Solange I in the Mirror of Time and the Divergent Paths of Judicial Federalism and Constitutional Pluralism

Andrej Lang*
Chemnitz University of Technology, Chemnitz, Germany
andrej.lang@wiwi.tu-chemnitz.de

Abstract

Solange I embodies a pivotal juncture in European constitutionalism. The German Constitutional Court faced a foundational choice between a judicial federalist vision in which national courts unconditionally accept the supremacy of European Union (EU) law and a constitutional pluralist vision in which constitutional courts review EU law in exceptional cases because limits on power and accountability are deemed more important than legal unity. The decision set the Court on the path of constitutional pluralism. It is very much in dispute whether this is the path of virtue or vice. Two competing constitutional narratives have emerged. According to the first narrative,

* PD Dr., visiting Professor of Public Law at Chemnitz University of Technology.

DOI 10.17104/0044-2348-2025-2-411 ZaöRV 85 (2025), 411-449

Solange I marks a virtuous path. It compelled the Court of Justice of the European Union (CJEU) to recognise fundamental rights as part of EU law, constituting a prime example for building constitutionalism from the bottom up. Conversely, the counter-narrative views *Solange I* as a parochial and backward decision that committed the original sin in European constitutionalism of subjecting EU law to the constitutional demands of a single national constitutional order. But narratives in constitutional theory about landmark cases can take on a life of their own that is detached from the original case. This is why this Article goes back to the original case and assesses the plausibility of the central narratives about *Solange I* from a historical perspective. It concludes that the Court's skepticism towards the CJEU's unconditional supremacy claim without adequate fundamental rights protection on the EU level was not predominantly driven by concerns about preserving its institutional role, but instead deeply rooted in constitutional thought, offering a vision for European integration deeply embedded in normatively dense structures of constitutional legitimacy.

Keywords

constitutional pluralism – fundamental rights – national constitutional courts – Court of Justice of the European Union – *Solange* – federalism – supremacy – European integration – Internationale Handelsgesellschaft – Costa – Pescatore – Hauer – accountability

I. Introduction

It is undisputed that the *Solange I*-decision of the German Federal Constitutional Court (GFCC/BVerfG) embodies a pivotal juncture in European constitutionalism.[1] The justices sitting on the Second Senate faced a foundational choice between two competing visions: on one hand a judicial federalist vision in which national courts unconditionally accept the supremacy of Community law and fundamental rights (FR) are protected against legal acts of the Community by the Court of Justice of the European Union, and, on the other hand, a constitutional pluralist vision in which national constitutional courts ought to review Community law in exceptional cases because limits on power and accountability are deemed more important than the avoidance of unresolved norm conflicts to ensure legal unity.

1 Vlad Perju, 'On Uses and Misuses of Human Rights in European Constitutionalism' in: Silja Voeneky and Gerald Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge University Press 2018), 263-295 (268).

 DOI 10.17104/0044-2348-2025-2-411

For the first and last time, the two visions openly clashed inside the GFCC in a 5-3 split decision and the question of whether the Court should exercise constitutional judicial review over Community law was debated as a matter of principle. What followed has attained canonical status in European constitutionalism: The Court's majority chose to review the conformity of Community law with the Basic Law (BL)'s FR guarantees '*so long as* the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law'.[2] As a consequence, it settled the dispute for the GFCC for good and set the Court on the path of constitutional pluralism. Today, many national constitutional courts self-evidently reserve to themselves the power to occasionally review Community law against important national constitutional principles.[3]

It is very much in dispute though whether this is the path of virtue or vice. Two competing constitutional narratives have emerged. According to the first narrative, *Solange I* marks a virtuous path. It goes something like this: Fundamental rights were absent from the original European treaties and only 'of secondary importance at that (early) stage of European development'.[4] This absence became a stumbling block for European integration when the radical doctrines of direct effect of EU law and supremacy provided the European Economic Community with the unfettered capacity to intrude FR positions. It is not surprising against the background of the strong constitutional commitment to fundamental rights in Germany and in Italy established in reaction to their fascist pasts that national courts chose to voice their resistance rather than to acquiesce to the unconditional supremacy of EU law.[5] Stone Sweet has summed up the ensuing dilemma succinctly: 'Without supremacy, the CJEU had decided, the common market was doomed. And without a judicially enforceable charter of rights, national courts had decided, the supremacy doctrine was doomed.'[6]

---

2 BVerfGE 37, 271 (para. 56) – *Solange I*. Emphasis added.

3 Andrej Lang, Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung (Springer 2020), 427-522.

4 Joseph H. H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the European Legal Order of the European Communities', Wash. L. Rev. 61 (1986), 1103-1142 (1106, 1113).

5 Ulrich Haltern, Europarecht. Dogmatik im Kontext. Band II: Rule of Law. Verbundsdogmatik, Grundrechte (Mohr Siebeck 2017), 592.

6 Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004), 89. Similarly Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483 (2417-2418).

Solange I is credited for offering a resolution to the dilemma: It made domestic judicial review of Community law conditional upon adequate FR protection on the EU level and compelled the CJEU to recognise fundamental rights as part of EU law. It is thus viewed as a prime example for building constitutionalism from the bottom up and for the constructive judicial engagement between the CJEU and the GFCC, illustrating the virtues of the non-hierarchical theory of constitutional pluralism.[7]

Conversely, the counter-narrative views *Solange I* as a parochial and backward decision that ultimately precluded the realisation of a more radical and truly supranational European integration project, capable of overcoming deep-rooted notions of sovereignty and the nation-state.[8] According to this view, the narrative that the CJEU neglected fundamental rights and underestimated the impact of its supremacy doctrine on them is a 'founding myth'.[9] Quite to the contrary, after the Court had initiated the constitutionalisation of the EU legal order in *van Gend en Loos* and *Costa*, it quickly followed-up by introducing fundamental rights as 'general principles of law' into the EU legal order in *Stauder*, *Internationale Handelsgesellschaft*, and *Nold*,[10] even though they were hardly affected at this stage of European integration.[11]

The German court nevertheless dismissed these meaningful developments and instead perpetrated, primarily out of reasons of institutional self-interest, a 'frontal attack on the Costa doctrine of the European Court of Justice'.[12] In doing so, the GFCC committed the original sin in European constitutionalism of subjecting EU law to the constitutional demands of a single national constitutional order, compromising the uniform application of EU law and asserting the ultimate authority of the German Constitution over EU law.[13]

But narratives in constitutional theory about landmark cases tend to take on a life of their own that is detached from the original case. A narrative may,

7 Neil Walker, 'Constitutional Pluralism Revisited', ELJ 22 (2016), 333-355 (340); Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', ELJ 11 (2005), 262-307 (266); Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in: Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003), 501-538 (509).

8 Perju (n. 1), 266.

9 Giacomo Delledonne and Federico Fabbrini, 'The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence', E. L. Rev. 44 (2019), 178-195 (180).

10 Perju (n. 1), 294.

11 Ulrich Scheuner, 'Der Grundrechtsschutz in der Europäischen Gemeinschaft und die Verfassungsrechtsprechung', AöR 100 (1975), 30-52 (46 f.).

12 Perju (n. 1), 269.

13 Perju (n. 1), 284.

 DOI 10.17104/0044-2348-2025-2-411

in other words, be grounded in a case that does not truly support the narrative. This is why this article goes back to the original case and assesses the plausibility of the central narratives about *Solange I* from a historical perspective in light of the factual and legal background, providing fresh historical insights based on archival research.[14] The article proceeds by combining recounting step by step the story of *Solange I* with analysing central pieces of the contrasting narratives.

Part II delves back into the complex facts of the case originating from the Common Agricultural Policy of the European Community to assess whether and to what extent fundamental rights were truly at stake at this stage of European integration. It finds on one hand that Community policies did not, at this stage, pose a real threat to undermine national fundamental rights, and, on the other hand, that the CJEU's superficial and one-sided FR analysis in *Internationale Handelsgesellschaft* was not suitable to dispel concerns about a protection vacuum resulting from the Court's unconditional supremacy doctrine. Part III analyses the broader institutional background of *Solange I*, looking into the role of other actors such as the CJEU, the lower courts, and the German Federal Government preceding the GFCC's ruling to see which influence they exerted on the *Solange*-saga. It argues that the prevailing narrative that a self-confident GFCC emphatically reasserted its authority in *Solange I* is oversimplified and overlooks the key roles and judicial activisms by the CJEU and the referring Frankfurt Administrative Court. Part IV juxtaposes the competing viewpoints of the majority decision and the dissenting opinion in *Solange I* to learn where the fault lines are situated, and summarises the damning criticism in German legal scholarship. It finds that the depiction of *Solange I* as backward and parochial is unjustified and identifies elements of a modern understanding of the role of constitutional courts in multi-level governance. Part V explores the impact of *Solange I* on the development of EC fundamental rights, inferring that *Solange I* arguably had a lasting impact on the European FR governance. The article concludes with a skeptical view towards the judicial federalist narrative, asserting that constructive judicial conflict between the GFCC and the CJEU likely contributed to the development of normatively denser structures of constitutional legitimacy in EU governance.

14 The author filed a request for all available files in the *Solange I*-case with the federal archive (Bundesarchiv) and received, amongst others, the Submissions of the Federal Government and the Federal Administrative Court as well as the original referral of the Frankfurt Administrative Court to the GFCC. The most precious historical material, however, the personal files of the justices in the case will only be released after 60 years. Hence, we will have to wait for ten more years for more answers about the history of *Solange I*.

II. The Facts: Were Fundamental Rights Under Threat or Barely at Stake?

An issue at the heart of the debate about the legacy of *Solange I* between judicial federalists and constitutional pluralists is the question whether fundamental rights were truly at stake when the GFCC ruled in *Solange I*. This issue was disguised in 'an archetype "European" case': a preliminary ruling request by the Frankfurt Administrative Court (FAC) to the CJEU under the Article 177 procedure concerning the Common Agricultural Policy (CAP).[15] The CJEU's ruling on the preliminary request is the *Internationale Handelsgesellschaft*-decision. But because the FAC refused to accept the CJEU's decision, it referred to the GFCC the same question it had submitted to the CJEU. As a result, the facts of the case are the same for *Internationale Handelsgesellschaft* and for *Solange I*.

They are the following: The claimant – Internationale Handelsgesellschaft Limited – was an import-export-undertaking seated in Frankfurt am Main and specialised in trading in grain. In August 1967, the claimant had obtained a license to export 20,000 metric tons of maise meal until the end of 1967. The license required the claimant to pay a deposit that became non-refundable when the exports approved in the export license were not carried out. In October 1967, however, the Federal Ministry of Finance had reimposed a levy on grain by-products remaining in the Community market, creating an unexpected financial burden for continued exporting. The claimant ultimately exported just over half of the amount of maise meal set forth in the export license (specifically 11,486.764 metric tons), and the German Einfuhr- und Vorratsstelle für Getreide und Futtermittel – a national agency entrusted with the task of implementing the CAP – consequently declared DM 17,026.47 of the claimant's export license deposit to be forfeited. The claimant brought the case before the Administrative Court Frankfurt am Main and requested to set aside the relevant Community provision concerning forfeiture of an export license deposit, arguing that the deposit scheme for agricultural products constituted a disproportionate intervention in the company's freedom of occupation guaranteed by German constitutional law.

The legal dispute must be viewed against the backdrop of the specific characteristics of the CAP's highly subsidised and interventionist price support regime, aimed at ensuring a fair standard of living for the European grain producers. As a result, Community prices are generally higher than world

15 Bill Davies, '*Internationale Handelsgesellschaft* and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence' in: Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017), 157-177 (159-160).

 DOI 10.17104/0044-2348-2025-2-411

prices, and the Community monitors, restricts and subsidises international trade with agricultural products to exercise adequate price control. The deposit system serves the monitoring dimension: The threat of forfeiture of the deposit creates strong economic incentives to actually effect the export transaction set forth in the license, putting the Commission in the position to determine adequate prices in real-time rather than ex-post. A system not based on deposits but on 'mere declaration of exports effected and of unused licences' would, by contrast, 'lack of any guarantee of application, be incapable of providing the competent authorities with sure data on trends in the movement of goods'.[16]

The facts of the case are hardly the stuff of headlines. However, it is one of the dualities of European integration that hidden underneath the technical niceties of the CAP, or various other policy fields for that matter, there lies a profound constitutional dimension that the FAC detected and elucidated in its referral to the GFCC. The FAC perceived the described legal state of Community law to be unacceptable. It contended that this type of deposit scheme is unconstitutional 'because it violates the freedom of development, economic freedom and the principle of proportionality'.[17] It saw 'a *blatant disproportion* between the achievement of the Community objective of market monitoring and the means used for this purpose, that is, the deposit system',[18] suggesting that 'the same goal can be achieved by less drastic means that are within the scope of the principle of proportionality (including notification of non-importation)'.[19] It further characterised the deposit payment as 'a fine or penalty' that contradicted a 'legal principle rooted in German law' according to which a fine 'presupposes culpability',[20] implicitly suggesting that Internationale Handelsgesellschaft did not culpably fail to export the entire amount of maise meal. This principle

16 ECJ, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, case no. 11/70, ECLI:EU:C:1970:114, para. 10; see also Advocate-General Dutheillet de Lamothe, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, case no. 11/70, ECLI:EU:C:1970:100, 1149: 'Without the latter information the Community action in external trade would develop in the dark.'

17 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545).

18 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545). Underlined emphasis in orginal.

19 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545).

20 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545).

'cannot be overridden' simply to remedy the 'poor administrative organisation' of the CAP.[21]

Does the Court's argument indicate that fundamental rights were undermined by the CAP? I think not. The harsh criticism overstates the FR stakes of the case and overlooks the idiosyncratic regulatory context of the CAP. This is confirmed by the GFCC's swift FR examination in *Solange I* that found no rights violation in the case. The GFCC designated the deposit scheme only as a 'pure regulation of trade practice'[22] (reine Berufsausübungsregelung) that 'merely affected the manner in which a trade could be practiced',[23] and concluded that the Community interests underlying the price support regime justified this low-level of infringement.

All legal actors ruling or submitting an opinion on the case – GFCC, CJEU, Advocate-General Dutheillet de Lamothe, the Commission in its submission written by its legal adviser *Claus-Dieter Ehlermann*, and the German Ministry of Justice – agreed that the deposit is an indispensable tool for the functioning of the price support regime. Dutheillet de Lamothe argued that the deposit was 'the minimum ransom, the indispensable ransom for the freedom of action that has been conceded',[24] constituting 'probably the least restraining measure that could be imagined to guarantee a correct functioning of that market'.[25] A simple notification of non-importation, as the FAC proposed as less restrictive alternative, is clearly less effective in ensuring – for the purpose of receiving reliable data – that the amounts of grain set forth in the licences mirror the amounts actually traded, for – as Ehlermann laid out – the license only actually leads to an export transaction if non-utilisation of the license entails a disadvantage for the license holder.[26]

When the FAC alleges a violation of economic freedom, it overlooks the highly subsidised nature of the CAP, pretending as if traders were operating in a purely market economic context. But without Community subsidies, the business of grain trading would likely not be profitable in the first place, likely justifying a more interventionist regulatory system geared at protecting the budgetary interests of the Community and the member states. Against this background, it is not adequate to characterise the deposit as a fine. The

21 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (545).

22 BVerfGE 37, 271 (para. 45) – *Solange I*.

23 Justin Collings, Democracy's Guardians: A History of the German Federal Constitutional Court. 1951-2001 (Oxford University Press 2015), 146.

24 Advocate-General Dutheillet de Lamothe, *Internationale Handelsgesellschaft* (n. 16), 1149.

25 Advocate-General Dutheillet de Lamothe, *Internationale Handelsgesellschaft* (n. 16), 1147.

26 See Submission by the Commission in the Case 11/70 (JD/9715/70/D), dated 12 June 1970, 17-18 (available via the Historical Archives of the European University Institute, at <archives.eui.eu>, last access 28 April 2025).

GFCC instead made the more plausible analogy, characterising the deposit as security for a risk transaction in which 'the businessman concerned knows what risk he is taking and is free to decide'.[27] Internationale Handelsgesellschaft Ltd. made an economic calculation that did not add up due to the reimposition of the levy by the Ministry of Finance, resulting in the economic unprofitability of continued maise meal exports. But such changes in the regulatory landscape fall into the sphere of risk of companies and considerations of purely economic profitability hardly constitute force majeure. In sum, these considerations suggest that the deposit regime of the CAP did not pose a real threat to undermine fundamental rights. And when viewed from a broader perspective, European integration arguably only began to intrude fundamental rights more seriously with the explosion of secondary legislation through the Single European Act of 1986.[28]

It does not follow from this conclusion, however, that concerns about FR protection in light of the CJEU's unconditional supremacy doctrine were entirely unwarranted in 1974 when *Solange I* was rendered. Although *Solange I* is not a 'hard' FR case, the infringement imposed by the deposit scheme is not negligible either. The fact that import and export companies can only conduct their business if they receive a licence and pay a deposit, thereby carrying the economic risk for exporting less than agreed in the licence, significantly impairs their freedom to conduct a business.

More importantly, the CJEU's FR examination in *Internationale Handelsgesellschaft* was far from reassuring. While the Court emphatically proclaimed at the outset of the judgment that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice', it subsequently did not put its money where its mouth is. More specifically, the Court failed to conduct a structured rights review geared towards assessing potential flaws of the scrutinised Community regulation and the harm imposed on the rights holder.[29] It predominantly sought to defend the Community regime, failing both to outline the fundamental rights at issue and the negative impact of the deposit regime on the claimant. For example, the CJEU emphasises 'the voluntary nature of requests for licences',[30] even though it is not exactly voluntary to request a license if the economic activity is subject to a license requirement.

27 BVerfGE 37, 271 (para. 43) – *Solange I*.

28 I thank Daniel Halberstam for this insight.

29 For a defense of structured rights review: Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', Law & Ethics of Human Rights 4 (2010), 141-175.

30 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 9.

Of course, placed into its broader historical context, *Internationale Handelsgesellschaft* is a bold step for a supranational court at a time when the Community lacked FR guarantees and judicial FR protection was only emerging in member states such as France, Belgium, and the Netherlands. To expect the CJEU as a court originally strongly influenced by the concise, if not terse French judicial style of reasoning to undertake a German style proportionality analysis is arguably too much.[31] Still, *Internationale Handelsgesellschaft* nevertheless confirmed existing concerns about the CJEU's institutional self-understanding as a federal supreme court preoccupied with ensuring the functioning of the internal market against restrictions imposed by the member state rather than as a constitutional court determined to protect fundamental rights against Community organs. It is therefore understandable when national courts were concerned that the CJEU's unconditional supremacy doctrine would lead to more serious FR infringements in the foreseeable future.

III. The Conversation: Was the Court Driver or Driven?

On its face, the factual and legal background of *Solange I* hardly provides the expected ground for a canonical clash between EU law and German law. As shown above, the case did not raise serious FR issues and even the GFCC agreed unequivocally that the deposit regime was in conformity with the Basic Law. But if all agree that the regulation in question does not in any way violate fundamental rights, neither under Community law nor under German law, it does not seem necessary to decide whether FR protection against Community law is exercised on the Community level or the national level, and the case arguably could have been disposed of on a less foundational basis.

The commanding narrative in legal scholarship about why the GFCC nevertheless rendered its *Solange I*-ruling is that 'a self-confident and mission-minded [German Federal Constitutional] court […] wanted to shape European law actively',[32] reassert its 'ultimate authority',[33] and 'extend[…] its influence in the process of European integration'[34]. This narrative finds support in the increasingly activist role of the GFCC during the 1970s when

31 I thank the anonymous reviewer for this point.

32 Cross-reference to article in Symposium Issue: 'Promoting European Constitutionalism? The Ambivalent Role of National Constitutional Courts from Solange I to Solange IV', 4.

33 Karen Alter, Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe (Oxford University Press 2003), 94.

34 Alter (n. 33), 94.

the Court struck down several key legislative pieces of the governing Social-Liberal coalition such as a law in support of women's right to have an abortion and a law relaxing the requirement for compulsory military Service.[35]

A look into the archives suggests, however, that this narrative is oversimplified. It is not at all clear that the GFCC actively aspired to adjudicate on the relationship between EU law and German law. There are, to the contrary, indications that an activist Frankfurt Administrative Court and an activist CJEU put the GFCC in a position from which it was difficult to avoid a clarifying ruling. This section indicates that the GFCC was propelled, if not cornered by two activist courts: the CJEU and the FAC. On one side, the CJEU – buoyed by 'the lack of negative reaction to its 1963-64 jurisprudence and by the influx of a new generation of self-confident, federalist leaning judges'[36] – sought to consolidate its supremacy doctrine with its bold decision in *Internationale Handelsgesellschaft*. On the other side, the FAC, overstating the constitutional stakes, painted a scenario in which fundamental rights, democracy, and the rule of law were gambled away for an unsecure economic union, appealing to the institutional role of the GFCC as guardian of the German Constitution. The uncompromising and mutually exclusive standpoints of the CJEU and the FAC rendered an avoidance strategy by the GFCC difficult.

While the GFCC hence chose not to duck the issue on procedural grounds but to take a stance on the merits, *Solange I* is not a sweeping constitutional assertion. It is, by contrast, visibly an attempt to compromise between the competing camps. Ulrich Haltern has demonstrated that the GFCC uses various angles to keep the holding narrow.[37] In terms of substance, the Court limits itself to the collision between German fundamental rights (not German constitutional law as a whole) and European secondary law (not Community law as a whole); in terms of time, it limits itself to the moment, the current phase of transition, so long as, assuming that the Community's current FR deficit will soon be remedied; procedurally, it limits the review of Community law to referrals by lower courts applying community law in a concrete case pursuant to Art. 100 para. 1 BL (not constitutional complaints by affected individuals); and jurisdictionally, it monopolises review of Community law within the GFCC (not other German courts).[38] At the very least, the

35 BVerfGE 39, 1 – *Abortion I*; BVerfGE 48, 127– *Conscription Law Amendment*. For this argument, see Collings (n. 23), 109-110; Ulrich Haltern, '50 Jahre Solange I', JURA 46 (2024), 449-462 (456).

36 Davies (n. 15), 176.

37 Haltern (n. 35), 457.

38 See Haltern (n. 35), 458.

GFCC is as much driver as driven, indicating that *Solange I* does not stand alone, but is fully appreciated only as part of a broader conversation with several key actors, including the CJEU (1.), lower German courts, especially the Administrative Court Frankfurt (2.), and the German Federal Government, especially the Ministry of Justice (3.).[39]

1. European Court of Justice

The decision of the CJEU in *Internationale Handelsgesellschaft* was extraordinarily bold. As is well known, the Court powerfully reaffirmed and extended the supremacy of Community law over all national law, even 'the principles of a national constitutional structure'.[40] Otherwise, Community law would be 'deprived of its character' and the 'legal basis of the Community itself [would be] called in question'.[41] Put differently, the Court declared 'that Community law must not be tested by national courts against their own Bill of Rights, else it would lose its character as law common to the Community'.[42] To assure national courts that this unconditional supremacy doctrine would not result in a constitutional vacuum, the CJEU pledged that fundamental rights formed 'an integral part of the general principles of law protected by the Court of Justice',[43] and were 'inspired by the constitutional traditions common to the Member States'.[44]

This bold decision must be seen against the background of substantial personnel changes in the composition of the CJEU prior to the ruling. In 1967, Robert Lecourt became President of the Court, and Pierre Pescatore was appointed as a judge. Both were highly influential figures on the Court and fervent believers in European integration. Lecourt's influence on the Court is compared to that of Chief Justice Marshall on the US Supreme Court in the first decades of the 19th century[45] and he is considered having 'helped to tip the balance in favour of accepting the direct effect and supremacy doctrines' as a regular judge, 'viewed the Court as a bulwark against vacillating political will for integration and used his control of the docket to

39 Haltern (n. 35), 449.

40 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 4.

41 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 3.

42 Bernard Rudden and Diarmuid Rossa Phelan, *Basic Community Cases* (Oxford University Press 1997), 60.

43 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 4.

44 ECJ, *Internationale Handelsgesellschaft* (n. 16), para. 4.

45 William Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: a Response to Delledonne and Fabbrini', E. L. Rev. 46 (2021), 175-193 (193).

employ particular judges in cases that served the end of pushing for greater integration'.[46] Pescatore is characterised as 'one of the most vocal and articulate of the European federalists', emphasising 'Pescatore's charisma and expertise',[47] and as 'the ECJ's storm trooper in terms of "European integration through law and ECJ case law" convictions'.[48] As the Judge Rapporteur in the case, Pescatore played a critical role in *Internationale Handelsgesellschaft*. Davies suggests that 'Pescatore's intellectual fingerprints are all over the ruling' and that he was a 'dominant force on the Court'.[49] This claim is supported by the fact that Pescatore had published an article on fundamental rights and European integration in 1968,[50] in which he proposed 'that the Court itself could protect fundamental rights within the context of the "general principles of law"',[51] largely '[f]oreshadowing the Internationale ruling in language and in spirit'.[52]

What motivated the Court, influenced by Pescatore and Lecourt, to render such a bold ruling? The decision in *Internationale Handelsgesellschaft* was not forced upon the CJEU by the preliminary request of the Administrative Court Frankfurt (Main). The two preliminary questions did not address the relationship between Community law and national fundamental rights. They basically asked whether the provisions about the lodging and the forfeiture of a deposit are legal.[53] They did not specify whether the legality of the regulations should be reviewed against the higher-ranking primary law of the Community or against the German Basic Law. Only in its underlying order did the Administrative Court indicate that in its view, the illegality of these provisions was based on contradicting fundamental rights guaranteed by the German Constitution.[54] Hence, the CJEU could have 'chosen to simply answer the two questions posed directly by FAC in its referral', but it instead preferred 'to freely to engage with the FAC's reasoning in the referral beyond the direct questions asked and expand on its constitutionalisation doctrine'.[55]

46 Davies (n. 15), 166.

47 Davies (n. 15), 168.

48 Vera Fritz, 'Tessili vs. Dunlop 1976: The Political Background of Judicial Restraint' in: Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017), 357-368 (359).

49 Davies (n. 15), 168.

50 Pierre Pescatore, 'Les Droits de l'Homme et L'Intégration Européenne', C.D.E. 4 (1968), 629-673.

51 William Phelan, 'Internationale Handelsgesellschaft, 1970 – Protection of Fundamental Rights' in: William Phelan (ed.), *Great Judgments of The European Court of Justice* (Cambridge University Press 2019), 197-220 (210).

52 Davies (n. 15), 168.

53 ECJ, *Internationale Handelsgesellschaft* (n. 16), 1127.

54 ECJ, *Internationale Handelsgesellschaft* (n. 16), 1128.

55 Davies (n. 15), 177.

The constitutional background informing *Internationale Handelsgesellschaft* was that the transformative judgments in *Van Gend en Loos* and *Costa* had received a largely positive reception in German legal scholarship and surprisingly little critical responses from national courts.[56] Karen Alter notes that 'national courts had taken pains to avoid open confrontation and contradiction' in order not to 'undermine the fragile authority of the ECJ and detract from the goal of creating a uniform interpretation of European law'.[57] In their decisions in 1965 and 1967,[58] the Italian and the German constitutional court had engaged Community law only cautiously and to a very limited extent, yet they had also chosen 'not to discard all control where a Community act was claimed to be in violation of the freedoms guaranteed by their national constitutions'.[59] The GFCC had even affirmed that Community law is 'autonomous and independent'[60] and deemed constitutional complaints against judgments of the CJEU inadmissible.[61] At the same time, lower national courts were increasingly articulating concerns that the CJEU's supremacy doctrine would weaken FR protection at the end of the 1960s.

There are good reasons to assume that *Internationale Handelsgesellschaft* was a preemptive strike by the CJEU. President Lecourt explained that 'it made sense for the Court of Justice to take precautions [se prémunir] against the risk either that Community law might breach fundamental rights protected by national constitutions or that the unity of Community law might be ruptured'.[62] It appears that the Court sought to consolidate and extend its supremacy doctrine while the reception of its case-law was still friendly, and before the critical voices would grow louder. The strategic calculus seems to have been to take the first word on the relationship between Community law and national fundamental rights to raise the stakes for a conflicting interpretation by national constitutional courts. Since the latter had proved careful not to fracture the fragile process of European integration and accepted, at least in principle, the supremacy doctrine, they may also swallow *Internationale Handelsgesellschaft* – not least because the extension of the supremacy doctrine to national constitutional law followed logically from the autonomy of Community law.[63] To increase the prospects of acceptance, the CJEU

56 Davies (n. 15), 162.

57 Alter (n. 33), 97.

58 Italian Constitutional Court, *Societe Acciaierie San Michele v. European Coal and Steel Community*, judgment of 27 December 1965, case no. 98/1965, CML Rev. 4 (1967), 83; BVerfGE 22, 293 – *EC-Regulation*.

59 Phelan, 'Internationale Handelsgesellschaft' (n. 51), 211.

60 BVerfGE 22, 293 (para. 12) – *EC-Regulation*.

61 BVerfGE 22, 293 (para. 20) – *EC-Regulation*.

62 Phelan, 'Internationale Handelsgesellschaft' (n. 51), 211.

63 See Davies (n. 15), 158.

 DOI 10.17104/0044-2348-2025-2-411

buttressed the stick with a carrot, proclaiming to protect itself fundamental rights as part of general principles of Community law.[64]

Solange I indicates that the CJEU's plan didn't pan out. Alter argues that '[t]he ECJ's Internationale Handelsgesellschaft had gone too far when it asserted the supremacy of European law over national constitutions', stepping 'onto the Constitutional Court's own jurisdictional turf'.[65] *Davies* sees 'a strategic miscalculation on the part of the Court', prompting 'significant resistance in the Member States'.[66] At the core of this miscalculation lies an imbalance between stick and carrot: If we assume that the unconditional supremacy doctrine is the stick and the announcement that the CJEU would protect fundamental rights on the Community level the carrot, it is obvious that from the perspective of national constitutional courts the stick is strong and the carrot is weak. To entrust a court entirely unproven as an FR guardian with the very task for which a constitutional court has been established in the first place is not an easy request.

2. Frankfurt Administrative Court

The academic debate about the relationship between EU law and national law and multi-level judicial dialogue is, as the term Verfassungsgerichtsverbund indicates, typically centered around national constitutional courts and the European Court of Justice (ECJ). An exclusive focus on those highest courts neglects, however, the critical role of lower courts. The *Solange I*-case exemplifies this claim. The Frankfurt Administrative Court is a key driver in the *Solange*-Saga:[67] Both the decisions of the GFCC in *Solange I* and the ECJ in *Internationale Handelsgesellschaft* originate from the same dispute, both decisions are based on references by the administrative court. After the court had supplemented the preliminary reference to the CJEU under Article 267 Treaty on the Functioning of the European Union (TFEU) (then Art. 177) with barely disguised criticism of the CJEU's primacy-doctrine, its subsequent reference to the GFCC pursuant to Article 100(1) BL stated – in clear contrast to the ECJ's holding in *Internationale Handelsgesellschaft* – that EC law may be reviewed for its conformity with the Basic Law because EC law does not prevail over all national law.[68] In other words, the constitutional

64 For this characterisation of *Internationale Handelsgesellschaft*, see Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018), 485: 'mixture of stick and carrot'.

65 Alter (n. 33), 91.

66 Davies (n. 15), 177.

67 Alter (n. 33), 88.

68 More specifically, the reference to the GFCC was signed by judges Kramer, Achtmann, Boettger of the FAC's second chamber. See original reference of the Verwaltungsgericht Frankfurt a. M., Az. II/2 – E 228/9, dated 23 December 1971, 26 (on file with author).

judicial dialogue between the CJEU and GFCC is enabled and framed by the FAC.[69]

It is disputed in legal scholarship whether the FAC had planned from the outset to send a preliminary reference to the GFCC after receiving the CJEU's response to its preliminary questions or whether the Court was genuinely surprised and disappointed that the CJEU had not declared the challenged provisions of the deposit regime invalid and not excluded national fundamental rights from the scope of the supremacy doctrine. Davies assumes that 'the FAC was interested in fetching the ECJ's opinion before it could refer the case again within its own domestic hierarchy'.[70] Alter draws the conclusion from the text of the FAC's reference that it 'expected the ECJ to agree that European law could not violate German Basic Law protections, and that thus the licence forfeiture scheme was invalid'.[71] Unfortunately, we will likely not be able to gain more clarity on the FAC's judicial behaviour because the archival documents relating to the case in the Hessian State Archive have apparently been lost.[72]

What we do know from other FAC decisions is, however, that the Court was a staunch critic of the deposit regime for agriculture products. It apparently had 'constantly refused to apply the deposit regulations'.[73] In 1977, the FAC was responsible for another reference to the GFCC challenging the validity of a CJEU decision, resulting in the GFCC's *Vielleicht*-decision,[74] in which the Court 'suggested that "in view of political and legal developments in the European sphere occurring in the meantime", its *Solange* decision might no longer apply to regulations and directives'.[75] The repeated challenges against the deposit regime that did not persuade the CJEU to change its case-law and the repeated preliminary references to the GFCC suggest that the FAC acted strategical and did not truly expect the CJEU to accommodate its concerns. At the latest when the FAC referred the case to the GFCC on 23 December 1971, it was determined to prompt

69 See Alter (n. 33), 88.

70 Davies (n. 15), 161.

71 Alter (n. 33), 88.

72 Davies (n. 15), 160. Davies notes that a letter exchange between the FAC and the European Commission that he found in the historical archives of the European Union indicates that the FAC only referred to the CJEU reluctantly and was scolded by the Commission's Legal Service representative in the case, Claus Dieter Ehlermann, for a delayed response. How to interpret this delayed response and what it may mean for the FAC's judicial behaviour remains unclear.

73 Manfred Zuleeg, 'Fundamental Rights and the Law of the European Communities', CML Rev. 8 (1971), 446-461 (448).

74 BVerfGE 52, 187 – *Vielleicht*.

75 Alter (n. 33), 94.

the GFCC to impose limits on the supremacy doctrine and on the loathed deposit regime.

The FAC states at the outset of the reasons of its referral: 'The Chamber cannot concur with the decision of the CJEU; it considers the cited EEC provisions to be unconstitutional.'[76] The Court warns that if 'Community law is given precedence over any deviating constitutional norm […], this would lead to a constitutional and legal vacuum' and 'constitutional law would be eliminated […] for increasingly expansive European legislation without equivalent guarantees of legal protection'.[77] The constitutional reasoning leads to a dramatic citation: 'Anyone who unhinges the rigid normative structure of constitutional law and offers it as a sacrifice on the altar of a Eurocratic economic union will ultimately have to take responsibility if the United Europe is won, but the secure form of democratic and rule-of-law decision-making is gambled away.'[78] The FAC concludes that '[b]ased on the assessment of the legal situation described above, the Chamber has no doubt as to the jurisdiction of the BVerfG'.[79] An avoidance approach barely appears as a feasible option for the GFCC against this background and would have risked losing acceptance of lower courts.[80] It certainly would have been easier to pursue for the CJEU in *Internationale Handelsgesellschaft* than for the GFCC in *Solange I*.

3. Federal Ministry of Justice

One of the reasons for the lasting legacy of *Solange I* is its dramatic 'So long as-language'. The (incomplete) view into the archives suggests that the Federal Ministry of Justice may not only have been the originator of this passage but may also have presented the GFCC a way out of the dilemma into which the Court was put by virtue of the activist approaches of the CJEU and the FAC. The Constitutional Court was caught between two stools. On the one hand, the GFCC did not intend to damage the nascent

76 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (541).

77 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (543).

78 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (543).

79 Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (543).

80 But see Alter (n. 33), 90, suggesting that '[t]he BVerfG could have relied on its 1967 jurisprudence, reasserting its incompetence to assess the validity of acts not emanating from German authorities and by extension asserting the administrative court's incompetence'.

and vulnerable process of European integration and understood well the significance of the uniform application of Community law in the member states for the smooth functioning of the highly regulated European internal market. On the other hand, the CJEU's unconditional primacy doctrine according to which any Community regulation would take precedence over domestic FR guarantees was unacceptable to the GFCC.

While the Federal Government (Bundesregierung) had generally taken a supportive and permissive approach towards European integration, the 60-pages long submissions for the *Solange I*-proceedings prepared by the Ministry of Justice on behalf of the Federal Government, co-signed by the Ministry of Economics and the Ministry of Food, Agriculture and Forestry, and submitted on 15 February 1973, suggested that the fundamental rights of the German Basic Law constituted limits to the transfer of powers to the European Communities. The Submission argued: 'In light of the central importance of the guarantees of freedom in our constitutional value system, Article 24(1) BL cannot be understood as permitting the transfer of sovereign rights with a general waiver of the guarantee of constitutional guarantees of freedom, as laid down as a value system in the fundamental rights of the Basic Law. Insofar as – and so long as – ("Soweit – und so lange –") an intergovernmental institution such as the European Communities […] lacks fundamental rights that correspond in principle to those of the Basic Law, the legislature is bound by the national system of fundamental rights when applying Article 24(1) of the Basic Law.'[81]

Of course, I have no idea whether the justices sitting on the Second Senate took the famous *Solange*-formula from the 'Soweit und so lange'-passage in

81 See Submission by the Federal Minister of Justice (1oo4 E (2186) – 6/73), co-signed by the Federal Minister of Economics (E2 – 110116/6) and the Federal Minister of Food, Agriculture, and Forestry (III A 2 – 3604.11 – 25/70) addressed to the Vice-President of the Federal Constitutional Court, dated 15 February 1973, 24 (on file with author). To be sure, the earlier preliminary reference of the Frankfurt Administrative Court of 24 November 1971 already contains a *Solange*-sentence, but it is more hidden and much less pronounced than the passage in the Submission of the Federal Government. In its order, the FAC briefly summarises the competing camps on the relationship between EU law and German law in legal scholarship before it sets forth its own position. In its summary, the Court, implicitly referencing the constitutional pluralist position, notes in German that 'the others do not want to completely forgo the safeguards that the existing 'traditional' institutions provide for citizens, *so long as* newly written legal protection guarantees have been created'. Emphasis added. See Verwaltungsgericht Frankfurt a. M., decision of 14 July 1971, case no. II/2 – E 228/69, Außenwirtschaftsdienst des Betriebs-Beraters November 17 (1971), 541-546 (542). The translation of this passage in the Common Market Law Reports does not accurately reflect this nuance. See Verwaltungsgericht Frankfurt a. M., Order of 24 November 1971, Case II/2 E 228/69, Common Market Law Reports (1972), 177: 'the national fundamental principles must be observed so long as there is no written constitutional law of the Community'. I thank the anonymous reviewer for drawing my attention to this passage.

 DOI 10.17104/0044-2348-2025-2-411

the Submission of the Ministry of Justice or whether they had already thought of this specific terminology independently of the Submission. In any event, the *Solange*-formula does not appear to be used in German legal scholarship on the relationship between Community law and national law prior to *Solange I*.

Beyond semantics, the Submission of the Ministry of Justice also had a political dimension from the perspective of the Court. The fact that the integration-friendly Federal Government opposed a general waiver of national FR guarantees so long as the European Communities lacked equivalent fundamental rights likely validated the GFCC's position and eased its concerns regarding the potential consequences for European integration of contesting the CJEU's primacy doctrine. To be sure, the Ministry of Justice did not develop this doctrinal construction 'out of the blue'. Although the Memorandum refrained from citing any literature, this viewpoint was likely based on an emerging mainstream position in German legal scholarship referred to as 'structural congruence', arguing that a certain degree of constitutional equivalence between national and European legal orders is necessary for the supremacy of EU law to be deemed legitimate and acceptable.[82] Moreover, the views of the GFCC and the Federal Government in *Solange I* diverged regarding two central issues: the admissibility of the Administrative Court's referral and the equivalence of FR protection. In contrast to the GFCC, the Ministry of Justice argued that the referral was inadmissible and 'the Court of Justice of the Communities has granted comparable protection of fundamental rights in the present case [Internationale Handelsgesellschaft]'.[83] The argument set forth here is therefore not that the GFCC and Ministry of Justice were on the same page,[84] but that the latter had roughly sketched a position, or perhaps only a formula ('so long as'), that was acceptable not only to those who advocated for the supremacy of the national constitution, but also to those who favored deeper European integration.

82 Davies (n. 15), 172; Haltern (n. 35), 451. The theory of structural congruence was originally founded by Herbert Kraus, 'Das Erfordernis struktureller Kongruenz zwischen der Verfassung der Europäischen Verteidigungsgemeinschaft und dem Grundgesetz (Gutachten)', in: Institut für Staatslehre und Politik e. V. in Mainz (ed.), *Der Kampf um den Wehrbeitrag. Band 2: Das Gutachtenverfahren (30.7.-15.12.1952)* (Institut für Staatslehre und Politik e. V. in Mainz 1953), 545-554.

83 Submission by the Federal Minister of Justice (n. 81), 30.

84 After *Solange I*, the Minister of Justice even wrote a letter to the President of the GFCC, asserting that the decision questioned Germany's membership in the European Community. See Haltern (n. 35), 456.

IV. The Decision: Modern Conception or Parochial Backlash?

One of the controversies in the debate between judicial federalists and constitutional pluralists goes to the heart of the legacy of *Solange I*: Is the decision best characterised as backward and parochial or as a modern and forward-looking understanding of the role of constitutional courts in multi-level governance? In search for answers to this question, this Section analyses the competing visions between majority and minority opinion, demonstrating that the default lines are whether the constitutional court has jurisdiction to review European Community (EC) regulations to protect the basic structures of the Constitution and which developments in European integration are required to relinquish this review (1.). It subsequently argues that the characterisation of the GFCC as backward-turned disregards the modern and innovative doctrinal elements in *Solange I* (2.).

1. Legal Background and Clash Between Majority and Minority Opinion

The central issue in *Solange I* is the relationship between EU law and German law. To better understand the dispute, it is helpful to look at the constitutional provision in the German Basic Law that implicitly regulated this relationship, and around which the judicial debate was centered. At the time of the decision, the legal basis for opening up the German legal order to EU law was Article 24 (1) of the Basic Law. The provision stipulates: 'The Federal Republic may, by legislation, transfer sovereign rights to intergovernmental institutions.' On its face, Article 24 directly only sets forth the conditions for the transfer of sovereign rights, on which it places two restrictions: i) substantively, the beneficiary must be an intergovernmental institution, and the European Communities were unanimously considered as such, and ii) procedurally, the transfer must be enacted in the form of a federal statute. The provision does not, by contrast, directly address the question raised in *Solange I*, namely whether and to what extent the GFCC may exercise constitutional judicial review of sovereign rights that have already been transferred to the EU.

As laid out in the Introduction, the justices sitting on the Second Senate were profoundly split on this issue.[85] According to the Senate majority composed of justices Geiger, Rinck, Schlabrendorff, Rottmann, and Seuffert,

85 They were noticeably not split along party lines. See Haltern (n. 35), 455.

 DOI 10.17104/0044-2348-2025-2-411

there are constitutional limits to the transfer of sovereign rights beyond the wording of Article 24(1), and those limits apply in the same way to the control of exercised sovereign powers. Drawing implicitly on the interpretative principle of unity of the constitution according to which the interpretation of an individual provision in a codified text must not contradict the fundamental concerns of the text as a whole, the justices assert that Article 24 'must like any constitutional provision of a similarly fundamental nature, be understood and interpreted in the context of the overall constitution', and, accordingly, does not allow 'the identity of the current constitution of the Federal Republic of Germany to be abolished by breaking into its constituent structures'.[86] These limits for the transfer of sovereign rights by Germany would apply in the same way to the control of exercised sovereign powers by the EU,[87] for if the legislature did not have the right to abrogate 'the identity of the constitution in force' when transferring sovereign rights,[88] then now the European Union cannot have the right to abrogate 'the identity of the constitution in force' through its legislation.[89]

According to the majority, fundamental rights 'form […] part of the constitutional structure of the Basic Law',[90] and it is the job of the GFCC to protect those rights 'within the framework of the powers granted to it by the Basic Law'.[91] If it failed to perform this 'constitutional task', 'a serious gap in judicial protection might arise precisely for the most elementary status rights of the citizen'.[92]

Although the justices in the minority, Rupp, Hirsch, and Wand, concur that the 'basic structures of the Constitution'[93] set limits to the transfer of sovereign rights to the EU, they disagree that these constitutional limits should equally apply to the application of EU law in the German legal order. They argue instead that Article 24(1) of the Basic Law would state 'on a proper interpretation, not only that the transfer of sovereign rights to intergovernmental institutions is permissible at all, but also that the sovereign acts of intergovernmental institutions are to be recognised by the Federal Republic of Germany'.[94] This 'excludes from the outset the possibility of subjecting them to national control',[95] for the Federal Republic of Germany had 're-

86 BVerfGE 37, 271 (para. 25) – *Solange I*.
87 BVerfGE 37, 271 (para. 43) – *Solange I*.
88 BVerfGE 37, 271 (para. 43) – *Solange I*.
89 BVerfGE 37, 271 (para. 43) – *Solange I*.
90 BVerfGE 37, 271 (para. 26) – *Solange I*.
91 BVerfGE 37, 271 (para. 32) – *Solange I*.
92 BVerfGE 37, 271 (para. 32) – *Solange I*.
93 BVerfGE 37, 271 (para. 43) – *Solange I*.
94 BVerfGE 37, 271 (para. 63) – *Solange I*.
95 BVerfGE 37, 271 (para. 63) – *Solange I*.

nounced this [possibility] by joining the European Economic Community (EEC), its consent to the establishment of Community institutions and its participation in the establishment of autonomous sovereignty'.[96]

Accordingly, they posit that the referral of the Frankfurt Administrative Court is 'inadmissible',[97] and any review of the applicability of Community law would constitute 'inadmissible trespass into competence reserved to the European Court of Justice'.[98] Furthermore, the Senate minority fears that there would be 'legal fragmentation in the area of Community law' if the protection of fundamental rights against European legal acts were not guaranteed solely by the ECJ.[99] 'To open up this possibility [of national control] would mean exposing a part of European legal unity, endangering the existence of the Community and denying the very idea of European unity.'[100]

The disagreement about whether the GFCC is entitled to review the applicability of EU law – as opposed to the transfer of sovereign rights to the EU – has far-reaching consequences for the scope of FR protection by the GFCC. It concerns the object of review: it is either only EU primary law (minority view) or additionally EU secondary law (majority view). Having constitutional limits to the transfer of sovereign rights effectively means constitutional review of a founding treaty prior to its ratification, or EU primary law for that matter. Review of applicability, by contrast, encompasses EU secondary law enacted on the basis of the treaty. Excluding all those legal acts from the purview of review and limiting review to the treaty itself largely depletes judicial FR protection (by the GFCC) because it is often impossible to know years in advance which EU policies are created based on the lawmaking institutions, competences, and procedures laid down in the treaty. In addition, review of primary law may preclude the ratification of a founding treaty, which likely exceeds the political-institutional limits of a national constitutional court, especially if it ultimately thwarts the entire treaty project or renders continued membership of that member state in the EU impossible. Review of a specific secondary legal act, by contrast, is phenomenologically exactly what courts do: An FR intrusion has already occurred, and the court examines the FR issue in an individualised and retrospective manner. And if the court deems the legal act to violate an FR, the legal consequence seems limited and manageable, for it is only this single legal act that is disapplied in the legal order of the member state.

96 BVerfGE 37, 271 (para. 63) – *Solange I*.
97 BVerfGE 37, 271 (para. 70) – *Solange I*.
98 BVerfGE 37, 271 (para. 69) – *Solange I*.
99 BVerfGE 37, 271 (para. 67) – *Solange I*.
100 BVerfGE 37, 271 (para. 67) – *Solange I*.

 DOI 10.17104/0044-2348-2025-2-411

Finally, the opinions of the Senate majority and minority differ on the question of the extent to which the 'basic structures of the Constitution' are impaired by the transfer of sovereign rights to the Community in the relevant phase of European integration and under what conditions the GFCC is required to relinquish national control. The Senate majority sees a risk of relativisation of the FR section of the Basic Law due to the considerable deficits in the level of FR protection provided by the Community. The latter would not only lack 'a directly democratically legitimised parliament resulting from general elections', but also 'a codified catalog of fundamental rights whose content is as reliable and unambiguous for the future as that of the Basic Law'.[101] Against this background, the majority concludes that 'so long as' this 'current phase of transition' within 'the ongoing process of Community integration' was still in progress, domestic constitutional limits would continue to apply.[102] The Senate minority, by contrast, contends that the 'fundamental structure of the Constitution […] is not at stake',[103] the requirements of the Basic Law for the 'renunciation of the exercise of sovereign power' are 'fulfilled in the European Economic Community',[104] and FR protection through the case law of the CJEU constituted a sufficient substitute for the missing FR catalogue within the Community.[105]

2. Elements of a Modern Understanding of the Role of Domestic Constitutional Courts in Multi-Level Governance

The characterisation of *Solange I* as backward-turned disregards the modern and innovative doctrinal elements in the decision. I identify three such elements in this section: First, the establishment of a graduated accountability mechanism that is well-suited to address structural norm conflict between EU law and national law (a); second, the use of the domestic implementation act as reference point for judicial review, which furthers the autonomy of EU law (b); and third, a relative notion of constitutional identity that seems to leave open the possibility for integration-friendly amendments by the constitution-amending legislature (c).

To be sure, *Solange I* also contains less progressive elements such as, in part, sovereigntist language, the failure to submit a preliminary reference to

101 BVerfGE 37, 271 (para. 44) – *Solange I*.
102 BVerfGE 37, 271 (para. 44) – *Solange I*.
103 BVerfGE 37, 271 (para. 83) – *Solange I*.
104 BVerfGE 37, 271 (para. 81) – *Solange I*.
105 BVerfGE 37, 271 (para. 82) – *Solange I*.

the CJEU in the case even though the GFCC had generally stipulated such a requirement in *Solange I*, and the excessively demanding and unrealistic demand for an FR catalogue. I nevertheless contend that all things considered *Solange I* formulated a surprisingly modern understanding of the relationship between European Community law and domestic law for its time. A possible explanation are the virtues of the judicial deliberative process: The disagreement between the majority and minority and the judicial deliberations and reflections it triggered may have proved to be productive.[106] The following archival finding may support this assumption: According to an order dated 28 July 1972, the reporting judge in *Solange I* changed for unknown reasons from Justice Rudi Wand to Justice Martin Hirsch.[107] Interestingly, both justices were in the minority, which is rare but not unusual in constitutional court practice because the reporting judge is assigned prior to the judicial decision-making process. The fact that one of the dissenting judges was responsible for preparing the majority opinion may have reinforced the conciliatory and integration-friendly elements in *Solange I*.

a) *Solange* as a Graduated Accountability Mechanism

First and foremost, *Solange I* sets forth an innovative and productive doctrinal construction to facilitate cooperation between 'interconnected but autonomous legal orders'.[108] It achieves this by offering a mechanism to resolve a profound and intricate normative conflict between EU law and German law – the conflict between the primacy of EU law designed to ensure the functioning of the internal market on one hand and a high level of FR protection established in response to the terrors of the Nazi regime on the other hand. Both paradigms are defining for the EU and the German legal order, respectively. The GFCC did not seek to damage European integration and the internal market, but it also adamantly insisted that EU law needs to satisfy the fundamental principles of the German Constitution.

106 On the deliberative character of the decision-making processes inside the GFCC: Gertrude Lübbe-Wolff, 'Why is the German Federal Constitutional Court a Deliberative Court, and Why Is That a Good Thing?' in: Birke Häcker and Wolfgang Ernst (eds), *Collective Judging in Comparative Perspective* (Intersentia 2020), 157-179.

107 See Order by the Chairman of the Second Senate of the GFCC in the matter '2 BvL 52/51' dated 28 July 1972 (on file with author).

108 See Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges', Eu Const. L. Rev. 15 (2019), 391-426 (408), also for a useful conceptualization of the *Solange* doctrine.

The conditionality of *Solange* is the way to reconcile this dilemma: By using the *Solange*-formula, the Court signals its willingness to relinquish its domestic constitutional judicial review – indicated by the wording 'so long as' – dependent on certain constitutional developments within the EU, namely on the level of FR protection guaranteed by European institutions. This conditionality contains two modern elements that contradict a characterisation of *Solange I* as backward-turned and parochial. First, the GFCC is manifestly motivated by the concern that European integration may lead to 'a manifest gap in judicial protection […] for the most elementary status rights of the citizen'.[109] In other words, the Court effectively makes a rights foundationalist claim. It is skeptical about the CJEU's claim for unconditional supremacy of EU law without sufficient structures of constitutional legitimacy and maintains that the choice for a certain layer of governance must not diminish the level of FR protection provided to individuals. We should not confuse this deep commitment to FR with parochialism.

Second, this rights foundationalism is in many ways supportive of European integration as exemplified by the conditional institutional control waiver included in the *Solange*-formula. The GFCC does not parochially insist on maintaining its judicial powers but instead holds out the prospect of a centralisation of FR review in EU matters in the hands of the CJEU. It permits the CJEU to exclusively carry out FR review so long as the *Solange I*-conditions are observed. This conditionality suggests that the GFCC cares less about ensuring that FR review is carried out at the national level and more about robustly protecting fundamental rights at all – regardless of whether this site is the EU or the national level.[110] Otherwise, it would not offer to relinquish national for the benefit of European constitutional judicial review.

The GFCC outlines why decentralised review is necessary at this moment in time considering the 'current transitional phase'[111] of integration to ensure adequate FR protection, but it also indicates that things could soon be different in 'the ongoing process of Community integration'.[112] It is only because the CJEU's case law on fundamental rights is still developing and lacks a codified normative basis that the GFCC needs to exercise decentralised national constitutional review.[113] Put differently, the *Solange I*-mechanism is not a static, but dynamic and forward-looking. It is predominantly concerned with the proper allocation of competencies and the proper concern

109 BVerfGE 37, 271 (para. 32) – *Solange I*.
110 Haltern (n. 35), 458.
111 BVerfGE 37, 271 (para. 44) – *Solange I*.
112 BVerfGE 37, 271 (para. 40) – *Solange I*.
113 Haltern (n. 35), 457.

for basic constitutional principles in the entire European multi-level order. *Solange I* is, in other words, the quintessential composite governance decision.[114]

The *Solange*-mechanism is best characterised as a graduated accountability mechanism. By making the exercise of national constitutional review conditional upon the due respect for fundamental rights, it establishes an accountability relationship vis-à-vis the CJEU and the political EU institutions. The basic idea of the concept of accountability is that the prospect for the accountee of having to provide an accounting on the basis of which the accountor may, upon a negative evaluation, impose sanctions provides ex ante incentives for the accountee to give appropriate consideration to the interests of the accountor in his decision-making process.[115] In the *Solange I*-situation, the GFCC is the accountor and its interests lie in adequate FR protection, the CJEU is the accountee whose decisions are subjected to domestic constitutional review. This decentralised review by the accountor is a form of sanction for two reasons: It undermines the CJEU's supremacy doctrine and threatens the uniform application of EU law because it may result in the disapplication of EU law in the German legal order. Both, supremacy and uniform application, is of essence to the CJEU as accountee. The prospect of continued judicial constitutional review by the GFCC provides ex ante-incentives to take into account the GFCC's foundational FR concerns to avoid this form of review. Not only is there a threat of 'negative' sanctions but, conversely, the requested equivalent FR protection is rewarded with the GFCC restraining itself from exercising jurisdiction. In other words, the *Solange*-mechanism uses a carrot and stick approach:[116] Depending on the response by the accountable institutions, the GFCC gives negative feedback (the stick) by exercising judicial constitutional review with the threat to find EU law inapplicable in Germany, or positive feedback (the carrot) by renouncing its review, effectuating a shift from decentralised to centralised FR review and strengthening the CJEU's judicial authority. The stick poses a harsh threat and the carrot contains a major concession.[117]

Consequently, the *Solange*-mechanism creates strong incentives and high pressure to intensify the EU's FR protection and to consolidate it at a high

114 Haltern (n. 35), 449.

115 See Richard Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', AJIL 108 (2014), 211-270 (246).

116 Alter (n. 33), 97; Haltern (n. 35), 459.

117 Haltern (n. 35), 459. Of course, contemporary national judicial constitutional review mechanisms such as ultra-vires-review and identity review also use a carrot-and-stick approach. The carrot is less appealing, however, because these mechanisms provide no prospect that national constitutional courts will decrease the intensity of their review in future cases if the CJEU takes their concerns seriously.

level.[118] It thereby sets in motion a legal and political process that may result in the development of a normative basic consensus on common constitutional principles and harmonise the competing paradigms of a functioning internal market and a robust FR protection. Conceptualised more broadly, the *Solange*-mechanism is a promising effective means against the fragmentation tendencies in multi-level contexts, for it creates incentives for institutions closely attached to the logic and self-image of their respective legal orders to observe the constitutional concerns of the incorporating legal orders and thus may have an integrating effect on divergent rationalities (e. g., internal market vs fundamental rights). This may help to reduce the occurrence of norm conflicts in multi-level orders by lowering the discrepancy between the constitutional principles of different legal orders.

b) The Act of Incorporation as Reference Point

A specific doctrinal challenge for the GFCC was how to review the compatibility of EU law with the FR guarantees of the Basic Law to ensure structural congruence between EU and national law, but without undermining the validity of EU law. As mentioned, the Court was worried about damaging the nascent European integration process. In *Solange I*, it accordingly accepted the claim to autonomy of EU law, upholding its previous case law according to which 'Community law […] forms an independent system of law flowing from an autonomous legal source'.[119] It drew the logical conclusion that 'the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law' and that the GFCC is not entitled to 'rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law'.[120] But if the Court is not entitled to rule on the validity of Community law, how is it supposed to ensure that German fundamental rights are protected against Community law?

The judicial federalist position is that national courts ought to accept the supremacy of EU law and thus may not review EU law – neither directly nor indirectly. This viewpoint was shared by the dissenting opinion in *Solange I*, in which the three justices in the minority argued: 'The Federal Constitutional Court possesses no jurisdiction to examine provisions of Community law against the criteria of the Basic Law, in particular its FR

118 Haltern (n. 35), 458.
119 BVerfGE 37, 271 (para. 22) – *Solange I*.
120 BVerfGE 37, 271 (para. 23) – *Solange I*.

section, in order to answer the question of their validity.'[121] The consequence of this standpoint is, of course, that EU law is out of reach for national constitutional law and is not subject to review by national constitutional courts. This consequence was, as we have seen, not acceptable for the Senate majority.

The GFCC developed a doctrinal construction that solved the conundrum and that has been adopted by many courts in Europe and beyond in multilevel contexts for the review of the secondary law of supranational and international organisations. In *Solange I*, the Court does not directly review the EU regulation, but the decisions of German customs authorities that apply the EU regulation.[122] In other words, it choses the act of incorporation of the German legal order as reference point for its judicial constitutional review, adapting to the CJEU's autonomy claim. For it does not rule on the validity of EU law, but on the compatibility of an exercise of German state authority with higher-ranking German fundamental rights. If the incorporation act is deemed unconstitutional and hence invalid, the application of the EU norms in Germany is blocked. EU law's validity, however, remains intact.

Solange I also preserves the autonomy of EU law in one other way. The decision refrains from disassociating the act of incorporation from the incorporated EU regulation. Although the GFCC formally reviews domestic law, it does not simply review an act of German state authority against the standard of the superior German constitution. Because the domestic legal act serves the implementation of Community law and a declaration of inapplicability would hence call into question the fulfillment of Germany's obligations under EU law, provoking a norm conflict with EU law, it needs to be treated differently to reflect the special character of Community law. As a result, the Court limits its control to the 'inalienable, essential feature[s]', which 'form […] part of the constitutional structure of the Basic Law': fundamental rights[123] – constitutional principles of undeniable value.

One of the criticisms against *Solange I* is that the distinction between invalidity and inapplicability is meaningless.[124] The dissenters objected that this 'distinction exhausts itself in the use of different words', arguing that '[i]f a court declares a legal norm generally inapplicable because of a violation of superior law, it is thereby stating that the norm does not apply, that is, that it

121 BVerfGE 37, 271 (para. 69) – *Solange I*.

122 BVerfGE 37, 271 (para. 53) – *Solange I*.

123 BVerfGE 37, 271 (para. 26) – *Solange I*.

124 Alter (n. 33), 91, citing Reinhard Riegel, 'Das Grundrechtsproblem als Kollisionsproblem im europäischen Gemeinschaftsrecht', Bayerische Verwaltungsblätter 12 (1976), 354-360 (360), who characterises the distinction as a mere euphemism.

 DOI 10.17104/0044-2348-2025-2-411

is invalid'.[125] It is true that the content of the national incorporation act and the incorporated EU norm is, for the purposes of indirect review of EU law, essentially the same. The GFCC effectively reviews the EU regulation in *Solange I*. It does not follow, however, that invalidity and inapplicability are virtually identical.[126] For an EU regulation deemed inapplicable in Germany by the GFCC is still applicable in all other member states. This would not be the case if the EU regulation was invalid, or if a declaration of inapplicability had the same legal effect as a declaration of invalidity. If the GFCC deems an EU regulation inapplicable, it only makes a bipolar claim that exclusively concerns the relationship between the EU and the German legal order. It contends that the EU regulation violates the specific FR standards of the German constitution. This claim does not extend to other member states.[127]

c) A Relative Notion of Constitutional Identity

Finally, *Solange I* sets forth a notion of constitutional identity that is less static and more promising than the notion that solidified in German constitutional law after the *Lisbon*-decision.[128] Today, constitutional identity is anchored in the eternity guarantee of Art. 79(3) BL that 'even prevents a constitution-amending legislature from disposing of the identity of the free constitutional order'.[129] It imposes 'an absolute limit on the transfer of sovereignty rights'.[130] The rationale behind this is that if Article 79(3) BL marks limits that are beyond even the constitution-amending legislature's power of disposition, then logically these boundaries must also apply to the

125 BVerfGE 37, 271 (para. 69) – *Solange I*.

126 On the basic distinction between precedence in application ('Anwendungsvorrang') and precedence in validity ('Geltungsvorrang'), see Franz C. Mayer, 'Supremacy – Lost? – Comment on Roman Kwiecień', GLJ 6 (2005), 1497-1505 (1498).

127 This is different for ultra vires-review where a national constitutional court interprets the legal bases laid down in EU treaty law, which constitutes the law of the land for all member states, and thus makes a claim that goes beyond the bipolar relationship between its own and the EU's legal order. Due to its institutional bias as a representative of its national legal order, however, a national constitutional court lacks the required legitimacy to interpret the legal competency provisions agreed upon in the European treaties and to unilaterally challenge the validity of EU legal acts in a way that goes beyond its own legal order. Lang (n. 3), 500-501. See also Franz C. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (C. H. Beck 2000), 115.

128 Cross-reference to article in Symposium Issue: Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment.

129 BVerfGE 123, 267 (para. 216) – *Lisbon*.

130 Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law', I.CON 14 (2016), 411-438 (427).

legislator transferring powers to the EU based on Art. 24(1) BL.[131] But this strict constitutional rigidity creates several normative problems that have been outlined in detail in constitutional legal scholarship.[132]

When the GFCC first introduced the concept in *Solange I* to underline that the transfer of sovereign powers was subject to constitutional limits, however, it proposed a relative and less static notion of constitutional identity. Although the Court also used language of inalterability in *Solange I*, noting the 'inalienable, essential feature[s]' of the German Constitution and holding that Article 24(1) BL 'does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity', it does not refer to Art. 79(3) BL. The Court also specifies that the identity of the Basic Law may not be amended 'without a formal amendment to the Basic Law',[133] inviting to the *argumentum e contrario* that the constitutional identity may be changed by virtue of a formal constitutional amendment. But this is precisely what Article 79(3) BL does not permit, indicating that the Court's notion of *Solange I* was not based on the eternity guarantee. It is argued in legal scholarship that the reference to constitutional identity in *Solange I* amounts to the Court's thunderous proclamation that fundamental rights '– will not […] be surrendered to the supranational level'.[134] But this reading contradicts the conditional institutional control waiver offered by the Court as outlined above. While the *Solange*-formula insists on an inalienable basic FR standard that is not to be compromised through European integration, it is open to the possibility that fundamental rights are protected through the EU.

V. The Aftermath: Lasting Impact or Superfluous Interference?

How we assess the legacy of *Solange I* hinges critically upon its impact on the development of EU fundamental rights. The two competing narratives about *Solange I* outlined in the Introduction differ especially in this regard. While proponents credit *Solange I* with spurring the development of fundamental rights in the Community, critics contend that the CJEU had already

131 The constitution-amending legislator has imposed these constitutional limits to transfers of sovereign powers to the European Union in 1992 by introducing Art. 23(1) sentence 3 into the Basic Law.

132 Cross-reference to article in Symposium Issue: Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment.

133 BVerfGE 37, 271 (para. 43) – *Solange I*.

134 Perju (n. 1), 289.

 DOI 10.17104/0044-2348-2025-2-411

been well in the process of doing so before and independently of *Solange I*. Most scholars who have commented on this issue and the genesis of EU fundamental rights assume that *Solange I* had a decisive impact, but they do so without substantiating their assessment.[135]

In a recent debate, *Delledonne* and *Fabbrini* on one side and William Phelan on the other side have exchanged important and intriguing arguments about the impact of national courts and *Solange I* on the CJEU's early fundamental rights case law. The former contend the 'conventional narrative' that the CJEU developed its fundamental rights jurisprudence predominantly in response to pressures by the German and the Italian constitutional courts is 'very simplistic' and a 'founding myth'.[136] In support of their argument, they challenge, amongst others, the prevailing understanding of the chronology between national and European court judgments,[137] arguing instead that 'by the time the Italian and West German constitutional courts voiced their concerns against the supremacy of EU law on human rights grounds, the ECJ had already recognised the importance of human rights in the European legal order – for almost half a decade'.[138]

A very similar argument had already been put forward by former CJEU judge Ulrich Everling long ago who argued that the narrative that the CJEU

135 See only Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?', CML Rev. 29 (1992), 669-692 (670-671); Kumm (n. 7), 294-295; Frank Schimmelfennig, 'Competition and Community: Constitutional Courts, Rhetorical Action, and the Institutionalization of Human Rights in the European Union', Journal of European Public Policy 13 (2006), 1247-1264 (1252); Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017), 205; Anne Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', ZÖR 65 (2010), 3-63 (62); Albert Bleckmann, *Europarecht. Das Recht der Europäischen Gemeinschaft* (Carl Heymann 1985), 400; Hans Peter Ipsen, 'Zehn Glossen zum Maastricht-Urteil', EuR 29 (1994), 1-21 (9); Nikolaos Lavranos, 'Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH', EuR 41 (2006), 79-92 (79); Jutta Limbach, 'Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa', NJW 54 (2001), 2913-2918 (2916).

136 Delledonne and Fabbrini (n. 9), 195.

137 The other central claim made by them is that FR protection only became a true priority for the Italian and German courts when the CJEU had already taken on its role as a guardian of fundamental rights in the European Communities, noting that those courts only regularly started to actively strike down major legislative initiatives contravening constitutional fundamental rights provisions in the 1970s. Delledonne and Fabbrini (n. 9), 189-190. Without delving into the details of this claim, this is – at least with regard to the fundamental rights jurisprudence of the GFCC with which I am familiar – an overly reductionist account that neither sufficiently accounts for numerous landmark decisions in the area of fundamental rights beyond the annulment of federal legislation nor for the sweeping and intrusive fundamental rights analysis with the proportionality principle at its heart elaborated by the GFCC. For a similar criticism of Delledonne's and Fabbrini's account, see Phelan, 'Role of the German and Italian Constitutional Courts' (n. 45), 189.

138 Delledonne and Fabbrini (n. 9), 181.

developed its FR jurisprudence under the Damocles' sword of the *Solange I*-decision was a widespread legend,[139] pointing to the chronology of the ECJ's jurisprudence who, in an act of bold judicial lawmaking, had already recognised fundamental rights as unwritten general principles of Community law in *Stauder* in 1969, in *Internationale Handelsgesellschaft* in 1970, and in *Nold* on 14 May 1974, before the GFCC's *Solange I*-decision of 29 May 1974 was even announced. As these FR decisions were rendered much earlier than *Solange I*, Everling argues that the assertion of a causal linkage is historically false.[140]

Phelan, by contrast, responds that 'any explanation of the rise of EU human rights jurisprudence' would need to account for 'the centrality of the ECJ's concern to respond to the German and Italian constitutional courts'.[141] In support of his claim, he refers to the above-mentioned 1965 and 1967 judgments of the Italian and German constitutional courts,[142] which had reserved the issue of conformity of Community law with national fundamental rights guarantees for subsequent decisions, and the writings of judges Pescatore and Lecourt who had justified the need for the CJEU to protect fundamental rights itself as general principles of Community law with reference to national court challenges.[143]

I agree with Phelan's assessment that the role of national court contestations and especially *Solange I* was central to the development of fundamental rights in the EU. Although the CJEU had already recognised FR as 'general principles of law' in *Stauder* and *Internationale Handelsgesellschaft* years before *Solange I*, the CJEU's reasoning in those decisions amounted to nothing more than vague proclamations and an abstract commitment without any meaningful rights analysis.[144] The CJEU's rights reasoning subsequently became more serious and committed in *Nold* and especially in *Hauer*, but

139 Ulrich Everling, 'Bundesverfassungsgericht und Gerichtshof der Europäischen Gemeinschaften nach dem Maastricht-Urteil' in: Albrecht Randelzhofer, Rupert Scholz and Dieter Wilke (eds), *Gedächtnisschrift für Eberhard Grabitz* (C. H. Beck 1995), 57-76 (74). See also Ulrich Everling, 'The Maastricht Judgement of the German Constitutional Court and Its Significance for the Development of the European Union', YBEL 14 (1994), 1-19 (14).

140 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 74. See also Brun-Otto Bryde, 'The ECJ's Fundamental Rights Jurisprudence – a Milestone in Transnational Constitutionalism' in: Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010), 119-130 (120): 'Unfortunately, this narrative does not fit with the sequence of events.' Perju (n. 1), 282.

141 Phelan, 'Role of the German and Italian Constitutional Courts' (n. 45), 191.

142 See above at III. 1.

143 Phelan, 'Role of the German and Italian Constitutional Courts' (n. 45), 192.

144 See above at III. 1.

there is considerable evidence that those two decisions were decisively influenced by *Solange I*.

The following parts of this section seek to enrich the debate about *Solange I*'s impact by outlining three considerations neither addressed by Delledonne and Fabbrini nor Phelan. First, it seeks to demonstrate based on informal conversations between justices of the GFCC and the CJEU that the anticipated ruling in *Solange I* likely influenced the CJEU's *Nold*-judgment (1.). Second, it argues with reference to the CJEU's decision in *Hauer* in 1979 that *Solange I* spurred the CJEU's FR case-law (2.). Third, it shows that *Solange I* contributed to an attitude shift regarding the importance of fundamental rights among several political Community actors beyond the CJEU (3.).

1. The Temporal Dimensions of *Nold*

A simple reference to the chronology between *Nold* and *Solange I* does not suffice to discharge the narrative that the *Solange I*-decision had a substantial impact on the CJEU's FR case-law. In fact, *Solange I* likely had an effect already on *Nold* even though that decision was delivered roughly two weeks before *Solange I*. It seems though that the *Nold*-decision was already drafted under the shadow of the expectation of the GFCC's imminent *Solange I*-decision. Indeed, it is conceivable that the CJEU scheduled the pronouncement of the *Nold*-judgement purposely on a date before the expected decision of the GFCC to preempt the GFCC from reviewing the conformity of EU law with German FR provisions.

There were growing signs of a negative evaluation by the GFCC on the eve of the *Solange I*-decision. It must have already alarmed the CJEU that the Frankfurt Administrative Court referred the case – and implicitly the decision in *Internationale Handelsgesellschaft* in the same matter – to the GFCC for review, not least because the criticism of the FR protection by European institutions (or the lack thereof) had noticeably intensified in German courts and legal scholarship.[145] But given that the GFCC had employed a 'delay tactic'[146] in its first decisions regarding the relationship between EU law and German law to survey the academic literature for orientation, there was time to appease the GFCC.

145 See, e. g., Hans Rupp, 'Die Grundrechte und das Europäische Gemeinschaftsrecht', NJW 23 (1970), 353-359.

146 Clarance J. Mann, *Function of Judicial Decision in European Economic Integration* (Martinus Nijhoff 1972), 184, 420-421.

More importantly, there were informal conversations between Pierre Pescatore and Walter Seuffert during the *Solange I*-proceedings. Both were important figures in their respective courts. Pescatore was, as demonstrated above, one of the most charismatic and influential judges on the CJEU during his tenure and the rapporteur in *Internationale Handelsgesellschaft*,[147] Walter Seuffert was the Vice-President of the GFCC and the presiding justice of the Second Senate. In a recorded interview in 2003, Pescatore recalled that in the run-up to *Solange I*, he had, at the request of the President of the CJEU Robert Lecourt, a lengthy conversation with Seuffert at a 'réunion de magistrats', an event with judges from different legal orders, to persuade Seuffert of the CJEU's position.[148] According to Pescatore, however, it became clear during the meeting that this attempt would not be successful.[149] This is not surprising because Seuffert had published a contribution to a Festschrift in 1972 in which he emphasised the GFCC's monopoly in matters of national fundamental rights and hinted at the existence of limits to the supremacy claim of EU law.[150]

We do not know the substance of this conversation, but it is noteworthy that the CJEU in *Nold* based fundamental rights as general principles of law – in addition to the national constitutional traditions – for the first time on the European Convention of Human Rights. This may have been a preemptive attempt to dispel the GFCC's concerns about the lack of a FR catalogue in the EU prominently articulated in *Solange I*. Against this background, it seems plausible to view the CJEU's *Nold*-ruling as a final attempt to appease the GFCC. In Davies' view at least, *Nold* 'was an obvious olive branch to the BVerfG'[151] and 'a peace offering by the CJEU to its German counterpart just weeks before the BVerfG delivered its *Solange* decision'.[152]

2. The Impressionability of the CJEU

A second argument put forward by Everling against the impact of *Solange I* on the CJEU's fundamental rights jurisprudence is that it would run counter the institutional role and ethos of CJEU judges to be impressed by

147 See above III. 1.

148 CVCE, 'Interview de Pierre Pescatore: les arrêts marquants de la Cour de justice (1967-1985)', CVCE of 12 November 2003, at <https://www.cvce.eu>, last access 28 April 2025.

149 CVCE (n. 148). *Pescatore* mentions that his interlocutor had already taken a preconceived stance, 'une idée préconçue dans la tête'.

150 Walter Seuffert, 'Grundgesetz und Gemeinschaftsrecht' in: Adolf Arndt, Horst Ehmke, Iring Fetscher und Otwin Massing (eds), *Konkretionen Politischer Theorie und Praxis* (Klett 1972), 169-187 (175).

151 Davies (n. 15), 164.

152 Davies (n. 15), 165.

threats.[153] As representatives of EU interests who are responsible to all member states, they would not give special consideration to the constitutional court of a single member state.[154] In his experience, the CJEU had never reacted frightened or intimidated to the GFCC.[155] To the contrary, announcements of obstinate refusal would rather have a counterproductive effect.[156]

But Everling's claim that the CJEU is not impressionable to contestations by national constitutional courts risks to create a legend itself.[157] Several indicators suggest that *Solange I* influenced and spurred the CJEU's FR case-law. The history of judicial dialogue between the CJEU and national constitutional courts, for example, demonstrates that the former has repeatedly accommodated the latter's demands to avoid open judicial conflict and damage to European integration.[158] *Solange I* itself is a prime example. This does not mean that the CJEU was frightened or intimidated and disregarded broader EU interests by developing more robust FR standards. In fact, it seems likely that the CJEU, in doing so, did not act against but rather in line with its own institutional self-interest. *Solange I* instead provided the CJEU with a strong justification vis-à-vis the political Community organs to further develop FR.[159] The decision legitimised the building of supranational constitutionalism.

153 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 74.

154 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 74.

155 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 74.

156 Everling, 'Bundesverfassungsgericht und Gerichtshof' (n. 139), 75.

157 See only Alec Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford University Press 2000), 171: '[T]he move [to FR protection], however, was not voluntary. An incipient rebellion against supremacy, led by national courts, drove the process.'

158 For example, the CJEU's more restrictive interpretation of the scope of the Charter of Fundamental Rights according to Art. 51(1) CFR in ECJ, *Julian Hernández and Others*, judgment of 10 July 2014, case no. C-198/13, ECLI:EU:C:2014:2055, compared to the more extensive understanding set forth in ECJ, *Åkerberg Fransson*, judgment of 26 February 2013, case no. C-617/10, ECLI:EU:C:2013:105, was likely a reaction to BVerfGE 133, 277 (para. 91) – *Counter-terrorism database*, where the GFCC explicitly held with regard to *Åkerberg Fransson* that '[a]s part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order'. Other examples suggesting that the CJEU was receptive and accommodating to contestations by national constitutional courts are the *Taricco* saga between the CJEU and the Italian Corte Costituzionale and the judicial dialogue between the CJEU and the GFCC concerning the *European Arrest Warrant*. On *Taricco*, see Matteo Bonelli, 'The *Taricco* Saga and the Consolidation of Judicial Dialogue in the European Union', MJ (Antwerp) 25 (2018), 357-373; on *Aranyosi*, see Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi', Eu Const. L. Rev. 12 (2016), 549-563.

159 Haltern (n. 35), 458.

In addition, the intensity of review by the CJEU in FR cases changed substantially before and after the *Solange I*-decision in 1974. The *Hauer*-decision of 1979 displays a unique intensity in terms of FR review.[160] The procedural set-up likely incentivised the CJEU to demonstrate to the GFCC that it took its fundamental rights concerns articulated in *Solange I* very seriously. The preliminary reference in *Hauer* was submitted by the Neustadt Administrative Court,[161] which did not only express its critical stance towards the CJEU's FR case-law so far but also announced that it would subsequently send the case to the GFCC.[162] As a result, portions of the decision read like a direct response to the concerns articulated in *Solange I*. On the one hand, the CJEU warns that '[t]he introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardising of the cohesion of the Community'.[163] On the other hand, the Court, explicitly referencing the Joint Declaration, emphasises the progress in EU FR protection and affirms emphatically that 'measures which are incompatible with the fundamental rights recognised by the constitutions of those States are unacceptable in the Community'.[164]

3. The Reaction of European Institutions to the GFCC's *Solange I*-Decision

Finally, the *Solange I*-decision added new momentum to the nascent European FR protection after it was announced. It triggered a remarkable wave of activity by political actors and made European FR protection a priority of several European institutions, thereby also enlarging the room of maneuvering of the CJEU in developing fundamental rights through its case-law. In the words of Bill Davies, *Solange I* had 'a lasting and formative impact on European governance'.[165] He provides a detailed account of how the

160 Rudolf Streinz, Bundesverfassungsgerichtlicher Grundrechtsschutz und europäisches Gemeinschaftsrecht (Nomos 1989), 65.

161 Verwaltungsgericht Neustadt, decision of 14 December 1978, case no. 2 K 205/76, EuGRZ 6 (1979), 341-344 (342).

162 Haltern (n. 5), 601.

163 ECJ, *Liselotte Hauer v. Land Rheinland-Pfalz*, judgment of 13 December 1979, case no. 44/79, ECLI:EU:C:1979:290, para. 14.

164 ECJ, *Liselotte Hauer v. Land Rheinland-Pfalz*, judgment of 13 December 1979, case no. 44/79, ECLI:EU:C:1979:290, para. 15.

165 Bill Davies, Resisting the European Court of Justice. West Germany's Confrontation with European Law, 1949-1979 (Cambridge University Press 2012), 182.

Solange I-decision resulted in 'a year-long inquiry by the European Parliament on the consequences of the *Solange* decision'[166] and even prompted German chancellor Helmut Schmidt to intervene behind the scenes. According to him, the reaction of the European institutions was surprisingly 'timid' and characterised by a 'willing[ness] to reach important compromises'.[167] It appears that these reactions were caused by real concerns about the future of the European integration project that found itself in a difficult period of stagnation at that time.[168]

In reaction to *Solange I*, the European Parliament, the Council, and the Commission adopted the 1977 Joint Declaration concerning the protection of fundamental rights and the ECHR, stressing 'the prime importance they attach to the protection of fundamental rights' and, in particular, to the ECHR.[169] The story behind the drafting process of the Joint Declaration is especially instructive of the effects of the *Solange*-method: Davies shows that a reason for the adoption of the Joint Declaration was to meet the GFCC's request for a parliamentary FR catalogue. Although the impression created in the outside world was that the Joint Declaration was initiated by the European Parliament, documents reveal that, in reality, the idea originated in a conversation between Chancellor Schmidt and the German Advocate General Gerhard Reischl,[170] in which both men had considered various measures to appease the GFCC.

VI. Conclusion

Solange I is not parochial and backward, but in many regards a modern and forward-looking decision. Although the analysis set forth in this article surely does not put the case for judicial federalism in the EU to rest, nor seeks to do so, it suggests that the judicial federalist narrative about *Solange I* discounts three key justifications for the decision emerging from the historical analysis of the decision.

First, the combination of the CJEU's unconditional supremacy doctrine and the absence of robust FR protection by Community institutions, including the CJEU itself, raised valid constitutional concerns, despite Community policies not posing a real threat to undermine national FR in this phase of

166 Davies (n. 165), 194.

167 Davies (n. 165), 7.

168 Haltern (n. 35), 455, referencing the recent crisis of the empty chair policy, the weakend role of the Commission, and the paralysing effect of the Luxembourg compromise.

169 Davies (n. 165), 183.

170 Davies (n. 165), 192-196.

European integration. But this combination arguably created an FR protection vacuum that was likely to lead to more serious FR infringements in the foreseeable future without adequate countermeasures. The lack of a structured FR review in *Stauder*, *Internationale Handelsgesellschaft*, and *Nold* further cast reasonable doubts whether the CJEU was truly poised to become a true judicial guardian of FR that would render national FR review against Community measures redundant or whether it was not more driven by instrumental considerations of safeguarding the supremacy doctrine and the Community market. More generally, the structural obstacles of collective action in supranational policy-making have led the CJEU to conduct more rigid judicial review against member state laws than against EU laws. Even today, it is rare that the CJEU invalidates EU regulations or directives for FR violations.[171] Suggesting against this background that judicial contestations by the GFCC are predominantly driven by concerns about preserving its institutional role therefore dismisses the Court's reasonable constitutional concerns too lightly. Quite to the contrary, it seems fair to say that the GFCC's skepticism towards the CJEU's unconditional supremacy claim without sufficient structures of constitutional legitimacy is deeply rooted in constitutional thought.

Second, *Solange I* arguably had a decisive impact on the European governance of FR, while the counterfactual assumption that the CJEU would have developed FR for the Community without the decision in the same way overlooks its effect on political EU institutions. Even if we assume hypothetically that the CJEU was determined to build robust FR guarantees from the outset, we should acknowledge that the CJEU does not act in a political vacuum but critically relies upon the support or acquiescence by other Community organs to effectuate profound constitutional change. *Solange I* assumed a valuable legitimising and enabling function: It did not only create leverage and strong justifications for the CJEU vis-à-vis the political Community organs to develop FR, but it also contributed to a more permissive political environment by inducing an attitude shift among political actors concerning the importance of fundamental rights.

Third and finally, it is highly speculative to assume that *Solange I* precluded the realisation of a more radical and truly supranational European integration project. It seems more plausible to assume, by contrast, that constitutional pressures would have steadily increased with further integration and that deficient structures of constitutional legitimacy would have continued to plague the Community even if the GFCC had unconditionally

171 One of the few instances is ECJ, *Digital Rights Ireland*, judgment of 8 April 2014, case nos C-293/12 and C-594/12, ECLI:EU:C:2014:238.

accepted the supremacy of Community law. This is illustrated by the *Maastricht* decision of 1993 that followed only seven years after the GFCC had largely relinquished the *Solange*-reservation in its *Solange II*-decision of 1986. This sequence of events indicates that the transformation of the Community from a supranational economic integration project to a political union through the Maastricht Treaty promptly resulted in more intense national judicial contestations and would have likely done so regardless of how the Court decided *Solange I*.

If this connection between European integration and constitutional legitimacy is necessary, then supremacy and uniform application of EU law must be embedded in normatively dense structures of constitutional legitimacy. *Solange I* can be viewed as offering a vision for a European Union that embraces principles of constitutionalism. The decision's significant impact on the EU governance of FR suggests that 'checks and balances' between the legal orders of the EU and the member states, opening up possibilities for contestation and for constructive inter-order judicial dialogue, may contribute more to this vision than the judicial federalist vision.