

## Article

### Agreeing to Disagree:

## The Primacy Debate Between the German Federal Constitutional Court and the European Court of Justice

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### I. INTRODUCTION

From the outside, the stability of the European Union (EU) and its central place on the European continent is taken for granted. Encompassing twenty-eight highly stable democracies bound together by a mutually beneficial economic union and a shared respect for fundamental rights,<sup>1</sup> the EU is rarely considered anything other than a permanent fixture on the international scene. To American legal scholars unfamiliar with its particular workings, the EU may even bear some superficial resemblance to a European version of the American system of federal government. The Union plays the part of the American federal government, complete with legal supremacy over any contravening domestic Member-State laws. According to jurisprudence from the European Court of Justice (ECJ), there is some validity to this conception: both primary sources of regulation (such as EU treaties) and secondary sources (EU legislation) trump any contravening national laws or domestic constitutional provisions.<sup>2</sup>

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1. See generally *How The EU Works*, EUR. UNION, [http://europa.eu/about-eu/index\\_en.htm](http://europa.eu/about-eu/index_en.htm) (last visited Feb. 12, 2015).

2. See Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229, 229–30 (1997); René Barents, *The Precedence of EU Law from*

However, the Member States that comprise the EU have historically been quite uninterested in peacefully assuming the role of subordinate federal states in a larger pan-European governmental system. This can be seen not only in the very public rejection by certain Member States of the European Union's proffered 'Constitutional Treaty,' which leaned overtly in that direction,<sup>3</sup> but also in other far less public, though still important, actions taken by the Member States to limit the primacy of the EU.<sup>4</sup> Such actions not only dispel the myth that the EU has taken on the characteristics of a federal nation-state, but also directly contravene the deeply rooted and generally accepted legal rule that EU norms trump their domestic counterparts. It is no exaggeration to declare that the denial of EU primacy calls into question not only the long-term stability of the EU, but the very legal basis for the entire Union itself.<sup>5</sup> Germany, in particular, has charged rather stridently down this path in the past few decades, developing a relatively complicated legal relationship with the EU wherein its Federal Constitutional Court, the *Bundesverfassungsgericht* (BVG), has rejected certain aspects of EU supremacy and asserted instead the primacy of the German Basic Law (i.e., the German

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*the Perspective of Constitutional Pluralism*, 5 EUR. CONST. L. REV. 421, 424 (2010); Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, 6 EUR. CONST. L. REV. 175, 190 (2010).

3. See, e.g., *Dutch Say 'Devastating No' to EU Constitution*, GUARDIAN (June 2, 2005), <http://www.theguardian.com/world/2005/jun/02/eu.politics> (referring to the Netherlands); Elaine Sciolino, *French Voters Soundly Reject European Union Constitution*, N.Y. TIMES (May 30, 2005), [http://www.nytimes.com/2005/05/30/international/europe/30france.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/05/30/international/europe/30france.html?pagewanted=all&_r=0) (referring to France).

4. See Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, 11 EUR. L.J. 262, 263 (2005) ("[I]t would be a mistake to conclude that all Member States have accepted the Court of Justice's view that EU Law is the supreme law of the land. A significant number of national courts have instead held that they could set aside EU [l]aw on constitutional grounds under certain circumstances."); see also Christina Eckes, *Protecting Supremacy from External Influences: A Precondition for a European Legal Order*, 18 EUR. L.J. 230, 234 (2012) ("As is well-known national (constitutional) courts have not easily accepted the supremacy of European law within their national legal orders.").

5. See Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 586, 594 ("It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.").

Constitution).<sup>6</sup> The ideological origins of this development and its consequences for the future of the EU are equal parts unsettling and fascinating.

The purpose of this Article is to assess the legal relationship that currently exists between the EU and Germany with respect to the primacy of their respective legal regimes. To do so, Part II will briefly examine the legal doctrine of supremacy as envisioned by the ECJ. Part III will then trace the development of the BVG's case law with respect to the EU's claim to supremacy. In this context, the relevant landmark decisions of the BVG will be highlighted and discussed. Parts IV–V will then analyze the current state of this relationship and potential future implications.

## II. THE EUROPEAN VISION OF UNION SUPREMACY

As mentioned *supra*, the EU considers its framework of legislation and directives to have primacy over contravening domestic norms. Although the doctrine of primacy has been somewhat implicit in earlier ECJ decisions, its overt formulation originated in *Costa v. ENEL*, wherein the ECJ held that in any conflict between national and EU legal norms, EU laws were to be considered supreme.<sup>7</sup> This doctrine was later extended in 1970 by the ECJ in *Internationale Handelsgesellschaft* to include the supremacy of European laws over national constitutions as well<sup>8</sup>:

[T]he validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a

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6. See, e.g., *id.*

7. *Id.*; see also Franz C. Mayer, *Supremacy—Lost?—Comment on Roman Kwiecień*, 6 GER. L.J. 1497, 1498 (2005); Dieter Grimm, *Defending Sovereign Statehood Against Transforming the Union into a State*, 5 EUR. CONST. L. REV. 353, 355 (2009); Meinhard Hilf, *Costa v. ENEL Case*, in 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 824, 824–25 (Rüdiger Wolfrum ed., 2013).

8. See Mayer, *supra* note 7, at 1498; see Grimm, *supra* note 2, at 230.

Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.<sup>9</sup>

Thus, from the perspective of the EU, any and all national legal norms must yield to their EU counterparts. The scope of this primacy is, therefore, “complete and unconditional.”<sup>10</sup> The practical outcome of such an approach is that, where EU law and national norms collide, the national norm must be set aside and the EU law applied “in its entirety.”<sup>11</sup> This does not, however, mean that the conflicting domestic provision is held to be null and void; rather it is simply not applied where it conflicts with an EU norm.<sup>12</sup>

There are a number of logical reasons for imbuing EU norms with supremacy. First, the unconditional nature of the treaty obligations assumed by Member States in creating the EU is such that these obligations cannot be overturned by later, unilateral domestic acts.<sup>13</sup> Second, allowing national laws to trump EU norms would create a legal landscape wherein the enforcement and application of EU norms differ from Member State to Member State.<sup>14</sup> Such a variance would directly undercut the uniformity of legal standards that EU legislation is intended to bring about.<sup>15</sup> Finally, the effectiveness of EU norms would be fatally undermined if such variability of enforcement existed.<sup>16</sup> From the standpoint of the ECJ, denying EU law supremacy over domestic norms would call into question the very legal basis of the EU itself.<sup>17</sup>

Given the necessity of the uniform application of EU norms throughout the Member States, it is perhaps unsurprising that

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9. Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr*, 1970 E.C.R. 1125, 1134 (alteration in original).

10. Barents, *supra* note 2, at 424.

11. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, 644.

12. See Barents, *supra* note 2, at 425.

13. See Hilf, *supra* note 7, at 824–25.

14. See *Costa*, 1964 E.C.R. at 594.

15. See Mayer, *supra* note 7, at 1502; Barents, *supra* note 2, at 424; Gunnar Beck, *The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict Between Right and Right in Which There Is No Praetor*, 17 EUR. L.J. 470, 472 (2011).

16. See Eckes, *supra* note 4, at 231; Barents, *supra* note 2, at 424; Mayer, *supra* note 7, at 1502.

17. See *Costa*, 1964 E.C.R. at 594.

ensuring the uniform interpretation of EU law has also been considered of great importance by the ECJ. With this goal in mind, the ECJ has asserted itself as the sole authoritative interpreter of EU treaties and the competences of the EU generally.<sup>18</sup> This is not to say that national courts do not interpret EU law; in fact, they are considered the “natural forum” for EU law, at least for most cases involving private individuals, and they generally interpret and apply EU law more than the designated EU courts do.<sup>19</sup> In exercising this role, national courts must not only set aside domestic laws that are incompatible with their EU counterparts, but must also interpret their own laws, where possible, such that they are compatible with EU law.<sup>20</sup> However, while national courts have the power to interpret and apply EU law, their jurisdiction stops short of allowing them to opine on the actual validity of any specific EU law.<sup>21</sup> Since the ECJ is the sole interpretive authority with respect to EU treaties, it is also the only legal body that may declare that an EU law or act is not in compliance with those treaties.<sup>22</sup> The natural consequence of this doctrine is that “national courts have no jurisdiction themselves to declare that acts of Community institutions are invalid.”<sup>23</sup>

Grounds exist whereupon EU law might very well be invalid in a manner that is of some importance to the Member States. The EU is limited by the principle of conferral, whereby its competences are restricted to what the Member States have agreed upon in the applicable founding treaties.<sup>24</sup> All other competences are left to, and exercisable by, the Member States.<sup>25</sup>

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18. See Beck, *supra* note 15, at 472–473; see also Grimm, *supra* note 2, at 236.

19. See MONICA CLAES, *THE NATIONAL COURTS’ MANDATE IN THE EUROPEAN CONSTITUTION* 58–59 (2006).

20. *Id.* at 67.

21. See Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4225, 4231–32.

22. *Id.*

23. *Id.* at 4232 (emphasis added); see also Franz C. Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court’s OMT Reference*, 15 GER. L.J. 115 (2014) (stating that national courts have no right to invalidate or declare EU law inapplicable); Jürgen Bast, *Don’t Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court’s Ultra Vires Review*, 15 GER. L.J. 171 (2014) (arguing that the ECJ has reserved the sole right to annul or declare an EU law invalid).

24. Consolidated Version of the Treaty on European Union art. 5, Dec. 13, 2007, 2012 O.J. (C 326) 18 [hereinafter Consolidated EU Treaty].

25. *Id.*

Thus, while EU law is acknowledged as supreme over national norms, “its supremacy extends no further than the scope of the powers that Member States have chosen to confer on the Union.”<sup>26</sup> Acting beyond its conferred powers would render the resulting EU law invalid, yet only an EU organ in the form of the ECJ, is allowed to make this determination. As such, the ECJ claims the sole authority (known as *Kompetenz-Kompetenz*) to determine the outer limits of the conferred competences of the EU, even though these specific limitations were established by the Member States.<sup>27</sup>

Another area where EU laws might be considered invalid involves the limitations set out in national constitutions. Since the EU may only exercise those powers voluntarily granted to it by Member States, it is not only limited to those powers which the Member States actually confer, but also to those powers which the Member States may *legally* confer in accordance with their national constitutions. This is a distinction of some importance, since most national constitutions limit the extent to which the Member States may transfer domestic powers to international entities.<sup>28</sup> One example of this is “national identity,” the relinquishment of which is generally prohibited in national constitutions.<sup>29</sup> Given this limitation, any EU law that infringes upon the national identity of such a nation would arguably be outside the conferred competences of the EU, as the domestic government would not have had the power under their own constitutional system to confer such a derogation of identity in the first place. In this manner, because the legitimacy of the EU relies on the conferral of powers pursuant to the limitations of national constitutions, the ultimate validity of EU laws (as well as any claim to supremacy) is therefore limited by these constitutions as well.<sup>30</sup> However, since national courts may not

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26. Beck, *supra* note 15, at 472.

27. *See id.*

28. *See* Grimm, *supra* note 2, at 230.

29. *See id.* Although generally acknowledged as impossible to define, this term presumably refers to certain basic political and constitutional structures or powers underlying sovereignty.

30. *See* Voßkuhle, *supra* note 2, at 191; Michelle Iodice, *Solange in Athens*, 32 B.U. INT'L L.J. 539, 541 (2014); Erich Vranes, *German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis*, 14 GER. L.J. 75, 109 (2013); Niels Petersen, *Karlsruhe Not Only Barks, But Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court*, 15 GER. L.J. 321, 322 (2014). However, it must be noted that this invalidity would arguably only occur from the perspective of the national courts enforcing domestic law; from the perspective of international law, such disputed treaty

declare EU laws invalid, the actual interpretation and application of any national limitations on EU competence is still left to the ECJ.

The end result is that the EU not only considers its laws to be supreme to both the laws and constitutions of the Member States, but also denies the national court systems of the Member States any jurisdictional ability to even consider the validity of the very EU laws that reign supreme over that legal system. In other words, the national courts may very well find themselves required to override a legitimate domestic legal norm (or constitutional requirement) in favor of an EU law that they deem to be illegitimate. As may well be imagined, not every national jurisdiction is entirely supportive of this outcome.

### III. THE GERMAN VISION OF UNION SUPREMACY

One jurisdiction that has been especially critical of the continued development of the EU's supremacy doctrine as well as its claim of *Kompetenz-Kompetenz* is Germany. It is well known that the BVerfG "has never fully accepted the absolute supremacy of the ECJ in matters of EU law."<sup>31</sup> This reticence to adhere to the EU's development of its own comprehensive supremacy over national constitutions can be clearly seen and best understood in the case law of the BVerfG.

#### A. THE *SOLANGE* CASES AND FUNDAMENTAL RIGHTS REVIEW

The initial case in which the BVerfG questioned the primacy of EU law is *Solange I*: in that case, the BVerfG was presented with the question of whether an EU law that infringed on

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provisions remain valid and binding upon the Member State unless it was "objectively evident to any State" involved in the process that the Member State lacked the domestic power to agree to that treaty and the internal limitation was of "fundamental importance." Vienna Convention on the Law of Treaties, art. 46, May 23, 1969, 1155 U.N.T.S. 331.

31. Petersen, *supra* note 30, at 321; Mayer, *supra* note 23, at 116; Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMMON MKT. L. REV. 1795, 1795 (2009); Matthias Niedobitek, *The Lisbon Case of 30 June 2009—A Comment from the European Law Perspective*, 10 GER. L.J. 1267, 1273 (2009). See also Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts*, 6 EUR. CONST. L. REV. 175, 195–96 (2010) (noting that "the primacy of Union law . . . is neither absolute nor based on Union law, but anchored in national constitutional law, and therefore also limited by it.").

fundamental rights enshrined in the German Basic Law (Constitution) did indeed have supremacy over those fundamental rights.<sup>32</sup> Given that such an EU law, if supreme, would be applied in place of the national fundamental rights, such a result would leave individuals at the complete mercy of the EU legal system for rights protection. The BVerfG stated that since fundamental rights were an inalienable part of the Basic Law, the competence to displace or weaken them could not legally be transferred to the EU as part of the conferral of powers.<sup>33</sup> In this sense, the protection of fundamental rights was part of the national identity of Germany and could not be “surrendered by any legal act.”<sup>34</sup> As such, any EU law that infringed upon fundamental rights would not be valid, and where a conflict occurred between German fundamental rights and an EU law, the German rights would prevail.<sup>35</sup> This was especially the case considering that the BVerfG determined the protection afforded to fundamental rights at the EU level to be inadequate.<sup>36</sup> The BVerfG concluded that “so long as” (“solange” in German) this inadequate level of protection remained, it would exercise its jurisdiction to review EU acts for compatibility with the fundamental rights set out in the German Basic Law.<sup>37</sup> The BVerfG noted, however, that it would only exercise its jurisdiction over an issue where the ECJ had already been asked to interpret the EU act in question and the resulting interpretation did not

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32. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 BVerfGE 271 (Ger.) [hereinafter *Solange I*].

33. See *Solange I*, 37 BVerfGE 271 (280) (Ger.) (“Ein unaufgebbares, zur Verfassungsstruktur des Grundgesetzes gehörendes Essentiale der geltenden Verfassung der Bundesrepublik Deutschland ist der Grundrechtsteil des Grundgesetzes. Ihn zu relativieren, gestattet Art. 24 GG nicht vorbehaltlos.”).

34. Grimm, *supra* note 7, at 356–57.

35. See *Solange I*, 37 BVerfGE 271 (281) (Ger.) (“Vorläufig entsteht also in dem unterstellten Fall einer Kollision von Gemeinschaftsrecht mit einem Teil des nationalen Verfassungsrechts, näherhin der grundgesetzlichen Grundrechtsgarantien, die Frage, welches Recht vorgeht, das andere also verdrängt. In diesem Normenkonflikt setzt sich die Grundrechtsgarantie des Grundgesetzes durch, solange nicht entsprechend dem Vertragsmechanismus die zuständigen Organe der Gemeinschaft den Normenkonflikt behoben haben.”).

36. See *id.*, at 280; Anne Peters, *The Bananas Decision (2000) of the German Federal Constitutional Court: Towards Reconciliation with the European Court of Justice as Regards Fundamental Rights Protection in Europe*, 43 GER. Y.B. INT'L L. 276, 278 (2000).

37. See *Solange I*, 37 BVerfGE 271 (285) (Ger.); see also Grimm, *supra* note 7, at 356–57; Ming-Sung Kuo, *Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?*, 26 CAN. J.L. & JURIS. 341, 362 (2013).



relieve any conflict between the EU norm and German fundamental rights.<sup>38</sup>

The ramifications of this decision are not only fairly clear, but also rather immense. First, by holding that an EU law would not be supreme to a national constitutional provision (however important its standing within the domestic legal system), the BVerfG was directly challenging the doctrine of EU supremacy as developed by the ECJ. Second, by inserting itself as a legal authority capable of reviewing the compatibility of an EU law with a national provision, and potentially holding that EU norm to be inapplicable within the national system, the BVerfG was explicitly ignoring the ECJ's ruling that it had the sole authority to declare an EU law invalid. These independent assertions arose from the basic fact that the BVerfG viewed the relationship between the Member States and the EU in a fundamentally different light than the ECJ did, as later cases will show.

Although there was considerable unease about the BVerfG's decision, the ECJ proved particularly receptive to the criticism that fundamental rights protection was lacking at the EU level and set about remedying this deficit.<sup>39</sup> Taking inspiration from various international instruments, as well as from the "joint constitutional heritage of Member States," the ECJ "substantially accelerated the development of its common-law type fundamental rights jurisprudence."<sup>40</sup> The end-result of the developmental process was that the EU treaties implicitly contained an "unwritten Bill of Rights" to which EU laws and actions were required to adhere.<sup>41</sup> In this manner, the ECJ was able to reinforce the continuing supremacy of EU law over conflicting national norms,<sup>42</sup> since the increased protection of fundamental rights never allowed Germany (or any other Member State) to entertain a case wherein an EU law was inconsistent with the protection of fundamental rights.

Thus, by developing its fundamental rights jurisprudence, the ECJ avoided any potential conflict with the BVerfG.<sup>43</sup> As a result of this development, it was never necessary for the BVerfG

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38. See *Solange I*, 37 BVerfGE 271 (285); see also Grimm, *supra* note 7, at 357.

39. See Grimm, *supra* note 2, at 233; Kuo, *supra* note 37, at 363.

40. Kumm, *supra* note 4, at 294–95; see also Grimm, *supra* note 2, at 233; Beck, *supra* note 15, at 489.

41. Grimm, *supra* note 2, at 233.

42. See *id.*

43. See Beck, *supra* note 15, at 489.

to assert the jurisdiction to review EU laws that it had claimed in *Solange I*. In 1986, the BVerfG officially put an end to any speculation that it eventually would: in what became known as *Solange II*, the BVerfG examined the ECJ's increased protection of fundamental rights, and declared that they were now sufficiently guaranteed at the EU level.<sup>44</sup> The Court further stated that "so long as" the EU continued to adequately protect fundamental rights, then the BVerfG would no longer exercise its jurisdiction to review EU legislation or acts.<sup>45</sup> Notably, the BVerfG specifically asserted that the protections afforded at the EU level need not be identical in every respect to those guaranteed at the national level, as long as they were generally considered to be equivalent.<sup>46</sup> In doing so, the BVerfG took away any obligation on its part to compare and contrast between the various doctrines of fundamental rights protections at each level, effectively eliminating any possible necessity to provide exhaustive oversight of EU law.

Although the BVerfG in *Solange II* established a legal standard that it would essentially no longer review EU acts or legislation, it is important to realize that the Court did not expressly relinquish its claim that it had the jurisdiction to do so.<sup>47</sup> Rather, it chose not to exercise this jurisdiction only so long as the EU continued to adequately protect fundamental rights.<sup>48</sup> Put differently, the BVerfG's decision maintained the stance that it has the power to review EU laws for validity given the limitations of national constitutional requirements and that it could reactivate this jurisdiction at any time if the EU failed to live up to its end of the bargain.<sup>49</sup> Thus, the assertions made by the BVerfG in *Solange I* that the supremacy of EU law is subject to limitations imposed by national constitutions, and the BVerfG's power to police these limitations (both contrary to the ECJ's established jurisprudence), were implicitly sustained. Actions of the BVerfG

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44. See BVerfG, Oct. 22, 1986, 73 BVerfGE 339 (378), (Ger.) [hereinafter *Solange II*] ("Dieser Grundrechtsstandard ist mittlerweile insbesondere durch die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften inhaltlich ausgestaltet worden, gefestigt und zureichend gewährleistet."); see also Voßkuhle, *supra* note 2, at 192.

45. See *Solange II*, 73 BVerfGE 339 (381) (Ger.); see also Grimm, *supra* note 7, at 357.

46. See *Solange II*, 73 BVerfGE 339 (381) (Ger.); see also Grimm, *supra* note 2, at 230–31.

47. See Voßkuhle, *supra* note 2, at 192; see also Grimm, *supra* note 2 at 234.

48. See Voßkuhle, *supra* note 2, at 192; Grimm, *supra* note 2, at 234.

49. See Grimm, *supra* note 2, at 235; Iodice, *supra* note 30, at 543.

since *Solange II*, however, have shown that the reactivation of its jurisdiction in this area would likely require a “decisive step backwards” in the protection of fundamental rights at the EU level.<sup>50</sup> Indeed, the standard of proof now required by those seeking to engage the Court’s jurisdiction in this area is “unanimously regarded in the academic literature as practically insurmountable.”<sup>51</sup>

#### B. THE *MAASTRICHT* CASE AND THE INITIATION OF *ULTRA VIRES* REVIEW

In 1993, in what has become known as the *Maastricht* case, the BVerfG was confronted with a constitutional challenge to Germany’s accession to the latest EU Treaty (the Maastricht Treaty).<sup>52</sup> The BVerfG’s eventual decision found the applicant’s challenges to the Treaty to be without merit, but in doing so, the BVerfG revisited and reinvigorated many of the primacy debates that had remained dormant since *Solange II*.<sup>53</sup>

The initial section of the decision concerns admissibility standards and, with respect to issues of fundamental rights review, effectively reaffirms the *Solange* line of cases—though with a slight twist.<sup>54</sup> In *Solange I* and *Solange II*, the BVerfG indicated that its jurisdiction to review fundamental rights cases involved only those situations where the infringing EU law in question was applied by a German institution.<sup>55</sup> On the other hand, in *Maastricht*, the BVerfG clarified that its jurisdiction extended to any situation where the application of EU law impacted fundamental rights.<sup>56</sup> The practical consequences of this extension are minimal, since the BVerfG also reasserted the same unattainable standard for the activation of its jurisdiction

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50. Grimm, *supra* note 2, at 235.

51. Vranes, *supra* note 30, at 104; see Voßkuhle, *supra* note 2, at 192 (opining that it is “unlikely that this admissibility standard may ever be passed”). It is arguable, however, that the admissibility standard in this area has been weakened in the recent Data Protection Case, BVerfG, Mar. 2, 2010, 125 BVerfGE 260 (Ger.) [hereinafter Data Protection Case], though the practical impact of that case remains to be seen.

52. See BVerfG, Oct. 12, 1993, 89 BVerfGE 155 (Ger.) [hereinafter *Maastricht*].

53. *Id.*

54. *Id.*

55. See *Solange I*, 37 BVerfGE 271 (Ger.); see also *Solange II*, 73 BVerfGE 339 (Ger.).

56. See *Maastricht*, 89 BVerfGE 155 (174) (Ger.); see also Grimm, *supra* note 2, at 234.

in this area.<sup>57</sup> In effect, the BVG expanded a jurisdiction that it had already rendered virtually impossible to invoke. However, in doing so, the BVG reiterated its theoretical ability to review EU legislation.

The second, and main, part of the *Maastricht* decision focuses on the competences of the EU from the perspective of the BVG. The basic assumption of the BVG is that the Member States are the “Masters of the Treaties” in the sense that the Member States control the EU and not the other way around.<sup>58</sup> As such, the validity of EU law in Germany arises from the national legislative acts that create and govern its application within the domestic legal system.<sup>59</sup> The natural consequence of this understanding of the relationship between the EU and the Member States is that EU law may be considered supreme when it comes into conflict with incompatible domestic norms, but this supremacy exists only because the national legislation governing EU law makes it supreme.<sup>60</sup> In other words, it is a supremacy over the domestic laws that is entirely dependent on those domestic laws. The end effect is that national laws are only subsidiary on a voluntary basis.

The conception that the EU is a product of the Member States also results in a fundamental shift as to the definition of EU competences. As a starting point in *Maastricht*, the BVG went to great lengths to disprove the notion that the EU had the power to decide the limitations of its own competence (*Kompetenz-Kompetenz*).<sup>61</sup> The restrictions set around the conferred powers are those established by the Member States, and the EU does not possess an exclusive position when it comes to their definition. Taking this line of reasoning a step further, the BVG stated that it, as a national domestic court, also had the power to review EU competences.<sup>62</sup> From the BVG’s point of view, since the EU is limited to only those powers specifically conferred upon it, any EU actions beyond those powers would

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57. See Grimm, *supra* note 2, at 234–35.

58. *Maastricht*, 89 BVERFGE 155 (190) (Ger.) (“Deutschland ist einer der Herren der Verträge.”); see also Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L.J. 389, 392 (2008).

59. See *Maastricht*, 89 BVERFGE 155 (190) (Ger.).

60. See *id.*; Grimm, *supra* note 7, at 355.

61. See *Maastricht*, 89 BVERFGE 155 (195–97) (Ger.).

62. See *id.* at 188 (“Dementsprechend prüft das Bundesverfassungsgericht, ob Rechtsakte der europäischen Einrichtungen und Organe sich in den Grenzen der ihnen eingeräumten Hoheitsrechte halten oder aus ihnen ausbrechen.”).

not be binding within Germany.<sup>63</sup> This is true not only of EU laws or other secondary legislation, but also where judicial interpretation of the EU Treaty effectively expands the Treaty outside the limitations specifically imposed by the Member States.<sup>64</sup> Thus, in *Maastricht*, the BVG not only asserted that EU power is limited by the national constitutions and the conferred powers within the EU Treaty, but also that the Member States have the right to police and invalidate any *ultra vires* acts taken by the EU.<sup>65</sup> Naturally, these doctrines fly directly in the face of established EU jurisprudence.<sup>66</sup>

The *Maastricht* decision was not well received by academics or practitioners.<sup>67</sup> However, similar to the aftermath of *Solange I*, the reaction at the EU level appeared fairly mute. Rather than directly combatting the challenge to its jurisdiction, the ECJ instead “began to act much more cautiously in cases related to Community powers.”<sup>68</sup> By tightening its case law with respect to EU competences, and limiting the liberalness of its interpretive doctrines, the ECJ, in effect, began to self-police EU actions. Similar to its response to *Solange I*, the ECJ’s actions post-*Maastricht* effectively reduced the opportunities for conflict between itself and the BVG, rather than seek them out.<sup>69</sup> It should be noted, though, that numerous scholars argue that the ECJ’s actions were not taken in response to the BVG, but rather were arrived at independently.<sup>70</sup> Although the validity of the cause and effect in this instance can never be authoritatively established, at a minimum, the timing of the ECJ’s shifting jurisprudence is suspicious.

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63. *See id.*

64. *See id.* at 157; Cruz, *supra* note 58, at 392.

65. *See* Bast, *supra* note 23, at 170; Elisabetta Lanza, *Core of State Sovereignty and Boundaries of European Union’s Identity in the Lissabon-Urteil*, 11 GER. L.J. 399, 411 (2010); Voßkuhle, *supra* note 2, at 193; Franz C. Mayer, *The European Constitution and the Courts: Adjudicating European Constitutional Law in a Multilevel System* 13 (Monnet Working Paper No. 9/03, 2003), <http://www.jeanmonnetprogram.org/archive/papers/03/030901-03.pdf>.

66. *See* Beck, *supra* note 15, at 472.

67. *See* JHR & LB, *On the Lissabon-Urteil: Democracy and a Democratic Paradox*, 5 EUR. CONST. L. REV. 341, 344 (2009); Grimm, *supra* note 2, at 237.

68. Cruz, *supra* note 58, at 404; *accord* Kumm, *supra* note 4, at 296; Voßkuhle, *supra* note 2, at 195.

69. *See* Cruz, *supra* note 58, at 404.

70. *Id.*

## C. THE LISBON DECISION AND IDENTITY REVIEW

For its part, post-*Maastricht*, the BVG also appeared to be in no hurry to provoke an incident with the ECJ. Having sent a “clear message” to the ECJ and the EU institutions generally,<sup>71</sup> the BVG failed to follow through with its threat to invalidate EU legislation in any of its subsequent cases.<sup>72</sup> In this respect, the Court actively avoided direct and open conflict with the ECJ over these issues. Some commentators believed the BVG became “all bark and no bite.”<sup>73</sup> As such, the aggressive expansion of the *Lisbon* decision of 2009 came as somewhat of a surprise to many.<sup>74</sup>

In *Lisbon*, the BVG upheld the constitutional compatibility of the new Lisbon EU Treaty with the German Basic Law, while striking down the domestic implementation of that Treaty.<sup>75</sup> Though, similar to *Maastricht*, it was not so much the ultimate outcome of the constitutional challenge that proved especially important, rather it was the language and reasoning the BVG applied in doing so. The BVG’s discussion of the Treaty in relation to the limitations of Germany’s Basic Law proved highly significant in several specific aspects surrounding Germany’s legal relationship with the EU.<sup>76</sup>

First, the BVG reiterated and clarified many of its positions from *Maastricht*. Specifically, *Lisbon* reaffirmed that the Member States remained the “Masters of the Treaties” and the ultimate source of the EU’s power.<sup>77</sup> As such, any primacy of EU law over domestic law is derived from the Basic Law rather than the autonomous supremacy of the Treaty.<sup>78</sup> Furthermore, the EU may only act within those powers that have been conferred

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71. *Id.*

72. See Beck, *supra* note 15, at 486; Cruz, *supra* note 58, at 395–96; Frank Schorkopf, *The European Union as an Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon*, 10 GER. L.J. 1219 (2009).

73. Cruz, *supra* note 58, at 395; see, e.g., Christoph U. Schmid, *All Bark and No Bite: Notes on the Federal Constitutional Court’s “Banana Decision,”* 7 EUR. L.J. 95 (2001).

74. See Schorkopf, *supra* note 72, at 1219.

75. See Frank Schorkopf, *German Federal Constitutional Court Opinion on the Compatibility of the EU Lisbon Treaty with the German Basic Law*, 104 AM. J. INT’L L. 259 (2010) [hereinafter Schorkopf Lisbon].

76. See *id.* at 260.

77. See BVERFG, Jun. 30, 2009, 123 BVERFGE 267, § 231 (Ger.) [hereinafter *Lisbon*]; see also Roland Bieber, *An Association of Sovereign States*, 5 EUR. CONST. L. REV. 391, 397 (2009).

78. See 123 BVERFGE 267 (§ 240) (Ger.).

upon it, and the BVG reasserted its jurisdiction to consider whether EU acts are *ultra vires*.<sup>79</sup> Moreover, the Court expanded this jurisdiction by clearly stating that, in addition to policing EU actions for conformity with conferred powers, it would provide oversight to ensure the EU's adherence to the principle of subsidiarity.<sup>80</sup> Finally, the BVG reasserted its understanding that the EU lacks jurisdiction to rule on its own competence (*Kompetenz-Kompetenz*).<sup>81</sup>

However, the BVG did more in *Lisbon* than simply repeat and further entrench its prior views on the legal relationship between the EU and Germany; it expanded them as well. When discussing the basic limitations imposed upon the Lisbon Treaty by the German Basic Law, the BVG noted that the German legislature's constitutional abilities to transfer sovereign powers to the EU "are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity."<sup>82</sup> Thus, not only is the EU limited to the use of those powers that have been specifically conferred to it by the Member State, but it also may not exercise conferred powers that the Member State was constitutionally unable to transfer.<sup>83</sup> In Germany's case, this encompasses those aspects of its "non-transferable identity" that are safeguarded under Article 79(3) German Basic Law.<sup>84</sup> The BVG in *Lisbon* states that this includes decisions as to:

[S]ubstantive and formal criminal law . . . the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior . . . fundamental fiscal decisions on public revenue and

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79. See *id.*; see also Schorkopf, *supra* note 72, at 1227–28; Vranes, *supra* note 30, at 93; Grimm, *supra* note 7, at 363; JHR, *supra* note 67, at 341.

80. See 123 BVERFGGE 267 (§ 240) (Ger.); Consolidated EU Treaty, *supra* note 22, at 18 (defining the principle of subsidiarity as such that "in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."); see also Schorkopf, *supra* note 67, at 1231.

81. See 123 BVERFGGE 267 (§ 322) (Ger.).

82. *Id.* § 226.

83. See Vranes, *supra* note 30, at 93.

84. See 123 BVERFGGE 267 (§ 235) (Ger.); Stefan Theil, *What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?*, 15 GER. L.J. 599, 610 (2014).

public expenditure . . . decisions on the shaping of living conditions in a social state . . . and decisions of particular cultural importance.<sup>85</sup>

The Court goes into great detail in the decision as to the specific aspects that are off-limits to European integration and restates that “substantial freedom of action must remain reserved to the Member States” in these areas.<sup>86</sup> In line with its prior assertion of jurisdiction to provide *ultra vires* review, the BVerfG also asserted in *Lisbon* the jurisdiction to assess whether EU actions infringe upon the national constitutional identity of Germany and invalidate any such actions that do.<sup>87</sup>

Understandably, *Lisbon* was not welcomed with immediate approval.<sup>88</sup> This is unsurprising, given the decision was simply another in a “long line of precedents” that had also previously been subjected to harsh critique.<sup>89</sup> The reaffirmation of the reasoning in these prior cases, and the expansion into other areas of review, acted to further entrench the BVerfG’s long-held conception of the legal relationship between Germany and the EU.

However, *Lisbon*, while relying on the BVerfG’s prior cases, shifted the BVerfG’s emphasis by focusing more on German sovereignty.<sup>90</sup> This shift may be seen quite clearly in the drastically increased usage of the German root word “soverän” (forty-nine times) in the judgment as compared to prior usage in *Maastricht* (eight times) and the *Solange* cases (zero times).<sup>91</sup> Far from a simple linguistic change, the alteration in focus to Member State sovereignty made the decision less about the limitations on the EU as required by the Treaty, and more about

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85. 123 BVerfGE 267 (§ 252) (Ger.); see also Theil, *supra* note 84, at 610; Jo Eric Khushal Murkens, *Identity Trumps Integration: The Lisbon Treaty in the German Federal Constitutional Court*, 48 DER STAAT 517, 521 (2009); Thym, *supra* note 31, at 1800; Christian Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, 10 GER. L.J. 1259, 1260 (2009).

86. 123 BVerfGE 267 (§ 253) (Ger.); see also (§§ 252–60).

87. See *id.* § 240.

88. See JHR, *supra* note 67, at 343; Joseph H. Weiler, *The ‘Lisbon Urteil’ and the Fast Food Culture*, 20 EUR. J. INT’L L. 505 (2009); Anna-Bettina Kaiser, *German Federal Constitutional Court: German Data Retention Provisions Unconstitutional in Their Present Form*, 6 EUR. CONST. L. REV. 503, 507 (2010); Alfred Grosser, *The Federal Constitutional Court’s Lisbon Case: Germany’s “Sonderweg”—An Outsider’s Perspective*, 10 GER. L.J. 1263 (2009).

89. Grimm, *supra* note 7, at 353.

90. See *id.* at 364.

91. See Murkens, *supra* note 85, at 520–21.



the restrictions imposed on the EU by the constitutional orders of Member States themselves. Thus, whereas *Maastricht* spoke of the EU acting beyond its treaty-defined powers (*ultra vires*), *Lisbon* spoke of the EU acting beyond the powers the Members States could constitutionally confer (identity review).<sup>92</sup>

In this respect, *Lisbon* is a throwback to the line of thinking apparent in *Solange I*, where even though the term “souveränität” is not mentioned by name, the fundamental rights limitation imposed upon the EU by the BVerfG was an external restriction arising from an inalienable aspect of Germany’s constitutional identity.<sup>93</sup> In many respects, *Lisbon*’s increased focus on protecting Germany’s sovereignty from EU encroachment was viewed as the BVerfG setting concrete limitations on the future integration of the EU.<sup>94</sup> From a practical standpoint, however, these restrictions were viewed with some skepticism: since the BVerfG had in prior cases continuously failed to invoke its jurisdiction over EU affairs, there was some doubt as to whether it would actually enforce these limitations in the future either.<sup>95</sup>

Despite the possible lack of a practical usage, the difficulties inherent in a limitation of the EU dependent on national identity are numerous and fairly apparent. For one thing, the concept of ‘identity’ itself is exceedingly difficult to quantify and define: the Dutch scholar Kossman has made the analogy to a “big jellyfish on the beach” which, after careful consideration, should be left alone, since it is “too complicated, too multifaceted and too variable.”<sup>96</sup> The malleability of this term also leaves it open to abuse by national courts.<sup>97</sup> Indeed, the BVerfG’s definition as to what comprises national identity has become rather “elaborate” and “expansive.”<sup>98</sup> Naturally, the more expansive the definition,

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92. Grimm, *supra* note 7, at 365.

93. *See id.* at 364; 37 BVerfGE 271 (280) (Ger.) (“Ein unaufgebbares, zur Verfassungsstruktur des Grundgesetzes gehörendes Essentiale der geltenden Verfassung der Bundesrepublik Deutschland ist der Grundrechtsteil des Grundgesetzes.”).

94. *See* Thym, *supra* note 31, at 1808; JHR, *supra* note 67, at 342.

95. *See* Schorkopf, *supra* note 72, at 1239; Henning Deters, *National Constitutional Jurisprudence in a Post-National Europe: The ESM Ruling of the German Federal Constitutional Court and the Disavowal of Conflict*, 20 EUR. L.J. 204, 213 (2014).

96. Jan-Herman Reestman, *The Franco-German Constitutional Divide*, 5 EUR. CONST. L. REV. 374 (2009).

97. *See* Mayer, *supra* note 23, at 133.

98. Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV.

the more protection national laws and rights are afforded with respect to EU encroachment. Of course, the resulting protection also necessarily shields idiosyncratic national laws from superseding EU regulations, which in turn hinders the uniformity of the EU legal landscape.

Since a Member State's national identity is determined by its domestic legal system, every national system will define its identity differently based upon its own internal prerogatives, further undermining consistency in the EU area.<sup>99</sup> This is in stark contrast to *ultra vires* review, where every national system would interpret and apply the same articles of the EU Treaty in a presumably similar manner.<sup>100</sup> Thus, identity review yields a greater risk of legal inconsistencies among the EU Member States, which, given the importance placed by the ECJ upon the uniform interpretation and application of EU laws, would likely provide a fertile ground for conflict between the ECJ and national courts, specifically the BVerfG.<sup>101</sup>

#### D. THE *HONEYWELL* CASE AND *ULTRA VIRES* REVIEW

Any doubt as to whether the BVerfG would actually invoke its jurisdiction to examine the validity of an EU act was, in some respects, both silenced and amplified by the BVerfG's *Honeywell* case of 2010. In *Honeywell*, the BVerfG was presented with its first real opportunity after *Lisbon* to review an EU act, and it did so, albeit tentatively.<sup>102</sup> In doing so, the BVerfG reiterated that it was "empowered and obliged" to review the validity of EU acts.<sup>103</sup> As such, the BVerfG invoked its *ultra vires* jurisdiction and explicitly clarified the conditions under which it would hold an EU law to be outside the powers of the EU.<sup>104</sup> The end result was that

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1417, 1438–39 (2011).

99. See Mayer, *supra* note 23, at 133; Thym, *supra* note 31, at 1806.

100. See Thym, *supra* note 31, at 1806. However, Thym also argues later that the resulting flexibility of 'identity' review provides for the possibility of country-specific solutions. See *id.* at 1809.

101. See *id.* at 1805.

102. See Matthias Mahlmann, *The Politics of Constitutional Identity and its Legal Frame—the Ultra Vires Decision of the German Federal Constitutional Court*, 11 GER. L.J. 1407, 1409 (2010); Theil, *supra* note 84, at 627.

103. BVerfG, July 6, 2010, 126 BVerfGE 286 (§ 55) (Ger.), [http://www.bundesverfassungsgericht.de/SharedDocts/Entscheidungen/EN/2010/07/rs20100706\\_2bvr266106en.html](http://www.bundesverfassungsgericht.de/SharedDocts/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html) (last visited Feb. 12, 2015) [hereinafter *Honeywell*].

104. See Mahlmann, *supra* note 102, at 1410.

under the clarified standard set out by the BVerfG, the EU action in *Honeywell* was not found to be *ultra vires*.<sup>105</sup> Thus, the BVerfG silenced some critics by actually invoking its jurisdiction over EU acts, but emboldened others by not actually following through with its threats to limit the EU.

The real importance of *Honeywell*, though, lies in the standard enunciated by the BVerfG as to when it would actually hold an EU act *ultra vires*. As an initial procedural hurdle, the BVerfG stated that the ECJ must have first had the opportunity to “deliver its legal opinion by means of a preliminary ruling.”<sup>106</sup> As such, the BVerfG will not invalidate an EU action unless the ECJ itself has specifically failed to act in that regard.<sup>107</sup> From a substantive standpoint, the BVerfG clarified that only those EU acts that are “manifestly” beyond the “transferred competences” and “highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law” will be considered *ultra vires*.<sup>108</sup> Finally, from a purely practical standpoint, the ECJ is entitled to a “tolerance of error,”<sup>109</sup> such that isolated cases of error may not give rise to *ultra vires* actions.<sup>110</sup>

The cumulative effect of these standards lends some credence to the critiques of the BVerfG, in that, although *Honeywell* makes the invocation of the Court’s *ultra vires* jurisdiction very possible (as evidenced by its usage in *Honeywell* itself), given the deferential language employed by the BVerfG, the most likely outcome is that the EU act will be upheld.<sup>111</sup> For one thing, the requirement of a manifest transgression of EU competences that has purposefully not been remedied by the ECJ when given the chance is a hurdle of such magnitude that it is likely never to occur.<sup>112</sup> Given that most structural change within the EU integration process has occurred incrementally or piecemeal, it

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105. See *Honeywell*, 126 BVerfGE 286 (§ 68) (Ger.).

106. 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*, 7 EUR. CONST. L. REV. 161, 165 (2011); see *Honeywell*, 126 BVerfGE 286 (§ 60)(Ger.); see also Theil, *supra* note 84, at 626.

107. See Bast, *supra* note 23, at 170.

108. *Honeywell*, 126 BVerfGE 286 (§ 61)(Ger.).

109. *Id.* § 66.

110. See Theil, *supra* note 84, at 627.

111. See Möllers, *supra* note 106, at 166.

112. See *id.*

is even more unlikely that a major structural shift in the competences between the Member States and the EU would even exist, much less be attributable to an actual manifest act by the EU itself.<sup>113</sup> Thus, the *Honeywell* requirements for a successful *ultra vires* appeal appear very similar in their impracticality to the standards for a fundamental rights appeal set out in *Solange II* (a standard that has yet to successfully be met).<sup>114</sup>

There are legitimate reasons for the inaccessibility of this standard, though. First and perhaps foremost, the difficulty in achieving the criteria reveals the BVG's unease itself with national courts actually having the ability to hold EU acts invalid.<sup>115</sup> Therefore, an *ultra vires* holding should be a rare measure of last resort and the seeming impossibility of the *Honeywell* standard reflects this. In addition, the requirement that an *ultra vires* act be manifest makes the determination of such an act fairly straightforward—an 'obvious' transgression of powers should be easy to identify and uncontroversial.<sup>116</sup> This in turn removes any uncertainty over the ultimate actions of the BVG, since the invalidation of such a manifest misstep on the part of the EU would be beyond reproach from most quarters.<sup>117</sup> Providing additional deference to the ECJ in its decisions serves the same purpose.<sup>118</sup> Also, only an obvious and highly significant *ultra vires* EU act would cause enough damage on its own to justify the extensive injury to the EU legal system that an *ultra vires* holding itself would cause.<sup>119</sup> In other words, an *ultra vires* holding would likely be a pyrrhic victory, and only justifiable where the EU was already far along in burning itself to the ground anyway.

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113. See *id.* at 166–67. This is an idea identified and explored by the *Honeywell* dissent, though it is ultimately found unconvincing to the majority. See *Honeywell*, 126 BVERFGGE 286 (§ 103) (Ger.); see also Mahlmann, *supra* note 102, at 1413.

114. See Möllers, *supra* note 106, at 165.

115. See *Honeywell*, 126 BVERFGGE 286 (§ 57) (Ger.) (“If each Member State claimed to be able to decide through their own courts on the validity of legal acts of the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk.”); see also Mayer, *supra* note 23, at 133; Mahlmann, *supra* note 102, at 1410.

116. See Mahlmann, *supra* note 102, at 1414.

117. See *id.*

118. See *id.* at 1410–11.

119. See *id.* at 1415.

E. THE *OMT* DECISION AND THE CURRENT STATE OF AFFAIRS

That, at least, was the conventional opinion. In its latest decision from January 2014, however, with respect to the Outright Monetary Transactions program (litigation that is still ongoing at the time of this Article), the BvG expressed an unexpected willingness to potentially set the entire system on fire.<sup>120</sup> In the *OMT* decision, the BvG was directly confronted with the rather complicated mechanisms meant to quell the European financial crisis.<sup>121</sup> In an earlier 2012 case, the BvG had ruled that Germany was allowed to participate in the European Stability Mechanism (ESM), which provided “loans and other financial assistance to states in trouble,” only so long as the German Parliament retained extensive control over ESM actions.<sup>122</sup> Contemporaneous with the 2012 decision, the European Central Bank (ECB) issued a public statement pledging to prop up troubled Eurozone States by buying their bonds on the secondary market; this was known as the Outright Monetary Transactions program (OMT).<sup>123</sup> In essence, the OMT was meant to serve the same purpose as the ESM: to stabilize the bond market sufficiently to relieve pressure on the distressed States.<sup>124</sup> The ECB press release about the OMT alone accomplished this feat, without any actual monetary actions being necessary.<sup>125</sup> However, from the point of view of the BvG, the question in the *OMT* case was whether Germany was allowed to participate in such a program given that the parliamentary controls necessary for its participation in the similar ESM were entirely lacking in the OMT scheme.<sup>126</sup>

Surprisingly, the BvG broke new ground in *OMT*—it submitted the first preliminary reference<sup>127</sup> in its history to the

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120. See BVERFG, Jan. 14, 2014, 2 BvR 2728/13 (Ger.), [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114\\_2bvr272813en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html) (last visited Feb. 12, 2015) [hereinafter *OMT*].

121. See *id.*

122. See Mayer, *supra* note 23, at 113.

123. See *id.*; Petersen, *supra* note 30, at 321.

124. See Mayer, *supra* note 23, at 113.

125. See *id.*

126. See *id.* at 113–14; see also Petersen, *supra* note 30, at 321–22 (discussing how the BvG “[i]nitiating a preliminary reference procedure before the European Court of Justice for the first time ever.”).

127. Consolidated EU Treaty art. 267, *supra* note 24 (identifying a preliminary reference as the procedure by which a national court may ask the ECJ to give a ruling on the “interpretation of the Treaties” or on the “validity

ECJ as to the OMT program and its compatibility with the European treaties.<sup>128</sup> Considering that the *Honeywell* standard requires that the ECJ be given first pass at ruling on the validity of any potential *ultra vires* EU action, the BVG's preliminary reference as to the legality of the ECB's actions was necessary.<sup>129</sup> It is important to note, however, that the BVG did not refer any questions concerning possible conflicts with the constitutional identity of Germany; in fact, it hinted rather strongly that identity review would not require a prior ruling by the ECJ.<sup>130</sup> Even more interesting, though, is that instead of waiting for the ECJ to definitively answer its *ultra vires* questions, the BVG presented an extensive, preliminary answer of its own.<sup>131</sup>

The BVG opined fairly strongly that the OMT program was an *ultra vires* act and would be inapplicable in Germany.<sup>132</sup> In other words, instead of taking the path of least resistance and deferring the issue to the ECJ until it became absolutely necessary to confront what it considered to be an *ultra vires* act on the part of the EU (a course of action that would align nicely with the Court's historical reluctance to actually rule on the validity of EU actions), the BVG instead went out of its way to speak out on the merits of the issue. That it then found the EU act to be *ultra vires* was perhaps even more shocking. Of course, the BVG did not legally hold the OMT to be *ultra vires* in the decision. Rather, it stated that it considered the OMT to be invalid under its present interpretation of EU law, but left open whether the ECJ's interpretation of that law or the OMT itself

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and interpretation of acts of the institutions, bodies, offices or agencies of the Union.”).

128. *E.g.*, *OMT*; Mayer, *supra* note 23, at 112.

129. *See* Mayer, *supra* note 23, at 118–19; *see also* Asteris Pliakos & Georgios Anagnostaras, *Blind Date Between Familiar Strangers: The German Constitutional Court Goes Luxembourg!*, 15 GER. L.J. 369, 373 (2014) [hereinafter Pliakos]; *see also* Karsten Schneider, *Questions and Answers: Karlsruhe's Referral for a Preliminary Ruling to the Court of Justice of the European Union*, 15 GER. L.J. 217, 225–26 (2014) (“Therefore, Karlsruhe’s referral for a preliminary ruling to the ECJ from Jan. 14, 2014 comes as no real surprise . . . it has been very clear since the *Lisbon* and *Honeywell* decisions that there would be referrals ‘prior to the acceptance of an *ultra vires* act’ . . .”).

130. *See* *OMT*, *supra* note 128, § 102–03; *see also* Mayer, *supra* note 23, at 132–33 (“Here, the majority judges’ misunderstanding of the function of the concept of ‘constitutional identity’ becomes manifest: They clearly do not accept that in the national constitutional identity context, a preliminary reference to the ECJ would be necessary in order to make sure that the legal argument in question falls under Article 4 (2) TEU.”).

131. *See* *OMT*, *supra* note 128, §§ 55–100.

132. *See id.*

might in some way save the validity of the program.<sup>133</sup>

In its extensive discussion of the issue, however, the BVG provided a small glimpse into the actual workings of *ultra vires* review according to the *Honeywell* standard. Far from being impossible to reach, *OMT* offers evidence that the ‘manifest’ standard depends largely on the clear textual commitment of powers within the EU Treaty. For instance, when discussing whether the ECB’s actions would be manifest, the BVG placed great emphasis on the fact that such actions would affect the economic policy of the Member States, the responsibility for which “lies clearly with the Member States.”<sup>134</sup> Likewise, the BVG invoked the idea of a clear demarcation of powers later when noting that the *OMT* would potentially violate an “explicit prohibition of monetary financing of the budget.”<sup>135</sup> Thus, a manifest violation can arise where the EU acts in areas that are clearly or explicitly within the domain of the Member States.

Furthermore, *OMT* sheds light on a potential realignment of competences as well. In the decision, the BVG noted that the ECB’s actions would be “structurally significant” because they would “lead to a considerable redistribution between the budgets and the taxpayers of the Member States,” areas which “belong to the core aspects of the Member States’ economic policy responsibilities.”<sup>136</sup> To summarize, it would appear from *OMT* that the *Honeywell* standard would be satisfied where an EU act violates a core area of Member State responsibility that is clearly demarcated as such in the EU treaties. In other words, as evidenced by *OMT* itself, the *Honeywell* standard is neither impossible nor perhaps even that difficult to satisfy.<sup>137</sup>

The practical accessibility of the BVG’s *ultra vires* standard implied in *OMT*, and the BVG’s apparent willingness to use it, may represent a significant problem going forward given the ECJ’s recent decision on the *OMT* referral. In *Gauweiler*, while steering clear of any consideration (or even mention) of the BVG’s assertion of *ultra vires* jurisdiction, the ECJ effectively disagreed with the BVG’s assessment as to the validity of the *OMT* program, ruling instead that it was entirely within the competence of the EU to create such a program.<sup>138</sup>

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133. See *id.* §§ 99–100.

134. See *id.* § 39.

135. See *id.* § 43.

136. See *id.* §§ 40–41.

137. See Bast, *supra* note 23, at 178–79.

138. See Case C-62/14, *Gauweiler et al. v. Deutscher Bundestag* (E.C.J. June

In other words, the ECJ sent the case back to the BVG for further consideration having ignored the German court's concerns as to the existence of an *ultra vires* act, thereby effectively fulfilling the "failure to act" component necessary under *Honeywell* for the eventual invalidation of an EU law by the BVG. Put more casually, if the preliminary referral in *OMT* evidenced an unexpected desire on the part of the BVG to set the entire system on fire by actually declaring an EU act *ultra vires*, the ECJ in *Gauweiler* appeared completely content to drop off matches and lighter fluid at the front door of the Federal Constitutional Court in Karlsruhe.

#### F. CONCLUSION

The evolution of the BVG's case law with respect to the legal relationship between Germany and the EU is one of fits and starts, threats and accommodations. In *Solange I*, the BVG introduced the concept that the ECJ's proclaimed supremacy of EU law over conflicting domestic norms might not be so ironclad, holding that EU acts must give way where they violate national fundamental rights. Moreover, the BVG stated that, despite the ECJ's assertion of exclusive authority to review the validity of EU laws, national courts were entitled to consider the legality of EU acts as well. However, the BVG never actually invalidated an EU act on these grounds and in the intervening years, the ECJ implemented fundamental rights norms into EU law to an extent that the BVG eventually voluntarily set aside its fundamental rights jurisdiction over EU acts in *Solange II*.

In *Maastricht*, though, the BVG reasserted its opinion that EU laws did not necessarily have primacy over national norms in holding that any EU acts outside the conferred competences of the EU set out in the constituent treaties would be held invalid by the BVG. This decision arose from the BVG's viewpoint that the Member States were the masters of the treaties and that EU law was only supreme because the national legal systems established it as such through their own domestic norms.

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16, 2015) (not yet published) § 127, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165057&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=159426> [hereinafter *Gauweiler*] ("In view of all the foregoing considerations, the answer to the questions referred is that Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.").



Following upon this conception of the EU, the BVG in *Maastricht* likewise asserted that the EU was limited to those powers conferred upon it by the EU treaties and that it therefore lacked the exclusive authority to define its own competences (*Kompetenz-Kompetenz*). Finally, the BVG itself not only retained this authority but was obliged to police the actions of the EU for validity. The ECJ took *Maastricht* in stride and arguably became more conservative in its interpretive approach to the competences of the EU as a result. For its part, the BVG never invoked its *ultra vires* jurisdiction, thereby creating an uneasy truce between the two judicial bodies.

*Lisbon*, however, marked the beginning of the next phase. In this case, the BVG took its line of reasoning one step further, holding that not only was the EU limited to those powers that had been conferred upon it in the EU treaties, but that the EU was also restricted from exercising powers that the Member States could not have legally transferred to it under their own national constitutions. With regard to Germany, this included any powers that would transgress the constitutional identity of the nation. The BVG went to great lengths to set out examples of domestic areas that were beyond the competence of the EU. Shortly thereafter, the BVG took the opportunity in *Honeywell* to clarify the standards for a successful *ultra vires* review, requiring that the ECJ be given a first pass at the issue, and that only a “manifest transgression”<sup>139</sup> of the “transferred competences” that was “highly significant in the structure of competences” between the EU and the Member States would constitute an *ultra vires* act. With the pronouncement of such a high standard, it appeared to be making the assertions of *Lisbon* less practically effective. Yet, shortly thereafter, in the *OMT* decision, the BVG clearly indicated that the *Honeywell* standard could be met, and indeed specifically stated that it considered the OMT program to be *ultra vires*, since it was an EU act that transgressed a core area that was clearly left to the Member States in the EU treaties. The ECJ’s decision in *Gauweiler* that the OMT program was within the competence of the EU creates a genuine conflict with the BVG as to the *ultra vires* issue.

#### IV. ANALYSIS AND PREDICTIONS

As can be seen from this recap of the BVG’s most significant

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139. See *Honeywell*, *supra* note 103, §§ 55–61.

case law, the legal relationship—from BVG’s vantage point—between the EU and Germany has evolved considerably over time. What remains to be considered is the current status of that relationship—from both courts’ point of view—and where it is currently headed. In this regard, there are several aspects that must be examined.

#### A. BASIC CONCEPTUAL DIFFERENCES

As illustrated *supra*, the ECJ and the BVG disagree on a variety of significant aspects concerning the relationship between the Member States and the EU. These differences largely stem from a basic conceptual difference in how the BVG and the EU view that relationship. From the ECJ’s perspective, the EU legal system is autonomous.<sup>140</sup> It derives from its own sources and is independent of the Member States and their national law.<sup>141</sup> As such, it is “self-referential and therefore constitutional [in] nature.”<sup>142</sup> Given this character, its primacy over national law is self-explanatory and exists without reference to national legal systems.<sup>143</sup> Furthermore, since the EU legal system is self-referential and requires absolute uniformity, it is the natural conclusion that a single court would have the ultimate and exclusive ability to define and regulate the boundaries of that system. The ECJ has claimed this role, and with it the jurisdiction to determine the competences of the EU as a whole (*Kompetenz-Kompetenz*).<sup>144</sup> Pursuant to this responsibility, the ECJ has become a “motor” of European integration and has often “complemented and further developed” the often fragmentary landscape of EU law through “dynamic” interpretation.<sup>145</sup> As such, from the conceptual viewpoint of the

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140. See *Costa v. E.N.E.L.*, 1964 E.C.R. 586, *supra* note 5.

141. See Iodice, *supra* note 30, at 541; see also Barents, *supra* note 2, at 423–24 (“Therefore, all national authorities are obliged to apply EU law in all situations falling within its scope, irrespective of the status, contents and form of conflicting national rules. It does not matter whether the conflicting national rules were adopted prior to or after the rule of EU law concerned.”).

142. Barents, *supra* note 2, at 431.

143. See *id.* at 423–24.

144. See Beck, *supra* note 15, at 472–73; see also Grimm, *supra* note 2, at 236 (“Within the European Community there is an institution whose special task is to determine whether or not organs of the Community have violated the Treaties—the ECJ. On the Community level, therefore, the question of competence is clear: if the ECJ concludes that a measure meets all Treaty requirements, then the boundary has not been violated.”).

145. Voßkuhle, *supra* note 2, at 182.

ECJ, the Member States created an EU where the legal system is both independent of, and dominant over, the national legal systems.

The BVG's conceptual perspective obviously differs rather substantially. From the BVG precedent examined *supra*, it is quite clear that the EU legal system is not considered to be absolutely autonomous and independent, but rather dependent upon the national legal systems for its authority.<sup>146</sup> The Member States, far from creating a self-referential and independent EU, are the masters of the treaties and EU law only has primacy through the voluntary assent of the national implementing legislation, which may be removed at any time.<sup>147</sup> As a result, EU law is only above national law to the extent and within the parameters considered permissible by the domestic legal system.<sup>148</sup> The BVG concludes that since the supremacy of EU law is a manifestation of and is controlled by the national legal system, that system would be allowed to provide some oversight with respect to those laws.<sup>149</sup> Likewise, to allow the EU itself to have unlimited reign to determine its own competences would render national limitations irrelevant. Thus, the BVG has held very firmly that the ECJ does not possess *Kompetenz-Kompetenz*.<sup>150</sup> Nor has the BVG been particularly welcoming to the concept of "dynamic interpretation," since such liberal interpretation might serve to extend the competence of the EU beyond what the Member States specifically conferred in the founding treaties.<sup>151</sup> Consequently, from the BVG's perspective,

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146. See Cruz, *supra* note 58, at 392; see also Honeywell, *supra* note 103, § 55 (showing the BVG refers to EU law as autonomous, but in the same sentence also affirms that it remains "dependent on assignment and empowerment in a Treaty" of which the Member States are in complete control).

147. *Maastricht*, *supra* note 52, § 112 ("Deutschland ist einer der 'Herren der Verträge.'"); see also Cruz, *supra* note 58, at 392 (explaining how "Germany is one of the 'Masters of the Treaties' and may withdraw from the EU unilaterally at any time" and that "[c]ommunity law is not autonomous: its validity in Germany depends upon the act of accession (the 'order to give legal application' or *Rechtsanwendungsbefehl*) and ultimately upon the German Constitution.").

148. See Grimm, *supra* note 7, at 356.

149. See Mayer, *supra* note 65, at 14.

150. See *Maastricht*, *supra* note 52, § 123–29.

151. See *id.* §§ 31–32 ("Thus interpretation of such standards may not have an effect equivalent to an extension of the Treaty; indeed, if standards of competence were interpreted in this way, such interpretation would not have any binding effect on Germany."); see also Lisbon, *supra* note 77, § 238 ("If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally important tension will arise with the principle of conferral and with the individual Member State's constitutional

the Member States retain ultimate control over the EU and its legal system.

Contrasting these divergent conceptual viewpoints, it can easily be seen how the two legal systems have developed in entirely different directions: they both view their respective legal order to have primacy over the other and their individual holdings reflect those beliefs. That the case law and legal norms of the BvG and the ECJ have become so contradictory creates an ongoing potential for conflict whenever the two legal orders come into contact.<sup>152</sup> Furthermore, since neither the BvG nor the ECJ appear willing to forfeit their claim to primacy any time in the near future, this overt disagreement will not likely go away on its own.

Yet, until *OMT* and *Gauweiler*, the BvG and ECJ have generally managed to avoid open battles for nearly forty years. This, in and of itself, has been a triumph of sorts, given that the consequences of such a public clash between the courts over the primacy/jurisdictional question would be catastrophic to the practical continuance of the EU.<sup>153</sup> That such a fate has been avoided this long owes perhaps just as much to the pragmatism of the two courts, though, as to any fear they may harbor concerning the magnitude of such a conflict.<sup>154</sup>

#### B. AGREEING TO DISAGREE

Despite their differences in opinion about the conceptual basis of the EU, both the ECJ and the BvG have shown a pragmatic ability to cooperate when necessary.<sup>155</sup> Given the intertwined nature of the EU and national legal systems, it is not surprising that the two systems (and the courts within) exert some influence over each other on substantive and procedural

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responsibility for integration.”).

152. See Cruz, *supra* note 58, at 418.

153. See Mahlmann, *supra* note 102, at 1414; see also Mayer, *supra* note 23, at 133 (“Establishing national identity and national constitutional identity as a limit of EU law unilaterally is extremely dangerous for legal unity in the EU and open to abuse.”); see also Bieber, *supra* note 77, at 405 (“How damaging such claims for unilateral action within a united system of decision-making are, has already been stated by the European Court of Justice . . .”).

154. See Beck, *supra* note 15, at 493.

155. See Voßkuhle, *supra* note 2, at 189 (“[T]he relationship between the Court of Justice and the Federal Constitutional Court is not about superiority or subordination but about appropriately sharing and assigning responsibilities in a complex multilevel system.”).

issues.<sup>156</sup> With specific reference to the BVG and the ECJ, this back and forth influence has at times been described as a form of judicial ‘dialogue,’ wherein the rulings of each court signal to the other their specific intentions.<sup>157</sup> This serves to both avoid possible conflicts as well as pave the way to potential resolutions where those conflicts already exist.<sup>158</sup> This dialogue, at times, has come to resemble a bit of a dance, with one partner gracefully leading the other around any potential legal pitfalls in their relationship. This can readily be seen in the cases examined *supra*.

Starting with *Solange I*, the BVG expressed its concern about the fundamental rights protection afforded under EU law. It also introduced the idea that national courts could deny the application of EU law where adequate protection was not provided at the EU level.<sup>159</sup> Thus alerted to the potential problem, the ECJ reacted by ensuring the protection of fundamental rights at the EU level.<sup>160</sup> Its fears allayed, the BVG responded in *Solange II* by voluntarily foregoing fundamental rights jurisdiction over EU law so long as EU protections remained sufficient.<sup>161</sup> Arguably, a similar dynamic took place with respect to EU competences: in *Maastricht*, the BVG signaled its intent to provide oversight in this area through *ultra vires* review, and subsequently, the ECJ took more care in its interpretation of EU competences.<sup>162</sup> The fact that the BVG waited seventeen years before actually exercising its asserted *ultra vires* jurisdiction in *Honeywell*, and in doing so propagated a review standard considered virtually impossible to meet,<sup>163</sup> might be interpreted similarly to *Solange II*, as a voluntary suspension of an asserted, but controversial, jurisdiction.

This warning and response pattern (BVG jurisdictional

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156. See Barents, *supra* note 2, at 440; Voßkuhle, *supra* note 2, at 181–82; Theil, *supra* note 84, at 633.

157. See Kuo, *supra* note 37, at 363–64; Vranes, *supra* note 30, at 99.

158. See Kuo, *supra* note 37, at 363–64.

159. See *Solange I*, *supra* note 32, at 281.

160. See Kumm, *supra* note 4, at 294–95; Grimm, *supra* note 2, at 233; Beck, *supra* note 15, at 489.

161. See *Solange II*, *supra* note 44, § 108.

162. See Cruz, *supra* note 58, at 404; Kumm, *supra* note 4, at 296; Voßkuhle, *supra* note 2, at 195.

163. See Möllers, *supra* note 106, at 166; see also *Honeywell*, *supra* note 103, §§ 95, 104 (Landau, J., dissenting) (arguing that the BVG majority creates “excessive requirements on the finding of an *ultra vires* act,” and therefore only creates an *ultra vires* review that exists “on paper” but not in reality).

assertion–ECJ adjustment–BVG jurisdictional suspension) can largely be seen as a form of deference each court has shown the other as well as a general hesitance to provoke a conflict.<sup>164</sup> For its part, the ECJ has mostly addressed the actual concerns with the EU put forward by the BVG while studiously ignoring the assertions of jurisdictional oversight those concerns have produced. By taking care of the underlying problems identified by the BVG, the ECJ has successfully eliminated any necessity for the BVG to actually exercise its proclaimed jurisdiction. Finding its main concerns resolved, the BVG has dutifully abstained from actually using its proposed EU oversight capabilities, even where it has had an opportunity to do so.<sup>165</sup> While not solving the principles of the jurisdictional conflict, this pattern has successfully avoided any practical ramifications that conflict might create. In short, both courts have seemingly gone out of their way to avoid the conceptual disagreement and the jurisdictional issue that it has provoked. They have, in basic terms, up until now agreed to disagree.

### C. CHANGING PATTERNS?

It is arguable, however, that the *OMT/Gauweiler* decisions represent a significant shift away from conflict avoidance and towards a declaration of war.<sup>166</sup> With respect to the BVG, there are several arguments that support this theory. First, unlike the prior cases in which the BVG threatened to consider an *ultra vires* complaint if circumstances lined up properly, in *OMT* the BVG officially opined that an EU act was actually *ultra vires*. Therefore, *OMT* is less a warning of an *ultra vires* finding and more a promise of one unless the ECJ intervenes.<sup>167</sup> As such, it represents a deviation from the BVG's established pattern. Second, while the BVG and the ECJ had previously worked hard

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164. See Beck, *supra* note 15, at 486, 489, 493.

165. See Möllers, *supra* note 106, at 161 (noting that the BVG deliberately missed an opportunity to exercise its jurisdiction in the *Bananas Case*); see also Data Protection Case, *supra* note 51 (abstaining from addressing the validity of the EU Directive, the BVG ruled on the unconstitutionality of the German legislation implementing the EU Data Protection Directive instead).

166. See Alexander Thiele, *Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program*, 15 GER. L.J. 241, 247–48 (2014) (focusing on whether the referral by the BVG of the OMT question to the ECJ was intended as an "act of friendliness" or as a hostile first step towards an "open conflict.>").

167. See Pliakos, *supra* note 129, at 375–76.

to avoid potential conflicts through dialogue,<sup>168</sup> the *OMT* referral appeared to invite such a confrontation between the two courts. The BVG could have simply referred the validity of the EU act to the ECJ for its consideration without any discussion of the substantive law; instead, it chose to pre-answer its own question as to the legitimacy of the OMT program.<sup>169</sup> In doing so, it virtually invented a novel referral mechanism through which it could issue the ECJ with its promise to invalidate the act.<sup>170</sup> This action stands in direct contrast to the impression given by the *Honeywell* standard that an *ultra vires* holding was a remedy of “last resort.”<sup>171</sup> Instead, the BVG in *OMT* appeared to be aggressively pursuing such a finding, which is inconsistent with its prior strategy of warnings and confrontation avoidance.

On the other hand, it is also quite possible to interpret the *OMT* referral as a simple continuation of the BVG’s prior warning and response pattern used to avert a potentially catastrophic disagreement between the BVG and the ECJ. Viewed in this light, the promise of an *ultra vires* holding with respect to the OMT program was nothing more than a simple notification to the ECJ as to how the BVG views the case. By clarifying its views beforehand, the BVG was not necessarily threatening the ECJ, but rather seeking to involve the ECJ in an extremely important decision that may very well affect the fate of the EU itself.<sup>172</sup> It is also important to realize that, once the BVG believed that the EU act was actually *ultra vires*, it had little choice but to express its opinion to the ECJ alongside the referral. To have simply sent a plain referral would have left the ECJ blind as to the potential dangers (with respect to a disagreement with the BVG) inherent in their decision. In this manner, the BVG’s pre-answer served the same exact purpose as the earlier threats to invoke oversight jurisdiction that *Solange I* and *Maastricht* did—it made the ECJ aware of a problem with the EU that needed to be fixed. Lesser measures would not have been able to serve the same informational purpose; thus the pre-answer, far from being a confrontational device or an escalation, may have helped to avoid a possible

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168. See Beck, *supra* note 15, at 489.

169. See Mayer, *supra* note 23, at 114; Thomas Beukers, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program: “In the ECB We Do Not Trust. What About You?”*, 15 GER. L.J. 343–44 (2014).

170. See Beukers, *supra* note 169, at 344.

171. Mahlmann, *supra* note 102, at 1415.

172. See Petersen, *supra* note 30, at 326.

conflict.

A similar technique can arguably be seen in the *Lisbon* decision as well. After introducing the possibility of identity review, the BVG went to great lengths to spell out those areas that would be considered part of Germany's constitutional identity and therefore off-limits to the EU.<sup>173</sup> While many critics have derided the list as being "difficult to reconcile with the present level of integration,"<sup>174</sup> a "simple compilation and protection of remaining national powers,"<sup>175</sup> "arbitrary," and "theoretically unfounded,"<sup>176</sup> these critiques miss the practical impact of the list. It serves as a warning to the EU and the ECJ that these areas are not eligible for further integration. Specifically defining these areas beforehand lessens the likelihood that the EU will exercise its authority in a manner that would require the BVG to actually use its asserted identity review jurisdiction.<sup>177</sup> Thus, the list is not meant only as an actual description of what constitutes the German identity, but rather is also intended as another mechanism through which the BVG can avoid confrontation with the ECJ over jurisdictional issues. As such, taking a wider view of the warning and response pattern of dialogue, not only does the *OMT* reference fit within the BVG's prior practice, but the *Lisbon* identity assertion (and definition) as well.

The ECJ's decision in *Gauweiler*, by contrast, is difficult to view as a continuation of the aforementioned pattern. Rather than avoiding a potential conflict with the BVG over the legality of the OMT program, the ECJ appears to have invited such a confrontation, even though it possessed numerous other options that would have deescalated the situation. For example, it could have followed the BVG's lead and declared the OMT program to be *ultra vires*.<sup>178</sup> Likewise, the ECJ could have interpreted the OMT program in the highly restrictive non-*ultra vires* manner suggested by the BVG in *OMT*, thereby keeping it within the competences of the EU.<sup>179</sup> In both instances, the ECJ, by following the BVG's lead as expressed in its referral decision, would have eliminated any grounds for conflict over the issue.

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173. See *Lisbon*, *supra* note 77, §§ 252–53.

174. Theil, *supra* note 84, at 610.

175. Thym, *supra* note 31, at 1801.

176. Murkens, *supra* note 85, at 522.

177. See Schorkopf *Lisbon*, *supra* note 75, at 264.

178. See Mayer, *supra* note 23, at 145.

179. See *id.* at 120; Beukers, *supra* note 169, at 367.



Another alternative would have been to simply stall for time—the ECJ takes an average of nearly seventeen months to answer a preliminary reference<sup>180</sup> and has no external, internal, or legal procedural requirement in normal cases to do so expeditiously.<sup>181</sup> The BVG, for its part, requested neither an accelerated timetable for the case nor that interim measures be taken with respect to the OMT program during the ECJ's consideration of the referral.<sup>182</sup> As such, the ECJ could have simply waited until the EU economies bolstered by the OMT program recovered enough to stand alone and thereafter ruled the program invalid. This would have allowed the ECJ to avoid open conflict with the BVG while still preserving the practical and arguably necessary benefits of the OMT program. Such an action, though perhaps controversial and even counterproductive,<sup>183</sup> would have corresponded directly with the warning and response pattern exhibited by the courts in previous conflicts.

The ECJ did not avail itself of any of these conflict avoidance options; it chose instead to press forward with its ruling and uphold the OMT program in the face of the BVG's apparent disagreement. At its worst, such an outcome might be considered as an outright declaration of war on the BVG. Yet, approached from a different angle, *Gauweiler* might simply be characterized as a turning of the tables: the ECJ has gone from adjusting its jurisprudence in response to BVG warnings to instead issuing its own warning to the BVG. In this light, *Gauweiler* may be taken as notice that the ECJ will not simply stand aside while the German court attempts to restrict the competence of the EU. At its best, this decision represents a simple change in lead, whereby the ECJ seeks to navigate the BVG through the legal pitfalls of the OMT situation according to its own interpretation of EU law, rather than following the BVG's directions from *OMT*.

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180. See Mayer, *supra* note 23, at 121.

181. See Consolidated EU Treaty, *supra* note 24, at art. 19; Title III—References for a Preliminary Ruling—Consolidated Version of the Rules of Procedure of the Court of Justice of 25 September 2012, 2012 O.J. (L 265) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2012:265:FULL&from=EN> (last visited Feb. 12, 2015).

182. See Mayer, *supra* note 23, at 123.

183. See Beukers, *supra* note 169, at 364 (arguing that the restrictions already placed upon German participation in the OMT program render it less effective in the meantime and that an expedited review might be more beneficial).

## D. PEERING INTO THE SHORT-TERM FUTURE

Of course, such changes in lead only work where the party previously in the lead is willing to take on a deferential role. In this respect, the responsibility for avoiding a foundational crisis now appears to be entirely in the hands of the BVG. In the past, the ECJ has proven that it was prepared to adjust its jurisprudence to avoid potential conflicts. The question becomes whether the BVG is now willing to do the same. If it is, then a confrontation over the OMT program may be avoided. This would require the BVG repudiating or rethinking its pre-answer and following the ECJ's reasoning instead.<sup>184</sup> Such a result would provide some evidence as to the relative interest both courts have in asserting their conceptual principles and further strengthen the view that neither court is particularly interested in fomenting a foundational crisis in the EU.

Nevertheless, after *Gauweiler*, the chances of a potentially catastrophic confrontation appear to have increased significantly. If the BVG chooses to abide by its pre-answer reasoning and finds the OMT program to be *ultra vires*, a legitimate foundational crisis might occur.<sup>185</sup> Even if the BVG reverses course and adheres to the ECJ's reasoning on the *ultra vires* aspect of the OMT program, it could still instigate a crisis by ruling that the program infringes upon Germany's constitutional identity (an option that it specifically left open pending the ECJ's handling of the preliminary reference).<sup>186</sup> The creation of such an impasse might not be solvable through the established legal mechanisms, but would likely require a political intervention instead.<sup>187</sup>

Of course, speculation as to the ultimate impact and importance of the *OMT/Gauweiler* decisions is rather limited in its utility, especially considering that the litigation is still ongoing. What can be said definitively at this point, is that regardless of the eventual outcome, the *OMT/Gauweiler* litigation will shed some much-needed light on the legal relationship between Germany and the EU. In this respect, it will have helped clarify not only the BVG's position, but the ECJ's as well.

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184. See Mayer, *supra* note 23, at 145; Petersen, *supra* note 30, at 326–27.

185. See Beukers, *supra* note 169, at 365; Mayer, *supra* note 23, at 124; Pliakos, *supra* note 129, at 378–79.

186. See OMT, *supra* note 128, ¶ 102; Mayer, *supra* note 23, at 131–32.

187. See Grimm, *supra* note 2, at 236.

## E. PEERING INTO THE LONG-TERM FUTURE

Even if the current *OMT/Gauweiler* litigation is resolved without further incident, there still remains “a potential for conflict embedded in the system” that arguably muddies the long-term prospects of the EU.<sup>188</sup> Assuming that any *OMT/Gauweiler* resolution results in neither the ECJ nor the BVG overtly backing down from their present jurisdictional principles, both courts will retain the potential to incite another jurisdictional clash going forward. Additionally, other national constitutional courts also claim the power to “set aside EU [l]aw on constitutional grounds under certain circumstances”<sup>189</sup> and thus also have the ability to provoke a crisis. Further, the influential stature of the BVG<sup>190</sup> likely invites more Member State constitutional courts to follow its lead and assert similar or identical oversight jurisdictions.<sup>191</sup> The existence of several Member State constitutional courts exercising such review doctrines not only multiplies the probability that such a court would openly incite (or even stumble into) a foundational crisis, but the increased acceptability of these jurisdictional doctrines (and the hazard they pose to the EU) may provoke the ECJ itself to step in and attempt to halt their spread, thereby creating its own conflict. Indeed, the BVG itself has recognized the danger to the EU inherent in every Member State exercising *ultra vires* jurisdiction; this was one of the reasons for the near impossibility of the *Honeywell* standard.<sup>192</sup>

In addition to a considerable number of institutional candidates capable of provoking a crisis, there are also a substantial number of substantive areas from which such a crisis might arise. While it is true that certain areas of EU law are less likely than others to create a conflict over EU

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188. Cruz, *supra* note 58, at 418 (stating also that real conflicts have been avoided due to prudence and pragmatism).

189. Kumm, *supra* note 4, at 263.

190. Peter E. Quint, “The Most Extraordinarily Powerful Court of Law the World Has Ever Known?”—*Judicial Review in the United States and Germany*, 65 MD. L. REV. 152, 153 (2006).

191. See Pliakos, *supra* note 129, at 374 (“It is indeed well known that the judicial pronouncements of the [BVG] inspire the case law of other constitutional courts, especially as concerns the existence of *ultra vires* acts.”).

192. See *Honeywell*, *supra* note 103, § 57 (“If each Member State claimed to be able to decide through their own courts on the validity of legal acts of the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk.”); see also Mahlmann, *supra* note 102, at 1410.

competences, the ambiguity of the EU treaty is such that there will “always be a blurred zone at the points of intersection between the powers of the Member States and the Union.”<sup>193</sup> Thus, debate concerning the conferred powers may always serve as a possible source of foundational conflict, as might the ongoing dispute over the ECJ’s claim to an exclusive right to interpret the extent of its own competences under those powers (*Kompetenz-Kompetenz*).<sup>194</sup>

Also, national constitutional identity, as introduced in *Lisbon*, is fertile ground for future disagreement,<sup>195</sup> especially given the expansive list of German identity areas presented as exempt from integration by the BVG in *Lisbon*. If it is a given that the EU exhibits a “tendency of political self-enhancement”<sup>196</sup> and that the ECJ, as the “motor of integration,”<sup>197</sup> enables this through its dynamic interpretation of the treaties, then it is highly probable that the dynamically developing competences of the EU will eventually transgress upon the forbidden areas of German identity. In this context as well, an increasing acceptance of oversight jurisdiction by Member State constitutional courts may spell disaster because constitutional identity is specific to each Member State.<sup>198</sup> Thus, the outlines of “off-limit” areas around which the EU must maneuver will vary from Member State to Member State, likely increasing the odds that an accidental transgression into an identity area in at least one State will ultimately occur.

Also, there will always be individuals or political actors in every Member State with a vested interest in challenging the authority or legitimacy of the EU in order to undermine its effectiveness. Evidence of this can be seen not only in the media headlines surrounding the negotiation of any new EU treaty or the ultimate unpopularity of the rejected Constitutional Treaty,<sup>199</sup> but also in the fact that both the Maastricht<sup>200</sup> and

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193. Beck, *supra* note 15, at 484.

194. *See id.* at 480.

195. *See* Thym, *supra* note 31, at 1805.

196. *Lisbon*, *supra* note 77, § 237; *see also* Grimm, *supra* note 7, at 361.

197. Voßkuhle, *supra* note 2, at 182.

198. *See* Thym, *supra* note 31, at 1806.

199. *See supra* note 3 and accompanying text.

200. *E.g.*, *Maastricht*, *supra* note 52 (Ger.); Constitutional Council [CC], Apr. 9, 1992, 92-308 DC, Maastricht I, (Fr.), *in* THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES: VOLUME 1, at 385 (Andrew Oppenheimer ed., Cambridge University Press 1994); Constitutional Council [CC], Apr. 9, 1992, 92-312 DC, Maastricht II, (Fr.), *in* THE

Lisbon<sup>201</sup> treaties were challenged in several Member State constitutional courts. The wide range of legal issues on which such individuals can attack EU actions in national courts means that there will be an ever-present supply of opportunities for the Member State constitutional courts that have embraced EU oversight doctrines similar to those found in Germany, to exercise their jurisdiction and potentially provoke a foundational crisis. In short, there exists abundant legal grounds from which a potentially catastrophic case can arise, numerous Member State courts willing to exercise jurisdiction over such cases, and a sufficient number of individuals willing to bring these issues to the attention of those courts. Given these circumstances, it would hardly be surprising if a foundational crisis in the EU were to occur.

## V. CONCLUSORY REMARKS

The legal relationship between Germany and the EU personifies a more general conceptual difference between how the EU views itself and how the Member States view it. In the context of Germany, the end result is a divergence in legal doctrines with respect to the relative jurisdictional abilities of the BVerfG and the ECJ: each believes that their respective legal system ultimately has primacy over the other and retains the jurisdiction to enforce that primacy. That the BVerfG and ECJ have managed to co-exist for over four decades while substantively disagreeing as to which one reigns supreme is a testament to their conflict avoidance skills and pragmatism.<sup>202</sup> As a former U.S. Attorney General once noted, “if necessity is the mother of

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RELATIONSHIP BETWEEN COMMUNITY LAW AND NATIONAL LAW: THE CASES: VOLUME 1, at 399 (Andrew Oppenheimer ed., Cambridge University Press 1994); Denmark Supreme Court, Apr. 6, 1998, I-361/1997, Carlsen and Others v. Rasmussen, *in* THE RELATIONSHIP BETWEEN COMMUNITY LAW AND NATIONAL LAW: THE CASES: VOLUME 2, at 174 (Andrew Oppenheimer ed., Cambridge University Press 2003) (Den.).

201. *E.g.*, *Lisbon*, *supra* note 77 (Ger.); Ústavní soud České republiky ze dne 26.11.2008 (ÚS) [Judgment of the Constitutional Court of Nov. 26, 2008, Treaty of Lisbon I], Pl. ÚS 19/08 (Czech), [http://www.usoud.cz/en/decisions/?tx\\_ttnews%5Btt\\_news%5D=484](http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=484) (last visited Feb. 12 2015); Ústavní soud České republiky ze dne 3.11.2009 (ÚS) [Judgment of the Constitutional Court of Nov. 3, 2009, Treaty of Lisbon II], Pl. ÚS 29/09 (Czech), [http://www.usoud.cz/en/decisions/?tx\\_ttnews%5Btt\\_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb276](http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb276) (last visited Feb. 12, 2015).

202. *See* Beck, *supra* note 15, at 493; Cruz, *supra* note 58, at 418.

invention, it's the father of cooperation,"<sup>203</sup> and the potentially catastrophic results that would follow a concrete disagreement between the two courts over issues of EU competence or constitutional court jurisdiction over those competences have long since necessitated intensive cooperation between the BVG and ECJ.

However, relying on this cooperation to avert a potential foundational crisis in the EU is a fairly dangerous strategy, regardless of its sustained historical success. For one thing, as U.S. Supreme Court Justice Stephen Breyer has mentioned, the successful avoidance of inter-court conflicts is often "judge specific; it may, or may not, continue to exist over time."<sup>204</sup> Thus, as the members of the BVG and ECJ change with time, the ability or interest of both courts in avoiding a conflict may wax and wane. Moreover, while the BVG and ECJ case law examined above provides numerous examples where both courts have worked well in the past to avoid such a disastrous conflict, those same cases offer ample evidence that both courts have been slowly inching closer and closer to a collision. The looming conflict is a bit like nightfall: it may not have arrived yet, but that does not mean it is not coming. Indeed, with the escalation of the *OMT/Gauweiler* litigation, it may already be present.

In fact, even if the *OMT/Gauweiler* situation is resolved without a major confrontation, it is very difficult to imagine that a crisis will not eventually arrive. The ECJ cannot allow the Member State constitutional courts to actually exercise oversight with respect to the EU competences and declare EU acts invalid, for to do so would ultimately undermine the uniformity of EU law<sup>205</sup> and destroy the legal basis of the EU.<sup>206</sup> On the other hand, the BVG is not likely to disavow the legal principles that it has developed over the past forty years, and likely could not do so without significantly losing face at both the national and European levels. Thus, the disagreement will persist, and any attempt by either court to actually settle the discrepancy in its favor may precipitate the very conflict that

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203. Interview by Larry King with John Ashcroft, Attorney General, CNN LARRY KING LIVE (May 31, 2002), <http://transcripts.cnn.com/TRANSCRIPTS/0205/31/lkl.00.html> (last visited Feb. 12 2015).

204. Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1056 (2000).

205. See *Honeywell*, *supra* note 103, § 57.

206. See *Costa v. E.N.E.L.*, 1964 E.C.R. 586, 594.

both courts have actively been trying to avoid.<sup>207</sup> Consequently, since neither side is likely to voluntarily alter its stance on the issue, and neither can end the disagreement in any other way, the best that can be hoped for is continued avoidance of the issue by both sides. While not exactly a comforting result, it is clearly better than the alternatives. And, as the BVG and ECJ case law discussed above shows, it is the approach historically taken by both sides in this regard. Whether the *OMT/Gauweiler* litigation represents a continuation of this avoidance pattern or a renewed, enlarged willingness on the part of the BVG to assert its jurisdiction remains to be seen. Regardless, the BVG's anticipated reaction to the *Gauweiler* decision and the eventual resolution of the overall case, will go some way towards further clarifying the legal relationship between Germany and the EU.

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207. See Barents, *supra* note 2, at 440.