

COMMENTS

SOLANGE III: THE GERMAN FEDERAL CONSTITUTIONAL COURT'S DECISION ON ACCESSION TO THE MAASTRICHT TREATY ON EUROPEAN UNION

KEVIN D. MAKOWSKI*

1. INTRODUCTION

On October 2, 1993, the German Federal Constitutional Court, or Bundesverfassungsgericht ("Court" or "BVerfG"), held¹ that representatives of the German government could formally ratify the Treaty on European Union ("TEU" or "Treaty")² by depositing a signed TEU in Rome. This decision

* J.D. Candidate, 1995, University of Pennsylvania Law School; B.A., 1992, University of Cincinnati. This Comment is dedicated to the memory of my grandmother, Emma Altrogge.

¹ Case 2134/92, *Brunner v. The European Union Treaty*, 1 C.M.L.R. 57 (1994). In the European Union ("EU"), this case is frequently referred to simply as the *Maastricht Decision*. For purposes of this Comment, this case will be referred to primarily as *Brunner*, and secondarily as *Solange III* in the discussion *infra* section 5.2.2.

² The TEU is an agreement among the twelve Member States of the European Economic Community ("EEC") to further the integration of Europe by establishing an economic and political union. The key features of the treaty are the establishment of a new European governmental institution called the European Union, the eventual establishment of a common European currency, and a new form of intergovernmental cooperation in foreign policy, security policy, justice and domestic affairs. See *Treaty on European Union*, Feb. 7, 1992, 1992 O.J. (224) 1 in *EUROPEAN COMMUNITY LAW: SELECTED DOCUMENTS* 104 (George A. Bermann et al. eds., 1993) [hereinafter TEU].

The TEU is the latest step in the long process of European integration that began almost 40 years ago in 1957 when the Treaty of Rome established the EEC. The goal of the EEC was to establish a "common market" throughout the Community by eliminating barriers to trade. This common market aimed to increase economic efficiency by reducing transaction costs, increasing competition, and spurring the development of Europe-wide firms to take advantage of economies of scale. After significant

enabled the TEU to go into force on November 1, 1993.³ The *Brunner* decision, both because of its holding and its underlying methodology, will greatly influence the future development of the EU.

Although the ratification process did not present any particular difficulties when the Treaty initially was signed by the Member States in February 1992, the Treaty faced a long and contentious ratification process in several countries.⁴ In France, voters narrowly approved the Treaty in a popular referendum, while in Denmark, it took two attempts before voters finally approved the TEU.⁵ Germany, traditionally one of European integration's strongest supporters, however, delayed ratification the longest.

Germany's two houses of Parliament approved the Treaty ahead of schedule in December 1992. Several different political groups, however, challenged the implementing statute's constitutionality in the Federal Constitutional Court, prompting the Federal President to postpone signing the statute. The Court heard oral arguments in June 1993, and in October 1993 held that Germany's ratification of the Treaty was constitutional.

This Comment will examine the BVerfG's decision, its importance for European integration, the applicable constitutional issues and arguments, the Court's underlying methodology, possible influences on the Court, and the effects this decision could have on business within the EU. Section 2 demonstrates the importance of the treaty to European integration. Section 3 discusses the constitutional issues

early success, the drive towards the common market stalled during the economic crises in the 1970s. In 1987, the Member States completed the Single European Act, which consisted of a series of measures designed to complete a single internal market by 1992. The TEU was designed to expand on the success of the Single European Act by reducing the interest rate risk inherent in separate currencies and ensuring the continued existence of the EEC by deepening political interdependence. *See generally* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (tracing the development of the relationship between the EEC and its Member States through three distinct phases).

³ *Constitutional Court Removes Last Obstacle to German Ratification of Maastricht Treaty on European Unity*, WK. IN GERMANY, Oct. 15, 1993, at 1 [hereinafter *Constitutional Court*].

⁴ *See id.*

⁵ *See id.*

involving accession to the TEU. Section 4 examines how the Court addressed these legal issues in the *Brunner* decision. Section 5 offers a critical analysis of the BVerfG's holding in *Brunner*. Specifically, Section 5 argues that the Court embraced relatively weak arguments on issues critical to its ultimate holding, and suggests that the BVerfG was predisposed to allow Germany to ratify the TEU. Section 6 examines the favorable mechanistic effects and unfavorable methodological effects this decision will have on business within the EU.⁶ This Comment concludes that although the *Brunner* decision is positive for business and European integration since it allows the TEU to proceed, the Court's "as long as" methodology creates uncertainty about the future that ultimately will limit the positive aspects of this decision.

2. THE MAASTRICHT TREATY ON EUROPEAN UNION AND THE RATIFICATION PROCESS IN GERMANY

The Maastricht⁷ Treaty on European Union "marks a new stage in the process of creating an ever closer union among the peoples of Europe"⁸ The TEU's provisions create an economic and political union of the twelve Member States of the former EEC.⁹

2.1. Provisions of the Economic Union

The creation of the EU consists primarily of a three-step process that results in a single currency, the European Currency Unit ("ECU"), and a single European Central Bank.¹⁰ The first stage of economic cooperation among

⁶ I term the effects this decision will have on business as "mechanistic" and "methodological." Mechanistic effects are those that develop solely from the Court allowing the Treaty to be ratified; methodological effects are those that relate specifically to the peculiar reasoning employed by the Court. See discussion *infra* section 6.

⁷ The TEU was formally signed by the Member States of the EU in Maastricht, the Netherlands, on February 7, 1992 and is informally referred to as the Maastricht Treaty. See TEU, *supra* note 2, at 104 (editor's note).

⁸ TEU, *supra* note 2, tit. I, art. A.

⁹ The TEU officially consolidated three individual communities, the EEC, the European Coal and Steel Community, and the European Atomic Community, into the EU. See Joachim Wolf, *Die Revision des Grundgesetzes durch Maastricht*, 12 JURISTENZEITUNG 594, 595 (1993).

¹⁰ TEU, *supra* note 2, tit. VI.

Member States has been completed and was supplanted by the second stage on January 1, 1994.¹¹ The second stage features the creation of the European Monetary Institute ("EMI") to coordinate the activities of the national central banks.¹² In addition, the national governments must meet a series of "convergence criteria" involving the reduction of budget deficits and the maintenance of a low inflation rate as conditions to admittance into the third stage.¹³ The newly-named European Council, which is composed of the heads of government of the Member States and the President of the Commission, will determine whether a sufficient number of Member States have satisfied these criteria to warrant entering the third stage before 1999.¹⁴ The third stage would replace the national currencies with the ECU and create a reserve system with a single European Central Bank.¹⁵

2.2. Provisions of the Political Union

The TEU also contains a number of provisions intended to further the political integration of the Member States of the new EU. One important element of this integration is the expansion of Community-level involvement in foreign policy, security policy, justice, and domestic affairs policy—areas

¹¹ The first stage of economic cooperation involved the coordination of national monetary policies in a European Monetary System, with the goal of keeping the national currencies within narrow ranges of fluctuation. See *id.*

¹² The EMI was established in Frankfurt, Germany. See *Frankfurt-Based EMI to Inherit Bundesbank Policies*, Reuter European Business Report, Oct. 29, 1993, available in LEXIS, News Library, REUEUB File.

¹³ See TEU, *supra* note 2, tit. VI, art. 109j. The criteria include, *inter alia*, maintaining an inflation rate of no more than 1.5 percentage points higher than the three best performing Member States, see Protocol on the Convergence Criteria Referred to in Article 109j of the Treaty Establishing the European Community, Feb. 7, 1992, in EUROPEAN COMMUNITY LAW: SELECTED DOCUMENTS 190 (George A. Bermann et al. eds., 1993) [hereinafter Protocol on Convergence], and holding government debts to less than a 60% ratio with gross domestic product, see Protocol on the Excessive Deficit Procedure, Feb. 7, 1992, in EUROPEAN COMMUNITY LAW: SELECTED DOCUMENTS 189 (George A. Bermann et al. eds., 1993) [hereinafter Protocol on Deficit].

¹⁴ TEU, *supra* note 2, tit. VI, arts. 109, 109(f). The extent of discretion the European Council enjoys regarding entrance into the third stage after 1999 is open to debate. See discussion *infra* section 5.2.

¹⁵ TEU, *supra* note 2, tit. VI, art. 109(1).

previously left to the Member States—by the establishment of a new form of inter-governmental cooperation.¹⁶

In addition, the TEU includes several institutional changes that are likely to further political integration by strengthening the EU's legitimacy vis-à-vis the Member States.¹⁷ One such change is the new "co-decision procedure," which essentially grants the European Parliament¹⁸ the right to veto legislation in certain areas, such as the free movement of workers, the right of establishment, and education policy.¹⁹ The TEU also codifies the "subsidiarity" principle, which requires decisions to be made at the lowest level of government.²⁰ Finally, the TEU creates a "European citizenship," which guarantees all Member State residents equal participation in EU elections regardless of their citizenship, and which also guarantees that a Member State's consular protection to its citizens abroad is equally available to all other Member States' nationals.²¹

2.3. *The Implementation Process in Germany*

The first step toward ratification of the TEU in Germany was an amendment to the *Grundgesetz* ("GG"), or the Constitution, of Germany.²² Previously, GG Article 24 granted the constitutional authority to transfer state power to the European Community ("EC"), allowing the "transfer [of]

¹⁶ See Wolf, *supra* note 9, at 596.

¹⁷ See generally Pierre Mathijsen, *The Power of Co-Decision of the European Parliament Introduced by the Maastricht Treaty*, 8 TUL. EUR. & CIV. L.F. 81 (1993) (examining the procedures involved in maintaining the balance of powers among Member States and between the Member States and the EU).

¹⁸ The European Parliament is the only directly-elected institution of the EU. See Wolf, *supra* note 9, at 598.

¹⁹ TEU, *supra* note 2, tit. XVII, art. 189b. The other legislative procedures, the "consultation" and the "cooperation" procedures, at most afford the European Parliament an advisory role in the legislative process. See EUROPEAN COMMUNITY LAW: SELECTED DOCUMENTS 80 (George A. Bermann et al. eds., 1993).

²⁰ See *The Treaty - and What it Means*, Press Association Newsfile, Nov. 1, 1993, available in LEXIS, News library, PANEWS File.

²¹ See *id.*

²² See Rupert Scholz, *Grundgesetz und Europäische Einigung*, 45 NEUE JURISTISCHE WOCHENSCHRIFT 2593, 2594 (1992).

sovereign powers to intergovernmental institutions."²³ There was a growing awareness, however, that the EC, and particularly the new EU, were no longer simply *intergovernmental* institutions like the United Nations, but had become supranational institutions outside the scope of Article 24.²⁴ Thus, the German Parliament amended the GG by passing a new Article 23,²⁵ which specifically permits the Federal Republic to participate in the development of both a united Europe and the EU by statutorily transferring some of Parliament's sovereign powers to these institutions.²⁶

Pursuant to the powers granted to it under the new Article 23, the German Parliament implemented the TEU by simple statute,²⁷ and further amended the other articles of the GG to conform to the provisions of the TEU. For example, Parliament amended Article 28, which involves voting procedures, to grant to all Member State nationals residing in Germany the right to participate in Community elections.²⁸ Article 88 was also altered to allow the *Bundesbank's* (the Federal Bank) duties to be transferred to the future European Central Bank.²⁹

²³ GRUNDGESETZ, art. 24 (F.R.G.) (emphasis added).

²⁴ See Scholz, *supra* note 22, at 2594.

²⁵ Article 23 states in part:

The Federal Republic of Germany participates in the fulfillment of a united Europe through the development of a European Union that is obligated to respect democratic, legal, state, social, and federal principles as well as the principle of subsidiarity, and to secure basic rights protection essentially similar to those of this *Grundgesetz*. The Federation may with approval of the *Bundesrat* transfer sovereign rights through a statute.

GRUNDGESETZ, art. 23 (F.R.G.).

²⁶ Article 23 also was amended to include provisions guaranteeing the *Bundesrat* (the upper house of the German Parliament which is elected from the *Länder* or state governments) the right to "participate in the formulation of the political objectives and demands" pursued by the government in areas transferred to the competence of the EU that had formerly been the responsibility of the *Länder*. *Id.* These provisions were intended to address any constitutional concerns involving the transfer of powers of the *Länder*. See Scholz, *supra* note 22, at 2596. See generally Peter Malanczuk, *European Affairs and the "Länder" (States) of the Federal Republic of Germany*, 22 COMMON MKT. L. REV. 237 (1985).

²⁷ Gesetz zum Vertrag vom 7. Februar 1992 über die Europäische Union, 47 BUNDESGESETZBLATT II 1245, 1251 (1992).

²⁸ GRUNDGESETZ, art. 28 (F.R.G.).

²⁹ GRUNDGESETZ, art. 88 (F.R.G.).

3. CONSTITUTIONAL ARGUMENTS AGAINST ACCESSION TO THE TEU

The focus of arguments against German accession to the TEU is GG Article 79, paragraph 3 which states: “[a]mendments of this Basic Law affecting the division of the Federation into *Länder*, the participation in principle of the *Länder* in legislation, or *the basic principles laid down in Articles 1 and 20 shall be inadmissible.*”³⁰ Article 20 describes the Federal Republic as “a democratic and social federal state.”³¹ Thus, Germany’s status as a democratic and social federal state is a core principle of the GG. Those who argue that Germany’s accession to the TEU is unconstitutional contend that the TEU violates this provision as well as the other protected core principles of the German constitution.

3.1. *The TEU and German Sovereignty*

The principal argument regarding German sovereignty is that this step in the integration process into the TEU is so far-reaching that it materially threatens Germany’s sovereignty, and, therefore, its status as a democratic and social federal state.³² The TEU creates an entity that is much more powerful than the EC. This is evidenced by several key characteristics of the EU: it will have a single currency, its areas of competence will be expanded to include transportation issues and social issues, as well as issues relating to security policy and justice policy; its democratic institutions will be strengthened by increasing the participation of the European Parliament, and it will even have its own citizenship.³³ In addition, unlike the EC, Article F, paragraph 3 of the TEU³⁴

³⁰ GRUNDGESETZ, art. 79 (F.R.G.) (emphasis added). The architects of the GG included this clause to prevent the recurrence of an event similar to that in 1933 when Adolf Hitler used the enabling clause of the then-existing Constitution to have dictatorial power “legally” transferred to him. See Hans Heinrich Rupp, *Muss das Volk über den Vertrag von Maastricht entscheiden?*, 46 NEUE JURISTISCHE WOCHENSCHRIFT 38, 39 (1993).

³¹ GRUNDGESETZ, art. 20 (F.R.G.).

³² See Dietrich Murswiek, *Maastricht und Der Pouvoir Constituant*, 32 DER STAAT 161, 174 (1993); Rupp, *supra* note 30, at 40; Wolf, *supra* note 9, at 598.

³³ See *Constitutional Court*, *supra* note 3, at 1.

³⁴ Article F, paragraph 3 states, “[t]he Union shall provide itself with the

arguably provides the EU with a competence-competence.³⁵ Thus, in many ways the EU resembles a sovereign state.

Some commentators argue that when a state transfers such a great degree of sovereign power to another governmental body so that the transferee governmental body begins to take on the attributes of a fully-functioning state, the transferring state at some point loses its status as a fully sovereign state. One scholar termed this distinction the difference between a "sovereign national state" and a "national member state."³⁶ While commentators' views differ as to whether the EU simply has "state-like characteristics,"³⁷ or has instead become a supranational federal state,³⁸ they argue that with this step in the integration process, Germany would relinquish so much of its sovereign power that it would cease to be the sovereign nation state guaranteed by Article 20.³⁹

3.2. *The TEU and Democratic Principles*

Another argument against accession to the TEU is that by transferring so much power to the non-democratic EU, the Treaty is disturbing the democratic principle at the core of the German constitution.⁴⁰ Of the three Community institutions, only the weakest, the European Parliament, is an elected body.⁴¹ The members of the European Council, the legislative and policy-making body, are officials of the Member State governments. Members of the Commission, the Community's executive body, are bureaucrats appointed by the Member

means necessary to attain its objectives and carry through its policies." TEU, *supra* note 2, art. F, para. 3.

³⁵ A competence-competence refers to the unfettered power of the EU to determine its own areas of activity. Such a power has arguably obliterated the previous division of powers between the EC and the Member State governments, under which the EC could only operate in certain delineated areas. See Wolf, *supra* note 9, at 596.

³⁶ See Murswiek, *supra* note 32, at 168.

³⁷ Rupp, *supra* note 30, at 40.

³⁸ See Wolf, *supra* note 9, at 597.

³⁹ Murswiek, noting that it is impossible to measure a nation's power with precision, suggests that Germany would be less than a sovereign state if greater than 50% of its powers are transferred to the European governmental institutions. See Murswiek, *supra* note 32, at 170.

⁴⁰ See Rupp, *supra* note 30, at 40.

⁴¹ See Wolf, *supra* note 9, at 598.

State governments.⁴² Some commentators point to the expanding role of the European Parliament and the indirect responsibility of the European Council ministers to the Member State governments to support an argument that the EU conforms to basic democratic principles.⁴³ Other commentators respond that this argument ignores the simple fact that most activity at the Community level is undertaken by the bureaucratic Commission.⁴⁴ These observers argue that the opportunity for only limited democratic participation in the Community is not enough to satisfy the minimum requirements of the democratic principles protected by the GG, where democracy is described as flowing directly from the people.⁴⁵

3.3. *The TEU and the Point of No Return*

The final argument that the TEU would violate the core principles of the Federal Republic's Constitution focuses on the future effects that the TEU would have on Germany's sovereignty and the democratic principles of the GG. The thrust of this argument is that even if the constitutional core is not disturbed at the moment Germany accedes to the TEU, Germany will have irretrievably committed itself to a path that will result in the disturbance of the constitutionally-protected core.⁴⁶

Commentators point to several provisions of the TEU as examples of this danger. First, it is argued that even if Article F, paragraph 3 does not presently give the EU a competence-competence, the European Court of Justice could interpret it to do so.⁴⁷ Second, by committing itself to the monetary

⁴² See Paul D. Marquardt, *Deficit Reduction: Democracy, Technocracy, and Constitutionalism in the European Union*, 4 DUKE J. COMP. & INT'L L. 265, 271 (1994).

⁴³ See Jürgen Schwarze, *Das Staatsrecht in Europa*, 12 JURISTENZEITUNG 585, 588 (1993).

⁴⁴ See Marquardt, *supra* note 42, at 271-72.

⁴⁵ See Rupp, *supra* note 30, at 40; see also GRUNDGESETZ, art. 20 (F.R.G.) ("All state authority shall emanate from the people.").

⁴⁶ See Murswiek, *supra* note 32, at 187.

⁴⁷ The European Court of Justice traditionally has interpreted the powers of the European institutions broadly. See, e.g., Case 14/68 Wilhelm

union, Germany is, in effect, committing itself to relinquishing control of all of its financial decision-making power, because such control will ultimately prove to be necessary for the successful operation of a monetary union.⁴⁸ Finally, it is argued, by agreeing to work towards "an ever closer union," Germany is acknowledging that it accepts a European federal state as the ultimate goal of European integration.⁴⁹

Some commentators contend that these provisions create a process that essentially is irreversible. They argue that the consequences of Germany leaving the EU would be so severe that it is unrealistic to think that Germany could ever withdraw from the Union.⁵⁰ Thus, accession to the TEU must be held unconstitutional now, because as one scholar noted, "to wait is to wait until there is nothing left to decide."⁵¹

3.4. *Demands for a Referendum*

Most commentators who argue that accession to the TEU is unconstitutional instead propose that accession be voted on by popular referendum,⁵² on the theory that, if accession within the existing framework is not constitutionally possible, a different form of legitimization must be utilized. According to these commentators, it follows that since the people are the ultimate source of legitimacy for the GG, they have the power to amend any part of the GG through a referendum, including those elements that form the constitutional core.⁵³

4. THE BVERFG'S HOLDING IN *BRUNNER*

4.1. *Standing*

The first issue the BVerfG examined was whether the complainants⁵⁴ had standing to bring their actions before the

⁴⁸ See Murswiek, *supra* note 32, at 186.

⁴⁹ TEU, *supra* note 2, art. A.

⁵⁰ See Murswiek, *supra* note 32, at 175.

⁵¹ *Id.* at 173.

⁵² See *id.* at 188; Rupp, *supra* note 30, at 39.

⁵³ See Rupp, *supra* note 30, at 40.

⁵⁴ The Court entertained arguments from two complainants. The first complainant was Manfred Brunner, who, as a top aide to a German

Court.⁵⁵ A complaint under GG Article 93, paragraph 1, number 4a, is only justiciable where the complainant can demonstrate that a constitutionally-protected individual right is being currently and directly violated.⁵⁶

In this case, the complainants brought their suits based on everything from the GG Article 9(1) (in conjunction with 21(1)) right to form political parties to the quasi-fundamental right to the maintenance of the separation of powers.⁵⁷ The Court systematically rejected almost all of these claims as inadmissible, finding that either the asserted right was not a constitutionally-protected individual right⁵⁸ or the complainant had not shown the possibility of a violation of an otherwise protected right.⁵⁹

The BVerfG did find, however, that the first complainant had made out a possible violation of his Article 38 right to participate in the election of the Bundestag.⁶⁰ The Court held that Article 38 guarantees individual citizens the fundamental right to participate in the democratic process, and thus gives individuals standing to challenge a law on the

Commissioner, had been fired for speaking out against the entrenched bureaucracy in the EC. *See Party Time for Brunner*, FINANCIAL TIMES, Oct. 12, 1993, at 17. The second complainant consisted of a group—four members of the Green party serving in the European Parliament. Their main concern in this process was the protection of democracy. *See David Gow, Court Case Delays Bonn's Ratification of Maastricht*, THE GUARDIAN, Mar. 1, 1993, at 7.

⁵⁵ See Brunner, 1 C.M.L.R. at 57, 71.

⁵⁶ See *id.* at 76.

⁵⁷ See *id.* at 72-73.

⁵⁸ For example, the Court rejected all of the second complainant's arguments because they involved only quasi-protected rights or non-existent rights, such as the right to a popular referendum, that simply do not appear in the GG. *See id.* at 83. The BVerfG also rejected arguments regarding the sovereign status of Germany because it found there was no specific right to this status. *See id.* at 85. The Court did address, however, the same arguments in its holding under the mantra of the possible violation of the democratic principle. *See discussion infra* section 4.2.2.

⁵⁹ For example, the court dismissed the first complainant's argument involving his right to establish and participate in political parties because the Court could not identify how the TEU would interfere with this right. *See id.* at 82.

⁶⁰ Article 38 of the GG states, "[a]nyone who has attained the age of eighteen years shall be entitled to vote [for the Bundestag]; anyone who has attained majority shall be eligible for election." GRUNDGESETZ, art. 38, para.

basis of a violation of the fundamental democratic principles as described in Article 20 and protected by Article 79 of the GG.⁶¹

4.2. *Substantive Analysis of the TEU*

The next issue for the Court was whether “there is a breach of the democratic principle insofar as it is declared by Article 79(3), in conjunction with Article 20(1) and (2), to be unassailable.”⁶²

4.2.1. *Democracy Within the European Institutions*

The Court began with the proposition:

[The] democratic principle thus does not prevent the Federal Republic of Germany from becoming a member of a community of States (organised on a supra-national basis). But it is a pre-condition for membership that a legitimation and an influence proceeding from the people is also secured inside the federation of States.⁶³

The Court accepted the argument that within the institutional structure of the EU, the only source of democratic legitimacy is the popularly-elected European Parliament.⁶⁴ Furthermore, while the Court held that Parliament's future role may be expanded to allow a sufficient amount of democratic legitimization, the Parliament's present “supporting role” is not enough to satisfy the minimum requirements of the democratic principle.⁶⁵

⁶¹ See Brunner, 1 C.M.L.R. at 76-77. The Court held that the complaint under Article 38 was admissible only where it related to the implementing law, not Article 23. The Court found that the complainant could not make out a violation of his fundamental rights under Article 23 because it only enables the implementation of laws that do not exceed the limit imposed by Article 79. See *id.*

⁶² *Id.* at 84.

⁶³ *Id.* at 86.

⁶⁴ See *id.* at 86-87.

⁶⁵ See *id.* at 87.

4.2.2. *Transfer of the Bundestag's Powers*

Since the institutions of the EU do not independently satisfy the democratic principle, the *Bundestag* remains the principal method for the people to participate in the democratic process.⁶⁶ "Limits are then set by virtue of the democratic principle to the extension of the European Communities functions and powers," the Court emphasized, "[therefore] functions and powers of substantial importance must remain for the German *Bundestag*."⁶⁷ Thus, the Court next examined whether the TEU exceeded this limit by transferring too much of the *Bundestag's* sovereign power.

Ultimately, the BVerfG held that the *Bundestag* retained sufficient control to satisfy the democratic principle protected by Article 79. The Court strongly rejected the conception of the EU as a state-like entity.⁶⁸ The Court's opinion emphasized that the power of the EU was circumscribed such that it was empowered to act only in certain limited areas.⁶⁹ The BVerfG also refused to consider that the new cooperative structure provides additional competences for the EU because these are not areas that had been transferred to the EU, but rather are simply areas of new cooperation among national governments.⁷⁰ Finally, the Court found that the doctrines of subsidiarity⁷¹ and proportionality⁷² are further guarantees of the limited nature of the EU.⁷³

The Court also rejected the "point of no return" argument by holding that the provisions of the TEU did not commit Germany to any further transfers of control without its further approval.⁷⁴ In finding that Germany was still one of the

⁶⁶ See *id.* at 91.

⁶⁷ *Id.* at 88.

⁶⁸ See *id.* at 91.

⁶⁹ See *id.* at 96-97.

⁷⁰ See *id.* at 93.

⁷¹ See *supra* section 2.2.

⁷² The doctrine of proportionality holds that any act by the EU must not be overly intrusive as compared to the goals that the act is intended to achieve. See, e.g., Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1140.

⁷³ See Brunner, 1 C.M.L.R. at 104-05.

⁷⁴ Germany's sovereign rights are equated with those of the *Bundestag* because of its parliamentary responsibility. See *id.* at 103.

“masters of the treaties,” the Court focused its analysis on four areas: 1) the ultimate goal of the treaty; 2) whether the EU enjoyed competence-competence; 3) the inevitability of complete economic union; and 4) whether the transition to the third stage of the monetary union was automatic.⁷⁵

First, the Court determined that the ultimate goal of the EU was simply to create a stronger organization of states rather than a federal state or a “United States of Europe.”⁷⁶ Second, the Court held that “Article F(3) does not empower the Union to provide itself by its own authority with the financial means and other resources it considers necessary for the fulfillment [sic] of its objectives.”⁷⁷ Instead, this clause was intended as a “programmatic” or policy-setting sentence.⁷⁸ In its analysis, the Court relied heavily on the argument that this clause could not create such a power because the creation of such a powerful entity was not the intention of the signatories.⁷⁹

Third, the BVerfG also rejected the argument that by entering the monetary union, Germany was creating a factual scenario whereby full economic union at the European level would ultimately become irreversible.⁸⁰ Whether full economic union is the only way to complete a monetary union successfully is a political question and should be decided by the proper legislative bodies.⁸¹ The BVerfG held that if Germany ever agreed to it, the Court would consider the constitutional implications at that time.⁸²

Finally, the BVerfG interpreted the TEU as “not subjecting [Germany] to an ‘automatic’ progress to a monetary union, which is unsupervisable and the momentum of which puts it beyond control.”⁸³ Instead, the BVerfG found that every stage of the process towards monetary union was subject to approval by the German government and, therefore, to

⁷⁵ See *id.* at 90-103.

⁷⁶ *Id.* at 90.

⁷⁷ *Id.* at 94.

⁷⁸ *Id.*

⁷⁹ See *id.* at 94-95.

⁸⁰ See *id.* at 102.

⁸¹ See *id.* at 103.

⁸² *Id.*

⁸³ *Id.* at 101.

parliamentary approval.⁸⁴ Furthermore, the Court held that even after Germany entered the third step of the monetary union, if the European Central Bank demonstrated that it could not meet its policy guidelines on inflation, then Germany's accession to the mechanism would no longer be valid and Germany could leave the EU.⁸⁵

4.3. *Scope of the Ruling*

The Court stated clearly that as long as the *Bundestag* provides the only viable instrument through which the people can exercise democratic power, then any further transfer of Germany's sovereign powers would infringe upon the democratic principle protected by Article 79.⁸⁶ As the Court noted, "[w]hat is decisive . . . is that the democratic bases of the Union will be built up with the integration process."⁸⁷ Any expansion of the treaty—including expansion via judicial interpretation—would not be binding on Germany because such an expansion would not be sanctioned by the law implementing the TEU and would be unconstitutional.⁸⁸ The Court further made it clear that it would exercise its jurisdiction to the fullest extent in order to supervise the integration process.⁸⁹

⁸⁴ *See id.*

⁸⁵ *See id.* at 102.

⁸⁶ *See id.* at 85.

⁸⁷ *Id.* at 108.

⁸⁸ *Id.*

5. CRITICAL ANALYSIS OF *BRUNNER*

5.1. *Point of No Return Argument*

On two points that were related to the "point of no return" argument and that were crucial to the Court's ultimate holding, the BVerfG adopted arguments advanced by the German government that were unsupported by the plain language of the TEU or by accompanying sources and statements. This section suggests that the Court may have been predisposed to favor the German government's argument on these issues, regardless of their merit.

5.1.1. *Final Goal*

The ultimate goal of a treaty and its signatories is important in determining the precise objective to which a state is committing itself.⁹⁰ Thus, it would have been difficult for the BVerfG to allow Germany to accede to the TEU if it had ruled also that the Treaty's ultimate goal was the achievement of a full federal state. The Court relied primarily on statements of political leaders in deciding that the TEU's ultimate goal was not the establishment of a full federal state.⁹¹ This reliance is misplaced because it is clear that many of these leaders actually view a full federal state as the ultimate goal of the TEU. For example, Chancellor Kohl often is quoted as speaking of a future "United States of Europe."⁹² In fact, until the final draft of the TEU, when it was stricken at the United Kingdom's insistence, the preamble specifically committed the Member States to "a union with a federal goal."⁹³ Since the Court undoubtedly was privy to these facts, it is difficult to understand its ruling on this issue.

⁹⁰ *Id.* at 90.

⁹¹ See Brunner, 1 C.M.L.R. at 90.

⁹² Helmut Kerscher, *Die Ehe mit Europa, eine Frage der Souveränität*, SÜDDEUTSCHE ZEITUNG, July 2, 1993, at 3.

⁹³ *EC Leaders Agree at Maastricht Summit to Treaties on Monetary and Political Union*, FACTS ON FILE WORLD DIG., Dec. 12, 1991, available in LEXIS, Europe Library, ALLEUR File.

5.1.2. Transition to the Third Stage

Another issue crucial to the BVerfG's holding that Germany was not facing the "point of no return" was whether Germany's entrance into the third and final step of the monetary union was automatic. The Court's holding that Germany has the right to approve the final transition to the third step is not supported by the language of the TEU and is contrary to Chancellor Kohl's public statements on the subject.⁹⁴

The Court attempts to read a right of approval into the Protocol⁹⁵ accompanying the TEU that established the specific convergence criteria for entrance into the third stage.⁹⁶ Nothing in the Protocol's language supports this conclusion. The Protocol does not mention the necessity of further approval by a Member State parliament. Rather, it details the *economic* steps required of the Member State.

That no further *political* steps at the national level are necessary for entrance into the third stage also is supported by the wording of Article 109j, paragraph 3, which states:

"[T]he Council . . . shall, acting by a *qualified majority*, not later than 31 December 1996: decide . . . whether a majority of the Member States fulfil the necessary conditions for the adoption of a single currency; [and] . . . whether it is appropriate for the Community to enter the third stage, and if so set the date for the beginning of the third stage."⁹⁷

Since this procedure does not require unanimous approval, Germany's approval to enter the third stage is not even required within the Council. It is difficult to argue, therefore, that a separate parliamentary approval at the national level is required.

The Court's argument is made even more suspect by the wording of the Protocol on the Transition to the Third Stage of

⁹⁴ See Brunner, 1 C.M.L.R. at 103.

⁹⁵ Protocol on Convergence, *supra* note 13, at 190.

⁹⁶ See Brunner, 1 C.M.L.R. at 100. Article 6 of the Protocol establishes the convergence criteria for passage to monetary and economic union. See Protocol on Convergence, *supra* note 13, at 191.

⁹⁷ TEU *supra* note 2, tit. VI art. 109j (emphasis added).
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the Economic and Monetary Union.⁹⁸ The Protocol labels the movement to the third stage "irreversible."⁹⁹ In addition, the only possibility of a state not entering the third stage that is suggested by the Protocol is where a state has not satisfied the economic convergence criteria.¹⁰⁰ Finally, Chancellor Kohl has repeatedly been quoted as saying that there will be no "second ratification" for entrance into the third stage.¹⁰¹

5.2. *The Court's Motivation*

The negative inference of the BVerfG's ruling is that if the Court had held differently on issues such as the ultimate goal of the TEU and the transition to the third stage, then the BVerfG would have been compelled to block German accession to the Treaty. In light of the significant political pressures attached to this issue and the Court's own precedent, it would have been highly unlikely for the BVerfG to have ruled against Germany's accession to the Treaty.

5.2.1. *Political Pressures*

The BVerfG, although structurally fully independent, has shown itself to be "politically sensitive." In fact, two-thirds of the judges that preside on the Court have a clear party affiliation.¹⁰² The Court's political sensitivity is particularly evident in cases involving foreign policy.¹⁰³ For example, in a recent case involving the constitutionality of German military participation in a United Nations mission in Bosnia, the Court was roundly criticized for "being more concerned about disappointing [Germany's] alliance partner than about

⁹⁸ Protocol on the Transition to the Third Stage of Economic and Monetary Union, Feb. 7, 1992, 1992 O.J. (224) 1, reprinted in EUROPEAN COMMUNITY LAW SELECTED DOCUMENTS 191 (George A. Bermann et al. eds., 1993) [hereinafter Protocol on the Transition].

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *Most Germans Oppose Abolition of Mark: Survey*, Agence France Presse, June 30, 1993, available in LEXIS, News Library, AFP File.

¹⁰² See *Awaiting the German Ja*, THE ECONOMIST, May 22, 1993, at 57, 58.

¹⁰³ See Tom Heneghan, *Speculation Mounts Over German Court View of Maastricht*, Reuter European Community Report, May 24, 1993, available in LEXIS, News library, REUEC File.

the constitutional issues."¹⁰⁴ Some commentators argue that external pressure on the Court is not an issue for ratification because public support for the TEU has diminished.¹⁰⁵ The TEU and European integration are the cornerstones of the Kohl government's foreign policy, however, and a ruling against accession to the TEU would have been "deeply embarrassing."¹⁰⁶ Thus, the serious consequences of ratification, coupled with the Court's sensitivity to political issues, are one reason why the BVerfG was apparently so willing to accept weak arguments supporting Germany's accession to the TEU.

5.2.2. Precedent

Brunner also can be explained by examining the BVerfG's major precedent involving the EC. The two major BVerfG cases involving the EC are *Solange I* and *Solange II*.¹⁰⁷ In *Solange I*, the BVerfG held that as long as the EC failed to strengthen the protection of fundamental rights through an enumeration of protected rights comparable those protected by the GG, then the BVerfG would review the constitutionality of secondary community legislation.¹⁰⁸ Under the facts of that particular case, the BVerfG held that the suspect legislation did not violate the GG.¹⁰⁹ In *Solange II*, the BVerfG held

¹⁰⁴ See Marc Fisher, *High Court Allows German Participation in U.N. Balkan Mission*, WASH. POST, Apr. 9, 1993, at A19.

¹⁰⁵ See Conor C. O'Brien, *Next Door to Nietzsche's Children*, THE INDEPENDENT (London), July 2, 1993, at 24. Polls show that approximately 50% of the German public are in favor of the TEU. See Marcus Kabel, *German Court Approves Maastricht, Bonn Pleased*, Reuter European Community Report, Oct. 12, 1993, available in LEXIS, News Library, REUEC File.

¹⁰⁶ See Heneghan, *supra* note 103.

¹⁰⁷ See Wulf-Henning Roth, *The Application of Community Law in West Germany: 1980-1990*, 28 COMMON MKT. L. REV. 137 (1991) (outlining the application of EC law in the former West Germany); see also *Internationale Handelgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (*Solange I*), 37 BVerfG 271 (1974); *In Re Application of Wünsche Handelgesellschaft* (*Solange II*), 73 BVerfGE 339 (1987). These cases are known as *Solange* (meaning "as long as") *I* and *II* because of their holdings. As the discussion in this section will show, the holding in *Brunner* closely relates to these cases.

¹⁰⁸ See *Solange I*, 37 BVerfGE at 271.

¹⁰⁹ See *id.* at 288.

that the EC had satisfied the demands the Court established in *Solange I*, and that as long as the EC continued its protection of fundamental rights, the BVerfG would not rule on the constitutionality of secondary community law.¹¹⁰

The methodology in *Brunner* is very similar to the "as long as" reasoning of *Solange I* and *Solange II*. In all three cases, the BVerfG expressed a strong sentiment that in any conflict of norms between Germany and the EU, German constitutional concerns would prevail.¹¹¹ Nonetheless, in all three cases, the Court also showed an unwillingness to hold directly against the interests of the European-level entity. By attaching the "as long as" conditions, however, the Court gave itself the best of both worlds. It gave the German government an important bargaining chip so that the Court's constitutional concerns would be addressed without having to rule against the EU directly. Thus, after *Solange I*, the EC became much more active in protecting fundamental rights.¹¹² In the same way, *Brunner* permitted Germany to ratify the TEU, while at the same time giving the German government substantially greater influence in future negotiations involving an expansion of the European Parliament's role.¹¹³ Thus, in many ways, *Brunner* is really the third "as long as" decision, and thus can be regarded as *Solange III*.¹¹⁴

¹¹⁰ See *Solange II*, 73 BVerfGE at 340.

¹¹¹ There is a distinction between the *Solange I* and *Solange II* cases and the *Brunner* decision because the former cases involved secondary EC legislation, and the latter addressed the constitutional challenge to a German statute approving primary EU laws. The thrust of all three holdings, however, is that ultimately, the BVerfG constitutional holdings will have primacy over EU law.

¹¹² See, e.g., Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727.

¹¹³ In fact, during negotiations at Maastricht, Germany sought a stronger European Parliament. See Tom Heneghan, *German Court Strengthens Bonn's EC Stand*, Reuter European Community Report, Oct. 12, 1993, available in LEXIS, News Library, REUEC File.

¹¹⁴ See *supra* note 1.
<https://scholarship.law.upenn.edu/jil/vol16/iss1/4>

6. BRUNNER'S EFFECT ON BUSINESS

6.1. Mechanistic Effects

Brunner, or *Solange III*, will have significant effects for business solely because it was decided favorably for the TEU. Without question, the most significant aspect of the decision for business was that it did not stop the TEU from going into effect. Had the ruling partially blocked ratification or postponed it pending a referendum, the decision might well have sounded the death knell for the TEU. In turn, the TEU's anticipated benefits for business, such as a reduction in both interest rate risk and transaction costs, would have been lost.

Another example of the mechanistic effect of the decision is that, starting January 1, 1994, Member States began to focus on the convergence criteria of the second stage of the monetary union.¹¹⁵ Europe is emerging slowly from a serious recession; EU unemployment rates have been approximately 10.5%¹¹⁶ and national economies in the region have only recently begun to expand after several years of consistent contraction.¹¹⁷ Many commentators argue that by forcing the Member State governments to reduce inflation and lower the public debt, the convergence criteria will help continue to pull Europe out of its economic downturn.¹¹⁸

The *Brunner* decision may also help pull Europe out of its recession by increasing consumer confidence in the EU.¹¹⁹ The long struggle to ratify the TEU, and the EU's efforts to deal with the crisis in the Balkans, for example, have resulted

¹¹⁵ See *Bank of England Official Calls Single European Currency "Inevitable,"* BNA International Business & Finance Daily, Nov. 5, 1993, available in LEXIS, News Library, BNAIBF File [hereinafter *Bank of England*].

¹¹⁶ See Jeremy Lovell, *EU Commission to Give Fight for Jobs a Legal Basis*, Reuter Newswire, Mar. 8, 1995, available in WESTLAW, Int-News Database.

¹¹⁷ See Robert J. Sanudron, *Saving the Welfare State from Itself*, WASH. POST, July 6, 1994, at 19.

¹¹⁸ See *Bank of England*, *supra* note 115. For example, Italy has already abolished an account it used for day-to-day deficit financing. See *Treasury Account at Bank of Italy Abolished*, Reuters, Nov. 11, 1993, available in LEXIS, News Library, REUFIN File.

¹¹⁹ See *Presentation of Autumn 1993 Forecasts for 1993-95*, Reuter European Community Report, Nov. 10, 1993, available in LEXIS, News Library, REUEC File.

in a lack of confidence in the fate of the EU that has translated into a general lack of consumer confidence.¹²⁰ The positive outcome in *Brunner* has "lifted a psychological weight from the community."¹²¹ This may in turn help "generate a strong rebound in private sector confidence, thereby entailing a faster-than-expected pick-up in domestic demand in the Community."¹²²

Finally, the formal ratification of the TEU allowed the EU to increase its competitiveness by focusing on the stalled negotiations with Sweden, Norway, Finland, and Austria on membership in the EU. These negotiations had been postponed during the ratification process.¹²³ On January 1, 1995, however, Sweden, Austria, and Finland joined the EU, bringing the total number of Member States of the EU to fifteen.¹²⁴

6.2. Methodological Effects

Although *Brunner* should have several positive effects for business by virtue of its holding, the specific "as long as" methodology the Court employed likely will limit the actual benefits that will accrue. By attaching the "as long as" conditions to its holding, the BVerfG has created a good deal of uncertainty about the future of the EU. The Court has put itself in the position of supervising every step of the TEU and any further European integration, thereby clouding the future of the TEU by raising the possibility that at some point the Court might seek to withdraw Germany from the EU.

The potential consequences resulting from a withdrawal by Germany from the EU could be very serious. In the short term, the EU could apply punitive tariffs to German products, and Germany could even be excluded from the monetary

¹²⁰ See *id.*

¹²¹ In *Brüssel*, FRANKFURTER ALLGEMEINE, Oct. 30, 1993, at 1.

¹²² *Presentation of Autumn 1993 Forecasts for 1993-1995*, *supra* note 119.

¹²³ *Klestil Hopes EC Summit Will Speed Austrian Entry*, Reuter European Business Report, Oct. 12, 1993, available in LEXIS, News Library, REUEUB File.

¹²⁴ See Patrick Smyth, *Three More Countries Join the Biggest Economic Club in the World*, IRISH TIMES, Jan. 2, 1995, available in LEXIS, News Library, MAJPAP File. Norway declined to join the EU after voters, in a November 1994 referendum, rejected the proposal. *Id.*

system.¹²⁵ In the long term, however, withdrawal by Germany from the EU could induce the collapse of the EU. Such a collapse obviously would have drastic consequences for economic undertakings throughout Europe.

The threat of these consequences alone could have a continuing adverse effect on consumer and investor confidence in Germany and the EU. Although the uncertainty probably will not deter the bulk of investment activities in Germany, should the ECJ begin consideration of an issue that could be seen by the BVerfG as an impermissible expansion of the EU's powers, investors will have to consider in their decisionmaking the outlying possibility of German withdrawal from the EU. Particularly in marginal or long-term transactions, this additional negative factor may prevent the consummation of some transactions. Thus, the BVerfG's methodology in *Brunner* may prove to have economically inefficient results by depriving society of the benefit of these transactions.

The solution to this problem is straightforward: either the EU must accede to the BVerfG's dictates vis-à-vis the strengthening of democratic institutions, or the Court must issue another decision permitting accession to the EU without an "as long as" condition. Until Germany implements one of these solutions, the benefits of the anticipated economic expansion from the ratification of the TEU will be limited due to the uncertainty of Germany's future status within the EU.

7. CONCLUSION

The TEU is the most important step yet taken in the process of European integration. It eventually will result in a monetary union with a single currency for all Member States. The TEU also will expand the areas of cooperation at the European level and create institutional changes that will result in greater political integration. The *Brunner* decision, however, may have harmful implications for the goals of the EU.

Germany must be a member of the EU for the Union to succeed, but the transfer of so much power to another

¹²⁵ There is no mechanism for leaving the EU. Membership in the EU requires a unanimous vote by all Member States. See TEU, *supra* note 2, tit. VII art. O.

governmental body raises serious constitutional issues in Germany. The German people's right to democratic control is guaranteed through the *Bundestag*. Therefore, the *Bundestag* must retain enough of its duties to satisfy the democratic principles of the GG. Currently, however, the institutional framework of the EU, particularly the limited role of the European Parliament, does not provide for real democratic legitimacy. Although many commentators feel the TEU thus violates Germany's core democratic principle by transferring too much power from the national to the supranational level, the Court in *Brunner* held that it does not. While this element of the Court's decision in *Brunner* is defensible, the Court's holding that the TEU did not create a "point of no return" is much more difficult to defend. In particular, the Court's finding that the goal of the TEU is not a federal state, and its holding that the transition to the third stage of monetary union requires further parliamentary approval, are difficult to support.

This Comment has argued that the Court was receptive to arguments supporting the TEU because it was confronted with a decision of significant political magnitude. In addition, the Court's precedent in *Solange I* and *Solange II* made it likely that, rather than rule directly against the EU, the Court would issue a favorable ruling while at the same time attaching conditions to ensure that the Court's lingering constitutional concerns would be addressed. Thus, the German government can now use this decision as a bargaining chip in any further negotiations regarding European integration.

Finally, this Comment concludes that this decision is positive for business because it did not create the disastrous situation that would have arisen had ratification of the TEU been denied or significantly delayed. *Brunner* may help Europe pull out of its recession by forcing national governments to adhere to the convergence criteria and by increasing consumer confidence.

The Court's "as long as" methodology creates uncertainty about Germany's status as a member of the European Union, however, which ultimately may reduce consumer and investor confidence in the EU, and possibly limit the benefits of the TEU. This uncertainty can only be addressed by strengthening democracy in the EU's institutions or by a

decision by the Court in favor of the TEU that does not condition its approval upon the “as long as” language.