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Mark Killian Brewer

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The European Union and Legitimacy: Time for a European Constitution

Mark Killian Brewer*

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Introduction

Conceived as a collection of international organizations, the legal architec-

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ture of the European Union (EU or the Union)¹ rests upon an evolving constitutional charter arising from the various Treaties² and decisions of the European Court of Justice (ECJ).³ Scholarship on the European Union has wrestled with whether to characterize the political and legal structure of the EU *either* as a constitutional entity akin (but not equivalent) to a federal state⁴ or as an international organization.⁵ Both theoretical models inadequately account for the political and legal framework of the EU.⁶ These characterizations fail because the current network of European laws

1. Since the adoption of the Maastricht Treaty, the European Coal and Steel Community (ECSC), the European Atomic Energy Community, and the European (Economic) Community have collectively become the "European Union." The Court of Justice of the European Communities [hereinafter the ECJ or Court] is the supreme judicial organ of the EU. Although the Maastricht Treaty formally changed the name of the European Community (EC) to the European Union, the Court of Justice of the European Communities does not have jurisdiction over the entire area of European Union activities. Hence, the law settled by the European Court of Justice is technically European Community law rather than European Union law. See TREATY ON EUROPEAN UNION, Feb. 7, 1992, Belg.-Den.-F.R.G.-Greece-Spain-Fr.-Ir.-Italy-Lux.-Neth.-Port.-U.K., [1992] O.J. C224/1 [hereinafter TEU or MAASTRICHT TREATY]. Nonetheless, the convention has been to refer to this law as EU law. This Note attempts to use the term EC law when referring to particular cases settled before the Maastricht Treaty came into force. Otherwise, this Note uses the terms EU law, EC law, and law of the Communities interchangeably according to the conventional practice.

2. The three original Treaties forming the European Communities are the TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, Belg.-F.R.G.-Fr.-Italy-Lux.-Neth., in 1 ENCYCLOPEDIA OF EUROPEAN UNION 1-0109 (Neville March Hunnings ed., 2001) [hereinafter ECSC Treaty], the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITIES, Mar. 25, 1957, Belg.-F.R.G.-Fr.-Italy-Lux.-Neth., in 1 ENCYCLOPEDIA OF EUROPEAN UNION 2-0003 (Neville March Hunnings ed., 2001) [hereinafter EURATOM TREATY], and the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, Belg.-F.R.G.-Fr.-Italy-Lux.-Neth., in 1 ENCYCLOPEDIA OF EUROPEAN UNION 3-0009 (Neville March Hunnings ed., 2001) [hereinafter EEC TREATY]. The other Treaties include the TREATY ESTABLISHING A SINGLE COUNCIL AND SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, Apr. 8, 1965, Belg.-F.R.G.-Fr.-Italy-Lux.-Neth., [1967] J.O. 152/2, [hereinafter MERGER TREATY], the SINGLE EUROPEAN ACT, Feb. 17, 1986 & Feb. 28, 1986, Belg.-Den.-F.R.G.-Greece-Spain-Fr.-Ir.-Italy-Lux.-Neth.-Port.-U.K., [1987] O.J. L169 [hereinafter SEA]; the TREATY ON EUROPEAN UNION, TEU, and the TREATY OF AMSTERDAM, Oct. 2, 1997, Belg.-Den.-F.R.G.-Greece-Spain-Fr.-Ir.-Italy-Lux.-Neth.-Aus.-Port.-Fin.-Swed.-U.K., [1997] O.J. C340/1.

3. See Alan Dashwood, *States in the European Union*, 23 EUR. L. REV. 201, 201-204 (1998).

4. See DIARMUID ROSSA PHELAN, REVOLT OR REVOLUTION: THE CONSTITUTIONAL BOUNDARIES OF THE EUROPEAN COMMUNITY 160-161 (1997); see also INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti et al. eds., 1986) [hereinafter INTEGRATION THROUGH LAW]; J.H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 268 (1999). Professor Weiler points out the problem with characterizing the Union: "[T]he very language of modern democracy, its grammar, syntax and vocabulary, revolve around the state, the nation and the people—its *demoi*. The Union, it is generally accepted, is not a state." *Id.* at 268.

5. See WEILER, *supra* note 4, at 268-69.

6. See *id.* at 268-285 (surveying intergovernmentalism, supranationalism, and infranationalism as candidates for classifying the political and economic structure of the European Union).

lacks the legitimacy of a coherent, democratic formal framework.⁷ Despite its precarious structure, the EU has functioned relatively well under this “neoconstitutionalism,”⁸ the organic, functional development of a constitutional framework from the various European Treaties—largely due to the foresight, flexibility and wisdom of the ECJ.⁹ Significantly deepening integration of the EU’s authority further into monetary and political matters would require the EU to adopt a formal Constitution demarcating authority above and below the individual Member States.¹⁰ The adoption of such a formal Constitution would put to rest concerns over the legitimacy of the European Union.¹¹

In Section I, this Note examines the status of the neoconstitutionalism that has come to dominate the legal structure of the EU. In the past, neoconstitutionalism has largely provided an adequate legal and political system for the Union. As long as the EU operates as an intergovernmental organization, the current level of neoconstitutionalism as formulated by the ECJ’s interpretation of the Treaties may prove sufficient. However, movement to a more politically and economically integrated Union requires a formal Constitution setting out the distribution of political and economic authority between the separate Member States and the EU institutions. This Note advocates that the European Union must adopt such a formal constitution that clearly delineates the respective competences of the EU and its constituent Member States. In Section II, this Note presents the background for understanding “neofunctionalism,” discussing its major components. Section II also reviews three influential German cases, *Solange I*, *Solange II* and *Solange III*, and their impact on the reception of the doctrine of supremacy of EC law in Germany. These cases illustrate the difficulties inherent in neoconstitutionalism. In Section III, this Note examines the deficiencies of neofunctionalism as outlined in Section II. Specifically, Section III criticizes neofunctionalism’s derivative character and lack of independent authority, or *Kompetenz-Kompetenz*. Against these concerns, Section III evaluates the challenges posed to neoconstitutionalism by the German cases discussed in Section II. Finally, this Note concludes with comments on the adoption of a formal Constitution for the European Union.

7. See Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT’L L.J. 389 (1996).

8. This Note uses the term “neoconstitutionalism” to refer to the evolving constitutional structure from the interpretation of European Union law by the European Court of Justice.

9. See G.F. MANCINI, *DEMOCRACY AND CONSTITUTIONALISM IN THE EUROPEAN UNION* 8-9 (2000).

10. See Quentin Peel, *Berlin Plays a Beguiling Tune*, FIN. TIMES, Feb. 5, 2001, at 23 (arguing that the EU “needs some sort of constitutional treaty, clear and concise, to spell out the powers and responsibilities of the different actors, nation states, regions and European institutions, and the relationship between those institutions”).

11. See *Our Constitution for Europe*, ECONOMIST, Oct. 28, 2000, at 17.

I. Background

The process of European integration has transformed the constitutional framework of Europe.¹² Following World War II, Germany, France, Italy, the Netherlands, Belgium, and Luxembourg began laying the framework for European polity with the establishment of the European Coal and Steel Community,¹³ the European Atomic Energy Community,¹⁴ and the European Economic Community.¹⁵ In the decades that followed, the Member States transferred increasing elements of their sovereignty to the European institutions, as Austria, Denmark, Finland, Greece, Ireland, Portugal, Spain, Sweden, and the United Kingdom all joined the evolving European order. Although conceived as international organizations, the EU institutions have pruned and fertilized their competencies in an attempt to constitutionalize the anatomy of the European Union.¹⁶ Through this process, the EU has emerged deceptively closer to a federal state in appearance.¹⁷ However, the collection of international treaties forming the EU lack the political legitimacy to form a constitution fit for governing a federal state.¹⁸ Nonetheless, the ECJ has embarked upon a journey into the realms of neoconstitutionalism¹⁹—a notion alluded to in several remarkable studies²⁰ but never adequately explained. Specifically, the leading scholarship in this area has largely papered over the inconsistencies and disregarded the actual problems of casually christening this new form of governance as “constitutional.”

A. The Emergence of Neoconstitutionalism

In interpreting EC law, the ECJ assumes that the “EEC-Treaty, albeit concluded in the form of an international agreement, none the less constitutes

12. See ELIES STEYGER, *EUROPE AND ITS MEMBERS: A CONSTITUTIONAL APPROACH* (1995); T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (2d ed. 1988).

13. ECSC TREATY.

14. EURATOM TREATY.

15. EEC TREATY. The other Treaties include the MERGER TREATY, the SEA, the TEU, and the TREATY OF AMSTERDAM.

16. See G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989).

17. See Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981). This portrayal of the evolving European constitutionalism has been widely acknowledged by many scholars as one of the earliest works to characterized the European Court of Justice as the architect of a “federal-style constitutionalism.” *Id.*

18. See Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 FORDHAM INT'L L.J. 746 (1998).

19. See J.H.H. Weiler, *European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order*, in CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 105 (Richard Bellamy & Dario Castiglione eds., 1996).

20. See first and foremost the contributions by Professor Weiler, many of which have been collected in WEILER, *supra* note 4. See also GEMEINSAMES VERFASSUNGSRECHT IN DER EUROPÄISCHEN UNION (Peter-Christian Müller-Graff and Eibe Reidel eds., 1998); THE EUROPEAN COURTS AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE (Anne-Marie Slaughter et al. eds., 1998) [hereinafter THE EUROPEAN COURTS].

the constitutional charter of a Community based on the rule of law."²¹ In the early 1960s, the Court established the foundation for neoconstitutionalism that has come to characterize the Communities by establishing the concept of supremacy of Community law its landmark 1964 case *Costa v. ENEL*.²² The doctrine is conspicuously absent from the various Treaties of the European Communities although the European Court of Justice has vigorously defended the concept since its inception. The Member States did not welcome the concept.²³ Indeed a number of Member States balked several decades before recognizing the concept,²⁴ and until this day, the Member States have never drafted the doctrine into any of the Treaties.²⁵ Nonetheless, the legal academic community has embraced the idea of the Court of Justice as a constitution-maker.²⁶

Beginning with the establishment of the principles of direct effect and supremacy,²⁷ the EU institutions have created a comprehensive legal system for the successful performance of EC law.²⁸ A purely descriptive model of European law might assume that the Treaties fulfill "the same functions as the constitution of a federal state."²⁹ Clearly, such a description of the constitutional character that the Court has embraced is useful in understanding the Court's role in the integration process; however, it falls short of appreciating the narrow base of legitimacy upon which the consti-

21. *Re the Draft Treaty on a European Economic Area [ECJ]*, 269 (holding that the various Treaties form the constitution of the EU).

22. *Case 6/64, Flaminio Costa v. ENEL*, 1964 E.C.R. 1141 (1964) (holding that "[b]y creating a Community of unlimited duration, having its own institutions, its own personality and its legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.").

23. See HARTLEY, *supra* note 12, at 219-45 (providing a summary of problems relating to the acceptance of the supremacy of EC law by the Member States).

24. See THE EUROPEAN COURTS, *supra* note 20.

25. HARTLEY, *supra* note 12.

26. Professor Weiler and Professor Haltern argue that such was the impact of Eric Stein's seminal article on European legal scholarship that the ECJ was no longer even considered an area within international law. J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L.J. 411, 421-422 (1996); see also Donal Barrington, *The Emergence of a Constitutional Court*, in HUMAN RIGHTS AND CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF BRIAN WALSCHE, 251 (James O'Reilly ed., 1992); Ole Due, *A Constitutional Court for the European Communities*, in CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW: ESSAYS FOR THE HON. MR. JUSTICE T. F. O'HIGGINS 3 (Deidre Curtin & David O'Keefe eds., 1992); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 THE AM. J. COMP. L. 205 (1990); J. Rinze, *The Role of the European Court of Justice as a Federal Constitutional Court*, PUB. L. 426 (1993).

27. Mancini, *supra* note 16, at 596-602. The ECJ formulated the concept of direct effect, or the immediate enforceability of Treaty provisions by individuals in Member State courts, in *Van Gend en Loos*. *Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 (1963). The ECJ recognized the supremacy of Community law over national in the EC's area of competencies in *Costa v. ENEL*. See *Case 6/64, Flaminio Costa v. ENEL*, 1964 E.C.R. 1141 (1964).

28. Due, *supra* note 26, at 4.

29. *Id.*

tution rests.³⁰

Rather than providing a sound theoretical explanation, the fallacy of assuming that the EU has a constitution akin to that of the United States or Germany merely muddles the problems facing the EU.³¹ At first blush, neoconstitutionalism may appear adequate as a constitutional model for the European Union (as the functionalists³² and neofunctionalists³³ have argued). Such an approach, however, ignores problems of legitimacy, sovereignty and the lack of a *demos*.³⁴ On the other hand, dismissing the EU as an international organization is an oversimplification.³⁵ The following Section illustrates that the EU's present neoconstitutionalism lacks a definite form and thus is incapable of creating increased political integration in Europe.

B. The Components of Neoconstitutionalism

Neoconstitutionalism rests upon three major assumptions.³⁶ First, neoconstitutionalism does not conform to traditional international law. Second, the EU suffers from structural deficiencies. Third, the EU has no *demos*. The following sections address each of these concerns.

1. The European Treaties Lack the Form of Traditional Constitutional Law

The Treaties do not conform to traditional constitutional law.³⁷ Considering the Treaties as a constitution is problematic as the Member States drafted them for establishing international organizations, and they there-

30. See Philip Allott, *The Crisis of European Constitutionalism: Reflections on the Revolution in Europe*, 34 COMMON MKT. L. REV. 439, 476-490 (1997).

31. See *id.*

32. For a discussion on Federalism, see DAVID MITRANY, *A WORKING PEACE SYSTEM: AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANIZATION* (1943).

33. For further details on neofunctionalism, see LEON N. LINDBERG, *THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION* (1963).

34. The concept of a *demos* is fundamental to the constitutional foundation of the European Union. *Demos* essentially refers to a "people" (or in the German *Volk*). "The People are important and too little acknowledged. . . . Political constitutions make certain crucial presuppositions about the sociological composition of the polity. They presuppose, if not exactly social homogeneity across the board, at least a certain homogeneity in the sorts of central principles which are internalized by all the major groups within the polity." Robert E. Goodin, *Designing Constitutions: The Political Constitution of a Mixed Commonwealth*, in CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 223, 224 (Richard Bellamy & Dario Castiglione eds., 1996).

35. See Weiler, *supra* note 19, at 108.

36. Wolf Sauter also identifies three particular components of the neoconstitutional approach: (1) the European Treaties do not form a constitution in the same manner as a nation state; (2) the constitution of the EU consists of both the text of the Treaties and the ECJ's interpretation of the Treaties; and (3) the Treaties and the ECJ's decisions leave many gaps in the EU's constitution to be filled in through a dynamic development of European law. See Wolf Sauter, *The Economic Constitution of the European Union*, 4 COLUM. J. EUR. L. 27, 30 (1998).

37. For a full discussion on the difference between Treaty law and constitutional law, see Theodor Schilling, *Treaty and Constitution: A Comparative Analysis of and Uneasy Relationship*, 3 MAASTRICHT J. EUR. & COMP. L. 47 (1996).

fore lack independent constitutional authority.³⁸ A comparison to the Constitution of the United States illustrates the constitutional deficiencies in the European Treaties.³⁹ The lack of a clear statement of the primacy of European law in the Treaties⁴⁰ underlies the complexity of European neoconstitutionalism. Unlike a traditional constitution, European neoconstitutionalism lacks the essential ingredients necessary for the formation of a federal state.⁴¹ Therefore, the Communities suffer initially from a lack of democratic legitimacy,⁴² and as a result, are vulnerable to assaults upon their authority.⁴³ Article VI, Section 2 of the U.S. Constitution establishes the supremacy of federal laws (in the areas of federal competencies) over state laws.⁴⁴ However, the various Treaties that form the European Communities lack a clear statement granting supreme constitutional authority to the European institutions.⁴⁵

Moreover, while the implementation of the Treaties forming the European Communities depended upon the ratification by the "Member

38. See Schilling, *supra* note 7.

39. Studies in comparative federalism have compared the government of the European Communities to that of the United States. See, e.g., *INTEGRATION THROUGH LAW*, *supra* note 4.

40. The willingness of the Member States to comply with the decisions of a supranational court has inspired many ingenious research projects, of which the debates between the neorationalists and the neofunctionalists deserve particular mention. See Geoffrey Garrett & Barry Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, in *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 173 (Judith Goldstein & Robert O. Keohane eds., 1993); Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 *INT'L ORG.* 533 (1992); Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 *INT'L ORG.* 171 (1995); Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 *INT'L ORG.* 149 (1998); Anne-Marie Slaughter Burley, *New Directions in Legal Research on the European Community*, 31 *J. COMMON MKT. STUD.* 391 (1993); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *INT'L ORG.* 41 (1993); Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 *INT'L ORG.* 183 (1995); Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 *INT'L ORG.* 177 (1998).

41. See Allott, *supra* note 30, at 487 (arguing that "[t]he democratic legitimating of constitutional forms is not achieved by formalistic manipulation of intricate sub-systems . . . [but] must be an interiorization in the consciousness of the people and the peoples of Europe of the necessity of new social forms of European society").

42. For an excellent study which addresses the democratic deficit in the context of EC law, see G. Federico Mancini and David T. Keeling, *Democracy and the European Court of Justice*, 57 *MOD. L. REV.* 175 (1994).

43. See J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2464 (1991) (summarizing the problem of compliance by the Member States).

44. The United States Constitution, Article 6, Section 2 reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

45. See STEPHEN WEATHERILL, *LAW AND INTEGRATION IN THE EUROPEAN UNION* 102-03 (1995). According to Professor Weatherill, the European Court implied supremacy from the Treaty's objectives, even without explicit statement of supremacy. *Id.*

States⁴⁶ or "High Contracting Parties"⁴⁷ in a similar manner to the American Constitution's contingency upon its ratification by state "conventions,"⁴⁸ the ratifications of the European Treaties were conditional upon the "constitutional requirements"⁴⁹ of the Member States. In contrast, the ratification of the U.S. Constitution was conditional upon no other constituent.⁵⁰ Therefore, the enactment of the European Treaties required the approval of the constituent Member States of the Community according to their own constitutions,⁵¹ while the establishment of the U.S. Constitution involved the elevation of the document as the supreme law, binding all those states that ratified it for this purpose.⁵² Thus, while the authority of the U.S. Constitution is explicit and inherent in the document itself,⁵³ the authority of the Treaties that form the European Communities is derivative, lacking clear expression in any of the documents.⁵⁴

2. *The European Treaties Lack the Authority of Traditional Constitutional Law*

The EU lacks the authority of a federal state.⁵⁵ The Treaties do lay the foundation for this *community* of states, but they do not form a constitution.⁵⁶ For a constitution to be accepted as a source of law, "it must have been enacted or approved or promulgated by a body recognized as competent to make law."⁵⁷ Possessing sovereignty according to their respective constitutions,⁵⁸ the Member States ceded only certain competencies to the institutions of the European Union.⁵⁹ Thus, they retain the constitutional authority within the EU.⁶⁰ The determining factor is that the European

46. See, e.g., ECSC TREATY.

47. See, e.g., EEC TREATY art. 247; EURATOM TREATY art. 224; TEU art. R, § 1.

48. U.S. CONST. art. VII.

49. See ECSC TREATY art. 99; EEC TREATY art. 247; EURATOM TREATY art. 224; TEU art. R, § 1.

50. See U.S. CONST. art. VII.

51. See EEC TREATY; EURATOM TREATY; TEU.

52. See U.S. CONST. art. VI.

53. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 151-153 (1928).

54. Nicholas Emiliou, *Opening Pandora's Box: The Legal Basis of Community Measures Before the Court of Justice*, 19 EUR. L. REV. 488, 488 (1994) ("The Communities have only the powers assigned to them by the Treaties, while all residual powers are left with the Member States.").

55. Allott, *supra* note 30.

56. The EEC Treaty, for example stated, "[b]y this Treaty, the High Contracting Parties establish among themselves a European Community." EEC Treaty art. 1. The Euratom Treaty contains similar language. EURATOM TREATY.

57. K.C. WHEARE, MODERN CONSTITUTIONS 52 (2d ed. 1966).

58. See generally JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH, bk. 1, ch. 8 (M. J. Tooley trans. & abr. MacMillan & Co., 1955) (1576) (explaining the concept of national sovereignty).

59. See Daniela Obradovic, *Community Law and the Doctrine of Divisible Sovereignty*, 1 LEGAL ISSUES EUR. INTEGRATION 1 (1993). Obradovic argues that "the Community holds not absolutely open-ended but specific powers which can be found throughout the EEC Treaty." *Id.* at 11.

60. See, e.g., GRUNDGESETZ [GG] [Constitution] art. 23 (F.R.G.) (providing that sovereign powers can only be transferred to the European Union at the approval of the

Treaties lack the authority of a constitution, and the Member States determine the development of European integration.⁶¹

To examine these issues further, it is necessary to distinguish between a community established through a treaty and a state founded upon a constitution.⁶² A community may have the character of a state when a treaty confers administrative powers regulating foreign relations and “other functions of the contracting states” on an organ of the community created by the contracting states, and a constitution is “stipulated by that treaty.”⁶³ Hans Kelsen further explains:

By concluding such a treaty and submitting to the federal constitution, the contracting states lose their character as states in the sense of international law. They become so-called component states of the federal state. . . . The centralization in the field of foreign affairs may not be complete; the component states may have some competence left in this respect, for instance, the power to conclude treaties with third states in certain limited fields. . . . [However] the component states have this competence [only] in accordance with the Federal constitution. . . .⁶⁴

In the EU, however, the Member States have retained ultimate political authority, and thus the EU possesses only derivative authority.⁶⁵ Instead, the European Communities are creatures of treaty-law.⁶⁶ Without an independent source of democratic legitimacy, the very existence of the Communities is dependent upon the Treaties drafted by the Member States.⁶⁷ An independent source of legitimacy—specifically a constitution clearly setting out the competencies and authority of the EU—is preferable to the derivative source of the EU’s legitimacy and unsettled doctrine of supremacy of European law.

3. *The Communities Lack a Demos*

Political theory holds that a democracy must have a *demos*, or a people bound together by culture, language or other factors which make them rec-

Bundesrat). The *Bundestag* is the lower chamber of the German Parliament, and the *Bundesrat* is the upper chamber.

61. Meinhard Hilf, *Der Justizkonflikt um EG-Richtlinien: Gelöst*, 23 *EUROPARECHT* 1, 9-10 (1988).

62. See Schilling, *supra* note 37 (discussing differences between single act and treaty-constitutions).

63. HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 260 (Robert W. Tucker ed. & rev., 2d ed. 1966) (1952).

64. *Id.*

65. See Rinze, *supra* note 26, at 436.

66. See Schilling, *supra* note 7; cf. David Hine, *Constitutional Reform and Treaty Reform in Europe*, in *FROM THE NATION STATE TO EUROPE? ESSAYS IN HONOUR OF JACK HAYWARD* 118 (Anand Menon & Vincent Wright eds., 2001) (explaining that “in a strictly legal sense, the distinction between a treaty and a constitution is a fundamental one, and . . . [i]f [the European Union’s] founding treaties are deemed to be traditional multilateral treaties in international law, squarely in the tradition of the Vienna Convention on the Law of Treaties, then it follows that they do not enjoy the status of a ‘higher law’ or a constitution . . .”).

67. See Josef Isensee, *Integrationsziel Europastaat?*, in *FESTSCHRIFT FÜR ULRICH EVERLING*, 567 (Ole Due et al. eds., 1995).

ognizable as a cohesive group.⁶⁸ Although the Maastricht Treaty establishes the concept of European citizenship,⁶⁹ codifying a concept of "citizenship" into the Treaties has not led to a European *demos*.⁷⁰ At best, the EU has a "thin identity,"⁷¹ because "a sense of European identity and loyalty is embryonic at best among the European electorate."⁷² Although a European *demos* may emerge from the peoples of Europe,⁷³ the current absence of a legitimating constituency for the EU requires clarification of the political and legal authority of the Member States and the EU.⁷⁴ A formal Constitution that clearly outlines the legal and political boundaries encapsulating such a developing *demos* provides a far superior governance than neoconstitutionalism with its ad hoc approach to integration.⁷⁵

C. The Doctrine of Supremacy and German Resistance

As the largest Member State, Germany exemplifies challenges the EU's legitimacy faces. In particular, the German conditional recognition of the doctrine of supremacy of European law illustrates the deficiencies of neoconstitutionalism.⁷⁶ The two most important German cases dealing with the supremacy of European law are *Internationale Handelsgesellschaft*,⁷⁷ commonly known in Germany as *Solange I* ("so long as"), and *Wünsche Handelsgesellschaft*,⁷⁸ or *Solange II*. More recently, *Solange III*,⁷⁹ a

68. See Weiler, *supra* note 19.

69. For examinations on European citizenship, see SIOFRA O'LEARY, *THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP* (1996); EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998).

70. See Richard Bellamy and Alex Warleigh, *From an Ethics of Integration to an Ethics of Participation: Citizenship and the Future of the European Union*, 27 *MILLENNIUM* 447 (1998).

71. DAVID BEETHAM & CHRISTOPHER LORD, *LEGITIMACY AND THE EUROPEAN UNION* 43 (1998).

72. *Id.* at 29.

73. See WEILER, *supra* note 4, at 324-357.

74. See Johan P. Olsen, *How, then, does one get there? An Institutional Response to Herr Fischer's Vision of a European Federation*, in *WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY?* 163, 164 (Christian Joerges et al. eds., 2000). According to Olsen, "Business as usual will not do." *Id.* at 65 (emphasis in original).

75. Cf. *id.* at 165-167.

76. For a discussion of German conditional acceptance of the doctrine of supremacy and the challenges this poses to the legitimacy of the European Union, see Mark Killian Brewer, *Towards a Rational Choice Analysis of the Court of Justice of the European Communities with an Examination of the Doctrine of Supremacy of European Community Law and Its Acceptance by the United Kingdom and Germany* (1998) (Ph.D. dissertation, University of St. Andrews 1998) (on file with the University of St. Andrews Library).

77. See Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 2 C.M.L.R. 540 (1974 BVerfGE) (F.R.G.). For the case decided by the ECJ, which preceded this decision by the *Bundesverfassungsgericht*, see Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 (1970).

78. See Case 2 BvR 197/83, *Re the Application of Wünsche Handelsgesellschaft*, 3 C.M.L.R. 225 (BVerfGE 1987) (F.R.G.). For the ECJ case, which preceded this decision by the *Bundesverfassungsgericht*, see Case 126/81, *Wünsche Handelsgesellschaft v. Germany*, 1982 E.C.R. 1479 (1982).

case before the *Bundesverfassungsgericht*, or German Federal Constitutional Court, has further clarified the standing of EC law vis-à-vis the *Grundgesetz*, the German Constitution.⁸⁰ In the first case, the *Bundesverfassungsgericht* ruled that as long as Community law did not provide as stringent protection for human rights as the *Grundgesetz*, German courts were to refer questions of constitutionality to the *Bundesverfassungsgericht*, which could ignore such EC law.⁸¹ The German Court adopted this position because EC law is considered derivative law by the German Constitutional Court and thus must conform to the *Grundgesetz*.⁸² The second case represented a change of attitude by the *Bundesverfassungsgericht* since it found that the European Communities vis-à-vis the *Grundgesetz* sufficiently guaranteed the protection of human rights.⁸³ Following an overview of the German legal system, these cases will be examined more fully in turn.

D. The German Legal Framework

Germany's legal system is based on a written constitution, the *Grundgesetz*, or "Basic Law." Drafted in the aftermath of World War II, it nevertheless owes much to former German legal culture, although it was also profoundly influenced by the legal precepts of the occupying Allied powers, especially the United States. Typical of the constitutions of most liberal democracies, the *Grundgesetz* focuses on human rights, provides for a divided system of government, establishes a constitutional court with the power of judicial review, and decrees the *Grundgesetz* as "the supreme law of the land."⁸⁴ Although the *Grundgesetz* is often regarded as being heavily influenced by American ideas, it bears a close resemblance in parts to the Frankfurter Constitution of 1849 and the Weimar Republican Constitution. However, rather than containing "statements of political ideals and guidelines to political action," as was characteristic of earlier German constitutions, the *Grundgesetz* "is a law of superior force and obligation and is directly enforceable as law" in the court system headed by the

79. See Cases 2 BvR 2134/92 & 2159/92, Manfred Brunner et al. v. The European Union Treaty, 1 C.M.L.R. 57 (1994 BVerfGE) (F.R.G.).

80. See Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229 (1997). The terms *Bundesverfassungsgericht* and German Constitutional Court will be used interchangeably throughout this Note, as will the terms *Grundgesetz* and German Constitution.

81. See HARTLEY, *supra* note 12, at 223-224.

82. See Nigel G. Foster, *The German Constitution and E.C. Membership*, PUB. L. 392 (1994).

83. See J.A. Frowein, *National Courts: Solange II (BVerfGE 73, 339). Constitutional Complaint Firma W.*, 25 COMMON MKT. L. REV. 201 (1988). Professor Frowein notes, "By this decision the German Constitutional Court . . . accepted that the safeguards existing against possible interference with fundamental rights in European Community law, especially by virtue of the case law of the European Court of Justice, are sufficiently developed to be fully recognized by German Constitutional Law." *Id.* at 201.

84. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 31 (2d ed., rev. 1997).

Bundesverfassungsgericht, or Federal Constitutional Court.⁸⁵ Through the *Grundgesetz*, "legalism was reintroduced into the German political system."⁸⁶ The result was a "reliance on authoritative judicial decisions to resolve political disputes rather than a preference for purely political methods."⁸⁷ The judiciary was thus accorded a significant share of the government's power.

Germany is constitutionally bound to work towards European integration. Specifically, in an attempt to prevent another war by anchoring Germany in a pan-European institutional framework, the drafters of the *Grundgesetz* expressed the aspiration for a "united Europe" in the document's Preamble.⁸⁸ West Germany⁸⁹ joined the European Communities based on Article 24⁹⁰ of the *Grundgesetz*. However, with the reunification of Germany in 1990, the *Grundgesetz* (which was amended for this purpose) became the constitution for the enlarged Federal Republic.⁹¹ At the same time, the Federal Republic adopted new Article 23⁹² to the *Grundgesetz*, providing the legal basis for Germany's membership in the Communities. Specifically, this new article allows, upon consent of the *Bundestag* and the *Bundesrat*, sovereign powers to be ceded to the European Communities. Moreover, both the Parliament and Federal Council must approve any modification to the Treaties, along with the approval of the *Länder*,⁹³

85. Donald P. Kommers, *The Basic Law of the Federal Republic of Germany: An Assessment After Forty Years*, in *THE FEDERAL REPUBLIC OF GERMANY AT FORTY* 134-135 (Peter H. Merkl ed., 1989).

86. Gisbert Brinkmann, *The West German Federal Constitutional Court: Political Control Through Judges*, *PUB. L.* 83, 85 (1981).

87. *Id.*

88. The first sentence of the Preamble of the *Grundgesetz* expresses this desire: "Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt . . . als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat das Deutsche Volk . . . kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz." *GRUNDGESETZ* [GG] [Constitution] pmb. (F.R.G.).

89. The former East Germany joined the European Communities when it became part of the Federal Republic of Germany by the Unification Treaty of August 31, 1990. For details of legal issues involving the reunification of Germany, see Gilbert H. Gornig and Sven Reckwerth, *The Revision of the German Basic Law: Current Perspectives and Problems in German Constitutional Law*, *PUB. L.* 137 (1997).

90. *GRUNDGESETZ* [GG] [Constitution] art. 24. (F.R.G.).

91. For further discussion on the challenges of reunification, see C. W. A. Timmermans, *German Unification and Community Law*, 27 *COMMON MKT. L. REV.* 437 (1990); Christian Tomuschat, *A United Germany Within the European Community*, 27 *COMMON MKT. L. REV.* 415 (1990); and Franziska Tschofen & Christian Hausmaninger, *Legal Aspects of East and West Germany's Relationship with the European Economic Community After the Collapse of the Berlin Wall*, 31 *HARV. INT'L L.J.* 647 (1990).

92. Basically, Article 23 allows and even calls for Germany to participate in the development of a united Europe. *GRUNDGESETZ* [GG] [Constitution] art. 23. (F.R.G.).

93. Loss of competences by the separate *Länder* has been an important issue in the German approach to European integration. The new Article 23 was partly intended to compensate the *Länder* for lost competences. For a full discussion see Michael Borchmann, *Bundesstaat und Europäische Integration*, 112 *ARCHIV DES ÖFFENTLICHEN RECHTS* 586 (1987); Konrad Hesse, *Bundesstaatsreform und Grenzen der Verfassungsänderung*, 98 *ARCHIV DES ÖFFENTLICHEN RECHTS* 1 (1973); and Klaus Kröger, *EINFÜHRUNG IN DIE VERFASSUNGSGESCHICHTE DER BUNDESREPUBLIK DEUTSCHLAND* 151-159 (1993).

which "ensures that a complete parliamentary process is observed" before a further transfer of sovereign power can occur.⁹⁴ In this manner, Germany is only able to participate in greater European integration if approved both on a *Länder* and Federal level, which greatly enhances the democratic control of Germany's relations with the Communities.

While the *Grundgesetz* clearly supports European integration, the incorporation of EC law has been met with some difficulty, particularly with regard to the doctrine of supremacy. At its inception, Community law was grafted onto domestic law according to a dualist approach. Nigel Foster explains this phenomenon as follows:

The discussion from the German point of view lies essentially with the relationship of international law, and in particular the membership of the Community, to the provisions of the *Grundgesetz*. Traditionally, Germany adopted a dualist approach to the reception of international law, whereby some form of transformation or adoption of international law was necessary in order for it to have any direct applicability in the state. In practical terms it meant that there had to be a process of incorporation by statute. Once incorporated, a law would simply rank as with other *Gesetze*, and if a later law was in conflict with an earlier law, the latter would prevail.⁹⁵

Approaching European law from such a dualistic legal background, Germany has essentially regarded the body of EC law as international law. Hence, the ultimate legitimacy of Community law in terms of German adherence is based on the *Grundgesetz*, and not upon the European Treaties. What this means, according to the *Bundesverfassungsgericht*, is that German acceptance of European Community law is a result of the provisions of German national law and not from an inherent source of authority flowing from the Communities as assumed by the ECJ. It is this lack of agreement on the origin of supremacy that is at the heart of the debate.

E. *Solange I*: Initial German Resistance to Authority of the European Communities

Solange I arose out of a grievance against the partial forfeiture of a deposit that the import-export company *Internationale Handelsgesellschaft* of Frankfurt am Main had lodged to receive a license for the export of 20,000 metric tons of maize meal.⁹⁶ In conformity to Council Regulation No. 120/67/EEC,⁹⁷ the license was effective from August 7, 1967 until December 31, 1967, and conditional upon lodging a deposit ensuring that the amount of meal would, in fact, be exported.⁹⁸ Since only 11,486.764 metric tons of the meal had been exported during the period granted for the license, the *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* held that part of the deposit (17,026.47 DM) was to be forfeited under Council Regu-

94. NIGEL FOSTER, *GERMAN LEGAL SYSTEM & LAWS* 73 (2d ed. 1996).

95. *Id.* at 67.

96. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 (1970).

97. Council Regulation 120/67, art. 12, 1967 O.J. SPEC. ED. 33, 38.

98. *Internationale Handelsgesellschaft mbH*, 1970 E.C.R. 1125 (1970).

lation No. 473/67/EEC.⁹⁹ They brought the dispute before the *Verwaltungsgericht* (Administrative Court) in Frankfurt am Main, which appealed to the ECJ for a preliminary ruling.¹⁰⁰ Specifically, the *Verwaltungsgericht* initially questioned the legality of the deposit and forfeiture guidelines in Council Regulation No. 120/67/EEC, and subsequently, if the said regulation was found to be legal, inquired if Council Regulation No. 473/67/EEC was legal since it excluded forfeiture only with respect to *force majeure*.¹⁰¹ The referral to the ECJ stemmed from the *Verwaltungsgericht's* concern that the regulations in question failed to respect the fundamental rights laid down in the *Grundgesetz* (namely Articles 2 [1] and 14).¹⁰²

In its decision, the European Court of Justice argued the supremacy of European law over that of the Member States.¹⁰³ The ECJ stated:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, 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 in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.¹⁰⁴

So, "even a violation of the fundamental human rights provisions of a Member State's constitution could not impair the validity of a Community provision."¹⁰⁵ In its final analysis, the ECJ further approved the system of deposits and forfeiture.¹⁰⁶

Concerning the ECJ's preliminary ruling, the *Verwaltungsgericht* was hostile and unsatisfied.¹⁰⁷ In particular, the *Verwaltungsgericht* held that the Community lacked not only a written bill of rights but also a parliament with the authority to establish such a guarantee of basic rights. Moreover, the German court "found in the ECJ's approval of what it continued to regard as the iniquitous deposit system a powerful confirmation of its deepest suspicions about the 'legal vacuum' of Community law."¹⁰⁸ As a result of its discontent, the *Verwaltungsgericht* appealed the case to the

99. See *Journal Officiel des Communautés Européennes*, vol. 10, no. 204 (Aug. 24, 1967): 16-20.

100. *Internationale Handelsgesellschaft mbH*, 1970 E.C.R. 1125 (1970).

101. *Id.*

102. See *id.* at 1127-1128; see also GRUNDGESETZ [GG] [Constitution] arts. 2(1) & 14 (F.R.G.).

103. See D. LASOK & P.A. STONE, *CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY* 22-23 (1987).

104. *Internationale Handelsgesellschaft mbH*, 1970 E.C.R. 1125, 1135 (1970).

105. HARTLEY, *supra* note 12, at 134.

106. *Internationale Handelsgesellschaft mbH*, 1970 E.C.R. 1125, 1133-1139 (1970).

107. See BERNARD RUDDEN, *BASIC COMMUNITY CASES* 67 (1987).

108. *Id.*

Bundesverfassungsgericht.¹⁰⁹ The *Bundesverfassungsgericht* faced two questions: (1) whether or not the case was admissible and (2) whether or not the system of deposits was justified.¹¹⁰

First, the *Bundesverfassungsgericht* examined the relationship between the constitutional law of Germany and EC law to determine whether the case was admissible.¹¹¹ Beyond recognizing that European law is separate from both national and international law, the *Bundesverfassungsgericht* agreed that the respective jurisdictions of the ECJ and the *Bundesverfassungsgericht* constitute separate legal domains; therefore, the two courts cannot legally impinge on the jurisdiction of the other.¹¹² Accordingly, the *Bundesverfassungsgericht* argued that:

The binding of the Federal Republic of Germany (and of all member-States) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is therefore not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict on a political level.¹¹³

Therefore, the *Bundesverfassungsgericht* plainly held that the ECJ may only determine questions of law within its own jurisdiction based on the Treaties; any such expansion could occur only through the acts of the Member States to grant additional areas of competence to the ECJ.¹¹⁴

The *Bundesverfassungsgericht*, in contrast to the reasoning of the ECJ, held that ultimate sovereignty rests in the *Grundgesetz*, and hence with the German nation-state.¹¹⁵ Further, the *Bundesverfassungsgericht* explained:

Article 24 does not actually give authority to transfer sovereign rights, but opens up the national legal system (within the limitations indicated) in such a way that the Federal Republic of Germany's exclusive claim to rule is taken back in the sphere of validity of the Constitution and room is given, within the State's sphere of rule, to the direct effect and applicability of law from another source.¹¹⁶

The German Federal Court was concerned that the European legal system did not sufficiently protect the basic rights outlined in the *Grundgesetz* because the European Parliament (at that time) was not directly elected and the Communities lacked a bill of rights, just as the *Verwaltungsgericht* had

109. Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 2 C.M.L.R. 540 (1974 BVerfGE) (F.R.G.).

110. See *id.*; HARTLEY, *supra* note 12, at 224.

111. See *Internationale Handelsgesellschaft mbH*, 2 C.M.L.R. 540, 547-549.

112. See *id.*

113. *Id.* at 550.

114. See *id.* at 549, 551-52.

115. See *id.* at 551-552.

116. *Id.* at 550.

argued.¹¹⁷

The *Bundesverfassungsgericht* argued that:

In accordance with the Treaty rules on jurisdiction, the European Court of Justice has jurisdiction to rule on the legal validity of the norms of Community law (including the unwritten norms of Community law which it considers exist) and on their construction. It does not, however, decide incidental questions of national law of the Federal Republic of Germany (or in any other member-State) with binding force for this State. Statements in the reasoning of its judgments that a particular aspect of a Community norm accords or is compatible in its substance with a constitutional rule of national law—here, with a guarantee of fundamental rights in the Constitution—constitute non-binding obiter dicta.¹¹⁸

While recognizing that the European Court did enjoy supremacy in its particular area of jurisdiction, the *Bundesverfassungsgericht* clearly conditioned the ECJ's authority upon respect for the *Grundgesetz*.¹¹⁹ Moreover, the German Federal Court stressed that if the ECJ failed to appreciate the limits to its jurisdiction and issued ultra vires decisions, these decisions would not bind the Member States.¹²⁰ This declaration constituted a direct challenge to the authority of the ECJ. The *Bundesverfassungsgericht* further held that "only the *Bundesverfassungsgericht* is entitled, within the framework of the powers granted to it in the Constitution, to protect the fundamental rights guaranteed in the Constitution. No other court can deprive it of this duty imposed by constitutional law."¹²¹ Finally, the *Bundesverfassungsgericht* justified its authority to hear the case:

[A] Community regulation . . . implemented by an administrative authority of the Federal Republic of Germany or dealt with by a court in the Federal Republic of Germany . . . is an exercise of German State power; and, in this process, the administrative authority and courts are also bound to the constitutional law of the Federal Republic of Germany.¹²²

Based on these issues, the *Bundesverfassungsgericht* found that "so long as" the European legal system did not protect basic rights guaranteed by the *Grundgesetz*, Community provisions were subject to review by the *Bundesverfassungsgericht*.¹²³ In so doing, Germany essentially balked at the doctrine of supremacy in EC law and instead, asserted the primacy of the *Grundgesetz*.

In the substance of the case, the *Bundesverfassungsgericht* found "[t]he challenged rule of Community law in the interpretation given by the European Court of Justice does not conflict with a guarantee of fundamental rights in the Constitution, neither with Article 12 nor with Article 2 (1) of

117. See Juliane Kokott, *German Constitutional Jurisprudence and European Integration II*, 2 EUR. PUB. L. 413, 423-24 (1996).

118. Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 2 C.M.L.R. 540, 551 (1974) (F.R.G.).

119. See *id.* at 551-552.

120. See *id.* at 549-550.

121. *Id.* at 552.

122. *Id.* at 553.

123. See *id.* at 554.

the Constitution."¹²⁴ However, the importance of the case lies in its impact on the doctrine of supremacy; therefore, this provides a background for understanding the events of the case.¹²⁵

F. *Solange II*: German Conditional Acceptance of the Authority of the European Communities

The response of the *Bundesverfassungsgericht* in *Solange II*¹²⁶ to the ECJ's decision in *Wünsche Handelsgesellschaft*¹²⁷ largely alleviated the threat to the supremacy of European law.¹²⁸ The *Bundesverfassungsgericht* changed its position in response to the safeguards for the fundamental rights introduced by the Communities in the time since the *Internationale Handelsgesellschaft* ruling.¹²⁹ Content that European law protected basic rights at a level comparable to the *Grundgesetz*, the *Bundesverfassungsgericht* stated that it would no longer evaluate the compatibility of EC law to German law.¹³⁰ However, the Court carefully framed the decision to reserve the authority to withdraw its approval of the doctrine of supremacy if the German Constitutional Court later found that EC law no longer offered adequate protection of human rights. In so doing, the *Bundesverfassungsgericht* again made clear that *Kompetenz-Kompetenz* remained with Germany.¹³¹

In the national case,¹³² the *Bundesverfassungsgericht* received a request to review the ECJ's ruling in *Wünsche Handelsgesellschaft v. Germany*¹³³ from a Preliminary Ruling in a case pending in the *Bundesverwaltungsgericht* (or Supreme Administrative Court of Germany).¹³⁴ In *Wünsche Handelsgesellschaft v. Germany*, the ECJ ruled that Council and Commission legislation regarding the importation of preserved mushrooms from non-European Union countries was justified.¹³⁵

Upon receipt of the preliminary ruling in *Wünsche Handelsgesell-*

124. *Id.* at 556.

125. See RUDDEN, *supra* note 107, at 68; Case 181/84, *The Queen, ex parte E.D. & F. Man (Sugar) Ltd. v. Intervention Bd. for Agric. Produce (IBAP)*, 1985 E.C.R. 2889 (1985). In actuality, the ECJ subsequently found that the deposit system for license export breaches European Law.

126. See Case 2 BvR 197/83, *Re the Application of Wünsche Handelsgesellschaft*, 3 C.M.L.R. 225 (BVerfGE 1987) (F.R.G.).

127. See Case 126/81, *Wünsche Handelsgesellschaft v. Germany*, 1982 E.C.R. 1479 (1982).

128. See June 1987: *Community Primacy and Fundamental Rights*, 12 EUR. L. REV. 161, 161-62 (1987).

129. See Juliane Kokott, *Reporting on Germany*, in *THE EUROPEAN COURTS AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT*, 89-90 (Anne-Marie Slaughter et al. eds., 1998).

130. See Hartley, *supra* note 12, at 224-225.

131. See Frowein, *supra* note 83, at 201.

132. See Case 2 BvR 197/83, *Re the Application of Wünsche Handelsgesellschaft*, 3 C.M.L.R. 225 (BVerfGE 1987) (F.R.G.).

133. See Case 126/81, *Wünsche Handelsgesellschaft v. Germany*, 1982 E.C.R. 1479 (1982).

134. See Case 7 C 87.78, 1 Dec. 1982 EuR 67, (BVerwGE 1983) (F.R.G.).

135. See *Re the Application of Wünsche Handelsgesellschaft* 3 C.M.L.R. 225 (BVerfGE 1987) (F.R.G.).

schaft,¹³⁶ *Wünsche* protested that the ECJ had breached particular German constitutional provisions, particularly that of the right to a hearing since—according to the German company—the ECJ failed to weigh important considerations that *Wünsche* had submitted.¹³⁷ Moreover, the German company argued that the Court should suspend the case and refer it to the *Bundesverfassungsgericht* or appeal for a new preliminary ruling from the ECJ.¹³⁸ In response, the *Bundesverwaltungsgericht* dismissed the appeal, arguing that the grievances by *Wünsche* were unfounded.¹³⁹ Maintaining that the *Bundesverwaltungsgericht* violated procedural and substantial rights of the *Grundgesetz*, the German company again appealed the case with the result that they ultimately brought the matter before the *Bundesverfassungsgericht*.¹⁴⁰

The German Federal Constitutional Court found that while the appeal was admissible on constitutional grounds, it was not “well founded,”¹⁴¹ finding that developments in the EC since its decision in *Internationale Handelsgesellschaft* indicated that basic rights were in fact adequately protected.¹⁴² Based on the assurance that the Communities adequately protected human rights, the German Federal Constitutional Court maintained:

In view of those developments it must be held that, so long as the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution¹⁴³

The *Bundesverfassungsgericht* recognized the ECJ as a “gesetzlicher Richter (a legal judge)” in the sense that it has the authority to give definitive rulings, enhancing the integrity of the European Court.¹⁴⁴ However, as one commentator has observed:

It is clear that the Federal Constitutional Court did not give up its jurisdiction or come to the conclusion that no such jurisdiction exists. It only states that it will not exercise the jurisdiction as long as the present conditions as to the protection of fundamental rights by the European Court of Justice

136. See *id.*

137. See *id.* at 238.

138. See *id.*

139. See *id.* at 239.

140. *Id.* at 240.

141. *Id.* at 250.

142. See *id.* at 259.

143. *Id.* at 265.

144. H. Gerald Crossland, *Three major decisions given by the Bundesverfassungsgericht (Federal Constitutional Court)*, 19 EUR. L. REV. 202, 203 (1994).

prevail.¹⁴⁵

Germany retained the primacy of the *Grundgesetz* in defiance of the reasoning of the ECJ.¹⁴⁶ The German Federal Constitutional Court did accept the doctrine of supremacy in practice.¹⁴⁷ However, its acceptance was conditional upon the ECJ conforming to the principles of German national law.¹⁴⁸

G. *Solange III: Bundesrecht Bricht Europarecht?*¹⁴⁹: Continued German Reluctance

The case, brought by four Members of the European Parliament (in the capacity of private citizens) and a former official of the Commission, challenged the Maastricht Treaty on constitutional grounds.¹⁵⁰ Concerned about "the erosion of national sovereignty and of the powers of the German Parliament," the complainants charged that the legislative assent that ratified the Maastricht Treaty for Germany and the constitutional amendments for this purpose violated the *Grundgesetz*.¹⁵¹ The *Bundesverfassungsgericht*, however, ruled that the ratification of Maastricht was compatible with the *Grundgesetz* since Germany transferred sovereignty in accordance with Articles 23 and 24 (*Grundgesetz*).¹⁵² While this decision further recognized the doctrine of supremacy of EC law in Germany, it also placed new restrictions on further integration.¹⁵³

The decision formally recognized the compatibility of the new Article 23 of the *Grundgesetz* with the German constitutional order.¹⁵⁴ While the European unity has been a goal of the *Grundgesetz* as established in the Preamble, Article 23 not only commits Germany to work towards a united Europe, but also clarifies the goal's meaning and significance.¹⁵⁵ Through the article, Germany formalized into its own domestic legal order the concept of European law as a separate legal order, which the European Court had long recognized.¹⁵⁶ Additionally, Article 23 assigns broad powers to

145. Frowein, *supra* note 83, at 203.

146. See Meinhard Hilf, *Solange II: Wie Lange noch Solange?*, 14 *EuGRZ* 1 (1987) (arguing that further European integration would be dependent upon joint decision-making and intensive cooperation between the ECJ and the *Bundesverfassungsgericht*).

147. See Kokott, *supra* note 129, at 122.

148. See Crossland, *supra* note 144, at 204.

149. *Bundesrecht bricht Europarecht?* may be translated as "Does German Federal Constitutional law enjoy a primacy over European law?" This is the fundamental question concerning the relationship between German federal law and European law.

150. See Cases 2 BvR 2134/92 & 2159/92, Manfred Brunner et al. v. The European Union Treaty, 1 C.M.L.R. 57 (1994 BVerfGE) (F.R.G.).

151. Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'*, 31 *COMMON MKT. L. REV.* 235, 238 (1994).

152. Foster, *supra* note 82, at 392-93.

153. Herdegen, *supra* note 151, at 239.

154. See Manfred Brunner et al., 1 C.M.L.R. 57, 82-83 (1994 BVerfGE) (F.R.G.).

155. See Karl-Peter Sommermann, *Staatsziel „Europäische Union“: Zur Normativen Reichweite des Art. 23 Abs. 1 S. 1 GG n. F.*, *DIE ÖFFENTLICHE VERWALTUNG* 596, 603 (1994).

156. The European Court of Justice introduced such a distinction between traditional international law and European law as early as 1963, in its *Van Gend en Loos* decision.

the separate *Länder* through the *Bundesrat* and the government through the *Bundestag* to formulate German policy toward the EU.¹⁵⁷ Scholars have made much over this new “cooperation” in the academic literature.¹⁵⁸

Although the wording of Article 23 enables the development of a “European Union,” the article is hardly explicit on details,¹⁵⁹ and qualifications introduced by the *Solange III* decision obfuscate the exact legal implications.¹⁶⁰ Professor Herdegen summarizes the impact of the reasoning in *Solange III*:

This concept of “cooperation” amounts to quite a flat (and renewed) denial of the absolute supremacy of Community law and its supreme judicial organ. . . . This message from Karlsruhe will hardly cause unmitigated enthusiasm in Brussels or Luxembourg. However, the Federal Constitutional Court’s position seems conclusive as long as the *pouvoir constituant* of Germany has not yet recognized the absolute supremacy of Community law and as long as the powers of the Constitutional Court are exclusively derived from the Basic Law.¹⁶¹

Finally, any future expansion of the competences of the Communities and the European Court, can only occur within the restrictions placed on such transfers of sovereignty as outlined in Article 23.¹⁶² Through Article 23, the *Bundestag* and the *Länder*—through the *Bundesrat*—gained significant powers to consult the Federal Government and affect future German participation in European integration since both the *Bundestag* and the *Bundesrat* must approve the policies for them to be valid as the German position.¹⁶³ *Solange III* again proved that the European Communities essentially remain an inter-governmental institution in which the Member States retain ultimate control over the European Court of Justice.¹⁶⁴

II. Analysis

A. The Problem of “Constitutionalism Without a Constitution”

By formulating a constitutional framework from the Treaties, the EU relies on a network of “constitutional practices without any underlying . . . constitutionalism.”¹⁶⁵ Although the components of neoconstitutionalism out-

See Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. I (1963).

157. See Foster, *supra* note 82, at 400.

158. Grimm, *supra* note 80, at 237; Herdegen, *supra* note 151, at 239.

159. See Udo Di Fabio, *Der Neue Art. 23 Des Grundgesetzes: Positivierung vollzogenen Verfassungswandels oder Verfassungsneuschöpfung?* 32 *DER STAAT* 191, 195 (1993).

160. See Kokott, *supra* note 117, at 431-435.

161. Herdegen, *supra* note 151, at 239.

162. See Sommermann, *supra* note 155, at 604.

163. GRUNDGESETZ [GG] [Constitution] art. 23, §§ 2-6 (F.R.G.).

164. Cf. Kevin D. 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, 168 (1995) (“[T]he Court determined that the ultimate goal of the EU was simply to create a stronger organization of states rather than a federal state or a ‘United States of Europe.’”).

165. Weiler & Haltern, *supra* note 26, at 423. This Note employs the designation neoconstitutionalism to stress the difference between true constitutionalism and the

lined in Section II alluded to its inherent deficiencies, this section contains a review and a more systematic analysis of these major deficiencies as background to analyzing the German cases. The EU's lack of a constitution clearly delineating the respective competencies of the Union and the Member States has deprived the EU of a basic constitutional form.¹⁶⁶ Borrowing from agency law, the relationship between the EU and the Member States could be thought of in terms of an agent to its principal.¹⁶⁷ Normally in such an agent-principal relationship, the principal delegates authority to the agent to perform acts on behalf of the principal.¹⁶⁸ Under agency law, "[a]n agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts."¹⁶⁹ Applying the agency concept to the EU, the EU institutions must act on behalf of the Member States according to the Treaties.¹⁷⁰ Unless the Member States clearly delineate the competences of the institutions in a formal constitution, the institutions of the EU run the risk of acting beyond the wishes of the Member States.¹⁷¹

B. Derivative Authority of the Communities and *Kompetenz-Kompetenz*

The Communities therefore possess simply "derivative autonomy," rather than "original autonomy."¹⁷² While the Treaties and subsequent legal acts do represent an "assemblage of laws, institutions and customs,"¹⁷³ this source of law lacks the authority of the respective national constitutions of the Member States.¹⁷⁴ Professor K.C. Wheare suggests that constitutions generally "claim to possess the authority not of law only but of supreme law."¹⁷⁵ First, logic dictates that the constitution must supercede other laws or it would fail to serve the purpose for which it was created—an

"constitutional" in the context of the European Union. A more appropriate label might be formulated in German by the designation *Staatenbundverfassung*, which denotes the constitution of a union of States.

166. See FRANK VIBERT, *EUROPE: A CONSTITUTION FOR THE MILLENNIUM* vii (1995).

167. See RESTATEMENT (SECOND) OF AGENCY § 26 (1958); see also Mark A. Pollack, *The Engines of Integration? Supranational Autonomy and Influence in the European Union*, in *EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE* 217, 249 (Wayne Sandholtz & Alec Stone Sweet eds., 1998).

168. See RESTATEMENT (SECOND) OF AGENCY § 26 (1958).

169. *Id.* § 33.

170. *Cf. id.* § 7 ("Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him.").

171. Compare Ulrich Everling, *The European Court of Justice and Interpretation of the Treaty*, in *THE DEVELOPING ROLE OF THE EUROPEAN COURT OF JUSTICE* 52 (1995) ("It is undisputed that the Community's institutions are only competent to act as far as sovereign powers are given to them by the Treaty.") with A.L.I., RESTATEMENT (SECOND) OF AGENCY § 14 (1958) ("A principal has the right to control the conduct of the agent with respect to matters entrusted to him.").

172. See Schilling, *supra* note 7, at 389-390 (emphases added).

173. WHEARE, *supra* note 57, at 2 (quoting Bolingbroke, *ON PARTIES*); CONSTITUTIONAL AND ADMINISTRATIVE LAW 4 (A.W. Bradley & K.D. Ewing eds., 11th ed. 1993).

174. See Emiliou, *supra* note 54, at 488.

175. WHEARE, *supra* note 57, at 56.

authoritative source of law—as is the logic of *Marbury v. Madison*¹⁷⁶ in U.S. law. Second, the constitution is the result of the actions of one who has the authority “to make supreme law.”¹⁷⁷ According to Professor Everling:

Courts in States receive their legitimation from constitutions, from which their traditional position obtains its justification. The Court of Justice relies in this regard on Article 164 of the EC Treaty, according to which the Court is to ensure that “in the interpretation and application of this Treaty the law is observed.” It is, however, not bound in the same way as national courts by a network of institutional relationships, for the constitutional system of the Community has not yet been secured and in part receives its legitimation indirectly from the Member States.¹⁷⁸

A fundamental problem surrounding the doctrine of supremacy of European law is the discord regarding its source.¹⁷⁹ While the ECJ regards supremacy as an intrinsic quality of European law as initially formulated in *Costa v. ENEL*,¹⁸⁰ the *Bundesverfassungsgericht* has continued to hold that Community law enjoys primacy over national law in Germany solely because the *Grundgesetz* grants such authority;¹⁸¹ however, “the ECJ cannot give judgments which have the effect of extending the Treaty. If so, they would not be binding in Germany.”¹⁸² Given that amendment of the Treaties is largely dependent on the Member States¹⁸³ and the *Bundesverfassungsgericht* occupies the position of guardian of the constitution in Germany, the “competence to scrutinize the applicability of Community law, [and] . . . even . . . the actions of the ECJ” hence lies with Germany’s Federal Constitutional Court.¹⁸⁴ Moreover, as long as the Communities have the character of an association of States,¹⁸⁵ “there can

176. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Many compare the U.S. Supreme Court’s *Marbury v. Madison* ruling to the ECJ’s in *Costa* since both clearly establish the supremacy of the respective courts; however, such a loose comparison fails to acknowledge the very real differences in the two courts’ competences: first, the Supreme Court enjoys the supremacy clause in the Constitution in stark contrast to the lack of such a statement in the European Treaties; second, the Supreme Court serves a *Federal State* while the ECJ serves a group of *Communities*, established under international law.

177. WHEARE, *supra* note 57, at 56-57.

178. See Ulrich Everling, *Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities*, in FESTKRIFT TIL OLE DUE 58 (1994).

179. See Joseph Weiler, *Community, Member States and European Integration: Is the Law Relevant?*, 21 J. COMMON MKT. STUD. 39 (1982); cf. FRANCISCO RUBIO LLORENTE, CONSTITUTIONALISM IN THE “INTEGRATED” STATES OF EUROPE (HARVARD JEAN MONNET PAPER SERIES), at <http://www.jeanmonnetprogram.org/papers/98/98-5-.html> (last visited Aug. 29, 2001).

180. See Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 1141 (1964).

181. See Wulf-Henning Roth, *The Application of Community Law in West Germany: 1980-1990*, 28 COMMON MKT. L. REV. 137, 142 (1991).

182. Foster, *supra* note 82, at 408.

183. See HARTLEY, *supra* note 12, at 90.

184. Grimm, *supra* note 80, at 236.

185. See Bruno de Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, in THE EUROPEAN COURTS & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE 293-301 (Anne-Marie Slaughter et al. eds., 1998) (explaining the emphasis on national sovereignty following the drafting of the Maastricht Treaty).

never be a transfer of power to create powers (the *Kompetenz-Kompetenz*) and the range of powers transferred can only be within the express and clear parameters as controlled by the Member States as 'Masters of the Treaty' (*Herren der Verträge*).¹⁸⁶

The Communities originated from treaties in the style of international law.¹⁸⁷ However, the process of integration has seen the Court's decisions attempt to convert supra-national agreements into a constitutional form.¹⁸⁸ The fundamental problem is that without a true constitution, the legitimacy of the Communities flows not from the Treaties themselves but from the Member States' continued respect for them.¹⁸⁹ Therefore, the Court is not wholly independent of the Member States as it possesses no inherent jurisdiction.¹⁹⁰ The *Bundesverfassungsgericht* has guaranteed that *Kompetenz-Kompetenz* remains with Germany.¹⁹¹ Specifically, the *Bundesverfassungsgericht* have concluded that "the Treaty on European Union does not set up a supranational entity invested with the insignia of statehood,"¹⁹² and the German Supreme Constitutional Court further perceives the "union" as a *Staatenverbund*—an association of States—and not an association of people.¹⁹³ In addition, there have been clear signs that, at least in the short-term, the evolution of the European Union into an entity in the manner in "which the United States of America became a state" will not occur.¹⁹⁴

The European Communities rest upon an inter-governmental structure,¹⁹⁵ and unless the Member States endow the Communities with constitutional authority, the integrity of the European institutions will depend precisely upon the willingness of the Member States to cooperate with the European institutions.¹⁹⁶ To state this plainly, without transferring *Kompetenz-Kompetenz* to the Communities, the Treaties cannot be transformed into a true constitution for Europe.¹⁹⁷ Hence, despite the Court's

186. Foster, *supra* note 82, at 407.

187. See Stein, *supra* note 17, at 1-3.

188. See *id.*

189. See Ulrich Everling, *The Court of Justice as a Decisionmaking Authority*, 82 MICH. L. REV. 1294, 1306 (1984) ("The Court cannot ignore that in the final analysis the Member States sustain the Community as its founders and exercise decisive responsibility through the Council . . .").

190. See HARTLEY, *supra* note 12, at 56; cf. Anthony Arnall, *Does the Court of Justice Have Inherent Jurisdiction?*, 27 COMMON MKT. L. REV. 683 (1990) (arguing that the ECJ has expanded its jurisdiction beyond a *compétence d'attribution*).

191. See Kokott, *supra* note 117, at 434.

192. Herdegen, *supra* note 151, at 241.

193. *Id.*

194. Cases 2 BvR 2134/92 & 2159/92, Manfred Brunner et al. v. The European Union Treaty, 1 C.M.L.R. 57, 90 (1994 BVerfGE) (F.R.G.).

195. See Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MKT. STUD. 473, 509 (1993).

196. Cf. P. Craig, *The Nature of the Community: Integration, Democracy, and Legitimacy*, in THE EVOLUTION OF EU LAW 177 (Paul Craig & Gráinne de Búrca eds., 1999).

197. Cf. Herdegen, *supra* note 151, at 235-36. Herdegen explains the impact of the *Solange III* decision on the idea of constitutionalism in the European Union: "The Court's [*Bundesverfassungsgericht*] perception of the European Union as a special compound of States falling short of statehood might deal a mild blow to a school of thought

consistent inclination to cloak its decisions with the trappings of constitutionalism,¹⁹⁸ the body of European law remains something other than a constitution.¹⁹⁹

C. Legitimacy, Constitutions, and the European Union

Legitimacy²⁰⁰ refers to the nature and appropriateness of statutes or other laws enacted by a legislature or sovereign, or here, the legitimacy of a European governance lacking a formal constitution. Max Weber identifies four bases of legitimacy: (1) tradition or belief that legitimacy has always existed; (2) change in attitudes—often emotional—toward espousing a new model, which frequently comes as prophesy; (3) rational belief in an absolute value of “natural law”; and (4) respect for actions established in a legal manner.²⁰¹ For a government or institution to be legitimate, one might consider the particular conditions to be met in the creation and implementation of law.²⁰² These conditions refer to the manner in which a government or institution formulates law, how the institution or government posits its lawmaking authority, and the manner and degree to which the constituents support the laws. Professor David McKay points out the legitimacy crisis facing the European Union:

[T]he experience of constitution building in other federations suggests that, in order to avoid legitimization problems, a constitutional settlement eventually has to [be] reached that clearly defines the limits to central power and provides the states with guarantees of sovereignty. No such settlement has thus been concluded in the European Union.²⁰³

Constitutions generally validate themselves by basing their legitimacy upon “the people” of a particular state.²⁰⁴ Such a “statement [positing legitimacy upon the people] is regarded as no mere flourish. It is accepted

which tends to assimilate the framework of the Community Treaties with a State’s “constitution” for the purposes of dynamic evolution. The implications of this perspective are far-reaching. The Court sides with the understanding of the Member States as “masters of the Treaties” and claims the role of final *arbiter* as to the scope of and competences covered by the parliamentary assent to the Maastricht Treaty.” *Id.*

198. See *Re the Draft Treaty on a European Economic Area* [ECJ], 269.

199. See Frank Vibert, *Europe’s Constitutional Deficit*, in *EUROPE’S CONSTITUTIONAL FUTURE* (James M. Buchanan et al., eds.) 69, 87-88 (1990).

200. See *LEGITIMACY AND THE STATE* 107-08 (William Connolly ed., 1984).

201. MAX WEBER, *THEORY OF SOCIAL AND ECONOMIC ORGANIZATION*, 130-131 (A.M. Henderson & Talcot Parsons eds. & trans., 1947).

202. See Robert S. Summers, *How Law is Formal and Why it Matters*, 82 *CORNELL L. REV.* 1165, 1206 (1997). According to Professor Summers, “Without such a ‘set’ methodology and operational techniques, and without the established mandatory and exclusionary force of legally authoritative reasons for action that this methodology and these techniques generate, there could be no social objects of sufficient determinateness and constancy through time to which the people of a society could express or imply their assent, acceptance, or acquiescence—the primary sources of legitimacy in modern systems. And without such legitimacy, the levels of voluntary compliance in accord with the formal reasons for action that law generates could not be sustained.” *Id.*

203. DAVID MCKAY, *DESIGNING EUROPE: COMPARATIVE LESSONS FROM THE FEDERAL EXPERIENCE* 150 (2001).

204. Werner von Simson, *Was Heißt in Einer Europäischen Verfassung „Das Volk“?* 26 *EUROPARECHT*, 1, 1 (1991).

as law.”²⁰⁵ “The people, or constituent assembly acting on their behalf, has authority to enact a Constitution.”²⁰⁶ This is exactly the manner in which the U.S. Constitution premises its authority.²⁰⁷ Constitutions derive their authority in a manner philosophically similar to the theoretical establishment of the social contract: the “people” agree to a particular binding higher law.²⁰⁸ In modern society, we generally hold that a democracy is legitimate only if “the people” consent to being governed, and “the people” continue to direct the government albeit often in a representative form.²⁰⁹

The U.S. Constitution formally derives its legitimacy from “the people.”²¹⁰ Similarly, the German Constitution (*Grundgesetz*) posits its legitimacy on the “German people.”²¹¹ Additionally, the French Declaration of the Rights of Man states: “The source of all sovereignty resides essentially in the nation (‘the people’, 1793 version); nor can any individual or any body of men be entitled to any authority which is not expressly derived from it.”²¹²

The source of legitimacy for the EU Treaties comes not from “the people” but from the Member States themselves according to separate constitutional provisions.²¹³ While the concept of European citizenship has become embedded as a fundamental element of European law, the concept is derived not from a higher law.²¹⁴ Instead, the intergovernmental cooperation of Member States established European citizenship in Part Two, Article 8 of the amended European Economic Treaty.²¹⁵ Title I, Article A of the Treaty on European Union contains the provision: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen.”²¹⁶ Hence, the authority for European law does not flow from “the

205. WHEARE, *supra* note 57, at 55.

206. *Id.* at 54-55.

207. *See* U.S. CONST. pmb.

208. *See* Richard S. Kay, *American Constitutionalism*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16, 30-32 (Larry Alexander ed., 1998).

209. *See* WEILER, *supra* note 4.

210. U.S. CONST. pmb.

211. GRUNDGESETZ [GG] [Constitution] pmb. (F.R.G.).

212. DAVID BEETHAM & CHRISTOPHER LORD, LEGITIMACY AND THE EUROPEAN UNION 7 (1998).

213. *See* Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L.J. 282, 290 (1995).

214. *See* Annette Schrauwen, *Sink or Swim Together? Developments in European Citizenship*, 23 FORDHAM INT'L L.J. 778 (2000). According to Annette Schrauwen, “European citizenship is built on the principle of free economic movement and is definitely not the expression of belonging to a political or a social community.” *Id.* at 793-794.

215. *See* EC Treaty (The Treaty on European Union formally changed the name of the Community from the “European Economic Community” to “European Community”; hence the term EC Treaty or simply EC will be used henceforth to refer to the former EEC Treaty after the ratification of the TEU). Part Two, Article 8, Section 1 reads: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.” Section 2 continues: “Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.” *Id.* art. 8, §§ 1, 2.

216. TEU tit. I, art. A.

people" (from bottom to top) but from the top downwards, finding its legitimacy in a system imposed by the Member States.²¹⁷

D. The Precarious Nature of the Doctrine of Supremacy of European Law and the *Bundesverfassungsgericht*

The three cases heard by the German Supreme Court discussed in Section II probably best illustrate the conflict between Member State sovereignty and the doctrine of supremacy of European law. Owing to contrasting legal interpretations, the *Bundesverfassungsgericht*²¹⁸ and the ECJ have been at odds over the precise basis of the doctrine of supremacy.²¹⁹ While the ECJ has assumed since *Costa*²²⁰ that the doctrine of supremacy is "an inherent feature of Community law," the *Bundesverfassungsgericht* has held that Germany only grants European law supremacy in certain fields through Articles 23 and 24 of the *Grundgesetz*.²²¹ This indicates that in German eyes, primacy remains with German law.²²² Moreover, while Article 24 originally provided the mechanism for Germany's accession to the Communities, Article 25 defined the relationship between German law and EC law.²²³ However, this Article provided simply for international law to enjoy primacy over ordinary law; it did not address the issue of constitutional law. Thus, with no established convention on this uncertainty, it has been left to the *Bundesverfassungsgericht* to resolve the issue, and the German Constitutional Court has consistently upheld the primacy of German law.²²⁴ The *Bundesverfassungsgericht* did not accept the doctrine of supremacy for some time, and even when accepted, the Federal Constitutional Court reserved the right to withdraw its support for the supremacy of EC law should it find the basic rights in the *Grundgesetz* no longer adequately protected under EC law.²²⁵

E. The European Court of Justice, Supremacy, and Germany: A Review Since 1964, European law has in principle enjoyed supremacy over

217. See Grimm, *supra* note 213, at 290-291.

218. For an account of the *Bundesverfassungsgericht*'s authority vis-à-vis the *Grundgesetz*, see Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 504 (1987).

219. See Peter M. Huber, *Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der Gemeinschaftsrechtlichen Kompetenzordnung*, 116 ARCHIV DES ÖFFENTLICHEN RECHTS 210, 216-217 (1991).

220. Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 1141 (1964).

221. Roth, *supra* note 181, at 142.

222. See Hilf, *supra* note 61. Meinhard Hilf argues "es sind die Mitgliedstaaten, die das Integrationsprogramm festlegen"; (it is the Member States that determine the integration program.). *Id.* at 10.

223. Article 25 reads: "Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes." GRUNDGESETZ [GG] [Constitution] art. 25 (F.R.G.).

224. See Grimm, *supra* note 213.

225. Case 2 BvR 197/83, *Re the Application of Wünsche Handelsgesellschaft*, 3 C.M.L.R. 225 (BVerfGE 1987) (F.R.G.).

national law.²²⁶ The German Federal Supreme Court however has never unequivocally recognized the primacy of European law,²²⁷ holding instead that the *Grundgesetz* is the supreme authority of law in Germany.²²⁸ Despite the clarification that *Wünsche Handelsgesellschaft* and later *Solange III* provided to Germany's position on the supremacy of European law, there remains a lack of clear demarcation between German domestic jurisdiction and ECJ authority.²²⁹ Specifically, it is unclear where the competences of the *Bundesverfassungsgericht* end and those of the European Court of Justice begin.²³⁰ Therefore, European legal integration will remain a two-step process between Germany and the Court, since it requires agreement by both actors to achieve progress.²³¹ Despite the ambiguity concerning the limits of European and German jurisdictions, one certainty remains: despite a decision of the ECJ, the Federal Republic of Germany retains the authority to reject Community law if the European Court goes beyond its granted competence.²³² Article 23 of the German Constitution grants a greater legitimacy to the Communities since transfers of sovereignty must have the approval of the *Bundestag*, the *Bundesrat* and the *Länder*.²³³ However, the *Grundgesetz* remains the supreme legal authority²³⁴ for the Federal Republic of Germany.

According to Professor Grimm, "Since the *Solange I* ruling, the German Constitutional Court has never deviated from its view that the supremacy of Community law in Germany is conditioned on an adequate protection of fundamental rights on the Community level."²³⁵ Professor Bruno de Witte comments, "It would be a misconception to see all this as creating a specifically *German* obstacle on the road to European integration."²³⁶ Given this prevailing mood, it is hard to imagine absolute supremacy being accorded to EC law. "The unrestricted primacy of Community law within the domestic legal systems of the Member States would signify nothing less than the birth of federal statehood at the European level."²³⁷ The European Union is ill-prepared for this task. The EU's overall inter-governmental structure "might deal a mild blow to a school of thought which tends to assimilate the framework of the Community Treaties with a State's 'constitution.'"²³⁸ Clearly, the Communities lack the authority of a state, which ultimately means that the Court must balance its decisions to the political reality of holding a narrow institutional

226. See Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585 (1964).

227. See Herdegen, *supra* note 151.

228. Huber, *supra* note 219, at 216-217.

229. See Meinhard Hilf, *The Application of Rules of National Administrative Law in the Implementation of Community Law*, 3 Y.B. EUR. L. 79 (1983).

230. See Huber, *supra* note 219, at 217.

231. See Herdegen, *supra* note 151, at 239.

232. See MATTHIAS HERDEGEN, *EUROPARECHT* 163 (1997).

233. See Sommermann, *supra* note 155, at 601.

234. Huber, *supra* note 219, at 227.

235. Grimm, *supra* note 80, at 231.

236. De Witte, *supra* note 185, at 300.

237. Herdegen, *supra* note 151, at 240.

238. *Id.* at 236.

authority.²³⁹

F. The State of European Law

Given the prior discussion on constitutionalism, the problems inherent in neoconstitutionalism may be summarized as follows:

[V]iewed as a constitution the Treaty is gravely defective. There is no enumeration of the rights and prerogatives of member-states, or attempt in even general terms to incorporate such principles as 'subsidiary' which might aim to demarcate responsibilities. There is no attempt to provide for checks and balances between executive, legislative and judicial functions of the type which would be regarded as essential for the constitution of a modern state. . . . They lay the basis for activist interpretations of the Treaty provisions rather than judicial limits.

The democratic rights and civil liberties of individuals are mentioned only in passing. The Treaty is showing its age: its framers were more concerned with providing a supranational platform for benevolent bureaucrats than a framework and processes for the exercise of political choice by the citizens of member-states.²⁴⁰

As the conclusions of this Note indicate, the Treaties do not form a constitution for the European Communities. While the lack of a constitution in itself certainly does not prevent the ECJ from playing a fundamental role in European economic and even political matters, it nonetheless permanently restricts the competences of the Communities.²⁴¹ Despite the tendency of academics to refer to the constitutionalization of the Treaties, these documents remain less than a true constitution given that the Community's authority flows from an external source.²⁴² What is fundamentally important to recognize is that to assume that the Treaties form a constitution is to disregard the potential political and legal deficiencies facing the European Communities.²⁴³ Such oversimplification of political and legal realities contributes to the already complex and undemocratic reputation which the Communities have gained.²⁴⁴ Given the significant impact these issues have upon the legitimacy of the European Court of Justice, it is in the interest of European integration to address these issues prudently and objectively.

G. Adopting a Constitution for the Union

The issue of constitutionalism is necessarily wed to the ultimate political destination of the Communities. It is beyond the scope of this Note to speculate on the ultimate form the Communities might take since that is a political decision collectively determined by the separate Member States;

239. See *supra* note 40; cf. Brewer, *supra* note 76.

240. Frank Vibert, *Europe's Constitutional Deficit*, in *EUROPE'S CONSTITUTIONAL FUTURE* 69, 87-88 (James M. Buchanan et al. eds., 1990).

241. See Herdegen, *supra* note 151, at 242-243.

242. See *id.*

243. See Grimm, *supra* note 213.

244. See, e.g., Brigitte Boyce, *The Democratic Deficit of the European Community*, 46 *PARLIAMENTARY AFF.* 458 (1993).

however, without the necessary legal structure, the Communities are restricted in the manner in which they might evolve.²⁴⁵ Severe problems lie in adhering to the existing Treaties for building such a state:

The assumption that political integration in Europe can continue to be pursued through indirect methods is a false one. It insults the instincts and intelligence of the peoples of Europe. It provokes a myriad of ill-defined and contradictory fears. It stimulates irrational opposition. It aggravates the tensions between the ties of the old political order that are under challenge and the ties of the new order of political association which have yet to be firmly established.²⁴⁶

Despite any amount of constitutionalizing, the Treaties remain a creature unlike any traditional national constitution.²⁴⁷ Although conceived from international law,²⁴⁸ the Communities undoubtedly consist of an unprecedented institutional network that blurs the apparent authority of the Member States, having progressed beyond the realm of a traditional international organization.²⁴⁹ A significant transfer of sovereignty would require substantiation by the citizens.²⁵⁰ At the moment, the Communities derive their power from the separate Member States who receive their respective authority from constitutions (written or unwritten as the case may be) which base their legitimacy upon their respective citizens.²⁵¹ In this manner, the respective national governments receive their legitimacy from popular support of the citizens.²⁵² Professor Grimm explains this matter:

[I]t is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people. . . . There is no such source for primary Community law. It goes back not to a European people but to the individual Member States, and remains dependent upon them even after its entry into force. While nations give themselves a constitution, the European Union is given a constitution by third parties. It consequently does not have the disposal of its own constitution. The 'Master of the Treaties' . . . are still the Member States, who have not been, as it were, absorbed into the Union.²⁵³

Moreover, identification remains with the nation-state and not at the European level, a complete European administration simply does not work.²⁵⁴ Although a number of scholars have urged the adoption of a European Constitution,²⁵⁵ German Foreign Minister Joschka Fischer's con-

245. See Herdegen, *supra* note 151.

246. VIBERT, *supra* note 166, at 222 (1995).

247. See *id.*

248. See Schilling, *supra* note 7, at 389-409.

249. Cf. Grimm, *supra* note 213.

250. Cf. *id.*

251. Cf. *id.*

252. Cf. *id.*

253. *Id.* at 290-91.

254. See Werner von Simson, *Was heißt in Einer Europäischen Verfassung „Das Volk“?*, 26 *EUROPARECHT* 10 (1991).

255. See JAMES M. BUCHANAN ET AL., *EUROPE'S CONSTITUTIONAL FUTURE* (1990); *Our Constitution for Europe*, *ECONOMIST*, Oct. 28, 2000, at 17-22.

stitutional proposals in January 1999 at the European Parliament in Strasbourg²⁵⁶ and in May 2000, at Humboldt Universitaet in Berlin,²⁵⁷ and French President Jacques Chirac's calls for a European Constitution a month later at the German *Bundestag* served to ignite a popular political debate.²⁵⁸ By engaging in a European-wide debate and subsequent adoption of a formal constitution, the Union could lay to rest the concerns over its legitimacy.

Conclusion

The notion that the Treaties are called upon to exercise this constitutional role is rife with theoretical problems, not the least of which is the derivative nature of the ECJ's authority. Without significant safeguards for its authority, the Court's continued legitimacy remains contingent upon respect from the Member States. Failure to recognize the limits of the Treaties provides no solution; rather, it further complicates an already complicated legal structure by prolonging, delaying and concealing—but not alleviating—conflicts between national and Community law. Noting these fundamental theoretical problems, these issues should be evaluated frankly and thoroughly, especially given that many experts simply “gloss over this.”²⁵⁹ Ultimately, the legitimacy of the ECJ and even the long-term viability of the Communities is connected to these constitutional issues. To this end, the concerns expressed by politicians, scholars and citizens throughout Europe should serve as the momentum for the drafting of a formal European Constitution. Although a formidable task, the result would clearly protect both the competences of the EU and the Member States. Failure to adopt a formal Constitution will instead perpetuate a undemocratic and outdated system of governance.

256. See Joachim Fritz-Vannahme, *Eine Verfassung für Europa*, DIE ZEIT, Jan. 21, 1999, at 3.

257. Cf. WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? RESPONSES TO JOSCHKA FISCHER (Christian Joerges et al. eds., 2000), available at <http://www.law.harvard.edu/programs/JeanMonnet/papers/00/symp.html> (last visited Feb. 27, 2001).

258. See Jacques Chirac *Schlägt Europäische Verfassung Vor*, DIE WELT, June 28, 2000, at 1-2.

259. Grimm, *supra* note 213, at 291.