A Parallel Legal Universe – The *Solange I* Dissent and Its Legacy

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Abstract

This article takes the dissenting opinion of the German Constitutional Court's 1974 *Solange I*-decision as a starting point to explore legal paths not taken. Based on an analysis of the majority and the minority opinions in *Solange I*, the article presents a reflection about what a parallel universe would look like in which the dissenting minority was not the minority and suggests some lessons that follow from this reflection. This is done against the background of the broader question of the consistency of dissenting opinions in European integration related cases before the German Constitutional Court.

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I. Introduction

In '*Doctor Strange in the Multiverse of Madness*', one of the more recent movies in the Marvel Cinematic Universe,[1] the protagonist, Doctor Stephen Strange, travels through a number of parallel universes that differ more or less significantly from his original universe. In one of the parallel universes, for example, you have to stop at traffic lights when the light is green and cross the road when it is red.[2] Parallel universes are the subject of scientific theory-building and pop culture narratives. In law, dissenting opinions to a decision of a supreme or constitutional court open a window to a parallel universe. To another legal world. A world that could be – but isn't or isn't yet.

What might a parallel universe look like in which the defeated judges from *Solange I* were in the majority? I would like to explore possible answers to this question. I will first outline the content of the majority opinion (II.) and of the dissenting opinion (III.). I will then turn to some considerations about what a parallel universe would look like in which the dissenting minority was not the minority and the lessons that follow from this reflection (IV., V.).

II. The *Solange I* Majority Opinion

In the *Solange I* decision of 29 May 1974,[3] a 5 to 3 majority of the Second Senate of the German Constitutional Court stipulated constitutional limits on the primacy of European law and claimed a right of judicial review of European action in order to safeguard the German fundamental rights guar-

1 Doctor Strange in the Multiverse of Madness, Marvel Studios 2022, 126 min.

2 At 00:40:27 (Earth-838).

3 BVerfGE 37, 271 (282) – *Solange I*. There are two English translations of *Solange I*: One is published in *Common Market Law Reports* 1974, 540 and was reprinted in Andrew Oppenheimer, *The Relationship between European Community Law and National Law: The Cases, Volume I* (Cambridge University Press 1995), 419. Another translation – albeit without the dissenting opinion – may be found in Bundesverfassungsgericht (ed.), *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court, Volume 1 Part I: International Law and Law of the European Communities 1952-1989* (Nomos 1993), 182. This book is out of print, but the text is available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>, last access 6 May 2025.

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anteed under the German Constitution by the German Constitutional Court, '*as long as*' (hence '*solange*', the respective German term) fundamental rights protection at the European level did not correspond to the level of protection under the German Constitution.[4]

The central argument of the majority of the Court is that Germany joining the European Communities did not open the way to amending the basic structure of the German constitution (Basic Law), which forms the basis of its identity,[5] without a formal amendment to the Basic Law. The Court acknowledges ('*certainly*') that the competent Community organs can make law which the competent German constitutional organs could not make under the Basic Law and which is nonetheless valid and is to be applied directly in Germany.[6]

The majority insists that the section of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. This assessment is presented as a preliminary and a temporary one, '*the present state of integration of the Community is of crucial importance*'.[7]

The majority judges point to the fact that the '*Community still lacks a democratically legitimate parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level*'.[8] This was written in 1974, five years before the introduction of direct elections to the European Parliament. A full responsibility of the European institutions participating in legislation taken literally would mean a full responsibility of the Commission and the Council. This is not even established today and considering the Council as a sort of second chamber, this request is either evidence of a misunderstanding of the *modus operandi* of European legislation or wilfully established as a requirement impossible to fulfil.

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4 For the details of the actual case, see in this issue the contribution by Andrej Lang, '*Solange I* in the Mirror of Time and the Divergent Paths of Judicial Federalism and Constitutional Pluralism', HJIL 85 (2025), 411-449.

5 See for the identity-argument and the Solange-saga the contribution in this issue by Julian Scholtes, 'Freeing Constitutional Identity from Unamendability: *Solange I* as a Constitutional Identity Judgment', HJIL 85 (2025), 547-568.

6 BVerfGE, *Solange I* (n. 3), 279: 'Gewiss können die zuständigen Gemeinschaftsorgane Recht setzen, das die deutschen zuständigen Verfassungsorgane nach dem Recht des Grundgesetzes nicht setzen könnten und das gleichwohl unmittelbar in der Bundesrepublik Deutschland gilt und anzuwenden ist.'

7 BVerfGE, *Solange I* (n. 3), 280: 'Dabei ist der gegenwärtige Stand der Integration der Gemeinschaft von entscheidender Bedeutung.'

8 BVerfGE, *Solange I* (n. 3), 280: 'Sie entbehrt noch eines unmittelbar demokratisch legitimierten, aus allgemeinen Wahlen hervorgegangenen Parlaments, das Gesetzgebungsbefugnisse besitzt und dem die zur Gesetzgebung zuständigen Gemeinschaftsorgane politisch voll verantwortlich sind.'

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The majority then points to the fact that the European Economic Community (EEC)

> 'still lacks, in particular, a codified catalogue of fundamental rights, the substance of which is reliably and un-ambiguously fixed for the future in the same way as the substance of the Basic Law and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Basic Law with regard to fundamental rights'.[9]

The majority insists that the transfer of public authority to supranational institutions be subject to constitutional limits: there is no authorisation to give up the identity of the German constitutional order by means of transferring competences to supranational institutions with the result of an '*intrusion into the fundamental architecture, the constituting structures*' of the Constitution.[10]

Then comes the famous '*Solange*'-sentence: As long as there is not the legal certainty that would come with a codified catalogue of European fundamental rights – the fundamental rights-friendly decisions of the European Court of Justice (ECJ) are not enough –, the reservation derived from Art. 24 Basic Law applies, meaning German fundamental rights apply, under the jurisdiction of the German Constitutional Court.[11]

The reference to identity of a constitution sounds familiar nowadays, as it resonates with Art. 4 para. 2 Treaty on European Union (TEU) that stipulates that the European Union '*shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional […]*'. In 1974, the only reference point for identity language in German constitutionalism was Carl Schmitt's 1928 reflection in his *Verfassungslehre* (Constitutional theory) about an

9 BVerfGE, *Solange I* (n. 3), 280: '[…] sie entbehrt insbesondere noch eines kodifizierten Grundrechtskatalogs, dessen Inhalt ebenso zuverlässig und für die Zukunft unzweideutig feststeht wie der des Grundgesetzes und deshalb einen Vergleich und eine Entscheidung gestattet, ob derzeit der in der Gemeinschaft allgemein verbindliche Grundrechtsstandard des Gemeinschaftsrechts auf die Dauer dem Grundrechtsstandard des Grundgesetzes, unbeschadet möglicher Modifikationen, derart adäquat ist, dass die angegebene Grenze, die Art. 24 GG zieht, nicht überschritten wird.'

10 BVerfGE, *Solange I* (n. 3), 275 et seq.: '[Art. 24 GG] eröffnet nicht den Weg, die Grundstruktur der Verfassung, auf der ihre Identität beruht, ohne Verfassungsänderung, nämlich durch die Gesetzgebung der zwischenstaatlichen Einrichtung zu ändern. […] Art. 24 GG begrenzt diese Möglichkeit, indem an ihm eine Änderung des Vertrags scheitert, die die Identität der geltenden Verfassung der Bundesrepublik Deutschland durch Einbruch in die sie konstituierenden Strukturen aufheben würde.'

11 BVerfGE, *Solange I* (n. 3), 280/281: 'Solange diese Rechtsgewissheit, die allein durch die anerkanntermaßen bisher grundrechtsfreundliche Rechtsprechung des Europäischen Gerichtshofs nicht gewährleistet ist, im Zuge der weiteren Integration der Gemeinschaft nicht erreicht ist, gilt der aus Art. 24 GG hergeleitete Vorbehalt. Es handelt sich also um eine rechtliche Schwierigkeit, die ausschließlich aus dem noch in Fluss befindlichen fortschreitenden Integrationsprozess der Gemeinschaft entsteht und mit der gegenwärtigen Phase des Übergangs beendet sein wird.'

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identity of the Weimar constitution that would be out of reach for constitutional amendment.[12] This idea, initially clearly designed to limit the powers of parliament out of the Schmittian anti-parliamentarian resentment, was codified in the 1949 Basic Law in Art. 79 para. 3 Basic Law, but this time as a safeguard against German backsliding into '*dictatorship and barbarism*'.[13]

Note that there is no reference to Art. 79 para. 3 Basic Law at all in *Solange I* which indicates Arts 1 and 20 Basic Law as elements of the constitution which can never be modified (the '*eternity clause*') and which later would be the basis for the German Constitutional Court to identify the national constitutional identity (see Art. 4 para. 2 TEU) of the German Constitution, which would include the human dignity (Art. 1 Basic Law) core of any fundamental right of the German Constitution.[14] The majority of *Solange I* does not limit the reach of German fundamental rights protection in that way, also in the latter part of the decision, the judges simply apply Art. 12 Basic Law. The missing reference to Art. 79 para. 3 Basic Law is particularly intriguing as Art. 1 Basic Law could have helped the line of reasoning of the majority not only with respect to the human dignity-argument. According to Art. 1 para. 2 Basic Law, the '*German people acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world*'.[15] 'Human rights' as opposed to 'fundamental rights' is the Basic Law code for the public international law dimension, it is a reference in 1949 to the 1948 United Nation General Declaration of Human Rights. This could have opened the door to a universalist argument underlying *Solange I*.

A reference to Art. 1 Basic Law would have helped the majority argument also for another reason. Art. 1 para. 3 Basic Law also stipulates that the '*following fundamental rights [sic!] shall bind the legislature, the executive and the judiciary as directly applicable law*',[16] which could have been used as

12 Carl Schmitt, *Verfassungslehre* (Duncker & Humblot 1928), 23 et seq., 103.

13 See on dictatorship and barbarism Gertrude Lübbe-Wolff in a dissenting opinion in 2005, BVerfGE 113, 273 (336) – *Europäischer Haftbefehl I*: 'Art. 79 Abs. 3 GG als verfassungsrechtliche Grenze der europäischen Integration ist in diesem Urteil zu Recht mit Vorsicht gehandhabt worden, denn Sinn dieser Bestimmung ist es, einen Rückfall unseres Landes in Diktatur und Barbarei auszuschließen, und nichts dient diesem Ziel mit höherer Wahrscheinlichkeit als Deutschlands Integration in die Europäische Union.'

14 'Identity control', as the Court calls it, not to be confused with 'Ultra vires-control', see on that Franz C. Mayer, 'Rashomon in Karlsruhe. A Reflection on Democracy and Identity in the European Union: The German Constitutional Court's Lisbon Decision and the Changing Landscape of European Constitutionalism', ICON 9 (2011), 757-785.

15 'Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.'

16 'Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.'

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a justification to uphold German fundamental rights scrutiny, as this provision cannot be altered by constitutional amendment, it probably cannot be undermined by Germany participating in European integration.

But a reference to Art. 1 Basic Law is missing. Something else is missing, too: The *Solange I* majority does also not bother to explain how its claim of jurisdiction is compatible with Art. 219 EEC (today Art. 344 Treaty on the Functioning of the European Union (TFEU)), which stipulates that '*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*'. They do acknowledge for the first time, though, that in principle the German Constitutional Court is also bound to submit preliminary references to the ECJ. It still took another 40 years until the first preliminary reference of the German Constitutional Court was submitted.[17]

Solange I in Karlsruhe was the sequel to a legal dispute that led the ECJ to unequivocally clarify the primacy of European law over the national constitution in 1970 in the case *Internationale Handelsgesellschaft*.[18] The Administrative Court of Frankfurt had submitted the case that would later become *Solange I* as a preliminary reference to the ECJ in 1970.[19] There is evidence that the ECJ used *Internationale Handelsgesellschaft* to respond to a provocative presentation by a German constitutional scholar, Hans Heinrich Rupp,[20] in which the primacy of European law, as it had been developed by the ECJ since the *Costa v. E.N.E.L.* judgment, was roundly dismissed.[21]

17 BVerfGE 134, 366 – *OMT* (Vorlage).

18 ECJ, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, case 11/70, ECLI:EU:C:1970:114.

19 Verwaltungsgericht Frankfurt am Main, preliminary reference (Vorlagebeschluss) of 18 March 1970, case II/2 E 228/69), *Common Market Law Reports* 1970, 294. The reference submitted to the German Constitutional Court after the ruling of the ECJ in 1971 can be found at Außenwirtschaftsdienst des Betriebs-Beraters 1971, 541.

20 Professor of Law at the University of Mainz, not to be confused with the dissenting judge Hans Georg Rupp in *Solange I*.

21 The presentation took place in January 1970 at the German Academy of Law, Trier, which is not far away from Luxemburg, which explains how ECJ judges got note of Rupp's critique. Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2001), 88 et seq. describes how Rupp's presentation possibly triggered a response by the ECJ, *Internationale Handelsgesellschaft* (n. 18), which openly demands the primacy of European law over national constitutional law. The presentation was later published in the widely read Neue Juristische Wochenschrift, Hans Heinrich Rupp, 'Die Grundrechte und das Europäische Gemeinschaftsrecht', NJW 23 (1970), 353-359. Rupp remained unconvinced for the rest of his life, see Hans Heinrich Rupp, 'Anmerkungen zu einer Europäischen Verfassung', JZ 58 (2003), 18-22; see in that context Hans-Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr Siebeck 1972), 260 on German inward-looking ('Haltung grundgesetzlicher Introvertiertheit').

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Solange I, which was clearly directed against the ECJ and the claim of an unconditional primacy of European law, was the subject of fierce criticism and debate, not only in Germany.[22] The European Commission considered

22 See Gert Meier, 'Anmerkung zu dem Beschluss des BVerfG vom 29. Mai 1974', NJW 27 (1974), 1704-1705; Hans Paetow, 'Blick in die Zeit', MDR 7 (1974), 986-987; Christian Pestalozza, 'Sekundäres Gemeinschaftsrecht und nationale Grundrechte', DVBl 89 (1974), 716-719; Heribert Golsong, 'Kommentar und Kritik', EuGRZ 1 (1974), 17-18; Jean-Victor Louis, 'Kommentar und Kritik', EuGRZ 1 (1974) 20-21; Hans Peter Ipsen, 'BVerfG versus EuGH re "Grundrechte"', EuR 10 (1975), 1-19; Meinhard Hilf, 'Sekundäres Gemeinschaftsrecht und deutsche Grundrechte', HJIL 35 (1975), 51-66; Eckart Klein, 'Stellungnahme aus der Sicht des deutschen Verfassungsrechts', HJIL 35 (1975), 67-78; Albert Bleckmann, 'Zur Funktion des Art. 24 Abs. 1 Grundgesetz', HJIL 35 (1975), 79-84; Konrad Feige, 'Bundesverfassungsgericht – Grundrechte – Europa', JZ 30 (1975), 476-479; Manfred Zuleeg, 'Das BVerfG als Hüter der Grundrechte gegenüber der Gemeinschaftsgewalt', DÖV 28 (1975), 44-46; Ulrich Scheuner, 'Der Grundrechtsschutz in der Europäischen Gemeinschaft und die Verfassungsrechtsprechung: Zum Beschluss des Bundesverfassungsgerichts vom 29. Mai 1974', AöR 100 (1975), 30-52.

The President of the German Constitutional Court, Chairman of the First Senate of the Court and thus not involved in the proceedings, as the case was decided by the Second Senate, intervened as a defender of the decision, Ernst Benda, 'Das Spannungsverhältnis von Grundrechten und übernationalem Recht', DVBl 10/11 (1974), 389-396; see also Hans Heinrich Rupp, 'Zur bundesverfassungsgerichtlichen Kontrolle des Gemeinschaftsrechts am Maßstab der Grundrechte', NJW 27 (1974), 2153-2156; Hans-Georg Crone-Erdmann, 'Grundrechtsschutz und Europäisches Gemeinschaftsrecht', Gewerbe Archiv (1974), 371-372; Detlef Schumacher, 'Die Konkordanz des nationalen mit dem Gemeinschaftsrecht in der Rechtsprechung', Der Betrieb (1975), 677-680.

With *Solange II* in 1986, the academic focus shifted to the newer decision. More recent academic reflections on *Solange I* include Peter M. Huber, 'Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der Gemeinschaftsrechtlichen Kompetenzordnung', AöR 116 (1991), 210-251 (231); Robert Chr. van Ooyen, *Die Staatstheorie des Bundesverfassungsgerichts und Europa – Von Solange über Maastricht und Lissabon zur EU-Grundrechtecharta und EZB* (Nomos 2022), 23-28; Ulrich Haltern, '50 Jahre Solange I', Jura 46 (2024), 449-462. For academic reactions outside Germany see for example in France in the immediate aftermath of the judgment Michel Fromont, 'Note sur l'arrêt de la Cour constitutionnelle fédérale du 29 mai 1974', RTDE 11 (1975), 333-336 (333); Michel Fromont, 'République fédérale d'Allemagne – les événements législatifs et jurisprudentiels survenus en 1974', RDP 92 (1976), 188-224 (199 et seq.); Claus Dieter Ehlermann, 'Primauté du droit communautaire mise en danger par la Cour constitutionnelle fédérale allemande', R. M. C. 181 (1975), 10-19 (14 et seq.); Gérard Cohen Jonathan, 'Cour constitutionnelle allemande et règlements communautaires, observations sur Cour constitutionnelle fédérale allemande, 2e chambre 29 mai 1974', C. D. E. nos 1-2 (1975), 173-206 (176 et seq., 186, 190 et seq., 194, 204); Jean Darras and Olivier Pirotte, 'La Cour constitutionnelle fédérale allemande a-t-elle mis en danger la primauté du droit communautaire?', RTDE 12 (1976), 415-438 (425 et seq.). For an overview see Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949-1979* (Cambridge University Press 2012), 78-88; 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; Bill Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context', ELJ 21 (2015), 434-459.

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introducing a treaty infringement case against Germany, but the case never made it to the ECJ.[23]

Twelve years later, in the 1986 *Solange II*[24] decision, in a unanimous decision, the German Constitutional Court gave up *Solange I*. After an extensive assessment of the development of European law the German Constitutional Court held, that '*as long as*' ('*solange*') an effective protection of fundamental rights was guaranteed at the European level, with a level of protection substantially equivalent to the inalienable minimum level of protection of fundamental rights under the German Constitution, including a general guarantee of the essential substance ('*Wesensgehalt*') of the fundamental rights, the German Constitutional Court '*will no longer exercise its jurisdiction to decide on the applicability of derived Community law, that may constitute the legal basis for acts of German courts or authorities in the Federal Republic*'.[25]

This article focusses on the dissenting opinion, but it is still worth noting that in hindsight, certain elements of the *Solange I* majority opinion appear more nuanced than the decision's reputation as an anti-European landmark case indicate.

The majority has no problem at all to refer to a European constitution, when it speaks of '*the Community and its constitution*'.[26] Later, the Second Senate will be much more anxious to stress the public international law nature of the European construct, e. g. in the 1993 Maastricht decision by

23 Files of the German Federal Government indicate that the case was closed with a letter from Commission President Ortoli to the Federal Minister of Foreign Affairs dated 21 November 1975, expressing the expectation that the danger created by the decision of the German Constitutional Court for the European legal order would never materialise, Aufzeichnung des Bundesministeriums der Justiz, 28 January 1976, 390/75, Auswärtiges Amt Politisches Archiv (1975), 410.424.50 (*EG-Grundrechte – Reischl-Vorschlag*).

24 BVerfGE 73, 339 – *Solange II*.

25 BVerfGE, *Solange II* (n. 24). The question left open in *Solange II* was what exactly could re-activate the German Constitutional Court in matters of fundamental rights protection. This was clarified in the *Banana market decision* in 2000, BVerfGE 102, 147 – *Bananenmarktordnung*: The threshold was a structural decline of the fundamental rights protection standard at the European level, see on that in more detail Franz C. Mayer, 'Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung', EuZW 11 (2000), 685-689. The Court declared this a matter of admissibility, which meant that any case brought to the Court as constitutional complaint or as a reference from a lower court would be thrown out as inadmissible unless it did show that there was systematic failure of fundamental rights protection. It is only in 2015 that the German Constitutional Court found a way to be able to look at individual cases where fundamental rights protection was at stake by shifting the issue to the realm of 'identity control', see BVerfGE 140, 317 – *Europäischer Haftbefehl II*.

26 BVerfGE, *Solange I* (n. 3), 282: 'der Gemeinschaft und ihrer freiheitlichen (und demokratischen) Verfassung'.

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means of insisting on the Member States as the '*masters of the Treaties*' ('*Herren der Verträge*').

The majority also has no problem continuing[27] to refer to – which in the present context means: endorse – the description of the European construct suggested by the ECJ in *Van Gend en Loos*[28] and in *Costa v. E. N. E.L.*[29]:

> 'This Court – in this respect in agreement with the law developed by the European Court of Justice – adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source.'[30]

It is also worth noting that with its statement on a clear separation of spheres of jurisdiction the majority states unambiguously that it is not the task of the German Constitutional Court to rule on the compatibility of European secondary law with the European treaties:

> 'It follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Basic Law, nor can the Federal Constitutional Court rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law.'[31]

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27 See already BVerfGE 22, 293 (296) – *EWG-Verordnungen*; BVerfGE 31, 145 (173) – *Milchpulver*.

28 ECJ, *N. V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Revenue Administration*, judgment of 5 February 1963, case 26/62, ECLI:EU:C:1963:1.

29 ECJ, *Flaminio Costa v. E. N. E.L.*, judgment of 15 July 1964, case 6/64, ECLI:EU:C:1964:66.

30 BVerfGE, *Solange I* (n. 3), 277 et seq.: 'Der Senat hält – insoweit in Übereinstimmung mit der Rechtsprechung des Europäischen Gerichtshofs – an seiner Rechtsprechung fest, dass das Gemeinschaftsrecht weder Bestandteil der nationalen Rechtsordnung noch Völkerrecht ist, sondern eine eigenständige Rechtsordnung bildet, die aus einer autonomen Rechtsquelle fließt.'

31 BVerfGE, *Solange I* (n. 3), 278: 'Daraus folgt, dass grundsätzlich die beiden Rechtskreise unabhängig voneinander und nebeneinander in Geltung stehen und dass insbesondere die zuständigen Gemeinschaftsorgane einschließlich des Europäischen Gerichtshofs über die Verbindlichkeit, Auslegung und Beachtung des Gemeinschaftsrechts und die zuständigen nationalen Organe über die Verbindlichkeit, Auslegung und Beachtung des Verfassungsrechts der Bundesrepublik Deutschland zu befinden haben. Weder kann der Europäische Gerichtshof verbindlich entscheiden, ob eine Regel des Gemeinschaftsrechts mit dem Grundgesetz vereinbar ist, noch das Bundesverfassungsgericht, ob und mit welchem Inhalt eine Regel des sekundären Gemeinschaftsrechts mit dem primären Gemeinschaftsrecht vereinbar ist.'

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The Ultra vires-control that the German Constitutional Court introduces in the *Maastricht* judgment 1993[32] and that it even activates in 2020 in the *PSPP* case[33] is not in line with that statement.[34]

III. The *Solange I* Dissenting Opinion

Unlike the majority of the Second Senate, the three dissenting judges Rupp, Hirsch and Wand considered the submission from the Administrative Tribunal Frankfurt to be inadmissible in their joint dissenting opinion.[35]

According to them, the German Constitutional Court did not have the power to review secondary Community law for its compatibility with the fundamental rights provisions of the German Constitution. The dissenting judges explain that, by ratifying the EEC Treaty, Germany transferred sovereign rights to the Community, as foreseen by Art. 24 Basic Law. What follows is a reasoning reminiscent of the ECJ's landmark constitutional cases *Van Gend en Loos* and *Costa v. E. N. E.L.* and the wording of Art. 164 EEC Treaty, today Art. 19 TEU: The Treaty created an independent legal system in a limited sector which has its own institutions and its own system of legal protection. Community institutions are vested with legislative powers, and the legal provisions adopted by them are neither part of the national legal order nor of international law. The Court of Justice of the European Communities (CJEU) ensures that the law is observed in the interpretation and application of the Treaty. This Community legal order is autonomous and independent of the national legal system.

Then, the dissenting judges stress that both legal systems recognise – each for its own area – fundamental rights norms and a legal protection system suitable for their enforcement. They claim that fundamental rights are not only guaranteed by the Basic Law within the national legal system of the Federal Republic of Germany, but also by the legal system of the European Communities. This claim is then supported by reiterating a number of decisions of the ECJ such as the 1969 *Stauder* case[36] or the 1974 *Nold* case[37],

32 BVerfGE 89, 155 (188) – *Maastricht*.

33 BVerfGE 154, 17 – *PSPP*.

34 This is why it is not accurate to construe a continuity of the case-law of the German Constitutional Court since the 1960s in the sense of a dialectical approach with supportive and limiting elements towards European integration.

35 BVerfGE, *Solange I* (n. 3), 291-305.

36 ECJ, *Erich Stauder v. City of Ulm – Sozialamt (Stauder)*, judgment of 12 November 1969, case 29/69, ECLI:EU:C:1969:57.

37 ECJ, *J. Nold Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities (Nold)*, judgment of 17 December 1970, case 4/73, ECLI:EU:C:1974:51.

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where the Court considers fundamental rights a part of the general principles of law whose observance it must ensure. This part of the dissenting opinion reveals that the *Nold* case, the core argument in the 1986 *Solange II* case for the case law of the ECJ, being on track in terms of fundamental rights protection,[38] was already known in Karlsruhe in May 1974.

According to the dissenters, with the preliminary reference procedure, the legal order of the European Communities already has a system of effective legal protection suitable for the enforcement of European fundamental rights.

As to the question of which law prevails in the case of conflict between Community law and national law, the dissenting judges consider this question settled by Art. 24 Basic Law. They stress that Art. 24 Basic Law, properly interpreted, states not only that the transfer of sovereign rights is possible at all, but also that the sovereign acts of a supranational entity[39] must be recognised by the Federal Republic of Germany. This, the judges write, excludes from the outset the possibility of national control of the legal acts of the Community. Community law takes precedence over national law. This extends to fundamental rights provisions of the national constitution.

For the dissenters, the majority's concern with safeguarding 'the basic structure of the Constitution, on which its identity is based' is misguided. The judges acknowledge, though, that the primacy of Community law over domestic law can only apply to the extent that the Basic Law authorises the transfer of sovereign powers. And they also stress that the Basic Law does not authorise the transfer of sovereign rights without any limits. The commitment to a united Europe in the Preamble of the Basic Law, on the one hand, and the preservation of a liberal and democratic order, as expressed in numerous constitutional provisions, on the other hand, must both be taken into account. Thus, the supranational community needs to be subject to the same obligations under its legal system as arise for domestic law from the fundamental and indispensable principles of the Basic Law; this includes in particular the protection of the core of fundamental rights.

The dissenting judges consider this requirement fulfilled with the EEC: They argue that the protection of fundamental rights guaranteed within the Community does not differ in its nature and structure from the fundamental rights system of the national constitution. The core of fundamental rights is recognised and protected in both legal systems. The fundamental rights that

38 BVerfGE, *Solange II* (n. 24).

39 In German: 'zwischenstaatliche Einrichtung'.

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apply within the legal system of the European Communities are essentially the same as those guaranteed by the Basic Law; they are based on the common constitutional traditions of the Member States – their recognition is based on the same values and concepts. And that, the judges say, is sufficient. It follows from this that provisions of Community law are only subject to the fundamental rights standards that apply at Community level, but do not also have to fulfil the fundamental rights standards of the national constitution.

The dissenters stress that the approach of the majority of the Senate leads to unacceptable results as it would lead to legal fragmentation, giving up European legal unity.

And the majority would violate the ECJ's established case law on primacy from *Flaminio Costa v. E. N. E.L.*[40] to *Internationale Handelsgesellschaft*[41]. This is where the dissenting judges state that the German Constitutional Court has no competence to scrutinise provisions of Community law. The majority opinion appears as an inadmissible encroachment on the jurisdiction reserved to the ECJ, in contradiction with Art. 24 Basic Law, jeopardising the Community legal order with the possible consequence of a treaty infringement case against Germany.

The dissenting opinion then goes on to make another, more technical inadmissibility argument, this time based on procedural concerns related to the path chosen by the Frankfurt Administrative Court, a reference under Art. 100 para. 1 Basic Law.[42] According to the dissenting judges, measures of a non-German public authority cannot be brought to the German Constitutional Court under that procedure. The provisions of secondary Community law, as norms of an independent legal system that flow from an autonomous source of law, are not acts of German public authority, thus, Art. 100 para. 1 Basic Law cannot apply to provisions of Community law. The task of the Federal Constitutional Court to be the guardian of the Constitution cannot lead to an extension of its jurisdiction, no matter how urgent the legal policy need may appear.

40 ECJ, *Flaminio Costa v. E. N. E.L.* (n. 29).

41 ECJ, *Internationale Handelsgesellschaft* (n. 18).

42 Art. 100 para. 1 Basic Law: 'Hält ein Gericht ein Gesetz, auf dessen Gültigkeit es bei der Entscheidung ankommt, für verfassungswidrig, so ist das Verfahren auszusetzen und, wenn es sich um die Verletzung der Verfassung eines Landes handelt, die Entscheidung des für Verfassungsstreitigkeiten zuständigen Gerichtes des Landes, wenn es sich um die Verletzung dieses Grundgesetzes handelt, die Entscheidung des Bundesverfassungsgerichts einzuholen. Dies gilt auch, wenn es sich um die Verletzung dieses Grundgesetzes durch Landesrecht oder um die Unvereinbarkeit eines Landesgesetzes mit einem Bundesgesetze handelt.'

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Finally, the dissenters insist that a decision of the full court, meaning a plenary decision of both Senates, should have been brought about because the Senate deviates in several respects from decisions of the First Senate.

That was the bottom line of the first comprehensive decision of the German Constitutional Court on European integration: a split court. This is even more intriguing as the majority ultimately did not find a fundamental rights problem. The dissenters would have thrown out the case as inadmissible, the majority held that the fundamental claims were unfounded. But clearly, this is not only a disagreement on technicalities.

IV. What Is This All About?

First of all, there is not much to say about the internal background of the cases and the judges. The files of the case will be released after 60 years, 10 years from now.[43] The biographies of the dissenting judges do not explain why they insisted on a dissenting opinion in this European integration case. Apart from the fact that none of them was a *Staatsrechtslehrer*, a constitutional law professor, the three did not have much in common: Rudi Wand was a conservative career judge, Martin Hirsch was a politician, a former member of parliament for the Social Democrats. Hans Georg Rupp, who served 24 years on the Court, came from the ministerial bureaucracy. He had the strongest academic background, having studied at Harvard Law School and being close to Carlo Schmid, a former law professor and one of the influential drafters of the German Constitution in 1949. None of the dissenters had any European integration background, though, which could explain why they insisted on the arguably most pro-European interpretation of the Basic Law ever – until today.

1. Dissenting Opinions in German Constitutional Law

It should be noted that dissenting opinions are not uncommon at the German Constitutional Court.[44] They were only introduced in 1970.[45] Since then, however, this possibility has been used regularly. In Volume 37 of the

43 Then, it will also be revealed whether the judge rapporteur who wrote the majority opinion was actually Judge Hirsch, who also dissented. It is not uncommon to have the assigned judge rapporteur draft the majority opinion even if he or she dissents. But in *Solange I*, such a double role would have been particularly difficult to master. Hirsch was initially assigned as judge rapporteur (information confirmed to the author by the registrar of the German Constitutional Court in 2009).

44 On dissenting opinions at the German Constitutional Court see Matthias K. Klatt, *Das Sondervotum beim Bundesverfassungsgericht* (Mohr Siebeck 2023), passim.

45 § 30 para. 2 BVerfGG.

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court's cases, the volume that contains *Solange I*, there are four further special votes, some of which written by the same judges as in *Solange I*.

2. Dissenting Opinions in European Integration Related Cases

a) The Veil of Ignorance: the Difficulty to Identify Consensus and Dissent

Coherence and authority of the German Constitutional Court's decisions are arguably higher in decisions taken unanimously, whereas one or more dissenting opinions reveal that the majority of the Court remained unconvincing even to one or more of their colleagues. To annex a dissenting opinion to a decision is just an option for judges who do not agree with the majority, the dissenting opinion is not mandatory in case of a split court. The decisions do not always reveal whether there was a split court or unanimity. The absence of a dissenting opinion does not always mean that the decision was taken unanimously. Some decisions emphasise that the decision was taken unanimously, some indicate that there was a split court, even where there is no dissenting opinion, which will typically lead to speculations on who dissented without writing a dissenting opinion. And some decisions remain completely silent on the question of unanimity or majority, which will typically lead to speculations on whether there was a split court or not. A systematic analysis of the cases related to European integration (Table 1) reveals that there was more dissent on these cases than dissenting opinions. Only five out of 35 cases state clearly that the decision was taken unanimously.

Table 1: Majorities and Unanimities in European Integration Related Decisions of the BVerfG

	No indication on unanimity/ majority	*Unanimity confirmed*	*- No unanimity and no dissenting opinion - Vote ratio*	*- No unanimity, dissenting opinion - Vote ratio - Dissent*
BVerfGE 22, 293 (*Constitutional complaint against EC regulations*)	X			
BVerfGE 31, 145 (*Milk powder*)		X		
BVerfGE 37, 271 (*Solange I*)				X - 5:3 on B I and II, unanimous on B III - Rupp/Hirsch/Wand

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	No indication on unanimity/ majority	*Unanimity confirmed*	*- No unanimity and no dissenting opinion - Vote ratio*	*- No unanimity, dissenting opinion - Vote ratio - Dissent*
BVerfGE 52, 187 (*Vielleicht*)	X			
BVerfGE 58, 1 (*Eurocontrol I*)	X			
BVerfGE 73, 339 (*Solange II*)		X		
BVerfGE 75, 223 (*Kloppenburg*)		X		
BVerfGE 85, 191 (*Night work*)	X			
BVerfGE 89, 155 (*Maastricht*)	X			
BVerfGE 92, 203 (*TV Directive*)	X			
BVerfGE 97, 350 (*Euro*)	X			
BVerfGE 102, 147 (*Banana market*)		X		
BVerfGE 113, 273 (*European arrest warrant I*)				X - no indication on vote ratio Broß; Lübbe-Wolff; Gerhardt
BVerfGE 118, 79 (*Emissions trading*)	X			
BVerfGE 123, 267 (*Lisbon*)			X - unanimous on the result, - 7:1 on the grounds	
BVerfGE 125, 260 (*Data retention*)			- 4:4 regarding incompatibility vs. invalidity	X - unanimous on the result, in particular regarding questions of EU law and formal constitutionality

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	No indication on unanimity/ majority	*Unanimity confirmed*	*- No unanimity and no dissenting opinion - Vote ratio*	*- No unanimity, dissenting opinion - Vote ratio - Dissent*
				- 7:1 on the result regarding the unconstitutionality of §§ 113a, 113b TKG - 6:2 regarding 'further substantive questions, as far as can be seen from the dissenting opinions' - Schluckebier; Eichberger
BVerfGE 126, 286 (*Honeywell*)				X - 7:1 on the result, - 6:2 on the grounds - Landau
BVerfGE 129, 124 (*EFSF*)			X - 7:1 on admissibility of the constitutional complaint	
BVerfGE 129, 300 (*5 per cent threshold EP*)				X - 5:3, - Di Fabio/Mellinghoff
BVerfGE 130, 318 (*ESM Act*)		X		
BVerfGE 131, 152 (*Duty to inform*)		X		
BVerfGE 132, 195 (*ESM interim decision*)	X			
BVerfGE 134, 366 (*OMT preliminary reference*)				X - 6:2 - Lübbe-Wolff; Gerhardt
BVerfGE 135, 317 (*ESM Fiscal Treaty*)	X			

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	No indication on unanimity/ majority	*Unanimity confirmed*	*- No unanimity and no dissenting opinion - Vote ratio*	*- No unanimity, dissenting opinion - Vote ratio - Dissent*
BVerfGE 135, 259 (*3 per cent threshold EP*)				X - 5:3 - Müller
BVerfGE 140, 317 (*European arrest warrant II*)	X			
BVerfGE 142, 123 (*OMT*)	X			
BVerfGE 143, 65 (*CETA I*)	X			
BVerfGE 144, 1 (*CETA II*)	X			
BVerfGE 146, 216 (*PSPP preliminary reference*)	X			
BVerfGE 149, 346 (*European schools*)	X			
BVerfGE 151, 202 (*Banking union*)	X			
BVerfGE 152, 152 (*Right to be Forgotten I*)		X		
BVerfGE 152, 216 (*Right to be Forgotten II*)		X		
BVerfGE 153, 74 (*Unified Patent Court I*)				X - 5:3 - König/Langenfeld/ Maidowski
BVerfGE 154, 17 (*PSPP*)			X - 7:1	
BVerfGE 156, 182 (*European arrest warrant III*)	X			
BVerfGE 157, 1 (*CETA interinstitutional*)	X			

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	No indication on unanimity/ majority	*Unanimity confirmed*	*- No unanimity and no dissenting opinion - Vote ratio*	*- No unanimity, dissenting opinion - Vote ratio - Dissent*
BVerfGE 157, 332 (*NGEU interim measures*)			X - 7:1 with regard to grounds in C.I.2. and C.II.1.a - result unanimous in favour	
BVerfGE 158, 1 (*Ecotox data*)	X			
BVerfGE 158, 51 (*Greece – Duty to inform Parliament*)	X			
BVerfGE 158, 210 (*Unified Patent Court II*)	X			
BVerfGE 163, 165 (*ESM amendment*)	X			
BVerfGE 164, 193 (*NGEU*)				X - 6:1 - Müller
BVerfG 168, 372 (*Direct elections act 2018, EP threshold*)	X			
45	*24*	*8*	*4*	*9*

b) Why the *Solange I*-Dissent Stands Out

Solange I stands out among the dissenting opinions relating to European integration: three dissenting judges are extremely rare in European matters. The first major case on the European arrest warrant in 2005 had three dissenters, albeit with conflicting criticisms of the majority. The *Unified Patent Court* case of 2020 also had three dissenters, but this was not strictly speaking EU law, and the dissent was on a procedural issue, the limits of standing under Art. 38 Basic Law. Three judges dissenting is significant.

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c) A European Integration Multiverse?

Dissenting opinions in cases related to European integration are no exception. There was no dissent in the *Solange II*, the *Maastricht*, and the *Lisbon* cases, although *Lisbon* was not decided unanimously, with one judge not supporting the majority decision, without writing a dissenting opinion, the same thing happened in *PSPP*. But apart from the *Solange I*-dissenting opinion, there are other important dissenting opinions in European integration cases: Gertrude Lübbe-Wolff's dissent to the *European Arrest Warrant* decision in 2005[46] and to the very first preliminary question in the *OMT* case 2014[47]; the dissenting opinions to the *EP electoral law (minimum threshold)* cases by Udo Di Fabio and Rudolf Mellinghoff in 2011[48] and Peter Müller in 2014[49].

Table 2: Dissenting Votes in European Integration Cases:

Date	*Reference*	*Dissenting judges*	*Orientation of the dissent*
29 May 1974 (order)	**BVerfGE 37, 271 (*Solange I*)**	Hans G. Rupp/ Martin Hirsch/ Walter R. Wand	**Progressive** *(European law cannot be reviewed for compatibility with fundamental rights; Art. 100 para. 1 Basic Law is not [analogously] applicable to European secondary law)*
18 July 2005 (judgment)	**BVerfGE 113, 273 (*European arrest warrant I*)**	Siegfried Broß	**Critical** *(violation of the subsidiarity principle of Art. 23 para.1 Basic Law)*
		Gertrude Lübbe-Wolff	**Progressive** *(Art. 79 para. 3 Basic Law should not prevent integration)*
		Michael Gerhardt	**Progressive** *([effective] European law implementation is mandatory; [allegedly] unconstitutional transposition laws shall apply temporarily)*

46 BVerfGE, *Europäischer Haftbefehl I* (n. 13).
47 BVerfGE, *OMT* (n. 17), 419 et seq.
48 BVerfGE 129, 300 (346 et seq.) – *Fünf-Prozent-Sperrklausel EuWG*.
49 BVerfGE 135, 259 (299 et seq.) – *Drei-Prozent-Sperrklausel EuWG*.

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Date	*Reference*	*Dissenting judges*	*Orientation of the dissent*
6 July 2010 (order)	**BVerfGE 126, 286 (*Honeywell*)**	Herbert Landau	**Critical** *(democratically non-legitimised obvious overstretch of competence is ultra vires)*
9 November 2011 (judgment)	**BVerfGE 129, 300 (*5 per cent threshold EP*)**	Udo Di Fabio/ Rudolf Mellinghoff	**Progressive** *(Member States bear joint responsibility for the functioning of EP)*
14 January 2014 (order)	**BVerfGE 134, 366 (*OMT*)**	Gertrude Lübbe-Wolff	**Progressive** *(BVerfG is not entitled to a general comprehensive European law scrutiny)*
		Michael Gerhardt	**Progressive** *(there is no general German constitutional supervision)*
26 February 2014 (judgment)	**BVerfGE 135, 259 (*3 per cent threshold EP*)**	Peter A. Müller	**Progressive** *(against the majority's interference with the functioning of EP)*
13 February 2020 (order)	**BVerfGE 153, 74 (*Unified Patent Court*)**	Doris König/ Christine Langenfeld/ Ulrich Maidowski	**Progressive** *(no standing for individuals to invoke procedural requirements of Art. 23 para. 1 sentence 2, 3 and Art. 79 Basic Law)*
6 December 2022 (judgment)	**BVerfGE 164, 19 (*NGEU*)**	Peter A. Müller	**Critical** *(insisting on stricter scrutiny of EU action)*

A systematic analysis of the dissenting votes in European integration cases does not result in a clear picture. Dissenting opinions are most of the time more Europe-friendly than the majority, but there are also counterexamples with Herbert Landau's angry dissent in *Honeywell* 2010 or, most recently, Peter Müller's dissent in *NGEU* in 2022.

Another Peter Müller dissent is the only example of a dissent becoming a majority opinion. In the case of *European electoral law and the minimum threshold* issue, the 2014 dissent is the blueprint for the *European electoral law* decision of February 2024.

The analysis of the dissenting votes in European integration cases reveals that there is no single alternate constitutional law universe, where the more

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or less coherent case law of the BVerfG in European law matters has a more or less coherent counterpart. There is a multiverse of dissents, as the dissents are neither coherent, nor are they built on the *Solange I*-dissent. The *Solange I*-dissent is absent from the reasonings of dissenting judges. It has not acquired the role of the leading reference for any European law related dissent.

3. Paths Not Taken

What would have happened, if the minority had been a majority? What could that legal universe look like, would it be tantamount to a universe where you cross the street at red? Any attempt to answer this question needs to assess what divides the majority from the minority in *Solange I*. It is not the outcome of the case. It is not the assessment of the European construct as a new legal order. It is not the existence of constitutional law limits to participating in European integration. On all these points, the judges agree. The conflict is about whether the German court has jurisdiction over European law. According to the dissenters it has not.

a) European Fundamental Rights Evolution in an Alternate Universe

Would European law have taken another direction, if *Solange I* had been decided along the lines of the dissent? Conventional German constitutionalist wisdom has it that the development of fundamental rights at the European level was triggered or at least enhanced by *Solange I*. According to that reading, the conditionality of *Solange I – 'as long as'* there is no adequate fundamental rights protection at the European level – forced the ECJ to establish the required level of protection and, more generally speaking, EU law to become a fundamental rights oriented legal order with a legally binding European Union (EU) Charter of Fundamental Rights as the ultimate evidence.

It's a nice story, but there is not much solid evidence for it. The dissenting opinion reveals that the ECJ decision that twelve years later in *Solange II*[50] is

50 BVerfGE, *Solange II* (n. 24). See in that context the view from an insider of the Court in 1986, Rainer Hofmann, 'Deutsches Verfassungsrecht und europäisches Gemeinschaftsrecht. Die „Solange-Rechtsprechung" des Bundesverfassungsgerichts' in: Juristische Fakultät der Universität Heidelberg (ed.), *Die Direktwirkung europäischer Richtlinien – L'effet direct des directives européennes. 25. Gemeinsames Seminar der Juristischen Fakultäten von Montpellier und Heidelberg, 23. Juni – 5. Juli 1993* (1994), 21-33.

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praised as the decisive step in the fundamental rights jurisprudence of the ECJ, the 1974 *Nold* case,[51] was already out before *Solange I*, they had it on their desks in Karlsruhe when drafting *Solange I*.[52] That means that the European law development towards more fundamental rights sensitivities was on track already with or without *Solange*.[53]

It is true that *Solange I* had repercussions also in the political world with a political declaration on fundamental rights by the European Parliament.[54] But there is no direct line that led to today's Charter of Fundamental Rights. The Fundamental Rights Charter that was proclaimed in December 2000 as a political declaration was a German idea, based on the political promise of the red-green government that came to power in 1998 to pursue a new European project.[55] This political project was totally disconnected from the development of the ECJ's and the German Constitutional Court's fundamental rights conversation, which, by the time, was at the *Solange II*-stage.

There is also a much darker answer to the question whether the outcome of *Solange I* mattered. The starting point here is scepticism about European fundamental rights protection and the success story narrative. This is not a conceptual objection. EU fundamental rights are unique. The EU is the only non-statal entity that offers fundamental rights protection against its own acts – the United Nations (UN) does not have that, no International Organisation has that. But the very first case which started all this, well before *Solange I*, the 1969 *Stauder* case,[56] might still be paradigmatic: At all costs, Erich Stauder from Ulm wanted to avoid becoming known as a recipient of social welfare. The result: Generations of EU law students learn that Erich Stauder from Ulm was a recipient of social welfare. The principle of protecting fundamental rights is upheld, but in the reality, somehow fundamental rights do not prevail in the specific case. There are almost no cases where the ECJ declares European legislation or action void because of fundamental

51 ECJ, *Nold* (n. 37).

52 BVerfGE, *Solange I* (n. 3), 293, referring to an advance copy ('hektographierter Text').

53 There is also the question of the impact of the German *Solange*-decision on other courts in other Member States, see on that the contribution to this issue by 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.

54 Joint Declaration of 27.4.1977, OJEC no. C 103/1. See on the context Bill Davies, 'Integrity or Openness? Reassessing the History of the CJEU's Human Rights Jurisprudence', Am. J. Comp. L. 64 (2016), 801-814.

55 Aufbruch und Erneuerung – Deutschlands Weg ins 21. Jahrhundert. Koalitionsvereinbarung zwischen der Sozialdemokratischen Partei Deutschlands und Bündnis 90/Die GRÜNEN (Bonn 1998), 42: Chapter XI, 1: 'Die neue Bundesregierung wird die Initiative ergreifen, um den europäischen Verträgen eine Grundrechtscharta voranzustellen.'

56 ECJ, *Stauder* (n. 36).

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rights violation. There are notable exceptions such as the case concerning the data retention directive.[57] But this case might be motivated by very specific circumstances.

However one may assess the effectiveness of the European fundamental rights protection: There is not much convincing evidence to argue that the development of fundamental rights protection at the European level would have been dramatically different, had the dissenters view been the view of a majority.

b) The German Constitutional Court in an Alternate Universe

With a *Solange I*-ruling without the claim to jurisdiction over European secondary law the German constitutional court's case law on European integration would have taken a different path. It is impossible to say whether, in the long run, that path would have led to a completely different universe where, in legal terms, you cross the street at a red light. After all, the dissenting opinion also sees limits to European law.[58] It could well be that at some point, the alternate German Constitutional Court would have started to claim jurisdiction in some limited, very exceptional cases. And with the actual German Constitutional Court's case law becoming more and more nuanced, the difference, in the long run might become smaller and smaller. But with the dissenters prevailing some key elements of the actual German Constitutional Court's case law on European integration after May 1974 would just not have happened.

No Solange II

The *Solange II*-decision would not have happened because it was a decision reacting to and correcting the *Solange I*-majority opinion. The standard account here is that *Solange II* is the pro-integration opposite of *Solange I*. This is however not accurate. There is a continuity between *Solange I* (majority opinion) and *Solange II* as far as the concept of a constitutional law reserve of control that restricts the European law claim for primacy is concerned. Unlike the dissenting opinion in *Solange I*, *Solange II* does not refuse jurisdiction over European law. It's just that *Solange II* in 1986 and the

57 ECJ, *Digital Rights Ireland and Seitlinger and Others,* judgment of 8 April 2014, cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

58 See in that context the contribution to this issue by 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 who understands the *Solange* method as the sum of the GCC's push-back against European integration – arguably, some kind of push-back was/is inevitable.

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Banana decision in 2000[59] set the bar for activating the court's jurisdiction much higher than *Solange I*, but all along these cases, there is one constant: the German court claims jurisdiction over European law – which is exactly what the dissenters in *Solange I* deny.

A different Article 23 Basic Law?

Without *Solange II*, the new Art. 23 Basic Law, introduced in 1992,[60] after German reunification, codifying elements of the *Solange*-formula would have looked different. Paragraph 1 of that provision reads as follows:

> 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity *and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law*. […]' (emphasis added).

This means that it is not necessary to have identical fundamental rights protection at the European level, but that essentially comparable fundamental rights protection is sufficient, which can mean less fundamental rights protection. The idea goes back to the *Solange*-cases.

The dissenting opinion in 1974 held that

> 'despite the lack of a catalogue of fundamental rights, the protection of the fundamental rights guaranteed in the Constitution is also guaranteed in the legal system of the European Communities – though to some extent in modified form – through the case law of the European Court of Justice.'[61]

For the dissenters, there was no need to codify the equivalence of fundamental rights protection at the European and the national level as they considered it as already given. The alternate German Constitutional Court would not have given cause for a revision of the constitution and the codification of constitutional limits of Germany's participation in European integration in that new Art. 23 Basic Law. But it is also true that the revision of the constitution was ultimately a political decision and part of a recalibration of the constitutional foundations of the Federal Republic after German reunification. With Rupert Scholz – the chairman of the committee in charge

59 BVerfGE, *Bananenmarktordnung* (n. 25).

60 38. Gesetz zur Änderung des Grundgesetzes, 21 December 1992, BGBl. I 1992, 2086. See also the final report of the joint commission that prepared constitutional amendments after reunification, 'Bericht der Gemeinsamen Verfassungskommission', BT-Drs. 12/6000.

61 'Trotz des Fehlens eines Grundrechtskatalogs ist somit der Schutz der im Grundgesetz gewährleisteten Grundrechte auch in der Rechtsordnung der Europäischen Gemeinschaften – wenn auch teilweise in modifizierter Form – durch die Rechtsprechung des Europäischen Gerichtshofes gewährleistet.', BVerfGE, *Solange I* (n. 3), 294.

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of preparing that revision[62] who was also a *Staatsrechtslehrer* – a conservative constitutional law scholar[63] points to the fact that there were forces beyond the court that wanted to emphasise limits of European integration. These forces might have prevailed in the alternate legal universe as well.

From divided responsibility to shared responsibility in fundamental rights protection?

The fundamental rights development leading to the *Right to be forgotten*-cases in 2019[64] is not easy to assess in the present context, as these cases are about the use of EU fundamental rights by the German Constitutional Court, and at least on paper, a commitment to cooperation with the ECJ.

No jurisdiction – no Ultra vires-control

With a firm commitment of the alternate German Constitutional Court not to encroach on the ECJ's turf as the guiding line of European integration cases, it would have been much more difficult to establish the Ultra vires-control, that began with the 1993 *Maastricht* decision[65] and culminated in the 2020 *PSPP*[66] fiasco plus treaty infringement proceedings against Germany.[67] The Ultra vires-argument is the ultimate encroachment on the ECJ's turf.

National constitutional identity in an alternate legal universe

What about the German Constitutional Court's defence of national constitutional identity? It's one of the central arguments of the *Solange I*-majority that there is something such as national constitutional identity that constitutes the ultimate barrier against European law primacy. The dissenters seem to agree with that and confirm that there are limits to Germany's participation in European integration. This seems to be the point where the majority's legal universe and the minority's legal universe differ the least. The dissenters insist that as far as fundamental rights protection is concerned, the limits are not reached, though, because they consider the fundamental rights protection at the European level to be sufficient.

62 See 'Bericht der Gemeinsamen Verfassungskommission', BT-Drs. 12/6000.

63 Scholz went on to feed his view on the new constitutional provisions dealing with European integration into academic discourse by means of a commentary of Art. 23 Basic Law, Rupert Scholz, 'Art. 23' in: Günter Dürig et al. (eds), *Grundgesetz-Kommentar* (C. H. Beck 2024).

64 BVerfGE 152, 152 – *Recht auf Vergessen I* and BVerfGE 152, 216 – *Recht auf Vergessen II*.

65 BVerfGE, *Maastricht* (n. 32).

66 BVerfGE, *PSPP* (n. 33).

67 See on that 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, with further references.

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The relationship between German constitutional law and the European legal order in an alternate legal universe

The underlying question to all the points raised until here is the question of how to explain the relationship between German constitutional law and the European legal order. This is probably where the most important conceptual feature of the minority legal universe can be detected: in that universe, it is the constitution itself that opens the domestic legal space to European law. This is a constitutional pluralism approach.[68]

The actual German Constitutional Court has developed a different view, and although not explicitly addressing the issue, the *Solange I* majority opinion already paves the path for this restrictive view. According to this explanation, European law enters the domestic legal order through the bridge of the ratification statute, which determines the inferior legal rank of European law in the German legal order: the rank of ordinary parliamentary legislation. This quite orthodox '*Brückentheorie*' (*theory of the bridge*)[69] underestimates the fact that European law is able to swim, meaning it does not need a bridge to be relevant in the domestic legal order. Above all, however, the downgrading of European law to the status of a simple federal law is hard to reconcile with the 1949 constitutional commitment to a unified Europe.

This of course leads back to the 1993 constitutional amendment introducing Art. 23 Basic Law with all that red tape for Germany's participation in European integration. Maybe the commitment to European integration before 1989 was first and foremost a functional commitment of a country that did not have full sovereignty before German reunification. Arguably it's easier to give up sovereignty if there is no sovereignty.

Assuming that reunification also occurred in the parallel legal universe of the *Solange I* dissenters, it is simply impossible to say how reunification would have played out in that parallel legal universe.

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68 See on that Franz C. Mayer, 'Verfassung im Nationalstaat: Von der Gesamtordnung zur europäischen Teilordnung?', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 75 (2016), 7-63 (28 et seq.); Franz C. Mayer, 'Konstitutionalisierung der Europäischen Union und Souveränität der Mitgliedstaaten', in: Matthias Friehe (ed.), *Zur Verfassung der Europäischen Union. Görres-Gesellschaft, Jahrestagung 2024. Rechts- und Staatswissenschaftliche Sektion der Görres-Gesellschaft*, forthcoming; Claudio Franzius, *Recht und Politik in der transnationalen Konstellation* (Campus 2014), 15. See in that context also the concept of permeability of the constitution, Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2011), 7 and passim.

69 See on that Paul Kirchhof, 'Die Gewaltenbalance zwischen staatlichen und europäischen Organen', JZ 53 (1998), 965-974, who has helped establish this approach as the central paradigm on the relationship between EU law and domestic law in Germany from the bench of the German Constitutional Court and in his academic writings.

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V. Conclusion

In Doctor Strange and the Multiverse of Madness, catastrophic things happen if different universes interact too much. Thus, I will leave imagining hypothetical parallel legal universes to others and turn to one insight that seems hard to contest: The randomness of appointments to the bench can have far-reaching consequences. One more vote alongside Rupp, Hirsch, and Wand, and things would have turned out differently.

1. A Categorical European Constitutional Law Imperative

One conclusion that may be drawn from this: Far-reaching court decisions on European integration must be supported as comprehensively as possible, not only by a more or less random majority of judges.

Far-reaching decisions are particularly those that could only be corrected by a completely new constitution. In the German context, this concerns the possible reasoning with national constitutional identity rooted in an absolute integration-proof core of the constitution (Art. 79 para. 3 Basic Law).

A categorical European constitutional law imperative for German Constitutional Court judges could read as follows: Never support a decision that cannot be corrected even by amending the constitution if you are not sure that all judges before and after you would decide the same way.

2. Plenary Responsibilities

In this context, the point of the *Solange I*-dissenting vote and the question of consent between the two Senates comes into view. So far, there has been not a single European law-related decision that has been issued as a plenary decision by both Senates. But perhaps some questions of European integration are of such great importance that they cannot be left to one Senate alone to decide.

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