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Constitutional Supremacy: National Constitutions vs. European Law

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Abstract:
Almost 50 years after the European Court of Justice clearly established the supremacy of Community law, the question regarding the primacy of law within the European context remains unresolved. By exploring the perspectives of the ECJ and the German Federal Constitutional Court, this article seeks to outline the controversies relating to constitutional supremacy and analyses the theoretical underpinnings of this difference. It will be suggested that by focussing only on select liberal democratic principles, each court not only constructs their respective claims to supremacy, but they do so in opposition to each other. Thus rather than creating constitutional integration throughout the European Union, the supremacy discourse has created fault lines along which further tension may arise. By drawing on Kumm's theory this paper will conclude by suggesting an alternative lens through which such conflicts may be resolved.

Key words: Constitution conflict, Costa, European Court of Justice, European legal integration, European Union, Solange

Since the beginnings of European economic integration, in the aftermath of the Second World War, the European Union (EU) has evolved to become a new type of polity which cannot be categorised as either a sovereign state or an international organisation.[2] This political and economic union has posed unique challenges to European and national institutions as they attempt to navigate this new territory using traditional conceptual tools. One such challenge that has been the subject of significant intellectual debate, is that of the relationship between EU law and national law. Almost 50 years after the European Court of Justice (ECJ) clearly established the supremacy of Community law, the question regarding the primacy of law within the European context remains unresolved.

This article will explore the controversy surrounding constitutional supremacy by comparing the perspectives of the ECJ and the German Federal Constitutional Court (FCC) on this issue. By outlining the conceptual foundation on which claims to constitutional primacy lay, this paper will reveal an alternative method for addressing such issues. Firstly it will be argued that the European monist position of the ECJ is grounded in a desire to promote the rule of law at a European level. In contrast, the German FCC's position may be termed a democratic statist approach, as it invokes its own constitution as the ultimate source of legitimacy, which is derived from the German demos. However by analysing the theoretical underpinnings on which this approach rests, this article will reveal its weaknesses. It will be suggested that by focussing only on select liberal democratic principles, each court not only constructs their respective claims to supremacy, but they do so in opposition to the

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[2] P. Craig and G. De Burca (eds), *EU Law: Text, Cases and Materials*, Oxford, Oxford University Press, 2008.

other. Thus, rather than creating constitutional integration throughout the European Union, the supremacy discourse has created fault lines along which further tension may arise. Accordingly, this paper will draw on Kumm's theory to suggest an alternative lens through which such questions may be explored. By debunking the theories on which the current approaches rest, Kumm draws on the common normativity of both legal orders to create a holistic framework in which courts can engage with conflict issues through the balancing of relevant principles.

Although there were no provisions dealing with supremacy of Community law over national law in the European Economic Community (EEC) Treaty, the ECJ addressed this issue early in its jurisprudence.[3] The court enunciated the conceptual basis of EU law supremacy in the case of *Costa*,[4] before subsequently expanding its ambit.

In *Costa*, the court adopted a European monist position by arguing that supremacy of Community law was necessary to ensure its effective and uniform application, so as to maintain the coherent legal order that the treaties sought to establish.[5] It was held that through the ratification of the EEC Treaty, Member States created a new legal order by transferring to the new Community institutions "real powers stemming from a limitation of sovereignty."[6] Moreover, given the Treaty's aims were integration and co-operation between members, to accord primacy to domestic law would be to undermine those aims. Accordingly this case may be understood as the ECJ drawing on the notion of an autonomous legal order, which promotes the realisation of the rule of law beyond state boundaries, as a conceptual basis for granting EU law supremacy.

This idea of EU supremacy was subsequently extended in the cases of *Internationale Handeslgesellschaft*[7] and *Simmenthal*[8]. In *Handeslgesellschaft* the ECJ rejected the argument that fundamental rights enshrined in the German constitution could be invoked to invalidate EU law. The court indicated that allowing recourse to national rules would impede the uniform applicability and efficacy of Community law.[9] Consequently, the ECJ maintained that not even fundamental rights expressed in a national constitution could provide a limit to EU law.

The court reaffirmed this position in *Simmenthal*, by upholding the primacy of EU law over the Italian constitution. However the ECJ also broadened the ambit of this doctrine by requiring all national courts that apply EU law to set aside conflicting national legislation.[10] This is of particular significance for many member States as often, only the national Constitutional Court has the power to decide on the constitutionality of national law. However in *Simmenthal* the ECJ held that any court with jurisdiction to apply Community law is under a duty to give full effect to those

[3] Ibid., p. 344.
[4] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
[5] M. Kumm 'Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice,' *Common Market Law Review*, Vol. 36, 1999, pp. 354-355.
[6] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
[7] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[8] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.
[9] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[10] P. Allot, 'Supremacy of European Community Law,' *The Cambridge Law Journal*, Vol. 38, No. 1, 1979 p. 21.

provisions, and must refuse to apply national legislation in the event of a conflict.[11] Thus inferior courts are not required to conform to national processes and submit questions of conflicting legislation to the Constitutional Court for judgment.

Accordingly, by 1978 the ECJ had firmly established the primacy of EU law. The court has used the skeletal provisions in the foundation treaties to consistently maintain the supremacy of EU law over national law, whatever its nature, so that national constitutions could not be invoked as a limitation on the applicability of European legislation.[12] Moreover national courts at every level were granted the power, by the ECJ, to set aside national legislation in the event of a conflict with EU law, despite existing national court hierarchies that reserved such a role for the highest constitutional court. The ECJ justified the supremacy of EU law by drawing on the liberal ideal of the rule of law at a supranational a level, and the necessity of effective and uniform application of EU law to ensure a functional common market.

Yet can it be accepted that the ECJ has settled the issue? To unquestioningly accept its decisions regarding supremacy would be to impute to it a normative authority to decide such issues. However any justification of such imputation would resurrect the question of the proper interpretation of the Treaty-constituted order, and in turn resurrect the issues which the ECJ has been said to have authoritatively determined.[13] While self-referentiality is a characteristic of most legal orders, in that the highest legal authority can appeal to no higher confirmation of its authority than that expressed in its own jurisprudence, such circularity of reasoning provides little guidance in a situation in which the very position of highest legal authority is itself at stake.[14] Given that the highest tribunals of Member States also belong to normative orders in which they claim ultimate legal authority, the intersection of these legal orders necessarily creates a bi-dimensional framework in which questions of supremacy arise.[15] Accordingly, the ECJ's elaboration of EU supremacy is but the first dimension. It is only when the courts of Member States accept the ECJ's perspective that the primacy of European law can be held to be settled.[16] Consequently this article will now explore the position of Member State courts to determine whether the second dimension of the bi-dimensional framework of supremacy is met. This analysis will proceed along the four lines of potential constitutional conflict between EU law and national law. That is, contention about the supremacy of EU law can arise in four different areas from the perspective of Member States. Firstly, the Member State court must determine whether it accepts the general primacy of EU law over national law. Secondly, should it accept this general proposition, the conceptual basis on which it is accepted must be identified. Contention will occur if the national court accepts EU supremacy for reasons other than those expressed by the ECJ in *Costa*.[17] Thirdly, conflict may arise should the Member State court impose limits on its acceptance of supremacy, so that its national constitution restricts the application of conflicting EU law. Finally constitutional conflict may manifest itself in questions of judicial review. While the

[11] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.
[12] N. MacCormick, 'Risking Constitutional Collision in Europe?,' *Oxford Journal of Legal Studies*, Vol. 18, No. 3, 1998, p. 520.
[13] Ibid.
[14] Ibid., p. 521.
[15] J. Weiler, 'The Community System: the Dual Character of Supranationalism,' *Yearbook of European Law*, Vol. 1, 1981, pp. 275 - 276.
[16] Ibid., pp. 275-276.
[17] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

ECJ maintains that it has the exclusive power to review and invalidate Union acts which are *ultra vires*,[18] a national court claiming that it is the ultimate arbiter of such questions will lie in opposition to the ECJ perspective.

Having established the framework of potential constitutional conflict through which a court's jurisprudence may be understood, this article will now use this framework to examine the position of the German FCC. The German position has been identified as an informative example for this analysis as Germany has not only been a Member State since the inception of the European legal order, but its highest court has also developed a rich body of doctrine dealing with supremacy issues.[19] Accordingly, German case law engages with each of the four lines of constitutional conflict outlined in the above framework. Therefore it provides a pertinent example of how such issues are resolved, thereby illuminating the concerns faced by other Member States. This is of particular value given that even original Member States, such as France, have not yet been required to adjudicate conflicts in all four areas.[20]

The original position of the German FCC was expounded in the case of *Solange I*,[21] in response to the ECJ ruling in *Handeslgesellschaft*.[22] As outlined above, in *Handeslgesellschaft* the ECJ held that the supremacy of Community law applied to all national law, notwithstanding its status. As such a fundamental principle under the German constitution could not be invoked to challenge the primacy of Community law. On receiving this ruling, the German Administrative Court submitted the case to the German FCC on the grounds that article 24 of the German Constitution, which allows for the transfer of legislative power to international organisations, could not provide the basis for an inter-state organisation to override the Constitution. The FCC held that even though article 24 of the Constitution permits the transfer of sovereign rights to inter-state institutions through treaty ratification, it does not leave open the opportunity to amend the Constitution by foregoing the formal process.[23] Accordingly article 24 nullifies any amendment to the EEC Treaty which would destroy the identity of the German Constitution, by denying citizens the protection afforded to them by the basic rights enshrined in their Constitution.[24] In reaching this conclusion the FCC emphasised the need for national courts to act as a check on Community law, in light of the limited protection of rights provided at the European level.[25] Therefore the highest German court refused to recognise the unconditional supremacy of EU law, but rather emphasised the primacy of fundamental rights enshrined in the Constitution in cases of conflict.[26]

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[18] Case 314/85 *Firma Foto Frost v Hauptzollant Lübeck-Ost* [1987] ECR 4199.
[19] Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 352.
[20] Craig and De Burca, op. cit., p. 354.
[21] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.
[22] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[23] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.
[24] W. Roth, 'The application of Community Law in West Germany: 1980-1990,' *Common Market Law Review*, Vol. 28, 1991, pp. 137, 142.
[25] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.
[26] N. Reich, 'Judge-made 'Europe á la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation,' *European Journal of International Law*, Vol. 7, 1996, pp. 103-104.

While the *Solange I* decision illustrates the strong position the German FCC adopted in relation to the first expressions of EU law supremacy, case law since has demonstrated that the court has assumed a more deferential stance. In 1987 the court passed its *Solange II* decision in which it reconsidered the primacy issue.[27] The distinguishing factor in this case was the extent to which the Community institutions, including the ECJ, had adopted a fundamental rights discourse through which basic rights were adequately protected.[28] The FCC held that:

> *"in view of these developments, so long as the European Communities and in particular the case law of the European court, generally ensured an effective protection of fundamental rights...which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, the FCC will no longer exercise its jurisdiction to...review legislation by the standard of the fundamental rights contained in the Constitution."*[29]

Accordingly, while this statement indicates that the FCC has retreated from its original position in relation to the primacy of EU law, it cannot be understood as the recognition of unconditional supremacy. The court is cautious not to surrender its jurisdiction, it merely states that it will not exercise this jurisdiction, provided rights protection at the EU level is maintained.[30] The court preserves its final authority to use the German Constitution as a means of nullifying EU legislation.[31]

The *Maastricht* decision reiterated the position outlined in *Solange II* in relation to fundamental rights protection, albeit in slightly different terms.[32] This case concerned a challenge to the constitutionality of Germany's ratification of the Treaty of the European Union (TEU). While the FCC held that ratification was compatible with the Constitution, it made several important comments regarding the relationship between the national court and the ECJ. It affirmed Germany's status as a sovereign state and emphasised that it would not relinquish its power to decide on the compatibility of Community law with the fundamental rights outlined in the German Constitution.[33] However it replaced the "no jurisdiction, so long as"[34] test expressed in *Solange II*, with the "jurisdiction, but exercised in a relationship of co-operation with the ECJ" formula.[35] However the practical significance of this amendment is limited in relation to the question of supremacy.[36] The new test preserves the FCC's jurisdiction, provided for in *Solange II*, to review and nullify EU law in situations of conflict.

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[27] *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.
[28] Roth, op. cit., p. 143.
[29] *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.
[30] Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice,* op. cit., p. 363.
[31] Craig and De Burca op. cit., p. 359.
[32] *Brunner v The European Union Treaty* [1994] 1 CMLR 57.
[33] *Brunner v The European Union Treaty* [1994] 1 CMLR 57.
[34] *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225.
[35] *Brunner v The European Union Treaty* [1994] 1 CMLR 57.
[36] Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice,* op. cit., p. 369.

Moreover the court also used this case to describe its perception of its own role within the European legal order. It stated that national courts are to exercise a power of review over Community competences, so that should the Community act *ultra vires*, that is, attempt to exercise powers which are not clearly provided for in the treaties, a national court may rule that the Community had no legal basis to perform such act.[37] Accordingly, the act would be held void for lack of competence. Of particular importance is the German court's retention of its power of review of the ECJ's decisions. So that should the ECJ itself act *ultra vires* in handing down a decision which would qualify as a an amendment to the Treaty, the FCC retains the position as the ultimate arbiter of constitutionality, empowered to strike down the ECJ's finding as applicable law in Germany.[38]

Having established the German FCC's position in relation to supremacy, it is now possible to contrast this perspective with that of the ECJ using the lens provided by the above constitutional conflict framework. While the FCC accepts the primacy of EU law, it does so only where there is no conflict with the German Constitution and in circumstances where there is no question relating to competence. Accordingly it does not accept the view, propounded by the ECJ, that EU law is unconditionally supreme. Moreover, where it does accept the primacy of EU law, the conceptual basis on which this acceptance derives, is article 24 of the German Constitution.[39] Thus it is not that Germany's ratification of the treaty created an autonomous European legal order, as put forward by the ECJ in *Costa,*[40] but rather it is Germany's internal legal regime which creates the foundation on which supremacy is grounded.[41]

Furthermore the FCC's stance in relation to supremacy also diverges from the ECJ's view with regards to the two final lines of potential conflict. Firstly, it has continued to assert its jurisdiction where EU law impinges on fundamental rights protection by the Constitution. This is so notwithstanding the ECJ's judgment in *Handelsgesellschaft*[42] which maintained that EU law supremacy applied even to national constitutions. Finally the FCC has asserted itself as the ultimate arbiter of constitutional conflict so that it retains the power to review and adjudicate questions of ECJ jurisdiction.

Accordingly the second dimension of the bi-dimensional framework of supremacy is not met. Although the German FCC accepts the primacy of EU law generally, its understanding of what constitutes this supremacy stands in contrast to the position of the ECJ. Germany's acceptance of EU law primacy is not only limited by constitutional constraints, but the conceptual foundation for such acceptance is firmly rooted in the German legal regime. Thus while the practical consequences of the German FCC's decisions may not differ dramatically to the ECJ's, because the national court has accepted EU law primacy, it does so only by accommodating the concept of supremacy within its own national legal framework. Accordingly the theoretical backgrounds, against which each court develops its understanding of

[37] *Brunner v The European Union Treaty* [1994] 1 CMLR 57.
[38] Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice,* op. cit., p. 364.
[39] Roth, op. cit., p. 142.
[40] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
[41] N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth,* Oxford: Oxford University Press, 1999, p. 110.
[42] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

supremacy, stand in opposition to each other, thus creating a tension at the theoretical level which has the potential to evolve into practical manifestations of the conflict in the future.

By exploring the differing perspectives of EU law primacy held by the ECJ and the German FCC, this paper has identified the conceptual sphere as the locus for constitutional conflict. However it is only by moving beyond the identification of the differing approaches of these courts, to reveal the theoretical underpinnings of such difference, that the source of the conflict may be understood, and thus resolved.

Accordingly this article will examine the traditional theoretical approach to supremacy to determine whether the underpinnings on which it rests provide a strong foundation for national courts to mount their primacy arguments. Kumm argues that the position reached by the German FCC is the "consequence of adopting a conception of democratic statism as a normative framework and constructive starting point."[43] This traditional approach of democratic statism does not provide a judge, faced with constitutional conflict, with a toolkit to address such issues, but rather points to the national constitution as the framework within which such questions are to be resolved. This position is adopted because supremacy of the national constitution is said to be a defining feature of the practice of national law.[44] Therefore judges are required to determine outcomes within the internal system by reference to the constitution which is the 'ultimate legal rule.' Questions about whether the constitution should in fact be the ultimate legal rule, lie beyond the scope of legal decision making.[45]

It may be questioned whether it is valid to maintain that legal practice is defined by national constitutional supremacy as the ultimate legal rule, so that judges cannot engage with constitutional conflict issues.[46] National constitutional supremacy may only be a defining feature of the practice of national law, if the set of rules which determine what is to count as law, includes the rule of national constitutional supremacy. However law is not a practice that is defined by its rules.[47] The ultimate legal rule is a defining feature of legal practice "only so long as it is recognised as such by its participants."[48] Therefore if the participants of the German legal practice begin to recognise European constitutional supremacy, the national constitution will become displaced as the defining rule of the German system.

This argument appears to refute the idea that judges must accept the framework in which they operate, without questioning why such a framework should be adopted. However if legal reasoning is to be defined as the application of rules, which are constituted by an ultimate set of rules, to resolve issues, then the decision about what should be the ultimate rule cannot be resolved through legal reasoning.[49] By framing the resolution of constitutional conflict as the search for an ultimate legal rule, it

[43] Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 365.
[44] N. Walker, 'The Idea of Constitutional Pluralism,' *The Modern Law Review*, Vol. 65, No. 3, 2002, pp. 317, 340.
[45] M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty,' *European Law Journal* Vol. 11, No. 3, 2005, p.270.
[46] Ibid., p. 271.
[47] Walker, op. cit., 340.
[48] Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 273.
[49] Ibid., p. 273.

becomes conceptually impossible for the law to provide guidance as to whether national constitutional supremacy or European supremacy should be the ultimate legal rule.[50] It is a legal non-issue according to this theory.

Consequently the traditional approach of searching for an ultimate source of legitimacy puts the question of which constitutional supremacy to adopt, beyond the scope of legal reasoning. Firstly, it denies judges the opportunity to engage with the issue by requiring them to resolve issues by reference to the internal legal order, as confined by the national constitution. But even a critique of this approach, which questions the blind adoption of a particular ultimate legal rule, defines itself out of resolving constitutional conflict issues within the legal sphere, because the critique itself sees the resolution of the issue as stemming from the adoption of some form of ultimate legal rule.

Accordingly the democratic statist approach is forced to identify an alternate ultimate source of legitimacy for the national constitution, if it is to continue to assert national constitutional supremacy. This approach has sought to locate this source of legitimacy of the national system by reference to the idea of 'we the people' as the original constituent power establishing the constitution.[51] The demos is understood as the normative basis for the supremacy of the constitution as it is the entity which firstly creates the constitutional system and then practices self-determination within the constitutional framework it established.[52] Thus the people are the source of legitimacy on which national constitutional supremacy is said to rest.

Applying this theory to the German context, the FCC asserts its jurisdiction to nullify EU law on the basis that it is either inconsistent with German fundamental rights enshrined in the German constitution, or that it is *ultra vires*, thus beyond the scope of the treaties which were ratified through the power conferred by the Constitution. It is the German Constitution, as the supreme law of the land, that legitimises the court's stance. The democratic statist approach provides the foundation on which Germany can adopt this position, as the theory identifies national constitutional supremacy as the defining feature of the national legal order, derived from the ultimate source of legitimacy of the demos.

However does this theoretical foundation provide adequate grounding to sustain the FCC's position, in opposition to the ECJ? There are two critiques of the traditional approach to supremacy which undermine the two theoretical bases on which it stands. Firstly, democratic statism requires national courts to confine themselves to the doctrine of national constitutional supremacy on the basis that the constitution is the defining feature of national law. However if the quest is not framed in terms of a search for the 'ultimate legal authority,' this position cannot be maintained. If instead one adopts Kumm's position that constraint on legal reasoning defines the institutional limits of the role of courts, then the supremacy of national constitutions does not necessarily follow.[53] It is only if national constitutional supremacy could be

[50] Ibid., p. 274.
[51] J. Weiler, 'The European Courts of Justice: Beyond 'Beyond Doctrine' or the Legitimacy Crisis of European Constitutionalism' in A. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* 1998, p. 381.
[52] Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 367.
[53] Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 282.

identified as such a constraint, that the claim that EU law takes precedence over national constitutional law would be so at odds with existing practice that it would disqualify such a claim as being within the confines of the practice of national law.[54] However given the realities of the current system, in which EU law has penetrated national legal orders to the point that it is unquestionably superior to at least the national statutes, it is implausible to claim that asserting the supremacy of EU law is not an identifiable claim within the national practice of law.[55] It would be merely another step towards legal integration. Consequently by framing the practice of law as being institutionally constrained by certain features, rather than a practice governed by an ultimate legal rule, national constitutional supremacy cannot be presented as a defining constraint of national law, thus it cannot be adopted to assert that constitutional conflicts are legal non-issues. A national constitution is not supreme merely by virtue of its position as a constitution.

While democratic statism overcomes this argument by relying on the ultimate source of legitimacy being derived from the demos, the second critique demonstrates that this justification does not support an argument for national constitutional supremacy alone. According to democratic statism, if a polity may only qualify as a state if the demos establishes its sovereignty through the adoption of a constitution, then "the concept of demos is analytically tied to the constitution of a sovereign state establishing a supreme legal authority."[56] Consequently, there can only be one demos, otherwise the legal authority it established could not be supreme. Therefore in a multi-polity, such as the EU and Germany, the question becomes at what level is the demos located?[57] By framing it in this manner, it becomes evident that those advocating European supremacy may also use this conceptual justification to support their claim. Just as the German demos may be said to have willed the German constitution into existence, the EU may be established by a European constituent power, based on the a European demos.[58] Accordingly, the notion of a constitution, derived from the will of the people, cannot provide the necessary theoretical underpinning for national constitutional supremacy.

An exploration of the traditional approach to supremacy reveals the tenuous theoretical grounds on which it rests. Rather than providing judges with the conceptual tools to deal with constitutional conflict, this theory denies them access to such inquiries, by confining them to resolving such conflicts within the boundaries of the constitution. However, while democratic statism lacks a strong theoretical foundation, the practical implications of this theory cause greater concern. By framing questions as a search for the 'ultimate legal rule,' this theory necessarily requires the resolution of constitutional conflict to be in terms of the domination of one legal order over the other. As such, select liberal democratic principles are invoked by both courts to bolster their claim to supremacy to the exclusion of other relevant considerations. Accordingly notions of fundamental rights and democratic self-governance are used by national courts to promote their claim to primacy, while the ECJ focuses on the importance of establishing the rule of law at a supranational

[54] Ibid., p. 283.
[55] Ibid., p. 285.
[56] Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, op. cit., p. 367.
[57] Ibid.
[58] Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 275.

level. Yet neither court incorporates the principles relied on by the other. Thus the current conceptual foundations on which the supremacy discourse is based, necessarily place national courts in direct conflict with the ECJ, in which the "competitive dynamic"[59] has been said to give rise to a potential "revolt or revolution."[60]

Given the traditional approach to supremacy is neither strongly theoretically grounded, nor practically desirable, an alternative conceptual approach to constitutional conflict should be adopted. This article will outline Kumm's alternative approach which draws on the limitations revealed from democratic statism as a foundation for creating a more holistic conceptual framework.

The foundation for this approach stems from the first critique of democratic statism. Rather than searching for an ultimate legal rule, this theory adopts the idea that the institutional role of courts is defined by constraint. However this constraint is neither national nor European constitutional law, but rather 'legal practice as a whole.'[61] That is, judges are not confined to either constitutional order, but rather they seek guidance from them both. By framing constraint in this manner, this theory appeals to the common normativity between all legal practices. It is based on the principles underlying domestic constitutional practices in liberal democracies which are considered universal.[62]

While at first glance it may appear impossible to identify the universal ideals underlying legal practice in the EU and its Member States because political decision making is inextricably linked to a state's pursuit of its national interest, closer analysis unveils the source of such ideals. Although political actors may pursue national interest, the legal principles applied to adjudicate such acts operate within the legal sphere.[63] The legal principles at the EU and national level are informed by the same normative principles as acknowledged in the TEU.[64] They share a commitment to principles of liberty, equality, democracy, the rule of law, liberal democratic constitutionalism and self-governance, to the point that new members may not be admitted until the they have incorporated these principles domestically.[65] Thus it is these principles, from which the individual legal orders derive, that should form the conceptual basis of the resolution of constitutional conflict.

Having established the constraining principles of this alternate theory, it is now necessary to determine how they interact to resolve constitutional conflict. Importantly, this theory does not provide judges with a resolution to apply in each case, but rather equips them with the conceptual tools necessary to engage with such issues in a holistic manner.[66] Thus the principles are not a clash which leads to the

[59] K. Alter, *Establishing the Supremacy of European Law: The making of an international rule of law in Europe,* Oxford, Oxford University Press, 2001, p. 60.
[60] D. Rossa Phelan, *Revolt or Revolution,* Dublin, Round Hall Sweet & Maxwell, 1997, p. 430.
[61] Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 286.
[62] Ibid., p. 287.
[63] Ibid., p. 286.
[64] Arts 6 and 49.
[65] TEU Arts 6 and 49.
[66] Walker, op. cit., p. 323.

supremacy of one order over the other. Instead they are to be balanced against one another, imbuing in each the relevant degree of importance in the particular case.[67]

The value of this theory becomes evident when compared with the traditional approach. Rather than conceiving of constitutional conflict as a clash of absolutes in which national constitutional supremacy, with its emphasis on certain liberal democratic principles, is pitted against the European legal order, based on the supranationalism of the rule of law, all these principles are drawn together and balanced against each other in a contextually sensitive manner. In this way, the benefit derived from the effective and uniform enforcement of EU law is incorporated in the strong presumption that national courts are required to enforce EU law.[68] However, the concern for liberal democratic principles currently expressed by national courts, work as a counterweight to the presumption, allowing it to be rebutted should the EU law fail to meet the requisite standard. Accordingly, the presumption may be rebutted if the EU protection for fundamental rights lacks in important respects, if the EU engages in acts which are *ultra vires* and if an EU law violates a clear and specific constitutional norm that reflects an essential value in the domestic community.[69]

Therefore, not only does this theory provide judges with a conceptual toolkit to resolve constitutional conflict, but it does so based on a holistic understanding of the liberal democratic principles which underpin the EU and Member State legal orders. Thus it is a framework which incorporates the concerns of all participants, rather than one that requires the domination of a legal order over the other. The hierarchical relationship provided for under democratic statism is transformed into a sphere of mutual deliberative engagement between all courts, fostering a legal network in which conflict is reduced.[70]

Although the supremacy of EU law was firmly established by the ECJ by 1978, Member States have not embraced the ECJ's perspective. This paper has sought to unravel the jurisprudence in relation to primacy, to ascertain the theoretical foundation on which this tension rests. It was argued that the current approach adopted by the German FCC is emblematic of the democratic statist position. This theory draws on the idea that the constitution is the ultimate legal authority, deriving legitimacy from the demos. As such, constitutional conflicts are to be resolved within the national constitutional framework, without reference to the European legal order. By exposing the weak underpinnings of this conceptual framework, as well as its adverse practical consequences, this article sought to demonstrate the need for an alternative approach. With the increase in competences being transferred to the EU, coupled with the expansion of the Union beyond the Western European nucleus, existing tensions are likely to be exacerbated. Therefore a theory in which the resolution to conflict is the ultimate domination of one legal order over another, will do little to further European coherence and integration. Accordingly it is only by drawing on the common normativity of Member States that the currently split sphere may be conceptually fused. In challenging the hierarchical approach to constitutional conflict, by synthesising all liberal democratic principles into a single package, this

[67] Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, op. cit., p. 299.
[68] Ibid.
[69] Ibid., p. 300.
[70] Ibid., p. 302.

alternate paradigm equips judges with the conceptual tools necessary to resolve such tensions, thereby creating a sphere of mutual deliberative engagement which in itself renders such conflict less likely to occur.