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A Critical Linkage The Role of German Constitutional Law in the European Economic Crisis and the Future of the Eurozone

Jared Curzan*

*Fordham University School of Law

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COMMENT

A CRITICAL LINKAGE: THE ROLE OF GERMAN CONSTITUTIONAL LAW IN THE EUROPEAN ECONOMIC CRISIS AND THE FUTURE OF THE EUROZONE

*Jared Curzan**

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*J.D. Candidate, 2013, Fordham University School of Law; B.A. Philosophy, French, 2006, Tulane University. The Author would like to thank Professor Sungjoon Cho for his guidance, the Fordham International Law Journal for their editing, and Madina Papadopoulos for all of her support. The European economic crisis is an ongoing and developing issue. This Comment reflects the state of events up to March 2012.

INTRODUCTION

In the second half of the twentieth century, Europe formed the European Economic Community (“EEC”) and began a process of economic integration to bring about a common market among its members.¹ Over the years, as the EEC developed, one of its members, Germany, grew concerned over the conflict between its own domestic laws and those regulating the European Community (“EC”). Specifically, Germany expressed concern with the possibility that EEC regulations disregard the fundamental rights guaranteed by Germany’s constitution, known as the German Basic Law or Grundgesetz (“GG”).² EC law, which is the body of treaties and legislation that have a direct or indirect effect on Member States, has become progressively more pervasive and influential over the years.³ As EC law became more all-encompassing due to the further integration of Member States, the German Constitutional Court, the Bundesverfassungsgericht (“BVerfG”), issued rulings regarding the protection of rights set forth in the GG from encroachment and possible infringement by European

1. The Treaty of Rome, signed on March 25, 1957, established the European Economic Community (“EEC”) as a way to integrate Member States via trade and became effective on January 1, 1958. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. The EEC was later renamed the European Community (“EC”) to reflect the determination to expand the EEC’s powers beyond economic issues. See *Summaries of EU legislation*, EUROPA.EU, http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm (last visited May 25, 2012) (explaining the history of the EEC).

2. See E. R. Lanier, *Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge*, 11 B.C. INT’L & COMP. L. REV. 1, 2 (1988) (noting a widespread debate in Germany during the 1960s over the democracy deficit in the EC); see also KLAUS-DIETER BORCHARDT, *THE ABC OF EUROPEAN UNION LAW* 122 (2010) (indicating that Germany initially refused to accept the primacy of EU law regarding the guaranteed protection of fundamental rights). The Grundgesetz (“GG”) is the Basic Law of the Republic of Germany and has been adopted as its constitution. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

3. See generally Piet Eeckhout, *The Growing Influence of European Union Law*, 33 *FORDHAM INT’L L.J.* 1490 (2011) (explaining how EU law has gained more influence through its scope and autonomy); “*Growing Influence Brings Growing Responsibilities*”: A Europe Day Message From EU Commissioner Ferrero-Waldner, EUR. UNION @ UNITED NATIONS (May 9, 2008), http://www.eu-un.europa.eu/articles/en/article_7862_en.htm (noting that the European Union has gained greater influence in the world as Europe has unified and pooled its resources).

law.⁴ The BVerfG has traditionally been the forum to resolve domestic disputes concerning the direction of the European Union because political parties have generally agreed on the necessity of an integrated Europe and Germans opposed to further integration found little support in those political parties.⁵

This tension between German Basic Law and the EC has again resurfaced as the current European debt crisis threatens the Eurozone and the European Union.⁶ Throughout 2011, the Eurozone worked to prevent the extreme sovereign debt of Greece from spreading to other fiscally weak Eurozone members exposed to Greek debt in order to avoid a systemic default throughout the Eurozone, which could potentially lead to a new global recession.⁷ At the center of this dilemma is

4. See *infra* Part I (discussing several Bundesverfassungsgericht (“BVerfG”) rulings on European integration’s effect on rights protected by the GG).

5. See Thomas Giegerich, *The Federal Constitutional Court’s Judgment on the Treaty of Lisbon—The Last Word (German) Wisdom Ever Has to Say on a United Europe?*, in 52 GERMAN Y.B. INT’L L. 9, 10 (Thomas Giegerich & Alexander Proelss eds., 2009) (noting that for decades German political parties agreed on promoting integration in Europe); see also Kurt Kiesinger, *Hello to Berlin: The German Chancellor Discusses the Euro Crisis and Domestic Politics*, ECONOMIST, July 9, 2011, at 50–51 (noting Chancellor Angela Merkel discussing the need to push out euro-skeptics and to forestall the emergence of a euro-skeptic political party).

6. See *infra* Part II (discussing the latest BVerfG ruling addressing the conflict between the GG and the interests of the EC). The European Union currently consists of twenty-seven nations that form an economic and political partnership. See *Basic Information on the European Union*, EUROPA, http://europa.eu/about-eu/basic-information/index_en.htm (last visited May 25, 2012) (explaining the basic configuration of the European Union). The Eurozone is defined as seventeen nations within the European Union who have adopted the euro as their currency, and have thus entered into an economic monetary union with fellow members. See *The Euro/Monetary Union*, EUROPA, http://europa.eu/about-eu/basic-information/money/euro/index_en.htm (last visited May 25, 2012) (explaining the basic configuration of the Eurozone).

7. See Jason B. Gott, *Addressing the Debt Crisis in the European Union: The Validity of Mandatory Collective Action Clauses and Extended Maturities*, 12 CHI. J. INT’L L. 201, 203–04 (2011) (recognizing that observers understood the danger of sovereign default in the European Union and its potential to derail the world’s economic recovery); see also Jim Jubak, *If Greece Defaults...Then What?*, MSN MONEY (Sept. 22, 2011, 7:30 PM), <http://money.msn.com/investing/if-greece-defaults-then-what-jubak.aspx> (describing how a default by Greece would lead investors to flee from other economically weak nations within the Eurozone causing European banks and insurance companies to suffer losses that in turn could spread to US banks, which have US\$670 billion exposed to the debt of weaker Eurozone nations); *IMF Predicts Global Recession When Greece Defaults*, ARABIAN MONEY (Sept. 21, 2011), <http://www.arabianmoney.net/banking-finance/2011/09/21/imf-predicts-global-recession-when-greece-defaults/> (noting that

Germany, the Eurozone's strongest economy, upon which faltering members depend for bailouts, and upon which the European Union as a whole relies as a solid foundation during this crisis.⁸ As the debt crisis in the Eurozone worsens, once again the BVerfG must address constitutional limitations, and its decision could become a serious burden to the government's future action in the European Union.⁹ The BVerfG has long been concerned with the possibility of Germany losing its fundamental democratic and sovereign rights to the supremacy of the EC.¹⁰ Despite these deliberations, Germany has been progressing towards a stronger union with other members of the European Union through the treaties it has signed, most recently the Treaty of Lisbon.¹¹ This amalgamation has forced

a default could shock banks, lead to a global economic slowdown, and cause another recession).

8. See Bill Witherell, *Germany & the Eurozone*, FIN. SENSE, Aug. 29, 2011, <http://www.financialsense.com/node/6237> (stating that Germany is the strongest economy and the "stability anchor" in the Eurozone); see also *Eurozone Depends on Germany—Italy's Tremonti*, REUTERS, Sept. 23, 2011, <http://www.reuters.com/article/2011/09/23/italy-germany-treonti-idUSR1E7KF03L20110923> (recognizing the Italian finance minister's statement about Europe depending on Germany); Liam Halligan, *Germany Must Decide if It Wants the Eurozone to Survive or Perish*, TELEGRAPH (U.K.), Nov. 12, 2011, <http://www.telegraph.co.uk/finance/comment/liamhalligan/8886350/Germany-must-decide-if-it-wants-the-eurozone-to-survive-or-perish.html>

(noting that EU members view Germany as the nation with the most influence in directing the future of the Eurozone).

9. See Wolfgang Münchau, *Stop Rejoicing: This Was No Victory for the Eurozone*, FIN. TIMES (London), Sept. 11, 2011, <http://www.ft.com/cms/s/0/e39dcac6-dae9-11e0-a58b-00144feabdc0.html> (noting that the September 7, 2011 decision of the BVerfG ("Sept. 7 Ruling") dismisses policy options beyond what has already been agreed on); see also *German Court Warns Ruling No Blank Cheque for Bailouts*, TELEGRAPH (U.K.), Sept. 7, 2011, <http://www.telegraph.co.uk/finance/financialcrisis/8746664/German-court-warns-ruling-no-blank-cheque-for-bailouts.html> (noting that the BVerfG's Sept. 7 Ruling potentially hampered the German government's ability to act decisively in the crisis).

10. See discussion *infra* Part I (noting prior rulings where the BVerfG addressed German sovereign rights and the EC's expanding power).

11. The Treaty of Lisbon, which is the latest amendment to the Treaty of European Union ("TEU"), increases the effectiveness of the European Union and grants more powers to the European Parliament. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007 O.J. C 306/01. The Treaty of Lisbon has given the European Parliament more powers in lawmaking, budgeting, and international agreements. See, e.g., *Treaty of Lisbon—A Democratic and More Transparent Europe*, EUROPA, http://europa.eu/libson_treaty/glance/democracy/index_en.htm (last visited May 25, 2012) (summarizing the Treaty of Lisbon); see also Giegerich, *supra* note 5, at 10 (indicating that for decades, German political parties agreed on the necessity of promoting

those opposed to integration to bring suit in the BVerfG as a substitute to debate in the political forum.¹² The result is an inconsistency in which the GG asserts Germany's sovereign identity, while Germany's politicians and citizens push it closer to uniting with the rest of Europe, inevitably leading to the loss of some sovereign power.¹³ Germany now exists in a state of uncertainty in which it has agreed to membership in a monetary union within the Eurozone that permits each country to independently decide its own budget and therefore precludes any true fiscal union.¹⁴

Today, this lack of a fiscal union threatens to cause the common currency, the euro, to collapse.¹⁵ One proposed

integration); Quentin Peel, *Germany Plans Closer EU Integration*, FIN. TIMES (London), Oct. 26, 2011, at 6 (noting that German politics continue to push the nation into closer integration with the European Union).

12. See Giegerich, *supra* note 5, at 10 (noting that the BVerfG is the only practical forum where laws on further European integration can be challenged); see also Helen Pidd, *Greek Bailout Challenged in Germany's Constitutional Court*, GUARDIAN (U.K.), July 6, 2011, at 25 (commenting that politician and euro-skeptic Peter Gauweiler has often brought constitutional complaints against German integration).

13. See Wolfgang Münchau, *Berlin Has Dealt a Blow to European Unity*, FIN. TIMES (U.K.) (July 12, 2009, 7:55 PM), <http://www.ft.com/intl/cms/s/0/48bbec78-6f10-11d0-9109-00144feabdc0.html#axzz1h6bjQPsl> (commenting that the BVerfG ruled that the ultimate authority rests in the Member State, not in the European Union, and that power may be shared but sovereignty may not); see also *Sovereignty and the EU*, EUROMOVE, <http://www.euromove.org.uk/index.php?id=6505> (last visited May 25, 2012) (noting that Member States give up some of their power when making a treaty that removes a right to a decision, which they otherwise would have). Compare GRUNDGESETZ art. 20(1) (Ger.) (indicating Germany as a democratic and social federal state), with Giegerich, *supra* note 5, at 10 (indicating the political push for a more integrated Europe).

14. See *How Economic and Monetary Union Works*, EUROPEAN COMMISSION—ECON. & FIN. AFF., http://ec.europa.eu/economy_finance/euro/emu/how/index_en.htm (last visited May 25, 2012) (noting that although there is an integrated monetary policy, each member nation sets its own fiscal policy); see also Willem F. Duisenberg, President, Ph.D., European Central Bank, Introduction at the International Monetary Conference (June 3, 2003), available at <http://www.ecb.int/press/key/date/2003/html/sp030603.en.html> (asserting that “in the euro area, fiscal policies remain under the exclusive responsibility of national governments”); Luke Baker & Julien Toyer, *Germany, France Examine Radical Push for Eurozone Integration*, REUTERS, Nov. 27, 2011, <http://www.reuters.com/article/2011/11/27/us-eurozone-crisis-idUSTRE7AQ0CF20111127> (noting that France and Germany are looking for ways to establish a fiscal union within the Eurozone).

15. See Matthew C. Turk, *Implications of European Disintegration for International Law*, 17 COLUM. J. EUR. L. 395, 415 (2011) (recognizing that many commentators argue that only a fiscal union can save the Eurozone from its “disintegrative path”); see also Baker & Toyer, *supra* note 14 (commenting on the attempts of France and Germany to

solution to this problem is the further unification of the Eurozone under a common fiscal policy, possibly including a mingling of Eurozone debt under a single common bond.¹⁶ Such a solution would not be compatible with the GG, according to the core constitutional rights to democracy and sovereignty articulated in the September 7, 2011 decision of the BVerfG (“Sept. 7 Ruling”).¹⁷ In the near future, Germany will either have to make some difficult decisions and compromises in order to resolve this predicament or will be forced to accept the consequences of inaction.¹⁸

This Comment argues that a fiscal union will be necessary in the long-term for the Eurozone to survive and that the way in which the BVerfG interprets the GG will have drastic implications on Germany’s ability to further integrate with the Eurozone. Part I explores previous rulings by the BVerfG that addressed the tension between German constitutional law and

secure a fiscal union in the Eurozone in order to avoid a collapse of the currency); Walter Brandimarte et al., *Nobel Economists Say Euro Zone Needs Fiscal Union*, REUTERS, Oct. 10, 2011, <http://www.reuters.com/article/2011/10/10/nobel-economics-idUSL5E7LAIWI20111010> (noting economist Christopher Sims stating that the Eurozone needed to create a fiscal union in order to avoid a collapse of the euro).

16. See Wolfgang Münchau, *The Only Way to Save the Eurozone from Collapse*, FIN. TIMES (London) (Nov. 13, 2011, 7:57 PM), <http://www.ft.com/intl/cms/s/0/64ceb9c8-0c5e-11e1-8ac6-00144feabdc0.html#axzz1ddX81LFP> (indicating that Eurobonds are needed to save the Eurozone from collapse); see also Baker & Toyer, *supra* note 14 (noting that Eurobonds could pave the way for the European Central Bank (“ECB”) to act more forcefully).

17. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 7, 2011, *Europäische Zeitschrift für Wirtschaftsrecht* [EuZW] 920, 2011 (Ger.), available at http://www.bundesverfassungsgericht.de/en/decisions/rs20110907_2bvr098710.html [hereinafter Sept. 7 Ruling]. For a press release summarizing the decision in English, see Press Release, Federal Constitutional Court, No. 55/2011, Constitutional Complaints Lodged Against Aid Measures for Greece Against the Euro Package Unsuccessful—No Violation of the Bundestag’s Budget Autonomy (Sept. 7, 2011), available at <http://www.bundesverfassungsgericht.de/en/press/bvg11-055en.html>; see also *infra* Part II (discussing the details of the ruling made by the BVerfG on September 7, 2011).

18. See Oliver Drews, *Germany Faces Tough Choices in Euro-Zone Crisis*, BUS. DAY (Nigeria) (Dec. 15, 2011, 12:18 PM), <http://www.businessday.co.za/articles/Content.aspx?id=161331> (noting that Germans face a difficult decision between saving the “European project” or maintaining separate liability from other Eurozone members); see also Fiona Ehlers & Hans Hoyng, *Deutschland ist das Neue China*, 48 DER SPIEGEL 108, Nov. 28, 2011 (indicating that Germany faces the collapse of the euro or risks damaging its creditworthiness and facing large-scale inflation if it agrees to measures to save the euro). A translation in English is available at <http://www.spiegel.de/international/europe/0,1518,800351,00.html>.

EC law and then turns to the history of the Eurozone economic crisis leading up to September 2011. Part II discusses the ruling of the BVerfG on the legality of bailouts to faltering Eurozone members, and the implications of these rulings upon future actions of Germany. Part III explains why it is unlikely that the Eurozone will be dismantled and what future actions Germany may be able to take to strengthen the Eurozone while abiding by the constitutional limitations established by the BVerfG.

I. A BRIEF HISTORY OF THE TENSION BETWEEN GERMAN AND EUROPEAN LAW AND THE EUROPEAN ECONOMIC CRISIS

In the last several decades, the BVerfG has issued important rulings regarding the sovereign powers that Germany is allowed to surrender to the EC.¹⁹ The Sept. 7 Ruling is the latest decision that denotes important implications regarding the further transfer of German powers.²⁰ To appreciate the Sept. 7 Ruling, it is necessary to understand the context in which it was decided. Part I.A describes the German *Solange* cases, which hold German law superior to EC law in order to protect fundamental rights. Part I.B analyzes the complaints regarding loss of sovereign powers and democratic legitimacy brought to challenge the German ratification of the EU treaties. Finally, Part I.C discusses the onset of the Eurozone economic crisis, and the measures taken to alleviate financial tensions leading up to the Sept. 7 Ruling.

19. This Comment will not describe all the constitutional cases that have been brought to the BVerfG regarding this issue, but will only highlight the most relevant ones. Some of the cases addressing integration that are not mentioned further are *European Arrest Warrant*, BVerfG, July 18, 2005, 113 BVERFGE 273 (Ger.); *Banana Market Organization*, BVerfG, June 7, 2000, 102 BVERFGE 147 (Ger.); *Euro*, BVerfG, Mar. 31, 1998, 97 BVERFGE 350 (Ger.); *Television Directive*, BVerfG, Mar. 22, 1995, 92 BVERFGE 203 (Ger.); and *Kloppenburg*, BVerfG, Apr. 8, 1987, 75 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 223 (Ger.). See generally Giegerich, *supra* note 5, at 10 n.5 (noting prominent BVerfG cases regarding the conflict between the German Constitution and European law).

20. See *infra* Part II (discussing the Sept. 7 Ruling in more detail).

A. *The Solange Cases*1. *Solange I*

Prior to the establishment of the European Union, and even before the reunification of Germany, the BVerfG addressed the concern of the inadequacy of European law to protect the fundamental rights of the German people. In 1974, a German export firm, Internationale Handelsgesellschaft, asked the Administrative Court of Frankfurt am Main (“FAC”) to rule on the applicability of a European regulation regarding the payment of a bond in conjunction with an application for an export license (“*Solange I*”).²¹ The FAC at first requested a preliminary ruling from the European Court of Justice (“ECJ”), but later referred the case to the BVerfG after the ECJ ruled that EC law could not be held to be in violation of national constitutional principles.²² The BVerfG did not find the regulation in violation of the GG, but used the opportunity to make a controversial ruling on the relationship between European law and German constitutional law.²³ The BVerfG ruled that the EC lacked a democratically legitimized parliament and codified fundamental right and “so long as” (“solange” in German) it lacked a provision to protect human rights comparable to those granted by the GG, the BVerfG would be

21. BVerfG, May 29, 1974, 37 BVERFGE 271 (Ger.), [1974] 2 C.M.L.R. 540 [hereinafter *Solange I*]; see Bill Davies, Dealing with the Fallout: West Germany’s Response to the Solange Decision (1974), at 3 (unpublished manuscript, EUSA Conference 2011), available at http://euce.org/eusa/2011/papers/5d_davies.pdf (noting the export firm asked the Administrative Court of Frankfurt am Main to rule on the European regulation). The Administrative Court is the court of original jurisdiction in the federal German judicial system, having general competence over administrative matters with some exceptions. See Lanier, *supra* note 2, at 4 n.13 (commenting on the jurisdiction of the German administrative courts).

22. See *Solange I*, *supra* note 21, [1974] 2 C.M.L.R. at 546–48 (noting the procedural history of the case); see also Lanier, *supra* note 2, at 5–7 (noting the procedural history of the case); Davies, *supra* note 21, at 3 (asserting that the administrative courts asked for a preliminary ruling by the European Court of Justice (“ECJ”) before referring it to the BVerfG).

23. See *Solange I*, *supra* note 21, [1974] 2 C.M.L.R. at 542–43 (holding that Article 12 of the GG does not pose an obstacle to the application of the challenged rules); see also Lanier, *supra* note 2, at 10 (noting that the *Solange I* decision “provoked a storm of criticism” over the unity of the EC system); Davies, *supra* note 21, at 3 (stating the BVerfG did not find a problem with the technical details of the case but used the opportunity to issue a highly controversial judgment).

able to rule on the applicability of EC law to Germany.²⁴ While the German government is allowed to transfer some of its sovereign powers to intergovernmental organizations like the EEC pursuant to Article 24 of the GG, the BVerfG clarified that Article 24 does not allow the Constitution to be amended or the constitutional order to be infringed on via simple regulation.²⁵ Out of concern for the protection of the democratic process and the explicit rights set forth in the GG, the court denied the absolute supremacy of EC law.²⁶

2. *Solange II*

Twelve years after *Solange I*, in 1986, the BVerfG ruled on a case regarding an EEC agricultural regulation on the importation of processed foods.²⁷ The petitioner, Wünsche Handelsgesellschaft, a German processed-foods importer, argued that certain temporary protective measures blocking imports had become obsolete and should be removed.²⁸ When the ECJ ruled against the petitioner, the petitioner alleged a denial of constitutional rights, including the right to have adjudication on factual determinations made by a lawful judge

24. See *Solange I*, *supra* note 21, [1974] 2 C.M.L.R. at 551 (noting the BVerfG's ruling that the EC could not adequately protect fundamental rights and the BVerfG had the power to review rulings by the ECJ in order to protect those rights); see also Lanier, *supra* note 2, at 7–8 (summarizing the decision by the BVerfG).

25. See *Solange I*, *supra* note 21, [1974] 2 C.M.L.R. at 550 (noting the BVerfG's ruling regarding Article 24 of the GG); see also Lanier, *supra* note 2, at 8 (recognizing the ability to transfer powers under Article 24 and the BVerfG's decision that this ability does not allow for infringing on the constitutional order).

26. See *Solange I*, *supra* note 21, [1974] 2 C.M.L.R. at 564 (noting the dissent's concerns that the ruling could lead to a fragmentation in the law and negate the idea of unification); see also FRANZ C. MAYER, THE EUROPEAN CONSTITUTION AND THE COURTS: ADJUDICATING EUROPEAN CONSTITUTIONAL LAW IN A MULTILEVEL SYSTEM 11 (2003) (noting that the BVerfG put constitutional limits of the supremacy of European law and reserved the right to judicial review to safeguard fundamental rights); Lanier, *supra* note 2, at 8 (stating that the BVerfG exercised the power to protect fundamental rights even against the ECJ's interpretation of EC law).

27. BVerfG, Oct. 22, 1986, 73 BVERFGE 339 (Ger.), [1987] 3 C.M.L.R. 225 [hereinafter *Solange III*]; see Lanier, *supra* note 2, at 11–15 (noting the initial complaint brought before the BVerfG in *Solange II*).

28. See *Solange II*, *supra* note 27, [1987] 3 C.M.L.R. at 234 (noting the petitioner's complaint that the protective measures should be removed); see also Lanier, *supra* note 2, at 15–16 (stating that the petitioner argued that the regulations had lost their basis in fact and therefore in law).

of the national court, the right to freely practice its trade, and the right to a hearing.²⁹

Upon hearing this case, the BVerfG ruled that the circumstances in the EC had changed enough to render earlier reservations from *Solange I* obsolete.³⁰ The EC had developed enough in its ability to protect rule of law, democratic principles, and human rights so that earlier reservations regarding the EC could be abandoned.³¹ The ECJ was now to be regarded as the lawful adjudicator in cases where EC regulations and directives conflicted with rights under the GG, so long as the German Court believed that the ECJ ensured effective protection of fundamental rights.³²

B. *The EU Treaty Cases*

When Germany first acceded to the European Union, and subsequently ratified amendments to the Treaty of European Union (“TEU”), parties who opposed these actions brought constitutional challenges against integration. This Section

29. See *Solange II*, *supra* note 27, [1987] 3 C.M.L.R. at 238–39 (indicating the petitioner’s complaint before the BVerfG); see also Lanier, *supra* note 2, at 18–19 (noting the petitioner’s constitutional complaint before the BVerfG).

30. See *Solange II*, *supra* note 27, [1987] 3 C.M.L.R. at 259 (noting that the BVerfG found the ECJ to be the lawful adjudicator under Article 101 of the GG and that it has the authority to make final decisions within its assigned competence); see also MAYER, *supra* note 26, at 12 (stating that the BVerfG recognized that an effective protection of fundamental rights existed at the European level after an extensive assessment); Lanier *supra* note 2, at 21 (indicating that the BVerfG found that the EC had become more sophisticated and the reservation from the prior *Solange* ruling could be abandoned).

31. See *Solange II*, *supra* note 27, [1987] 3 C.M.L.R. at 258–59 (noting that the BVerfG found the EC developed enough to protect basic rights); see also Lanier, *supra* note 2, at 22 (asserting that the BVerfG found the EC developed enough to satisfactorily protect human rights); Miriam Aziz, *Sovereignty Lost, Sovereignty Regained? The European Integration Project and the Bundesverfassungsgericht* 6 (European Union Inst., Robert Schuman Ctr. for Advanced Studies, Working Paper No. 31, 2001) (noting that the BVerfG recognized that the EC now had a level of protection for basic rights that was comparable to the protection offered by the GG).

32. See *Solange II*, *supra* note 27, [1987] 3 C.M.L.R. at 259, 265 (noting the BVerfG’s decision that the European Court could rule on such cases as long as it continued to protect fundamental rights); see also Lanier, *supra* note 2, at 21 (indicating that in the second *Solange* decision, the BVerfG determined that the ECJ could be the lawful adjudicator “so long as” the BVerfG determined it was adequately protecting human rights); Aziz, *supra* note 31, at 6 (noting that as long as the general level of protection was secured by the ECJ, the BVerfG would not review the level of protection in specific cases).

discusses the cases brought to the BVerfG by those opposed to the signing of the Maastricht Treaty and the Treaty of Lisbon, and the rulings handed down regarding Germany's loss of sovereign power to the European Union.

1. The Signing of the Maastricht Treaty

As Germany was preparing to ratify the Maastricht Treaty to become a member of the newly formed European Union, the BVerfG ruled on a case brought before it that challenged the constitutionality of the treaty (“*Maastricht Ruling*”).³³ Prior to the ratification process, the German Parliament—the Bundestag and Bundesrat—amended the GG to allow Germany to participate in a united Europe by allowing some of its sovereign powers to be transferred to European institutions.³⁴ The complainants in the *Maastricht Ruling* brought suits regarding the constitutionality of the treaty under numerous potential violations.³⁵ The complainants’ primary argument hinged on their interpretation of Article 79(3) of the GG, which does not

33. BVerfG, Oct. 12, 1993, 89 BVERFGE 155 (Ger.), [1994] 1 C.M.L.R. 57 [hereinafter *Maastricht Ruling*]; see Rudolf Geiger, *EU Constitutionalism and the German Basic Law* 4 (Univ. of Miami Jean Monnet/Robert Schuman Paper Series Vol. 5. No. 1A, 2005), available at <http://www6.miami.edu/eucenter/geigerfinal.pdf> (noting that Manfred Brunner, a former chief of cabinet member of the EC, who lodged a constitutional complaint against the German statute ratifying the Maastricht Treaty).

34. GRUNDGESETZ art. 23(1) (Ger.); see Manfred H. Wiegandt, *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, 10 AM. U. J. INT'L L. & POL'Y 889, 891 (1995) (noting that the newly amended Article 23 allows for the transfer of some sovereign rights); see also Joachim Wieland, *Germany in the European Union—The Maastricht Decision of the Bundesverfassungsgericht*, 5 EUR. J. INT'L L. 259, 260 (1994) (indicating that the German Parliament amended the GG to legalize Germany's membership in the European Union); Kevin D. Makowski, Comment, *Solange III: The German Federal Constitutional Court's Decision on Accession to the Maastricht Treaty on European Union*, 16 U. PA. J. INT'L BUS. L. 155, 160 (1995) (noting that the GG was amended to allow some Parliamentary powers to be transferred to the European Union). The Bundestag is the national parliament of the Federal Republic of Germany. See DEUTSCHER BUNDESTAG, http://www.bundestag.de/htdocs_e/index.html (last visited May 25, 2012). The Bundestag is distinct from the Bundesrat, which is another parliamentary body where the German federal states (Länder) participate in legislation and administration. See BUNDESRAT, http://www.bundesrat.de/EN/Home/homepage_node.html (last visited May 25, 2012).

35. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 71–72 (noting the various constitutional complaints); see also Makowski, *supra* note 34, at 165 & n.59 (noting that the complainants brought their suits based on issues such as the right to form political parties and the maintenance of the separation of powers).

permit amendments to the basic principles contained in Articles 1 and 20.³⁶ Article 1 addresses human rights and dignity and Article 20 describes Germany as a democratic and social federal state.³⁷ Although the Court rejected most claims brought against the ratification, the BVerfG did rule on the potential violation of Article 38, which gives individuals standing to claim a loss of the democratic principles protected by Article 20.³⁸ In acceding to the European Union, the Bundestag, had surrendered some of its traditional powers.³⁹ This transfer of power called into question Germany's status as a sovereign state, and the democratic rights of the German people guaranteed by a democratic state.⁴⁰

The complaint brought in the *Maastricht Ruling* also suggested that by ratifying the Maastricht Treaty, Germany would have committed itself to a path that ultimately would end with a disruption of the core principles protected under Article 20, even if there were no constitutional violations at present.⁴¹

36. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 74–75; see also Makowski, *supra* note 34, at 161 (noting that the focus of the arguments against the treaty came from Article 79(3)). Known as the eternity clause, Article 79(3) provides: “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.” GRUNDGESETZ art. 79(3) (Ger.).

37. GRUNDGESETZ arts. 1, 20 (Ger.).

38. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 63–64. Article 38 guarantees the rights of citizens to vote for the Bundestag. See GRUNDGESETZ art. 38 (Ger.); see also Makowski, *supra* note 34, at 165–66 (noting that Article 38 gives standing for claimants to show a violation of fundamental democratic principles protected by Article 20).

39. See Gesetz zum Vertrag vom 7. Februar 1992 über die Europäische Union of 28 December 1992 (BGBl II, S 1251); see also MATTHIAS RUMPF & MICHAEL POPP, GERMAN BUNDESTAG PUB. RELATIONS DIV., THE BUNDESTAG AND EUROPE: THE EUROPEAN UNION AND EUROPEAN AFFAIRS IN PARLIAMENT 3 (Klemens Vogel et al. eds., 2007) (explaining that the Maastricht Treaty transferred monetary policy and many aspects of economic policy from the Bundestag); Makowski, *supra* note 34, at 161 (noting that the European Union areas of competence had been expanded to include transportation and social issues as well as security and justice policy).

40. See Makowski, *supra* note 34, at 162 (explaining that if enough sovereign powers are transferred, the government may lose its status as a fully functioning state); see also Wiegandt, *supra* note 34, at 893 (noting that because the Bundestag was relinquishing some of its powers, the BVerfG opened itself to scrutinizing the treaty compliance with protected democratic principles).

41. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 75 (noting the complaint that accession to the European Union introduces the covert and irrevocable institution of a European federal state and that the creation of a monetary union will make the European Union irreversible); see also Makowski, *supra* note 34, at 163

Part of this concern was that a functioning monetary union would require Germany to relinquish control of its ability to set financial policy.⁴²

The BVerfG held that European institutions alone did not yet satisfy the democratic principle protected by the GG and therefore, the Bundestag had to maintain substantial power and influence as the instrument able to protect the German right to democracy.⁴³ The ruling determined that the Bundestag was not deprived of sufficient control such that it lost its sovereignty or its ability to protect the democratic principle of the German state articulated in Article 20 of the GG.⁴⁴ The BVerfG also noted that the treaty did not commit Germany to any further transfers of control without further approval.⁴⁵ The powers that had been assigned to the European Union were not constitutionally protected, and Germany was not committing itself to any further European integration outside the approval of proper government bodies.⁴⁶ When considering the future implications of ratifying the Maastricht Treaty, the Court determined that the necessity of a full economic union was a

(articulating the argument that if the Maastricht Treaty did not disturb the constitutional core at present, it would do so in the future).

42. See Makowski, *supra* note 34, at 164 (indicating the concern that Germany would have to surrender budgetary powers to successfully operate the monetary union); see also Wiegandt, *supra* note 34, at 904 (noting that the BVerfG contends that entering into the monetary union impedes on the essence of the GG).

43. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 87–88, 91 (noting that EC institutions were limited in their functions and powers because they did not satisfy democratic rights of the people and that the Bundestag retained sufficient influence as a democratic body).

44. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 84, 91 (indicating that Germany's accession to the European Union has not violated its democratic principle or compromised its sovereignty); see also Steve J. Boom, *The European Union After the Maastricht Decision: "Will Germany be the 'Virginia of Europe?'"* 43 AM. J. COMP. L. 177, 183 n.27 (1995) (noting that the court found that the Bundestag retained sufficient competences); Makowski, *supra* note 34, at 167 (noting the Court's decision that the Bundestag retained sufficient control to protect democratic rights).

45. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 97–98 (noting the approval needed for further transfers); see also Makowski, *supra* note 34, at 167 (stating that the BVerfG ruled that the Maastricht Treaty did not commit Germany to any further transfers of control without further approval).

46. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 84 (noting that there was no constitutional breach by acceding to the European Union and further functions and powers of the European Union are subject to the approval of the national parliaments); see also Makowski, *supra* note 34, at 167 (indicating that the Bundestag retained enough power to satisfy the democratic principle in Article 79(3) of the GG).

political question, and that the Court could rule on the legality of such a union if the issue ever arose.⁴⁷

In the *Maastricht Ruling*, the BVerfG was able to conclude that the amount of power Germany was transferring to Europe was constitutionally acceptable at that time.⁴⁸ As with the two *Solange* cases, the *Maastricht Ruling* upheld German constitutional rights but allowed the EC to gain more power as long as it did so within the confines of the BVerfG's interpretation of the GG.⁴⁹ In the *Maastricht Ruling*, the conditional approval of the treaty suggested that the European Parliament would need to be strengthened to protect the democratic rights of the people if the Bundestag was ever to surrender more powers to the European Union.⁵⁰

2. The Signing of the Treaty of Lisbon

In 2009, when EU Member States were ratifying the Treaty of Lisbon, the same constitutional controversy over fundamental rights resurfaced.⁵¹ Complaints were filed stating that ratification entailed a violation of democratic principles because the transfer of powers to the European Union made the legislature less relevant to the decisions that would affect the German

47. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 103 (determining that an economic union could be decided on at a later date); see also Makowski, *supra* note 34, at 168 (noting the BVerfG's decision that entering the monetary union did not ultimately mean that Germany would have to join a full economic union).

48. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 84 (noting that the scope of powers and functions granted to the European Union do not at present breach the GG).

49. See Makowski, *supra* note 34, at 174 (noting the resemblance of the *Maastricht Ruling* to the previous *Solange* cases); see also Wiegandt, *supra* note 34, at 900 (indicating that the BVerfG passed the Maastricht treaty as constitutional but only by interpreting it narrowly).

50. See *Maastricht Ruling*, *supra* note 33, [1994] 1 C.M.L.R. at 86–88 (indicating that the European Parliament plays a necessary role in democratic support and its influence could eventually be a part of democratic legitimization in the European Union); see also Wieland, *supra* note 34, at 265 (asserting that the Court emphasized the possible future importance of the democratic process and European Parliament in further steps of integration); Makowski, *supra* note 34, at 174 (noting that the *Maastricht Ruling* gave Germany greater influence on future negotiations involving an expansion of the role of the European Parliament).

51. BVerfG, June 30, 2009, 123 BVERFGE 267 (Ger.), [2010] 3 C.M.L.R. 13 [hereinafter *Lisbon Ruling*]; see Giegerich, *supra* note 5, at 11 (noting that the central application filed in the suit indicated a violation of individual fundamental rights).

people.⁵² In its ruling (“*Lisbon Ruling*”), the Court again looked to whether the treaty transferred too many powers to the European Union, whether it failed to provide the European Union with sufficient democratic legitimacy, and whether Germany’s diminished sovereignty reduced the country to a mere canton of a European federal state.⁵³ The Court avoided ruling that any provision of the treaty was unconstitutional, and instead only found fault with the process of ratification since it lacked the participation of both the Bundestag and Bundesrat.⁵⁴ On the issue of German sovereignty, the Court ruled that for Germany to join a federal state, it would have to be a decision of the people, not just a body acting on behalf of Germany.⁵⁵ The BVerfG claimed the power to review EU law already in force, and to declare those provisions inapplicable to Germany if they were found incompatible with the GG.⁵⁶ Furthermore, the Court reserved for itself the ability of *ultra vires* review to determine if the European bodies remained within the boundaries of the

52. See *Lisbon Ruling*, *supra* note 51, [2010] 3 C.M.L.R. at 322 (acknowledging the constitutional complaint addressed by the BVerfG); see also Giegerich, *supra* note 5, at 11 (noting that the complaint argued that the right to vote for parliament had been interfered with since some of the Bundestag’s powers had been transferred to the European Union). The democratic principles are laid out in Article 20. See GRUNDGESETZ art. 20(1)–(2) (Ger.). The right to vote is found in Articles 38 and 93. See *id.* arts. 38, 93(1), 93(4a).

53. See *Lisbon Ruling*, *supra* note 51, [2010] 3 C.M.L.R. at 322 (noting the aspects of the treaty that the BVerfG reviewed); see also Giegerich, *supra* note 5, at 14 (indicating the three respects in which the Court reviewed the treaty).

54. See *Lisbon Ruling*, *supra* note 51, [2010] 3 C.M.L.R. at 346–47, 381–82 (indicating that the BVerfG found that the Act approving the Treaty of Lisbon did not violate the GG but the Extending Act, which allowed ratification, did not accord to the Bundestag and the Bundesrat sufficient rights of participation in European law-making); see also Giegerich, *supra* note 5, at 13 (noting that the Court did not rule that the treaty itself violated the GG).

55. *Lisbon Ruling*, *supra* note 51, [2010] 3 C.M.L.R. at 334 (“The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right of self-determination of the German people in the form of Germany’s sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.”).

56. *Lisbon Ruling*, *supra* note 51, [2010] 3 C.M.L.R. at 338 (noting the BVerfG’s identity review can declare certain EU laws inapplicable in Germany); see also Giegerich, *supra* note 5, at 23 (indicating that identity review allows the Court to review treaty provisions already in force and declare them inapplicable, thus disregarding the primacy of EU law).

powers conferred upon them by the treaty.⁵⁷ Although the *Lisbon Ruling* contains passages that praise EU integration and that indicate the openness of the GG towards it, the Court placed conditions and constitutional limits that ultimately reserved power for Germany.⁵⁸

C. *The European Economic Crisis*

The genesis of the monetary union allowed members of economically weaker countries to benefit from lower long-term interest rates and greater access to credit than was previously available to them.⁵⁹ The Maastricht Treaty established rules regarding the debt-to-GDP ratio of Eurozone members, but members often disregarded or inaccurately reported them.⁶⁰

57. *Lisbon Ruling*, *supra* note 51, [2010] 3 C.M.L.R. at 337–38 (noting that the Court retained *ultra vires* review); *see also* Giegerich, *supra* note 5, at 25 (noting that the Court would review whether European institutions kept within the bounds of the sovereign power conferred upon them).

58. *Lisbon Ruling*, *supra* note 51, [2010] 3 C.M.L.R. at 333, 336, 342 (noting that the GG calls for European integration); *see also* Giegerich, *supra* note 5, at 42 (noting that the judgment contains passages that praise the EU project).

59. *See* Ferry Batzoglou et al., *Die Geldbombe*, 39 DER SPIEGEL 56, Sept. 26, 2011 (noting that the euro allowed weaker countries to look like better investments). A translation in English is available at <http://www.spiegel.de/international/europe/0,1518,790138,00.html>. *See also* Turk, *supra* note 15, at 412–13 (noting that periphery states had access to lower long-term interest and more credit because of the euro); Kash Mansori, *Why Greece, Spain, and Ireland Aren't to Blame for Europe's Woes*, NEW REPUBLIC, Oct. 11, 2011, <http://www.tnr.com/article/economy/95989/eurozone-crisis-debt-dont-blame-greece> (indicating the euro made it easier for money to flow to capital-poor countries that offered high returns on investments).

60. *See* Turk, *supra* note 15, at 412, 414 (noting that members cheated on the Stability and Growth Pact requirements, even France and Germany). For entry into the euro, a Member State had to meet the Maastricht criteria—meaning debt had to be below sixty percent of GDP and the budget deficit below three percent of GDP as well as specific conditions relating to price stability, interest rates, and exchange rates. *See A Plain Guide to Eurojargon*, EUROPA—EUROJARGON, http://europa.eu/abc/eurojargon/index_en.htm (last visited May 25, 2012) (stating the criteria needed for entry into the euro). These are based in Article 121(1) of the Treaty on European Union (“TEU”). *See* Treaty on European Union (Maastricht text), July 29, 1992, art. 104c(2), 1992 O.J. C 191/1, at 13 [hereinafter Maastricht TEU]. The political push for the new euro and the trust of European countries to supply their own financial data allowed Greece to join even though its initial debt and deficit numbers were above those required for entry. *See* Batzoglou et al., *supra* note 59 (noting that Greece manipulated economic figures used to join the Eurozone); *see also* Ekin Inal, *The Recent Greek Crisis: Harbinger of a New Contagion?*, 16 COLUM. J. EUR. L. ONLINE 95 (2010), http://www.cjel.net/online/16_3-inal/ (indicating the Greece was admitted into the Eurozone by falsifying its economic records).

European Banks invested heavily in Eurozone government bonds, which seemed to bear a low risk of default.⁶¹ After joining the Eurozone, many economically weaker Eurozone countries, like Greece, began borrowing low-interest money from northern Europe.⁶² Since Eurozone countries are able to establish their own fiscal policies, without enforced monitoring, several Eurozone countries spent the last ten years incurring too much debt.⁶³ Greece's economy also was burdened by significant government corruption, such as local bureaucracies that were overbearing on business and a culture of tax evasion that kept government coffers empty.⁶⁴

61. See Batzoglou et al., *supra* note 59 (noting that European banks invested in Eurozone government bonds because they seemed to be a secure investment); see also *Times Topics: European Debt Crisis*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/e/european_sovereign_debt_crisis/index.html (last updated June 19, 2012) (indicating that European banks invested heavily in government bonds).

62. See *Times Topics: European Debt Crisis*, *supra* note 61 (asserting that Greece took advantage of easy money to drive up borrowing); see also Batzoglou et al., *supra* note 59 (noting that weaker Eurozone members were effectively borrowing the credit rating of stronger members); Julie Creswell & Graham Bowley, *Ratings Firms Misread Signs of Greek Woes*, N.Y. TIMES, Nov. 29, 2011, at A1 (noting that the credit agencies judged Greek debt as investment grade for the last decade missing signs of trouble and that the market was scarcely differentiating between the different Eurozone members); Justin Fox, *Echoes of Greece's Debt Crisis*, TIME, Feb. 22, 2010, at 24 (stating that Greece's new reliable currency allowed it to borrow at lower interest rates than before).

63. See Turk, *supra* note 15, at 406 (noting that Ireland, Italy, Portugal, and Spain faced similar difficulties as Greece with increased deficit and debt projections resulting in credit downgrades); see also Cody Edwards, *What Is the European Financial Stability Facility?*, UNIV. OF IOWA CTR. FOR INT'L FIN. & DEV. (May 31, 2011), <http://blogs.law.uiowa.edu/ebook/uicifd-ebook/european-financial-stability-facility-and-european-stabilization-mechanism> (noting the Eurozone members' ability to overspend and under-tax allowed them to incur large deficits); Chris Gaffney, *EU Pushes for a More Perfect Fiscal Union*, DAILY RECKONING (Nov. 28, 2011), <http://dailyreckoning.com/eu-pushes-for-a-more-perfect-fiscal-union/> (stating that as of May 2011 only four of the Eurozone countries were below the debt-to-GDP ratio set by the Maastricht Treaty, and that Germany was not one of them).

64. See Turk, *supra* note 15, at 408 (noting the tax evasion epidemic in the Mediterranean countries); see also Stavros Katsios, *The Shadow Economy and Corruption in Greece*, 1 SOUTH-EASTERN EUR. J. ECON. 61, 78 (2006) (noting that in Greece "entrepreneurs go underground . . . to reduce the burden of bureaucracy and corruption"); Batzoglou et al., *supra* note 59 (indicating that Greece's government had problems with corruption, overbearing bureaucracies, and tax collection); James Surowiecki, *Dodger Mania*, NEW YORKER, July 11, 2011, at 38 (asserting the large gap between what Greek tax payers owed and what they paid, as well as their ability to bribe tax officials).

In 2008, after the global financial services firm Lehman Brothers collapsed due to its investment in worthless securities, rating agencies began to question the quality of government bonds.⁶⁵ In January 2009, Standard and Poor's ("S&P"), a global credit rating agency, began downgrading Greek bonds.⁶⁶ Creditors to Greece began demanding higher interests rates to compensate for the risk that Greece would not be able to pay back its debts.⁶⁷ The higher borrowing costs had made it impossible for Greece to grow itself out of debt.⁶⁸ The fact that Greece used the euro also made it impossible for the state to devalue its currency in order to foster competition.⁶⁹

Europe's banks had invested considerable amounts of money not only in Greece, but also in other crisis-stricken

65. See Batzoglou et al., *supra* note 59 (noting that rating agencies began to question government bonds after the collapse of Lehman Brothers); see also George Soros, *The Crisis and the Euro*, N.Y. REV. BOOKS, Aug. 19, 2010, at 28 (stating that the first clear reminder that the Eurozone did not have a common treasury came after the bankruptcy of Lehman Brothers and that afterward, markets began to worry about the accumulation of sovereign debt).

66. See Batzoglou et al., *supra* note 59 (noting that Standard & Poor's ("S&P") downgraded Greek bonds in January 2009); see also Ambrose Evans-Pritchard, *Greek Crisis Deepens as S&P Downgrades Sovereign Debt*, TELEGRAPH (U.K.), Jan. 14, 2009, <http://www.telegraph.co.uk/finance/financialcrisis/4242070/Greek-crisis-deepens-as-SandP-downgrades-sovereign-debt.html> (indicating that S&P downgraded Greek bonds). S&P is a credit ratings agency that gives opinions about credit risk, meaning an issuer's willingness and ability to meet its financial obligations, and rates the issuer with a letter grade rank between AAA and D. See STANDARD & POOR'S, GUIDE TO CREDIT RATING ESSENTIALS: WHAT ARE RATINGS & HOW DO THEY WORK? 3 (2011), available at http://img.en25.com/Web/StandardandPoors/SP_CreditRatingsGuide.pdf.

67. See Batzoglou et al., *supra* note 59 (noting that creditors to Greece demanded higher interest rates on Greek bonds); see also *Times Topics: Greece*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/greece/index.html> (last updated June 20, 2012) ("Throughout 2010 and 2011, investors continued to demand ever higher interest rates for Greek borrowing as the market appeared to conclude that some sort of default was inevitable.").

68. See Batzoglou et al., *supra* note 59 (stating that the higher interest rates made it almost impossible for Greece to grow itself out of debt); see also Jack Ewing, *German Court Ruling Could Complicate Euro Zone Decisions*, N.Y. TIMES, Sept. 5, 2011, <http://www.nytimes.com/2011/09/06/business/global/german-court-ruling-could-complicate-euro-zone-decisions.html> (noting that as the European economy slows, it reduces the chances that the region can grow itself out of the crisis).

69. See Turk, *supra* note 15, at 409 (noting that because the euro is controlled by the ECB rather than Member States, the members do not have the power to devalue the currency); see also Batzoglou et al., *supra* note 59 (indicating that Greece could not devalue its currency to make it more competitive); Kabir Chibber, *How Might Greece Leave the Euro?*, BBC NEWS, Nov. 3, 2011, <http://www.bbc.co.uk/news/business-15575751> (noting Greece is unable to devalue its currency).

countries, leading to concern that a Greek default would result in contagion.⁷⁰ Moreover, Greece's inability to pay off its debts raised concerns that other Eurozone countries with large debts and deficits would also be unable to pay off their debts.⁷¹ In an effort to stabilize the market, the European Central Bank ("ECB"), acting as a stronghold for the euro's stability, began buying up Greek bonds, as well as those of Ireland, Portugal, and Spain, which were also overextended in their sovereign debt.⁷² In April 2010, S&P lowered Greek bonds to junk status, and other major credit rating agencies soon followed.⁷³ In response to the concern about government debt and desiring to "restore confidence and safeguard financial stability in the Euro area," European leaders and the International Monetary Fund ("IMF") provided Greece with a EU€110 billion bailout in May 2010 conditioned upon Greece implementing austerity

70. See Batzoglou et al., *supra* note 59 (asserting that because banks had invested heavily in the bonds of weak Eurozone countries, there was fear that a Greek default would lead to contagion); see also David Wroe, *What Happens If a Country Goes Bust?*, GLOBAL POST, <http://www.globalpost.com/dispatch/news/business-tech/debt-crisis/110719/euro-zone-sovereign-debt-crisis-banks> (last visited May 25, 2012) (noting that because of the debt owned by European banks, a Greek default could spark contagion).

71. See Edwards, *supra* note 63 (indicating that the fear of Greece defaulting led to the fear that other struggling countries would also default); see also Landon Thomas, Jr. & Stephen Castle, *Heads of Europe Back Broad Plan to Rescue Greece*, N.Y. TIMES, July 21, 2011, at A1 (noting that a Greek default would cause contagion to spread because bondholders would unload bonds from other troubled Eurozone members).

72. See Batzoglou et al., *supra* note 59 (noting that the ECB had purchased the bonds of struggling Eurozone members in order to stabilize the bond market); see also Ambrose Evans-Pritchard, *ECB Must Buy 'Hundreds of Billions' of Bonds to Tame Europe's Debt Crisis*, TELEGRAPH (U.K.), June 17, 2010, http://www.telegraph.co.uk/finance/comment/ambroseevans_pritchard/7836652/ECB-must-buy-hundred-of-billions-of-bonds-to-tame-Europes-debt-crisis.html (stating that in April 2010 the ECB bought Greek, Irish, and Portuguese bonds to help buttress the European Financial Stability Facility). The ECB is the central bank for the euro and its task is to maintain the euro's purchasing power and price stability. See EUR. CENTRAL BANK, <http://www.ecb.int/ecb/html/index.en.html> (last visited May 25, 2012).

73. See Turk, *supra* note 15, at 405 (indicating that S&P lowered Greek bonds to junk status in April 2010); see also Batzoglou et al., *supra* note 59 (asserting that the major credit agencies had reduced Greek bonds to junk status by June 2010); John Blau & Nigel Tandy, *EU Commission Slams US Rating Agency over Greek 'Junk' Status*, DEUTSCHE WELLE, June 15, 2010, <http://www.dw-world.de/dw/article/0,,5686135,00.html> (noting that Moody's, a bond credit rating business, slashed Greece's sovereign debt rating to junk status).

measures.⁷⁴ Civil unrest and labor strikes occurred because of austerity measures put in place to liberalize the labor market and change the essence of the Greek economy.⁷⁵

To calm financial markets, the European Union created the European Financial Stability Facility (“EFSF”) and the European Financial Stabilization Mechanism (“EFSM”) in May 2010 to control the spread of sovereign debt.⁷⁶ This financial safety net, protecting troubled nations from a sudden default, totals EU€750 billion, with EU€500 billion coming from the European Union and EU€250 billion from the IMF.⁷⁷ The lending capacity of the EFSF is EU€440 billion, which it would achieve by selling

74. See Gott, *supra* note 7, at 204 (noting that Greece received bailout money from the European Financial Stability Facility (“EFSF”) in May 2010 because of its budget deficits and escalated borrowing costs); see also Edwards, *supra* note 63 (stating that Eurozone leaders and the International Monetary Fund (“IMF”) granted a bailout to Greece in order to ensure the financial stability to the Eurozone); *Times Topics: Greece*, *supra* note 67 (noting that Greece received a bailout package in return for implementing austerity measures in an effort to restore investor confidence).

75. See Batzoglou et al., *supra* note 59 (noting that liberalizing truck licenses in Greece caused people to lose their lifetime investments and led to protests and strikes); see also Anousha Sakoui, *Terrorism: Source of Next Attacks Defies Easy Prediction*, FIN. TIMES (London), Nov. 8, 2011, <http://www.ft.com/intl/cms/s/0/fe950c80-0303-11e1-899a-00144feabd0.html#axzz1hwXdzNuY> (asserting that Greece has seen violent protest in response to austerity measures).

76. See, e.g., HELEN HAWORTH ET AL., CREDIT SUISSE, EFSF (R)EVOLUTION 3 (2011), available at https://research-and-analytics.csfb.com/docView?language=ENG&format=PDF&document_id=804326740&source_id=em&serialid=OtY9EhZygvxb53tmOyt21DVQZpT6XNymEqnLTTsYhI0%3D (acknowledging the creation of the EFSF); see also EUROPEAN FINANCIAL STABILITY FACILITY, EUROPEAN FINANCIAL STABILITY FACILITY FAQs 1 (2011), available at http://www.efsf.europa.eu/attachments/faq_en.pdf (noting the date when the EFSF was incorporated). The European Financial Stability Mechanism (“EFSM”) allows the European Commission to borrow up to EU€60 billion to lend to financially troubled Eurozone members. *European Financial Stability Mechanism (EFSM)*, EUROPA, http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm (last update May 2, 2012) (noting the structure of the EFSM). The EFSF is the larger of the two facilities that considered more important. See ANNE SIBERT, DIRECTORATE GEN. FOR INTERNAL POLICIES, EUROPEAN PARLIAMENT, IP/A/ECON/FWC/2009_040/C, THE EFSM & THE EFSF: NOW & WHAT FOLLOWS, EUROPEAN PARLIAMENT DIRECTORATE GENERAL FOR INTERNAL POLICIES 2 (2010) (noting that the EFSF is potentially the most important facility).

77. See EUROPEAN FINANCIAL STABILITY FACILITY, PRESENTATION (Oct. 2011), available at http://www.efsf.europa.eu/attachments/efsf_presentation_en.pdf (noting the basic design of the EFSF and the funding available to it); see also EUROPEAN FINANCIAL STABILITY FACILITY FAQs, *supra* note 76, at 1 (noting the structure of the EFSF and the amount of money it can lend).

debt in capital markets under the guarantees of Member States and by lending the proceeds to Eurozone countries in need.⁷⁸

After Greece received its bailout, Ireland and Portugal soon followed, tapping the EFSF funds.⁷⁹ In July 2011, Greece required a second bailout.⁸⁰ The ECB also has bought EU€115.5 billion in government bonds to keep borrowing costs down.⁸¹ While the EFSF is capable of bailing out countries with relatively small economies, there is a serious concern that the funds available to the EFSF would not be able to support a bigger economy such as Italy or Spain.⁸² Although the ECB has been purchasing some Eurozone government bonds, pressure has been building for the ECB to play a bigger role in supporting troubled Eurozone members.⁸³

78. See EUROPEAN FINANCIAL STABILITY FACILITY, *supra* note 77 (noting the lending capacity of the EFSF); see also Edwards, *supra* note 63 (noting how the EFSF would raise funds used to bail out Eurozone countries).

79. See *Times Topics: European Financial Stability Facility and European Stability Mechanism*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/e/european_financial_stability_facility/index.html (last updated June 11, 2012) (noting the EFSF bailout of Ireland and Portugal); see also HAWORTH ET AL., *supra* note 76, at 9 (describing the bailouts to Ireland and Portugal).

80. See Luke Baker & Julien Toyer, *Europe Agrees Sweeping New Action on Debt Crisis*, REUTERS, July 21, 2011, <http://www.reuters.com/article/2011/07/21/us-eurozone-idUSTRE76I5X620110721> (noting the agreement to give Greece a second bailout); see also *Times Topics: Greece*, *supra* note 67 (indicating that European leaders agreed on a second bailout for Greece in July 2011).

81. See OPEN EUR., THE KARLSRUHE FACTOR: WHAT WILL THE GERMAN CONSTITUTIONAL COURT RULING MEAN FOR THE EUROZONE CRISIS? 2 (2011), available at <http://www.openeurope.org.uk/research/KarlsruheFactor.pdf> (acknowledging the EU€115.5 billion worth of bonds that the ECB bought in order to stabilize borrowing costs); see also Marc Jones, *Politics, Markets to Test ECB's Bond-Buying Appetite*, REUTERS, Sept. 5, 2011, <http://uk.reuters.com/article/2011/09/05/uk-ecb-bonds-idUKLN E78403O20110905> (indicating that, as of August 25, 2011, the ECB bought EU€115.5 billion of government bonds).

82. See DANIEL GROS & THOMAS MAYER, DIRECTORATE GEN. FOR INTERNAL POLICIES, EUROPEAN PARLIAMENT, IP/A/ECON/NT/2011-04, POLICY DEPARTMENT A: ECONOMIC & SCIENTIFIC POLICIES; HOW TO BACK UP THE RESCUE FUND? 6 (2011) (recognizing Italy and Spain as “too big to fail” and “too big to be saved”); see also Gott, *supra* note 7, at 205 (indicating that if a country as large as Italy or Spain needed rescuing, there might not be enough funds to cover its deficit).

83. See, e.g., *ECB Increases Purchase of Sovereign Bonds*, MONEY NEWS, Jan. 2, 2012, <http://www.moneynews.com/FinanceNews/ecb-bond-euro/2012/01/02/id/422776> (noting that France and Italy have urged the ECB to increase purchases to hold down elevated borrowing costs for indebted Eurozone countries); see also Jack Ewing, *Bank Chief Hints Help for Europe is Possible*, N.Y. TIMES, Dec. 2, 2011, at B1 (reporting that ECB President Mario Draghi suggested the ECB could increase support if the Eurozone leaders took more steps to enforce spending discipline); Sakari Suoninen & Eva

The EFSF and EFSM are only temporary institutions that will stop issuing new bailout programs after June 30, 2013.⁸⁴ The Eurozone members have signed a treaty to establish a permanent stability mechanism known as the European Stability Mechanism (“ESM”), which will replace the EFSF and EFSM.⁸⁵ The treaty was originally signed in July 2011, but was modified in February 2012.⁸⁶ The ESM will have the ability to issue loans in an emergency situation on a majority of eighty-five percent of the votes cast.⁸⁷ The treaty will have to be ratified by at least ninety percent of the Member States, and is expected to enter into force in July 2012.⁸⁸

II. THE BVERFG’S RESPONSE TO THE GERMAN BAILOUTS AND THE RULING’S IMPLICATIONS FOR THE FUTURE

As the economic crisis in the Eurozone unfolded, Member States provided funds and guarantees to protect other Eurozone

Kuehnen, *Pressure for Bigger ECB Role in Crisis Must End: Weidmann*, REUTERS, Nov. 14, 2011, <http://www.reuters.com/article/2011/11/14/us-ecb-weidmann-idUSTRE7AD0RZ20111114> (stating that Prime Minister Cameron, President Obama, and Prime Minister Putin have called for the ECB to take a bigger role in resolving the crisis).

84. See EUROPEAN FINANCIAL STABILITY FACILITY FAQs, *supra* note 76, at 4 (indicating that the EFSF is a temporary institution that will not enter any new programs after June 30, 2013); see also Edwards, *supra* note 63 (noting that the EFSF has a three-year life span that ends in 2013).

85. See Treaty Establishing the European Stability Mechanism pmbl. ¶ 1, Feb. 1, 2012 (not yet ratified), available at <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf> [hereinafter ESM Treaty] (noting that the European Stability Mechanism (“ESM”), once it comes into effect, is a permanent stability mechanism meant to replace the EFSF and EFSM).

86. See *European Stability Mechanism Signed*, EUROPEAN COUNCIL (Feb. 2, 2012), <http://www.european-council.europa.eu/home-page/highlights/european-stability-mechanism-treaty-signed?lang=en> (noting that the ESM was originally signed in July 2011 but was modified and resigned in February 2012); see also *Treaty Establishing the European Stability Mechanism (ESM) Signed*, EUR. COMMISSION (July 11, 2011), http://ec.europa.eu/economy_finance/articles/financial_operations/2011-07-11-esm-treaty_en.htm (noting the ESM treaty was originally signed in July 2011).

87. See ESM Treaty, *supra* note 85, art. 4(4) (noting that in an emergency voting procedure decisions can be made on eighty-five percent of the votes cast); see also *European Stability Mechanism Signed*, *supra* note 86 (stating that in situations where a failure to urgently adopt a decision jeopardizes the stability of the Eurozone, the decision may be taken by eighty-five percent of the votes cast).

88. See ESM Treaty, *supra* note 85, art. 48(1) (indicating that ninety percent of the members have to ratify the treaty for it to come into force); see also *European Stability Mechanism Signed*, *supra* note 86 (noting that the ESM is expected to enter into force in July 2012).

members from defaulting.⁸⁹ After Germany began contributing to the rescue fund, the question of German constitutional rights in relation to interests of the European Union again resurfaced. Part II.A discusses the constitutional complaints brought to the BVerfG concerning the legality of Germany providing bailout funds for other Eurozone members, specifically focusing on the Sept. 7 Ruling by the BVerfG. Part II.B analyzes the ruling's implications for further German action in resolving the euro crisis.

A. *The Sept. 7 Ruling*

In May 2010, a group of euro-skeptics filed complaints in the BVerfG, challenging Germany's participation in funding the bailouts of Greece and other troubled Eurozone nations, as well as Germany's possible accession to the ESM.⁹⁰ The complainants challenged the rescue packages on the grounds that they were in conflict with EU treaty provisions that prohibit one Member State from taking on the debt of another Member and the ECB

89. See *supra* notes 76–80 and accompanying text (noting that Eurozone members have contributed funding to the EFSF and that it has already been used to provide emergency bailout loans).

90. See Sept. 7 Ruling, *supra* note 17 (outlining the constitutional complaints brought before the Court prior to rendering its judgment); see also DEUTSCHE BANK RESEARCH, CONSTITUTIONAL COMPLAINTS: GERMAN REJECTION OF RESCUE PACKAGES UNLIKELY 2–4, 6 (2011), available at http://www.dbresearch.info/PROD/DBR_INTERNET_EN-PROD/PROD000000000271154/Constitutional+complaints%3A+German+rejection+of+rescue+packages+unlikely.pdf (noting that the complaint was extended to cover the ESM); OPEN EUR., *supra* note 81, at 2–4 (noting that the complaints addressed German participation in the bailouts and the ESM); Press Release, BVerfG, No.37/2011, Mündliche Verhandlung in Sachen “Griechenland-Hilfe/Euro-Rettungsschirm” (June 9, 2011), available at <http://www.bundesverfassungsgericht.de/en/press/bvgl1-037.html>; *German Court Seen Approving EU Bailouts, with Conditions*, EURACTIVE.COM (Sept. 6, 2011), <http://www.euractiv.com/euro-finance/german-court-Seen-approving-eu-bailouts-conditions-news-507294> (reporting the challenge to the bailouts). The euro-skeptics include conservative member of the Bundestag, Peter Gauweiler, and five professors who have previously challenged German integration into the European Union. See Dietmar Hipp & Ralf Neukirch, *Court to Give Bundestag Bigger Say in Bailouts*, SPIEGEL ONLINE, Sept. 5, 2011, <http://www.spiegel.de/international/europe/0,1518,784442,00.html> (noting that the challenge was mounted by Peter Gauweiler and a group of professors); see also OPEN EUR., *supra* note 81, at 6. A complaint also was filed by the Europolis Group made up of fifty-five prominent German academics and business leaders. See OPEN EUR., *supra* note 81, at 6.

from directly purchasing debt instruments.⁹¹ While the violation of EU treaties was one argument brought before the Court, the primary challenge brought to the BVerfG was that the bailouts were unconstitutional under the GG.⁹² The complaints raised several arguments and used various lines of reasoning to assert a constitutional breach.⁹³ The main arguments were that Germany's role in the bailouts and participation in the EFSF 1) limited the role of the Bundestag in key decisions involving public money and thus violated the constitutional principles of democracy and election law, and 2) fostered inflationary tendencies thereby negatively impinging on the German

91. See Sept. 7 Ruling, *supra* note 17, ¶¶ 40–44 (noting the complaints addressing violation of the EU treaties). Article 125 of the Treaty on the Functioning of the European Union (“TFEU”), known as the “no-bailout clause,” states that “[a] Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.” Consolidated Version of the Treaty on the Functioning of the European Union art. 125(1), 2010 O.J. C 83/47, at 99 [hereinafter TFEU]. Article 123 of the TFEU states:

Overdraft facilities or any other type of facility with the European Central Bank or with the central banks of other Member States . . . in favor of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

Id. art. 123(1), at 99. The ECB also is prohibited from seeking or taking instructions from any EU institution, agency, or government of a Member State. Consolidated Version of the Treaty on European Union, Protocol (No 4): On the Statute of the European System of Central Banks and of the European Central Bank art. 7, 2010 O.J. C 83/230, at 232; see OPEN EUR., *supra* note 81, at 2 (recognizing the complaint as to the violation of the “no-bailout clause” and the ECB’s violation of its statute); see also DEUTSCHE BANK RESEARCH, *supra* note 90, at 3–4 (noting that the complaints addressed potential violations of the European Union’s no-bailout clause and the ECB bond purchasing program).

92. See Press Release, BVerfG, No.37/2011, *supra* note 90; see also AUGHNE MILLER, HOUSE OF COMMONS LIBRARY, SN/IA/6062, GERMANY AND THE EURO RESCUE AGREEMENTS 9–10 (2011), available at <http://www.parliament.uk/briefing-papers/SN06062.pdf> (recognizing the existence of an argument that the bailout fund had an inappropriate legal basis and was in violation of EU law, though the BVerfG only considered the complaints proposing the bailouts were in violation of constitutional law); OPEN EUR., *supra* note 81, at 2 (noting that the main challenge of the complaint was to the legality of the bailouts under the GG).

93. See OPEN EUR., *supra* note 81, at 2 (noting that the multiple complaints raised various arguments and lines of reasoning); see also DEUTSCHE BANK RESEARCH, *supra* note 90, at 3–4 (outlining the various arguments used by the complainants to allege a constitutional breach).

people's right to property.⁹⁴ On July 5, 2011, the Court opened hearings on these issues.⁹⁵

On September 7, 2011, the BVerfG reached a decision.⁹⁶ The Court endorsed the legislative acts allowing Germany's involvement in the bailouts ("Acts") and rejected the idea that participation violated parliamentary rights.⁹⁷ The BVerfG stated that the bailouts did not result in an excessive burden on the German budget, constitute a significant transfer of power from the Bundestag, or negatively impact the euro's purchasing power.⁹⁸ Although the Court noted that the arguments regarding EU law did not raise reviewable constitutional complaints, it determined that the ECB's current bond purchasing was not in violation of EU law and that there was no violation of the European Union's no-bailout clause, which it

94. See Sept. 7 Ruling, *supra* note 17, ¶¶ 32–34 (recognizing the constitutional complaints regarding rights to democracy and property); see also MILLER, *supra* note 92, at 10 (indicating the main constitutional arguments); OPEN EUR., *supra* note 81, at 2 (noting the main arguments regarding potential violations of the GG). Article 38 of the GG protects voting citizens from losing competences of the present or a future Bundestag. See Sept. 7 Ruling, *supra* note 17. The fundamental right to property is protected by Article 14 of the GG. GRUNDGESETZ art. 14 (Ger.).

95. See OPEN EUR., *supra* note 81, at 3; see also Annika Breidhardt, *German Court Hears Case Against Euro Bailouts*, REUTERS, July 5, 2011, <http://www.reuters.com/article/2011/07/05/us-eurozone-germany-court-idUSTRE76415D20110705> (indicating when the court opened hearings); Derek Scally, *German Court to Hear Euro Bailout Challenge*, IRISH TIMES, July 5, 2011, <http://www.irishtimes.com/newspaper/world/2011/0705/1224300090884.html> (noting that the BVerfG opened hearings on the complaints on July 5, 2011).

96. See Sept. 7 Ruling, *supra* note 17; see also Münchau, *supra* note 9 (noting that the Court reached a verdict of seven to one).

97. See Sept. 7 Ruling, *supra* note 17, ¶ 133 (stating that the Bundestag did not dilute its rights to adopt and control the budget and did not disregard the principle of democracy); see also Matt Zuvela & Nicole Goebel, *Germany's Top Court Throws Out Anti-Euro Bailout Lawsuit*, DEUTSCHE WELLE, Sept. 7, 2011, <http://www.dw-world.de/dw/article/0,,15369145,00.html> (noting that the BVerfG decided "that the contribution did not violate parliament's right to control spending of taxpayers' money"). Germany passed two acts relating to the bailouts ("Acts"). The Monetary Union Financial Stabilization Act granted authorization to provide aid to Greece. The Euro Stabilization Mechanism Act granted authority to participate in the euro rescue package. See Sept. 7 Ruling, *supra* note 17, ¶¶ 6–12, 19–30.

98. See Sept. 7 Ruling, *supra* note 17 (holding that the bailouts did not violate conditions set by the Court that would be considered unconstitutional); see also Press Release, Open Eur., *Open Europe Responds to German Constitutional Court Ruling* (Sept. 7, 2011), available at <http://www.openeurope.org.uk/Article/Page/en/LIVE?id=1676> (noting the Court's ruling).

interpreted broadly.⁹⁹ Although the ruling approved of the current rescue packages funded by Germany, the presiding judge also indicated that there were limits to the amount of aid that could be given.¹⁰⁰ The Court made it clear that decisions on revenue and expenditures remain in the hands of the Bundestag, and that the Bundestag must remain in control of fundamental budget policy even in a system of intergovernmental governance.¹⁰¹ Moreover, the Court ruled that the government must have the approval of the Bundestag's budget committee before any more loans could be granted.¹⁰² Section 1.4 of Germany's Euro Stabilization Act had previously only required the government to strive to reach an agreement with the budget committee before giving guarantees.¹⁰³

As to the Bundestag's ability to grant bailouts, the BVerfG noted that it will not question the legislature's discretion in the amount of guarantees it assumes, but that it will review possible transgressions of ultimate boundaries.¹⁰⁴ The ruling stated that the Bundestag cannot establish permanent mechanisms that would result in an assumption of liability for other states' voluntary decisions, particularly if it leads to unpredictable consequences.¹⁰⁵ Therefore, the Bundestag cannot approve of

99. See Sept. 7 Ruling, *supra* note 17, ¶¶ 57, 62–67, 70–71, 84 (noting the Court's determination that arguments regarding a potential violation of the articles of the TFEU did not raise a valid constitutional complaint but nevertheless ruling that the TFEU was not violated).

100. Andreas Voßkuhle, BVerfG President, stressed that the verdict "should not be misinterpreted as a constitutional blank-check for further aid-packages." Press Release, Open Eur., *supra* note 98; see also *Ruling in Greek Aid: German Court Rejects Challenges to Euro Bailout*, SPIEGEL ONLINE, Sept. 7, 2011, <http://www.spiegel.de/international/germany/0,1518,784859,00.html> (quoting BVerfG President Voßkuhle).

101. See Sept. 7 Ruling, *supra* note 17, ¶¶ 121–24.

102. See *id.*

103. See Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus [StabMechG] [Law for the transfer of guarantees in the context of a European stabilization mechanism], May 22, 2010, BGBl. I at 627, §1, no. 4 (Ger.); see also Sept. 7 Ruling, *supra* note 17, ¶ 141 (noting that the government now needed approval of the budget committee but previously the Euro Stabilization Mechanism Act only indicated the government had to attempt to get approval).

104. See Sept. 7 Ruling, *supra* note 17, ¶¶ 126, 132 (indicating that the Court will not decide on how much money can be allocated to bailouts unless it surpasses ultimate boundaries).

105. See *id.* ¶ 128 (noting what the Court considers to be the ultimate boundaries of the Bundestag's power).

any aid package that could lead to an unforeseeable burden on future parliaments, and it cannot accept the debt liability of another nation unless it is given increased control over that nation's fiscal policy.¹⁰⁶ In its ruling, the Court stated that, at present, there is no violation of Article 38 of the GG since there was no reason to view the bailouts as an irreversible process with incalculable consequences, but that any future bailout packages would need legislative approval.¹⁰⁷

The BVerfG approved the Acts permitting Germany to provide aid to Greece and contribute to the EFSF.¹⁰⁸ In doing so, the Court noted that the legislation restricts the authorization to give guarantees with regard to their amount, indicates objectives of the guarantee and payment modalities, and provides for conditional policy agreements that secure an influence to the German government.¹⁰⁹ The Acts define the authorization to give guarantees, and the EFSF requires mutual agreement from Member States, thus both secure a determining influence for Germany's government and do not overstep the constitutional boundaries.¹¹⁰

B. *Implications of the Decision*

The Sept. 7 Ruling legitimized the German bailout contributions under German law. The ruling did not deprive the rescue fund of its largest contributor and thus avoided putting debt-heavy nations in high risk of default.¹¹¹ The Court is subject

106. See Press Release, Open Eur., *supra* note 98 (noting that Germany could not agree to pool national debt unless it were given more power to control of other nations' fiscal policy); see also Münchau, *supra* note 9 (stating the Bundestag cannot empower a third party to usurp sovereign power).

107. See Sept. 7 Ruling, *supra* note 17, ¶¶ 74, 141 (noting that Article 38 was not violated because the Bundestag retained its powers, but the budgetary committee would need to approve of any further warranties).

108. See *id.* ¶ 119 (noting that the Court did not find the Acts granting the bailouts to be unconstitutional).

109. See *id.* ¶¶ 128, 133–40 (stating the reasons why the legislation did not cross the boundaries set by the Court).

110. See *id.* (recognizing that the Bundestag can agree to bailouts without sacrificing constitutionally protected power).

111. See Ewing, *supra* note 68 (indicating that the Court could have thrown the euro into chaos by ruling in favor of the challenges to the bailouts, and that Germany is the rescue fund's largest contributor); see also *Ruling in Greek Aid: German Court Rejects Challenges to Euro Bailout*, *supra* note 100 (noting that the Court approved of the bailout plan).

to political and public influence and had they ruled that the bailouts were illegal, some commentators estimate that it could have been a disaster for the Eurozone.¹¹² The ruling also limited the ability of EU leaders to freely give funding or take on debt liabilities when dealing with the crisis, which affects future solutions.¹¹³

Although the bailouts have been approved, the conditions given by the BVerfG in the Sept. 7 Ruling increase the probability of default by struggling Member States because the Bundestag's budget committee now has an effective veto over future activation of the EFSF.¹¹⁴ If the need for bailouts continues, the Bundestag may not wish to continually support the EFSF if it believes it is ineffective.¹¹⁵ A single "no" vote by the budget committee will now prevent the German government from providing additional funding and, as the main contributor to the fund, the loss of German financial support would likely trigger a default.¹¹⁶

112. See Oliver Gerstenberg, *The People's Court*, EUTOPIA L. (Sept. 8, 2011), <http://eutopialaw.com/2011/09/08/the-peoples-court/> (noting the dramatic consequences to the euro if the court invalidated the act allowing the bailouts); see also OPEN EUR., *supra* note 81, at 1, 3 (asserting that if the Court did not approve the bailouts it would be a disaster for the euro, and that the Court is subject to political influences); Diane Niedernhoefer, *German Court to Hear Euro Bailout Challenge July 5*, REUTERS, July 9, 2011, <http://www.reuters.com/article/2011/06/09/eurozone-germany-idUSLDE7581ZN20110609> (noting that, because of the disastrous consequences for the European Union and the Court's reputation, the BVerfG had little choice but to rule against the plaintiffs).

113. See *Ruling in Greek Aid*, *supra* note 100 (recognizing that bailout packages now must be approved from the Bundestag budget committee); see also Münchau, *supra* note 9 (noting that Eurobonds no longer seem like an option for the Eurozone).

114. See Press Release, Open Eur., *supra* note 98 (noting the budget committee has an effective veto over future bailouts); see also Münchau, *supra* note 9 (commenting that the increased hurdles for the German government in providing funding makes default more likely).

115. See Münchau, *supra* note 9 (stating that the budget committee could grow tired of continually providing bailouts with no results); see also Florian Gathmann & Philipp Wittrock, *Merkel Gambles on Parliamentary Support for Euro Backstop*, SPIEGEL ONLINE, Oct. 25, 2011, <http://www.spiegel.de/international/europe/0,1518,793848,00.html> (noting that certain members of the Bundestag have already voted against EFSF expansion and plan to continue to vote "no"); *Merkel Tells MPs to 'Do the Right Thing' on Euro Bailouts*, EURONEWS (Sept. 26, 2011, 6:33 PM), <http://www.euronews.net/2011/09/26/merkel-tells-mps-to-do-the-right-thing-on-euro-bailouts/> (indicating that voter surveys show that the German public is tiring of their government's role in bailing out other Eurozone countries).

116. See Münchau, *supra* note 9 (noting that a single "no" vote can trigger default); see also Gerstenberg, *supra* note 112 (indicating that an initial "no" vote to the

Moreover, at least one commentator has suggested that the future of the ESM has been called into question by this ruling.¹¹⁷ The BVerfG had made clear that it will not accept permanent liability in large or incalculable amounts, which can be triggered by the actions of foreign governments.¹¹⁸ As a permanent mechanism replacing the EFSF, the ESM could possibly be in violation of the Sept. 7 Ruling.¹¹⁹

While the decision may put the ESM on questionable ground, commentators have suggested that the ruling dismissed the idea of pooling Eurozone debt under Eurobonds even though the Court did not specifically mention them.¹²⁰ The Eurobond is a permanent mechanism that would have to be very substantial in size to be effective and the liabilities and risks to Germany's credit would be triggered by the actions of other national governments by how they handle their own domestic debt.¹²¹ Although the Court's language suggests that adopting

bailouts would have meant the return of German credits already granted, the loss the bailout fund's AAA credit rating, and the possible demise of the euro).

117. See Münchau, *supra* note 9 (noting that the ESM has become questionable because of the ruling).

118. See Sept. 7 Ruling, *supra* note 17, ¶¶ 125–28 (asserting that large and permanent liabilities for other nations would not be constitutionally acceptable); see also Münchau, *supra* note 9 (noting the ruling made by the BVerfG on September 7).

119. See HAWORTH ET AL., *supra* note 76, at 19 (describing the ESM as a permanent program for the rescue fund); see also Münchau, *supra* note 9 (noting that the ESM seems to be a permanent mechanism that places large uncontrollable liabilities on Germany); *ESM May Violate Germany's Constitution*, CAPITAL (Greece), Feb. 13, 2012, <http://english.capital.gr/News.asp?id=1409206> (reporting the notion that the ESM threatens the German budget in a manner that could be considered unconstitutional).

120. See Münchau, *supra* note 9 (noting that the idea of Eurobonds seems to be outside the limits of the ultimate boundaries of the Bundestag); see also Press Release, Open Eur., *supra* note 98 (noting that the ruling reinforced the constitutional restriction on Eurobonds). A Eurobond would combine the debts of all Eurozone members and make those countries collectively responsible to pay that debt. See Hibah Yousuf, *Wishing for Euro Bonds? Fat Chance.*, CNN MONEY (Sept. 16, 2011, 3:52 PM), http://money.cnn.com/2011/09/15/markets/bondcenter/euro_bonds/index.htm?iid=EL. The Eurobond would bring down the borrowing costs for economically troubled nations but it would drive up rates in Germany, which currently has low interest rates. See *id.*; see also Peter Spiegel, *Commission Proposes 'Eurobonds'*, FIN. TIMES (London), Nov. 20, 2011, <http://www.ft.com/intl/cms/s/0/da6468de-136f-11e1-9562-00144feabdc0.html#axzz1iScbGf00> (noting that Eurobonds could help to resolve the financial crisis, but also that Germany resists the idea because of the free rider problem).

121. See Münchau, *supra* note 9 (stating that the Eurobond would have to be large to be effective and that it would constitute a permanent liability triggered by the actions

Eurobonds would be unconstitutional, its language also suggests that if Germany were to have a greater say over the fiscal policies of other states where it has assumed a liability, the bonds may be constitutionally permissible.¹²²

This latest ruling by the BVerfG appears to stall further integration of the European Union. In interviews after the Sept. 7 Ruling, BVerfG President Andreas Voßkuhle stated that Germany had reached its limit in surrendering any more core powers to the European Union unless a new German constitution were created via referendum.¹²³ Under the present interpretation of the GG, a plan that strips the Bundestag of further budgetary powers is prohibited.¹²⁴

of other nations); *see also* Hibah Yousuf, *Europe Ups Ante on Eurobonds*, CNN MONEY (Nov. 23, 2011, 11:39 AM), <http://money.cnn.com/2011/11/23/markets/eurobonds/index.htm> (noting that healthier members are unwilling to support Eurobonds because it makes them liable without giving them a say in future fiscal actions).

122. *See* Press Release, Open Eur., *supra* note 98 (noting that the Court's language seems to suggest that joint debt liability may be permissible if Germany were given more control of other nations' fiscal policies). For now, Germany is adamantly opposed to the idea of Eurobonds. *See* Siobhan Dowling, *Merkel's Plans Won't Fix Europe; Germany Still Says "NEIN!" to ECB as Last Resort Lender*, GLOBALPOST (Dec. 2, 2011, 7:15 AM), <http://www.globalpost.com/dispatch/news/regions/europe/germany/111201/why-germany-says-%E2%80%9Cnein%E2%80%9D-ecb-lender-last-resort> (noting that Germany opposes issuing Eurobonds).

123. BVerfG President Andreas Voßkuhle stated that politicians do not have the legal authority to sign away the birthright of the German people without their explicit consent. *See* Ambrose Evans-Pritchard, *German Turmoil over EU Bail-outs as Top Judge Calls for Referendum*, TELEGRAPH (U.K.), Sept. 26, 2011, <http://www.telegraph.co.uk/finance/financialcrisis/8790785/German-turmoil-over-EU-bail-outs-as-top-judge-calls-for-referendum.html> ("The sovereignty of the German state is inviolate and anchored in perpetuity by basic law. It may not be abandoned by the legislature (even with its powers to amend the constitution) . . . There is little leeway left for giving up core powers to the EU. If one wants to go beyond this limit—which might be politically legitimate and desirable—then Germany must give itself a new constitution. A referendum would be necessary. This cannot be done without the people."). An amendment to the Constitution can be achieved through Article 79(2) of the GG by a two-thirds vote in both the Bundestag and the Bundesrat. Article 79(3) prohibits certain aspects of the GG from being amended and these aspects ultimately can only be altered when a new constitution is adopted by the German people pursuant to Article 146 of the GG. *See* GRUNDGESETZ arts. 79(2)–(3), 146 (Ger.). The idea of a completely revamping the GG via referendum, however, is not a politically easy task. *See* Münchau, *supra* note 9 (noting that the German people agreeing to abolish their constitution and transfer sovereign power from Berlin to Brussels is unlikely).

124. *See* Sept. 7 Ruling, *supra* note 17, ¶¶ 121, 124 (noting that members of Parliament must remain in control of fundamental budgetary policy decisions); *see also* Henry Chu, *Germany's Hand Will Be Uppermost as Europe Writes New Fiscal Rules*, L.A. TIMES, Dec. 2, 2011, at A1 (noting Chancellor Merkel's statements that under the GG it

While there are numerous economic theories on how to solve the current debt crisis, commentators suggest that the root cause of the crisis comes from a crisis of governance.¹²⁵ The economic failings of the Eurozone may have come from the inability of some members to control their borrowing and reform their economies, as well as from the structure of the Eurozone, which makes it difficult to control the debt of one of their smallest economies from spreading to the global economy.¹²⁶ In order to address the structural weaknesses of the current monetary union, some German politicians have begun to consider introducing constitutional amendments and amendments to the EU treaties that would correct the Eurozone's economic weaknesses by forming a more accountable Eurozone with greater control over its Members.¹²⁷

is not possible to have the budget controlled by a European institution); Dietmar Hipp & Thomas Darnstädt, *Der Bundesstaat ist ein Irrtum*, 52 DER SPIEGEL 34, Dec. 23, 2011 (reporting BVerfG Judge Di Fabio's opinion that the Sept. 7 Ruling put a constitutional ban on transferring the Bundestag's power of disposition over revenue and expenditure). A translation in English is available at <http://www.spiegel.de/international/germany/0,1518,805873,00.html>.

125. See Simon Nixon, *ECB Can't Fix Euro Zone's Governance Crisis*, WALL ST. J., Nov. 15, 2011, at C10 (indicating the Eurozone faces a governance crisis); see also Paul De Grauwe, *What Kind of Governance for the Eurozone?*, 214 CENTER EUR. POL'Y STUD. POL'Y BRIEF, Sept. 2010, at 1 (noting that the Eurozone needs to improve its governance).

126. See Nixon, *supra* note 125, at C10 (noting that the instability of the euro comes both from members inability to control their spending and the Eurozone's inability to control the debt of members); see also De Grauwe, *supra* note 125 (asserting that the Eurozone has a problem in governing itself). The inability to maintain debt may have been the cause of the current crisis but it is not the only way an economic crisis can occur. See Clive Crook, *EU Pact Could Make Germany's Nightmare Come True*, BLOOMBERG NEWS, (Dec. 13, 2011, 7:00 PM), <http://mobile.bloomberg.com/news/2011-12-14/eu-fiscal-pact-could-make-germany-s-real-nightmare-come-true-clive-crook> (noting that fiscal irresponsibility is only one way to get a financial crisis started); *Europe's Fiscal Pact May Solve Next Crisis, Not This One. View*, BLOOMBERG NEWS (Dec. 11, 2011), <http://www.bloomberg.com/news/2011-12-12/europe-s-fiscal-pact-may-solve-next-crisis-not-this-one-view.html> (indicating that structural deficits may surge even if countries have little or no discretion to exceed EU limitations).

127. See Christoph Hickmann et al., *Geheimaktion Grundgesetz*, 46 DER SPIEGEL 40, Nov. 14, 2011 (commenting on Chancellor Merkel's plans to amend the GG and the EU Treaty to give the European Union more fiscal control). A translation in English is available at <http://www.spiegel.de/international/europe/0,1518,797584,00.html>. See also Ambrose Evans-Pritchard, *Fiskalunion Is Worst of All Worlds for Europe*, TELEGRAPH (London), (Dec 4, 2011, 7:30 PM), http://www.telegraph.co.uk/finance/comment/ambroseevans_pritchard/8934363/Fiskalunion-is-worst-of-all-worlds-for-Europe.html (noting Chancellor Merkel's plans to give the European Union more ability to control and discipline members who do not stay within debt limits).

Economic and political maneuvering can be done to hold the Eurozone together from imminent collapse but long-term solutions are needed to prevent this instability from causing another crisis.¹²⁸

If a fundamental reform of the Eurozone, which includes a fiscal union and greater EU control over Members' budgets, cannot be reached, another possible solution is a change in the membership of the Eurozone.¹²⁹ Many have questioned whether the breakup of the Eurozone is inevitable.¹³⁰ If an economically weak country like Greece were to leave the Eurozone, its debt would no longer threaten the stability of the euro and it could devalue its new currency to become competitive again.¹³¹ For the time being, however, there is no provision in the relevant EU treaties for a country to exit the euro, nor is there a provision for a country to be expelled from the euro.¹³² Article 50 of the

128. See RAYMOND J. AHEARN ET AL., CONG. RESEARCH SERV., R41411, *THE FUTURE OF THE EUROZONE AND U.S. INTERESTS* 13 (2011) (indicating that leaders are looking at various long-term solutions to improve fiscal coordination); see also *A Makeshift Solution: Europe Needs to Find a Long-Term Plan to Solve the Eurozone Crisis*, TELEGRAPH (U.K.), Aug. 8, 2011, <http://www.telegraph.co.uk/comment/telegraph-view/8689013/A-makeshift-solution.html> (noting that Europe needs a long-term solution to solve the crisis); Ben Rooney, *Euro Debt Crisis: 'No Solution in Sight'*, CNN MONEY (Sept. 16, 2011, 3:35 PM), http://money.cnn.com/2011/08/19/news/international/european_union_debt_crisis/index.htm (stating that European leaders are under intense pressure to come up with a long-term solution).

129. See, e.g., STEPHANE DEO ET AL., UBS INV. RESEARCH, *EURO BREAK-UP—THE CONSEQUENCES* 1 (2011), available at <http://bruxelles.blogs.liberation.fr/UBS%20fin%20de%20l'euro.pdf> (noting that changing the members of the Eurozone is an option to solve long-term problem).

130. See, e.g., Martin Banks, *Former EU Commissioner Says Break-Up of Euro Is 'Inevitable'*, PARLIAMENT (Dec. 1, 2011), <http://www.theparliament.com/latest-news/article/newsarticle/former-eu-commissioner-says-break-up-of-euro-is-inevitable/> (indicating that former EU Commissioner Frits Bolkestein believes a split up of the euro is "unavoidable"); see also Hibah Yousuf, *Like It or Not, the Euro Is Doomed*, CNN MONEY (Dec. 9, 2011, 11:40 AM), http://money.cnn.com/2011/12/09/markets/euro_breakup/index.htm (noting groups believe there are too many obstacles in the way of keeping the currency union together).

131. See Nicholas Kulish, *Opposition Grows in Germany to Bailout for Greece*, N.Y. TIMES, Feb. 16, 2010, at A4 (asserting that the debt of Greece could threaten the rest of the Eurozone); see also Chibber, *supra* note 69 (noting that if Greece were in control of its own currency, it could devalue it to become more competitive).

132. See DEO ET AL., *supra* note 129, at 4 (noting the reasons why an opt-out clause was not included in the monetary union were because: 1) such a clause would have been "seen as a lack of commitment," 2) the clause would have "raised the possibility of a country exiting," and 3) by not specifying how to exit, "the costs of trying to do so are significantly raised"); see also ECON. INTELLIGENCE UNIT, *AFTER €UROGEDDON?*:

TEU references a withdrawal option for Member States, but this provision does not mention a simple withdrawal from the Eurozone.¹³³ Besides the legal difficulties in exiting the Eurozone, a weak country would be faced with sovereign default, corporate default, a collapse of international trade, civil disorder, and a collapse of the domestic banking system as both investors and citizens withdraw money in a bank run due to the uncertainties of a new national currency.¹³⁴ An exit from the euro would not only cause social unrest, but a messy default also would have serious economic consequences of global recession and default contagion for banks and other troubled Eurozone countries.¹³⁵

FREQUENTLY ASKED QUESTIONS ABOUT THE BREAK-UP OF THE EURO ZONE 3 (2011) (noting that no formal mechanism exists for a country to be expelled from the Eurozone or to leave of its own volition); Polly Curtis, *What Happens if Greece Leaves the Euro?*, GUARDIAN (U.K.), Nov. 3, 2011, <http://www.guardian.co.uk/politics/reality-check-with-polly-curtis/2011/nov/03/greece-bankruptcy-eurozone-exit#A> (indicating that currently there is no legal way to exit the Eurozone nor a provision in the current EU treaties to expel a country).

133. Article 50 states that a withdrawal comes from the Member State's initiative and willingness, which therefore provides no basis for an expulsion. Consolidated Version of the Treaty on European Union art. 50, 2010 O.J. C 83/13, at 53–54 [hereinafter TEU post-Lisbon]. Moreover, Article 50 provides no details on how an exit would occur, it only gives the seceding Member State the option to negotiate its exit. *Id.* Finally, Article 50 deals with an exit from the European Union, not the Eurozone, suggesting that to leave the monetary union, a member would also have to withdraw from the European Union. *See id.* This analysis is supported by provisions stating the adoption of the euro is “irrevocable.” *See id.*; *see also* DEO ET AL., *supra* note 129, at 5 (indicating vagaries of Article 50).

134. *See* Curtis, *supra* note 132 (asserting that when Greece leaves the euro, there will likely be a run on banks and Greece could be treated as a pariah state); *see also* DEO ET AL., *supra* note 129, at 9–10 (stating that a Eurozone exit could cut valuable trade ties with the rest of the European Union and could lead to civil unrest). Economic modeling has estimated that the cost of a weak country leaving the euro would be EU€9500 to EU€11,500 per person during the first year (forty to fifty percent of GDP) and then EU€3000 to EU€4000 per person in subsequent years. *See* DEO ET AL., *supra* note 129, at 10–11; ECON. INTELLIGENCE UNIT, *supra* note 132, at 5, 10 (noting that many companies would become insolvent and violent protests would likely occur in members that left the Eurozone).

135. *See* ANSGAR BELKE & BERTELSMANN STIFTUNG, DOOMSDAY FOR THE EURO AREA: CAUSE, VARIANTS, AND CONSEQUENCES OF BREAKUP 13 (2011) (stating that social unrest would almost certainly follow in the wake of an enforced currency conversion); *see also* DEO ET AL., *supra* note 129, at 10, 14–15 (noting that historically, monetary union breakups have led to authoritative governments or civil war, and that a country with internal regional or ethnic divisions may split if one group wants to stay on the euro); Curtis, *supra* note 132 (noting that Greece leaving the Eurozone could cause other members to leave the euro decreasing exports and causing recession); Don

If an economically strong country like Germany were to leave the Eurozone, it would face the same legal problems in attempting to exit.¹³⁶ When the country's new currency appreciates against the euro, the country's export sector would be severely damaged.¹³⁷ The new higher valued currency could put the country at a competitive disadvantage in trade.¹³⁸ Another attendant cost is in recapitalizing the domestic banking system.¹³⁹ The cost of secession would ultimately be even more expensive than an extreme bailout scenario, and so, in the end, it is likely that all Member States will strive to remain in the Eurozone.¹⁴⁰

The BVerfG's Sept. 7 Ruling has set constitutional limits on how Germany can respond to the economic crisis.¹⁴¹ While the IMF, ECB, and other Member States all play critical roles in the

Melvin, *Analysis: Leaving the Euro Carries Massive Costs*, ASSOCIATED PRESS, Nov. 3, 2011, available at LEXIS (noting that if Greece left the euro it would wreak havoc on the global economy).

136. See DEO ET AL., *supra* note 129, at 12 (asserting that strong countries also face difficulties in leaving the euro); see also ECON. INTELLIGENCE UNIT, *supra* note 132, at 3 (noting the legal difficulty for a Member State attempting to leave the Eurozone).

137. See DEO ET AL., *supra* note 129, at 12 (indicating a higher valued currency would damage the country's export business); see also David Böcking, *Preparing for the Worst: The High Price of Abandoning the Euro*, SPIEGEL ONLINE, Nov. 29, 2011, <http://www.spiegel.de/international/europe/0,1518,800700-3,00.html> (noting that the new deutsch mark would appreciate and severely undermine exports).

138. See DEO ET AL., *supra* note 129, at 13 (implying a higher valued currency would lead to a loss of competitiveness); see also Böcking, *supra* note 137 (noting that the euro appreciated less than the deutsch mark and kept prices competitive).

139. See DEO ET AL., *supra* note 129, at 12 n.5 (stating that recapitalizing banks is a cost that a strong country would face if it left the euro); see also ECON. INTELLIGENCE UNIT, *supra* note 132, at 9 (noting that sovereign governments leaving the euro would be saddled with the cost of recapitalization).

140. An economic model of a strong country such as Germany leaving the euro estimates the costs at EU€6000 to EU€8000 per person during the first year (twenty to twenty-five percent of GDP) and then EU€3500 to EU€4500 per person in subsequent years. In comparison, if Greece, Ireland, and Portugal all defaulted on their debt with a fifty percent haircut and the remainder of the Eurozone bought all outstanding government debt in the market, it would generate a cost of a little over EU€1000 per person in Germany. See DEO ET AL., *supra* note 129, at 14; see also Brad Plumer, *Could Germany Just Leave the Euro Zone? Not Easily*, WASH. POST WONKBLOG (Nov. 28, 2011, 4:20 PM), http://www.washingtonpost.com/blogs/czra-klein/post/could-germany-just-leave-the-euro-not-easily/2011/11/28/gIQAhvjn5N_blog.html (indicating that a breakup of the Eurozone could prove more costly to Germans than bailouts for its neighbors).

141. See *supra* notes 100–06 and accompanying text (noting the limits set by the BVerfG in the Sept. 7 Ruling).

euro crisis, Germany is perceived as the Eurozone economic leader.¹⁴² Some German politicians have rejected certain measures that would quickly alleviate the financial stress put on the Eurozone.¹⁴³ Although more strain is put on the monetary union, Germany is primarily seeking long-term solutions by pursuing the prolonged process of amending the EU treaties in a way that is acceptable to the GG before considering other options, such as Eurobonds.¹⁴⁴ An independent non-EU treaty known as the Treaty on Stability, Cooperation and Governance (“Fiscal Compact”) has been signed among most European Union Member States and proposes a fiscal compact that would set automatic penalties to members that do not keep their budgetary promises.¹⁴⁵ The treaty was designed to be

142. See Alan Wheatley, *Analysis: Germany Holds the Key to Euro Zone Rebalancing*, REUTERS, Nov. 17, 2011, <http://www.reuters.com/article/2011/11/17/us-eurozone-thinking-idUSTRE7AG13S20111117> (recognizing Germany’s importance in the Eurozone crisis); see also Daniel Hayden IV, *Poland Begg Germany to Save Europe*, INT’L BUS. TIMES (Nov. 29, 2011, 8:06 AM), <http://www.ibtimes.com/articles/258138/20111129/poland-begs-germany-to-save-europe.htm> (noting that Polish Foreign Minister Radoslaw Sikorski made pleas for Germany to do more to save the Eurozone from collapse); Alan O’Keeffe, *Pressure Piles on Germany to Save the Eurozone as Debt Crisis Deepens*, EVENING HERALD (Ir.), Nov. 29, 2011, <http://www.herald.ie/news/pressure-piles-on-germany-to-save-the-eurozone-as-debt-crisis-deepens-2948512.html> (stating that pressure is mounting on Germany to save the Eurozone).

143. See O’Keeffe, *supra* note 142 (reporting statements by German Finance Minister Wolfgang Schauble rejecting calls for the European Central Bank to act as a “lender of last resort” in the Eurozone and dismissing demands for jointly guaranteed Eurozone bonds to relieve the pressure on the most heavily debt-strapped nations); see also Dowling, *supra* note 122 (indicating that Chancellor Merkel is holding out on issues dealing with the ECB and Eurobonds).

144. See Chu, *supra* note 124 (stating that Chancellor Merkel does not intend to transfer budgetary control to EU institutions); see also Hipp & Darnstädt, *supra* note 124 (quoting BVerfG Judge Di Fabio’s statement that a fiscal union that merely enforces budgetary promises does not surrender substantive powers and thus could be acceptable under the GG); Nicholas Kulish & Steven Erlanger, *Merkel Seeks Swift Action on What May Be Long Job to Save the Euro*, N.Y. TIMES, Dec. 3, 2011, at A9 (noting that historically there has been nothing speedy about amending the EU treaties and that it took years to negotiate and ratify the last major change in the Treaty of Lisbon); Monti, *Merkel, Sarkozy Will Not Ask ECB Help to Stem Crisis*, EURACTIVE.COM (Nov. 25, 2011), <http://www.euractiv.com/euro-finance/monti-merkel-sarkozy-ask-ecb-help-stem-crisis-news-509224> (noting that Chancellor Merkel may accept Eurobonds only after the long process of fiscal integration).

145. See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union arts. 3(2), 8, Mar. 2, 2012 (not yet ratified), available at http://www.european-council.europa.eu/media/639235/st00tscg26_en12.pdf (indicating automatic correction mechanisms and penalty payments for members who do not maintain their budget); see also Bill Cash, *The Treaty on Stability, Co-ordination,*

incorporated into the EU treaties later on and although amending the EU treaties could have a positive effect on the market, doing so is a long and complicated process that ultimately raises the question of whether to amend the GG to form a more centralized, accountable, and stable Eurozone.¹⁴⁶

III. GERMANY'S DIFFICULT DECISIONS AND THE FUTURE OF THE EUROZONE

In its current state, the Eurozone is not functioning effectively and ultimately it must either alter its structure or change its membership.¹⁴⁷ After the signing of the Maastricht Treaty, the European Union started down an ambitious path towards integration. With the formation of the monetary union, Germany and the rest of the Eurozone became caught in a

and Governance in the Economic and Monetary Union is Unlawful, SOVEREIGNTY BILL (Mar. 5, 2012), http://www.europeanfoundation.org/my_weblog/2012/03/the-treaty-on-stability-co-ordination-and-governance-in-the-economic-and-monetary-union-is-unlawful.html (noting that the Treaty on Stability, Cooperation and Governance ("Fiscal Compact") is a non-EU treaty and that the Czech Republic and the United Kingdom have not signed it). This type of fiscal compact is not considered a full fiscal union since it does not involve transferring finances between members. See Crook, *supra* note 126 (noting that the fiscal union proposed by EU leaders more closely resembles a fiscal pact because it does not involve cross-border fiscal transfers, which would be found in a true fiscal union); see also Ambrose Evans-Pritchard, *Merkel's Teutonic Summit Enshrines Hooverism in EU Treaty Law*, TELEGRAPH (U.K.), Dec. 11, 2011, <http://www.telegraph.co.uk/finance/financialcrisis/8949723/Merkels-Teutonic-summit-enshrines-Hooverism-in-EU-treaty-law.html> (stating that Chancellor Merkel's plan is not remotely a fiscal union).

146. See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, *supra* note 145, art. 16 (indicating the intention that the treaty should be incorporated into the legal framework of the European Union within five years); see also Hickmann, *supra* note 127 (noting that Chancellor Merkel is considering the possibility of a constitutional change); *France and Germany Agree on EU Treaty Changes*, ALJAZEERA, Nov. 24, 2011, <http://www.aljazeera.com/news/europe/2011/11/201111241332825455.html> (observing that France and Germany have agreed on making changes to the EU treaties, and reporting that Chancellor Merkel may soften her stance toward Eurobonds after fiscal integration). Amending the EU treaties requires unanimous ratification of the EU Member States. See Peadar ò Broin, *How to Change the EU Treaties: An Overview of Revision Procedures Under the Treaty of Lisbon*, 215 CENTER EUR. POL'Y STUD. POL'Y BRIEF, Oct. 2010, at 4 (noting that amendments to the EU treaties require unanimous ratification by Member States according to Article 48 of the TEU).

147. See *supra* notes 125–29 and accompanying text (asserting that if the Eurozone does not change in its ability to control members an alternative solution would be to change the membership of the Eurozone).

pivotal transition period.¹⁴⁸ While a monetary union is in place, an economic union is not.¹⁴⁹ As of the drafting of this Comment, the euro crisis is an ongoing event and the situation is continually changing. Therefore, this Part discusses the Eurozone only in regards to what was current as of March 2012. Part III.A explains why the euro cannot be easily abandoned and why the costs of exiting make it unlikely that any Eurozone member will attempt to leave the common currency. Part III.B discusses what actions Germany will have to take in the near future in order to secure the Eurozone. This Part explains that given the BVerfG's history, it may interpret the GG in a way that would allow a fiscal compact and even Eurobonds to be lawful under certain conditions. If not, the BVerfG may force the German people to rewrite their constitution to allow more political unity within the European Union in order to prevent the collapse of the Eurozone.

A. *The Potential Breakup of the Eurozone*

It is unlikely that the Eurozone will breakup or lose members.¹⁵⁰ The exit of Greece from the Eurozone is unlikely despite the social unrest in Greece caused by the fact that the Greeks are displeased with the austerity measures that are being placed on them in exchange for the bailout funds they receive.¹⁵¹ As hard as it is for the Greeks to accept the spending cuts and sudden changes to once stable employment, the alternative is worse.¹⁵² If Greece decides to leave the Eurozone, a messy default would occur shortly after, once the bailout money ceases.¹⁵³ While sovereign default is still possible even if Greece

148. See *supra* note 14 and accompanying text (noting that the Eurozone has a monetary union without a fiscal union and Germany and France are seeking to form a more unified fiscal policy within the Eurozone).

149. See *supra* note 14 and accompanying text (commenting that the Eurozone is not an economic union).

150. See *supra* notes 131–40 and accompanying text (discussing the legal difficulty and economic hardship that would occur if member nations attempted to leave the Eurozone).

151. See *supra* note 75 and accompanying text (noting the civil unrest and strikes that have occurred in Greece).

152. See *supra* notes 131–35 and accompanying text (emphasizing the economic hardship Greece would face if it were to leave the Eurozone).

153. See *supra* note 134 and accompanying text (noting that sovereign default would soon follow if a weak country like Greece left the Eurozone).

remains in the Eurozone, by leaving, Greece would risk corporate default and bank-runs when the country adopts a weaker currency.¹⁵⁴ When banks lose money and businesses go bankrupt, serious civil unrest is virtually inevitable.¹⁵⁵ Leaving the Eurozone puts a country at risk of cutting vital political ties and trade advantages with the rest of the European Union.¹⁵⁶ Therefore, a weak country would not find it advantageous to voluntarily leave the Eurozone, nor is there any threat of being forced out.¹⁵⁷ Germans, for their part, also may find it difficult to imagine they are paying for the irresponsibility of the Greeks and other faltering Eurozone nations, but supporting a large bailout measure for the weak Eurozone countries is also less costly than leaving the euro.¹⁵⁸

A breakup of the Eurozone also would have serious nonfinancial consequences. In countries where domestic tension already exists, if a certain region or ethnic group wished to stay in the Eurozone, it could lead to a breakup of the country attempting to leave.¹⁵⁹ Since there is no clear legal way to leave the Eurozone, a country would have to exit from the European Union entirely, possibly unilaterally, breaking treaties and souring relations with the rest of the European Union.¹⁶⁰ Finally, any kind of breakup would cripple the European Union's political and economic influence in the world and destroy the progress of integration that Europe has been striving towards for

154. *See supra* note 134 and accompanying text (stating that corporate and bank defaults would occur if a weaker country left the Eurozone).

155. *See supra* notes 134–35 and accompanying text (observing that a default would leave Greece in economic ruin and a currency change would likely cause serious social unrest).

156. *See supra* notes 133–34 and accompanying text (noting that a Eurozone country attempting to leave unilaterally could result in the loss of valuable ties with the rest of the European Union).

157. *See supra* notes 132–35 and accompanying text (recognizing that currently there is no way to force a member out of the Eurozone and there would be serious economic hardship if a member voluntarily exited).

158. *See supra* note 140 and accompanying text (noting that German bailouts are less costly than exiting the Eurozone).

159. *See supra* note 135 and accompanying text (indicating that civil unrest in a country trying to exit the Eurozone could cause a split within the nation).

160. *See supra* note 133 and accompanying text (observing that an exit from the Eurozone implies an exit from the European Union).

the past sixty years.¹⁶¹ The accumulation of disastrous economic, political, legal, and social consequences makes a breakup scenario something all parties want to avoid.

B. *Future Actions Germany Can Take to Preserve the Eurozone*

Since a complete breakup of the Eurozone carries disastrous consequences for the region, the remaining long-term solution is stronger integration and a change in the functioning of the Eurozone. A long-term and permanent solution to the economic crisis will come when the Eurozone members form a fiscal union and Germany, as the strongest economy, leads the way.¹⁶² A more financially accountable Eurozone, and the possible introduction of Eurobonds, will require changes to the current EU treaties, and since these changes are something that must be ratified by all EU Member States, they could take years to implement.¹⁶³

To create a tighter fiscal union, EU treaties will have to be amended. While the TEU already has guidelines for members' debt,¹⁶⁴ it obviously is not enough since most of the Eurozone countries have gone over the debt limit, including Germany.¹⁶⁵ A treaty amendment is required to make the budget requirements more binding and enforceable.¹⁶⁶ Amending the TEU, however, is not an easy task because it requires unanimous consent from all Member States and such agreements to amend could end up in a political deadlock.¹⁶⁷

161. See *supra* note 11 and accompanying text (noting that European integration has been steadily increasing over the past six decades and that the European Union has become a strong political and economic entity).

162. See *supra* notes 144–46 and accompanying text (recognizing that Eurozone leaders have considered the idea of a fiscal union and that Germany is leading the Eurozone in putting forth plans for more fiscal discipline).

163. See *supra* notes 144–46 and accompanying text (noting that fiscal union requires treaty changes that must be unanimously ratified and could take years to implement).

164. See *supra* note 60 and accompanying text (reporting the treaty rules on debt levels for Eurozone countries).

165. See *supra* note 63 and accompanying text (noting that Germany has also gone over the debt limits set out in the treaty).

166. See *supra* notes 127, 144–46 and accompanying text (recognizing that to impose stronger regulation on fiscal policies of Eurozone members, the TEU would have to be amended).

167. See *supra* note 146 and accompanying text (indicating that unanimous ratification is needed for a change to the EU treaties).

Germany still needs to be concerned with finding a short-term solution to the rising debt in troubled Eurozone countries. While merely agreeing to reform the treaties could have a positive effect on the markets, that alone might not be enough.¹⁶⁸ The EFSF, together with the IMF, may not have enough resources at their disposal to keep the larger debt-ridden members of the Eurozone from defaulting.¹⁶⁹ In order to avoid a possible default by weaker members before permanent structural remedies are put in place, Germany may have to support the calls to have the ECB act as a lender of last resort.¹⁷⁰ There has been pressure for the ECB to increase its bond purchasing to provide short-term relief from elevated borrowing costs, and the ECB has suggested it could do more if the Eurozone adopted better budget discipline and enforcement.¹⁷¹ Although this action may be politically unpopular in Germany because it would cause inflation, the BVerfG has already been lenient in determining the ECB's ability to purchase government bonds.¹⁷²

For now, from the German perspective, the idea of joint liability under Eurobonds is not an option.¹⁷³ The BVerfG's most recent ruling denies the Bundestag from taking on this kind of permanent liability because, unlike a bailout, it would be relinquishing too much power from itself and from future Bundestags, thus violating Article 38(1).¹⁷⁴ German Chancellor Angela Merkel has expressed support for creating a fiscal union

168. *See supra* note 146 and accompanying text (observing that the discussion of reforming the EU treaties has had some positive effect on the market).

169. *See supra* notes 76–78, 82 and accompanying text (acknowledging that the EFSF has limited funding and that larger economies would be too big to be rescued by the EFSF).

170. *See supra* note 143 and accompanying text (explaining that Chancellor Merkel is refusing to accept plans for the ECB to buy more Eurozone government bonds).

171. *See supra* note 83 and accompanying text (noting that the ECB has been pressured by other nations to take more action against the debt crisis and it suggested it could do more if Eurozone members adopted better budget enforcement measures).

172. *See supra* notes 18, 91, 94, 99 and accompanying text (indicating that ECB bond purchases would lead to inflation but that the BVerfG did not find the ECB's current bond purchasing program to be in violation of EU law).

173. *See supra* notes 120–22, 143 and accompanying text (noting that Germany currently refuses to accept Eurobonds).

174. *See supra* notes 105–06 and accompanying text (discussing that the Bundestag is not allowed to agree to large future liabilities that are outside of its control).

that does not lead to further loss of national sovereign power.¹⁷⁵ Such a fiscal union could be accomplished by giving European institutions more power to enforce budgetary promises made by Member States rather than direct control over the budget. BVerfG Judge Udo Di Fabio has suggested that a fiscal union structured in such a way could be seen as acceptable to the BVerfG because the Bundestag would not lose any substantive power over budget decisions.¹⁷⁶ Agreements like the Fiscal Compact only involve Member States agreeing to penalties for not adhering to their agreements rather than direct control of the budget by EU institutions.¹⁷⁷ Thus, the Fiscal Compact could be the foundation for the Eurozone to enter a full transfer union.

Ultimately, a type of transfer union will be necessary to secure the Eurozone in the future because another economic crisis could still occur, even if members adhere to their budgets.¹⁷⁸ The constitutional legality of a transfer union is dubious given the BVerfG's latest ruling.¹⁷⁹ ECB government bond purchases are a way of spreading debt liability similar to a transfer union but the ECB's actions, as they relate to other nations, are outside of the BVerfG's jurisdiction.¹⁸⁰ The BVerfG would still be able to rule on legislation that allows Germany to accept Eurobonds. Eurobonds could be deemed constitutionally acceptable if EU institutions had more control over enforcing members' budgets such as under the Fiscal Compact. Under such a scenario, liabilities would not be unforeseeable or incalculable, since a stricter fiscal policy of checks and penalties would be put in place to make such liabilities definite before

175. See *supra* notes 144–45 and accompanying text (stating that Chancellor Merkel's plans for a fiscal union do not involve giving budget control to a European institution).

176. See *supra* note 144 and accompanying text (noting that BVerfG Judge Di Fabio suggested that the proposed fiscal union could be acceptable under the GG).

177. See *supra* note 145 and accompanying text (indicating that the proposed fiscal union is not a true fiscal union since it does not involve cross-border fiscal transfers or joint liability).

178. See *supra* note 126 and accompanying text (asserting that a financial crisis can occur even if EU members adhere to their budgetary policy).

179. See *supra* notes 104–06, 118–20 and accompanying text (noting the BVerfG's language on the Bundestag accepting further financial liabilities).

180. See *supra* note 99 and accompanying text (asserting that the bond purchasing of the ECB did not raise reviewable complaints in the BVerfG).

Eurobonds would be granted.¹⁸¹ Moreover, Chancellor Merkel has already suggested the possibility of accepting Eurobonds after a tighter fiscal union was formed.¹⁸²

Given the history of the BVerfG, it is probable that the Court could find a way to accept the idea of a type of transfer union while highlighting exceptions that would allow the Bundestag to maintain sovereignty.¹⁸³ The BVerfG has a history of relenting to political pressure and supporting European integration by never ruling directly against the European entity, instead introducing exceptions and conditions that preserve German rights.¹⁸⁴ A future ruling by the BVerfG could be similar to the previous *Solange* decisions and EU integration rulings where the BVerfG approved the European interests while maintaining constitutional concerns.¹⁸⁵ The Court could rule that the fiscal compact prevents liabilities from being completely incalculable or uncontrollable, and if the Bundestag is given approval power on the continued issuing of the Eurobonds, it could retain its sovereign powers.

If the BVerfG finds a transfer union to be constitutionally unacceptable, Germans may have to decide whether the era of transferring power under the GG has reached its limit and the constitution needs to be changed. Normally a change to the GG could be done by a two-thirds vote in both the Bundestag and the Bundesrat, but Article 79(3) prohibits amendments to certain aspects of the GG including Article 1 and 20.¹⁸⁶ Article 20 refers to basic institutional principles and has been used

181. See *supra* notes 105–06, 121–22 and accompanying text (commenting on the BVerfG's ruling that the Bundestag could not accept liabilities that are triggered by another nation).

182. See *supra* notes 144, 146 and accompanying text (noting that Chancellor Merkel may consider Eurobonds as a possibility after a fiscal union is formed).

183. See *supra* Part I.A–B (indicating that in previous rulings, the BVerfG had allowed the European measures to pass by attaching conditions to protect German constitutional rights).

184. See *supra* Part I.A–B (noting that in earlier rulings, the BVerfG did not rule directly against European action, but approved it with exceptions to preserve German rights).

185. See *supra* Part I.A–B (recognizing that in earlier holdings the BVerfG preserved German constitutional rights without ruling against the European entity).

186. See *supra* note 123 and accompanying text (stating the mechanism by which the GG can be amended); see also *supra* note 36 and accompanying text (noting that Article 79(3) prevents alteration to core principles set out in Articles 1 and 20).

previously to argue against further German integration.¹⁸⁷ BVerfG President Andreas Voßkuhle has already mentioned that the Bundestag has maximized its ability to surrender core powers to the European Union, and that a referendum would be needed for further transfer of power.¹⁸⁸ If the BVerfG believes that entering into a full fiscal union cannot be accomplished without surrendering more budgetary powers to the European Union, then a parliamentary vote to amend the GG would not be sufficient and a referendum would have to be made to adopt a new German constitution.¹⁸⁹

The German people would have a referendum on the continuation of European integration. Such a referendum could be difficult to pass because it would entail the German people voting to abolish German democratic sovereignty and transfer power away from Berlin.¹⁹⁰ When the European Union was established, the BVerfG ruled that EU institutions did not independently satisfy the democratic principle, and that the Bundestag remained the principal establishment for Germans to satisfy the democratic process since homogeneity did not exist within the European people.¹⁹¹ As the European Union gains more power and European people begin to see themselves as a single group with less emphasis on nationality, the European Parliament could take on the responsibility of preserving the people's democratic rights in a fully united Europe. A United States of Europe is a theoretical idea that could result from EU Members' further integration in an effort to achieve greater political, economic, and social unity, but Members may not be

187. See *supra* notes 36–38, 41 and accompanying text (describing Article 20 and noting that in the *Maastricht Ruling*, the ratification of the treaty was challenged on Article 20 grounds).

188. See *supra* note 123 and accompanying text (noting BVerfG President Voßkuhle's statement about Germany reaching its limit to the further transfer of power to the European Union).

189. See *supra* note 123 and accompanying text (observing BVerfG President Voßkuhle's statement that a referendum would be needed for Germany to give up any more core powers to the European Union).

190. See *supra* note 123 and accompanying text (noting that a vote by the German people to change core principles of the Constitution is unlikely).

191. See *supra* note 43 and accompanying text (indicating that the BVerfG ruled that the EU institutions did not independently satisfy the principle of democratic rights).

ready to relinquish this amount of sovereignty to EU institutions at this point.

The concern of a loss of sovereign democratic status has been challenged since the formation of the European Union, and the BVerfG has circumvented this concern by claiming that any further integration could be ruled on when the time came.¹⁹² Even before Germany joined the Eurozone, there was a concern that eventually a fiscal union would have to be formed.¹⁹³ The BVerfG has allowed Germany to travel far down the road of integration, and it is unlikely that it will now stand in the way when the existence of the euro is in jeopardy.¹⁹⁴ If this cannot be done, the pressure of a collapsing Eurozone might be enough to get the German people—through referendum—to rewrite the GG in such a way that it will pave the way for Germany to enter into a fully integrated European Union.

CONCLUSION

Germany will have a difficult decision ahead regarding how to reconcile continued integration into the European Union with the constitutional restrictions of handing over any more sovereign power. For now, ECB bond purchases and continuing support from the EFSF seem to be necessary to defend against immediate default. In the long-term, the European Union will have to agree to stricter adherence to fiscal policy to allow Germany to consider Eurobonds and a transfer union to secure the Eurozone. Entering a full fiscal union with the Eurozone raises the potential for a constitutional challenge as to the loss of sovereignty and democracy within Germany, but such a union could be structured in a way that is acceptable to the BVerfG.

Certainly Germany is not the only member of the Eurozone that can prevent further integration through domestic laws or

192. See *supra* notes 10, 45–47 and accompanying text (noting that the BVerfG had a history of concerns about violations to its sovereign powers and that in the *Maastricht Ruling*, the BVerfG determined that future integration can be decided when the issue arises).

193. See *supra* notes 15, 42 and accompanying text (identifying the argument that a fiscal union would need to be formed to control a monetary union).

194. See *supra* Part I.B (noting that in prior cases involving European integration, the BVerfG allowed Germany to transfer power to the European Union amid constitutional complaints and was able to legitimize the actions taken by the German government without directly ruling against the European interest).

referenda. At this moment, however, Germany's large economy, upon which the rest of the Eurozone depends for stability, puts it in a leadership role. For this reason, Germany's position on the bailouts and treaty reform to create a disciplined fiscal union are of particular interest. Thus, German constitutional law is going to continue to play a major role in deciding what solutions are available to the Eurozone for solving its economic problems. As Germany continues to integrate further with fellow Member States, it may be forced to reassess its constitutional identity. This process could happen quickly if the European Union is to survive the current crisis. Ultimately, the euro, the European Union, and the health of the global economy now predominately rest in the hands of Germany.

NOTES AND OBSERVATIONS