Solange I Between Constitutional Mimesis and Originality

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Abstract

Seizing the opportunity of the 50th anniversary of the *Solange I* decision, this paper examines its legacy après demi-siècle, raising the following question: other than contributing to the development of fundamental rights protection in the EU, which has been thoroughly described and analysed elsewhere, what, if anything, has been an original theoretical and institutional contribution of this decision, perhaps even beyond the immediate environment of European Union (EU) law? In search of the answer, the paper consists of three parts. First, it engages with the arguments sceptical of the theoretical and institutional originality of Solange I and its aftermath. Finding these arguments less persuasive, the second part proceeds by outlining the rationale in favour of the originality thesis. The last part concludes by noting that while often misunderstood, even rejected from the conventional theoretical premises, the originality of the *Solange I* decision goes way beyond the similarities that it shares with the traditional federalist and monist, statist constitutional accounts.

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Keywords

Solange I – federalism – constitutional pluralism – EU law – human rights protection

I. Introduction

On 29 May 1974, the German Federal Constitutional Court (GFCC) handed down its decision in the *Solange I*-Beschluss.[1] Wittingly or not, the case has made history in EU law, so much so that, without exaggeration, generations of students have learned by heart the famous '*as long as*' dictum, according to which:

> 'as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Basic Law.'[2]

In short, after *Solange I*, the landscape of EU law has never been the same. Nevertheless, the merits of the ruling and its exact implications for the development of EU law were bitterly contested at the time of its adoption and, to a certain extent, remain so till the very present day. Not unlike the recent *PSPP* decision of the Federal Constitutional Court (FCC),[3] *Solange I* was also met with heavy criticism in Brussels; with a disapproval and political headache by the national executive branch as well as with an almost unanimous condemnation by EU-minded academics.[4] Similarly, as the history has

1 Federal Constitutional Court (FCC), Order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*). The article acknowledges the very rich German theoretical discussion of the *Solange I* jurisprudence, which is, however, not analysed here in any great detail as the article is limited to the discussion of the international theoretical reactions to this case-law and its developments.

2 FCC, *Solange I* (n. 1), 271.

3 FCC, Jugdment of 5 May 2020, 2 BvR 859/15, BVerfGE 154, 17 (*PSPP*).

4 Compare the historical analysis of the reactions to the *Solange I* ruling and the *Weiss* decision as analysed by: Bill Davies, *Resisting the European Court of Justice* (Cambridge University Press 2012), 180-200; Mattias Wendel, 'Constructive Misunderstandings – How the PSPP Conflict Was Eventually Settled and How it Reflects Constitutional Pluralism?' in: Matej Avbelj (ed.), *The Future of EU Constitutionalism* (Hart 2023), 53-70.

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attested, the *problematique* raised by the FCC in the 1970s has been addressed, perhaps even resolved, through a combination of carefully calibrated judicial, legislative, political as well as diplomatic measures that have, especially the latter, not infrequently played out also behind the scenes.[5] All this sufficed to talk the FCC into the *Solange II* ruling.[6] As a result, since the adoption of the Treaty of Lisbon in 2009, whose constitutive part is also the Charter of Fundamental Rights,[7] the EU is indeed endowed with a comprehensive system of fundamental rights protection as required by the FCC in 1974.

Against this backdrop and seizing the opportunity of the 50th anniversary of the *Solange I* decision, this paper examines its legacy *après demi-siècle.* In so doing, the following question is raised: other than contributing to the development of fundamental rights protection in the EU, which has been thoroughly described and analysed elsewhere,[8] what, if anything, has been an original theoretical and institutional contribution of this decision, perhaps even beyond the immediate environment of EU law? In search of an answer, the paper is, in what follows, broken down into three parts. First, the paper engages with the arguments sceptical of the theoretical and institutional originality of *Solange I* and its aftermath. Finding these arguments less persuasive, the paper proceeds by outlining the rationale in favour of the originality thesis. The last part concludes.

II. *Solange I* as Nothing New Under the Federal Sun

Looking back to the emergence of the *Solange I* decision and the ensuing developments both under national and EU law, the argument could be made that they fail to exhibit anything novel, anything that could not be subsumed under the well-known federal script.[9] Following this non-originality thesis, the tensions between the FCC and the European Court of Justice (ECJ), encapsulated in *Solange I*, are indistinguishable from the dynamics in any composite federal regime, in which the federal and federated level search for

5 Davies (n. 4); Wendel (n. 4).

6 FCC, Order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*).

7 For the genesis of the Charter, see, for example Giacomo di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011).

8 For an overview, see, Lorenza Violini and Antonia Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe* (Edward Elgar 2018).

9 Robert Schütze, 'Federalism as Constitutional Pluralism: Letter from America' in: Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012), 185-212.

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the appropriate federal equilibrium. What is more, according to this rationale, not just a similar, but in fact the same scenario could be observed almost 200 years earlier in the development of the American federalism.

There too, like the founding Treaty of the European Coal and Steel Community, the federal Constitution did not contain a catalogue protecting human rights and fundamental freedoms.[10] It was widely believed that as the scope of competences of the federal government was so limited it posed no threat to human rights; there was simply no need to protect these rights on the federal level.[11] Supplementing the just adopted United States (US) Constitution with human rights protection was thus perceived as 'an unnecessary political expedient, of little constitutional importance'.[12] In short, to amend the Constitution by including human rights protection would simply be a 'waste of time'.[13] To recall, a roughly similar rationale existed in the then European Communities, that were also due to their narrow economic remit considered to have nothing to do with human rights protection. Instead, human rights were to be a sphere reserved for the Member States and for the emerging Council of Europe, conceived of as a regional human rights organisation.[14]

Nevertheless, the fact that in the US human rights were not protected at the federal level, but did exist in many of the constitutions of the former colonies, now federated states, created a discrepancy, a gap in the federal constitutional order, triggering a federal disequilibrium, leading to tensions between the two levels of government. These tensions, one could argue, were tamed down by eventually amending the US Constitution and adding to it the first ten amendments containing, what is presently known as, the Bill of Rights.[15] Hence, like the FCC's *Solange I* concern regarding the lack of human rights protection on the supranational level led to the establishment of human rights protection in the EU by way of preserving the federal equilibrium in the Union, a similar demand of the representatives of federated states in the US Convention and the Congress contributed to the adoption of the Bill of Rights in the American federal system. On this account, the FCC strode an already well-trodden path. Its *Solange I* decision did not

10 Library of Congress, *Creating the United States: Demand for a Bill of Rights*, available at: <https://www.loc.gov>, last access 15 April 2025.

11 Library of Congress (n. 10).

12 Kenneth R. Bowling, '"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights', Journal of the Early Republic 3 (1988), 223-251 (224).

13 Bowling (n. 12), 224.

14 See, Antonio Cassese, Andrew Clapham and Joseph Weiler (eds), *Human Rights and the European Community: Methods of Protection* (Nomos 1991).

15 Michael J. Douma, 'How the First Ten Amendments Became the Bill of Rights?', Georgetown Journal of Law & Public Policy 15 (2017), 593-614.

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amount to anything new, let alone original. It only mimicked what other constitutional actors in federal regimes, most notably in the US, have been doing for decades, namely struggling to find and maintain a fitting federalist balance around, *inter alia*, human rights protection.

However, it turns out that the just sketched comparison between the US and the EU federal experience regarding human rights protection is convincing only at the first glance. A closer study of the two jurisdictions reveals major differences between them. These are to be attributed, foremost, to the vast temporal gap, setting the Bill of Rights and the *Solange I* events almost 200 years apart. Consequently, the two human rights protection episodes took place in a completely different socio-political, economic and cultural setting. They evolved against an entirely diverging background rationale. They were based on fundamentally different underlying normative premises and deployed a deeply contrasting, even if nominally similar, federal object and purpose.

Beginning with the latter, it is clear that the trigger behind the FCC's *Solange I* ruling was a genuine dissatisfaction with the lack of so-called 'structural congruence'[16] between the German constitutional order and the then Community law. On the one hand there was this new post-World War II (WWII) German constitutional order, replete with human rights protection, considered 'as an objective scale of values',[17] which was portrayed as pervading the entire polity situated in a robust and functional parliamentary democracy.[18] On the other hand, the then European Communities lacked any directly elected parliamentary body and there was a complete absence of written standards of human rights protection. It was because of this yawning gap between EU law and national law, and with an ambition of closing it, that the FCC conditioned a full and unconditional primacy of EU law by requiring that the EU too develops its own system of human rights protection.

The *Solange I* ruling was thus an example of a constructive critique of EU law and the integration built on it.[19] It was an attempt of improving the

16 Davies (n. 4), 49. For an early discussion in German, see Hebert Kraus, *Der Kampf um den Wehrbeitrag*, Institut für Staatslehre und Politik e. V. Mainz 1953; Gerhard Konow, 'Maastricht II und die "föderativen Grundsätze"', DÖV 49 (1996), 845-852; Bernd Grzeszick, 'Art. 20' in: Günter Dürig/Roman Herzog/Rupert Scholz, *Grundgesetz-Kommentar* (C. H. Beck 2024), para. 160.

17 FCC, judgment of 15 January 1958, 1 BvR 400/51, BVerfGE 7, 198 (*Lüth*): 'eine objektive Wertordnung, die als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gilt.'

18 Davies (n. 4), 28.

19 Compare this with Ana Bobić, *The Jurisprudence of Constitutional Conflict* (Oxford University Press 2022), 59-71, who also distinguishes between 'constructive' and 'destructive' constitutional conflicts. Also in this issue Ana Bobić, 'Constitutional Courts in the Face of the EU's Reconfiguration', HJIL 85 (2025), 523-545.

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quality of EU law, turning it into a fuller, denser legal order, which could, provided it effectively protected human rights in a way functionally paralleling domestic jurisdiction, possess sufficient legitimacy to claim primacy in application over national law. *Solange I* was thus not concerned with curbing the federal power, or with shielding the national sovereignty of the Member States against the incursions on behalf of EU law. In the same vein, the FCC did not question the object and purpose of EU law, but it insisted that to achieve this object and purpose the integration shall qualitatively shift into a higher gear by incorporating human rights protection in its body of law. Eventually, the EU took this initiative seriously and followed suit.

The US story of the Bill of Rights is markedly different. Unlike the FCC which acted with genuine normative resolute to improve the functioning of EU integration by taking human rights seriously, the considerations of the American proponents of codifying human rights protection on the federal level were almost exclusively strategic. The federalisation of human rights was used as a pretext, as a means of upending the constitutional settlement achieved during the Philadelphia constitutional convention.[20] The project of instituting the federal protection of human rights was thus part of the anti-federalist political agenda. Behind the ostensibly virtuous insistence on protecting personal freedoms against the government, there lurked a desire 'to change the structure and curtail the power of the new federal government'.[21] The Bill of Rights that was eventually adopted was a compromise between the divergent interests of federalists and anti-federalists, a measure that, like 'a tub to the whale',[22] distracted both camps, to neither's satisfaction, but with an ultimate effect of averting the second constitutional convention that could have undermined the nascent US federal state.[23] The human rights in the Bill of Rights, in a glaring contrast to the *Solange I* episode, were thus not an end in and of itself. They were instrumental for keeping or undermining, depending on the perspective, the federal balance.

However, beyond the instrumental use of the Bill of Rights in the US there is even a more important difference between the two jurisdictions. This resides in a completely different socio-political, economic, and cultural setting. The *Solange I* doctrine is, indirectly at least, a reflection of Germany's catharsis after the horrors committed during the WWII. It is a remedial attempt for the mass violations, indeed extinction of human rights protection, underlined by a commitment of 'never again'. It is against this backdrop that

20 Library of Congress (n. 10).
21 Bowling (n. 12), 225.
22 Bowling (n. 12), 224.
23 Bowling (n. 12), 224.

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the *Lüth* jurisprudence,[24] its *Austrahlungswirkung*,[25] the objective order of values, from whose perspective the European Communities of the 1960s and 1970s not only appeared to be, but were indeed lacking in human rights protection, engendered the *Solange I* constitutional doctrine.

In comparison to the just presented European, in particular German, normative backdrop, the background rationale of the proponents of human rights protection on the federal level in the US could not be more different. As argued by Brest, Levinson, Balkin, and Amar almost all constitutional law cases prior to 1865 in the US involved slavery.[26] The process of adoption of the Bill of Rights was no exception. However, what was exceptional, indeed perverse, at least from the contemporary normative point of view, was the motivation of the anti-federalist proponents of the protection of human rights on the federal level. This mechanism was proposed as a means of curbing federal power, to win more room to manoeuvre in preserving the slave-holding social order in the south. In other words, and to put it bluntly, the southern anti-federalists insisted on the creation of federal human rights protection to preserve slavery in their federated states. By any means their ambition was not about improving the nature of the American union.[27] In this way it becomes clear that the Bill of Rights and the *Solange I* episodes unfolded in a completely different historical context, relying on an entirely incompatible set of normative premises, pursuing adverse social and federal objectives. It is on this basis that the *Solange I* jurisprudence is completely at odds with its US counterpart and therefore stands for a unique, indeed original legal theoretical and practical achievement. It is to its exact contours that the next section turns to.

III. Institutional Innovations Spurred by *Solange I*

Fifty years on, with the benefit of hindsight, it can be confidently argued that the *Solange I* decision has brought about a number of institutional innovations in practice, which have in due course also led to original developments in the field of legal theory. These innovations have echoed beyond the law of the European Union, that the FCC initially sought to improve, and have also surpassed the limits of federalism. Admittedly, the central

24 FCC, *Lüth* (n. 17).

25 FCC, *Lüth* (n. 17), 207.

26 Paul Brest, Sanford V. Levinson, Jack M. Balkin and Akhil Reed Amar, *Process of Constitutional Decisionmaking: Cases and Materials* (4th edn, Aspen Law & Business 2000), 1.

27 Akhil Reed Amar, 'The Bill of Rights as a Constitution', Yale L. J. 100 (1991), 1131-1210.

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practical novelty consisting of the insistence of 'structural congruence' between two different levels of government was initially deployed in what could be described as a proto-federal regime. As the ECJ developed the doctrines of autonomy, direct effect and primacy of EU law,[28] national highest courts following the lead of the *Solange I* rationale have been willing to acquiesce to them provided that the new body of autonomous EU law, now effective side by side with national laws on the national territory, complies at least with similar, functionally parallel substantive standards of human rights protection. To the extent that the EU exhibits the features of a composite federal regime, that it at least to a certain extent arguably does, the *Solange I* decision has thus made an original contribution to the theory and practice of federalism, whereby the two federal levels engage in mutual collaboration through, in a way, competition with regard to the common acceptable standards of human rights protection. The *Solange I* decision can be thus seen as a stimulus for improving the quality of a federal regime by a substantive race not to the bottom, but to the top.

This can be explicated with a reference to a couple of national and supranational landmark cases that have ensued following the *Solange I* ruling, first on the vector pointing from the Member States to the EU; then inside the Member States, and very soon and very interestingly also on the vector travelling from the EU to the Member States. On the Member States – EU vector, the FCC's *Solange I* jurisprudence first found approval in the Italian Constitutional Court. The latter in fact preceded the *Solange I* case with its *Frontini*[29] ruling, that has been in the following years reaffirmed in the *Granital*[30] and *Fragd*[31] cases.[32] In all these cases, like the GFCC, the Italian Constitutional Court insisted on the importance of fundamental rights protection, but, unlike the FCC, its Italian counterpart posited the

28 ECJ, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, judgment of 5 February 1963, case no. 26-62, ECLI:EU:C:1963:1; ECJ, Flaminio Costa v. ENEL, judgment of 15 July 1964, case no. 6-64, ECLI:EU:C:1964:66.

29 Constitutional Court of Italy, *Frontini v. Ministero delle Finanze*, judgment of 18 December 1973, case no. 183/73. For an English translation of the judgment, see Andrew Oppenheimer (ed.), *The Relationship Between European Community Law and National Law: The Cases: Volume 1* (Cambridge University Press 1994), 629-642.

30 Constitutional Court of Italy, *SpA Granital v. Amministrazione delle Finanze dello Stato*, judgment of 8 June 1984, case no. 170/84. For English: Oppenheimer (n. 29), 643-652.

31 Constitutional Court of Italy, *SpA Fragd v Amministrazione delle Finanze dello Stato*, judgment of 21 April 1989, case no. 232/89. For English: Oppenheimer (n. 29), 653-662.

32 For a very informative, more in-depth discussion of 'the local remodelling' of *Solange I*, see in this issue Niels Graaf, '"*Solange*", "*Fintantoché*", "*Tant que*": On the Local Remodelling of a Canonical German Decision in French and Italian Constitutional Debates', HJIL 85 (2025), 479-501.

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national standards of human rights protection as a limit to EU integration and as an exception to the primacy of EU law. While the two courts thus proceeded from the same normative standpoint of expressing concern for the existing national standards of human rights protection, their normative direction was different. The German FCC's '*as long as*' worked as stimulus for the EU legal order to develop its own system of human rights protection, while the Italian Constitutional Court's '*contro limiti*' doctrine[33] was foremost a defensive national constitutional measure, which acted not as a stimulation, but much more like an irritation of the supranational level. Nevertheless, it can be argued that in due course the dual reliance on national human rights protection, on the one hand as a stimuli for the EU to develop its own human rights standards, on the other as a shot across the bow, has eventually merged into a single doctrine, so to present the two sides of the same medal pushing the EU to qualitatively deepen its legal order with human rights protection.

This doctrine has been almost universally espoused by the Member States, be it on the level of their constitutional texts or in the jurisprudence of their highest judicial authorities and typically both.[34] Especially in the new Member States that joined during the 2004 enlargement the *Solange I* doctrine was also used in a somewhat mutated sense, not just externally towards the EU, but also internally against other domestic political authorities. As *Sadurski* convincingly demonstrated, the, on its face paradoxical, reliance on the *Solange I* rationale by the Central European constitutional courts in the early 2000 s, when structural congruence could arguably be seen as long achieved, and if certain gaps were left in the European human rights mosaic their existence was much more likely in the new Member States than in the EU, could be best explained as a self-serving attempt of those countries' constitutional courts to preserve their elevated institutional position in the national constitutional and political ordering. In short,

> 'deciding on the status of the European supremacy rule [was] therefore a valuable and effective asset for Constitutional Courts to enhance their position vis-à-vis other domestic political actors,'[35] as 'these are very powerful and skilled political actors, used to playing a strong role in the political and legislative game'.[36]

33 Marta Cartabia, 'The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Community', Mich. J. Int'l L. 12 (1990), 173-203 (182).

34 Stefan Griller, Lina Papadopoulou and Roman Puff (eds), *National Constitutions and EU Integration* (Hart 2022).

35 Wojciech Sadurski, '"Solange, Chapter 3": Constitutional Courts in Central Europe – Democracy – European Union', EUI Working Paper LAW No. 2006/40, 33.

36 Sadurski (n. 35), 34.

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The above discussion has thus disclosed that the *Solange I* rationale has been capable of wearing and producing different faces. One of them, existing on the vector running from the EU to the Member States, was certainly not intended for when the FCC issued its ruling in 1974. The FCC wanted to prompt the EU to develop its own standards of human rights protection, but it did not take long for the ECJ, following its proverbial hermeneutic expansionism, to turn those freshly minted EU human rights, developed under the pressure of national constitutional courts, against those very courts and other national institutions. The newly developed EU human rights thus became the standards for measuring the compliance of the Member States with EU law, when their institutions were charged with implementing EU law (*Wachauf* line of cases)[37] or when the Member States sought to avail themselves of one of the Treaty derogations from the four fundamental freedoms (*ERT* line of cases).[38] While the Charter of Fundamental Rights in Art. 51/1, admittedly, circumscribed the scope of this case-law, by excluding the *ERT* doctrine, the ECJ circumvented the Charter's textual limits and has continued to subject the national measures to compliance with EU law's autonomous standards of human rights protection whenever the Member States act within the scope of EU law.[39]

Furthermore, due to the process of constitutional and democratic backsliding that has pestered the EU since 2010,[40] the use of the *Solange I* doctrine has received yet another, unexpected turn. Already in 2012, a team of scholars pleaded in favour of the so-called reverse *Solange*.[41] This doctrine would enable individuals to rely qua EU citizenship on fundamental rights as protected under EU law against their Member States even beyond the scope of application of EU rights if their Member States were proven to have engaged in a systemic violation of the fundamental values contained in Article 2 Treaty on European Union (TEU). In other words, echoing the *Solange*

37 ECJ, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, judgment of 13 July 1989, case no. C-5/88, ECLI:EU:C:1989:321.

38 ECJ, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, judgment of 18 June 1991, case no. C-260/89, ECLI:EU:C:1991:254.

39 ECJ, *Åklagaren v. Hans Åkerberg Fransson*, judgment of 7 May 2013, case no. C-617/10, ECLI:EU:C:2013:105.

40 *Miklós Bánkuti, Kim Lane Scheppele, Gábor Halmai*, 'Hungary's Illiberal Turn: Disabling the Constitution' Journal of Democracy 23 (2012), 138-146; *Wojciech Sadurski*, *Poland's Constitutional Breakdown*, (Oxford University Press 2019); Matej Avbelj, Jernej Letnar Černič, Gorazd Justinek, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond* (Hart Publishing 2020).

41 Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Matthias Kottmann, Maja Smrkolj and Armin von Bogdandy, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', CML Rev. 49 (2012), 489-519.

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doctrine, albeit now applied from the EU to the Member States. As long as the Member States do not systemically threaten to violate human rights, the latter remain within their national autonomy immune to the EU's interference. In the opposite case, EU law will step in to safeguard the common body of human rights that all EU citizens, irrespective of their domicile in a particular Member State, should be entitled to.[42]

Almost a decade later this academic proposal planted roots also in the actual jurisprudence of the ECJ. In *Repubblika*[43] the Court formally developed a principle of non-regression according to which the Member States are bound in virtue of Art. 2 TEU to refrain from undermining the already existing standards of the rule of law and human rights protection as its constitutive part. In Cases C-156/12 and C-157/21 in 2022 the ECJ made its position even stronger, by arguing

> 'that the values contained in Article 2 TEU, among them human rights, have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties […]'.[44]

The discussion of the three vectors of *Solange I* (inside the Member States and between the Member States and the EU, and vice versa) is an example of how this FCC doctrine affected the EU integration's 'federal' dynamics. However, as indicated above, the implications of the *Solange I* jurisprudence gradually stretched beyond proto-federal analogies and also served as a normative point of orientation for the EU with its external environment. This came most strikingly to the fore in the protracted *Kadi* saga.[45] In this case,[46] Mr. *Kadi* was subject to targeted sanctions imposed on him by the United Nations (UN) Security Council, which were effectuated through the EU Council's regulations. It was undisputed that, due to the EU regulation implementing the UN Security Council Resolution, Mr. *Kadi* was put under

42 Antpöhler, Dickschen, Hentrei, Kottmann, Smrkolj and von Bogdany (n. 41), 491.

43 ECJ, *Repubblika v. Il-Prim Ministru*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:311, para. 64.

44 ECJ, *Hungary v. European Parliament and the Council of the European Union*, judgment of 16 February 2022, case no. C-156/12, ECLI:EU:C:2022:97, para. 127; ECJ, *Poland v. European Parliament and the Council of the European Union*, judgment of 16 February 2022, case no. C-157/12, ECLI:EU:C:2022:98.

45 For a book length discussion of this case, see Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2016).

46 ECJ, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, judgment of 3 September 2008, case no. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

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a travel ban and all his funds and other assets were frozen in the absence of any judicial protection and the right to be heard. After the case had been brought to the EU General Court, it was dismissed for not having amounted to the violation of *jus cogens* that was, according to the General Court, the only standard against which the supreme UN Security Council resolution could be reviewed. The potentially scandalous outcome in which an individual in the EU would be deprived of basic human rights due to the need to comply with 'supreme' international law was avoided thanks to the ECJ which confirmed the primacy of the Charter of the United Nations and the entire body of international law developed under it, but it effectively conditioned it on the existence of an appropriate protection of human rights on the international level.

In so doing, the ECJ effectively transposed the *Solange I* rationale, which the FCC developed to incentivise the EU to develop its own standards of human rights protection, to the realm of international law. The ECJ insisted that the effective protection of human rights in the EU:

> 'requires from the Community judicature [to conduct] in principle the full review of the lawfulness of all EU acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations'.[47]

While this judicial move, similar to the one by the FCC in the national context on behalf of EU scholars, was received with a great degree of scepticism by scholars of international law,[48] it has indeed, like *Solange I* inside the EU, led to an improvement of human rights protection in the context of the specific Security Council mechanism on the level of international law.[49]

In this way, the *Solange I* mechanism was freed from its specific EU law context and started to be used beyond the EU, as a principled regulatory mechanism in pursuit of 'structural congruence' between different sites of legal and political authorities within the framework of multilevel governance

47 ECJ, *Kadi* (n. 45), para. 326.

48 See, for example, Antonios Tzanakopoulos, 'The *Solange* argument as a justification for disobeying the Security Council in the *Kadi* Judgments' in: Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2016)121-134 (133-134), who has indicatively of the prevailing sentiment among public international lawyers at the time claimed that 'the disobedience of SC decisions […] is no doubt dangerous and hugely destabilizing'.

49 See, Matej Avbelj and David Roth-Isigkeit, 'The UN, the EU, and the Kadi Case: A New Appeal for Genuine Institutional Cooperation', GLJ 17 (2016), 153-178.

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in a global context. The *Kadi* case is an example of a *Solange I* interaction between EU law and international law. The *Bosphorus* case,[50] on the other hand, is an example of the employment of the *Solange* doctrine by a regional international organisation, the Council of Europe,[51] in rapport with the EU. There the European Court of Human Rights (ECtHR) had to adjudicate the actions of the Irish authorities which were interfering with the plaintiff's right to private property by executing an EU regulation which did not leave any discretion to the national authorities. In this way the ECtHR was, in fact, invited to pronounce on the compatibility of the EU regulation with the European Convention on Human Rights (ECHR). The Court avoided a potential clash with EU law again by resorting to the *Solange I* formula and its sequel, stressing that as long as an international organisation, the EU in this case, in substantive and procedural terms ensures human rights protection which is at least equivalent, without the need to be identical, to the Convention, the interests of international cooperation dictate a presumption, rebuttable in case of manifest deficiencies, of compliance of the challenged EU legal acts with the Convention.[52] In other words, as long as the EU protects human rights in a way structurally congruent and equivalent with the ECHR, so long the ECtHR will, in principle, not judicially interfere with its actions.

The same logic was applied to the North Atlantic Treaty Organisation (NATO)[53] and when faced with cases of the Security Council's targeted sanctions, as implemented by the UN Member States, the ECtHR relied, even if indirectly, on the *Solange I* doctrine also within the ambit of broader international law. To accommodate the primacy of the UN-Charter and its objectives with the Member States' ongoing obligations under the ECHR, the ECtHR established a presumption that the Security Council, unless when using clear and explicit language to the contrary, does not intend to induce the Member States into human rights violations. The presumption, albeit rebuttable, like in relation with the EU, therefore is that, in principle, the UN Security Council is a human rights compliant institution and that it is, consequently, for the Member States when adopting concrete implementing measures to adapt their international obligations to the standards of the

50 ECtHR (Grand Chamber), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005, no. 45036/98, paras 155-156.

51 For earlier similar cases, see, ECtHR (Grand Chamber), *Waite and Kennedy v. Germany*, judgment of 18 February 1999, no. 26083/94, paras 67-73; ECtHR (Grand Chamber), *Beer and Regan v. Germany*, judgment of 18 February 1999, no. 28934/95, paras 57-63.

52 ECtHR, *Bosphorus* (n. 50), paras 155-156.

53 ECtHR, *Gasparini v. Italy and Belgium*, judgment of 12 May 2009, no. 10750/03.

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Convention. While the ECtHR, eventually,[54] in practice several times[55] refused to employ the *Bosphorus* equivalence test[56] and thus to pass a verdict on the compliance of concrete UN Security Council resolutions with the Convention, its *Solange* message to the UN could not be stated in clearer terms:

> 'The Court emphasises that it is not its role to pass judgment on the legality of the acts of the UN Security Council. However, where a State relies on the need to apply a Security Council resolution in order to justify a limitation on the rights guaranteed by the Convention, it is necessary for the Court to examine the wording and scope of the text of the resolution in order to ensure, effectively and coherently, that it is consonant with the Convention.'[57]

In other words, as long as the UN Security Council does not explicitly and directly require the ECHR Member States to fall below the requirements of the Convention, so long the ECtHR will assume that the UN regime in a manner is equivalent with the Convention protects human rights and its acts will not be subject to the ECtHR's review. The same or very similar jurisprudence in rapport to international law has also been developed in the chambers of the highest courts in several European states.[58]

The preceding discussion has demonstrated that the *Solange I* formula travelled way beyond the national – supranational legal relationship in which it was originally developed. Its institutional-normative reach thus exceeds the ambit of federalism. The rationale, underlying the *Solange I* doctrine, has

54 In ECtHR (Grand Chamber), *Al-Dulimi Montana Management Inc. v. Switzerland*, judgment of 21 June 2016, no. 5809/08, the first instance Chamber did, however, decide to subject the UN Security Council to the *Solange I*, equivalence test review, which a concrete Resolution failed to pass. However, upon appeal the Court found the equivalence test inapplicable in this case and thus avoided a potentially resounding clash and controversy with the UN.

55 ECtHR (Grand Chamber), *Al-Jedda v. The United Kingdom*, judgment of 7 July 2011, no. 27021/08; ECtHR (Grand Chamber), *Nada v. Switzerland*, judgment of 12 September 2012, no. 10593/08.

56 Sébastien Platon, 'The "Equivalent Protection Test": From European Union to United Nations, from Solange II to Solange I', Eu Const. L. Rev. 10 (2014), 226-262.

57 ECtHR, *Al-Dulimi* (n. 54), para. 139.

58 See, for example, the decision of the UK Supreme Court, *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others*, judgment of 27 January 2010, UKSC/2009/0016; *Her Majesty's Treasury v. Mohammed al-Ghabra,* judgment of 17 March 2009, UKSC/2009/0015*; R (on the application of Hani El Sayed Sabaei Youssef) v. Her Majesty's Treasury*, case no. UKSC 2009/0018, and the decision of the Swiss Federal Tribunal, *Rukundo v. Federal Office of Justice*, judgment of 3 September 2001, case no. 1A. 129/2001 and 1A 130/2001, ILDC 348 (CH 2001). For an overview see: Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument' in: Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International Law and National Courts and the (De-)Fragmentation of International Law* (Hart 2012), 185-215.

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been applied as a judicial formula to regulate or at least shape multilevel governance in a global realm. The existing plurality of legal orders of territorial and functional character clearly requires 'structural congruence' and 'equivalence' in human rights protection to prevent the regression of the achieved substantive value standards; to ensure the protection of individual rights[59] and through that foster the functionality and viability of a pluralist structure of contemporary global law.[60] It goes without saying that the FCC, when it delivered its ruling in 1974, did not anticipate, let alone deliberately pursue the institutional developments which would ensue fifty years on, and neither was its jurisprudence informed by a coherent theoretical account.[61] This has emerged only later. While the *Solange I* practice has thus preceded theory, it is undisputable that beyond the institutional innovations described above, the FCC's *Solange I* doctrine has also had a strong impact on constitutional theory, eventually leading up to the establishment of a whole new theoretical branch that has since been known as constitutional pluralism.

IV. Theoretical Innovations Spurred by *Solange I*: A Theory of Constitutional Pluralism

Admittedly, the birth of a theory, or more accurately theories,[62] of constitutional pluralism is typically not associated with the *Solange I* decision. To the contrary, according to the conventional narrative the intellectual roots of constitutional pluralism date back to the Treaty of Maastricht. This treaty could only be ratified in Germany after the FCC had given a green light. The thus adopted *Maastricht*-Urteil,[63] delivered in 1993, drew even heavier academic criticism[64] than its *Solange I* predecessor two decades earlier. The only

59 See also in this issue Eyal Benvenisti, 'When *Solange I* Met *Neubauer*: National Court Protecting Global Interests When Reviewing Decisions of International Organisations', HJIL 85 (2025), 627-648.

60 Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015); Matej Avbelj, *The European Union Under Transnational Law* (Hart 2018); Rafael Domingo, *The New Global Law* (Cambridge University Press 2010); William Twining, *Globalisation and Legal Theory* (Cambridge University Press 2000); Matej Avbelj, 'Global Constitutionalism as a Grammar of Global Law?', KritV 3 (2016), 217-233.

61 Davies (n. 4).

62 For an overview, see, Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018).

63 FCC, judgment of 12 October 1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155 – *Maastricht*.

64 For an overview (and a response), see, Peter L. Lindseth, 'The "Maastricht Decision" Ten Years Later: Parliamentary Democracy, Separation of Powers, and the Schmittian Interpretation Reconsidered', Robert Schuman Centre Working Paper 2003/18.

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notable exception was *Neil MacCormick* who defyingly argued that the FCC's *Maastricht* decision '*after all has a sound basis in legal theory*'.[65] This legal theory was initially marked by some nominal ambiguity, being qualified as normative, legal or juridical pluralism, but gradually the name constitutional pluralism has prevailed. This denomination, as well as the profound conceptual deepening of the theory, is to be credited to the 2002 seminal article by *Neil Walker* on '*The Idea of Constitutional Pluralism*'.[66]

If the central concept of the *Solange I* decision was 'structural congruence', the *Maastricht* decision was about sovereignty. The focus of the two rulings and, consequently their main thrust too, was notably different. As sovereignty is about the locus of the ultimate legal and political authority,[67] the stakes, not just legal, but also political, were much higher in the *Maastricht* decision, and the overall approach of the FCC was less friendly and more confrontational than in *Solange I*. In that case the FCC was, in a way, prescribing the standards that could bring the two legal orders closer together, making them more compatible. By contrast, in the *Maastricht* decision the FCC was drawing the jurisdictional boundaries that EU law and its highest Court should not cross.[68] Nevertheless, despite their uneven focus and main thrust the *Maastricht* and the *Solange I* decisions are directly related, because the underlying theoretical basis of the *Maastricht* decision anticipates *Solange I*, which had, somewhat paradoxically, chronologically come first.

The normative requirement of 'structural congruence' namely only makes sense in an environment of plurality of legal orders containing (and being an expression of) different polities as distinct epistemic sites.[69] The FCC's *Solange I* ruling assumed that EU law and national law are distinct, making up two different autonomous legal orders which are, however, integrated into a larger, overarching common whole whose viability, as well as the identity of the insular parts of which this common whole is formed, requires the demanded 'structural congruence' and 'equivalence', but not identity of substantive standards between and across legal orders and polities inside the common whole.[70] Therefore, what the *Solange I* decision had assumed, was

65 Neil MacCormick, 'The Maastricht Urteil: Sovereignty Now', ELJ 1 (1995), 259-266 (265).

66 Neil Walker, 'The Idea of Constitutional Pluralism', M. L. R. 65 (2002), 317-359.

67 Matej Avbelj, 'Theorizing Sovereignty and European Integration', Ratio Juris 27 (2014), 344-363.

68 See, Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', CML Rev. 36 (1999), 351-386.

69 Walker, 'The Idea of' (n. 66), 338.

70 Matej Avbelj, 'Theory of European Union', E. L. Rev. 36 (2011), 818-836.

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eventually articulated in the *Maastricht* decision.[71] One presupposed the other, but neither was easily accepted by the then theoretical mainstream.

Here constitutional pluralism,[72] in particular as developed by *Neil Walker*, has made an important difference. *Walker*, writing ahead of the described *Solange I* migration beyond EU law to other areas of multi-level governance, demonstrated already in 2002 that constitutional pluralism is not just a persuasive descriptive, explanatory, and normative account of European integration, but that it might lend itself as a, in a way, universal theoretical framework for a global post-national realm[73] of late sovereignty.[74] An old one-dimensional Westphalian world has evolved into a pluralist, multi-dimensional constellation in which old and new, territorial and/or functional forms of legal and political communities can be found on the sub-state, trans-state, supra-state, and on other non-state levels.[75] Not only can this development be accurately captured (only) by constitutional pluralism, the latter moreover also disposes of normative tools for maintaining the necessary degree of coherence, indeed 'structural congruence' through a whole plethora of bridging mechanisms[76] between different territorial and functional sovereigns, without their authority claims, when conflicting, always being susceptible to harmonious reconciliation.[77]

It is easily identifiable how the migration of *Solange I* beyond the EU fits nicely in this theoretical framework, as well as how *Solange I*, as initially articulated by the FCC, paved the path to the theory of constitutional pluralism. There would have been no need for the theory of constitutional

71 Situating the *Solange I* decision yet into a broader context of the FCC jurisprudence, which is however beyond the scope of this article, makes this point even more evident. See, in particular, BVerfGE 73, 339 *Solange II* and BVerfGE 152,152 and 152, 216 *Right to be Forgotten I and II*, discussed in Matej Avbelj, 'The Federal Constitutional Court Rules for a Bright Future of Constitutional Pluralism', GLJ 21 (2020), 27-30.

72 For a critical approach within German legal theory to the pluralist characters of EU integration, see, in particular, Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited', CML Rev. 36 (1999), 703-750 and Ingolf Pernice, 'Multilevel Constitutionalism in the European Union', E. L. Rev. 27 (2002), 511-529; Ingolf Pernice, 'European v. National Constitutions', Eu Const. L. Rev. 1 (2005), 99-103; Matthias Ruffert, Nach dem Lissabon-Urteil des Bundesverfassungsgerichts – zur Anatomie einer Debatte, ZSE 7 (2009), 381-398. On the compatibility between multilevel constitutionalism with constitutional pluralism see, in particular, Franz C. Mayer and Mattias Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism' in: Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

73 Walker, 'The Idea of' (n. 66).

74 Neil Walker, 'Late Sovereignty in the European Union' in: Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003), 3-32.

75 Walker, 'The Idea of' (n. 66), 320.

76 Walker, 'The Idea of' (n. 66), 347.

77 Walker, 'The Idea of' (n. 66), 338.

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pluralism if the FCC had simply acquiesced to the unconditional supremacy of EU law. If the latter had happened, the good old conventional statist federalism could have served as a theoretical matrix for describing, analysing, and normatively evaluating the developments inside the process of European integration. As this was not the case, statist federalism turned out to be an inadequate theory to capture the complexity of legal and political relationships inside the EU. As a consequence, the theory of EU law avoided the binary pitfall between choosing the federal statist nature of the EU or the confederal international character of the Union.[78] Beginning with the *Solange I* saga, it has been undisputed that EU law and politics were sui generis, neither national nor international, but something in-between that ought to be filled in with theoretical substance lest to be devoid of content.

This theoretical gap has been gradually closed through the development of constitutional pluralism. The *Solange I* ruling and its aftermath, which was definitely not theoretically premeditated, practically prompted the growth of a fresh theory to guide the complex web of relationships between autonomous legal and political sites. At the same time, as the contours of this theory became more precise and its normative predicaments more robust, the *Solange I* doctrine benefited from constitutional pluralism and has been, as a result and as described above, used as a normative model for multilevel governance in the global realm. The unique practices that the *Solange I* case consisted of have thus given rise to a new theory that has, in return, informed these unique practices to be upgraded inside the EU and expanded beyond it.

V. Conclusion

The story of *Solange I* is thus a paradigmatic example of social constructivism[79] at play in the field of law and politics beyond the state. New practices have given rise to a new theory, that has reshaped those practices in return, leading to further sophistication and differentiation of the theory to fit other jurisgenerative environments and their practices that had initially not even been thought of.[80] Furthermore, the meta-theory of social constructivism

78 Avbelj, 'Theory' (n. 70).

79 Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin University Books 1971).

80 For an alternative reading according to which Solange is a parochial and backward decision, see Vlad Perju, 'On Uses and Misuses of Human Rights in European Constitutionalism' in: Silja Voeneky and Gerald Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge University Press 2018), 263-295 (268). For a critique of this view, see in this issue Andrej Lang, '*Solange I* in the Mirror of Time and the Divergent Paths of Judicial Federalism and Constitutional Pluralism', HJIL 85 (2025), 411-449.

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also helps us to understand the resistance the novel practices spearheaded by *Solange I* have been confronted with. To paraphrase Feyerabend, the *Solange I* decision simply went against method,[81] demonstrating that the prevailing theoretical approaches no longer suffice to capture the new legal and political reality begotten by the process of European integration. Those with federal credo, judging by the conventional American federal experience, found the FCC's opposition to the supreme supranational law of the EU unacceptable. It was simply not part of their theoretical matrix for the EU. Similarly, some in the national statist strand of the German scholarly elite were also not entirely satisfied with the reconciliatory language of *Solange I*. It was not strong enough.[82]

As the same debate was elevated to the level of international law, playing out between the EU and the Council of Europe as well as the UN, the conventional international lawyers, long wedded to the idea of the supremacy international law, were also taken aback by the reticence of the ECJ and even the ECtHR.[83] Like their EU counterparts, the internationalists too feared an irreparable fragmentation of international law,[84] which is going to be torn into bits and pieces by the judicial authorities ruling over many insular legal orders of the global constellation, furthering their particular interests.

In all truth, none of those feared scenarios of a legal and political Armageddon came into existence because of the *Solange I* decision.[85] To the contrary, it turns out, with the benefit of hindsight that this ruling with its ingenious pursuit of structural congruence (but not homogeneity or identity!),[86] between legal and political orders worked as a cohesive force that, rather than pushing the global pluralist landscape further apart, brought the plurality of legal and political orders closer together by integrating them

81 Paul Feyerabend, *Against Method* (4th edn, Verso 2010).

82 Davies (n. 4), 180-200.

83 Tzanakopoulos, 'Judicial Dialogue' (n. 58), 185-215.

84 Tzanakopoulos, 'Judicial Dialogue' (n. 58), 185-215.

85 Of course, there are also less favorable, much more critical views of the contemporary developments that could be at least indirectly traced back to the Solange I decision, see in particular, Daniel Sarmiento, 'Requiem for Judicial Dialogue – The German Federal Constitutional Court's judgment in the Weiss case and Its European Implications', EU LAW LIVE 16 (2020), 9-20; Daniel R. Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech and Renáta Uitz, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order', Verfassungsblog, 26 May 2020, <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>, last access 15 April 2025.

86 Following the adoption of Art. 4(2) TEU the constitutional resistance to ECJ began to build around the concept of national constitutional identity. This line of jurisprudence is, however, distinct, neither directly related nor anticipated by the Solange case-law. For an alternative view, however, see in this issue Julian Scholtes, 'Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment', HJIL 85 (2025), 547-568.

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under the common pluralist vault of shared values, principles, and practices. In the absence of any potential emergence of a global government which, leaving its normative undesirability aside, could, as a unifying, universalist force create or even impose top-down a just legal and political order over the globe,[87] the better, perhaps the only alternative, is to follow the *Solange I* rationale. The latter in a pluralist way recognises the distinctiveness of different sites of regulation and socio-political-epistemic existence, but insists that they in their mutual interaction, which is inevitable in a globalised world, commit at least to the principle of non-regression of the existing standards of human rights protection, and beyond that engage in the exchange of good practices; borrowing of the higher standards of human rights protection, being thus entangled in a virtuous circle of a race to the top. If anything, this has been the original, both institutional and theoretical, contribution of the *Solange I* doctrine to the modern legal and political thought and practice beyond the state. Often misunderstood, even rejected from the conventional theoretical premises, the originality of *Solange I* goes way beyond the similarities that it shares with the traditional federalist and monist, statist constitutional accounts.

87 For the relevance of the *Solange I* jurisprudence at the current stage of (anti-)globalisation, see in this issue Karen J. Alter, 'So Long as We Are a Constitutional Democracy: The *Solange* Impulse in a Time of Anti-Globalism', HJIL 85 (2025), 599-626.

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