

1-1-2017

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Recommended Citation

Vlad F. Perju. "On Uses and Misuses of Human Rights in European Constitutionalism." *Human Rights, Democracy, and Legitimacy in a World in Disorder (forthcoming 2017)* (2017).

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Forthcoming in Silja Vöneky and Gerald L. Neuman (eds.), Human Rights, Democracy, and Legitimacy in a World in Disorder (Cambridge University Press, 2017)

ON USES AND MISUSES OF HUMAN RIGHTS IN EUROPEAN CONSTITUTIONALISM

Vlad Perju*

I. CONCEPTIONS OF EU CONSTITUTIONALISM

The prevailing myth in European Union constitutionalism is that human rights were absent from the genesis of the EU legal order.¹ Historical evidence marshaled to support this view includes the lack of a bill of rights from the original Treaties – *Paris* [1951] and *Rome* [1957] – as well as early decisions of the European Court of Justice denying recognition to such rights. While the need to protect human rights from violations by the European Community was occasionally invoked at the early stages of European integration, the Masters of the Treaties rejected that protection as ill-fitted to the project of a common internal market for whose completion they, participating nation states, were willing to transfer limited competencies to supranational

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¹ My focus throughout this chapter is on the European Union (“EU”). By “European constitutionalism” I refer to constitutionalism in the EU, unless specific mention is made otherwise, for instance to the European Convention for the Protection of Human Rights.

political institutions. Only decades later, according to this account, did European Union institutions extend protection to human rights and only after municipal courts grew concerned that supranational legislation could potentially violate with impunity rights protected under national constitutions.² Yet, even as new doctrines were being developed, the European Court of Justice was more interested in legitimizing European political institutions than, as one would expect in the case of human rights, in protecting the interests and/or needs of vulnerable rights holders.

This purportedly descriptive account of human rights has far-reaching implications for European constitutionalism. If the account is accurate, how plausible does it make the claim that European norms have primacy over municipal norms, “however framed”³, especially in jurisdictions such as Germany and Italy that entrusted their judges with the enforcement of fundamental rights? Furthermore, how remedial could have been the process of filling in the gaps of the missing human rights doctrines as it exposed the European legal order as caving under national pressure? Adopting new human rights doctrines might have made European supremacy more palatable, but that was Pyrrhic victory if its effect was to subvert European law’s equally important claim to autonomy vis-à-vis municipal as well as international law.

² The scope of human rights protection includes infringements by EU secondary legislation as well by national measures implementing EU legislation or falling within the scope of the EU. *See* Case 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft, 1989 E.C.R. 2609; Case C-260/89 Elliniki Radiophonia Tiléorassi AE (ERT AE) v. Dimotiki Etairia Pliroforissis (DEP) (“ERT”), 1991 E.C.R. I-02925 (EEC).

³ Case 6/64 Flaminio Costa v E.N.E.L., 1964 E.C.R. 585, 594 (“It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”). This became a canonical statement, repeated *ad litteram* in subsequent decisions. *See, e.g.*, Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. I-125, 134, para. 3.

To salvage itself at least partially from this predicament, European constitutionalism recalibrated its claims. The prevailing myth offers one such account.⁴ Its starting point is the observation that, unlike municipal legal orders, which are comprehensive in scope, the legal system of the European Communities (now, Union) was largely tailored to the goal of the common market. Human rights were “of secondary importance at that (early) stage of European development”⁵, their protection having been consigned to the national level and/or to the European Convention on Human Rights. Since human rights protections were indispensable for any post-war legal order, the European Community law could meet this viability threshold only by drawing upon the normative resources of municipal legal orders. The separateness and autonomy of the municipal legal orders is thus secured: European constitutionalism cannot seek to displace municipal constitutional orders since it depends on them.⁶ This is a preservationist view, which sees European integration as at best a system of complex coordination between the supranational and national level of government, and among participating nation states themselves. Placed at the normative interface between supranational and national law, human

⁴ KLEMEN JAKLIC, *CONSTITUTIONAL PLURALISM IN THE EU* 3 (Oxford 2013) (describing constitutional pluralism as “the dominant branch of European constitutional theory”).

⁵ 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*, 61 WASH. L. REV. 1103, 1106, 1113 (1986).

⁶ European constitutionalism might, however, seek to transform national legal orders internally. Such transformation would be, for example, the effect of internalizing into the normative DNA of each municipal order the existence of other orders on equal footing, and hence a commitment to the preservation of the plurality of distinct political identities. See Joseph H.H. Weiler, *Europe’s Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 17 (Joseph H.H. Weiler & Marlene Wind eds., 2003) (referring to the corollary of this principle of constitutional tolerance, understood as the “normative hallmark of European federalism.”).

rights have a uniquely important role.⁷ They pierce the veil of European constitutionalism's self-serving claim that supremacy of EU law flows in one direction, from the top-down.⁸ The correct conception of supremacy is, in this view, bidirectional. The acceptance and implementation of EU supremacy by municipal legal orders is not only a precondition for its effectiveness but it is co-constitutive of the supremacy claim itself.⁹ Bidirectional supremacy is, therefore, the "deep structure" of human rights doctrines.¹⁰

Would that the European constitutional project fit this jurisprudential orthodoxy so neatly. But integration, it turns out, is a far more unruly *Grundnorm* of European constitutionalism than the conjectures of the preservationist model let show.¹¹ The coordination-of-separate-municipal-jurisdictions narrative offers at most a partial, and thus overall misleading, account of European constitutionalism. A fuller picture emerges as one places coordination

⁷ The same is true about human rights at the interface between the European and international legal orders. See Joined Cases C-402 & 415/05 *Kadi v. Council*, 2008 E.C.R. I-635. For an analysis, see Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 HARV. INT'L L.J. 1 (2010).

⁸ *Costa*, 1964 E.C.R. at 585.

⁹ See, e.g., Bruno de Witte, *Direct Effect, Primacy and the Nature of the European Legal Order*, in THE EVOLUTION OF EU LAW 351 (Oxford, Paul Craig & Gráinne de Búrca, eds., 1st ed., 1999) ("There is a second dimension to the [primacy] matter, which is decisive for determining whether the Court's doctrines have an impact on legal reality: the attitude of national courts and other institutions.").

¹⁰ Weiler, *supra* note 5, at 1119. See also Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 Am. J. Int'l. L. 649, 668 (2011) (arguing that the recognition of human rights in the ECJ's decisions did not come "out of blue" but was "preceded by heated political and legal debates in various European arenas about the implications of the doctrine of supremacy of EC law."). Conversely, "the alleged concern for fundamental rights [was] ... a disguise for the opposition to supranational power as such", in Brun-Otto Bryde, *The ECJ's Fundamental Rights Jurisprudence – a Milestone in Transnational Constitutionalism*, in THE PAST AND FUTURE OF EU LAW 121 (Miguel Poiares Maduro & Loic Azoulai, eds., 2010) (citing in this context the work of Hans Peter Ipsen and other German scholars working in the first decades of European integration).

¹¹ See Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Compatibility of the draft agreement with the EU and FEU Treaties*, 2014 EUR-Lex CELEX 613CV002 (Dec. 18, 2014), para. 172 (referring to integration as the "*raison d'être* of the EU itself.").

games within a richer and more radical view of European integration. Since states provide neither the best solution to their coordination problems, nor the best institutional abode for their professed, and presumably shared, values, European integration is at its core a project of unification. From that distinct angle, European integration appears aimed at centralizing at the supranational level the core constitutive values and functions of nation states. The project challenges the autonomy and separateness of state formations. Coordination is a part of the process of integration, but it is emphatically not the normative horizon against which to understand that process. Supranational integration aims to fuse municipal jurisdictions, not to celebrate their autonomy.

The implications and complications of the project of European integration, understood in this radical iteration, reach as deep and far as its high ambitions to undermine “categories of thought which have been settled for centuries, overturn deep-rooted political ideologies and strike powerfully at organized interests.”¹² Human rights are not late additions, but from the beginning part of a European legal order that is viable, if atypical in the modern age of nation-states. They become visible on any search that uses at the supranational level methods of legal interpretation similar to those routinely deployed in domestic law. Furthermore, far from providing evidence of a deep normative dissonance between autonomy and supremacy, human rights reinforce the normative coherence of European constitutionalism.¹³

¹² PIERRE PESCATORE, *LAW OF INTEGRATION* 26, 43 (1974).

¹³ Manfred A. Daus, *The Protection of Fundamental Rights in the Community Legal Order*, 10 *E.L.REV.* 398, 408 (1985) (“the substance and limits to Community fundamental rights are determined in the final analysis not by the interactions with the national constitutions but by the structure of the autonomous Community legal order in the light its objectives of interaction.”).

To be sure, this radical vision of European constitutionalism has lost much of its grip on contemporary constitutional thought. Its demise was not foreordained, but a comprehensive study of the deradicalization processes falls beyond the scope of this chapter.¹⁴ My interest here is more limited, namely the forensic study of the role of human rights in the clash of visions of European constitutionalism. I cannot, however, entirely suppress a more subversive aim. There is plenty evidence that the benumbing consensus around one, dominant vision of European constitutionalism has made it difficult to envision alternative accounts of human rights. Recovering some of the lost radicalism of European constitutionalism, by reclaiming some of those alternative accounts, could help to denaturalize the current uses, and to expose strategic misuses, of human rights.

Exactly how to unravel the prevailing consensus around human rights is a question of choice. One string to pull could presumably be *Kadi*¹⁵ or the Opinions on the EU's accession to the European Convention on Human Rights. Or one can start with *Omega*¹⁶, *Åklagaren*¹⁷ or any aspect of the still-underused Charter of Fundamental Rights. My own preference in this chapter is for the classic *Solange* saga. The reason is more than some chance interest in all things German or a general fondness for beginnings - "that god", as Plato called it, "which as long as it dwells among men saves all things."¹⁸ While *Solange*'s origins are German, its ghost has

¹⁴ I develop such an account in Vlad Perju, *The Deradicalization of European Legal Integration* (work in progress).

¹⁵ *Kadi*, 2008 E.C.R. at I-635.

¹⁶ Case C-36/02, *Omega Spielhallen-und Automatenaustellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609.

¹⁷ Case C-617/10, *Åklagaren v Fransson*, 2013 EUR-Lex CELEX 610CJ0617 (Feb. 26, 2013).

¹⁸ PLATO, LAWS VI 775.

travelled far beyond and become a building bloc of European constitutionalism.¹⁹ Part II presents *Solange I* as a clash of visions of European constitutionalism. Each of these visions is under-theorized, but their significant overlap is sufficient to challenge the conventional interpretation of *Solange I* as a successful national rebellion against European supremacy on a human rights platform. Part III distinguishes between shallow and deep methodologies that guide the search for human rights, and shows how the former connects to the preservationist account of European nation states whereas the latter is an integral part of the bolder, unity-centered conception of supranational integration. Part IV presents the disconnect between, on the one hand, *Solange I*'s demise and, on the other hand, the resilience of its underlying account of human rights. The fact that subsequent doctrinal developments, which settled retroactively the meaning of *Solange I*, failed to bring closure to struggles over the nature of European supremacy and autonomy, supports the conclusion that human rights had been all along just the means to a larger end. The end, I submit, was to resist what Federico Mancini called “the Union moving toward statehood.”²⁰ Resistance to that goal grew all the more urgent, the closer the goal came within reach. But once human rights as a medium of resistance had been compromised, more powerful tools, such as democracy, quickly took its place. Human rights were not altogether abandoned, of course, and Part V discusses subsequent repackaging strategies. Common to these strategies is a dovetailing of human rights and democracy, within the conveniently malleable framework of constitutional identity. Part VI is a brief conclusion.

¹⁹ The informed reader might find striking my omission from this analysis of the Italian reception, specifically the decisions of the Italian Constitutional Court. I believe an analysis of those cases, omitted here for reasons of space, would confirm the account I present in this paper. If anything, the Italian cases are less convoluted than the German one and certainly less influential. I discuss the Italian cases at great length in other work, see *supra* note 14.

²⁰ G. Federico Mancini, *Europe: The Case for Statehood*, 4(1) EUR. L.J. 29, 31 (1998) (“[i]t seems to me that the closer the Union moves toward statehood, the greater the resistance to the attainment of this goal becomes.”).

II. HUMAN RIGHTS AND THE GENESIS OF THE EUROPEAN LEGAL ORDER

Solange I [1974]²¹ marks a critical juncture in the constitutional canon of European integration. Concerned about the implications of European constitutional doctrines on its mandate to enforce national constitutional protections of human rights, the German Constitutional Court held that, should conflicts arise between European secondary legislation and the human rights provisions of the German Basic Law, *Karlsruhe* retained “the right to review the validity of the Community legislation – that is, to render it without effect within the jurisdiction it controls.”²² What made conflicts possible, albeit, considering the European Community’s limited mandate, presumably unlikely, were missing guarantees at the European level equivalent to those afforded to human rights under the Basic Law. The holding that EU law lacks supremacy over German law so long as the European legal order fails to include human rights protections, an “inalienable essential feature”²³ of municipal law, has systemic implications. It means that in the case of conflict with domestic human rights guarantees the legal effect of European legislation in one of the (originally, six) national jurisdictions depends on the existence or non-existence of adequate human rights guarantees at the supranational level. It is not the European doctrine of supremacy, as articulated by the European Court of Justice, that determines the effect of European legal norms in cases of their potential conflict with human

²¹ Bundesverfassungsgericht [BVerfG] [German Constitutional Court] May 29, 1974, 37 BVerfGE 271, 14 COMMON MKT. L. REV. at 540 (*Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* (“*Solange I*”)).

²² *Solange I*, *supra* note 21, COMMON MKT. L. REV. at X

²³ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 550.

rights norms, but rather the independent assessment of municipal courts, making their decisions on the basis of a feature – human rights – they deem essential for national and supranational legal orders alike. Without the permission of municipal courts applying national human rights, European norms, including the doctrine of supremacy, lack legal effect; they gain no traction in reality.²⁴ Put differently, whatever traction the supremacy claim might have domestically, it is not preconditioned by the European Court’s supremacy doctrine.²⁵ Its real source is the acquiescence of the doctrine’s addressees in municipal law.²⁶

This is a frontal attack on the *Costa* doctrine of the European Court of Justice, which claimed unqualified and automatic primacy for norms of primary and secondary European law over municipal legal norms, irrespective of their internal rank.²⁷ But the exact scope of the attack requires interpretation. How far-reaching is it? Specifically, does the rejection of unqualified supremacy also entail a rejection of the autonomy of European law? And, if it does not, on what grounds does national acquiescence to European autonomy rest, once supremacy is rejected, given the European Court’s adamant efforts throughout its case-law to combine the doctrines of autonomy and supremacy in a unitary theory of European constitutionalism?

On autonomy, *Solange I’s dicta* seems straightforward: “[i]n agreement with the law developed by the European Court of Justice”, the Court writes, “Community law is neither a component part of the national legal system nor international law, but forms an independent

²⁴ See de Witte, *supra* note 9 (*Direct Effect, Primacy and the Nature of the European Legal Order*).

²⁵ For an analysis of this argument, see Ulrich Scheuner, *Fundamental Rights in European Community Law and in National Constitutional Law*, 12 COMMON MKT. L.R. 171, 175-176 (1975).

²⁶ KAREN ALTER, *THE EUROPEAN COURT’S POLITICAL POWER* 458, 459 (1996) (“the ECJ can say whatever it wants, the real question is why anyone should heed it.”).

²⁷ *Costa*, 1964 E.C.R. at 585.

system of law flowing from an autonomous legal source.”²⁸ German judges acquiesce in the European Court’s *Van Gend en Loos* doctrine, that the Treaty of Rome is an independent source of law that brought into existence a legal order autonomous from both municipal and international law.²⁹ The timing of this acceptance is also significant, since the contours of autonomy, and especially of how that doctrine sets European legal order apart from international law, had by the mid-1970’s become sufficiently discernible. Unlike in the case of international legal norms, autonomy implies that the implementation of norms of European law into domestic law escapes the control of each municipal jurisdiction. Whether they originate from the Treaty or from secondary legislation, decisions about the effect of European norms in domestic legal order are ultimately within the authority of the European Court of Justice. Pursuant to that authority, the European Court had held that, in specific though broadly construed situations³⁰, European norms could directly confer rights to nationals that are justiciable in municipal courts.

The gravitational pull of the doctrine of autonomy on the hierarchy of legal norms depends on the former’s jurisprudential underpinnings. For the *Solange I* Court, the background conception of the normative interface between European and national legal systems are the two legal systems “independent of and side by side one another in their validity.”³¹ Each apex court – *Luxembourg* and *Karlsruhe* – rules on the “binding force, construction and observance” of its own law. The courts of one system cannot rule on the validity or invalidity of the norms of the

²⁸ *Solange I*, *supra* note 21. An earlier case where the German Constitutional Court emphasize the autonomy of the European legal order, see *Lütticke*, 31 BVerfGE 145 (1971).

²⁹ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

³⁰ How broadly construed those cases were would become apparent over time. For one clear example, albeit one that post-dates *Solange I*, see Case C-43/75, *Defrenne v Sabena* (No. 2) 1976 EUR-Lex CELEX 675CJ0043 (Apr. 08, 1976).

³¹ *Solange I*, *supra* note 21, at X.

other system. In case of conflict, or at least of the kind of conflict that *Solange I* envisaged, national courts can dis-apply the European norm by depriving it of legal effect within the jurisdiction they control. Under this theory, the municipal and European legal orders are independent and co-exist alongside one another in their legal validity.

Solange I was, of course, not the first time the coordination-centered vision had been articulated. The European Court itself had encountered a recognizable version from its own Advocate General, in *Costa*.³² Its reaction on that occasion, and consistently in all the subsequent ones, was to reject it on the ground that it failed to conceptualize the European legal order as one different in kind from international law. “By contrast with ordinary international treaties,” the ECJ wrote, “the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.”³³ For the European Court, supremacy is a normative implication of the autonomy of the European legal order.³⁴ Once the difficult question of autonomy has been settled³⁵, and settled specifically on the grounds laid out in *Van Gend*, the

³² The model adopted in *Solange I* was neither original nor confined to the municipal level. See AG Lagrange, Opinion, in *Flaminio Costa v E.N.E.L.*, 1964 E.C.R. 585 at 606 (arguing, unsuccessfully, that “the system of the Common Market is based upon the creation of a legal system separate from that of the Member States, but nevertheless intimately and even organically tied to it in such a way that the mutual and constant respect for the respective jurisdictions of the Community and national bodies is one of the fundamental conditions of the proper functioning of the system instituted by the Treaty and, consequently, the realization of the aims of the Community.”). For a similar interpretation of AG Lagrange’s position, see Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1, 12 (1981).

³³ *Costa*, 1964 E.C.R. at 585.

³⁴ By normative implication I mean that the grounds on which autonomy rests extend to the hierarchy of municipal versus supranational norms. Normative implications are to be distinguished from logical implications.

³⁵ And apparently, it did so unanimously. See *Editorial, For History’s Sake: On Costa v. ENEL, André Donner and the Eternal Secret of the Court of Justice’s Deliberations*, 10(2) EUR. CON. L. REV. 191, 195, fn. 12 (2014) (relying

extension to supremacy of European over municipal norms is a small conceptual, albeit not political, step. Autonomy entails that national courts may not tie the effect of European norms to municipal rules, including rules of constitutional rank, that determine the domestic effect of international legal norms. Irrespective of whether national legal orders are monist or dualist, or any combination thereof, the imperatives of systemic unity demand the centralization of decisions regarding legal effect. This explains, for instance, the recurrent and tantalizingly tautological deployment of the effectiveness rationale in the formative decisions of European constitutionalism.³⁶ Effectiveness speaks to a concern with the executive, as opposed to the purely normative, force of norms, a concern understandably heightened in legal orders at early stages of development. In the European supranational context, by contrast to international law, effectiveness is a function of the uniformity of interpretation and implementation, the idea that the legal effect of European legal norms cannot depend on the different traditions and structures of municipal jurisdictions, or even more questionably, on the political interests du jour.³⁷

on circumstantial evidence to argue that the *Costa* holding was unanimous, by contrast to *Van Gend*, which was decided by the narrowest of margins (4 to 3 votes)).

³⁶ *Costa*, 1964 E.C.R. at 585 (“[T]he law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question.”).

³⁷ The European Court argued that “[t]he obligations undertaken under the treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.” *Costa*, 1964 E.C.R. at 585. But, as far as international law is concerned, the issue has its own complexities. The Permanent Court of International Justice had held that municipal norms, including norms of constitutional rank, could not be invoked to bar or otherwise limit that effect of international law, in *Polish Postal Service in Danzig*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11 (May 16). Expanding on this analysis, Derrick Wyatt argued a few decades ago that pretty much everything the Court did in *Van Gend* could already be accomplished under international law. Derrick Wyatt, *New Legal Order, or Old*, 7 EUR. L. REV. 147, 148 (1982).

Centralization reflects the constitutional demands of a political project not guided by “the laws of expediency [but one that] should be built upon a more permanent and objective foundation.”³⁸

Echoes of this normative approach were not entirely absent from *Solange I*. In fact, they informed the forceful, unusual and now largely forgotten three-judge dissent. Judges Rupp, Hirsch and Wand rejected the majority’s view of coordinated, but always separate, legal orders standing side by side. Norms of European law, the dissenters argue, are “just as binding on the German authorities and courts as the norms of national law.”³⁹ Following closely the European Court’s reasoning in *Costa*, the dissenters point out the unsustainable implications of the “inadmissible trespass”⁴⁰ of allowing national legal orders to check the applicability of European norms. Empowering the courts of each of the member states to limit the effect of European norms, even on grounds as important as fundamental rights, would lead to “fragmentation of law”, thus “exposing a part of European legal unity, endangering the existence of the

See also Bruno de Witte, *Retour à “Costa”: La primauté du droit communautaire à la lumière du droit international*, 20 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 425 (1984).

³⁸ ANDRE M. DONNER, THE ROLE OF THE LAWYER IN EUROPEAN COMMUNITIES 59 (1968). This is not to deny that, conceptually speaking, coordination rationale can be sufficient to explain supranational centralization. In the case of European legal integration, such an account would envisage successive spill-over processes set and kept in motion by the need for ever more perfect coordination between municipal jurisdictions. But, as Donner suggests, that process would not rest on “permanent and objective foundation.” Even aside from close association between the logic of coordination and international law, one insuperable difficulty of understanding integration as an ever-perfectible process of coordination is that, by itself such a process is aimless. What gives it direction is an understanding of its purpose, be that pacification, prosperity and/or the full axiological panoply of collective self-government: equality, liberty, and solidarity. For a study, see Dimitry Kochenov, *The Ought of Justice*, IN DIMITRY KOCHENOV, GRÁINNE DE BÚRCA, ANDREW WILLIAMS (EDS.), EUROPE’S JUSTICE DEFICIT (Hart Publishing, 2015); Pierre Pescatore, *L’objectif de la Communauté Européenne comme principes d’interprétation dans la jurisprudence de la Cour de Justice*, in MISCELLANEA W.J. GANSHOF VAN DER MEERSCH 325-363 (Bruylant 2d ed. 1972).

³⁹ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 561.

⁴⁰ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 565.

Community, and negating the very idea of European unity.”⁴¹ The dissenters go further and question the majority’s distinction between invalidity and inapplicability. The majority had held that depriving European norms of legal effect within Germany would not render those rules invalid. The dissenters are unconvinced, pointing out that “the distinction exhausts itself in the use of different words” and that, *pace* Kelsen⁴², a norm that, in the specific circumstances such as the ones at issue here, does not apply can be said to be invalid.⁴³ To insist otherwise is to misunderstand the relevant context of a supranational legal order seeking to establish the connection between its norms and social reality. Indeed, the disapplication of a European norm within any part of territory of the European Community is a denial of legal effect whose proper interpretative context is the goal of European unity.⁴⁴ The delineation of territory may track municipal jurisdictional boundaries, but the existence of such sub-European units is irrelevant from the integrated perspective of European law that conceptualizes the entire territory of the Community as one common jurisdiction. The effect of deferring to sub-European jurisdictions on

⁴¹ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 564.

⁴² Kelsen had argued that “a single legal norm [does not] lose its validity if it is only exceptionally not effective in single cases”, in HANS KELSEN, PURE THEORY OF LAW 212-213 (1967).

⁴³ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 564-565. Kelsen might have been right as a conceptual matter, but the matter presents itself here as contextualized for a (European) legal system that sees its legality of its norms threatened by non-application within a critically important part of its jurisdiction. Kelsen himself provides elsewhere some (admittedly rudimentary) tools to analyze this state of affairs, in this comments about the relation between the “*ought* of the legal norm” and the “*is* of physical reality”, in Kelsen, *supra* note 42, at 211-212.

⁴⁴ Insofar as disapplication seeks to erode validity, the same question can be asked of the “set-aside” order of the European Court of Justice in *Simmenthal*. See Case 106/77, *Amministrazione delle Finanze v Simmenthal SpA*, 1978 E.C.R. 629, 644, para. 22 (“Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.”).

the legal effect of European norms would be the fragmentation of European law, a blow to its effectiveness and legality.

The account of the nature and implications of such a vision is bound to be ambiguous, so long as the vision remains under-theorized – a function both of its novelty, and, as far as the European Court is concerned, of the style of its judgments.⁴⁵ Nevertheless, the comparison to international law is a source of insight. Writing extra-judicially, Pierre Pescatore, one of the European Court’s early towering figures, contrasted international law, which he saw as a law of “conflicts, equilibrium and coordination” and, when particularly successful, of “inter-state cooperation”, with the European legal order, which was “more than [international law]: a law of solidarity and integration.”⁴⁶ Coordination of states is the logic of international law in a “society weakly organized and profoundly heterogeneous in the political, legislative and judicial needs.”⁴⁷ By contrast, the aim of European Community law is “formation of a political will, the creation of a common body of legislation” – ultimately, “unification according to a coherent idea of order.”⁴⁸ More recently, Gráinne de Búrca has traced the implications of this distinction for the early EC approaches to the European Convention on Human Rights, which was perceived as a typical instance of intergovernmental cooperation, and on that basis deemed inadequate.⁴⁹ The

⁴⁵ See generally Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT’L L. 307 (2009).

⁴⁶ Pierre Pescatore, *International Law and Community Law – A Comparative Analysis*, 7 C. M. L. REV. 167, 169 (1970).

⁴⁷ *Id.* at 170.

⁴⁸ Pierre Pescatore, *L’application directe des traités européens par les juridictions nationales: la jurisprudence nationale*, REVUE TRIMESTRIELLE DE DROIT EUROPEEN 700 (1969).

⁴⁹ Gráinne de Búrca, *supra* note 10, at 666 (arguing that, by contrast to “[t]he Council of Europe [which] was established as a broader, pan-European organization for international cooperation on a range of issues that included human rights and cultural, educational, health and economic matters”, “the European Communities were a vehicle for

question remains about the basis of unification. Different forces or visions will drive the idea of “unifying Europe in a federation or remaining an order of nation states.”⁵⁰ Sometime, that choice itself has been framed as one “between life or death, or freedom and slavery.”⁵¹ Less climactically, the option for unification as the *modus* of European integration has practical implications. For instance, as far as institutional identity is concerned, that choice grounds the dual identity – for courts, for citizens and businesses, and for national executive and legislatures – that has always been central to understanding European integration.⁵² At the interpretative level, the vision of unification underpins the choice for the normative basis for a teleological method in the early decisions of the European Court of Justice – as well as the deep ambivalence about the role that comparative law ought to play in the Court’s methodology.⁵³

III. HOW TO (NOT) FIND HUMAN RIGHTS IN THE EUROPEAN LEGAL ORDER

The implications of finding, or not finding, human rights in the European legal order are far-reaching. Those high stakes might understandably affect how the search is conducted. Specifically, the choice of a method may not be easily detachable from broader, background

states to pursue closer and deeper integration through a system in which they conceded some of their sovereign powers and accepted a significant degree of supranational control and influence by the new organization.”).

⁵⁰ *Id.*

⁵¹ Jieskje Hollander, *The Dutch Intellectual Debate on European Integration (1948-present). On Teachings and Life*, 17 J. EUR. INTEGRATION HIST. 197, 201 (2011).

⁵² For a general study of split identity, see Antonio Cassese, *Remarks on Scelle’s Theory of “Role Splitting” (dédoulement fonctionnel) in International Law*, 1 EUR. J. INT’L. L. 209-231 (1990).

⁵³ For an observation regarding the paucity of comparative references, see Mattias Kumm, *Internationale Handlungsgesellschaft, Nold and the New Human Rights Paradigm*, in *THE PAST AND FUTURE OF EU LAW* 108 (Miguel Poiares Maduro & Loic Azoulay, eds., 2010).

conceptions of European constitutionalism. But, then, isn't the outcome of the search for human rights preordained by the structure of the search itself (including mine in this chapter)?

Consider first the methodology deployed in the majority opinion in *Solange I*. The German judges searched for a bill of rights in the text of the Treaty of Rome and for human rights interpretative rules in the opinions of the European Court of Justice. This shallow search was quick and it returned no results. It would have been “absurd”⁵⁴ to claim a bill of rights in the Treaty of Rome or in the Treaty of Paris. The reason was not that human rights had not entered the drafters' imagination.⁵⁵ After all, human rights provisions had been included in the drafts for the European Defense Community and the European Political Community.⁵⁶ But the political failure of those projects implied that, as one scholar described it, “the original euphoria gave way to sober utilitarian considerations and sight of a general concept of fundamental and human rights was lost.”⁵⁷ By the time the Rome Treaty was drafted, including such provisions could have been misinterpreted as acknowledgment that European institutions might enact legislation

⁵⁴ FEDERICO MANCINI, *Safeguarding Human Rights: The Role of the European Court of Justice*, IN DEMOCRACY AND CONSTITUTIONALISM IN THE EUROPEAN UNION: COLLECTED ESSAYS BY JUDGE G. F. MANCINI 82 (2000) (“to say that the EC Treaty contains a Bill of Rights is ... absurd.”).

⁵⁵ For a comprehensive study, see Gráinne de Búrca, *supra* note 10. Professor De Búrca finds that “the point in terms of political support for the creation of a powerful, supranational human rights regime was actually reached in the early 1950s and that progress in recent decades has been much more hesitant, equivocal, and deeply contested.”, at 651).

⁵⁶ Even the case for the European Economic Community's accession to the European Convention on Human Rights was advocated from the early stages of the process of integration. *See, e.g.*, WALTER HALLSTEIN, *EUROPE IN THE MAKING* 49 (1973).

⁵⁷ Manfred A. Daus, *The Protection of Fundamental Rights in the Community Legal Order*, 10 EUR. L. REV. 398, 399 (1985).

capable of violating human rights, thus reaching far beyond the economic competencies that nation-states delegated to the supranational level.⁵⁸

As for the case-law of the European Court, the shallow search interprets the Court's early decisions, from the oft-cited *Stork*⁵⁹ to *Sgarlata*⁶⁰ and beyond, as a self-evident rejection of any place for human rights in the European legal order. The inclusion of human rights came only later, when the European Court started to develop, including by incorporation from municipal law, human rights doctrines under pressure from national, especially German, judges. While such pressure pre-dated *Solange I*⁶¹, that decision crystallized and gave impetus to the counter-reactions to European constitutionalism. The German judges deemed insufficient the European Court's early openings towards fundamental rights; only a "catalogue of fundamental rights decided on by a parliament and of settled validity" could guarantee protections that are "reliably and unambiguously fixed for the future in the same way as the substance of the Constitution."⁶² Was it a coincidence that the call for a catalogue of fundamental rights, presumably in the mold of Germany's Basic Law, as well as the decision to predicate it on the existence of "a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level"⁶³, were made at a time when political stalemate within the

⁵⁸ Weiler, *supra* note 5, at X (*Eurocracy and Distrust*)

⁵⁹ Case 1/58, *Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community*, 1959 E.C.R. 17.

⁶⁰ Case 40/64, *Sgarlata v Commission*, 1965 E.C.R. 215.

⁶¹ In a decision from 1967, the German Constitutional Court indicated it might have the right to review European legal norms. See 22 BVerfGE 293, 298. This decision sparked a robust academic debate. For a discussion, see Bruno Otto Bryde, *supra* note 10, at 120-21.

⁶² *Solange I*, *supra* note 21, COMMON MKT. L. REV. at X.

⁶³ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at X.

Community institutions made it impossible to enact even minor legislation, much less the kind of Treaty-level overhaul that the German judges called for?

Contrast the above approach with a *deep* search for human rights. Starting from the premise that, as a constitutional matter, the European legal order was as viable as municipal legal orders, it follows that interpretative methods at the supranational level should be aligned with methods used in municipal law.⁶⁴ While legal interpretation differs across legal traditions, interpreters often reject fetishism of specific bill of rights provisions in favor of more comprehensive, systemic and structural human rights protections.⁶⁵ Rights-granting provisions in the Treaty of Rome become visible on such a recalibrated constitutional radar. Some of these provisions fall under the equality rubric – the prohibition of discrimination on the basis of nationality⁶⁶ and gender in the case of equal remuneration⁶⁷ – while others are part of a more general right to freedom. The four fundamental freedoms (goods, capital, services and workers) had originally an economic cast, which would become less dominant as the doctrines developed over time.⁶⁸ One level deeper than separate clauses, one finds general principles of law. Some of these principles are mentioned explicitly in the Treaty, whereas others are implied and surface

⁶⁴ Dausies, *supra* note 57, at 408 (*The Protection of Fundamental Rights in the Community Legal Order*) (“the substance and limits to Community fundamental rights are determined in the final analysis not by the interactions with the national constitutions but by the structure of the autonomous Community legal order in the light its objectives of interaction.”).

⁶⁵ So long as the European Court has the means to protect, and it has protected, fundamental rights, it is irrelevant if rights are protected through codification. *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 653 (dissenting opinion).

⁶⁶ Treaty Establishing the European Community, Mar. 26, 1957, art. 7(1).

⁶⁷ Treaty of Rome, *supra* note 66, art. 119, at 62.

⁶⁸ MANCINI, *supra* note 54, at 82 (SAFEGUARDING HUMAN RIGHTS: THE ROLE OF THE EUROPEAN COURT OF JUSTICE) (“[I]s it not a fact that the major legal discovery of the twentieth century is the danger which the economy represents to human rights?”).

through judicial interpretation. The legality of administration⁶⁹, the principles of legal certainty⁷⁰, fair hearing⁷¹, and good faith⁷², as well as the prohibition of double jeopardy⁷³, fall in this latter category. Another level deeper, the search turns to the institutional structure of Community legality, directly relevant to gauge the role of human rights within the scope of European constitutionalism. Legality requires that the European Court's role, under the Treaty, be to ensure that "in the interpretation and application of this Treaty the law is observed."⁷⁴ The Court fulfills its task through *ex ante* and *ex post* jurisdictional tools similar to those of any municipal independent court. The rule of law, in the Court's interpretation and application, is part of the "very structure of the Communities."⁷⁵

How does a deep search for human rights integrate the early cases of the European Court, explicitly denying recognition to human rights? A first step is to read those decisions in their proper historical context. Those cases involved the impact of the High Authority's regulations or decisions reorganizing the sale of coal in the Ruhr within the newly created European Coal and Steel Community. Coal wholesalers that could no longer maintain their status after the High Authority modified the qualification thresholds or other application rules moved in direct actions to annul Community legislation that allegedly violated their property rights. But since no explicit provision of the Treaty of Paris protected that particular right, petitioners had recourse to

⁶⁹ Case 9/56, *Meroni*, 1958 E.C.R. 133.

⁷⁰ Joined Cases 17 & 21/61, *Klöckner and Hösch*, 1967 E.C.R. 325.

⁷¹ Case 32/62, *Alvis* 1963 E.C.R. 49.

⁷² *See. e.g.*, Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. I-649.

⁷³ Joined Cases 18 & 35/65, *Gutmann Cases*, 1966 E.J.R. 61.

⁷⁴ Treaty of Rome, art. 164.

⁷⁵ Pierre Pescatore, *Fundamental Rights and Freedoms in the System of the European Communities*, 18 AM. J. COMP. L. 343, 347 (1970).

national law in order to claim their right. Many cases arose in the German context, and so the German Basic Law became the constitutional framework of reference. From the European Court's perspective, the substantive aspects raised by petitioners were entirely dependent on the structural issues involving the two legal orders: municipal and European. And it was on structural grounds that the European Court decided those cases. Without fail, it refused to strike down the Community legislation on the ground that European norms violated national (constitutional) law. The European judges held that the application of national law fell outside their purview. One finds here, in an incipient form, jurisprudential questions that would eventually find their unmistakable answer in the supremacy doctrine. But, and this point is critical, the legal analysis of the early cases reflects the terms of the Coal and Steel Community⁷⁶, in which the legal debates were inevitably nailed to the cross of the specific – and narrow – contexts in which they arose.

By contrast, when human rights eventually received recognition in the European legal order, that recognition came in cases that were preliminary references brought under the Treaty of Rome and, importantly, *after* the European Court formulated its radical doctrines of autonomy and supremacy.⁷⁷ Consider *Stauder*, a preliminary reference, where the petitioner challenged a Community scheme to dispense subsidized butter as a violation of his right to dignity, in that access to that benefit was conditioned on his proving his identity by showing a special identity card that included his full name. The case turned on discrepancies between the German

⁷⁶ And, in one instance, of the European Atomic Energy Community. See Joined Cases 18 & 35/65, *Guttman v. Comm'n*, EUR-Lex CELEX-61965J0018 (May 5, 1966).

⁷⁷ Scholars commonly acknowledge the implications of the doctrine of supremacy for human rights. See *supra* note 10. As I argue in this chapter, it is in my view important to see the doctrine of autonomy as shaping in equal measure the human rights debate.

translation of the Community norm that applied to the petitioner, and the version of the legislation in other Community languages. The Court sensibly removed the conflict by holding that the versions of the legislation that imposed less stringent identity requirements were to be given legal effect. The European Court did not make the point that human dignity is a German provision without equivalent in the Treaty systems. It simply noted that the interpretation it favored contained “nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.”⁷⁸ Even that brief *dicta* was unnecessary, judging by the holding of the case, but it makes perfect sense for the Court in the post-*van Gend/Costa* era to signal its readiness to take seriously the responsibilities it had assumed once it articulated the double helix of European constitutionalism: autonomy and supremacy.

Less than a year later, the European Court provided as detailed an account of “the protection of fundamental rights in the Community legal system” as its style and form of judgment allowed.⁷⁹ In *Internationale Handelsgesellschaft*⁸⁰, the case that would eventually become *Solange I* before the German Constitutional Court, the European judges held that “the respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.”⁸¹ Restating its steadfast doctrine that assessing the validity of Community law by national standards would undermine “uniformity and efficacy of Community law”⁸², the Court concluded that the legal effects of Community norms cannot be affected by the claims that

⁷⁸ Case 29/69, *Stauder v Ulm*, 1969 E.C.R. 419.

⁷⁹ See Perju, *supra* note 45 (*Reason and Authority in the European Court of Justice*).

⁸⁰ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. I-125.

⁸¹ *Id.* at para. 4.

⁸² *Id.* at para. 3.

they violate fundamental rights in the national constitution or to the principles of a national constitutional structure. The national constitutional traditions are sources of inspiration for Community law, but the rights themselves fit within the presumably self-referential “framework of the structure and objectives of the Community.” Drawing inspiration from national law does not undercut the core axes of European constitutionalism because the process of recognizing human rights remains solely within the authority of the European Court. From *Luxembourg’s* standpoint, the recognition of human rights does not dilute or otherwise qualify the doctrines of European constitutionalism: “the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”⁸³ The Court then proceeded to find the regulatory scheme challenged in *IH* as not violating the principle of proportionality, a legal principle of European law.⁸⁴

Finally, there is *Nold*, which begins the indispensable task of operationalizing human rights doctrines. The facts in *Nold* recalled the early cases under the Paris Treaty about changes in the regulation of coal sales that allegedly violated plaintiff wholesalers’ fundamental rights to

⁸³ *Id.*

⁸⁴ The recognition of the existence, and indeed centrality, of proportionality in the European legal order as early as *IH* falsifies, in my view, attempts to justify *Solange I* as rooted in the misgivings of the German judges that their much-cherished proportionality analysis lacked recognition at the European supranational level. While it is true that the European Court had yet to show how similar or dissimilar its own version of proportionality was from the German version, the cause for such delay was the limited opportunities, as of that moment, for a robust application of proportionality. Furthermore, little if anything in *IH* suggested that the ECJ’s use of proportionality was manifestly different or generally incompatible with the method’s usage in German public law. The German constitutional judges’ views on how Luxembourg deployed the proportionality method cannot by itself explain the shift from *Solange I* to *Solange II*.

practice their trade and profession. The *Nold* holding goes beyond general statements about the importance of human rights in the European legal order, and addresses the sources of human rights. The Court held itself “bound to draw inspiration from the constitutional traditions common to the Member States” – thus refusing to uphold “measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.”⁸⁵ This approach opens difficult methodological questions, involving the meaning of “common” traditions and the level of protection – floor or ceiling – that the European Court would adopt. *Nold* itself does not offer any definitive answers, and indeed for decades the Court would shy away from pursuing these questions with rigor. But merely raising these questions is no trivial matter for national judges, such as those called to decide *Solange I*, as they screened European law for evidence of adequate protection for human rights at the supranational level. Furthermore, *Nold* provided the first firm example of applied fundamental rights analysis with high ideological stakes. The European Court invoked the social functions of property as ground to limit its exercise, thus shifting the responsibility to the rights holder-plaintiffs to adapt to the economic implications of the new regulatory frameworks of coal production.

Nold came down a full six months before the German Constitutional Court decided *Solange I*, in November 1974. Its analysis was available to the German Constitutional Court, just as the analysis – and holding – of some of the other cases was equally on display. Indeed, on that basis the dissenters in *Solange I* concluded that there was “enough case-law to permit the statement that fundamental rights are adequately protected at Community level.”⁸⁶ Not so the

⁸⁵ Case 4/73, *Nold*, 1974 E.C.R. 491.

⁸⁶ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 560 (dissenting opinion).

majority. While its shallow search cannot ignore these protections entirely⁸⁷, it deemed them insufficient. To be sure, the protections were far from comprehensive, when compared to municipal human rights, or sufficiently watertight. But the shallow search did not construct a standpoint from which to gauge strengths and weaknesses of human rights protections by the supranational judiciary. Instead, it dismissed their potential outright. Its conclusion about the insufficiency of European protections for human rights was preordained by the conception of European constitutionalism in which the shallow method found its roots.

IV. MANUFACTURING DISSENT

Solange I's influence, such as it was, turned out to be fleeting. The decision was met, both domestically and in Europe, with dismay and disparagement.⁸⁸ It was never ground for disapplying European secondary legislation in Germany.⁸⁹ Most significantly, as I discuss below, the German Constitutional Court eventually reversed its assessment of the European legal order.⁹⁰ The real puzzle, looking retrospectively, is what explains *Solange I*'s reputation as an inflection point in European constitutionalism.

Any answer has to start with the processes of *ex-post* meaning (re-) creation, in *Solange II* (1986). In that case, the German Constitutional Court unanimously found that “in conception, substance and manner of implementation” the protection of fundamental rights within the

⁸⁷ *Id.* at X (referring to the protection of fundamental rights as “favorable”).

⁸⁸ See Hans Peter-Ipsen, *BVerfG versus EuGH re ‘Grundrechte’*, in 10 EUROPARECHT 1 (1975) (arguing that *Solange I* was “wrong...fallacious, superfluous, and legally-politically mistaken ...[and] groundless.”).

⁸⁹ For a watering-down of the doctrine, see *Vielleicht-Beschluss* (“Maybe Decision”), 52 BVerfGE 187 (1979).

⁹⁰ *Wünsche Handelsgesellschaft* (“*Solange II*”), 73 BVerfGE 339 (1986), 2 BvR 197/83, *Europäische Grundrechte-Zeitschrift*, 3 COMMON MKT. L. REV. 225 (1987).

“sovereign jurisdiction of the European communities” is “essentially comparable with the standards of fundamental rights provided for in the Constitution.”⁹¹ Underlying the description was a change in the normative tune. The German judges noted that “the legal orders of the member-States and that of the Community are not abruptly juxtaposed in a state of mutual insulation but are in numerous ways related to each other, interconnected and open to reciprocal effects.”⁹² Structural features of the European legal order stood out in that context. The very existence of the preliminary reference procedure, to take one prominent example, demonstrated to the German Court that, “in the interests of the Treaty objectives on integration, legal security and uniformity of application, it serves to bring about the most uniform possible interpretation and application of Community law in all courts within the sphere of application of the EEC Treaty.”⁹³

However, if one recalls that the preliminary reference procedure had been already in place before *Solange I*, and that little in its subsequent use was – or should have been – entirely surprising to the German judges, one realizes that the relevant question is not so much which overall features of the European legal order Karlsruhe found reassuring in *Solange II* but, rather, what were the new features or post-*Solange I* practices that stood out for the German judges. The answer is from self-evident. Little on the to-do list that the German Constitutional Court had presented to European institutions had been ticked off. Nothing akin to a bill of rights had been incorporated into the constitutive Treaties. There had been no significant change in the

⁹¹ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at 259.

⁹² *Solange II*, *supra* note 90, COMMON MKT. L. REV. at 251. As Justin Collins noted, much of the opinion reads as if it had been written by the dissenters in *Solange I*. See JUSTIN COLLINS, DEMOCRACY’S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 1951-2001, 207 (2015).

⁹³ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at 252.

Community's institutional structure. One exception was the first holding of direct elections for the European Parliament in 1979, which, notably, did not require a Treaty amendment. But the elections were, and were widely perceived to be, insufficient to turn the European Parliament into an institution "to which the Community organs empowered to legislate are fully responsible on a political level."⁹⁴ At the political level, a joint declaration of the political institutions stressed the importance of protecting fundamental rights. While significant, that declaration chartered, at most, a political program lacking the hard legal effect that *Solange I* had called for. Finally, the European Court had continued to expand both the range of its fundamental rights jurisprudence as well as its relation to sources, such as the European Convention on Human Rights.⁹⁵ The German Constitutional Court took credit in *Solange II* for this development at the European level, although its self-serving congratulatory mood should be viewed with skepticism.⁹⁶ In reality, the European Court's jurisprudence had built on its own earlier cases such as *IH* and *Nold*, which had already been decided by the time *Solange I* was decided.⁹⁷

This all indicates that the explanation of the shift in *Solange II* had more – or, to be more exact, had *everything* – to do with the German Constitutional Court itself than with the European legal order. No longer committed to the shallow search for human rights that characterized

⁹⁴ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at X.

⁹⁵ Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727; Case 36/75 *Rutili v. Ministre de l'intérieur*, 1975 E.C.R. 1219. See G. Federico Mancini, *A Constitution for Europe*, 26 COMM. MKT. L. REV. 611 (1989) (“[r]eading an unwritten bill of rights into Community law [as] indeed the most striking contribution that the Court has made to the development of a constitution for Europe.”).

⁹⁶ See also G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MODERN L. REV. 157, 187 (1994) (“It would be an exaggeration to say that the European Court was bulldozed into protecting fundamental rights by rebellious national courts.”).

⁹⁷ The German Constitutional Court did acknowledge the first openings of the European Court of Justice, “favorable though those have been to fundamental rights”, in *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 551.

Solange I, the German Court now looks deeper into the European legal order. Its rediscovery of the preliminary reference mechanism signals renewed propensity for structural “rule-of-law” analysis, and in particular for the role and status of the European Court of Justice within the larger Community structure.⁹⁸ The German Court’s excursus on Treaty interpretation confirms the change of heart. The constitutional judges acknowledge that “gaps” might still exist in the European system of protecting fundamental rights, so long as it remains driven by case-law rather than the application of a bill of rights. But, in answering such concerns, what the Court found “decisive” was not the existence of the gaps themselves, but rather “the attitude of principle which the Court maintains at this stage towards the Community’s obligations in respect of fundamental rights ... as is also the practical significance which has been achieved by the protection of fundamental rights in the meantime in the Court’s application of Community law.”⁹⁹ Whatever the merits or demerits of such confidence, one can hardly imagine a farther cry from the imperative demand in *Solange I* that rights receive reliable protection through a “written bill of rights.”

The glaring question is how the German Constitutional Court, applying the standards it had articulated in *Solange I*, could rest content in *Solange II* with the protection of human rights at the EU level. The answer to that question is far from evident. The German Court pointed out, presumably for the purpose of reassuring its domestic audience, that *Luxembourg* did not commit itself to applying the “lowest common denominator” between the systems of human rights protections of the various national jurisdictions. But this creates an inescapable tension with the rights protections afforded under the German Basic Law. The Court’s direct answer is little more

⁹⁸ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at 251.

⁹⁹ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at 262.

than an expression of hope: “it is to be expected that the European Court will strive to ensure the best possible development of any particular principle of fundamental rights in Community law.”¹⁰⁰ The doctrinal influence of the European Convention on Human Rights on EU constitutionalism is deemed sufficient to guarantee the “minimum standard of substantive protection of fundamental rights which in principle satisfies the legal requirements of the Constitution as such.”¹⁰¹ But this only deepens the conundrum. If minimum standards of protection at the European level meet the needs of the German constitution, it must be that *Solange I* had deemed the European system incapable of protecting such minimum standards. And yet, if the European legal order is so fundamentally deficient, lacking in a necessary features of a specifically constitutionalist legal order, how could German law stand alongside it, recognizing its autonomy and functional interdependence?

It must be, then, that an alternative interpretation is warranted. The German Court’s concern in *Solange I* is not with whether the European legal order can meet *minimal* standards, but rather with the compatibility or non-compatibility of the standards the European Court stood ready to recognize with the comparatively high level of human rights protections guaranteed under the German Basic Law.¹⁰² This is certainly a more cogent interpretation of *Solange I*. It was precisely that perceived unsustainability of demanding European law to meet the standards of one – and, *eo ipso*, presumably any -- of its municipal constitutional orders, that was deemed unacceptable both by the European court and, notably, by the dissenting German constitutional court judges. Yet, there is nothing reassuring about this alternative interpretation. If true, it only reinforces how puzzling, or misleading, *Solange II*’s mention of minimal standards remains.

¹⁰⁰ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at X.

¹⁰¹ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at 264.

¹⁰² *See also Solange I*, *supra* note 21, COMMON MKT. L. REV. at X (dissenting opinion).

There is still another way to handle the challenge of fitting *Solange II* into the standard the German Court had set in *Solange I*. That solution is to abandon the lens of *Solange I* altogether and to conclude that *Solange II* essentially gave up on the standards they had themselves imposed over a decade previously.¹⁰³ This approach has twofold implications. First, it accepts that the jurisprudential shifts between *Solange I* and *II* are rooted in developments at the national level. Whether these shifts represent sweeping changes or, as I have suggested, result from specifying previously under-theorized constitutional theories, these shifts are detached from the process of European integration that, in aspects that are relevant, cannot causally explain municipal constitutional developments. Second, this interpretation implicitly acknowledges the inadequacy of fundamental rights as ground for opposing the radical project of European integration *qua* unification. Relevant here is not only that the municipal constitutional doctrine develops in time, but rather the specific direction its development takes place from *Solange I* to *Solange II*. An important question arises in that context, about just how far the German Court goes in *Solange II* in the direction that the ECJ had previously laid out. Do the national constitutional judges go all the way to the transformative project of European integration as unification? After its acceptance in *Solange I* of the doctrine of autonomy, in the version originally formulated by the ECJ, did the German Court complete the normative alignment in *Solange II* by accepting the doctrine of supremacy, also in the version formulated by the ECJ?

¹⁰³ Juliane Kokott notes that, whereas *Solange I* held that “basic rights” are part of the German constitutional Basic Law, *Solange II* identifies “legal principles” that underpin basic rights provision in the Basic Law are indispensable. See Juliane Kokott, *Report on Germany*, in *THE EUROPEAN COURT AND NATIONAL COURTS - DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT*, 90 (Slaughter, et al, eds., 1998).

The conventional interpretation of *Solange II* points out that the judgment does not surrender the German Constitutional Court’s jurisdiction to review secondary European legislation. It only pledged that, so long as the European institutions “generally safeguard the essential content of fundamental rights”¹⁰⁴, German judges would no longer review the applicability of Community legislation within its jurisdiction.¹⁰⁵ EU law has only precedence of application¹⁰⁶, subject to the power of review that could presumably be activated at will upon a finding that the human rights safeguards at the European level are no longer in place. The sword of Damocles does its work while hanging in the air. That much is true. Still, it is still far from clear what are the implications of this residual power. The circumstances in which that power might be exercised are an important part of the context for understanding the power itself. How serious is a threat that comes from a sword that, despite opportunities aplenty¹⁰⁷, has never fallen and which seems too heavy to hold in the air indefinitely? To be sure, the future is always open-ended and *Karlsruhe* could conceivably use its residual power at some point in the future. But if it did it, its action would unsettle European constitutionalism so profoundly that, in all likelihood, it would usher in a paradigm shift away to a new, and different, constitutional settlement in the European Union.¹⁰⁸

¹⁰⁴ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at X.

¹⁰⁵ Conversely, and in keeping with the logic of “applicability”, the German Court will decide which norms of German law will not be applicable in specific cases, even though they remain valid. See Kloppenburg, 75 BVerfGE 223 (1987).

¹⁰⁶ See also Lisbon judgment, 123 BVerfGE 267, para. 240 (2009).

¹⁰⁷ For a recent and much publicized such opportunity, see Honeywell, 2 BvR 2661/06 (July. 6, 2010).

¹⁰⁸ Subsequent case law seems to confirm this interpretation. See the *Banana Market* decisions, 102 BVerfGE 147 (2000), holding that actions against a EU legislative act were not admissible if it did not demonstrate that the standard of fundamental rights protection had slipped below a certain threshold. See also European Arrest Warrant, 113 BVerfGE 273 (2005).

More intriguing is another attempt to show that *Solange II* does not bring German constitutional law in closer alignment with the tenets of European constitutionalism. In this view, the common reading *Solange II* as integration-friendly is mistaken. In fact, the German court undermines European integration by resting its holding on “the international law basis of the Community.”¹⁰⁹ This interpretation is supported, first, by the German Court’s failure to recommit explicitly to the autonomy of the European legal order and, second, by its invocation of Article 24 of the German Basic Law.¹¹⁰ The first leg of the claim is unconvincing. Recognition of autonomy is implicit in the recognition of supremacy. From an internal perspective, the normative basis of European constitutionalism is unitary, and it incorporates both supremacy and autonomy, as the European Court never tired to point out. Furthermore, since the German Court had already settled that matter in *Solange I*, an explicit mention would have been necessary as that earlier jurisprudence was not being revisited. Thirdly, what I referred to above as the German Court’s change of normative tune in *Solange II*, together with references to specific references throughout the decision, suggests continuing acquiescence to the autonomy. Finally, it helps to recall that *Solange II* was a unanimous judgment. It is possible that, for prudential reasons, the Court either did not want, or could not find the appropriate language, to dwell on jurisprudential aspects of the autonomy of EU law without challenging its unity.

It is equally unconvincing to interpret the German Court’s reliance on Article 24 as evidence of an integration-unfriendly decision. That provision was the general, and the only

¹⁰⁹ Kokott, *supra* note 103, at 90 (*Report on Germany*).

¹¹⁰ GRUNDGESETZ [GG] [BASIC LAW] ART. 24 [1] The Federation may by a law transfer sovereign powers to international organizations.

available pre-the 1992 constitutional amendment¹¹¹, textual hook for “opening up” the German legal system to a legal universe beyond itself. The German Court relied on Article 24 to point out that inter-jurisdictional coupling by itself does not answer the problem of the priority of validity and application, that is, that priority rules “do not follow directly from general international law.”¹¹² Such rules might follow from norms of domestic constitutionalism, but that is a matter of municipal law, and thus domestic self-government, rather than a response to a demand of international origin, based either on treaty or on custom.¹¹³ Importantly, the German Basic Law allows for “appropriate internal application-of-law instructions” with regard to specific transfers of sovereignty.¹¹⁴ And that was exactly the case with Germany’s participation in the European Economic Community.

Now, using Article 24 of the Basic Law, and an Act by which the Bundestag ratified the Rome Treaty, as the basis for accepting the supremacy of EU law is, formally speaking, not the same as accepting that supremacy on the basis of the European Court’s *Costa* jurisprudence. But how surprising can it be that national constitutional judges would ground the most foundational decisions regarding centers of decision-making in their own constitution? National judges come to the encounter with European constitutionalism by their own systems’ trajectory – one marked by specific history, circumstance, and culture. They do not occupy a constitutional point of view

¹¹¹ *See id.*, ART. 23.

¹¹² *Solange II*, *supra* note 90, COMMON MKT. L. REV. at X.

¹¹³ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at 257 (“Current international law does not contain any general rule arising out of the agreed practice of States or undoubted legal acceptance to the effect that States are obliged to incorporate their treaties into their internal law and to accord them thereunder priority of validity or application as against internal law.”).

¹¹⁴ On the question of the difference between transfer, conferral and limitation of sovereignty, see JO ERIC KHUSHAL MURKENS, FROM EMPIRE TO UNION: CONCEPTIONS OF GERMAN CONSTITUTIONAL LAW SINCE 1871 158-59 (2013).

from nowhere. What makes it all the more significant is that, grounded as they are in the particulars of their national constitutions, they had to process the radical claims that European constitutionalism put forward. This state of affairs inevitably put national apex courts in an unparalleled situation. Only a shallow – and partial¹¹⁵ – analysis, one that rests content with the perfunctory level of constitutional appearances, can read in the mere reference to Article 24 a denial of the autonomy of the European legal order in marked distinction from usual understandings of international law.

The stakes of the internationalist interpretation of the holding and reasoning in *Solange II* become visible by enlarging the framework of reference to include not only what came before but also what came after it. The critical issue is how *Solange II* relates to the all-important *Maastricht* decision of the German Constitutional Court. If *Solange II* indeed denied the autonomy of the European legal order, then it was a precursor of *Maastricht*. And if *Maastricht* had such an immediate precursor, it would be wrong to portray that decision as the awakening of a dormant giant that, under the historical circumstances of the German reunification, it awakened ready to throw its weight at the process of European integration that had itself been recently resuscitated under the Single European Act [1986]. But if, by contrast, *Maastricht* does stand on the shoulders of *Solange II*, then it marks a sharp break with existing constitutional doctrine – and, through a mechanism that remains to be investigated, a critical juncture in the deradicalization of European legal integration. The crux of these questions is where *Solange II* stands in relation to the doctrine of autonomy, at what distance it is from *Solange I*. The answer, I have suggested, is to be found within inner workings of German constitutional law and politics.

¹¹⁵ While *Solange II* does not explicitly engage with the autonomy doctrine, it does mention that “by its entry into the EEC, [the German Republic] consent[ed] to the establishment of Community organs, and its collaboration in the foundation of an autonomous sovereign power.” *Solange II*, *supra* note 90, COMMON MKT. L. REV. at x.

But the inquiry cannot rest there, at least as far as European constitutionalism is concerned. From the perspective of European integration, the question is how the municipal German doctrinal twists have come to shape the doctrine of European supremacy and autonomy. By virtue of what doctrinal feature, or normative artifice, have they managed to colonize the internal point of view of European constitutionalism? When and how have the Europeans become the children of *Solange* and *Maastricht*?

V. THE POLITICS OF CONSTITUTIONAL IDENTITY

It is not possible to give a full answer to these questions in the remainder of this chapter. What I can do is to challenge a common assumption that the use of human rights in the pre-*Maastricht* era somehow predetermined the future trajectory of European constitutionalism, up to and including the contemporary turn to constitutional identity. A more defensible interpretation of the evidence, in my view, is that human rights have been used, misused, half-discarded and eventually repackaged alongside new doctrines, such as self-government and identity, as part of the political strategy of constitutional resistance to what I referred previously as the preservationist project. That strategy of resistance to European unification, forged from German material, has shown its ugly face in recent years as the Union's Eastern lands, especially Hungary and Poland, have appropriated the language of constitutional identity just as they sank ever deeper into authoritarianism. None of this should be surprising. Or, rather, it should not be surprising if the strategic misuse of human rights doctrines, including *ex-post* re-interpretations of *Solange* and their progenies, are seen for what they are, namely an important part of the

deradicalization of European integration that, under the pressure of the historical circumstances of the early twenty-first century, has led the Union to its current predicament.

Temporality, let us recall, pervades the *Solange* judgments. It qualifies the holdings and opens up conceptual spaces, in a manner that, at least on its face, points away from constitutional determinism. *Solange I* sets out to elucidate “the *sui generis* community in the process of progressive integration.”¹¹⁶ It depicts the relationship between the municipal and European legal orders as in flux. The judges write about the “*present* state of integration” in which the Community “*still* lacks a democratically legitimate parliament.”¹¹⁷ The legal difficulty of having to sort out the ranking of legal orders is a “legal difficulty arising exclusively from the Community’s *continuing* integration process, which is *still in flux* and which will end with the present *transitional* phase.”¹¹⁸ Temporality is also *Solange II*’s saving grace. “The present stage” of Community integration is found to be different from the previous stages, differences that the German Court registers as satisfactory progress.¹¹⁹

This sense of unfolding and development underpins the open-statehood position of German law in relation to European integration. Time is an essential, if ambiguous, dimension of constitutional openness. Much changes in time, but there are also elements that the passing of time leaves unaffected. “Open statehood”, as one scholar aptly captured the German position vis-à-vis European integration, “does not mean open-ended statehood.”¹²⁰ Time changes the perspective on how municipal orders relate to European legal orders, yet not all aspects of that

¹¹⁶ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at 549.

¹¹⁷ *Id.* (emphasis added).

¹¹⁸ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at X (emphasis added).

¹¹⁹ *Solange II*, *supra* note 90, COMMON MKT. L. REV. at 265.

¹²⁰ MURKENS, *supra* note 114, at 160.

interplay are subject to development or reconsideration over time. The German Court's emphasis of the limits of conferral of sovereignty from the national to the European levels identifies lines that must not be crossed. In *Solange I*, the Court states that "Article 24 (1) of the Constitution does not open the way to 'altering the basic structure of the constitution, on which its identity rest.'"¹²¹ *Solange II* elaborates: "Article 24 (1) does not confer a power to surrender by way of ceding sovereign rights to international institutions the identity of the prevailing constitutional order ... by breaking into its basic framework."¹²² The tone of authority cannot shun the ambiguities of the relation between time and identity. Constitutional identity develops in time; the passing of time changes identity. But identity is also that which cannot change (merely) through the passing of time. Fundamental rights represent an aspect of the German constitutional identity that cannot – and, as the German sovereign thunders – *will* not, be surrendered to the supranational level.¹²³

There are two shifts underway here. The first, which is subtle, concerns a center of gravity moving from human rights to identity. In the early *Solange* judgments, identity appears as the normative, if under-theorized, background of human rights. Over time, it will expand to encompass human rights as a subset of a constitutional identity. I return to this process below.

What made the first shift difficult to grasp, until recently and in retrospect, was that it unfolded against the background of another, far more virulent movement. The movement was a tectonic shift in the constitutional tactics of reinforcing the autonomy of national jurisdictions as a strategy of fragmenting European law. *Solange*'s lesson, in this light, is that half-measures will not succeed against the project of European unification. To be effective, that is, to hold the

¹²¹ *Solange I*, *supra* note 21, COMMON MKT. L. REV. at x.

¹²² *Id.* at 257.

¹²³ GRUNDGESETZ [GG] [BASIC LAW] ART. 79(3).

national line against supranational construction, constitutional resistance to unification must be as radical as the vision it opposes. *Solange I*'s flaw was to have accepted the claim to autonomy of the European legal order. Radical opposition to the project of European integration required the rejection of that claim in no uncertain terms. So the next time the German Constitutional Court came swinging against European unification, in the *Maastricht* decision, the German judges rejected the claim to autonomy of the European legal order and European constitutionalism wholesale. Furthermore, rather than spending its energy solely on the doctrine of supremacy, as the German Court had done in *Solange I*, *Maastricht* made a doctrinal move much harder to revert: it linked identity with self-government.

As far as autonomy is concerned, *Maastricht* theorizes explicitly and unabashedly the European legal order as a subset of the international legal order: “The Maastricht Treaty constitutes an agreement under international law establishing a compound of States of the Member States which is oriented towards further development. The inter-governmental community is dependent upon the Treaty continually being constantly revitalized by the Member States; the fulfillment and development of the Treaty must ensue from the will of the contracting parties.”¹²⁴ The Treaty of Maastricht is thus seen as establishing a community of States, whose identity is respected and autonomy guaranteed, as is the case in any international organization – “and not with membership in a single European State.”¹²⁵ The conclusion, replete with international lingo is, is that “Germany is therefore maintaining its status as a sovereign State in

¹²⁴ *Maastricht*, 89 BVerfGE 155 (Oct. 12, 1993) (German Constitutional Court Decision); Brunner v. European Union Treaty, COMM. MKT. L. REV. (1994). As one scholar put it, the reduction of supranational commitments to the aims of international law was “a slap in the face of [Walter Hallstein’s] idea of legal community.” MURKENS, *supra* note 114, at 192 (Citing Pernice, at 706 (2004)).

¹²⁵ *Maastricht Judgment*, at 16.

its own right as well as the status of sovereign equality with other States in the sense of Art. 2, sub-para 1 of the UN Charter of 26 June, 1945.”¹²⁶ At the time of German reunification, as the Constitutional Court took it upon itself the task of replenishing the normative resources of the German state, German constitutionalism demands that states be and remain the main actors of European integration.¹²⁷

In this brave (old) world, human rights are both insufficiently effective as the central medium for national resistance to European unification as well as too important a category to dismiss them outright. The task, then, is to repackage them. The starting point of the repackaging strategy is the depiction in both *Solange I* and *II* of human rights as an element of constitutional identity. Interestingly, however, self-government itself is part of the identity package, following *Maastricht*'s depiction of a community that promises to itself to preserve a space for politics where decisions affecting the life of each member will be made collectively. What, one might wonder, of the inherent normative tension between human rights, on the one hand, and democracy, on the other? If national constitutional identity is to be coherent, its component elements, including human rights and the commitment to self-government, must be made

¹²⁶ Maastricht Judgment, at 21. The court would continue along the same lines in its Lisbon judgment. Christian Calliess calls it “almost tragic” that, in adopting an international law perspective, “the court is adopting a restrictive democratic approach towards the very organization which – contrary to classic institutional organizations like the UN and the WTO – actually has a parliament that is directly elected by its citizens and has far-reaching decision-making and control powers.” Christian Calliess, *The Future of the Eurozone and the Role of the German Federal Constitutional Court*, 31 YEARBOOK OF EU LAW 402, 406 (2012).

¹²⁷ MURKENS, *supra* note 114, at 154 (arguing that the court’s use of meta-concepts such as identity, statehood or sovereignty can be explained as a show of force vis-à-vis the ECJ, caused by the failure to reconceptualize public law, especially the constitutional relation with the European Union.”).

coherent.¹²⁸ This is not only a normative challenge but also, given the judgments of the German Constitutional Court, a doctrinal problem.

Doctrinally, one might expect a *Solange III* that sorts out the effect of democratic self-government on human rights, through the lens of constitutional identity. It is thus perhaps unsurprising that the *Solange III* label has been applied, among others, to the *Maastricht*¹²⁹ and *Lisbon* decisions¹³⁰ as well as cases in the European Arrest Warrant saga.¹³¹ So much has been included under that rubric that perhaps *Solange III* is best understood not so much as a case in waiting¹³², but rather as the name of an entire age of German, and indeed European, constitutionalism. This is an age that combines identity, human rights and democracy to protect itself from perceived supranational encroachment. Some combinations are benign.¹³³ Others,

¹²⁸ Weiler, *supra* note 5, at 103 (*Eurocracy and Distrust*) (“Constitutionalism, despite its counter-majoritarian effect, is regarded as a complementary principle to majoritarianism rather than its negation.”).

¹²⁹ See, e.g., Kevin Makowski, *Solange III: The German Federal Constitutional Court’s Decision on Accession to the Maastricht Treaty on European Union*, 16 U. PA. J. INT’L BUS. L. 155 (2014).

¹³⁰ See, e.g., Jacques Ziller, *Solange III, ovvero la Europarechtsfreundlichkeit del Bundesverfassungsgericht. A proposito della sentenza della Corte Costituzionale Federale Tedesca sulla ratifica del trattato di Lisbona*, in 5 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 973-95 (2009).

¹³¹ 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*, 12 EUR. CONST. L. REV. 549-63 (2016).

¹³² The possibility that *Solange III* is a case in waiting has occasionally surfaced in German constitutional scholarship. See MURKENS, *supra* note 114, at 165.

¹³³ In the OMT case, the German Constitutional Court discussed how the *ultra vires* and identity types of review dovetail, with the latter encompassing the former. See OMT, 2 BvR 2728/13, para. 153 (Jun. 21, 2016). For analysis, see Mehrdad Payandeh, *The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture*, 13 EUR. CONST. L. REV. 400, 414 (2017). For an earlier discussion of how human rights review fits with identity review, see Monica Claes, *National Identity: Trump Card or Up for Negotiation?*, in ALEJANDRO SAIZ ARNAIZ & CARINA ALCOBERRO LIVINIA (EDS.), NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 109 (2013).

such as those in Hungary, are less so.¹³⁴ Either way, these doctrinal solutions will often require innovation. Inalienable dignity, for instance, is expanded beyond the ambit of the right expressly recognized in Article 1 of the Basic Law, and to a dignity “core” of other fundamental rights.¹³⁵ The familiar and reassuring principle of mutual trust, which has been a pillar of European constitutionalism, becomes subject to the condition of satisfying municipal constitutional guarantee of dignity in situations such as intra-Union extraditions.¹³⁶

A question remains, at the normative level, how human rights dovetail within an identitarian, democratic paradigm. Joseph Weiler account of rights as “fundamental boundaries” provides an influential answer.¹³⁷ The account is couched as a metaphysical gloss meant as “guarantee against existential loneliness”¹³⁸, but at its core, it uses fundamental boundaries as a “metaphor for the principle of enumerated powers and limited competences that are designed to

¹³⁴ See the Decision of the Hungarian Constitutional Court 22/2016 (XII. 5.) AB (available online at http://hunconcourt.hu/letoltesek/en_22_2016.pdf) (citing the *Solange* cases in creating a municipal doctrine of fundamental rights review and an *ultra vires* review, the latter consisting of a sovereignty review and an identity review). In particular, the Hungarian Constitutional Court held, regarding fundamental rights review, that “any exercise of public authority in the territory of Hungary (including the joint exercising of competences with other Member States) is linked to fundamental right.” After referring to the *Solange* decisions of the German Federal Constitutional Court, the Hungarian judges found that the Court “cannot set aside the *ultima ratio* protection of human dignity and the essential content of fundamental rights, and it must [ensure that the EU law] not result in violating human dignity or the essential content of fundamental rights.” *Id.*, at para. 49. Under Article E (2) of the Hungarian Constitution, “the joint exercising of a competence shall not violate Hungary’s sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control).” *Id.*, at para. 54. For an early analysis, see Gábor Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, *VerfBlog*, 2017/1/10, <http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>.

¹³⁵ OMT judgment, BVerfGE, 2 BvR 2728/12], para. 138 (Jun. 21, 2016).

¹³⁶ BVerfGE, 2 BvR2735/14, para 83 (Dec. 15, 2015). For the ECJ’s answer, see Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăreanu* (Apr. 5, 2016).

¹³⁷ JOSEPH H.H WEILER, *Fundamental Rights and Fundamental Boundaries*, in *THE CONSTITUTION OF EUROPE* (1999).

¹³⁸ *Id.* at 104.

guarantee that in certain areas communities (rather than individuals) should be free to make their own social choices without interference from above.”¹³⁹ The EU is the “above”, the threat to aspects of identity through which communities distinguish themselves from others and, generally, from the outside world. Rights are, in Weiler’s account, “both a source of, and an index for, cross-national differentiation and not only cross-national assimilation.”¹⁴⁰ They represent core values that are part of self-understanding – a community’s “particularized identity rooted in history and political culture.”¹⁴¹ Rights are inherently fragile since they are the outcome of clashes of deeply felt values and normative projects at the national level. Since “human rights are almost inevitably the expression of a compromise between competing social goods in the polity,”¹⁴² the process of European integration should tread carefully not to interfere with those constitutional accomplishments that everyone with passing knowledge of modern history knows to be distressingly fragile.

Those constitutional accomplishments, and especially the processes by which they are come about, now fall under the protective shell of constitutional identity. Consider how they are integrated into a system of supranational protection. One indispensable doctrine concerns the standard for human rights protections. A possible approach is to hold that, beyond a common threshold that receives European protection, each political community ought to be free to define rights in ways that reflect its own fundamental values.¹⁴³ These processes of rights articulations are constitutive of political identity. Rooted as they are in history, political and social culture,

¹³⁹ *Id.* at 103-104.

¹⁴⁰ *Id.* at 105.

¹⁴¹ *Id.*

¹⁴² WEILER, *supra* note 134, at 106.

¹⁴³ *Id.* at 102.

they are an acknowledgment of the “social nature of mankind.”¹⁴⁴ Constitutional litigation will center on what elements of specific rights fall under and above the threshold. But as long as the normative medium is that of identity and democracy, the interplay between the supranational and municipal, as far as rights definition, interpretation and application is concerned, will likely be structural rather than substantive.¹⁴⁵ This too is a form of coordination which extends to the definition of rights, which is just another form of the interaction among political communities that find themselves enmeshed in a process of complex coordination. But this type of coordination, like all other types, does not threaten the separateness and deference to the autonomy of municipal jurisdictions. It is predicated on their preservation.

VI. CONCLUSION

The recent crises that have befallen the European Union, from the Eurozone crisis to the incoming refugees and from Brexit to the rule-of-law erosion in the East, have renewed the call for deeper political integration within the Union. The resurrection of plans for a common defense union, the proposals for a Eurozone parliament and a full-blown banking union are all part of what might develop into a new age of European integration. It is, at this stage, impossible to predict Europe’s contours during such an age, in part because of the nature of political life both nationally and supranationally and in part because of larger tectonic shifts that are simultaneously occurring on the global political and economic scenes. Nevertheless, it is certainly not too early to debate the constitutional foundations of a new age of integration. This

¹⁴⁴ *Id.*

¹⁴⁵ For an example, see Case C 36/02, Omega, 2004 E.C.R. I-09609.

chapter, while primarily a study of the history of human rights, can be read as an argument that at least some of the constitutional bases for deeper integration, and indeed perhaps even European unity, are already present in the foundational doctrines of European constitutionalism. If and when the Union moves into this next phase, its constitutional doctrines would not need to be reinvented wholesale, though some of the meaning they have lost post-Maastricht would have to be recovered through reinterpretation.

This chapter has sketched out what that task of reinterpretation might involve. I have challenged the widely held view that human rights were absent from the genesis of the EU legal order. I have argued instead that, by deploying methods that have become routine in domestic constitutionalism, one could gain a better understanding of the decisions of the European Court of Justice that found human rights as part of the European legal order from the moment when that order became constitutionalized. As far as the normative stakes of this debate are concerned, I have challenged the neutrality of the prevailing account, which offers in my view questionable doctrinal support for the equally questionable normative view that, since the viability of European constitutionalism depends on access to the normative resources of the national legal orders, such as in the case of human rights doctrines, European law's strong claim to autonomy from domestic law is inevitably compromised. In fact, I argued, there has never been anything neutral about the use of human rights at the normative interface between municipal and European law. Human rights, just like constitutional identity or the argument from democracy itself, can be made to look neutral if they are misrepresented as by themselves setting the terms of that interplay between national and supranational law. They are naturalized by their acceptance as discourses of legitimation. Scholarly reflection on European constitutionalism should challenge that naturalization, not rationalize it. Given the current state of the European Union, it is likely

that the future of European integration might well depend on how successful that challenge will be.
