So Long as We Are a Constitutional Democracy: The *Solange* Impulse in a Time of Anti-Globalism

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Abstract

What is the role of constitutional courts in protecting rights and democracy in age of anti-globalism? This essay identifies how the German Constitutional Court's (GCC) *Solange* pushback historically reinforced individual rights and German democracy. The article defines the *Solange* method as the sum of the GCC's legally questionable push-back against European integration, contestation that this push-back generates, changes undertaken to address GCC concerns, followed by de-escalation but not retreat. After summarising fifty years of Solange pushback, the author calls for more *Solange* type pushback to deal with the threats of over-globalisation and anti-globalism. Alter defines the task for German legal scholars. Do not follow the

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GCC's recent framing of the problem. Return instead to the *Solange* strategy of calling for political change and demanding that politicians and judges protect individual rights and national democracy.

Keywords

European Integration Politics – European Law – Democratic Politics – International Law – Constitutional Law – Constitutional Courts

This special issue is convened for the 50th anniversary of the German Constitutional Court's (Bundesverfassungsgericht, GCC) *Solange* ruling wherein the GCC inserted itself as an intermediary protecting essential element of the German constitutional order from the European integration process. In 1974, the *Solange* decision appeared rather far-fetched. European integration was stuck in political doldrums, thus it seemed highly unlikely that European integration and European law was or soon would undermine German basic rights, let alone German democracy. When I first confronted the *Solange* ruling during my PhD research, I found it unsurprising that encroachments into national autonomy would reflexively generate resistance and I explained the *Solange* and *Maastricht* pushback as efforts to protect the GCC's turf and its own pre-eminence.[1] Even if I was right in part, I surely underappreciated the constitutional issues at play. From today's vantage the conversations surrounding the *Solange* and *Maastricht* decisions appear prescient.

This article embeds the *Solange* approach into the changing political context, exploring how the GCC's *Solange*-type rulings responded to and transformed German and European politics and European Court of Justice (ECJ) decision-making. As the conclusion explains, I am interested in the *Solange* method because I think the GCC developed the gold standard strategy to deal with the expanding and intrusive nature of international law. This essay argues that we need more, not less, *Solange* type engagement.

My argument is that the *Solange* ruling matters because of the way the GCC resisted the ECJ's assertion of European law supremacy. *Solange* is the German word for 'as long as'. The *Solange* method of push-back has the GCC defining conditions for the European Union (EU), the ECJ, and the German government. Until and as long as the set of conditions are not met, the GCC opens its jurisdictional doors to receive complaints about the

[1] Karen J. Alter, 'The European Court's Political Power', W. Eur. Pol. 19 (1996), 458-487. Karen J. Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001).

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constitutionality and legal appropriateness of specific European acts and ECJ interpretations, threatening to find them inapplicable in Germany. The various *Solange* iterations are deeply controversial, partly because they imply limits to the supremacy of European law, but also because each iteration advances novel and rather questionable legal arguments to generate legal leverage. The rulings engender contestation, which in my view is a good thing. What I dub the *Solange* method is the sum of the GCC's often quite problematic push-back, contestation this push-back generates, behavioural changes undertaken to address GCC concerns, followed by de-escalation but not retreat.[2] The upshot of the analysis is that the *Solange* method is productive, especially when the GCC names deeply felt concerns and forces political bodies and the legal community to take these concerns more seriously. I explain why the latest GCC contestations are unproductive, arguing that there is no discernible rights or democracy-enhancing objective within. That said, it is too soon to say how the most recent *Solange* moment will play out. This essay sets a challenge for legal and political minds of how to protect constitutional democracies in an age of anti-globalism. The *Solange* method is, I argue, the approach that we should repurpose for this moment.

Part I defines the *Solange* method by tracing its origin and iterations covering from 1974-2010. Uniting the iterations is the primary objective to create constitutional limits for the process of European integration, at least insofar as European integration impacts the German legal and democratic political order. Part II focuses on GCC pushback after 2010 where European integration and the ECJ are the putative targets, yet really what is happening is that European states are realising that a collective response will be more effective, so that the EU has become the level where states are creating solutions to new global challenges. This part develops the argument that we need a new set of constitutional expectations and justifications. I define the goal as striking a balance that includes helping citizens and groups protect Germany's constitutional identity in the face of over-globalisation, while defending democracy and resisting rights-compromising nationalist anti-globalisation. Part III concludes by asking what might be done to support and update the *Solange* impulse and method?

Let me presage some unusual elements in this analysis. First, this article's long-durée perspective suggests greater judicial foresight than might be warranted. I do think that the constitutional concerns are sincerely felt, and the

[2] My use of the '*Solange* method' term differs from German scholars who use the term to mean the specific doctrine developed in the *Solange* decision (review of EU law using the yardstick of German fundamental rights) as distinguished from identity control and *ultra vires* review.

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political scientist in me finds it unproblematic that judges consider political factors. Yet my historic situating and the focus on the productive developments that then follow surely give too much credit and validity to in-the-moment judicial determinations that have for good reasons been highly criticised.

Second, I will not belabour how problematic the GCC's legal argumentation has been. Others have done this, and my goal is different. Yes, I will argue that the legal justifications employed by the GCC were always questionable, and they have become even more problematic over time. I will also point out that judicial activism abounds. Yet if one considers the bigger picture, activism is not per se a problem and the GCC may be partially right in naming concerns that are deeply felt, even if the concerns are hard to translate into compelling constitutional legal argumentation. I encourage wise German legal minds to help constitutional judges develop better legal argumentation and strategies grounded in constitutional law. Contestation in the wake of *Solange*-type rulings helps accomplish this task.

Third, in asking the GCC to keep defending constitutional democracy, I am advancing an argument that is the opposite of an endorsement of global constitutionalism and global democracy. A global democracy wherein entire nations and populations can be overruled is highly likely to generate political backlash. In my view, it is politically better for European and international law, and better for democracy, if national level democracies stand up for themselves. Constitutional courts have a role to play as they are best able to protect individuals from the harms that majoritarianism and laissez-faire global capitalism inevitably generate. Their role is even more important when politicians are failing to do their part and democracy is itself under threat. That said, the GCC's *Solange* approach needs an update. We can wonder why Eurosceptic push-back tends to drive *Solange* moments, and map out a way for Constitutional Courts to promote citizen-efforts that call on governments to better protect rights and democracy. We may need to think harder about how appointment politics drive constitutional review, and how to ensure that *Solange* efforts do not become a counter-democratic form of minority rule.

I. The First Generation of *Solange* Rulings: Protecting Germany from the Process of European Integration

This section overviews with the benefit of hindsight the first three *Solange* iterations where the goal was to influence the European integration process.

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By explaining the valid impulse behind the rulings, and what then happened, the discussion demonstrates how the *Solange* method allows the GCC to insert a greater constitutional sensibility in European and German law and politics. For brevity sake, I skip over the details of how the various *Solange-type* rulings were received. As a general rule, each *Solange* iteration generated vocal public critique that spilled into speeches and newspapers, critical legal commentaries, formal complaints by the European Commission to the German foreign ministry, discussions and roundtables throughout the German legal academy and more. Contestation identified areas of consensus among the dissensus, and it generated political responses to address valid concerns. These developments repeatedly led the GCC to retreat by promising and practicing forbearance, thereby avoiding protracted conflicts with European institutions. Reviewing the *Solange* progression underscores the expansionist and activist nature of the GCC's pushback, before and especially via its *Lisbon* and post-*Lisbon* rulings (2009-present).

1. The *Solange* Method: *Solange I* Focuses on Insufficient European Human Rights Protections

The *Solange* story has its origins in 1967, when the GCC's First Senate rejected the claim that the European Economic Community's (EEC) Treaty of Rome was unconstitutional.[3] The GCC's endorsement was welcomed by supporters of European integration, yet German public opinion was becoming increasingly hostile to European integration.[4] Because the First Senate's ruling left important legal issues unaddressed, the ruling amplified the concerns of constitutional patriots.[5] In the 1960s, an important constitutional concern was the need to clarify Article 24 of the German constitution, the legal basis of European Community (EC) membership, which seemed to transfer the German legislative and political authority in an all or nothing way. Working through Europe could then become a means to circumvent the

3 FCC, order of 5 July 1967, 2 BvL 29/63, BVerfGE 22, 134 – *EEC law*, discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 71-80.

4 Bill Davies, 'Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law', Contemporary European History 21 (2012), 417-435 (423).

5 *Jan-Werner Müller* defines constitutional patriotism as 'the idea that political attachment ought to center on the norms and values of a liberal democratic constitution rather than a national culture or the "global human community"'. At a time when nationalism was associated with Nazism and thus feared, constitutional patriotism was widely embraced as a positive form of German pride. See Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press 2007).

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German constitution, which in light of Germany's Nazi past, was alarming. For others, the pressing issue was that the European legal system lacked any basic rights protections. Back then, European integration was an executive-led process and the only possible check on the European integration process would be if the ECJ started to find European legal acts to have limits.[6] This wasn't happening. The ECJ was issuing rulings that went well beyond the text of the Treaty of Rome, including declaring the direct effect and supremacy of Community law in national legal orders. Pro-European integration lawyers were championing the ECJ's iconoclastic legal interpretations,[7] and national governments appeared willing to use the Treaty of Rome's 'necessary and proper' and 'implied powers' provisions (Article 235 Treaty of Rome) to enable European level action wherever states so desired.[8] Then, in 1970, the ECJ declared in its *Internationale Handelsgesellschaft* decision that European law was even supreme to national constitutions.[9]

What is today called the *Solange I* ruling was a 1974 GCC decision reviewing a Frankfurt Administrative court's questioning the ECJ's *Internationale Handelsgesellschaft* decision. The Frankfurt court saw the ECJ's claim that European law supersedes even national constitutions unacceptable. The GCC agreed insofar as it found that 'Only the Bundesverfassungsgericht is entitled, within the framework of the powers granted to it in the Constitution, to protect fundamental rights guaranteed in the Constitution. No other court can deprive it of this duty imposed by constitutional law.'[10] The decision finessed the question of whether the GCC had the competence to invalidate European law, arguing that German implementation rendered European law an act of German state power. The GCC argued that it could find that European law is 'inapplicable' in Germany, which – the judges argued – is different than finding that European law is 'invalid'. At the time, legal commentators (and the authors of the legal dissent) saw the distinction between 'inapplicable' and 'invalid' as bogus.[11] That this distinction is now

6 At the time, the European Court of Human Rights could not receive direct appeals and most complaints were being blocked by the Commission that served as a gatekeeper. Henry G. Schermers, 'Acceptance of International Supervision of Human Rights', LJIL 12 (1999), 821-831.

7 Karen J. Alter, 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)' in: Karen J. Alter (ed.), *The European Court's Political Power* (Oxford University Press 2009), 63-91.

8 *Joseph Weiler* discusses this issue in terms of concerns about usage of the implied powers doctrine. Joseph Weiler, 'The Transformation of Europe', Yale L.J. 100 (1991), 2403-2483 (2444-2447).

9 ECJ, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, case no. 11-80, ECLI:EU:C:1970:114.

10 FCC, order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (282) – *Solange I*.

11 Alter, *Establishing the Supremacy of European Law* (n. 1), 91.

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accepted and replicated is testament to how even questionable interpretations can become part of a legal bedrock.

The *Solange* name came from the part of the ruling addressing whether the GCC would conduct regular review of European acts. The majority-ruling said '[a]s long as (*solange*) the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament of settled validity, which is adequate in comparison to the catalogue of fundamental rights contained in the Constitution', the German constitutional court would conduct its own review of the constitutionality of European law.[12] Not only did these requirements pose what seemed like insurmountable obstacles, having a democratic EC parliament and an EC catalogue of rights does not ensure that basic rights will be protected. In other words, the *Solange* proviso made little sense.

Meanwhile, much to everyone's surprise, the EU went on to fulfil the set of *Solange* requirements. The ECJ responded with a heralded and welcomed activist construction of a human rights-based jurisprudence.[13] Member states transformed the European Parliament into a directly elected body in 1979, and then repeatedly conferred to it greater legislative and oversight authority.

Well before the *Solange* conditions were met, the GCC retreated. In 1980, the same Frankfurt court tried to provoke the GCC to confront the ECJ, but this time the GCC backed the ECJ's jurisprudence finding the case inadmissible and signalling its willingness to revise its *Solange I* jurisprudence.[14] In 1981, the GCC suggested that a formal catalogue of basic rights and a democratic parliament may no longer be necessary for basic rights to be sufficiently protected.[15] In 1987, a private litigant appealed to the GCC an EC Commission factual determination regarding the EC's mushroom market, arguing that the EC Commission was factually wrong and that incorrect ECJ rulings cannot be binding. The GCC clearly stated that it would not become the appellate body for every disliked European level or ECJ decision. In what became known as the *Solange II* decision, the GCC declared that it

12 FCC, *Solange I* (n. 10), 271, 285.

13 The GCC's pushback was not the only factor pushing towards the development of a human rights jurisprudence (see Grainne De Burca, 'Roads Not Taken: The EU as a Global Human Rights Actor', AJIL 105 (2011), 649-693). Citing the activist nature of the ECJ's human rights jurisprudence, *Alter* and *Helfer* argue that national judges are quite willing to embrace judicial activism (see Laurence Helfer and Karen J. Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts', Theoretical Inquires in Law 14 (2013), 479-503).

14 German legal scholars dubbed the ruling the *Vielleicht* decision. FCC, order of 25 July 1979, 2 BvL 6/77, BVerfGE 52, 187 – *Vielleicht* discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 94.

15 FCC, order of 23 June 1981, BVerfGE 58, 1 (40-41) – *Eurocontrol I* discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 95.

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would 'no longer exercise its jurisdiction' to review whether European secondary law was or was not compatible with Germany's constitution, and thus that 'references to the Court under Article 100 (1) for that purpose are therefore inadmissible'.[16] Six months later, the GCC put down a rebellion by the German Federal Tax Court, declaring in its *Kloppenburg* decision that the ECJ is 'legal judge' for the issue. To fail to refer questions or defer to the ECJ regarding European law was to deny a German citizen their constitutional right to their 'legal judge'.[17]

The movement from *Solange I* to *Solange II* to the *Kloppenburg* decision is what I am calling the *Solange* method, a carrot and stick approach that encourages legal and political actors to act to address GCCs concerns. The stick is the threat to find European law inapplicable in Germany, while the carrot involves enhancing the domestic legal obligation to respect the EU law and the ECJ's legal authority. Step by step the GCC's *Solange* method involves: 1) an assertion of the supremacy of the national constitution, and the GCCs role in protecting basic rights and German democracy; 2) a requirement that all domestic actors – including judges – respect the law and authority associated with European (and international) commitments; 3) a specification of what a range of domestic and European legal and political actors must do to render European or international law constitutional within Germany. The GCC never winds back the doctrinal extensions, yet the episodes end with the GCC reinforcing the obligation to respect European law, the construction of guardrails to discourage litigants from raising endless cases, and a promise and practice of forbearance.

2. The *Maastricht* Iteration: Can Germany's Political Branches be Trusted to Defend German Democracy?

The next *Solange* iteration – the GCC's *Maastricht* ruling – lacked an explicit 'so long as' clause, yet it was the same mode of contestation. The end of the Cold War brought German reunification. As a quid-pro-quo reassurance that reunification would not portend German nationalism, the twelve existing European member states chose greater European integration. The 1992 Maastricht treaty transformed the EC into the EU, added the Monetary Union project, and authorised greater European-level coordination of state

16 FCC, order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339 (340, 387) – *Solange II*. See Alter, *Establishing the Supremacy of European Law* (n. 1), 95-98.

17 FCC, order of 8 April 1987, 2 BvR 687/85, BVerfGE 75, 223 (233-234) – *Kloppenburg* discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 98-103.

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foreign policies (Pillar II) and state justice and home affairs (Pillar III). Expanding European policy-making authority via the Pillar system was a way to distinguish supranational authority (Pillar I, The Common Market) from areas that would remain intergovernmental and beyond the purview of ECJ review (Pillars II and III).

Well before the Maastricht Treaty, however, how to reconcile European integration and the German federal democratic system was a growing concern. When the European Community tried to build a larger media market for European content, Bavaria, a German Land, challenged the effort arguing that regulating broadcasting was a state-level activity. Given that the European law in question – a directive – allows each state to determine the appropriate mode of implementation, one can argue that German constitutional concerns could be adequately addressed at the implementation stage. The GCC, however, wanted constitutional concerns to be addressed at the negotiation stage. Ruling before the issue reached the ECJ, the GCC upheld the directive while instructing the German government to consult and listen to German states as they engaged European policy-making.[18]

Then came the Maastricht Treaty expansions, which amped up concerns about encroachments into the separation of powers in Germany. Distracted by reunification, the negotiation, adoption and the ratification of the Maastricht Treaty may not have respected the consultation requirements the GCC had created. To create a better process going forward, as part of ratifying the Maastricht Treaty the Bundestag created a new Basic Law Article 23 that spelled out the role that Land governments, the Bundesrat and the Bundestag should play in formulating German positions on European-level policies. Article 23 was not the only constitutional change to facilitate European integration.[19] For example, the constitutional provision regarding the Bundesbank (Article 88) was revised to allow for a transfer of the Bundesbank's functions and competences to the yet-to-be established European Central Bank.

For the author of the GCC's *Maastricht* ruling, the constitutional changes did not go far enough. In 1993 I interviewed the author and his legal clerk (to whom the judge conferred one-hundred-percent agreement, and thus an ability to speak on his behalf).[20] Both admitted that if there is a democratic

18 FCC, judgment of 11 April 1989, BVerfGE 80, 74 – *EEC Television Broadcasting Directive* discussed in Alter, *Establishing the Supremacy of European Law* (n. 1), 104-109.

19 The Basic Law's original Article 23 was about German unification. By 1992, Article 23 had served its purpose, and thus it was basically a dead letter provision. Constitutional revisions actually went beyond the changes to Article 23 and 88. See Georg Ress, 'The Constitution and the Maastricht Treaty: Between Co-Operation and Conflict', German Politics 3 (1994), 47-74.

20 Interview with the German author of the *Maastricht* decision and his clerk, Karlsruhe, Germany (8 December 1993).

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will to integrate Germany into the EU, the GCC would not stand in the way. Yet they had no faith that members of the Bundestag fully understood the very long and complicated Maastricht Treaty, and thus they were sceptical that there was a German democratic will standing behind the EU's expanding authority. Germany does not permit popular referenda, so there was no way to put the Maastricht Treaty to a vote. Just as the initial *Solange* decision tried to define how basic rights could become part of European law, the GCC tried to define what it would mean for there to be a national level democracy alongside a European level democracy.

The GCC's 1993 *Maastricht* ruling had many legal innovations, including a problematic effort to specify what democracy requires in practice.[21] To facilitate the GCC's greater involvement in European integration, the GCC translated the constitutionally guaranteed 'right to vote' into a right for German votes be substantively meaningful. The decision's author explained that politicians, no matter how democratic they are, cannot turn over German sovereignty without a conscious decision by the people. Yet citizens and the GCC have no direct say in political decisions involving advancing European integration.[22] The GCC's 'right to vote' expansion was a people-powered means for the GCC to be brought into European integration conversations. The GCC also required the relevant German actors to do everything within their power to stop EU actions that run afoul of German separation of powers and the Basic Law's charter of individual rights. Part of the 'do everything' mandate included that the German Government had to raise legal challenges to *ultra vires* European acts by bringing a legal case to the ECJ. It would then be the ECJ's job to ensure that the limits of European authority are respected.[23]

The GCC remained focused on the ECJ as the problematic lynchpin of the European legal system. My notes of the meeting include the following: 'The 1974 message [to the ECJ] was to pay more attention to basic rights. The 1993 message is to stop your activism which undermines state sovereignty. You are not the motor of integration, the states are the masters of the treaty, and the people are the masters of the state.'[24] The GCC insisted that the ECJ lacked a *Kompetenz-Kompetenz*, meaning the legal right to determine the limits of its own authority. The GCC declared its intent to use the German

21 FCC, judgment of 12 October1993, 2 BvR 2134/92, 2159/92, BVerfGE 89, 155 (186-187) – *Maastricht*.

22 Interview with the German author of the *Maastricht* decision and his clerk, Karlsruhe, Germany (8 December 1993).

23 FCC, *Maastricht* (n. 21).

24 Interview with the German author of the *Maastricht* decision and his clerk, Karlsruhe, Germany (8 December 1993).

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act ratifying the Maastricht Treaty as the legal framework defining the limits of European authority. Given that the act of accession reiterated Maastricht Treaty provisions, the GCC was really asserting an authority to interpret European law, and to then find that transgressive European law (ausbrechende Rechtsakte) is inapplicable in Germany.

The opportunity to apply its *Maastricht* criteria arose during the extensive litigation regarding an EU regulation focused on banana imports. The saga is complex. Germany had a longstanding and deep history pertaining to banana imports, which is why the German government opposed the EU banana import regime, challenging it twice in front of the ECJ. German litigants also challenged the regulation, multiple times. Basic rights issues were addressed; the regulation was adjusted, yet ultimately the EU has the competence to regulate the European common market.[25] As with the *Solange II* case, a German importer continued to provoke a constitutional clash hoping to render the EU regulation inapplicable in Germany. The GCC avoided the central issue as long as it could, and it eventually sat on a case for four years, probably waiting for the author of the *Maastricht* ruling to leave the court. Using its *Banana Market Order* ruling to signal peace, the GCC ruled that as long as the ECJ's basic rights protections do not generally sink below a certain undefined level, the GCC will not conduct additional constitutional review of EU law.[26] This proviso made about as much sense as the *Solange I* proviso.

The upshot of this second *Solange* iteration is that the German government became more vigilant in protecting the German constitutional system in its European level actions, and the ECJ and European officials worked to respect basic rights, and the GCC retreated without recanting its controversial legal innovations.

3. The *Lisbon* Ruling: Adding the Objective of Protecting Germany's Statehood and 'Constitutional Identity'

Before the next *Solange* iteration, European integration evolved again. The 1997 Treaty of Amsterdam conferred to the EU a greater competence over immigration, civil procedure, and police and justice coordination, and

25 See Karen J. Alter and Sophie Meunier, 'Banana Splits: Nested and Competing Regimes in the Transatlantic Banana Trade Dispute', Journal of European Public Policy 13 (2006), 362-382.

26 FCC, order of 7 June 2000, 2 BvL 1/97, BVerfGE 102, 147 (147, 164) – *Banana Market Order*. See Alter, *Establishing the Supremacy of European Law* (n. 1), 110-115.

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it established the European Central Bank (ECB) and the Eurosystem (the governance mechanism for states that have adopted the euro as their currency). The Amsterdam Treaty also addressed some GCC concerns, enhancing the co-decision powers of the Parliament, further defining the subsidiarity rights of states, and creating principles and responsibilities for foreign policy and security coordination.[27] In 2000, the European Parliament, Commission and Council drafted a Charter on Fundamental Rights.[28] The next step was the European Constitution Project, an ambitious effort to define the values, objectives, spheres of action, and institutional governance for a European constitutional polity wherein a Charter of Fundamental Rights and European law would be supreme. The *Draft Treaty Establishing a Constitution for Europe* was signed by all member governments, adopted by the European Parliament, and ratified by 17 European states.[29] When ratification referenda in France and the Netherlands failed, the Constitution project faltered. For Eurosceptics, the ultimate failure of the European Constitution Project settled the question of what the future of the EU would be: The EU would forever be a union of independent European states.

The fallback strategy was the *Treaty of Lisbon on the Functioning of the European Union*, which incorporated the Charter on Fundamental Rights and enacted necessary changes that had been part of the Constitution Treaty.[30] Signed in 2009, EU officials insisted that the Lisbon Treaty conferred 'no additional exclusive competences' to the EU, and it included no references to the supremacy of European law. It did, however, complete 'the absorption of the remaining third Pillar aspects of the area of freedom, security and justice (FSJ), i. e. police and judicial cooperation in criminal matters, into the first Pillar', which means that the ECJ gained competence to rule on EU Pillar III policies.[31] A protocol attached the Lisbon Treaty (Protocol 2) expanded upon the Amsterdam subsidiarity protocol, granting national parliaments a role in European policy-making and the ECJ 'jurisdiction in actions on grounds of infringement of the principle of sub-

27 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997, OJ 1997 C 340/1.

28 Charter of Fundamental Rights of the European Union of 7 December 2000, OJ 2000 C 364/1.

29 *Draft Treaty* establishing a *Constitution* for *Europe of 18 July 2003*, OJ C 2003 169/1.

30 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007, OJ 2007 C 306/1.

31 Quotes come from: European Parliament, 'The Treaty of Lisbon. Fact Sheets on the European Union', at <https://www.europarl.europa.eu>, last access 24 April 2025.

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sidiarity by a legislative act'.[32] In sum, Lisbon Protocol 2 instantiated into European law the consultation rights demanded in the GCC's *Maastricht* ruling.

The process of ratifying and reviewing the constitutionality of the Lisbon Treaty was a replay of what had happened in the GCC's *Maastricht* ruling, but in a significantly different context. As they had done with the Maastricht, Amsterdam and Draft Constitution Treaties, the Bundestag overwhelmingly endorsed the Lisbon Treaty. Once again, the Bundestag updated Basic Law Article 23. The 1992 revision of Article 23 mainly instructed German authorities on how they had to proceed regarding issues of European policy-making. A 2006 constitutional revision further specified Länder participation in the European integration process. The Amsterdam Treaty, the defunct Constitution Project, and protocol 2 of the Lisbon Treaty created additional subsidiarity rights and roles for national legislative actors. The 2009 updating of the Basic Law's Article 23 addressed these changes. Under the revised Article 23, German states, the Bundesrat and the Bundestag gained a constitutionally guaranteed consultative role in European policy-making; the Bundesrat and Bundestag were explicitly authorised to defend Germany's subsidiary rights by challenging European legislative acts in front of the ECJ; and Article 23 required consultative, representative and co-governing rights for German states in the matters of school education, culture and broadcasting.[33] In short, the revised Article 23 instantiated into German constitutional law the GCC's 'democracy-protecting' constitutional doctrines.

Peter Gauweiler, a member of the Bundestag who would go on to challenge the Outright Monetary Transactions (OMT) policy (discussed in Part II), invoked the 'right to vote' doctrine, challenging the ratification of the Lisbon Treaty. The GCC seized on the opportunity as a chance to interpret the new Article 23 and cement what the failure of the European Constitution Project meant for the future of European integration.

The GCC's *Lisbon* ruling was a comprehensive restatement of Germany's constitutional engagement in the European Union.[34] My treatment is far too brief, mentioning only two innovations. First, the GCC declared its own competence to find EU law *ultra vires.* The *Solange I* ruling had established the GCC's right to find EU law inapplicable, and the *Maastricht* ruling indicated that the GCC would be interpreting EU Treaties directly. The

32 Consolidated version of the Treaty on the Functioning of the European Union – PROTOCOLS – Protocol (No. 2) on the application of the principles of subsidiarity and proportionality of 9 Mai 2008, OJ 2008 C 115/206. Discussed in Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', C. L. J. 68 (2009), 525-536.

33 Article 23 para. 1a of the German Basic Law.

34 FCC, judgment of 30 June 2009, BVerfGE 123, 267 – *Lisbon*.

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Lisbon ruling went further, exchanging the *Maastricht* ruling terminology of 'ausbrechender Rechtsakt' for a broader claim that international institutions have a secondary legal and political status in Germany. This seemingly puts European law on par with all international law. The notion of *ultra-vires* control also goes beyond the idea of subsidiarity rights, in that the GCC will also rule that the EU never had authority for certain issues. This means that any European act could be ruled a transgression of the German constitution, or of EU authority.[35] If the GCC makes the latter determination (which it did in its *PSPP* ruling, discussed in Part II), the GCC would be trespassing into what the GCC has long acknowledged as the ECJ's jurisdictional purview.

Second, the GCC's 'identity control' doctrine is linked to a conception of German statehood and a commitment to uphold fundamental unchangeable principles of the German Constitution, including the inviolable protection of human dignity. Whereas the *Broadcasting Directive* ruling had focused on Land rights, and the *Maastricht* ruling on democratic rights, the *Lisbon* ruling added the notion of an 'inviolable core content' to Germany's constitutional identity that the GCC, and only the GCC, must and will always protect. Identity control also suggests that Germany's identity as a nation must be maintained. The majority opinion argued that 'European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural, and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical, and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics.'[36] Remember this statement, as it creates a means for the GCC to act as the protector of every aspect of German citizenship, the German polity, and human dignity.

Given that the GCC also found the Lisbon Treaty changes to be constitutional, it was not entirely clear what the ruling would mean. Yet the combination of enhanced subsidiarity and proportionality requirements (Lisbon Treaty protocol 2), a 'right to vote' basis for any German voter to challenge

35 Frank Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon', GLJ 10 (2009), 1219-1240 (1219, 1231-1232).

36 FCC, *Lisbon* (n. 34), 357-358. Quoted in Peter Hilpold, 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European "Popular Spirit"', The Cambridge Yearbook of European Legal Studies 23 (2021), 159-192 (169). See also Schorkopf (n. 35), 1232-1233.

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any European policy, and now *ultra-vires* and identity control created an explosive possibility of more clashes with the European legal order.

As occurred following the *Solange I* and *Maastricht* rulings, the GCC then walked back its *Lisbon* ruling to create guardrails that would avoid a conflict with the ECJ. The case involved a constitutional complaint of a German Federal Labour Court ruling that had applied an ECJ interpretation that some legal minds thought to be a legal stretch.[37] When the employees won their case, the company (Honeywell) brought a constitutional complaint arguing that its freedom to contract and freedom of profession had been impinged upon. The GCC took the complaint as a chance to acknowledge the binding impact of European law in Germany. The GCC acknowledged the ECJ's right to develop general principles of EU law, and it created a threshold criterion that would limit GCC findings that EU is *ultra-vires.* In addition to an 'evident' and 'obvious' *ultra vires* legal act, an expansion of EU power had to generate a structural deficit that shifts the power structure between the EU and its member states.[38] The *Honeywell* decision created a 'friendliness towards European law', adding a *Kloppenberg* type requirement that German judges must first refer a case to the ECJ before ruling an EU act ultra-vires.[39] As the dissenting opinion pointed out, *Honeywell* was a retreat from the *Lisbon* ruling and a return to the *Solange II* and *Banana Market Order* positions. For the authors of the dissent, the retreat made it difficult if not impossible for states to reassert their power as masters of the treaty.[40]

II. The *Solange* Problem in a Globalised World

The first three *Solange* iterations were GCC reactions to advances in European integration. The latest GCC pushback is different in that it is not really about new EU expansions of authority or activist ECJ interpretations. Instead, the GCC seems to want to turn back time, to reclaim German authority that political leaders long ago transferred to the European level. Also new is that the GCC is letting Eurosceptics usurp the Bundestag,

37 The date to implement a directive barring age discrimination had not passed, and Germany had yet to implement the directive. Yet the ECJ ruled that Germany was already required to disallow age discrimination. See Christoph Möllers, 'German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 Bvr 2661/06, Honeywell', Eu Const. L. Rev. 7 (2011), 161-167 (163).

38 Möllers (n. 37), 165-166.

39 Franz C. Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020', Eu Const. L. Rev. 16 (2020), 733-769 (757).

40 Möllers (n. 37), 166-167.

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Bundesrat, Länder, and German government's authority and discretion vis-à-vis EU actions that do not clearly infringe on German subsidiarity rights. Meanwhile, the GCC seems to have no plan of trying to use push-back to improve procedures or substantive rights protection.

The EU laws and policies discussed in this section reflect decisions by European governments, with the support of national legislative actors, to act collectively rather than having 27 EU countries pursue their own independent policies. Many of the EU's new policies – on migration, asylum, regulating data, COVID protocols, and Russian sanctions – are controversial, which does not mean that they are not democratically adopted. One can reasonably question the legitimacy and legal appropriateness of the GCC actively enhancing the power of cranky Germans to challenge the collective decisions that democratic political institutions across Europe have chosen.

The GCC is not wholly hostile to the ECJ's engagement. It has not resisted ECJ's *Kadi* rulings, where the ECJ adopted the *Solange* method, declaring the supremacy of European law over the UN Charter (which makes acts of the Security Council supreme), and successfully pressuring the Commission, Member States and the UN to create changes to better protect due process rights for individuals flagged as supporters of terrorism.[41] The GCC's First Senate has embraced and collaboratively built on ECJ 'right to be forgotten' jurisprudence.[42] But the GCC's Second Senate is, for now, clinging to the constitutional toolkit it created even where there is no clear *Solange* method solution available. Perhaps the Second Senate is simply stuck in its own doctrine and fixations. Perhaps the GCC is channelling a Brexit drive to turn the clock back to a world in which Germany acts alone, much to Germany's own disadvantage.

In any event, the GCC's effort to pressure the ECJ to reject valid EU policy will not work. Insofar as the EU is exercising powers that member states transferred and insofar as EU level actions follow proper procedure and respect democratic and individual rights, the ECJ has no choice but to engage, uphold, and interpret EU level policy. In this respect, one can question the appropriateness of the GCC blaming the ECJ for seeing a legal issue that falls under its purview differently.

41 Grainne De Burca, 'The European Court and the International Legal Order after Kadi', Harv. Int'l L. J. 51 (2010), 1-49. On the changes the *Kadi* rulings propelled, see: Karen J. Alter, *The New Terrain of International Law* (Princeton University Press 2014), 298-306.

42 Jürgen Kühling, 'Germany: The Right to Be Forgotten' in: Franz Werro (ed.), The Right To Be Forgotten: A Comparative Study of the Emergent Right´s Evolution and Application in Europe, the Americas, and Asia (Springer 2020), 125-140. Ana Bobić, 'Developments in the EU-German Judicial Love Story: The Right to Be Forgotten II', GLJ 21 (2020), 31-39. Paul Friedl, 'A New European Fundamental Rights Court: The German Constitutional Court on the Right to Be Forgotten', European Papers 5 (2020), 447-460.

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The unfortunate part of this assessment is that there is so much to be done. Insofar as there is a deeply felt sentiment that globalisation has gone too far, one can reasonably ask why political bodies are not taking advantage of their *Lisbon*-created rights to bring *ultra-vires* suits to the ECJ. EU law also allows plaintiffs to bring 'failure to act' suits. Why not bring more of these suits? I suspect that litigants are holding back because European politicians are struggling with and concerned about the challenge of dealing with illiberal member states and Russian destabilisation of European democracies. Constructive engagement grounded in constitutionalism and individual rights could, however, bolster the courage and ability of European level actors to take bold action. The worst of all worlds involves letting only the Eurosceptics challenge EC actions. In this respect, one might wonder if the GCC is implicitly prioritising Euroscepticism? After reviewing the latest controversial GCC pushback, the next section will discuss the work that needs to be done.

1. European Arrest Warrants: The GCC Squanders an Opportunity

European cooperation in justice and home affairs has evolved significantly, as it should given the state of the world today. In the 1992 Maastricht Treaty, EU countries agreed to coordinate their justice and home affairs, and they have adopted a number of framework agreements and created the European Union Agency for Law Enforcement Cooperation (EUROPOL). Originally, the ECJ had no role in this third pillar of European integration, but in 2009 the Lisbon treaty absorbed the third pillar into the first pillar, creating a role for the ECJ in interpreting European justice and police framework agreements. ECJ rulings have established rights for suspects and accused individuals.[43] The sum of these changes is that the European arrest warrant system replaced the interstate system of extradition treaties, and the ECJ has gained a role interpreting these agreements. Of concern to the GCC is that EU Framework Agreements suggest that member states should mutually recognise and trust the decisions of national prosecutors, judges, and police. Yet one can plausibly argue that national constitutional rights can operate alongside an enhanced system of European-wide coordination and cooperation.

43 See, e. g.: ECJ, *Dieter Krombach v. André Bamberski*, judgment of 28 March 2000, case no. C-7/98, ECLI:EU:C:2000:164, para. 42; ECJ, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministers*, judgment of 26 June 2007, case no. C-305/05, ECLI:EU:C:2007:383, para. 29-32; ECJ, *Europese Gemeenschap v. Otis NV and Others*, judgment of 6 November 2012, case no. C-199/11, ECLI:EU:C:2012:684, para. 71.

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The GCC once again inserted itself, assuming the role of constitutional arbiter adjudicating appeals of extradition orders that lower courts had reviewed and approved. Frank Meyer argues that the GCC seized on an easily dispatched constitutional complaint, using the appeal as an opportunity to make a major statement regarding the European law governing arrest warrants.[44] That the GCC plays this intermediating review role is not the problem, nor is the ruling's case-specific finding of a lack of due process on the part of Italian and German judges. The problem is that the GCC did not apply its *Solange* method.

Rather than finding that 'as long as there are insufficient due process checks on the issuing of arrest warrants', the GCC's 2015 *European Arrest Warrant* ruling found criminal law to be an inviolable part of Germany's social and cultural identity. The judges grounded German jurisdiction in a need to protect human dignity, defined in such a way that even small procedural blips could be seen as violations of human dignity.[45] At a minimum, the ruling qualifies Germany's participation in the EU-wide cooperative system of police coordination. A maximal interpretation is that the GCC has claimed exclusive, unchangeable, uncompromisable, and ultimate authority over pretty much all criminal law issues. The legal argumentation is such a stretch that Meyer asks why the GCC would bother to invoke identity control and human dignity to challenge European arrest warrant authority? Meyer's answer is that the GCC wants to be very clear that ECJ rulings on arrest warrant issues have no legal relevance in Germany, since German law is all that matters.[46]

One wonders if this pushback is an actual impediment to the smooth operation of the system, or mostly a constitutional tempest in a teapot? One also wonders whether leaving the issue outside of the EU system of review would have made a real difference. The counterfactual to be answered is whether German officials would be able to force all of its extradition partners to adopt the due process review systems that the GCC saw as optimal. In any event, the broad nature of the GCC's pushback appears mostly unhelpful.

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44 Frank Meyer, '"From Solange II to Forever I:" The German Federal Constitutional Court and the European Arrest Warrant (and how the CJEU responded)', New Journal of European Criminal Law 7 (2016), 277-294 (278-279).

45 FCC, order of 15 December 2015, 2 BvR 2735/14, BVerfGE 140, 317 (343) – *European Arrest Warrant*. Discussed in Meyer (n. 44), 281. Critics may argue that the inability of a plaintiff to challenge their guilt or innocence is more than a mere procedural blip. Perhaps, but the more pragmatic question is whether Germany could have instead used an extradition treaty to force all other countries to first allow appeals to the charges before an extradition request would be accepted.

46 Meyer (n. 44), 283-293.

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Shouldn't the GCC instead be defending due process and scrutinising EU actions taken during the state of exception generated by September 11?[47]

2. Growing European Central Bank (ECB) Authority: Does the Bundesbank and the GCC Want to Turn Back Time?

The most recent GCC pushback is even more worrisome. The creation of the euro required a much deeper level of coordination of the fiscal policies (e. g. taxing and spending) of states in the Eurosystem. The Maastricht Treaty included a set of convergence criteria, but in deference to sovereignty, no tools were created to enforce the criteria. Meanwhile, on the monetary side, upon the creation of the euro in 1999, member states transferred to the ECB the responsibility of currency printing, price stability oversight, and market-related interventions to stabilise and sustain the value of the euro. In recognition of Germany's historic concerns about inflation, the ECB's design followed the German *Bundesbank* model, including the ECB's mandated focus on price stability and the structure of central bank independence.[48] Article 130 of the Lisbon treaty is clear that political and legal bodies cannot review or influence decisions and actions of the ECB.[49] Yet the Lisbon treaty also introduced a confusing and unsustainable distinction wherein economic policy is subject to subsidiarity, proportionality and legal review while monetary policy – a subset of economic policy – is not. This political fudge created an opening for the GCC to insist that certain monetary tools are actually economic policies.

The Greek financial crisis of 2007 tested the euro in new ways. One could blame the Greek government for deficit spending, yet policy-makers recognised that a number of European countries engage in deficit spending. Indeed Spain and Italy are larger economies with problems that are as deep, and even more likely to spread instability across EU member states. In this respect, the Greek sovereign debt crisis was tottering domino that was easier to shore up, and the best way to avoid a full-blown eurozone financial crisis. Moreover,

47 Possible concerns are identified in Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11', U. Pa. J. Const. L. 6 (2004), 1001-1083.

48 The ECB is located in Frankfurt and its governance structure includes an Executive Board appointed by political bodies as well as representatives from national Central Banks.

49 Article 130 states 'When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body.'

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one could also blame German and French banks that had profited greatly by issuing loose euro-denominated credit to Greek individuals and businesses. A Greek government default would make repaying private debt impossible, and a failure to repay this debt could compromise French and German banks.

The IMF intervened, creating a package that averted a Greek default. The ECB's role in this crisis-moment was to stabilise the euro and European banks. ECB President Draghi announced a plan to exceptionally purchase government bonds that were deemed too risky for markets, associating conditions with the purchasing promise (the so-called Outright Monetary Transactions (OMT) policy).[50] The new and exceptional OMT policy was intended to calm financial markets, and the strategy worked so well that the ECB never actually purchased OMT bonds. In other words, the announcement of a willingness to act on its own calmed financial markets.

Once again, Peter Gauweiler appealed to the GCC. One senses that Gauweiler was unhappy that the Bundestag had not embraced the active engagement that the GCC's *Lisbon* ruling had invited.[51] He and GCC judges also seemed to be unhappy that the ECB would employ a collective resource to help a country that had practiced fiscal imprudence. The legal challenge was rather audacious. *Gauweiler* was targeting the Bundestag's failure to file a complaint with the ECJ; meanwhile ECB policies are not subject to legal review, the OMT policy had never been implemented, and there was good reason to worry about contagion affecting the entire eurozone. The GCC, following its *Honeywell* mandate, referred to the ECJ the question of whether the OMT was *ultra-vires*. While the reference demonstrated the required 'friendliness' – it was the first-ever GCC reference – the substantive issue was moot and the GCC's reference basically told the ECJ how it must rule.[52]

The ECJ issued its OMT preliminary ruling in June, 2015, following the GCC's direction in part. It controlled to ensure that the OMT policy was adopted following proper procedure and that the policy fell under the powers conferred to the ECB. The ECJ required the OMT policy to be exceptional, limited in time and application, and applied with strict conditions. But the ECJ also defined the legal issue differently, accepting ECB officials' claims

50 ECB, 'Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012', ECB of 26 July 2012, at <https://www.ecb.europa.eu/>, last access 24 April 2025.

51 See Severin Weiland, 'The German Politician Behind the Lisbon Suit', Der Spiegel of 1 July 2009, at <https://www.spiegel.de>, last access 24 April 2025.

52 The text of the preliminary reference suggested that it was 'likely' that the OMT decision exceeded ECB competences, but the action could be saved if the ECB's action were given a certain interpretation. See Paul P. Craig and Menelaos Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions', E. L. Rev. 41 (2016), 4-24 (7).

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that the goal of the ECB policy was to preserve monetary policy and encourage price stability. In other words, the ECJ displayed an appropriate and legally required deference to the ECB's monetary policy expertise and authority.[53]

The case then returned to the GCC. On the one hand, it is truly pointless to prohibit the ECB from working with the IMF or to limit the ECB's use of speech-acts and signalling to calm markets. On the other hand, *Gauweiler* was right that the ECB would continue to make OMT-type pronouncements, and it would continue to help Eurosystem countries in need. A year after the ECJ's preliminary ruling, the GCC issued its own ruling. On the face of it, the GCC agreed with the ECJ ruling. While it did not declare the OMT policy to be *ultra vires*, the GCC undertook its own full review, confirming that the relevant legal authority had been properly transferred to the ECB, conducting 'identity control', and confirming that the ECJ had operated within its delegated authority in validating the OMT policy.[54] Giving its own interpretive spin to the ECJ's ruling, the GCC ruled that the Bundesbank can only participate in ECB collective actions insofar as the purchases are limited from the outset, intervention is stopped when no longer needed, conditions attached are not distorted, and the purchases are not announced (so that the German economy is not then destabilised). The GCC went on to criticise how the ECJ had done its job. The ECJ had, the GCC argued, not sufficiently reviewed the factual assumptions; it had not determined that the policy fit within the definition of monetary policy; and it had not developed a principle wherein democratic legitimacy requirements called for a 'strict judicial review' of the ECB's mandate.[55] The grumpy and arguably *ultra-vires OMT-Programme* decision sent a signal that the GCC was unhappy. Given that the OMT policy had been upheld, the EU did not take formal action and criticism was muted.

Yet the conflict was far from over; the next iteration was already in the queue. The Greek financial crisis was really a microcosm of the global 2007-2008 financial crisis. Quick and radical actions on the part of many governments kept the crisis from spilling into a global depression. For example, the United States created the Troubled Assets Relief Program (TARP), and the United States (US) government stepped in to save the American automobile industry. Central banks and policy-makers then created new monetary tools to be better prepared to act as lenders of last resort in the future. In 2014 the

53 ECJ, *Peter Gauweiler and Others v. Deutscher Bundestag*, judgment of 16 June 2015, case no. C-62/14, ECLI:EU:C:2015:400. For more, see Craig and Markakis (n. 52).

54 FCC, judgment of 21 June 2016, BVerfGE 142, 123 – *OMT-Programme*.

55 FCC, *OMT-Programme* (n. 54), 181-221.

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ECB announced a 'non-standard toolkit' it could use to reassure markets that the ECB would protect the stability of Eurozone countries and their banking sectors. The Public Sector Purchase Programme (PSPP) can be used for national central bank and public-sector bonds from specified agencies based in the Eurozone. This tool was opposed by the Bundesbank. Unlike the OMT, the ECB started to use its toolkit in limited ways starting in 2015.[56] It should be underscored that the adoption and implementation of these new tools was subject to collective decision-making by the ECB Governing Council, which includes six members and 20 national central bank governors. While Bundesbank arguments have significant influence in Governing Council deliberations, and along with four other eurozone heavyweights the Bundesbank has a greater voting voice, the Bundesbank can still be outvoted.[57] Political actors have accepted this reality. In 1992, the Bundestag amended the German Constitution to allow for the transfer of authority to the ECB. Especially given that the Bundesbank is not a democratically accountable institution, one can reasonably ask what German right to vote was undermined by the creation of the PSPP programme?

The GCC's *PSPP-Programme* ruling was a repeat of the *OMT-Programme* proceedings, this time with the nightmare scenario outcome. A German citizen brought a charge against the Bundestag for having failed to challenge the ECB's PSPP programme and the GCC referred the case to the ECJ and instructed it on how it should rule. This time, however, the GCC rejected the ECJ interpretation and declared the PSPP programme *ultra-vires*. It then ordered the German government and the Bundesbank not to participate in the programme.[58]

The *PSPP-Programme* ruling outshines all other *Solange* iterations in the magnitude and harshness of the criticism it has received. To name just a few problems: 1) Whereas in the past the GCC criticised the ECJ for having invented and stretched European law, this time the ECJ practiced judicial restraint and the GCC demanded that the ECJ should have been activist in a way barred by the Lisbon Treaty, and prohibited in Germany itself. 2) The GCC is seen as having violated its own *Honeywell* requirements that the ultra vires act be 'evident' and 'obvious', and in ordering to the German government and Bundesbank to violate their European obligations, the GCC

56 For a list of tools, see: ECB, 'Asset Purchase Programmes', at <https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html>, last access 24 April 2025.

57 For an explanation of weighted voting and the rotation on the governing board, see ECB, 'Rotation of Voting Rights in the Governing Council', ECB of 1 December 2014 (updated on 1 January 2023), at <https://www.ecb.europa.eu/ecb-and-you/explainers/tell-me-more/html/voting-rotation.en.html>, last access 24 April 2025.

58 FCC, judgment of 05 May 2020, BVerfGE 154, 17 – *PSPP-Programme*.

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trespassed its own authority;[59] 3) Not only does the GCC lack jurisdiction to review ECB actions, it lacks substantive expertise and its recommendations make no practical sense.

My concern is the democratic and policy elements of the ruling. As in the *OMT-Programme* ruling, the GCC adopted the perspective of Bundesbank critics, seeing the ECB's intervention as designed to stop the 'spread' of interest rates that would 'naturally occur' if fiscally imprudent governments had to pay a higher interest rate on government bonds.[60] According to the GCC, efforts to influence the interest-rate spread fall into the category of economic policy rather than monetary policy. As many have pointed out, the Lisbon Treaty's distinction between economic and monetary governance is unworkable in practice. The relevant point is that the Lisbon Treaty puts ECB decisions outside of judicial and political intervention, for good reason. Central bank independence can go too far, but it exists because voters and politicians are regularly tempted by bad monetary policy decisions.

The GCC worried that the ECJ did not delve sufficiently into the factual basis of the ECB's policy-choices. My worry is that constitutional judges lack the expertise to do so. Political economists recognise that Central Bankers were operating in a context of radical uncertainty, playing what is essentially a confidence game. Because Central Bank market intervention, through the regular tool of buying and selling public-sector bonds, is a confidence game, judicial review and proportionality review are simply not usable tools.[61] This is probably why no Supreme Court has exercised the type of Central Bank oversight that the GCC demands of the ECJ, and that the Lisbon Treaty precludes.

It is reasonable to worry that monetary easing will generate inflation. Presumably this concern is the primary focus of every meeting of the ECB's Governing Council, and is raised in every public-record questioning of the ECB in the European Parliament. The democratic problem is greater. Bundesbank critics see state level fiscal imprudence as the primary reason that private sector bond-buyers might be reluctant to buy the public-sector bonds. This may or may not be true. The critics, however, think that the natural market remedy would be for countries with large deficits to then pay a significantly higher interest rates (creating a natural interest rate 'spread'). Of course charging higher interest rates for some country Eurobonds would create even greater destabilising economic problems, and there is the reality

59 Mayer (n. 39).

60 Craig and Markakis (n. 52), 9.

61 Karen J. Alter, 'When and How to Legally Challenge Economic Globalization: A Comment on the German Constitutional Court's False Promise', I.CON 19 (2021), 269-284 (277-280).

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that governments and Central Banks exist to counteract what market actors worry and panic about. In the radical viewpoint, however, it would be better if any of the following options occurred: a) maybe currency management should revert back to states, which would mean that the euro would be rolled back; b) maybe it would be good if high interest rates pushed European states into default, because then Greek-style austerity could be forced on them; c) maybe states should be expelled from the eurozone.[62] I won't bother to point out the pitfalls of options a, b, and c.[63] The relevant point is that even if a subset of German voters agree, these types of policy decisions are above the paygrade of the Bundesbank, average citizens, and the GCC.

With respect to the euro and the ECB, a democratic choice has been made. The EU created the option of a monetary union, and twenty European countries opted in. The Bundestag endorsed the Maastricht Treaty objective of creating a monetary union, changing the German constitution to enable it. Later German political leaders chose to join the Eurozone, and they approved the accountability setup of the ECB. Then, the Bundesrat, the Bundestag, and the German government chose not to raise a legal challenge to the OMT or the PSPP policies.

The sad part of this whole story is that there are serious reasons to question political decision to help banks and not individuals impacted by the 2007-2008 financial crisis. There may even be a legal review role to play. Rather than focusing on the ECJ's actions, shouldn't constitutional courts be asking governments to also help individuals, or to create oversight mechanisms based on the Maastricht convergence criteria? Should German banks be required to more prudently lend monies so as to protect their solvency? It is no small irony that the GCC declared the PSPP programme *ultra-vires* during the COVID-19 pandemic, a moment when European and German leaders prioritised quantitative easing. Should the GCC have the power to stop these exceptional actions too? The ruling was as substantively unhelpful as it was politically outrageous. To symbolically appease the GCC, the ECB confidentially shared with the EU and German parliaments some of the reasoning behind their decisions, after which both declared themselves satisfied that the ECB was acting prudently.[64]

62 Carlo Bastasin, 'Defending The Wolf: The Useful Contradiction of the Bundesbank', SEP Policy Brief No. 1 – 2014, at <https://www.brookings.edu/wp-content/uploads/2016/06/Defending-The-Wolf.pdf>, last access 24 April 2025.

63 See, for example, Barry Eichengreen, 'The Breakup of the Euro Area' in: Alberto Alesina and Francesco Giavazzi (eds), *Europe and the Euro* (University of Chicago Press 2010), 11-51.

64 Mayer (n. 39), 762 f.

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3. Wither the *Solange* Method?

I argued that the first-generation *Solange* iterations were productive insofar as they named valid and deeply felt concerns; they were about protecting individual rights and national democracy; and they generated contestation about the issues raised by the rulings. The post-*Lisbon* ruling iterations are problematic in that the GCC seems to be stuck in its old battles, seeing the ECJ as the problem when really it is European governments that are falling down on their responsibilities. Entrenched in contesting the ECJ, the risk of the *Solange* method is playing out today. *Solange* iterations intentionally encourage litigants to push their own interests and viewpoints through a constitutional appeal. The GCC regularly walks back its *Solange* assertions because being a tool of provocateurs is not the constitutional role German Constitutional judges want to play. If history is our guide, it is too soon to know what will become of the current GCC pushback, especially after the current set of judges leave office and thereby allow for a return to constructive engagement.

The larger point is that problem is not the *Solange* method per se. Indeed, new *Solange* criteria to protect individual rights and democracy might be warranted to address the set of issues European governments are grappling with. Yet, as I have argued, the GCC is misdirecting its critics, framing the question as being about 'whether Europe can act' and suggesting that the ECJ is both the problem and the solution.[65] German lawyers err insofar as they engage by accepting the GCC's framing. They also err in letting the weakness of the GCC's recent rulings drive their critiques. The real and braver issue to debate and contest is the *Solange* question: what must national and European policy-makers and judges do to better protect democracy, individual rights, and human dignity? How might the *Lisbon* toolkit be constructively deployed towards these ends?[66]

III. The *Solange* Method in a Time of Anti-Globalism

I am interested in the *Solange* method because the current global capitalist system is seriously out of whack, to the point that democracy is at risk. I

65 Alter, 'Economic Globalization' (n. 61).

66 Right after the *Lisbon* ruling, there was greater optimism and hope that the *Lisbon* criteria could be developed to enhance social democracy. A good question worth investigating is why this hasn't happened. See Andreas Fischer-Lescano, Christian Joerges and Arndt Wonka (eds), *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives* (ZERP 2010).

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have my own views of where the problems lie. Whether mine or a different set of issues are the right ones to reform, it seems undeniable that reasoned minds should be debating how much globalisation to accept or scale back. This conversation is hard to have insofar as anti-globalism is unleashing a 'we want none' nationalism. Now more than ever we need constitutional courts to protect the political process, due process, elections, and individual and minority rights. Judicial intervention may stir contestation, yet so long as constitutional courts are articulating deeply felt rights-based and procedural concerns, the contestation will be productive.

I have focused on the GCC, but it is not alone in using the *Solange* method towards good ends. The Colombian Constitution has incorporated international human rights treaties, and it has created the notion of a constitutional bloc, applying these ideas to both challenge and reinforce the applicability of Andean law and Inter-American Human Rights Law in Colombia.[67] Constitutional courts in South Africa and Brazil have used their constitutions to push back against efforts to use the intellectual property protections of the World Trade Organization to stymie government efforts to provide life-saving AIDS medications.[68] The commonality in these examples is that domestic and international law are not treated as all-or-nothing propositions, and constitutional courts are intervening to protect cherished national values, while recognising that these values exist alongside a presumption that polities should follow their international commitments. In practice this means that international and national judges should work together to render domestic and international law compatible, at least as long as international law is not actually undermining the national constitutional order and the protection of basic rights.

There are two jointly necessary and collectively sufficient permissive conditions that makes the *Solange* method possible, both of which are increasingly at risk. The *Solange* method requires a Western style rule of law, where governments are also held accountable to constitutional limits. This, in turn, requires judicial independence. Second, there must be a national political culture of constitutional obedience where 'judges help define legitimate political action and determine whether specific contested acts are "constitutional"'.[69] Autocratic legalism is how authoritarians undermine judicial inde-

67 Karen J. Alter, 'National Perspectives on International Constitutional Review: Diverging Optics' in: Erin F. Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar 2018), 244-271 (254-257).

68 Holger Hestermeyer, *Human Rights and the WTO* (Oxford University Press 2008), 1-17.

69 Karen J. Alter, *The New Terrain of International Law* (Princeton University Press 2014), 290-295.

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pendence.[70] Resigned acquiescence and political cynicism is how political opponents undermine cultures of constitutional obedience. Indeed, a number of countries that had cultures of constitutional obedience are now wavering, and with this wavering comes the undermining of democracy.[71] This means that we cannot take judicial independence, support for a genuine rule of law, or the survival of the *Solange* method for granted.

Here is the bottom line. Voters are indicating their frustration with what globalisation has brought, creating contestation about over-globalisation. Politicians do not know how to respond, and nationalist anti-globalism is becoming a very real threat to democracy. While I don't love the idea of identity control, the desire to protect the national identity is deeply felt. Knowing that the GCC never retrenches its doctrine, German scholars should work on recalibrating the *Lisbon* ruling criteria. We need arguments about how the 'right to vote' must not become a cudgel against reasonable political decisions to *not* assert subsidiarity rights, and legal cases and arguments that render identity control, *ultra vires* review, and human dignity review helpful for the age of globalisation.

While I have argued for more *Solange* method action, German scholars should also be debating when and why the GCC should step back. Part of this conversation must involve a realistic assessment of what the legal process, in comparison to the political process, best achieves. The question, therefore, is not what the constitution allows. If anything, the *Solange* iterations demonstrate the plasticity of any constitution. The issue is that adjudication is inherently a process full of blinders. Judges must be narrowly focused on the factual pattern; legal proceedings inevitably feature only a slice of the valid viewpoints that matter; and there are legal processes and principles to prioritise. Meanwhile judges are not by nature prescient people; they tend to be conservative, insular and myopic. The answer, therefore, is to double down on the *legal process,* meaning iteration, contestation, and correction. Assume that litigants will make tendentious arguments in support of self-interested and political viewpoints. Assume that judges are humans who will at times overreach. Active contestation of problematic rulings alongside a robust discussion of the important role that constitutional review should play in a globalised world and during a populist moment is the antidote.

Finally, we all need to create the conditions that make *Solange* method pushback possible and effective. Legal pluralism is here to stay, and so is international law. In 2014 I argued that the 'international and domestic rule

70 Kim Lane Scheppele, 'Autocratic Legalism', U. Chi. L. Rev. 85 (2018), 545-583.

71 For more, see: Karen J. Alter, 'The Future of Embedded International Law: Democratic and Authoritarian Trajectories', Chi. J. Int'l L. 23 (2022), 26-43.

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of law are intertwined and co-dependent, rising and falling in legitimacy and effectiveness together. We will not be returning to the old terrain of international law, just as we will not be returning to the sovereignty of national law. This means that the only way forward is to find a way to reconcile international law and democracy by making international law responsive to its stakeholders, the society of states and peoples who benefit from a rule of law.'[72] The recent GCC pushback will fail because European leaders are right that collective action is the most effective, the ECJ has no choice but to uphold valid EU policies, and autarchy is no solution. Meanwhile, there is so much that constitutional contestation can help accomplish. Judges need good cases, and we all need constructive *Solange* method engagement. The real debate, therefore, should be about when, where, how far, and how constitutional contestation can help defend democracy and rights in an age of over-globalisation and anti-globalism.

72 Alter, *New Terrain* (n. 69), 365.

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