Fordham Law Review

Volume 71 | Issue 6 Article 11

2003

Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts

Joseph R. Wetzel

IMPROVING FUNDAMENTAL RIGHTS PROTECTION IN THE EUROPEAN UNION: RESOLVING THE CONFLICT AND CONFUSION BETWEEN THE LUXEMBOURG AND STRASBOURG COURTS

*Joseph R. Wetzel**

INTRODUCTION

In the late 1960s and early 1970s, the European Court of Justice[1] ("ECJ") began recognizing the European Community's[2] growing potential to influence fundamental rights protection,[3] and started adjudicating in this area.[4] The national courts of the Member States challenged the ECJ's authority to be a fundamental rights guardian.[5] To defeat this challenge and preserve its supremacy within the Community legal order, the ECJ repeatedly asserted the EC's commitment to fundamental rights protection.[6] The ECJ continued to expand the scope of its review powers well into the ambit of fundamental rights protection, even at the national level.[7]

---

*J.D. Candidate, 2004, Fordham University School of Law; A.B., 2000, Brown University. I would like to thank my fiancée, Emily, for her love and support.

1. *See infra* Part I.A. This Note uses the terms "European Court of Justice," "ECJ," and "Luxembourg Court" interchangeably.

2. *See infra* note 27 and accompanying text. This Note spans the entire life of the European Economic Community, including its transformation into the current European Union. The terms "EEC," "European Community," "European Union," "Community," "EC," and "EU" are used interchangeably throughout the Note. For the purposes of this Note, each term refers to the supranational body governed by the ECJ.

3. *See* Desmond Dinan, Ever Closer Union 25 (2d ed. 1999). By fundamental rights, I mean those human rights so basic and universal as to constitute "an essential ingredient of any constitutional democracy." *See id.* at 302. Naturally, there will be debate as to what constitutes "an essential ingredient of democracy." That important discussion is beyond the scope of this Note. For the purposes of this Note, the reader should think abstractly of "basic human rights," or of the rights most critical to a well-functioning human society, when attempting to define "fundamental rights."

4. *See infra* notes 89-96 and accompanying text.

5. *See infra* notes 97, 102-03, 108-10 and accompanying text.

6. *See infra* notes 98-101, 104-07, 111-12 and accompanying text.

7. *See infra* Part I.B.1. "The ECJ's assumption of competence for human rights review not only vis-à-vis the Community institutions, but also vis-à-vis the Member States, results in a situation where the Community may be said to have moved from 'respecting' to 'ensuring' human rights." Rick Lawson, *Confusion and Conflict?*

Although the ECJ's newfound commitment to fundamental rights protection should benefit the Member States, the Court's expanded jurisprudence causes some problems. For one, the ECJ's commitment to fundamental rights originated as a politically motivated attempt to protect the Court's supremacy, calling into question the Court's sincere desire to effectively protect fundamental rights.[8] The ECJ sought not to match the Member States' standards, but to make the jurisdictional claim that the ECJ may assert an autonomous community legal standard.[9] As a jurisdictional claim, the ECJ's decision to adopt fundamental rights threatens to interfere with existing European fundamental rights protection standards, such as that established by the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights ("ECHR").[10]

The ECHR represents a rights protection standard agreed upon by all European Union Member States and, although the EU itself has not signed the Convention,[11] it provides a natural starting point for discussing Community-wide human rights protection.[12] Failure by the EU to accede to the ECHR has left gaps in the Convention's protection, as claims against Community organs cannot be brought

---

Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg, *in* 3 The Dynamics of the Protection of Human Rights in Europe 219, 224 (Rick Lawson & Matthijs de Blois eds., 1994).

8. Joseph H.H. Weiler, *Methods of Protection: Towards a Second and Third Generation of Protection*, *in* Human Rights and the European Community: Methods of Protection 555, 581 (Antonio Cassese et al. eds., 1991) (suggesting that the ECJ's commitment to fundamental rights protection came as "an attempt to protect the concept of supremacy").

9. Anne-Marieke Widmann, Note, *Article 53: Undermining the Impact of the Charter of Fundamental Rights*, 8 Colum. J. Eur. L. 342, 347 (2002) ("[T]he ECJ's fundamental rights jurisprudence does not constitute a substantive effort to match Member State standards, but rather amounts to a jurisdictional claim, asserting the Court's right to impose an autonomous Community standard which cannot be derived by national courts.").

10. The ECHR, or Convention, includes a catalogue of fundamental rights approved by the member states of the Council of Europe. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm [hereinafter ECHR]. The European Commission on Human Rights, whose approval was required to send a case before the European Court of Human Rights in Strasbourg, France, originally heard claims arising under the Convention. *See id.* Protocol 11. Protocol 11 to the Convention dismantled the Commission, leaving the Strasbourg Court to handle all claims directly from the applicants. *See id.* The states, by signing the agreement, are bound to secure to anyone within their jurisdiction the rights and freedoms contained in the Convention. *See id.* art. 1.

11. *See infra* note 119 and accompanying text.

12. Each of the EU Member States also belongs to the Council of Europe. *See* Dates of Ratification, *at* http://www.echr.coe.int/Eng/Edocs/DatesOfRatifications.htm (last visited Mar. 31, 2003) (listing dates of ratification of ECHR and subsequent Protocols by Council of Europe members); Member States, *at* http://europa.eu.int/abc-en.htm (last visited Mar. 31, 2003) (listing Member States of the European Union).

before the European Court of Human Rights in Strasbourg.[13] This raises the specter of the ECJ deciding a case that obligates a Member State to enact legislation violating the ECHR. When assessing the immediate future of human rights protection within the EU, one must ask: How can we guarantee the ECHR's uniform application across the EU and the rest of Europe in light of the ECJ's intense interest in maintaining its supremacy, as well as an autonomous Community legal order? For the moment, the Charter of Fundamental Rights of the European Union[14] ("Charter") presents the most promising solution: affirming a strong fundamental rights protection standard and harmonizing the ECHR's interpretations by the European Court of Human Rights and the ECJ. Only when the EU secures this baseline of fundamental rights protection can the human rights protection standards within the European Union develop further.

This Note examines the ECJ's role as a fundamental rights protector within the European Union and how the Court's increased involvement in adjudicating fundamental rights claims has led to conflicting ECHR interpretations by the ECJ and Strasbourg Court. The Note determines that the Nice Charter provides the best possible means to restore uniformity to the ECHR's interpretation.

Part I of this Note provides a historical background of fundamental rights protection within the European Union. Part I.A gives a brief history of the European Court of Justice. This section examines the ECJ's rise as a constitutional court for the European Community through the development of its judicial review powers and the extension of these powers to affect legislation at the national level within EU Member States.[15] Part I.B.1 outlines early fundamental rights cases in Luxembourg, describing how these cases sprang from market-related concerns surrounding employees' rights in the workplace. This section describes the expansion of fundamental rights protection within the EU as a direct response to certain national courts' challenges to ECJ supremacy that alleged inadequate rights protection at the EU level.[16] Part I.B.2 discusses the failure of the proposed EC accession to the ECHR, which otherwise would have enhanced fundamental rights protection in the EU by eliminating any gaps in protection between the EU rights protection system and that of the ECHR.[17] Part I.C introduces the Charter of Fundamental Rights of the European Union and explains the motivations behind its drafting.[18]

---

13. *See infra* notes 117-19 and accompanying text.

14. 2001 O.J. (C 364) 1, *available at* http://ue.eu.int/df/docs/en/CharteEN.pdf [hereinafter Charter]. Other names for the Charter include the European Fundamental Rights Charter and the Nice Charter.

15. *See infra* notes 25-86 and accompanying text.

16. *See infra* notes 90-114 and accompanying text.

17. *See infra* notes 115-31 and accompanying text.

18. *See infra* notes 132-42 and accompanying text.

In Part II.A, this Note describes the potential problems resulting from overlapping jurisdiction within the current two-court international rights protection system in Europe.[19] Part II.B outlines three possible solutions: (1) to revisit the possibility of EU accession to the ECHR, (2) to create a referral mechanism between the Luxembourg and Strasbourg Courts, and (3) to establish a standard within the EU that will prevent the ECJ from reducing the scope of the Convention's fundamental rights as interpreted by the Strasbourg Court.[20]

Part III considers the merits of each solution.[21] Part III.A suggests that neither the accession nor the referral solution solves the two-court problem due to the political implications of relinquishing review powers for the ECJ.[22] Part III.B posits that the Nice Charter will provide an enhanced rights protection system within the EU and a harmonization mechanism for the ECHR jurisprudences of both courts—and therefore reduce the potential for harmful divergent ECHR interpretations.[23] Part III.C examines the probability that the Nice Charter will succeed in solving the two-court problem when applied in the real world, either in its current, non-binding status or in its potential status as part of the treaties.[24] Two factors weigh heavily in this evaluation: (1) whether the Charter allows for a rights protection standard greater than or equal to that provided under the ECHR, and (2) whether the Charter promotes a convergence of the fundamental rights jurisprudences of the two courts. This Note concludes that, because the ECJ is unlikely to reverse its position on sharing its review powers with another court, implementing the Nice Charter, as either "soft" or binding law, represents a critical step in strengthening fundamental rights protection not only within the European Union, but also throughout Europe.

I. A SUPREME COURT FOR EUROPE

Before evaluating the ECJ's role in fundamental rights protection within the EU, the Court's origins—and particularly the sources of the Court's authority, legitimacy, and the scope of its judicial review powers—need to be considered. This section begins by charting the ECJ's inception and the expansion of its authority within the European Community. After detailing the Court's growing influence within the European Union, this section describes the genesis of fundamental rights protection at the European Union level and how growing concerns over the inadequacy of such protection led to the

19. *See infra* notes 147-76 and accompanying text.
20. *See infra* notes 177-90 and accompanying text.
21. *See infra* notes 191-306 and accompanying text.
22. *See infra* notes 198-230 and accompanying text.
23. *See infra* notes 231-47 and accompanying text.
24. *See infra* notes 248-306 and accompanying text.

unsuccessful proposed EU accession to the European Convention on Human Rights. Finally, this section presents the European Union's latest attempt to address the EU fundamental rights protection issue—the Charter of Fundamental Rights of the European Union.

A. *A Brief History of the European Court of Justice*

The European Court of Justice had modest beginnings in 1951 as an oversight body charged with adjudicating matters arising within the nascent European Coal and Steel Community ("ECSC").[25] Six years later, after the Treaties of Rome[26] established the European Economic Community[27] ("EEC") and European Atomic Energy Community[28] ("EURATOM"), officials within the Member States decided that one court, the ECJ, would rule over the three international communities.[29] A brief glance at the number of cases brought under each treaty shows that the ECJ is most important to

25. *See, e.g.*, Renaud Dehousse, The European Court of Justice: The Politics of Judicial Integration 5 (1998); Dinan, *supra* note 3, at 2, 301-02. The Treaty of Paris established both the ECJ and the ECSC in 1951. Dehousse, *supra*, at 5. Many consider the ECSC, with six members (France, Germany, Italy, Belgium, the Netherlands, and Luxembourg), the "first manifestation" of the European Community. *E.g.*, Dinan, *supra* note 3, at 2-3. Created in response to the need to rehabilitate Germany and allay French security concerns following World War II, the ECSC controlled the resources at the core of both nations' industrial economies and war-making potential. *Id.* For its creators, the ECSC represented the beginning of a "process that would culminate in a European federation transcending the nation state." *Id.* at 3.

26. The Treaties of Rome include the Treaty Establishing the European Community ("EC Treaty") and The Treaty Establishing the European Atomic Energy Community, both signed by the six members of the ECSC in 1957. *See, e.g.*, Dehousse, *supra* note 25, at 5; Dinan, *supra* note 3, at 1; Neill Nugent, The Government and Politics of the European Union 43-46 (4th ed. 1999).

27. Better known as the European Community, the supranational EEC focuses on economic cooperation between its members. *See, e.g.*, Dinan, *supra* note 3, at 9. The EC Treaty states:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.

Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340), art. 2 (1997) (Amsterdam Consolidated Version) [hereinafter EC Treaty]. In its subsequent articles, the EC treaty included fairly clear trade rules, with guiding principles for agricultural and social policy. *See, e.g.*, Nugent, *supra* note 26, at 42-43.

28. Together with the ECSC and EEC, EURATOM forms the first of "three pillars" upon which the EU was founded in 1993—the other two pillars being the Common Foreign and Security Policy and police and judicial cooperation in criminal matters. *E.g.*, Dinan, *supra* note 3, at 1-2.

29. Dehousse, *supra* note 25, at 5 ("[I]t was decided that a single court would deal with legal disputes arising under all three Communities.").

the EEC.[30] Consequently, the ECJ derives much of its power from the Treaty Establishing the European Community ("EC Treaty").[31]

1. The Birth of a Constitutional Court

The EC Treaty indicates that the EEC founders intended the ECJ to hear cases brought by other Community organs and Member States, and not by individuals.[32] For example, Articles 226 and 227 allow the European Commission[33] and Member States to bring claims against specific Member States for failure to comply with the EC Treaty.[34] Article 230 establishes the Court's jurisdiction in cases brought against the Commission or the European Council[35] by a Member State, the Commission, the Council, or by specific individuals who are the subject of a Council or Commission decision in which they are named.[36] Almost as an afterthought, Article 234 authorizes

---

30. *Id.* at 5-6. By 1995, the ECJ had made 4024 judgments regarding the EEC, compared to 359 for the ECSC and 19 for EURATOM. *Id.*

31. *See id.* (noting that "the dominance of the EEC Treaty is in part attributable to the purpose of this treaty, which covers all the principal areas of economic activity"); *see also supra* note 27. Traders bringing suits citing TEC provisions have played a key role in the development of litigation before the ECJ. Dehousse, *supra* note 25, at 6.

32. *See* EC Treaty arts. 221-34 ("The Court of Justice shall sit in plenary session when a Member State or a Community institution that is a party to the proceedings so requests.").

33. The European Commission, unlike the other bodies in the EU governmental system, has no analogue within national governmental systems. Dinan, *supra* note 3, at 205. The national governments of the Member States appoint the Commission's members, who pledge to serve the EU's interests. *Id.* The Commission has the exclusive right to initiate legislation in the first pillar, but, at the same time, retains quasi-executive authority within the EU governmental structure. *Id.* "[T]he Commission epitomizes supranationalism and lies at the center of the EU system." *Id.*

34. EC Treaty arts. 226-27. These articles state:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty [and the latter fails to comply with an opinion issued by the former] . . . [the Commission] may bring the matter before the Court of Justice. . . . A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Id.

35. The European Council (not to be confused with the Council of Europe) consists of each Member State's top political leaders and the Commission President, assisted by the Member States' foreign ministers. Dinan, *supra* note 3, at 237; Nugent, *supra* note 26, at 177. The EEC institutionalized the Council in 1974. *See* Nugent, *supra* note 26, at 177-78. The European Council meets at least twice a year and reports on the progress achieved by the EU, lending an intergovernmental aspect to the otherwise supranational EU structure. *See* Dinan, *supra* note 3, at 238; Nugent, *supra* note 26, at 178-79.

36. EC Treaty art. 230. Article 230 reads:

> The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB . . . . It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission . . . . Any natural or legal person may . . . institute proceedings against a decision

the Court to issue "preliminary rulings" on questions concerning Community law that arise in the national courts of the Member States.[37]

The EC Treaty does not explicitly grant individuals standing to challenge breaches of Community law before the ECJ.[38] Without access for individuals, the ECJ appears unsuitable to adjudicate fundamental rights claims. Through innovative use of Article 234, individuals have found ways to bring claims before the Court.[39] By removing a major obstacle to uniform fundamental rights protection in the EU, Article 234 has strengthened Community law and the ECJ's role as a rights protector.[40]

Article 234 permits lower national courts to seek guidance from the ECJ in cases involving Community law, but obligates the highest national courts to do so.[41] Once a court requests a preliminary ruling, the ECJ assesses the arguments presented, along with relevant case law and treaty provisions, and issues a binding ruling which the national court must apply.[42] Preliminary rulings serve three major functions: (1) they ensure that national courts make legally "correct" decisions with respect to EC law, (2) they promote the uniform interpretation and application of EC law in the Member States, and

---

addressed to that person or against a decision which . . . is of direct and individual concern to the former.

Id.

37. *See id.* art. 234. Article 234 states:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

a. the interpretation of this Treaty;

b. the validity and interpretation of acts of the institutions of the Community and of the ECB;

c. the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Id. EC Treaty Article 234 establishes an important connection between the ECJ and the Member States' national courts. *See id.*

38. *See generally* EC Treaty arts. 226-34 (explaining the role and jurisdiction of the ECJ).

39. *See* Dinan, *supra* note 3, at 305 (describing Article 234 as a "powerful tool" and a means for citizens to "ascertain the compatibility of national and Community law"). A lower national court deliberating a case brought by an individual may request "authoritative guidance" via a preliminary ruling from the ECJ when the national court cannot resolve the dispute based on previous EC case law. *Id.*

40. *See id.*

41. *Id.*

42. *Id.*

(3) they provide valuable access to the ECJ for private individuals who cannot directly appeal to the Court, either for lack of legal standing or lack of funding.[43] The EC's proper legal and economic functioning relies heavily on the preliminary ruling mechanism.[44] By creating ECJ review power over national courts, the preliminary ruling procedure effectively made the ECJ a supreme court for the European Union.[45]

Legal scholars often classify the ECJ as a "constitutional court," comparable in function to the United States Supreme Court, because it acts as a supreme court that ensures the uniform interpretation and application of Community law.[46] Although "constitutional court" most accurately describes the ECJ, the Court cannot hear appeals of national courts' decisions.[47] Despite this incongruence, some consider the collective effect of ECJ rulings a constitutionalization of the EC's founding treaties.[48] The ECJ's broad interpretations of treaty provisions, particularly EC Treaty Article 234, suggest the Court's willingness to assert itself on the supranational stage.[49] As a constitutional court, the ECJ has great potential as a fundamental rights champion.

2. EC Law and the Beginnings of a Federal/State Judicial Hierarchy

EC law has two main sources—"primary" and "secondary" legislation.[50] "Primary legislation" includes treaties and their

---

43. *Id.*

44. *See id.* ("[T]he preliminary rulings procedure is of fundamental importance to the proper functioning of the legal and economic system established by the EEC Treaty. It is in the framework of that procedure that basic principles of the Community legal order . . . have been developed." (citing Anthony Arnull, *Reference to the European Court*, 15 Eur. L. Rev. 391 (1990))).

45. Dinan, *supra* note 3, at 305 ("The increasing rate of preliminary ruling requests from lower courts has enhanced the stature of the ECJ, effectively giving it the power to review national law and thereby turning it into a supreme court.").

46. *See* Dehousse, *supra* note 25, at 35 ("It is . . . incontestable that the court has seen itself endowed with a constitutional task: to ensure the uniform interpretation of the treaties.").

47. *See id.*

48. *See* Dinan, *supra* note 3, at 302 ("From the outset the ECJ has seen the original treaties not simply as narrow international agreements but, because of the member states' unique decision to share sovereignty, as the basis of a constitutional framework for the EU.").

49. *See* Dehousse, *supra* note 25, at 34-35 (referring to Article 177 of the original EC Treaty, which maps onto Article 234 of the amended EC Treaty); Dinan, *supra* note 3, at 301-03, 305-06 (noting the Court's use of EC Treaty Article 177 (now Article 234)). "The Treaty of Rome evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the European Union." Walter Mattli, The Logic of Regional Integration: Europe and Beyond 73 (1999).

50. *E.g.*, Dinan, *supra* note 3, at 302; Nugent, *supra* note 26, at 260.

subsequent amendments.[51] "Secondary legislation" consists of laws made in accordance with the treaties.[52] EU law that does not require any national measures in order for it to be binding has direct applicability within the Member States.[53]

The ECJ gradually has developed its power and influence with the aim of promoting uniformity in Community law, thereby contributing to further integration within the EC.[54] Two doctrinal pillars developed by the Court maintain uniformity within EC law: direct effect and primacy.[55]

The principle of direct effect holds that certain EC law provisions either confer rights or impose obligations on individuals that national courts must recognize and enforce.[56] The ECJ first established the direct effect of primary legislation in the 1963 *Van Gend en Loos*[57] case. In its opinion, the Court declared that "any unconditionally worded treaty provision, being 'self sufficient and legally complete,' did not require further intervention at the national or Community levels and therefore applied directly to individuals."[58] Beginning with *Van Gend en Loos*, the ECJ incrementally expanded the scope of direct effect in a series of judgments.[59] In so doing, the Court enhanced its ability to enforce EU law at the national level.[60]

To ensure the value of direct effect in the enforcement of EU law, the ECJ developed the principle of primacy.[61] This principle holds that EU law supersedes national law, thereby establishing an informal federal-state hierarchy between the Community organs and the

---

51. *E.g.*, Dinan, *supra* note 3, at 302; Nugent, *supra* note 26, at 260-61.

52. *E.g.*, Dinan, *supra* note 3, at 302; Nugent, *supra* note 26, at 260.

53. Nugent, *supra* note 26, at 260 ("EU law is directly applicable when there is no need for national measures to be taken in order for the law to have binding force within the member states."). This straightforward principle suggests a self-executing nature to certain EU law.

54. *See, e.g.*, Dehousse, *supra* note 25, at 34-35 (concluding that the Court principally must "ensure the uniform interpretation of the treaties"); Dinan, *supra* note 3, at 301-03 (noting that the ECJ's case law maintained the momentum for further integration); Nugent, *supra* note 26, at 257 (stating the Court's "duty to ensure that EU law is interpreted and applied correctly").

55. Nugent, *supra* note 26, at 260-61.

56. *See* Dinan, *supra* note 3, at 303 (citing Case 26/62, Van Gend en Loos v. Nederlandse Tariefcommissie, 1963 E.C.R. 3).

57. Case 26/62, Van Gend en Loos v. Nederlandse Tariefcommissie, 1963 E.C.R. 3 (involving a Dutch importer who wanted to invoke directly the EC Treaty against the Dutch government, which was attempting to tax certain imports).

58. *See* Dinan, *supra* note 3, at 303 (internal citation omitted).

59. Nugent, *supra* note 26, at 261 (noting that the ECJ "has gradually strengthened and extended the scope of direct effect so that it now applies to most secondary legislation except when discretion is explicitly granted to the addressee").

60. *See* Dinan, *supra* note 3, at 303-04; Nugent, *supra* note 26, at 260-61.

61. Dinan, *supra* note 3, at 304 ("The principle of direct effect would have had little impact if Community law did not supersede national law."); Nugent, *supra* note 26, at 261 ("Clearly the principle is vital if the EU is to function properly.").

Member States.[62] Although the EC Treaty makes no explicit reference to primacy, the Court has actively sought to establish the supremacy of EC law almost from the outset.[63] Just one year after *Van Gend en Loos*, in *Costa v. ENEL*,[64] the Court declared that in creating a community like the EC, with legitimate power granted by willing limitation and transfer of sovereignty from the Member States to the community, the Member States have created a body of law binding upon "both their nationals and themselves."[65] National legislation could not override Community law without undermining the EC's legal basis.[66] In 1978, the Court expanded Community law primacy in *Simmenthal S.p.A. v. Commission*,[67] ruling that national courts must apply Community law in its entirety and eliminate any national laws that conflict with Community law.[68]

With the landmark decisions in *Van Gend en Loos*, *Costa*, and *Simmenthal*, and the subsequent establishment of the principles of direct effect and primacy, the ECJ took national courts by surprise.[69] This prompted a reaction from the national courts, which challenged the legitimacy of the ECJ.[70] The Court ultimately responded by expanding significantly the scope of its fundamental rights jurisprudence.

3. Compliance and Legitimacy Surrounding ECJ Rulings

The ECJ's capability as a fundamental rights guardian hinges on how much the Court's decisions actually affect the EC Member States. National courts within the Member States must consistently comply with, accept, and apply the Court's decisions for them to have any real

---

62. *See, e.g.*, Dehousse, *supra* note 25, at 41 ("It was thus clear that Community law . . . required that incompatible national legislation be *set aside*."); Dinan, *supra* note 3, at 304 ("[T]he ECJ had no hesitation in asserting the supremacy of Community law over national law."); Nugent, *supra* note 26, at 261 ("National courts . . . must apply EU law in any conflict, even if the domestic law is part of the national constitution.").

63. *See, e.g.*, Dehousse, *supra* note 25, at 41 (noting that the EC Treaty is "silent on this point"); Dinan, *supra* note 3, at 304 (dubbing the EC Treaty "equivocal on the issue").

64. Case 6/64, 1964 E.C.R. 585, 594 (holding that Community law could not be overridden by domestic measures without threatening the attainment of the objectives of the EC Treaty).

65. *Id.* at 593.

66. *See id.* at 592-94.

67. Case 92/78, 1979 E.C.R. 777.

68. *See* Dinan, *supra* note 3, at 304 ("[E]very national court must . . . apply Community law in its entirety . . . and must accordingly set aside any provisions of national law which may conflict with it." (citing Case 92/78, Simmenthal v. Commission, 1979 E.C.R. 777)).

69. Dinan, *supra* note 3, at 304.

70. *Id.* ("Some national courts reacted strongly against what they saw as the encroachment of a new legal order.").

influence within the EU.[71] The Court must also derive legitimacy from the support of the Member States and their populations, even in the face of disagreement with its decisions.[72] Without compliance and legitimacy, the Court's decisions constitute mere lip service and provide no real protection to individuals.[73]

From the outset, the ECJ has enjoyed a large degree of legitimacy and compliance by the Member States.[74] The Court should expect such compliance, because each Member State became a willing participant in the EU by relinquishing some sovereignty.[75] Member States accepted the Court's competence as obligatory and exclusive—joining members must respect its authority.[76] Without an effectively supreme EC law, common policies would "not in practice exist" and national interests would continually undermine the entire rationale behind the EC's formation.[77] The Court famously explained the binding legal effects of the EC in the *Costa v. ENEL* judgment:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[78]

On the whole, the Member States and their courts have bowed to the ECJ's requirements, and have accepted the Court's jurisprudence.[79] A broad consensus among the Member States regarding the values the ECJ sought to promote led to this early compliance with ECJ rulings.[80] This consensus, coupled with the

---

71. *See* Dinan, *supra* note 3, at 305, 309-10; *see also* James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 Am. J. Pol. Sci. 459, 461 (1995).

72. *See* Dinan, *supra* note 3, at 305; Gibson & Caldeira, *supra* note 71, at 461.

73. *See* Dinan, *supra* note 3, at 304-05.

74. Dehousse, *supra* note 25, at 118 (noting that "[t]he ECJ's case law edifice was given a positive—even enthusiastic—welcome, and, in most cases, its judgments have been faithfully applied"). *But cf.* Gibson & Caldeira, *supra* note 71, at 464 (pointing to a decline in legitimacy and compliance during the 1980s).

75. Nugent, *supra* note 26, at 242 ("[The EU] is an organisation in which states have voluntarily surrendered their right, across a broad range of important sectors, to be independent in the determination and application of public policy.").

76. EC Treaty art. 292 (forbidding Member States from seeking any other venue for the resolution of EC Treaty-related conflicts).

77. Nugent, *supra* note 26, at 243 (noting that the effectiveness of common policies hinges on common laws capable of uniform interpretation in all joining states).

78. Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 593.

79. Dehousse, *supra* note 25, at 120.

80. *See id.* at 121-22 (referring to the strong pro-integration sentiment of the late 1980s and early 1990s, which, in turn, led to a positive reception of the pro-integration

relatively obscure character of EU law at the time, ensured that the Court met little systematic resistance to its activities.[81]

In addition to widespread compliance with its decisions, the ECJ enjoys a social legitimacy as a result of decisions that, by improving upon the level of rights protection afforded to individuals within the EU, produce broad incentives for compliance by national institutions and individuals.[82] Through its judgments in response to preliminary reference requests, the ECJ has enhanced individual rights protection in areas where Community law affords better protection than the national law of some Member States, such as equal pay for women.[83] By subjecting Member States' actions that affect fundamental rights protection to judicial review under EU standards, Article 234 has become a vital tool for fundamental rights improvement.[84] The social legitimacy resulting from the Court's image as a valuable ally to the individual against the Member States' national governments substantially enhances the ECJ's ability to promote fundamental rights within the European Union.[85] The EU must establish its ability to guarantee a minimum fundamental rights protection standard that is palatable to the Member States' national courts. Otherwise, pressure from the Member States will force the ECJ to take a conservative approach to the adjudication of fundamental rights claims that will limit its effectiveness as a fundamental rights protector.[86]

B. *The Fundamental Rights Jurisprudence of the ECJ Prior to the Nice Charter*

The EC's original treaty framework does not mention "human rights."[87] Unable to find explicit textual support for its mission, the ECJ developed its fundamental rights jurisprudence without the benefit or guidance of express treaty provisions mandating it to do

---

rulings of the ECJ).

81. *Id.*

82. *See id.* at 145 ("The very broad interpretation of the concept of direct effect sustained by the ECJ has in effect conferred on private persons a substantial number of individual rights, which the preliminary reference procedure has allowed them to effectively enjoy.").

83. *See infra* notes 90-93 and accompanying text.

84. *See* Dehousse, *supra* note 25, at 146 (noting that approximately eighty-five percent of Article 234 cases concern individuals in dispute with a public body).

85. *See id.* (suggesting that the use of Article 234 has allowed the Court to appear as a "useful ally in the struggle against bureaucracy which characterizes modern societies").

86. *See id.* at 176 (describing the increasingly conservative approach taken by the ECJ resulting from a desire to avoid unnecessary confrontations with the national courts in the face of growing criticism from sources at the national level).

87. *See* Dinan, *supra* note 3, at 302. Dinan suggests, however, that "[f]undamental human rights . . . underpin EC law." *Id.*

so.[88] The Court started slowly, but eventually built a substantial body of non-binding human rights law that ultimately prompted the EU to propose codification of its own list of fundamental rights.[89]

1. The Genesis of Fundamental Rights Cases in Luxembourg

The ECJ initially hesitated to expand its jurisdiction beyond the field of economic activity within the Community,[90] and the EC Treaty drafters did not foresee such an expansion.[91] Slowly, the Court's jurisprudence extended to the area of workers' rights, particularly women's rights in the workplace.[92] The EC Treaty does, however, explicitly support protecting women's rights,[93] making the Court's behavior consistent with the EC's policy of intervening only where a clear link to creating a common market exists.[94] The ECJ's attention to individual rights during this period laid a critical foundation for future Community initiatives in the realm of fundamental human rights.[95]

---

88. Weiler, *supra* note 8, at 567. Weiler notes that:

> [I]n the absence of a written Bill of Rights in the Treaties and in the presence of an apparent freedom to the Community legislature to disregard individual rights in Community legislation, the European Court of Justice, in an exercise of bold judicial interpretivism, and reversing an earlier case-law, created an unwritten higher law of fundamental human rights, culled from the Constitutional traditions of the Member States and international agreements such as the European Convention on Human Rights.

Id.

89. *See* Rainer Arnold, *A Fundamental Rights Charter for the European Union*, 15 Tul. Eur. & Civ. L.F. 43, 44-46 (2000-2001) (noting that the Charter corresponds to the evolution of Community law by "taking over particular judge-made fundamental rights developed by the [ECJ]").

90. Legal Issues of the Maastricht Treaty 123 (David O'Keeffe & Patrick M. Twomey eds., 1994) ("In the absence of a catalogue of rights in the Treaty of Rome on which to base its jurisprudence, the Court of Justice initially proved reluctant to protect fundamental rights other than those explicit in the text of the [EC Treaty].").

91. *See* Nugent, *supra* note 26, at 259.

92. Ilana Ostner & Jane Lewis, *Gender and the Evolution of European Social Policies*, *in* European Social Policy 159, 159 (Stephen Liebfried & Paul Pierson eds., 1995) ("The European Commission and the European Court of Justice (ECJ) have had much success in promoting, monitoring, and interpreting the rights of working women, forcing major revisions of national practice.").

93. EC Treaty art. 141 (calling for the equal treatment of women).

94. Ostner & Lewis, *supra* note 92, at 162 (noting that "[f]rom 1957-1972, the EC intervened in social policy only when the link to creating a common market was obvious").

95. *See id.* at 162. Between 1975 and 1986, the Council of Ministers passed five equality directives in the areas of equal pay and equal treatment. *Id.* By the late 1980s, the ECJ's interpretations of article 119 (now articles 141-42), Commission sponsored directives to strengthen and extend article 119, and subsequent rulings regarding the meanings of the directives, yielded a substantial body of gender-related politics. *Id.* "The Commission and the ECJ have exploited successfully the principle of equal pay and of equal treatment, forcing a number of states to give up many discriminatory practices." *Id.* at 160.

The Court began to realize the EC's growing capacity to influence fundamental rights protection, and first addressed the issue in *Stauder v. City of Ulm*.[96] National courts, particularly those in Germany and Italy, threatened to question the ECJ's legitimacy without a full, codified Community recognition of fundamental rights.[97]

The ECJ responded in its ruling in *Internationale Handelsgesellschaft*[98] by asserting that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure."[99] The ECJ attempted to address any concern this decision raised by insisting that fundamental rights protection is a principal concern of the European Community.[100] Rather than enforce national law, the ECJ would seek "analogous guarantees" particular to Community law.[101] This bold assertion of primacy in the face of incompatibility with local fundamental rights protection standards concerned the national courts.[102] Without any bill of rights at the Community level, Member States found it difficult to ascertain the legal basis for the Court's resolve to ensure fundamental rights protection.[103]

The ECJ attempted in its 1974 decision, *Nold v. Commission*,[104] to define more precisely the criteria the Court would apply in its fundamental rights jurisprudence.[105] In the *Nold* ruling, the ECJ held that Community law bound the Court to look to the common traditions of the Member States and the ECHR for inspiration in cases involving fundamental rights.[106] Taken together with the specific

---

96. Case 29/69, 1969 E.C.R. 419, 425 (holding that human rights considerations inhere in EC law).

97. *See* Dehousse, *supra* note 25, at 62-63 (noting the risk before 1970 that national courts would refuse to apply Community provisions at odds with national human rights standards). Germany and Italy posed particular threats because of their heightened sensitivity to human rights in the wake of World War II. *Id.* at 63.

98. Case 11/70, Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125 (issuing a preliminary ruling to the German administrative court concerning the validity of a Community regulation regarding import and export licenses for cereal products).

99. *Id.* at 1134.

100. *See id.* (holding that "respect for fundamental rights forms an integral part of the general principles of [Community] law").

101. *See id.*; Dehousse, *supra* note 25, at 64 (citing *Internationale Handelsgesellschaft*).

102. *See* Dehousse, *supra* note 25, at 64.

103. *See id.* The national courts, particularly those of Germany and Italy, "saw in this vagueness a degree of uncertainty so great as to cast doubts on the efficacy of human rights protection at Community level." *Id.*

104. Case 4/73, 1974 E.C.R. 491 (stating that the protection of fundamental rights not only is compatible with economic integration, but is necessary to such a project).

105. *See id.*

106. *See id.* at 507; *see also* Dehousse, *supra* note 25, at 64 (noting that the Court at this stage envisaged its later use of the ECHR as a non-binding fundamental rights

analogous guarantees in Community law, the inspiration drawn from the Member States provides the basis for an autonomous fundamental rights protection standard encompassed by EC law.[107]

Just two weeks after the *Nold* decision, the most notorious challenge to ECJ authority came from the German Constitutional Court in the *Solange I*[108] case.[109] In a decision directly challenging the principle of supremacy, Germany's highest court declared that until the EC adopted a catalogue of basic rights, in accordance with German Basic Law and adopted by Germany's parliament, the German Court reserved the right to review EC law for any incongruence.[110]

Heeding the underlying concern that prompted the challenge in *Solange I*, the ECJ proceeded cautiously but productively with the development of its fundamental rights jurisprudence.[111] Eventually, the ECJ established a standard sufficient to allay the German Constitutional Court's fears, and the German Court renounced its review power over the application of Community secondary law.[112]

The judicial dialogue between the ECJ and the German national courts illustrates how the ECJ's expansion of its fundamental rights jurisprudence came in direct response to challenges to direct effect and primacy by the Member States' national courts.[113] Rather than force the ECJ to continue to tiptoe around the area of fundamental rights protection, risking future challenges by national courts of Community law supremacy,[114] the EU should seek a codified set of fundamental rights, directly enforceable before the ECJ.

2. EC Accession to the ECHR—Round 1

The search for a set of codified fundamental rights for the European Union should begin with the ECHR. Each of the Member

---

standard from which to draw inspiration).

107. *See Nold*, 1974 E.C.R. 491, 507-08; Dehousse, *supra* note 25, at 64.

108. Internationale Handelsgesellschaft, 2 BVerfGE 52/71 (1974) [hereinafter *Solange I*].

109. *See* Dehousse, *supra* note 25, at 64-65 (stating that the there could be no more direct a threat to the ECJ's authority).

110. *See Solange I*, 2 BVerfGE 52/71.

111. Dehousse, *supra* note 25, at 65-66 (describing the ECJ's response to *Solange I* with a "cautious line" of cases, exemplified by *Cinéthèque v. Fédération Nationale des Cinémas Français*, Joined Cases 60 & 61/84, 1985 E.C.R. 2605, and the Court's subsequent move to a less cautious attitude, while retaining great deference to the Member States' legal orders).

112. *See* Wünsche Handelsgesellschaft, 2 BVerfGE 197/83 (1986) (deeming it no longer necessary for the German Constitutional Court to control the application of EC secondary law so long as the ECJ ensured the effective protection of fundamental human rights); Dehousse, *supra* note 25, at 66. The German Court referred to *Wünsche* as *Solange II*. Dehousse, *supra* note 25, at 66.

113. *See* Dehousse, *supra* note 25, at 64-66.

114. *See id.* at 64-69.

States has already acceded to the Convention,[115] making its list of protected rights an obvious starting point in the quest for universal rights protection within the EU. Even the ECJ itself, in the *Nold* decision, recognized the potential inspiration to be drawn from agreements such as the ECHR.[116] Unfortunately, difficulty lies in the resolution of the relationship between the EC and the ECHR.

Almost immediately after the ECJ charged itself with fundamental rights protection within the European Community, the relationship between the EC and the ECHR came to the forefront in several cases—brought before both the ECJ and the European Commission of Human Rights.[117] In response to the *Nold* decision, individuals within the Member States recognized the possibility of applying the ECHR at the Community level, and attempted to bring cases before the European Commission on Human Rights against both EC organs and Member States applying EC-mandated legislation.[118] The Commission rejected these cases on the grounds that the ECHR's jurisdiction did not extend to the EC, which had not signed the Convention.[119]

Rulings by the Commission blocking claims brought against the EC caused continued concern within the Member States, which already viewed fundamental rights protection on the EC level with skepticism.[120] Eventually, this concern prompted some academics and EC officials to propose EC accession to the ECHR.[121] Accession to the ECHR would resolve the lack of jurisdiction in cases involving Community organs, thereby assuring that the minimum ECHR standards would apply at the Community level as well as the national level.[122]

Accession to the ECHR would mean more than merely an acceptance of the fundamental catalogue of rights featured by the Convention.[123] The ECHR requires that a petitioner exhaust all

115. *See supra* note 12 and accompanying text.

116. *See* Case 4/73, Nold v. Commission, 1974 E.C.R. 491, 507; Philip Raworth, Introduction to the Legal System of the European Union 216 (2001).

117. Peter Wessman, 7 The Protection of Human Rights in European Community Law 7 (1992) (thesis, Instituet för Europeisk Rätt vid Stockholms universitet). Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms eliminated the need to petition the Commission. *See supra* note 10. Now petitioners can bring claims directly before the European Court of Human Rights. *See supra* note 10.

118. *See* Wessman, *supra* note 117, at 7. The ECJ refused to hear some of these cases, making the Commission the only recourse available to those parties seeking justice. *Id.*

119. Lawson, *supra* note 7, at 230.

120. *See supra* notes 97-114 and accompanying text.

121. *See* Wessman, *supra* note 117, at 7; Lawson, *supra* note 7, at 219 (noting Professor Henry Schermers's advocacy of Community accession to the ECHR in 1978, prior to the EC Commission's memorandum suggesting the same action).

122. Lawson, *supra* note 7, at 233.

123. Wessman, *supra* note 117, at 7.

domestic remedies prior to filing a complaint under the Convention's mechanism, meaning individual petitions before the Commission would come in the wake of ECJ rulings, ultimately granting the European Court of Human Rights judicial review over the ECJ.[124]

Consequently, in a 1996 opinion,[125] the ECJ blocked the possibility of Community membership in the ECHR when it held that the EU's founding Treaties did not authorize the Commission to negotiate agreements in the realm of human rights itself—asserting, ironically, that the Treaties limited the EU's competence to the economic stage.[126] In order to quell any fear that the Community lacked an obligation to respect fundamental rights norms embodied by the ECHR, officials pointed to Article 6 of the Maastricht Treaty,[127] which essentially codified the approach of the ECJ in the *Nold*[128] decision, thereby providing that the EU would respect fundamental rights norms as found within the ECHR and the constitutions of the Member States.[129] By acknowledging the rights found within the ECHR without allowing the EC to sign the Convention, the ECJ appeased those concerned that fundamental rights protection at the Community level would fail to meet the minimum standards in the ECHR without making itself subservient to the Strasbourg Court.[130]

---

124. *See* ECHR, *supra* note 10, art. 35(1) ("The [Strasbourg] Court may only deal with the matter after all domestic remedies have been exhausted."); Lammy Betten & Nicholas Grief, EU Law and Human Rights 117 (1998).

125. Opinion 2/94, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, 1787-89 (denying that the Community has competence to accede to the ECHR). The Court acknowledged the importance of respecting human rights, but found that accession to the ECHR would entail such substantial modifications to the Community's system of rights protection as to necessitate treaty amendment. Betten & Grief, *supra* note 124, at 113.

126. *See* Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe*, 8 Colum. J. Eur. L. 37, 38-39 (2002). The ECJ revealed its true fear when it declared that accession was "incompatible with its role as supreme guarantor of the Community's legality to attribute jurisdiction to the Strasbourg court, a jurisdiction which might conflict with the ECJ's competence." *Id.* at 40 (citing Opinion 2/94, 1996 E.C.R. I-1759).

127. Treaty on European Union, Oct. 1, 1997, O.J. (C 340) (1997) (as amended by the Treaty of Amsterdam), *available at* http://europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf. Article 6 reads:

> 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Id.

128. *See supra* notes 104-07 and accompanying text.

129. *See* Sacerdoti, *supra* note 126, at 40.

130. *See id.*

This clever solution maintained the legal order that had evolved within the Community, but did little to resolve the vagueness that plagued the ECJ's authority in the area of fundamental rights—and it left two international courts poised for future conflict.[131]

C. *A Bill of Rights for the European Union*

Although the ECJ's fundamental rights jurisprudence continued to grow throughout the 1970s, 1980s, and 1990s, the European Commission in 1998 formed a committee to study the possibility of formally recognizing fundamental rights at the Community level.[132] In June 1999, the European Council in Cologne decided to draft a charter covering fundamental rights in the EU.[133] Just over a year later, at the December 2000 intergovernmental conference in Nice, the European Council proclaimed the European Union Fundamental Rights Charter.[134]

The Council intended the Charter to reiterate the importance of fundamental rights in the EU by expressing these rights in a more visible format.[135] Two principal underlying motivations for the expression of fundamental rights in a highly visible charter, such as that proposed in Nice, surfaced: the aspirational purpose of bringing fundamental rights to the forefront of Community policy,[136] and the practical purpose of protecting the ECJ's supremacy within the EU legal order.[137]

---

131. *See id.*

132. *See id.* at 41.

133. *See id.* The Charter would cover:

> the rights of liberty and equality, the fundamental procedural rights guaranteed by the ECHR and resulting from the common constitutional traditions . . . the fundamental rights of [EU] citizens . . . [as well as] the economic and social rights provided for in the European Social Charter . . . and in the 1989 Community Charter of the Fundamental Social Rights of Workers.

Id.

134. *See* Arnold, *supra* note 89, at 44-45.

135. *See* Thomas von Danwitz, *The Charter of Fundamental Rights of the European Union Between Political Symbolism and Legal Realism*, 29 Denv. J. Int'l L. & Pol'y 289, 291-92 (2001).

136. *See, e.g.*, *id.* (suggesting that the Charter's recognition of the value of fundamental rights to the citizens of the EU promises to contribute to the core of a future European identity); Olivier de Schutter, The Questions to be Decided—Protecting Fundamental Rights, an Issue in the Convention on the Future of Europe, para. 2, *at* http://europa.eu.int/comm/justice_home/unit/charte/en/print/questions.html (last visited Apr. 2, 2003) (noting that, in the presence of the new Charter, fundamental rights should give direction to the building process within the EU). A detailed discussion about the aspirational underpinnings of the Nice Charter is beyond the scope of this Note.

137. *See* Danwitz, *supra* note 135, at 289, 293 (noting that the idea to adopt a charter of fundamental rights for the EU comes in direct response to demands originating in the early 1970s from national courts, governments and community institutions); *see also supra* notes 98-114 and accompanying text.

Adopting a charter of fundamental rights would signify to the ECJ, and to the rest of the world, the importance the EU places on the protection of human rights.[138] This recognition could, and hopefully would, indirectly lead to "an enhanced level of fundamental rights protection in the EU" by refocusing the attention of Community institutions, particularly the ECJ.[139]

While making fundamental rights a priority in future EU policymaking is an admirable goal, the Nice Charter's more immediate value comes from the second underlying motivation: the Charter's ability to protect the supremacy of EU law from the continued allegation that rights protection at the EU level is sub-par.[140] The continued legitimacy of the Community legal order, along with the corollary EU defense against the criticism that it cannot sufficiently guarantee the protection of its citizens' fundamental rights, constitutes a necessary precondition for the realization of enhanced fundamental rights protection within the EU.[141] Rather than look to the Charter for express new solutions writ large in the realm of fundamental rights, one must look first at its ability to resolve the claims of inadequate rights protection at the Community level—in particular, the Charter's ability to resolve the problem of divergent ECHR interpretations by the ECJ and the European Court of Human Rights.[142]

II. TOO MANY COURTS SPOIL THE JUDGMENT

It seems logical that the ECJ should retain its supremacy in the realm of EC law, while the ECHR should continue to bind the Member States. For the same reasons that Member States initially considered the ECJ unsuited to adjudicate in the area of human rights,[143] one will find the European Commission and the European Court of Human Rights equally, if not more, unsuited to adjudicate in the predominantly economic arena of Community law.[144] A very real

138. *See* Danwitz, *supra* note 135, at 294-95 ("By convincing the ECJ of the overall importance of the protection of fundamental rights it can lead the ECJ to accept that this is the principal mission it has to accomplish."); *see also* Schutter, *supra* note 136.

139. Danwitz, *supra* note 135, at 295.

140. *See* Arnold, *supra* note 89, at 46-47 (noting that the Charter represents an "updated standard" in the continuous development of the EU's constitutional law).

141. *See supra* Part I.A.3; *supra* notes 97-113 and accompanying text.

142. *See* Arnold, *supra* note 89, at 47 (noting "there is no need nor any possibility for the adoption of new concepts," but that "[t]he Charter cannot be contrary to the tradition of the autonomous EC legal order"); *see also infra* Part II.

143. *See supra* notes 97, 102-03, 108-10 and accompanying text.

144. *See* Mark W. Janis, *Fashioning a Mechanism for Judicial Cooperation on European Human Rights Law Among Europe's Regional Courts*, *in* 3 The Dynamics of the Protection of Human Rights in Europe 211, 216 (Rick Lawson & Matthijs de Blois eds., 1994) (suggesting that the ECHR, representing more than twice as many nations as the EU, may not be the proper arbiter in cases involving EU law and policy).

problem arises, though, when one considers the well-accepted EU legal doctrines of direct effect[145] and primacy.[146]

A. *Problems with the Current Two-Court System for Human Rights in Europe*

Under the current systems, a situation could arise in which an ECJ opinion at variance with Strasbourg case law would nevertheless obligate a national court to implement a law in violation of the ECHR—thereby causing a Member State to derogate from its responsibilities under the Convention.[147] Such an exercise of conflicting jurisdiction would damage the legitimacy of one or both courts and hinder their ability to protect fundamental rights.[148]

Conflicting jurisdiction becomes practically relevant when considering the ECJ's role as a political integrating factor within the EU.[149] The political nature of the ECJ causes a problem due to the paradoxical nature of fundamental rights protection.[150] On one hand, fundamental rights protection has an integrating value, because the rights themselves give a sense of identity to a society and its members.[151] As such, the development of fundamental rights protection is a critical integrating tool for the ECJ. On the other hand, fundamental rights protection often aims to shield the individual from public authority.[152] Taken as a whole, fundamental rights protection standards within a given society seek to balance protecting the individual with maintaining the identity and values

145. *See supra* text accompanying notes 56-60.

146. *See supra* text accompanying notes 61-68.

147. *See* Lawson, *supra* note 7, at 233. "[T]he ECJ considers itself by no means obliged to follow the case-law of the European Commission and Court of Human Rights." *Id.* at 228. Although the ECJ, by its own jurisprudence, has charged itself with the interpretation of the ECHR, which expressly charges the Strasbourg Court with the same task, there is no guarantee of similar interpretations by the two courts. *See* Janis, *supra* note 144, at 213. Although a gross divergence has not yet occurred between the jurisprudences of the two courts, it remains a realistic possibility. *See generally* Lawson, *supra* note 7.

148. *See* Lawson, *supra* note 7, at 228-29.

149. Scholars have widely recognized the ECJ as a principal driving force behind integration within the EU since the 1980s. *See, e.g.*, Robert O. Keohane & Stanley Hoffmann, *Institutional Change in Europe in the 1980s*, *in* The New European Community: Decisionmaking and Institutional Change 1, 1 (Robert O. Keohane & Stanley Hoffmann eds., 1991) (noting the EC's extensive role in limiting national autonomy and pushing Community-building acts); Mattli, *supra* note 49, at 73-74 (describing the Article 234 preliminary ruling procedure as a driving force for integration); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 Am. J. Int'l L. 205, 233 (1993) (attributing the "constitutionalization" of the EC Treaty to the ECJ alone). A detailed discussion of the Court's integrating role is beyond the scope of this Note.

150. *See* Weiler, *supra* note 8, at 569.

151. *Id.*

152. *Id.* at 569-70. Much of the ECHR focuses on such protection for the individual. *See generally* ECHR, *supra* note 10, arts. 1-17.

common to the society.[153] Given the active, and arguably political, integrating role the ECJ has played in the EU, one may logically fear a reluctance on the part of the Court to strike down legislation important to the Community's integrated workings in the name of individual rights.[154]

One could argue that conflict between the Luxembourg and Strasbourg Courts presents only theoretical problems, or, at least, only marginal practical problems. After all, the ECHR defines only minimum standards, leaving national (or supranational) authorities free to set higher protection levels, and Community law limits the ECJ's competence to national legislation made pursuant to EU law.[155] Still, any ECJ failure to guarantee the minimum standards established by the ECHR would leave no remedy available to EU citizens.[156] The continued exercise of overlapping jurisdiction by the ECJ and the European Court of Human Rights will result in numerous divergent ECHR interpretations that could damage the authority of both courts.[157]

One example of the divergent interpretations problem surfaced in a pair of cases brought before the ECJ and the ECHR that resulted in opposing interpretations of ECHR Article 8.[158] In 1989, the ECJ ruled in *Hoechst AG v. Commission*[159] that ECHR Article 8 did not apply to companies.[160] Three years later, in *Niemietz v. Germany*,[161] the European Court of Human Rights held that Article 8 might apply to certain business premises or activities.[162] These incompatible Article 8

153. *See* Weiler, *supra* note 8, at 569-70.

154. *See id.* at 570. The ECJ has "a clear tendency to approach cases from a common market point of view." Lawson, *supra* note 7, at 251 (pointing out that the ECJ did not entertain allegations of fundamental rights violations in *Cinéthèque*, Joined Cases 60 & 61/84, 1985 E.C.R. 2605, *Demirel*, Case 12/86, 1987 E.C.R. 3719, and *Grogan*, Case C-159/90, 1991 E.C.R. I-4685).

155. Lawson, *supra* note 7, at 230.

156. *Id.* at 230-31.

157. *Id.* at 250 ("*Any exercise of overlapping jurisdiction* by the [ECHR] and by the [ECJ] *could give rise to confusion and conflict.*" (quoting Case 118/75, Watson & Belmann, 1976 E.C.R. 1207)).

158. *See id.* at 239-47. ECHR Article 8 provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR, *supra* note 10, art. 8.

159. Joined Cases 46/87 & 227/88, 1989 E.C.R. 2859.

160. *Id.* at 2924 (validating an EC search of a business premises without a court order from the ECJ).

161. App. No. 13710/88, 16 Eur. H.R. Rep. 97 (1992).

162. *Id.* at 112 ("[T]o interpret the words 'private life' and 'home' as including certain professional or business activities or premises would be consonant with the

interpretations merited particular concern because the EC Commission already enjoyed wide powers in competition law.[163]

A second example of divergent ECHR interpretations arose in a more complex series of cases dealing with a person's right to respect for her name. The case before the ECJ, *Konstantinidis v. Stadt Altensteig-Standesamt*,[164] involved a Greek man who felt his name had been incorrectly transliterated by the German government.[165] The Advocate General[166] argued that a broad interpretation of ECHR Article 8[167] should recognize an individual right to prevent "unjustified interference" with one's name.[168] In its judgment, however, the ECJ completely ignored the Article 8 human rights aspect of the case, basing its decision on the potential economic impact on Mr. Konstantinidis.[169]

By contrast, the European Court of Human Rights has addressed the human rights issues inherent in cases involving the right to a name, and has expanded its Article 8 interpretation to extend protection to individuals who change their names.[170] In several cases raised by transsexuals wishing to change their names to reflect their new sexual identities, the Strasbourg Court recognized that states may violate Article 8 when they deny a person the right to change her name—provided that such a denial brings significant inconvenience to the individual.[171] Later cases went further, reading a right to develop and

---

essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities.").

163. *See* Lawson, *supra* note 7, at 245 (noting that the "broader implications" of *Hoechst* "should not be overlooked").

164. Case C-168/91, 1993 E.C.R. I-1191 (holding that if a state obliges a Greek national to use a transliterated spelling of her name for business purposes, the pronunciation of that name cannot be distorted to the extent of causing confusion of identity for that individual's potential clients).

165. *See id.* Christos Konstantinidis was registered as "Christos Konstadinidis" when he married a German national. *Id.* at 1193. He applied to have the spelling corrected, at which time the German government employed a professional to transliterate the name. *Id.* The end result was even worse, spelled "Hrēstos Kōnstantinidēs." *See id.* The German court felt that forcing Mr. Konstantinidis to spell his name in a distorted fashion could be an infringement of his rights under Community law. *See* Lawson, *supra* note 7, at 247.

166. The nine Advocates General are responsible for "mak[ing], in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court." EC Treaty art. 222. The Member States appoint the Advocates General, who "do not participate in the Court's deliberations." Dehousse, *supra* note 25, at 9.

167. For the text of Article 8, see *supra* note 158.

168. Lawson, *supra* note 7, at 248.

169. *See* Case C-168/91, Konstantinidis v. Stadt Altensteig-Standesamt, 1993 E.C.R. I-1191; *see also* Lawson, *supra* note 7, at 248.

170. *See* Lawson, *supra* note 7, at 248-50.

171. *See* Rees v. United Kingdom, App. No. 9532/81, 9 Eur. H.R. Rep. 56 (1986) (acknowledging a possible Article 8 violation arising from the right to a name, but denying that such a violation occurred in the present case); B. v. France, App. No. 13343/87, 16 Eur. H.R. Rep. 1 (1992) (finding that the inconveniences suffered by B. in her everyday life constituted a violation of Article 8).

fulfill one's personality, which included the right to a name—a right deemed necessary to forming one's identity.[172] Although all of these cases came prior to the judgment in *Konstantinidis*, the ECJ failed to consider the cases in its deliberations.[173]

In the first example, the ECJ and Strasbourg Court interpreted ECHR Article 8 with different results.[174] The second example showed how divergent interpretations can arise through the ostensibly different foci of the Courts—economy for the ECJ and individual rights for the Strasbourg Court.[175] The legitimacy of both courts rests on the resolution of the divergent interpretations problem.[176]

B. *Possible Solutions*

In order to preserve the integrity of the two international judicial orders, Europe must resolve the conflict and confusion resulting from the courts' overlapping jurisdictions.[177] More importantly, a solution would lead to better overall rights protection for individuals within the European Union. Two solutions would completely eliminate overlapping jurisdiction: (1) reexamining EU accession to the ECHR, making the Strasbourg Court supreme in the realm of fundamental rights,[178] and (2) creating a link between the two courts in order to eliminate divergent rulings.[179]

---

172. *See* Burghartz v. Switzerland, App. No. 16213/90, 18 Eur. H.R. Rep. 101 (1994) (Commission report) (finding that ECHR Article 8 ensures a sphere of privacy in which everyone may freely develop her personality).

173. *See* Lawson, *supra* note 7, at 247-50, 249 n.89.

174. *See supra* notes 159-63 and accompanying text.

175. *See supra* notes 164-73 and accompanying text.

176. *See* Janis, *supra* note 144, at 213.

177. Some say that such a resolution is more important to the ECHR. Weiler, *supra* note 8, at 619-20 ("Indeed, more than the Community needs for its internal reasons to accede to the ECHR, the ECHR needs Community accession; for without accession there is the danger that the focal point of Human Rights jurisprudence would shift from Strasbourg to Luxembourg."). This suggests the potential impact of the ECJ not only on the Member States, but on the entire Council of Europe.

> The neat arrangement which the ECHR may be said to represent can only work in relation to a core which gives expression to those "rights", or to those "levels of protection", which are said to be universal, transcending any legitimate cultural or political difference among different societies in, at least, the universe of Europe.

Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, *in* The European Union and Human Rights 51, 53-54 (Nanette A. Neuwahl & Allan Rosas eds., 1995).

178. *See* Schutter, *supra* note 136, § II.

179. *See* Janis, *supra* note 144, at 213. These two solutions seem to be the only options that would eradicate the problem. This Note proposes a third solution that does not eliminate the overlap in jurisdiction—it aims to limit the divergence in the face of overlapping jurisdiction. *See infra* Parts II.B.3, III.B-C.

1. EU Accession to the ECHR—Round 2

One way to approach the two-court problem is to amend the EU Treaties to permit Community accession to the ECHR ("Accession Approach"). The EU would reap important legal and political benefits by acceding to the ECHR.[180] Procedurally, EU accession to the Convention would eliminate the possibility of conflicting fundamental rights law interpretations.[181] Politically, accession would strengthen the EU's democratic legitimacy by better defining the EU's relationship to its citizens and reaffirming its commitment to the protection of its citizens' rights.[182] The Accession Approach has failed once, and to succeed would require a fundamental shift in the ECJ's approach to interpreting Community law—a shift that may never occur.[183]

2. Creating a Link Between the Two Courts

Another approach to the problem of overlapping jurisdiction is to create a method of cooperation between the ECJ and the Strasbourg Court by amending both the EU Treaties and the ECHR, so that neither court is subordinated to the other ("Link Approach").[184] A referral mechanism through which the European regional courts could cooperate would assure uniformity and clarity in European Human Rights Law and thereby promote international human rights law in general. It would positively develop the political and legal identity of Europe.[185]

Time and again, on both the national and supranational scale, constitutions and courts have recognized the value of a "single ultimate judicial interpreter."[186] In the *Van Gend en Loos* decision, the ECJ cited the value of uniform application of international law.[187] The integrity of the European fundamental rights protection project rests on the uniform interpretation of European human rights law.[188] Unfortunately, the Link Approach, like the Accession Approach,

---

180. *See* Betten & Grief, *supra* note 124, at 118.

181. *See id.*

182. *Id.* at 118-19.

183. *See supra* Parts I.B.1-2.

184. *See generally* Janis, *supra* note 144 (suggesting a procedural link between the ECJ and the European Court of Human Rights).

185. *See id.* at 212.

186. *See, e.g.*, U.S. Const. art. III (asserting that the "judicial power of the United States, shall be vested in *one supreme Court*, and in such inferior Courts as the Congress may from time to time ordain and establish") (emphasis added); Janis, *supra* note 144, at 214 ("[I]t makes sense both for the success and for the fairness of the legal system of the European Convention on Human Rights that a single court be responsible for giving a final interpretation of European Human Rights Law."); *see also supra* Part I.A.2.

187. *See supra* notes 57-60 and accompanying text.

188. *See* Janis, *supra* note 144, at 214.

requires a power concession by the ECJ and, as such, fails to provide a realistic solution to the two-court problem.[189]

3. The EU Cannot Stop Divergence—The EU Can Only Hope To Contain It

A third approach, aimed at limiting divergent ECHR interpretations by the two courts rather than eliminating them altogether, may be more practical ("Limiting Approach"). The Limiting Approach would establish a system of fundamental rights protection within the EU that promises to meet or exceed the protection afforded by the ECHR, while ensuring that the Luxembourg Court does not develop a jurisprudence affording less protection and at odds with that of the Strasbourg Court. This approach would render the two-court problem theoretical by significantly reducing the potential for any actual conflict between the two courts. The Nice Charter contains the necessary elements for effectuating the Limiting Approach, making the Charter a potent tool in the quest for consistent application of the ECHR at the EU level.[190]

III. A HARMONIZING FORCE IN FUNDAMENTAL RIGHTS PROTECTION

Although discussions of the Accession[191] and Link[192] Approaches are well documented,[193] the less visited Limiting Approach[194] provides the best solution to the problem of divergent ECHR interpretations.[195] Community case law reveals the ECJ's unwillingness to consider the Accession Approach because, to the Court, it represents an unacceptable grant of review to an outside body.[196] The same concerns doom the Link Approach.[197] On the other hand, the Limiting Approach shows promise, and the Nice Charter will effectuate its solution by harmonizing the divergent regional fundamental rights jurisprudences of the two courts.

A. *The ECJ's Refusal To Share*

The Accession and Link Approaches both provide real solutions to the two-court problem, but neither approach offers a realistic solution. This section outlines the objections to the Accession and Link

189. *See infra* Part III.A.2.
190. *See infra* Part III.B.
191. *See supra* Part II.B.1.
192. *See supra* Part II.B.2.
193. *See infra* Parts III.A.1-2.
194. *See supra* Part II.B.3.
195. *See infra* Part III.B.
196. *See infra* Part III.A.1.
197. *See infra* Part III.A.2.

Approaches, and concludes that the jurisprudence of the ECJ suggests that neither approach will resolve the two-court problem.

1. Still No Accession in Sight

The ECJ's unwillingness to compromise its supremacy in the realm of EU law is the main obstacle to the Accession Approach.[198] While it is important for the ECJ to guard its primacy within the EU legal system, its fears concerning the implications of accession may be unfounded.[199] The ECJ has already accepted the possibility of the Community being subject to an outside body's review, provided that the outside body did not interfere with the autonomy of the Community legal order.[200] This suggests that no problem exists in principle with EU accession to the ECHR.[201] The concern then shifts to whether the Strasbourg Court threatens to undermine the autonomy of the Community legal order. It does not.[202] Decisions of the Strasbourg Court would not directly repeal or affect any Community legislation, leaving the autonomy of the Community legal order intact under the ECHR in much the same way the Convention preserves the national constitutional order of each Council of Europe[203] member.[204]

---

198. *See supra* notes 97-98, 124-25 and accompanying text.

199. *See* Betten & Grief, *supra* note 124, at 113-15.

200. *See* Case 1/91, Re the Draft Treaty on a European Economic Area, 1991 E.C.R. I-6079, 6082 ("The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created by such an agreement as regards the interpretation and application of its provisions.").

201. *See* Betten & Grief, *supra* note 124, at 114.

202. *See* Weiler, *supra* note 8, at 620 ("[I]t is doubtful if the European Court of Human Rights would find much to criticize in the approach of the European Court of Justice but the availability of an instance of appeal would have a symbolic value the significance of which should not be underestimated.").

203. The Council of Europe describes itself as:

> an intergovernmental organisation which aims: to protect human rights, pluralist democracy and the rule of law; to promote awareness and encourage the development of Europe's cultural identity and diversity; to seek solutions to problems facing European society (discrimination against minorities, xenophobia, intolerance, environmental protection, human cloning, Aids, drugs, organised crime, etc.); to help consolidate democratic stability in Europe by backing political, legislative and constitutional reform.

An Overview, *at* http://www.coe.int/T/E/Communication%5Fand%5FResearch/Contacts%5Fwith%5Fthe%5Fpublic/About%5FCouncil%5Fof%5FEurope/An%5Foverview/ (last visited Apr. 2, 2003).

204. *See* Betten & Grief, *supra* note 124, at 114-15. Decisions of the European Court of Human Rights do not enter into direct effect within the separate legal systems of the signatory states. *See id.* The states must employ further legislative action in order to implement these decisions. *See id.* In this way the Convention preserves the independent constitutional orders of each of the states, although the signatories have relinquished some sovereignty in order to grant review power to the court in Strasbourg. *See id.* at 115.

Accession to the ECHR also raises a textual concern. One may question whether the Convention's text, in its existing form, readily applies to a multinational organization such as the EU.[205] The text of the ECHR contains many concepts presupposing its members' statehood.[206] Terms such as "national security"[207] and "territorial integrity"[208] assume potential signatories meet the qualifications of statehood. However, such concepts easily apply to the structure and interests of the Community and, as such, do not establish a meaningful block to EU accession.[209]

Accession also presents a procedural problem. EU accession to the ECHR would create a scenario of "double representation" within the institutions of the ECHR for each state that also belongs to the EU.[210] This, too, presents only a theoretical problem, because the Convention charges each of the judges on the Strasbourg Court (much like the justices of the ECJ) to act independently of national pressures—to act impartially, not as a political representative of the nation from which she came.[211]

Ultimately, the only valid consideration accession to the ECHR raises concerns the length of time it would take to resolve litigation involving fundamental rights.[212] The ECHR requires exhaustion of all domestic remedies available to an individual before admitting a matter to the Strasbourg Court.[213] EU accession to the ECHR would create huge delays in the adjudication of fundamental rights cases by placing an entire additional judicial framework between the individual and the Strasbourg Court.[214]

---

205. *See id.*

206. *See id.*

207. ECHR, *supra* note 10, arts. 6(1), 8(2), 10(2), 11(2).

208. *Id.* art. 10(2).

209. *See* Betten & Grief, *supra* note 124, at 115-16 ("[T]he need to restrict certain rights on the grounds of an overriding interest applies to the Community no less than to sovereign States."). The terms in question—"national security," "territorial integrity," and "economic well-being of the country"—all appear in clauses allowing restriction of rights found in the ECHR, making it easy to find analogues in the EU. *See id.* "National security" finds an equivalent in "[*supra*national or EU-wide] security." *See* ECHR, *supra* note 10, arts. 6(1), 8(2), 10(2), 11(2). The analogue to "territorial integrity" would refer to the sum territory of the Member States. *See id.* art. 10(2). "Economic well-being of the country" becomes "economic well-being of the [EU]." *See id.* art. 8(2).

210. *See* Betten & Grief, *supra* note 124, at 116.

211. *See id.* at 117. That is to say, judges on the European Court of Human Rights who take seriously their role as non-political, independent jurists create no instance of single representation upon which to build a concern over double representation. Still, the text of the ECHR suggests an obvious wariness about equal representation in the Convention itself—otherwise it would not call for one judge from each member state.

212. *See id.*

213. *See* ECHR, *supra* note 10, art. 35(1) (stating that the Strasbourg Court may only deal with a matter "after all domestic remedies have been exhausted").

214. *See* Betten & Grief, *supra* note 124, at 117. The framework of the Convention would have to consider the ECJ a national court, so a cause of action in Strasbourg

With the only valid concern regarding EU accession to the ECHR focusing on the increased time in deciding fundamental rights cases, the debate should be narrowed to an evaluation of: (1) the gains of increasing democratic legitimacy within the EU and eliminating potential conflict and confusion between the two international courts, versus (2) the inherent procedural delay in resolving cases brought under the Convention should the EU accede.[215] The ECJ, however, has indicated a lack of willingness to subject itself to review by the Strasbourg Court.[216] In the end, the ECJ's objections, however unfounded, prevent EU accession to the ECHR from becoming a viable solution.

2. The Unlikelihood of a Link

The dissimilar characters of the regional international legal systems of the EU and the Council of Europe present an obstacle to the Link Approach.[217] Members of the Council of Europe outnumber EU Member States almost three to one.[218] Some question whether the Strasbourg Court, with a judge from each member state of the Council, should pass judgments affecting the smaller subsection of EU Member States.[219] In theory, the ECJ can better address the needs of its smaller region and, as such, will likely pass judgments conflicting with those of the Strasbourg Court, which must take a broader approach to its decisions.[220]

---

could only commence after a ruling by the ECJ. *Id.* Cases involving fundamental rights begin with individuals in national courts, meaning ECJ involvement occurs only with an Article 234 request for a preliminary ruling. *See supra* notes 38, 40-45 and accompanying text. In some cases, an exhaustion of domestic remedies will mean a case will go all the way from a nation's constitutional court—at which point the court will be obligated to request a preliminary ruling from the ECJ if the matter concerns Community law—to the ECJ, and then to the Strasbourg Court. *See id.* With cases taking approximately eighteen months to be decided at the ECJ level, and five years to be decided under the ECHR, due to an increasingly packed docket, the Courts could incur huge delays in the process of adjudicating fundamental rights claims. *See* Betten & Grief, *supra* note 124, at 117.

215. *See* Betten & Grief, *supra* note 124, at 113-17.

216. *See supra* notes 125-26 and accompanying text.

217. *See* Lawson, *supra* note 7, at 216.

218. At the time of this writing, there were forty-four members of the Council of Europe, versus fifteen for the European Union. *See* Council of Europe, *at* http://www.coe.int/portalT.asp (last visited Apr. 2, 2003); The European Union at a Glance, *at* http://europa.eu.int/abc-en.htm (last visited Apr. 2, 2003). Granted, the continual expansion of the EU could result in a larger overlap of membership. Nevertheless, the fact that membership in the EU requires a much more significant compromise of state sovereignty than membership in the Council of Europe makes it difficult to imagine that membership in the EU would reach that of the Council.

219. *See* Janis, *supra* note 144, at 216 (asking whether the European Court of Human Rights, with judges from forty-four Council of Europe states should render authoritative judgments affecting a Community of fifteen states).

220. *See id.* (recognizing the argument that it would be "right and proper" for the ECJ to give a sub-regional interpretation of the ECHR at odds with the jurisprudence

Carried out to its logical extreme, this objection would apply to a Strasbourg Court ruling at odds with national legislation violating the Convention, and argues against any agreement that establishes an international oversight mechanism—a proposition that an international court should not dictate anything to a national court, which undoubtedly responds better to the needs of the nation it serves.[221] If the ECJ were to rely on the national constitutional traditions of its member states—as it promised to do—it would enforce a stricter standard of fundamental rights protection than that afforded by the ECHR, making the representation objection invalid.[222]

As with the Accession Approach, the only truly salient issue involves the time it takes to adjudicate claims.[223] For the same reasons EU accession to the ECHR could create an increased amount of time devoted to adjudicating fundamental rights claims, the addition of a referral mechanism between the courts could cause similar delays if a referral happens late in a case.[224] A referral mechanism also may unduly burden the docket of one or both courts, producing further procedural delays.[225]

The current systems also create time-consuming scenarios in which a claimant may bring a second cause of action subsequent to an ECJ or Strasbourg Court ruling on the same matter.[226] This second course of litigation entails more costs and time than a referral during the original proceeding.[227] Unlike a pure accession scenario, a referral

---

of the Strasbourg Court because the two Courts represent different constituencies).

221. This proposition is directly contradicted by the fact that EU Member States have submitted themselves to a number of international courts. While these states have expressed concerns about the adequacy of protection international courts provide, they do not object in principle to the existence of these courts.

222. *See* Janis, *supra* note 144, at 216 ("[R]eal conflict on human rights law in general would usually only be a problem when the interpretation of European Human Rights Law by the Luxembourg Court was *laxer* than the interpretation of the Strasbourg Court."). As much as the potential exists for ECJ interpretations at odds with those of the Strasbourg Court, it still seems as if this should not happen. After all, the EU, in its treaty framework, has charged the ECJ with interpreting the provisions of the ECHR. This suggests that it seeks to build a minimum standard of protection that incorporates the ECHR standard. With this in mind, the smaller size of the EU, relative to the Council of Europe, should plausibly lead to an ability to pass more protective legislation than the ECHR requires. Problems arise when the integrationist motives of the ECJ cause it to reduce the scope of the guarantees of the ECHR in its interpretations, causing actual scenarios in which the courts' interpretations stack up in such a way that the Strasbourg interpretation affords more protection than that issued by Luxembourg. For more discussion on this point, see *supra* Part II.A.

223. *See* Janis, *supra* note 144, at 217.

224. *See id.*; *see also supra* notes 211-13 and accompanying text.

225. *See* Janis, *supra* note 144, at 217; *see also supra* notes 211-13 and accompanying text.

226. *See* Janis, *supra* note 144, at 217.

227. *See id.*

system could eliminate redundancy and allow cases to be resolved earlier and in accordance with both international courts.[228] Ultimately, this may be the best answer, enabling a vital discourse on the interpretation and application of the ECHR by two legitimate courts with differing expertise.[229] The problem remains that, until both of the courts are willing to relinquish their ultimate authorities within their relative areas of expertise, a link between the two remains a political impossibility.[230]

B. *To the Rescue: The Nice Charter Presents a Viable Solution to the Two-Court Problem*

Without eliminating the two-court problem altogether, the EU can only hope to reduce the amount of divergence between the two courts by raising the level of fundamental rights protection in the EU, and harmonizing the jurisprudences of the Luxembourg and Strasbourg Courts.[231] The Nice Charter outlines a system of rights protection within the EU that should solve the two-court problem in exactly this way.[232] To achieve a heightened level of rights protection sensitive to the needs of modern Europe,[233] the Charter includes a comprehensive catalogue of fundamental rights,[234] and incorporates the jurisprudence of the Strasbourg Court into EU law.[235]

Even in its preamble, the Nice Charter affirms a higher protection level than the ECHR; it incorporates all of the rights recognized therein and more.[236] The Charter's text includes enumerated rights, grouped into six main categories: "Dignity,"[237] "Freedoms,"[238] "Equality,"[239] "Solidarity,"[240] "Citizens' Rights,"[241] and "Justice."[242] These enumerated rights cover more ground than the ECHR,

228. *See id.*
229. *See id.* at 213.
230. *Cf.* Betten & Grief, *supra* note 124, at 113-15 (noting that the ECJ's argument that the subjection of the Community to another international system of courts does not fit with past ECJ opinions).
231. *See supra* Part II.B.3.
232. *See generally* Charter, *supra* note 14.
233. Sacerdoti, *supra* note 126, at 43 (noting that the Charter "aims to 'strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments'" (quoting Charter, *supra* note 14)).
234. *See generally* Charter, *supra* note 14 (adopting the case law of the Strasbourg Court in the Preamble, and continuing to enumerate rights in 50 Articles); Sacerdoti, *supra* note 126, at 43 (claiming that the Charter provides a comprehensive rights protection scheme unparalleled in the past fifty years).
235. *See* Charter, *supra* note 14, Preamble.
236. *See id.*
237. *Id.* arts. 1-5.
238. *Id.* arts. 6-19.
239. *Id.* arts. 20-26.
240. *Id.* arts. 27-38.
241. *Id.* arts. 39-46.
242. *Id.* arts. 47-50.

including modern rights necessitated by growth in technology and socioeconomic rights guaranteed in the European Social Charters.[243] The comprehensive nature of the Nice Charter as a codification of fundamental rights establishes a crucial foundation that enables the EU to implement an equal or higher fundamental rights protection standard than that provided under the ECHR.[244]

Perhaps more important to the resolution of the two-court problem, the preamble text incorporates the case law of the European Court of Human Rights.[245] The Charter thus normalizes ECJ interpretation of the ECHR to that of the Strasbourg Court.[246] In the future, each Court will draw upon the same Strasbourg jurisprudence, minimizing the possibility of continuing grossly divergent ECHR interpretations.[247] If successful, this minimization, coupled with the higher protection standard provided in the Charter, ultimately should render the two-court problem purely theoretical.

C. *The Charter in Practice: Does It Work? Will It Work?*

To predict the ability of the Nice Charter to resolve the issue of conflicting supranational human rights courts in Europe, one must

---

243. The European Social Charters include the Council of Europe's European Social Charter and the non-binding Community Charter of the Fundamental Social Rights of Workers. *See* Arnold, *supra* note 89, at 56. These Social Charters inspired many of the social and economic rights found in the European Charter of Fundamental Rights, whereas the ECHR provides most of the civil and political rights. *See id.* at 50-56.

244. *See infra* Part III.C.1.

245. *See* Charter, *supra* note 14, Preamble. The preamble states:

> This Charter reaffirms . . . the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and *the case-law* of the Court of Justice of the European Communities and *of the European Court of Human Rights.*

Id. (emphasis added).

246. *See* Arnold, *supra* note 89, at 52 ("Taking over dispositions of the ECHR and the European Social Charter means a *reception*, i.e., the normativisation of dispositions already existing in a legal order distinct from that of the EC/EU.").

247. Of course, the Courts will undoubtedly come to different conclusions on some issues, much like different federal circuit courts do in the United States. Unlike the federal system in the U.S., the European court system prior to the Nice Charter was analogous to a system of two circuit courts allowed to continue without the possibility of higher review. *See supra* Part II. Although the Charter does not place either court in Europe at the direct mercy of the other, it does establish a system for correction. When the two Courts take different approaches to interpreting the ECHR, the approach taken by the Strasbourg Court, by virtue of the Charter, will become precedent for the ECJ. *See* Arnold, *supra* note 89, at 54-55 (explaining that the Charter "envisions a reception of the Strasbourg jurisprudence" such that "divergent interpretation at the different levels of fundamental rights protection in Europe" is avoided). This reception will harmonize the jurisprudences of the two Courts to a certain degree.

evaluate the Charter in its current non-binding sense,[248] and as potentially binding within the EU's constitutional framework[249] should the Member States ratify the Charter next year.[250] Naturally, the Charter will provide the most effective protection as a binding catalogue of fundamental rights for the European Union.[251] The EU can, however, glean some immediate benefit from the Charter.[252]

Judges within the EU likely will look to the Charter for inspiration in their fundamental rights interpretations, making the Charter a potent source of "soft law."[253] Recent EU case law already reflects this.[254] The ECJ's recent use of the Charter as an inspirational guide

---

248. At this point, the Charter does not constitute part of the constitutional treaty framework of the EU, making it "an act of self-obligation" for the Member States, rather than binding law that can be invoked before the ECJ. *See id.* at 48.

249. There are three ways for the Charter to become binding law within the EU: integrate it into the principle text of the existing EC/EU Treaty itself; "add[] it as an annex to the EC Treaty[;]" or "leav[e] it outside the Treaty," but place a reference to the Charter in the text of the Treaty. *See* Arnold, *supra* note 89, at 48.

250. *See id.*

251. *See id.* at 50 (noting that, if accepted by the people of the EU, the Charter "would assume the highest rank in the hierarchy of norms, superior even to the EC primary law").

252. *See* Carol Harlow, *Voices of Difference in a Plural Community*, 50 Am. J. Comp. L. 339, 362 (2002) ("A European Charter of Rights can only accelerate the process of convergence.").

253. *See* Editorial Comments, 38 Common Mkt. L. Rev. 1, 6 (2001). The comments suggest that:

> [w]ithin the Union, it is very likely that the Charter, a document negotiated by the political entities—representatives of Member States, the Commission, the European Parliament and national parliaments—reproducing rights which are already accepted either as Community law or as expressing a common view of Member States, and proclaimed during a European Council and then published as an interinstitutional agreement, will inspire the judges in their interpretation of fundamental rights, even if it is only 'soft law'. There is no reason why European judges should not use it as a source of inspiration, in the same way as they have used the ECHR.

Id.

254. *See, e.g.*, Joined Cases T-377, T-379 & T-380/00, T-260 & T-272/01, Phillip Morris Int'l Inc. v. Commission, 1 C.M.L.R. 21 (2003) (noting that, although the Charter is not legally binding, "it showed the importance of the rights it set out in the Community legal order"); Case T-321/02, Vannieuwenhuyze-Morin v. Parliament, O.J. 2003 C7/21 (2003) (citing the right to freedom of expression mentioned in Article 11 of the Charter); Case C-491/01, The Queen v. Sec'y of State for Health, *ex parte* British American Tobacco (Investments) Ltd., Celex No. 601J0491 (2002) (referring to the right to property as "enshrined" in Article 17 of the Nice Charter); Case C-223/02, Republic of Finland v. Parliament, O.J. 2002 C202/10 (2002) (citing Article 15(1) of the Charter—freedom to pursue an occupation); Case C-206/02 LR af 1998 A/S v. Commission (appealing Case T-23/99) (overturning a prior decision at odds with Article 7 ECHR, "as introduced in EC law by Article 49 of the Charter of Fundamental Rights of the European Union"); *see also* Case C-94/00, Roquette Frères SA v. Directeur general de la concurrence, la consommation et de la repression des fraudes, Celex No. 600J0094 (2002) (referring to the case-law of the Strasbourg Court in order to clarify the scope of ECHR Article 8, which had been previously interpreted differently by the two courts); Joined Cases C-238, C-244, C-245, C-247, C-250, C-252 & C-254/99, Limburgse Vinyl Maatschappij NV (LVM) v.

identifies a slow but significant process by which the ideals encompassed in the Charter will begin to take effect within the EU.[255] This suggests that the Charter has the potential to remedy the two-court problem, even in its current incarnation as a non-binding declaration of the European Council.

Better still, a binding Nice Charter would give EU citizens an effective means to enforce their fundamental rights against EU legislation.[256] This would ensure even further the ECJ's regular application of the Charter.[257] In either scenario, the Charter will influence positively the development of fundamental rights protection within the EU legal system.[258] That being the case, one must analyze both the Charter's textual implications, and its practical application thus far, in order to determine whether the Charter will, in fact, resolve the confusion and conflict between the Strasbourg and Luxembourg Courts.

1. Does the Charter Truly Signal a Higher Standard of Rights Protection Within the EU?

To resolve the two-court problem in Europe, the Charter must establish a minimum standard of rights protection within the EU that equals or surpasses that provided by the ECHR.[259] By so doing, the EU, although not a signatory to the Convention, would act in accordance with the Convention's aims by invoking a level of protection that meets and exceeds that found in the ECHR.[260] Consistent application of the Charter standard in the EU will ensure that the ECJ always upholds the ECHR minimum standard, as the former includes the latter.[261]

Commission, 2002 E.C.R. I-8375 (citing repeatedly judgments of the European Court of Human Rights and using the Strasbourg case-law to determine standards of interpretation); Case C-62/00, Marks & Spencer plc v. Comm'rs of Customs & Excise, Celex No. 600C0062, para. 74 (2002) (using the jurisprudence of the European Court of Human Rights to determine that "[a]n excessively short period for lodging an action has been held . . . to be contrary to the Convention").

255. Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 Common Mkt. L. Rev. 1307, 1307-08 (2000) ("The solemn declaration of such a charter, whatever its provisional or its final legal status, might be part of an ongoing process that has the potential to transform substantially the Union and its legal system.").

256. Widmann, *supra* note 9, at 345 ("Acquiring full effect would bring the Charter to bear upon the EU's institutions and offer EU citizens an effective means of enforcing their rights either in national courts or before the ECJ." (citing Editorial Comments, 38 Common Mkt. L. Rev. 1, 5 (2001))).

257. *See id.*

258. *See supra* Part I.C.

259. *See supra* notes 231-44 and accompanying text.

260. Imagine a Venn diagram where the circle representing the Charter standard of fundamental rights protection completely encompasses a smaller circle that represents the ECHR standard.

261. *See* Widmann, *supra* note 9, at 347-48; *see also* Charter, *supra* note 14, art.

One could argue that the Charter only nominally establishes such a higher standard.[262] This argument focuses on Article 53 of the Charter, which, in the case of divergent standards, allows existing national and international human rights protection standards that provide greater protection than EU standards to prevail.[263] In other words, the EU rights protection scheme would mimic the "uniform moveable standard" of rights protection provided by the ECHR—in cases where higher protection levels than those proposed by the EU already existed within the Member States, the stronger standard would win.[264] This model of rights protection disturbs those who believe supremacy, one of the principal doctrines of the Community legal order, hinges upon uniformity.[265]

Supremacy does not, however, hinge on uniformity. One must consider that the Charter principally aims to establish a *minimum* fundamental rights protection standard for the EU.[266] Article 53 does not undermine this purpose.[267] The EU standard prevails in the uniform moveable standard model, because the stricter national standard, by default, meets the laxer Community standard—much in the way that by applying the Charter, the EU ensures compliance with the ECHR.[268]

Some argue that this type of rights analysis, comparing different rights protection systems to determine which guarantees a higher protection level, comes from a "misconceived perception" as to the quantifiability of human rights.[269] Although protecting human rights

---

52(3) (establishing that the EU must afford equivalent, if not greater, protection to those rights derived from the ECHR).

262. *See* Widmann, *supra* note 9, at 351.

263. Article 53 reads:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Charter, *supra* note 14, art. 53.

264. *See* Widmann, *supra* note 9, at 348.

265. Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 Wash. L. Rev. 1103, 1122-23 (1986) (noting that, if the EU were to bow to the specificity of any national legal order, "the cardinal principle of supremacy" would be destroyed).

266. *See* Arnold, *supra* note 89, at 58 (noting that Charter article 52(3) "allows European Union Law to have a more extensive protection than laid down by the Convention").

267. *See supra* notes 132-42 and accompanying text. *Contra* Widmann, *supra* note 9 (arguing that Article 53 undermines the Charter's impact).

268. *See* Widmann, *supra* note 9, at 351; *supra* Part III.B.

269. *See* Widmann, *supra* note 9, at 353 (basing her argument on a discussion found in Ronald Dworkin's book, Taking Rights Seriously (1977)).

does require a society to balance competing interests that may be specific to that society,[270] it must still be possible to compare rights protection standards against one another.[271] Otherwise, it would be impossible to ascertain whether legislation protecting fundamental rights complies with local constitutional or international standards.[272]

In more complex cases involving conflicting rights, or those that tend to receive protection at levels inversely proportional to one another, a seesaw effect will occur.[273] Raising the protection standard for one right will reduce the ability to uphold the protection standard for the conflicting right.[274] Should this standard dip below the minimum standard established by the ECHR and embraced by the Charter, the Charter will correct the standard, thereby lowering the protection level of the competing right.[275]

The Commission drafted the Charter intending to enforce the ECHR standard for rights derived from the Convention, and to add protection for rights drawn from other sources.[276] This allows for two possible interpretations of the Charter's text: (1) that concurrent enforcement of all the rights, with the scope prescribed by the ECHR for those concerned, is feasible, or (2) that the Charter would represent, at the very least, a codification at the EU level of the rights protected by the ECHR, with any rights presently in conflict with the protection level afforded by ECHR standards left as aspirations.[277]

---

270. *Id.*

271. If it were impossible to compare rights protection standards, one would be unable to determine when a violation of one's rights has taken place. Deeming a state's laws in violation of a constitutional standard requires making a judgment, perhaps one right at a time, about whether that state's overall rights protection standard meets the constitutional standard. This judgment necessarily compares the two standards of protection.

272. *See supra* note 271.

273. *See* Widmann, *supra* note 9, at 355 (noting "fundamental rights cannot be ranked against one another"). A good example of conflicting rights would be the right to education, *see* Charter, *supra* note 14, art. 14, and the right to social security and social assistance, *see* Charter, *supra* note 14, art. 34. Programs established to provide these rights to individuals inevitably draw their resources from the same finite pool. Increasing the level of protection for one would reduce the ability to protect the other. Again, Widmann's illustration of the problem fails to provide a convincing argument. She suggests that the protection of some of the socioeconomic rights found in the Nice Charter, and not in the ECHR, could result in reduced protection given to rights derived from the ECHR, *see* Widmann, *supra* note 9, at 355, while ignoring that much of the Charter seeks to create uniformity between the ECHR and the autonomous EU standard. *See* Arnold, *supra* note 89, at 58-59. *But see* Widmann, *supra* note 9, at 355.

274. *See* Widmann, *supra* note 9, at 355.

275. *See* Arnold, *supra* note 89, at 58 (noting that the scope of the Charter rights which correspond to ECHR rights shall be identical).

276. These sources include "the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, . . . [and] the Social Charters adopted by the Community and by the Council of Europe." *See* Charter, *supra* note 14, Preamble.

277. *See* Charter, *supra* note 14. To suggest that the Charter does not uphold at

Both interpretations suggest that, despite the existence of conflicting rights within the Charter, the EU and its Member States will ultimately strike a desired balance that, at the very least, affords the minimum ECHR protection standard to all rights.[278]

When determining whether the Nice Charter establishes a more protective standard than the ECHR, critics may level a more serious allegation—that the Charter will restrict, not enhance, fundamental rights protection within the Member States.[279] In certain cases, EU legislation that meets Charter standards probably will provide less protection than that afforded at the national level within some Member States.[280] When Member States apply EU legislation at the national level, an act in accordance with the Charter's provisions may supplant stronger existing rights-protective national legislation and restrict fundamental rights protection within that State.[281]

Although this means that Article 53 fails as a savings clause in the traditional sense, designed to ensure consistency among prior fundamental rights instruments and standards in effect at the time of ratification,[282] the Nice Charter does not fail to advance the cause of fundamental rights protection in Europe. Absent the Charter, the EU would still threaten to restrict rights protection at the national level, except without a comprehensive professed autonomous EU rights protection standard.[283] With the Charter, the EU guarantees that, even when restricting rights protection within the Member States, the standard will never drop sufficiently to force unwarranted deviation from the ECHR.[284]

2. Can the Charter Effectively Normalize the Courts' Jurisprudences?

Having established that the Nice Charter does allow for a rights protection standard equal to or greater than that provided by the ECHR, the remaining concern involves the scope of protection afforded under the Charter. Where the scope of protection between two rights protection schemes differs,[285] a measurably higher

---

least the standard prescribed by the ECHR would render the entire document superfluous.

278. *See* Widmann, *supra* note 9, at 355-56.

279. *See id.* at 351.

280. *See id.* at 350-51.

281. *Id.* at 351-52.

282. *Id.* at 356 ("A savings clause meant for supervisory international regimes is unworkable in a system where supranational powers implement policies bearing directly upon signatory states.").

283. *See supra* Part I.A.2.

284. *See, e.g.*, Arnold, *supra* note 89, at 58-59 (describing the Charter's ability to afford a higher standard of protection than the ECHR); Widmann, *supra* note 9, at 351 (noting that "[w]hen national and regional laws conflict, supremacy requires regional standards to prevail").

285. *See* Widmann, *supra* note 9, at 353. Widmann refers to "divergent judgments rendered by the ECHR and ECJ" as an example of conflict caused by divergent

protection standard must contain the entirety of the scope of the minimum protection standard. Article 52(3) of the Charter, directly addresses the issue of scope.[286]

The Nice Charter incorporates and enumerates all the rights protected under the ECHR.[287] Now the critical determination involves whether the Charter takes the all-important step of eliminating divergent rulings from the Strasbourg and Luxembourg Courts that would afford lower rights protection levels within the EU. Only then can the Charter avoid the risk of falling short when it comes to dictating the enforceable scope of a right and, therefore, present a viable solution to the two-court problem.[288]

As clearly as the text of the Charter incorporates protection of the civil and political rights of the ECHR,[289] the Charter also clearly aims to establish a consistent interpretation of the ECHR by both courts charged with the Convention's interpretation.[290] Should the Member States ratify the Charter into the EU's constitutional treaty framework, they will proclaim a legally binding commitment to harmonized ECHR jurisprudences.[291] The question then becomes whether this commitment achieves the goal of harmonization. Recent EU case history suggests that it will.[292]

An exemplar of the Charter's potential to resolve divergent interpretations of the scope of fundamental rights protection under the ECHR is *Roquette Frères SA v. Directeur general*.[293] In this case, the ECJ, invoking the jurisprudence of the European Court of Human

---

scopes of rights protection. *Id.* at 354. She mistakenly uses a pair of cases decided in 1989 and 1992 to illustrate a problem raised by Charter Article 52(3), which ties the scope of the rights protected in the Charter to the scope recognized at the time of the Convention. *See id.* The Charter, brought about in 2000, holds with it the potential to prevent such issues of differing scope from occurring in the future. In fact, the ECJ, citing the Charter, corrected the divergent scopes of protection in these exact cases with its decision in *Roquette Frères SA v. Directeur general de la concurrence, la consommation et de la repression des fraudes*. Case C-94/00, Celex No. 600J0094 (2002). For a further discussion of this case, see *infra* notes 293-302, and the accompanying text.

286. Charter, *supra* note 14, art. 52(3) ("In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.").

287. *See, e.g.*, Arnold, *supra* note 89, at 50 (noting that the Charter's concept of fundamental rights is "essentially shaped by the ECHR"); Sacerdoti, *supra* note 126, at 43 (suggesting that the ECHR's catalogue of rights appears "dated" next to the Charter).

288. *See supra* Part II.B.3; *see also* Arnold, *supra* note 89, at 54-58.

289. *See supra* text accompanying note 236.

290. *See supra* note 245 and accompanying text.

291. *See* Arnold, *supra* note 89, at 48 ("The Charter would acquire through incorporation into the Treaties the same legal force as primary law." (citation omitted)).

292. *See supra* note 254.

293. Case C-94/00, Celex No. 600J0094 (2002).

Rights, resolved a ten-year rift in the Courts' ECHR Article 8 interpretations.[294]

In a March 2000 case deciding whether Community law allowed government authorized entry and seizure in a place of business for the purpose of gathering inculpatory evidence,[295] a French court recognized that the ECJ ruling in the *Hoechst*[296] case found nothing in Community law suggesting the extension of the right of the inviolability of the home to places of business, but also noticed that the European Court of Human Rights ruling in the *Niemietz*[297] case found that Article 8 protection did, indeed, extend to places of business.[298] These observations prompted the court to petition the ECJ for a preliminary ruling.[299]

The ECJ, in its decision issued in October 2002, wrote: "[f]or the purposes of determining the scope of [Article 8] in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*."[300] Looking to Strasbourg case law, the ECJ found that it supported two principles: that Article 8 may be extended to cover business premises in some cases, and that the right of interference found in Article 8(2) may be more far-reaching where a place of business is concerned.[301] Using these principles, derived from Strasbourg case law in conflict with its own jurisprudence, the ECJ issued its preliminary ruling, which acknowledged that Article 8 protection did extend to places of business and that national courts could deny the Commission's request to search a place of business for lack of sufficient cause.[302]

---

294. *See* Dean Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities*, *in* The EU and Human Rights 757, 776 (Philip Alston ed., 1999). For a description of the conflict, see *supra* text accompanying notes 158-63.

295. Case C-94/00, Roquette Frères SA v. Directeur general de la concurrence, la consommation et de la repression des fraudes, Celex No. 600J0094, grounds, para. 1-2 (2002).

296. Joined Cases 46/87 & 227/88, Hoechst AG v. Commission, 1989 E.C.R. 2859 (1989).

297. Niemietz v. Germany, App. No. 13710/88, 16 Eur. H.R. Rep. 97 (1992).

298. *Roquette Frères SA*, Case C-94/00, grounds, para. 19-20.

299. *See id.* grounds, para. 21.

300. *See id.* grounds, para. 29 (italics added).

301. *See id.*

302. *See id.* Specifically, the Court held:

> [I]t must be open to the competent national court to refuse to grant the coercive measures applied for where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, or the evidence sought so peripheral, that the intervention in the sphere of the private activities of a legal person which a search using law-enforcement authorities entails necessarily appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation.

Id. grounds, para. 80.

The *Roquette Frères* example illustrates perfectly how the Nice Charter, by encouraging, and perhaps someday obligating, the ECJ to look to the Strasbourg Court's case law, will reduce or possibly eliminate diverging interpretations of the rights afforded by the Convention that would result in an EU standard less protective than that of the ECHR.[303] By so doing, the Charter will secure, at the very least, the full scope of rights protection afforded by the ECHR.[304] This would represent a tremendous advance for fundamental rights protection in Europe, as it would serve the same purpose as EU accession to the ECHR without requiring the ECJ to relinquish its supremacy within the EU legal order.[305] At the same time, the requisite attention paid by the ECJ to the Strasbourg jurisprudence will bolster the authority of the European Court of Human Rights.[306]

CONCLUSION

Continued integration within the European Union has expanded the scope of EU law into areas outside its original competence, especially that of fundamental rights protection. What began as an attempt to protect ECJ supremacy within the Community legal order against threats mounted by national courts alleging inadequate human rights protection in the original treaty system has blossomed into a rich fundamental rights jurisprudence under the European Court of Justice. This expansion of the scope of the ECJ's power creates the potential for conflict and confusion, as Europe already has a court with established legitimacy and competence in human rights protection—the European Court of Human Rights in Strasbourg. The future status of fundamental rights protection in the European Union, and in all of Europe, rests on the two courts' ability to avoid diverging interpretations detrimental to the application of the Convention for the Protection of Human Rights and Fundamental Freedoms, and to ensure uniform minimum standards for fundamental rights protection across Europe.

Assuming that the ECJ will not reverse its stance regarding the grant of judicial review of Community functions to the Strasbourg Court in certain cases, one solution remains: to create a guaranteed EU fundamental rights standard equal or superior to that found within the ECHR. This solution relegates the two-court problem to the realm of theory by minimizing or eliminating the potential for divergent interpretations affording less protection within the EU. In order to function properly, such a standard must include a comprehensive catalogue of fundamental rights, enforceable within

303. *See supra* Part III.B.
304. *See supra* Part III.B.
305. *See supra* Parts I.B.2, II.B.1, III.A.1.
306. There would still exist a minor possibility of harmful divergence, however greatly reduced—and no longer a pressing concern.

the EU, which meets or surpasses that found in the ECHR, and a normalizing mechanism to ensure harmony between the jurisprudences of the Strasbourg and Luxembourg Courts with respect to minimum fundamental rights protection standards. The European Charter on Fundamental Rights, declared on December 7, 2000, at the European Council meeting in Nice, meets these criteria. Whether or not the EU Member States approve it for inclusion in the treaty framework of the European Union in 2004, the Charter represents the best and most realistic way to guarantee and strengthen individual rights protection within Europe.

The Charter accomplishes this feat by including all the rights protected by the ECHR, and more. Its self-proclaimed devotion to the ECHR suggests that it seeks to maintain at least the Convention's protection level for the rights derived from the ECHR, with the possibility of expanding EU rights protection into the realm of socioeconomic and group rights, or second- and third-generation rights, respectively. In so doing, the Charter leaves only the possibility of diverging jurisprudences lessening the scope of the rights protection afforded by the ECHR within the EU.

The Nice Charter deals handily with this problem, by creating convergence with regard to the scope of fundamental rights standards as outlined in the ECHR, and incorporating the entire existing jurisprudence of the Strasbourg Court into that of the ECJ. In this manner, the Charter obligates the ECJ to honor the case law precedent of the European Court of Human Rights without making the Luxembourg Court subordinate to the Strasbourg Court. Conversely, competing interpretations of ECHR provisions issued from Luxembourg that reduce the scope of protection afforded under the Convention will no longer undermine the authority of the European Court of Human Rights.

In these respects, the Charter properly resolves the two-court problem. Already, as a non-binding declaration, the Charter unifies the courts' ECHR interpretations, thereby granting force and legitimacy to both supranational courts and to the fundamental rights they seek to protect. To increase the Nice Charter's impact, the Member States should ratify the Charter, giving it binding legal force within the EU. Binding or not, the Nice Charter promises to accelerate the process of bringing uniformity to ECHR interpretation, leaving the EU and the rest of Europe to pursue even loftier human rights projects.