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Revisiting the European Court of Justice

Walter Mattli and Anne-Marie Slaughter

Introduction

Political scientists have discovered the European Court of Justice (ECJ). In the last four years the literature on the Court has dramatically expanded, nourishing a lively debate between neofunctionalists and intergovernmentalists and spawning a new generation of dissertation research and detailed country studies of the relationship between the ECJ and national courts. The Court is widely recognized not only as an important actor in the process of European integration but also as a strategic actor in its own right.

It was not always so. In the 1980s and early 1990s legal scholars, such as Eric Stein, Francis Snyder, Martin Shapiro, Hjalte Rasmussen, and, most notably, Joseph Weiler, called for an interdisciplinary approach to European Union (EU) law, or at least for the examination of EU law in political, economic, and social contexts. On the political science side, Mary Volcansek had revived the pioneering tradition of Stuart Scheingold in developing an impact analysis of European judicial politics, focusing particularly on the relationship between the ECJ and national courts.¹ Nevertheless, the overwhelming majority of political scientists studying and writing about the EU still gave the Court very short shrift.

The new interest in the Court was sparked in large part by the unexpected reinvigoration of European integration itself, beginning with the Single European Act in 1986 and the drive toward the completion of the single market in 1992. In discovering that regional integration was no longer obsolete, political scientists also became aware of what lawyers had known for some time—that legal integration had significantly outpaced economic and political integration. Moreover, the Court became the poster

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1. Volcansek 1986.

child for a revival of neofunctionalism. At a time when the Single European Act was being described as an intergovernmental bargain², we argued that the Court's success in constructing an effective Community legal system was best explained in neofunctionalist terms.³

While some intergovernmentalists were prepared to accept the Court as a neofunctionalist anomaly, Geoffrey Garrett mounted a neorealist challenge, arguing forcefully that the Court has been a faithful agent of the EU member states.⁴ Others soon joined in, contributing new insights and new data. Martin Shapiro, Alec Stone, and James Caporaso have begun analyzing the Court from the perspective of comparative judicial politics.⁵ Karen Alter, Bernadette Kilroy, and Amy Richmond are examining the relationship between the ECJ and national courts, the congruence between national court decisions and economic and political definitions of the national interest in specific countries, and the rate of member state participation in cases before the ECJ.⁶ Other contributions include Jonathan Golub's analyses of patterns of references from the national courts, Karen Alter and Sophie Meunier-Aitsahalia's analysis of the *Cassis de Dijon* decision, and several thought-provoking analyses by Daniel Wincott.⁷ At the same time, a new generation of EU legal scholars is adopting a much more lively and critical stance toward ECJ jurisprudence, coupled with reflections on the dynamics of the EU legal community.⁸

The neofunctionalist–intergovernmentalist debate has performed an important function by helping to generate interest in the ECJ and providing a set of opposing hypotheses to drive further research. At this point, however, the debate has reached the limits of its usefulness. Not surprisingly, we conclude that much of the more recent scholarship on the ECJ confirms the importance of sub- and supranational actors interacting within a sphere of law insulated from direct political interference. At the same time, however, many neofunctionalists, including ourselves, have recognized the force of intergovernmentalist claims concerning the ability of the state to impose significant constraints on supranational actors such as the ECJ, claims confirmed by the anti-ECJ posture of several important EU members during the negotiation of the Maastricht Treaty and the Court's subsequent response. Thus in many ways the two positions have converged.

More important, new research and further analysis have highlighted several significant failings of both the neofunctionalist and intergovernmentalist approaches. These include neglect of the range of specific motives and constraints shaping the behavior of individual litigants and national courts and an insistence on modeling the state as a unitary actor. A stream of new scholarship on public interest litigation in Great

2. Moravcsik 1991.

3. See Burley and Mattli 1993; and Mattli and Slaughter 1995.

4. Garrett 1995.

5. See Shapiro 1991; Stone 1996; and Stone and Caporaso 1996. Goldstein also adopts a comparative perspective in seeking to explain the relatively placid reception of the Court's authority by the EC states. See Goldstein 1996.

6. See Alter 1996a; Richmond 1995; and Kilroy 1996.

7. See Golub 1996a,b; Alter and Meunier-Aitsahalia 1994; and Wincott 1995a,b.

8. See Shaw 1996; Shaw and More 1995; Joerges 1996; and Ward 1993.

Britain and corporate efforts to use EU law to challenge domestic law, as well as important new data on the range of variation in the acceptance of the direct effect and supremacy of EU law by national courts, highlights these defects. This literature challenges neofunctionalists and intergovernmentalists to leave their paradigms behind and work toward a set of midrange hypotheses, focusing on a new generation of empirical puzzles.

This essay begins by briefly reviewing the general theoretical literature on European legal integration, with the secondary aim of closing the books on the neofunctionalist–intergovernmentalist debate. We then canvass a number of more specific studies on the role of individual litigants and national courts. We do not seek to present an integrated theory concerning the positive or negative impact of these actors on European legal integration as a whole. However, we argue that the picture that emerges from this literature is one of “disaggregated sovereignty,” an image of different governmental institutions interacting with one another, with individuals and groups in domestic and transnational society, and with supranational institutions.⁹ Explaining the variance in the process of constructing the EU legal system is impossible without focusing on the ways in which alliances with supranational and subnational actors can advance the interests of some government institutions (courts) against others (either other courts or the executive or legislative branches). Even when these institutions are not in direct competition with each other, they may have different preferences resulting from their socialization as a particular type of government actor. Further, they are subject to different types of constraints flowing from their particular identity and function in domestic politics.

We thus review the literature on individual litigants and domestic courts in the context of a model of the legal integration process that encompasses disaggregated state actors—courts, regulatory agencies, executives, and legislatures—interacting with both supranational institutions and private actors in domestic and transnational society. We do not seek to offer specific hypotheses about the ways in which these actors interact to foster or hamper legal integration. Our purpose is rather to distill both new data and theoretical insights to specify as carefully as possible the preferences of some of these various actors and the constraints they face in implementing those preferences, in the hope of providing a framework for more rigorous theory testing. We close with a brief review of new developments in European legal scholarship that are likely to help shape the next generation of interdisciplinary studies on legal integration.

The Theoretical Debate: Evolution and Limitations

The failure of political scientists to pay adequate attention to the ECJ is due in large part to the dominance of the realist paradigm in the field of international relations. From a realist perspective, supranational organizations are ineffectual at forcing upon

9. See Slaughter 1995, 534–38; and Slaughter 1997.

sovereign states a pace of integration that does not conform to the states' own interests and priorities. Thus the role of the ECJ was largely viewed as technical and subservient; that is, faced with a dispute, the Court simply applies treaty provisions and rules formulated by the member states of the EU. Judicial interpretation, according to this model, is nothing more than a translation of these rules into operational language, devoid of political content and consequence.

Garrett's intergovernmentalist analysis of the ECJ proceeds from the basic realist premises of sovereign and unitary actors: member states delegate some authority to the ECJ to enable it to monitor compliance with community obligations. Further, the Court mitigates the incomplete contracting problems by applying the general rules of the Treaty of Rome to a myriad of unanticipated contingencies, thus obviating the costly need for the actors to make exhaustive agreements that anticipate every dispute that might arise among them. However, delegation of these tasks to the ECJ implies no loss of autonomy for the most powerful member states, since—as Garrett puts it—“the principles governing decisions of the European Court and hence governing those of domestic courts following its rulings are consistent with the preferences of France and Germany.”¹⁰ The implication of this analysis is straightforward: ECJ decisions that deviate from the preferences of powerful states are likely to be ignored or to trigger court-curbing measures. However, since the Court has an incentive to anticipate the reactions of the member states to its decisions, it will be careful not to stray from the preferences of the key players.

Neofunctionalists draw a very different picture of legal integration, with implications that are diametrically opposed to neorealism. They challenge the presumed congruence between ECJ decisions and member state interests. More fundamentally, they question the identification of state interests as unitary economic interests. Their analysis accords pride of place to precisely those actors that neorealism deems of marginal importance: individual litigants, national courts, and the ECJ. The analysis can be summarized as follows:¹¹ The ECJ made subnational actors aware of the opportunities offered to them by the Community legal system. The Court in fact created these opportunities by giving pro-Community constituencies a direct stake in the promulgation and implementation of Community law. As a result, individuals (and their lawyers) who could point to a provision in the Community treaties or secondary legislation that supported a particular activity they wished to undertake—from equal pay for equal work to a lifting of customs levies—were able to invoke Community law and urge a national court to certify the question of whether and how Community law should be applied to the ECJ.

The ECJ and lower national courts also had a self-interested stake in this process: lower national courts sought enhanced power within national legal systems through a partnership with the ECJ, and the ECJ sought to promote its own prestige and power by raising the visibility, effectiveness, and scope of EU law. This concatenation of interests above and below the state gave a self-sustaining impetus to the process of

10. Garrett 1992, 558.

11. Burley and Mattli 1993.

integration, with the ECJ interpreting the Treaty of Rome, case after case, as requiring faster and deeper integration than member state preferences would have specified.

This account, however, does not amount to a “runaway-bureaucracy” argument. The critical insight that led us to apply neofunctionalist analysis to legal integration was its emphasis on the power of a technical community to circumvent perceived state interests. Ernst Haas and his followers predicted that technocracy would prevail in economic policy; we argued that law ultimately proved more impervious to political interference, not only due to “the mask” of technical discourse, but also “the shield” of domestic norms of rule of law and judicial independence. However, these protections carried their own constraints. The Court could not outrun its constituency without losing its legitimacy. It used the Commission of the EC as a “political bellwether” to see how far it could go in landmark decisions.¹² And it had to remain minimally faithful to both substantive legal doctrine and the methodological constraints imposed by legal reasoning. Within these constraints, however, the Court interpreted and applied the Treaty of Rome and EC secondary legislation to reach outcomes that departed significantly from member state preferences in case after case.¹³

The difference between the neofunctionalist and realist–intergovernmentalist approaches to legal integration has been clarified in a recent study by Mark Pollack on delegation, agency, and agenda setting in the EC.¹⁴ Pollack offers a unified theoretical approach to the problem of supranational influence using principal agent analysis. He summarizes the intergovernmentalist view as presenting “the ECJ as the agent of the member states, on a short leash,” and the neofunctionalist view as presenting the Court as “a more independent and sophisticated strategic actor.”¹⁵ Much of Pollack’s analysis is concerned with identifying the factors that determine the length of the leash, that is, the factors that define the relative autonomy of agents. Four such factors are identified and discussed: first, the distribution of preferences among member state principals and the supranational agents; second, the institutional rules governing EC policymaking; third, the information available to member governments and supranational agents; and fourth, the ability of supranational institutions to build transnational constituencies within the member states.

The first two factors imply that the Court can exploit member state differences to shirk within certain limits and avoid sanctions. This ability depends in turn on the institutional decision rules established for applying sanctions, overruling legislation, and changing agents’ mandates. Pollack persuasively argues that these rules and control mechanisms are limited in both scope and credibility in the case of the Court: judges hold terms of six years and cannot be dismissed during their tenure; Court decisions are taken secretly by majority vote (neither actual votes nor dissenting views are made public), rendering it difficult for member states to single out the

12. See *ibid.*, 71, citing Stein 1981, 25; and Kilroy 1996.

13. *Ibid.* See also Mattli and Slaughter 1995.

14. Pollack 1997. See also Mattli forthcoming.

15. Pollack 1997, 120.

views of individual judges for sanctioning; the Council of Ministers requires a qualified majority to overrule Court decisions, and in many cases a unanimous vote, which poses a formidable institutional hurdle; finally, a revision of the Court's powers requires a revision of the treaties by unanimous vote and ratification by national parliaments. Pollack notes, "The threat of treaty revision is essentially the 'nuclear option'—exceedingly effective, but difficult to use—and is therefore a relatively ineffective and noncredible means of member state control."¹⁶

Pollack's third and fourth factors limiting member states' ability to control the Court follow neofunctionalist premises. He notes, for instance, that "the informational asymmetry in favor of the Court resulting from the technical and legal obscurity of the latter's decisions . . . provide the Court with considerable sophistication."¹⁷ Finally, Pollack notes that the influence of supranational institutions is greatest in situations where those institutions possess constituencies of subnational institutions, interest groups, or individuals that can act to bypass the member governments or to place pressure on them. In the context of legal integration, the acceptance of supremacy of Community law over national law by the Court's judicial allies, lower national courts, meant that member governments seeking to avoid compliance would have to defy not only the ECJ but also their national courts, thereby considerably raising the costs of noncompliance.¹⁸ In sum, Pollack's critical assessment within a broad principal-agent framework of factors constraining member states, such as the effectiveness of control mechanisms stressed in Garrett's intergovernmentalist account as well as neofunctionalist factors, offers a valuable synthesis of the two approaches.

Besides clarifying theoretical issues, recent research has also produced valuable statistical analyses testing contending theories of legal integration. A particularly noteworthy example is a recent study by Alec Stone and James Caporaso. The authors develop an analytical framework that "is generally congruent with neofunctionalist priorities"¹⁹ and then proceed to "engage the intergovernmentalists directly, assessing the empirical evidence of agency and the efficacy of member-state controls."²⁰ Central to their study is the proposition that the constitutionalization of the Treaty of Rome relies on the initiative of self-interested private actors and the supporting response by supranational institutions. Stone and Caporaso test this proposition in two steps. First, they examine whether the pressure by private litigants for supranational rule increases as the number of cross-national transactions rises. Their data set comprises 2,978 Article 177 references by national courts to the ECJ. References rely on the initiatives of private actors who deem governmental regulation incompatible either with existing Community rule or with the spirit of the Treaty of Rome. Strikingly, the authors find that the relationship between references and

16. *Ibid.*, 119.

17. *Ibid.*, 121.

18. *Ibid.*, 118.

19. Stone and Caporaso 1996, 6.

20. *Ibid.*, 9. See also Stone and Brunell forthcoming.

intra-EU trade is nearly linear, with litigants in countries that trade more with other EU countries generating higher levels of references.

Second, Stone and Caporaso examine whether there is any relationship between these references and Community legislation (regulations and directives). They find that the relationship between annual rates of references and annual rates of EC legislation is positive and significant (the adjusted *R*-square is 0.74), suggesting that references lead to legislation.²¹ Finally, they complement the quantitative analysis with detailed case studies in the areas of free movement of goods and social provisions. They find that in these areas “the court is not setting down a pattern of jurisprudence that follows (or reflects) the positions of the most powerful states. Indeed, some of the most powerful states were on the other side of the Court’s decisions most of the time.”²² More generally, Stone and Caporaso conclude based on their evidence that governments do not control the integration process in any determinative sense. Governments behave reactively rather than proactively. They act to ratify transfers of governing authority from the national to the supranational level that have already begun or to slow down the pace at which these transfers are made.

The ECJ is also receiving attention in larger studies of economic, political, and social integration. A prominent example is Paul Pierson’s historical institutional analysis of the integration process. Pierson writes that his approach “incorporate[s] key aspects of neofunctionalism while offering a stronger and expanded analytical foundation for an account of member-state constraint.”²³ In an earlier study, he and Stephan Leibfried concluded that “the ECJ has taken an active, even forcing, stance, gradually building a remarkable base of authority and effectively ‘constitutionalizing’ the emerging European polity.”²⁴ Nevertheless, Pierson argues that a focus on supranational institutions alone cannot fully account for the growing divergence between the institutional and policy preferences of member states and the actual functioning of institutions and policies. He highlights three additional sources of gaps: member state preoccupation with short-term concerns, the prevalence of unanticipated consequences, and instability of member states’ policy preferences. This analysis of why gaps emerge is complemented by an account of why gaps may be difficult to close. Here Pierson relies on arguments about informational asymmetry and subnational actors stressed in neofunctionalism and about the limited scope and credibility of control mechanisms highlighted in Pollack’s study.

What emerges from these studies, with the possible exception of Stone and Caporaso, is that the story of European legal integration cannot be told without an account of the interrelationship between neofunctionalist and intergovernmentalist factors. Neither framework is fully satisfactory on its own terms; both must stretch to explain anomalies highlighted by the other. What also emerges, however, is the extent to

21. More refined tests remain to be done. As the authors note, a further implication of their main proposition is that levels of integration are expected to vary across economic sectors, depending on the differential rates of transnational exchange.

22. *Ibid.*, 47.

23. Pierson 1996, 147.

24. Pierson and Leibfried 1995, 11. See also Pierson 1996, 151.

which both frameworks share similar failings. These flaws are particularly evident in light of new data pointing to significant variation in the process of legal integration.

The first weakness in these analyses is an oversimplification of the dependent variable. We were careful in our initial article to specify that we sought to explain the process of legal integration, which we defined as the construction of a functioning legal system in which national courts both referred cases to the ECJ and complied with the resulting judgments as part of an acknowledged legal process that privileged EU law over national law in areas of EU competence. The larger question of the relationship between the ECJ and the integration process as a whole would have required an evaluation of the actual impact of ECJ decisions in specific issue areas. Intergovernmentalist scholarship has similarly concentrated on trying to explain why states permitted the implementation of the doctrines of direct effect and supremacy and why and when they have been willing to comply with specific ECJ decisions. New data makes clear, however, that even “legal integration” is neither a uniform nor a linear process. Acceptance of the landmark ECJ decisions creating the pillars of the Community legal system has varied across countries and between different national courts within countries. Neither neofunctionalism nor intergovernmentalism can account for this variance.

Second, neither neofunctionalism nor intergovernmentalism adequately takes account of the role of individuals in driving or countering legal integration. Intergovernmentalists exclude individuals from their framework of analysis. Neofunctionalists accord them an important role but provide a very thin account of their motives and actions under the general rubric of “self-interest.” However, national courts are fundamentally dependent on the cases presented for their decision, cases brought to them by individual litigants with a wide range of specific motivations. Stone and Caporaso focus on the desire of litigants to challenge trade barriers; Carol Harlow and Richard Rawlings, and more recently Alter and Jeannette Anne Vargas, observe increased awareness among European citizens of the way in which courts can be used to achieve a particular political result, as well as the growth of a phenomenon that U.S. lawyers refer to as “public interest litigation.”²⁵ The result, particularly in Great Britain, is a stream of cases brought by public interest groups seeking to use EU law to advance the interests of groups such as women and environmentalists.

Third, both neofunctionalists and intergovernmentalists rely on an oversimplified conception of “the state” as a unitary entity. The standard neofunctionalist model assumes that “the state” is a monolith, to be circumvented and influenced by coalitions of sub- and supranational actors. Intergovernmentalists respond by showing the ways in which “the state” strikes back. Yet closer examination of the actual process of integration, with starts and stops within and across states, reveals courts, legislatures, executives, and administrative bureaucracies interacting as quasi-autonomous actors.²⁶ Each of these institutions has specific interests shaped by the structure of a

25. See Harlow 1992; Harlow and Rawlings 1992; and Alter and Vargas 1996.

26. For a similar conclusion, see Dehousse 1996.

particular political system, the need to perform specific sociopolitical functions such as judging or legislating, and the demands of specific political constituencies.

Conversely, a fully satisfactory account of legal integration would have to delve beyond the battle between unitary governments and neofunctionalist networks. It would need to generate specific theories about how individual litigants, disaggregated state actors, and supranational institutions interact in different countries. Assuming that all these actors are motivated by different interests and face different constraints, it would further have to identify the circumstances under which the different sets of actors will ally and oppose one another and when a particular set will prevail.

Many of these questions are peripheral to intergovernmentalist analyses, which frankly prefer the parsimony afforded by the assumption of unitary states. They pose a harder challenge for neofunctionalists, who prefer the neofunctionalist framework precisely because it identifies many of these actors as critical to an explanation of integration. At bottom, the inability of neofunctionalism to provide a richer account of the interests motivating these actors gives rise to its traditional Achilles heel of teleological bias. Because actors are always presumed to follow their “self-interest,” neofunctionalists cannot convincingly specify the limits to integration. They have no tools to determine when self-interest will align with further integration, due to the triumph of functional demands over national identity, and when it will not.

It was precisely this problem that ultimately led neofunctionalists, led by Haas himself, to abandon neofunctionalism, or rather to label it a “pretheory” that identified critical and distinctive aspects of a process (the actors, motives, process, and context) but that was ultimately unable to account for variation in that process. Pierson offers a similar critique, distinguishing between neofunctionalism and the reliance of his historical institutionalist approach on “lock-in effects” created by earlier policy decisions: “Neofunctionalism sees political control as a zero-sum phenomenon, with authority gradually transferred from member states to supranational actors, whereas historical institutionalism emphasizes how the evolution of rules and policies along with social adaptations creates an increasingly structured polity that restricts the options available to all political actors.”²⁷

We turn in the remainder of this essay to both empirical and theoretical studies exploring the role of individual litigants and national courts in the EU. The discussion of individual litigants focuses on a new stream of scholarship examining patterns of EU litigation in Great Britain. The discussion of national courts draws on a larger project examining the reception by national courts of the core ECJ doctrines mandating the direct effect of EU law in the national legal systems of EU member states and the supremacy of that law over conflicting rules of national law. This project includes six case studies examining the process of reception of these doctrines in Belgium, France, Germany, Great Britain, Italy, and the Netherlands. The case studies have been written by European legal scholars, who were instructed not

27. Pierson 1996, 147.

only to provide a doctrinal account of this process but also to gather evidence concerning causes “beyond doctrine.”²⁸

We seek to distill from this literature both the preferences of the various actors identified and the constraints shaping their pursuit of those preferences. Regarding individual litigants, constraints are imposed not only by the legal process, but also by a differential ability to bring a series of suits rather than just one. With respect to national courts, these constraints are analyzed in the context of specific conceptions of judicial identity and the demands of legal legitimacy and democratic accountability. The discussion of national courts also relies on the framework of the disaggregated state, seeking to highlight evidence of conflicts of interest between different governmental actors. An overview of our findings is set forth in Table 1.

The Role of Individual Litigants in EU Legal Integration

Without individual litigants, there would be no cases presented to national courts and thus no basis for legal integration. The various identities, motivations, and strategies of litigants have inevitably influenced the nature and pace of integration. This section summarizes new data collected by British scholars on the importance of private litigants in the deepening and broadening process of EU law and highlights its implications regarding the interests and constraints facing national actors. The analysis sets the stage for a closer look at the role played by national courts.

Marc Galanter, a prominent observer of efforts to achieve social and economic change through the U.S. legal system, has distinguished between “one-shotters” (OSs) and “repeat players” (RPs).²⁹ This distinction, as well as other socioeconomic categorizations of private litigants, offers not only a typology of actors appearing before the courts but also provides insight into different tactical approaches to Euro-litigation.³⁰ Galanter further observes, “If we analyze the outcomes of a case into a tangible component and a rule component, we may expect that in [a single] case, [an] OS will attempt to maximize [the] tangible gain. But if [an] RP is interested in maximizing his tangible gain in a series of cases . . . , he may be willing to trade off

28. This project is directed by Anne-Marie Slaughter, Alec Stone, and Joseph Weiler. The Dutch country study was written by Monica Claes and Bruno de Witte, the French country study by Jens Plötner, the British country study by Paul Craig, the Italian country study by Francesco Ruggeri Laderchi, the German country study by Juliane Kokott, and the Belgian country study by Herve Bribosia. These papers and a number of “cross-cutting analyses” by scholars including Karen Alter, Alec Stone, and Joseph Weiler have been published as working papers by the Robert Schuman Centre at the European University Institute.

29. Galanter 1974. Among corporate litigants, OSs are likely to be small companies, whereas large multinational corporations are likely to fill the ranks of RPs. However, even small companies could overcome their lack of experience and legal expertise by forming litigation coalitions, provided the collective action problem does not cripple cooperation among a large number of individual firms in specific industry sectors. See Olson 1971; and Hardin 1982.

30. Harding pioneered the study of identities and characteristics of private litigants before the ECJ in his study of litigation against Community institutions. See Harding 1980. Rawlings followed Harding’s and Galanter’s lead and demonstrated in his penetrating account of the Sunday trading saga (discussed later) the usefulness of such sociological analysis of actors in the context of litigation against member states.

TABLE 1. *Key actors of legal integration: Overview of preferences and constraints*

<i>Actors</i>	<i>Preferences</i>	<i>Constraints</i>
<i>European Court of Justice</i>	To promote its own prestige and power by increasing the effectiveness of EU law and developing a constituency for EU law and litigants and national courts To advance the objectives of the Treaty of Rome	Consistency with substantive legal doctrine and methodological constraints imposed by legal reasoning Extent of “information asymmetry” between ECJ and member state governments Institutional rules governing EC decision making Public attitudes toward EU integration
<i>Litigants</i>		
One-shotters	To minimize loss by winning case (thus coercing compliance with EU rules in a given case)	Limited resources and relatively short time horizon
Repeat players (large corporate actors, public interest pressure groups)	To maximize trade gains and individual rights by seeking new (or expanded) EU rules	Inherent difficulties of case selection and litigation timing
<i>National courts</i>	To gain and solidify power of judicial review To improve institutional power and prestige relative to other courts within the same national judicial system To increase power to promote certain substantive policies through the law	Consistency with substantive legal doctrine and methodological constraints imposed by legal reasoning Minimum democratic accountability

gain in any one case for rule gain. . . . [I]t pays an RP to expend resources in influencing the making of the relevant rules.”³¹

Several different categories of litigants have been RPs before the ECJ. First are public interest “pressure groups” seeking to use a variety of political and legal strategies to advance particular causes. These have been active largely in Great Britain. Paul Craig confirms in his report on the United Kingdom that particular litigants have made strategic use of the greater rights afforded under Community law than under national legal rules to play a significant part in the development of substantive Community law, particularly in employment law and gender equality.³² The same theme is evoked in the writings of Harlow. She describes how pressure groups have made calculated use of the litigation strategy offered under Article 177 to establish freedom of movement; to query income tax assessments; to claim social security benefits,

31. Galanter 1974, 100–101.

32. Craig 1995. See also Vargas 1995; and Alter and Vargas 1996.

equal pay, and damages for invalid administrative action; to protest against discrimination; to challenge nationalization and immigration policies; and to dispute elections.³³ Interestingly, a number of these cases were fought by groups that conceal their identity behind “frontmen.”

A second category of RPs in Euro-litigation is large corporate actors. Consider the role played by powerful French firms in forcing the Conseil d’Etat to accept EU law doctrine. Until the beginning of the 1980s, the Conseil d’Etat felt little pressure to endorse direct effect and supremacy. Two of its major partners, Germany and Italy, had supreme courts that refused to fully comply with the jurisprudence of the ECJ. In 1984, however, the Italian Constitutional Court authorized lower national judges to declare national law incompatible with treaty obligations without having to refer the case to the Constitutional Court.³⁴ The German Federal Constitutional Court announced in 1986 in the *Solange II* case that it would no longer control the constitutionality of Community legal acts. The legal context in which corporate interests in France now found themselves put them increasingly at a competitive disadvantage relative to firms operating in member states where supremacy and direct effect doctrines were fully accepted.³⁵

To remedy this situation major import- and export-oriented companies in France launched systematic attacks on government decisions that they felt were contrary to Community law. Their aim was to provoke a chain of verdicts by the ECJ condemning France for breach of Community law. This increased the pressure on the French government and the Conseil d’Etat to comply with Community rule. It is no coincidence that the decision by the Conseil d’Etat confirming direct effect of Community directives in France was initiated by Philip Morris and Rothmans—classical repeat players.³⁶

Rawlings provides another account of the litigation strategy of corporate RPs in the European context in his study on the Sunday trading saga, appropriately entitled *The Eurolaw Game*.³⁷ At issue was the British Shops Act of 1950 that places statutory restrictions on Sunday trading. Large retailers used an Article 177 reference to the ECJ with the practical effect of freezing the enforcement of the national law. The economic incentive for such action is clear. For large retailers Sunday trading repre-

33. Harlow 1992. See also Harlow and Rawlings 1992, 268–89.

34. Italian Constitutional Court decision 170/84, *Granital*, [1984] CMLRev 756.

35. Plötner writes, “There were . . . solid economic reasons which, in advance of the Common Market made a full integration of Community law into French law paramount. How could the Project of 1992 become effective if the almost three hundred directives intended to transform it into legal reality were not to be directly enforced by the Conseil d’Etat?” He adds, “The impossibility of referring to certain community regulations was bound to represent a serious economic disadvantage in comparison to their European competition. In the long run, this could have led to a movement of forum shopping, combined with some delocalization of head offices.” See Plötner 1995, 29, 24.

36. *Ibid.*, 27. Reporting on the Netherlands, Claes and de Witte note similar pressures by Dutch business companies seeking to enforce in the early years of the Community the competition rules of the Treaty of Rome before national courts. See Claes and De Witte 1995, 7.

37. Rawlings 1993. The term *saga* has been used in the literature to denote the situation where a single policy attracts litigation over a period of time through a series of attacks.

sents up to 23 percent of their turnover.³⁸ The “European defense” put forth by the retailers stated that the Shops Act contravenes Article 30 EEC Treaty, which prohibits “quantitative restrictions on imports and all measures having equivalent effect.” If a shop is prohibited from trading on a Sunday, they argued, its overall sales will be reduced; if sales are reduced, imports from the EC will be reduced (by about 15 percent). Ergo the Shops Act amounts to a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30.³⁹

The Sunday trading saga—too long and convoluted to be narrated here in full—illustrates a number of critical points to which future studies on Euro-lobbying must be sensitive. First, the saga demonstrates the potential for the use of Euro-litigation strategies to achieve gains by powerful corporate interests. The issue here, however, is not primarily one of coercing compliance with Community legislation. To “win” a case in that sense may not be the principal aim. Interim remedies providing time for retaliation or delays caused by legal proceedings may be the true objective of litigation, especially if it involves repeat players.⁴⁰ Furthermore, the action of the large retailers inevitably had a domino effect on smaller merchants who felt the commercial pressure to start trading on Sundays while the national law was in abeyance. During that protracted period, the big players also helped bring about changes in shopping habits and in people’s expectations about the opening hours of stores. “In short, a social context more favorable to reform was fostered.”⁴¹

Second, the saga contains a subplot that Rawlings calls the multinational game. In this game, large British retailers were part of a coordinated Euro-wide litigation strategy by corporate interests in other member states that used Article 177 references almost simultaneously to intensify the pressure for abolition of restrictions on Sunday trading in their respective countries. Rawlings characterizes the Euro-law game played in the Sunday trading saga in terms of outflanking or “trumping” the domestic system.⁴² He concludes, “It is not only the doctrines of primacy and of direct effect which give increased scope for litigation strategies. . . . Particular features of the system have a strong tendency towards uncertainty and delay, attributes of a legal order which the . . . litigation strategy [of repeat players] not only works to generate but also thrives upon.”⁴³

Ideological commitment and material interest provide the incentives for litigants; lack of resources and short time horizons provide the principal constraints. Pressure groups and large corporate actors may have very different, indeed, opposing, motivations with regard to the legal outcomes they seek, but both are well placed to see the

38. Diamond 1991, 72.

39. *Ibid.*, 79.

40. Harlow and Rawlings 1992, chap. 7. The point was earlier made by O’Connor 1980 and Epstein 1980.

41. Rawlings 1993, 332.

42. *Ibid.*

43. He notes that uncertainty is created by ECJ judgments “too often curt and unhelpful and delphic in character.” Further, the operation of Article 177 procedures is frayed with problems of delays. Even after the creation of the Court of First Instance, the average duration to obtain a preliminary ruling is still about eighteen months. *Ibid.*, 333.

ECJ as a potential ally. Of particular interest is the way in which a repeat-play strategy on the part of a particular litigant dovetails with the Court's preferred method of expanding the reach of Community law: an incremental approach implemented over a series of cases, in which national governments typically win the battle and lose the war. The Court's standard move is to enunciate a principle of great long-term significance but to find some procedural or factual reason not to apply it to the case at hand.⁴⁴ The repeat play analysis suggests that in many of these cases the individual litigant who has sought aid from the Court may be a willing partner in this strategy.

The Role of National Courts in EU Legal Integration

One of the most striking new findings in the legal integration literature is the evidence of variation in national court acceptance of the Court's doctrines of direct effect and supremacy, both across countries and between different courts within a particular country. Figure 1 illustrates the range of this variation. It provides the foundation for a new set of much more nuanced theories of legal integration.

Our original neofunctionalist account posited that lower national courts would cooperate with the ECJ, both in terms of referring cases under Article 177 and in following the resulting ECJ decisions, based on their desire for "empowerment."⁴⁵ That account cannot explain the above-mentioned variation. Further, as a number of scholars have subsequently argued, it is too crude even on its own terms.⁴⁶ It does not specify what power judges seek nor how they were able to obtain it through acceptance of the authority of the ECJ. It also conflates the professional and personal interests of individual judges with the institutional interests of courts.⁴⁷ Finally, it does not even acknowledge, much less specify, the constraints shaping the opportunities for judges to implement these various interests.

New analyses published in later literature, as well as new data from various country studies, make it possible to develop a more refined and differentiated definition of the kinds of power that courts actually seek. First is the power of judicial review to establish the validity of national legislation, which is an increase in power with respect to national legislatures. Some national courts, notably constitutional courts, already exercise this power within their domestic legal system; others gained this power with respect to at least some subset of national statutes in partnership with the ECJ. Second is the pursuit of institutional power and prestige relative to other courts within the same national judicial system. This dimension of judicial power is best developed in the work of Alter, who has developed an "intercourt competition" approach to explain European legal integration. Third is the power to promote certain substantive policies through the law. In other words, where European law and national law promote different policies or have different distributional effects with re-

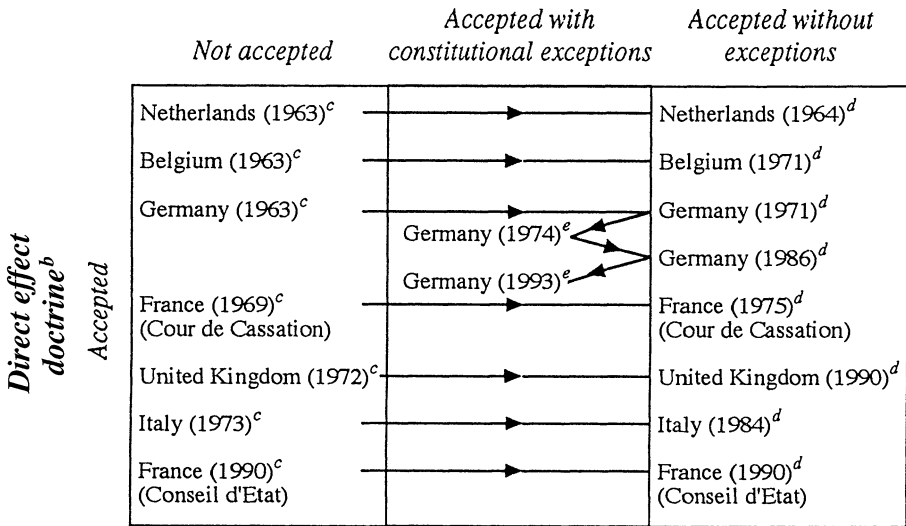
44. See Alter 1996a, chap. 6; Hartley 1988, 78.

45. Burley and Mattli 1993, 63, citing Weiler 1991.

46. See Alter 1996b,c.

47. Stone 1996, 8.

Supremacy doctrine^a (levels of acceptance)



^aDoctrine states that in any conflict between community law and national law, the former must be given primacy.

^bDoctrine states that EU law can confer on individuals legal rights that public authorities must respect and national courts protect.

^cIndicates year of acceptance of the direct effect doctrine.

^dIndicates year of acceptance of the supremacy doctrine.

^eIndicates year of change of interpretation of supremacy doctrine.

FIGURE 1. Dates of acceptance of ECJ doctrines

spect to a particular class of litigants, national judges may have the opportunity to achieve the result that they favor through the application of European law.⁴⁸

A noteworthy aspect of this refinement of judicial interests—a term that we use interchangeably with preferences—is that each factor may explain resistance to as well as acceptance of EU law. Courts that already exercise the power of judicial review, for instance, are likely to perceive the “parallel” exercise of that power by the ECJ regarding matters of European law as a threat. Similarly, the intercourt competition model posits that courts that already enjoy substantial prestige and power

48. This point does not rely on a model of judges “making” the law, in the sense of simply voting their policy preferences. On the contrary, the assumption is that national judges who conscientiously seek to apply the law as written or interpreted will not vote their policy preferences where their preferences appear to conflict with that law unless they can achieve the result they favor by a legitimate legal route. Such a route is offered by following European law within a framework in which a tribunal consented to by the national government has interpreted and applied it to trump national law.

relative to other courts within the same national legal system are likely to object to the extension or even transfer of that power elsewhere in the system; they may thus reject EU law for the same reasons that their counterparts accept it. Finally, the congruence of EU law with a particular set of substantive legal outcomes in different issue areas can produce opposition from national courts who favor the outcomes produced by the application of national law as easily as it can marshal support from judges who would like to see a change in national law.

The following subsections discuss each of these strands of judicial interests in turn, drawing on evidence from the country studies. The result gives content to the concept of judicial empowerment. It also assumes that judicial interests are distinct from and often conflicting with the interests of other branches of government. Judicial review of legislation and administrative rulings may pit the judiciary against the legislature or the administrative bureaucracy; judicial policy preferences may conflict with those of the executive as well. And intercourt competition assumes conflict among different institutions within the legal system. The specification of these varying interests thus is consistent with and to a large extent dependent on the model of a disaggregated state.

Judicial Review

A number of country studies offer evidence of a link between acceptance of EU law through adoption of the doctrines of direct effect and supremacy and a desire to exercise some judicial review powers. In the Netherlands, for example, Parliament amended the constitution in 1956, giving national courts the power to review legislation for its compatibility with international treaties. This new power was at odds with a long tradition that banned judicial review of the constitutionality of legislation. Judges could now set aside statutes that violated international obligations, but at the same time the inviolability of these statutes against any judicial review of their constitutionality was maintained. The judges were initially reluctant to use their new powers. Only when encouraged by the ECJ did they assume their new task. Monica Claes and Bruno de Witte note that in the landmark *Van Gend en Loos* case, the Court's willingness to accept the role of "accomplice" in *Van Gend* encouraged Dutch courts to exercise their constitutionally recognized powers against the national legislature.⁴⁹

The British situation is similar to the Dutch in that the doctrine of parliamentary sovereignty preempted any courts from attacking primary legislation. With the formal acceptance of EU supremacy in the *Factortame* case of 1990, however, national courts were granted the right to set aside primary legislation that violated Community obligations. Craig notes that "the UK jurisprudence provides a good example of how readily the national courts can embrace their newfound authority."⁵⁰ The best

49. Claes and De Witte 1995, 26–27, discussing Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

50. Craig 1995, 22.

example of the way in which a desire to exercise judicial review shaped acceptance of direct effect and supremacy may come from the Italian experience. As told by Francesco Ruggeri Laderchi, the Italian story is a drama with three principal characters: the ECJ, the Italian Constitutional Court, and the lower courts. Again aided and abetted by the ECJ, lower court judges understood that supremacy afforded them the opportunity to control Italian national legislation for consistency with Community law. The Italian Constitutional Court understood equally well that its prerogative of exclusive constitutional review was in jeopardy and sought to supervise the application of EU law in the face of contrary national legislation by the lower courts. Only in the 1980s, after it perceived that it was lagging behind the supreme courts of virtually all other member states, did it finally accept supremacy more or less on the ECJ's terms.⁵¹

In France the monopoly of interpretation of public and constitutional law belonged to the Conseil d'Etat until 1958. In that year the power to review the constitutionality of legislation passed to the newly established Conseil Constitutionnel. This body decided in 1975 to abstain from examining the conformity of international treaties with national laws. The Conseil d'Etat—a particularly elitist group of French civil servants—considered any interference by the ECJ in French domestic affairs as a direct menace to its administrative and political power and chose therefore to ignore the ECJ.⁵² Not so the Cour de Cassation. It decided to accept the supremacy doctrine in the landmark *Jacques Vabre* case only four months after the Conseil Constitutionnel's refusal to review legislation on its compatibility with international treaties.⁵³ Up to that point the Cour de Cassation had followed the famous Matter Doctrine, requiring judges to avoid conflicts between domestic law and international obligations using rules of construction; but if such avoidance was impossible, judges had to enact national law, for they “cannot know other will than that of the law.”⁵⁴

Judicial Competition

Alter's “intercourt competition” model seeks to explain variations in the scope and pace of national court acceptance of the doctrines of direct effect and supremacy.⁵⁵ She argues, “different courts have different interests vis-à-vis EU law . . . national courts use EU law in bureaucratic struggles between levels of the judiciary and be-

51. Laderchi 1995, 12–13, 20–25. See also Stone 1996, 10–11.

52. Plötner writes, “To keep . . . Community law out of the way seemed to be in the well understood interest of the Conseil d'Etat; it was . . . a question of power,” and “While for the Conseil d'Etat any change in the status quo could only mean loss of influence, things were the other way around for the Cour de Cassation. Their reaction to Direct Effect and Supremacy was a flawless application of this insight.” See Plötner 1995, 28, 32.

53. Stone 1996, 12.

54. Plötner 1995, 5. Similar doctrines were in place in most other member states of the EU prior to their acceptance of EU supremacy. In U.K. jurisprudence, for example, the predominant strand before *Factortame* sought to “blunt the edge of any conflict between the two systems by use of strong principles of construction, the import of which was that UK law would, whenever possible, be read so as to be compatible with Community law requirements. . . . On this view the traditional theory of sovereignty could be maintained.” See Craig 1995, 3, 5. The Dutch situation is discussed in Claes and De Witte 1995, 6–8.

55. Alter 1996a,c.

tween the judiciary and political bodies, thereby inadvertently facilitating the process of legal integration.”⁵⁶ The exercise of judicial review involves a “horizontal” competition between courts and legislatures, allowing a judge to invoke the higher law of the constitution or a treaty as a bar to enforcement of a particular legislative product. Pure intercourt competition, on the other hand, can occur both horizontally, between high courts each charged with superintending a different body of law, and “vertically,” between higher and lower courts within different branches of a national court system.

Judicial interests flowing from intercourt competition reflect interests in relative judicial power—power and prestige relative to other courts within the same national legal system. These interests may intersect interests in gaining the power of judicial review; in national legal systems in which some courts exercise judicial review while others do not, for instance, those courts lacking the power under the national system may seek to equalize their status with other national courts by arrogating the power to review national law for compatibility with EU law in partnership with the ECJ. For instance, Jens Plötner argues that the Cour de Cassation’s institutional position vis-à-vis the Conseil d’Etat improved greatly with its swift endorsement of EU supremacy.⁵⁷ Such competitive interests may also intersect with interests in promoting particular substantive policies, to the extent that a lower national court disagrees with a higher national court on a particular set of doctrinal outcomes and seeks to leapfrog that higher court by reference to the ECJ.

Promotion of Substantive Policies

Jonathan Golub has recently demonstrated the ways in which a desire to shape specific policy outcomes may motivate national courts to limit the number of references to the ECJ. He shows that British courts have been reluctant to make references in cases in which the environmental protection requirements in EU law are less stringent than in British environmental law.⁵⁸ Golub seeks to explain patterns of references, not acceptance of the doctrines of direct effect and supremacy. But other analysts of the reception of Community law by national courts have similarly pointed to judicial policy preferences as an explanatory factor. For Stone, a court has an “interest in using its decisions to make good policy.”⁵⁹ Alter notes that “lower courts can use EU law to get to policy outcomes which they prefer, either for policy or legal reasons.”⁶⁰

How to identify and assess judicial policy preferences? The question has long bedeviled students of judicial politics, who have been singularly unsuccessful at generating an algorithm that can help predict the political attitudes of individual

56. Alter 1996b, 21.

57. Plötner 1995, 16, 22–23.

58. Golub 1996b.

59. Stone 1996, 26.

60. Alter 1996b, 23–24.

judges.⁶¹ It is much easier to demonstrate a correlation between the political posture of a particular judge and a particular set of judicial outcomes than to identify which judge will favor which policies.

This uncertainty is multiplied in the present context by the difficulty of predicting how acceptance of direct effect and supremacy will affect outcomes in individual cases. Suppose, for instance, that a British judge favors high levels of environmental protection. At a given moment, EU directives and ECJ interpretations of those directives might mandate higher levels of environmental protection than British law. Yet those directives could change, as could the composition or disposition of the ECJ. Further, the acceptance of direct effect and supremacy cannot be limited to a particular class of cases. EU law and the Court's interpretation of that law could contradict the same national judge's policy preferences with regard to state subsidies for particular industries, gender discrimination, immigration law, or any other substantive area.

But why cannot an individual national judge accept direct effect and supremacy and then control the actual application of EU law simply by manipulating references? Golub's findings suggest that British courts may be pursuing this strategy. However, courts' ability to pick and choose cases to refer will be progressively limited both by the pressure of individual litigants and by lower courts, as well as by the overriding need for minimum consistency and coherence in the law itself. Once a court has declared that EU law is supreme over national law, litigants will cite favorable doctrines of EU law and appeal national court decisions that do not follow those doctrines where they clearly apply to the facts in a particular case. Lower courts will similarly seek clarification in cases of apparent conflict between EU and national law. And to the extent that higher national courts refuse to provide such clarification, or selectively apply EU law in individual cases, the resulting patchwork will endanger the legitimacy of the national legal system.

Returning to the question of preferences concerning direct effect and supremacy, it is still possible to identify situations where accepting direct effect and supremacy may on balance advance a judge's substantive policy preferences. First, some number of national judges may simply favor European integration and would see participation in the construction of the European legal system as an important step in that direction. Second, a national court might have a particular "constituency," such as workers or traders, that will be systematically advantaged by EU law. Overall, however, the direct evidence is thin and easy to challenge. The difficulty, more generally, is that a judge's preferences regarding any individual case or class of cases will be a compound of views on a range of substantive issues: highly individualized preferences over specific policy outcomes combined with more general preferences concerning modes of statutory interpretation, the optimal relationship between courts and the legislature, and the need to protect specific classes of litigants. These preferences will then be tempered by a need for consistent, coherent, generalizable rules. It is important to note, however, that legal education, training, and socialization often result in the internalization of the constraints of clarity and predictability as indepen-

61. Shapiro 1981, 29.

dent preferences. Judges will thus often refer to these attributes as goals that they seek to pursue in upholding the “rule of law.”

In sum, judicial preferences over specific policy outcomes are unlikely to be sufficiently generalizable to explain initial acceptances of direct effect and supremacy, although they may nevertheless be relevant to explaining or understanding the outcome of any particular case.

Constraints on the Process of Legal Integration

Even the most precise specification of the preferences of individual litigants and national courts provides an incomplete account of the legal integration process. It is simultaneously necessary to identify the constraints operating on these actors in their pursuit of their preferences. As outlined earlier, different courts within different national legal systems have different interests. However, to the extent that variation exists in the timing and scope of acceptance of EU legal doctrines by national courts that should have roughly the same preferences (two national constitutional courts, for instance), those differences are likely to flow from the relative constraints that those courts face in pursuing those preferences. We discuss these constraints as they operate on national courts, and hence indirectly on individual litigants, in terms of the demands imposed by the need to maintain judicial legitimacy.

Legitimacy is an elusive concept, highly contingent on social and political norms and self-understandings. Our definition of judicial legitimacy rests on our earlier claim—critical to our “mask of law” argument developed in the context of a neofunctionalist analysis—that courts in countries upholding the rule of law must perceive themselves and be perceived by others as fundamentally nonpolitical actors.⁶² They are socialized to understand themselves as agents and servants of the law. Political considerations attach to judicial decisions and may motivate these decisions at the margin. Nevertheless, overt political arguments are illegitimate; actions must be justified with reference to generalizable principles and in a particular technical discourse.

We initially emphasized the ways in which this judicial self-understanding underpinned the ability of courts to engage in a specialized normative discourse with other courts. We argued that the receptivity of national courts to participation in a dialogue with the ECJ depended in part on their perception of it as a court like themselves, as a fellow member of a “community of law.”⁶³ In subsequent iterations of the debate with intergovernmentalists, we also noted the ways in which the need to maintain the appearance and the reality of a “nonpolitical” identity has constrained the ECJ in its relations with EU member states.⁶⁴ The remainder of this section builds on these ideas in an effort to develop a concept of judicial legitimacy that imposes differential

62. Burley and Mattli 1993, 74–75.

63. Slaughter 1995, 133.

64. Mattli and Slaughter, 1995.

constraints on national courts in pursuing their interests with regard to other courts, in particular national legal systems and their fellow branches of domestic governments.

A final caveat before proceeding. The language of preferences and constraints is harshly instrumental, likely to jar and even offend the sensibilities of many judges (and lawyers). Judges are likely to describe their own thought processes in reaching decisions based on deeply internalized notions of both the idea and the ideal of the rule of law. These psychological factors also mean that the preference-constraint dichotomy is inevitably artificial, since many judges will be unable to define their interests independently of the constraints of judicial legitimacy. The following discussion of constraints is thus presented as an analytical construct that can help generate hypotheses about specific aspects of legal integration rather than an account of how judges actually operate.

Constraints Imposed by Conceptions of Judicial Legitimacy in Rule of Law States

A court in a liberal democracy—which we equate, for present purposes, with a state committed to upholding the rule of law as the principal safeguard of the rights and liberties (and hence the political power) of its citizens—is charged with interpreting and applying the law without regard to the judge’s own political preferences, the power and political preferences of the parties appearing before the judge, or the power and political preferences of any other branch of government with an interest in the case. Two principal constraints shape this process of rule interpretation and application. First is the constraint of minimum fidelity to the demands of legal discourse: “the language of reasoned interpretation, logical deduction, systemic and temporal coherence.”⁶⁵ Reasoning and results that do not meet these requirements may be challenged as “unfounded in law” or as indicative that a court is acting *ultra vires*—in excess of its mandate.

Second is a constraint of minimum democratic accountability: the requirement that a court not stray too far from majority political preferences.⁶⁶ At first glance, this constraint may seem completely at variance with the conception of courts as nonpolitical actors. By definition, surely, courts are not accountable to voter preferences. Furthermore, judges are not and cannot be directly accountable to the voters and, indeed, are specifically safeguarded by guarantees of life tenure and prohibitions on judicial salary reduction from feeling the full effects of electoral disagreement with their decisions. A closer look, however, reveals that judicial decisions that consistently and sharply contradict majority policy preferences are likely to undermine perceptions of judicial legitimacy and can result in legislative efforts to restrict or

65. Joseph Weiler 1994, 521.

66. This constraint will not operate in cases involving the protection of minority rights where the national constitution explicitly enjoins courts to protect minorities from majority decisions infringing on their fundamental rights.

even curtail judicial jurisdiction—the scope of judicial power over particular classes of cases.⁶⁷ An astute judge will anticipate these reactions and seek to avoid them.

Yet if a court is constrained by the demands of legal reasoning and discourse, how can it “choose” to decide more or less in line with majority preferences? In many cases the choice will be clear: the weight of text and precedent; the elemental requirements of precision, clarity, and determinacy in rule interpretation and application; or the potentially disastrous social, political, or economic consequences attendant on one of the proffered readings of a textual provision as compared to another leave little room for doubt as to the correct “legal” outcome. In such cases should the judicial outcome diverge from majority preferences, it is up to the legislature to change the law. In other cases, however, the sides are much more evenly matched. The text may be genuinely ambiguous, legislative intent murky, the option of a clear and determinate rule equally available on both sides, all equal prospects for creating a cascade of evils or a cornucopia of benefits however the court comes out. In these cases—hard cases, close cases, frequently very important cases—judicial outcomes that consistently or persistently stray too far from perceived majority opinion in a particular country, whether expressed through the legislature or not, are likely to trigger suspicions that judges are substituting their own policy preferences for those of “the people.”

Sources of Variation in the Operation of Judicial Legitimacy Constraints

Both of the preceding constraints—the demands of legal discourse and democratic accountability—are likely to vary from country to country. The sources of this variation are three: (1) variation in national policy preferences concerning the desirability of European integration, (2) variation in “national legal culture,” and (3) variation in specific national legal doctrines. In the first category a national court that readily accepts direct effect and supremacy will face less of a challenge to its legitimacy in a polity where public support for European integration is generally strong than in one with a split in public attitudes. In the second category the demands of legal discourse will vary depending on the nature and strength of the links between the legislature and the judiciary and different styles of legal reasoning. Some national legal cultures prove more hospitable than others to national judicial participation in the EU legal system. In the third category doctrines governing the relationship between national and international law, the specific function of particular national courts, and the definition and operationalization of national sovereignty pose particular obstacles within national legal discourse and may themselves reflect majority preferences. Factors in each of these categories have produced variations in the constraints facing different national courts.

67. Consider the proposals floated at Maastricht and by some parties prior to the 1996 IGC to curtail the jurisdiction of the ECJ. See Alter 1996a, 282–85; Kevin Brown, “Government to Demand Curb on European Court,” *Financial Times*, 2 February 1995, 10; and Arnulf 1994, 13.

National policy preferences. The country studies show that the rate of acceptance of the supremacy doctrine in particular, and to a lesser extent direct effect doctrine, generally track national attitudes toward European integration. Figure 1 shows that the first countries to accept the doctrines of direct effect and supremacy were the Netherlands, Germany, and Belgium, followed by Italy, France, and Great Britain, in that order. No surprises here; an observer ignorant of EU law and national legal doctrine but knowledgeable about relative political support for the EU in these various countries is likely to have predicted a similar sequence. It is possible, of course, that national judges simply shared the prevailing attitudes toward European integration held by their fellow citizens and interpreted the law accordingly. It is impossible to know without interviewing individual judges, who would in any event be reluctant to confirm such speculation. Such evidence, however, is unnecessary insofar as the democratic accountability thesis would lead to the same result. Based on the assumption that national judges across countries shared uniform preferences concerning the advantages and disadvantages of entering into a partnership with the ECJ, the pursuit of these preferences would be constrained by the need not to allow their decisions to diverge too far from majority political preferences.

If judges are constrained by majority preferences, however, how then is the construction of the European legal system even a puzzle? What of the claim that the system was built by the ECJ and national judges, lawyers, and litigants against the wishes, or at least behind the backs of, member state governments? Here is a prime example of a place where the general intergovernmentalist–neofunctionalist debate described earlier founders on the underlying assumption of a unitary state. To counter Garrett and Weingast's claim that the ECJ was able to do its job because it advanced the interests of the EU member states requires understanding the ways in which courts and national executives compete against each other not in deciding whether to support further European integration (a decision ultimately up to the electorate), but to determine the balance of power among governmental institutions in an integrated Europe.

Assuming that the member states of the EU are arrayed along a spectrum of favorable attitudes toward integration, attitudes broadly determined by the electorate as a reflection of economic interest, historical experience, and geopolitical position, it is nevertheless possible to imagine alternative architectures for an integrated Europe that would be relatively more or less favorable to the interests of national executives, legislatures, and courts. For instance, an EU that required provisions of the Treaty of Rome to be implemented by decisions of the Council of Ministers, which in turn imposed obligations on national executives and legislatures to pass directives implementing these decisions at the national level, affords much more power to national executives than a structure in which treaty provisions can be directly implemented through national courts. It follows that there is no contradiction between the assertion that national courts did not follow the preferences of national executives in accepting direct effect and supremacy and the recognition that both national courts and national executives are more or less constrained by majority preferences concerning European integration.

The country studies provide strong evidence for both of these propositions. Relative to one another, national courts in all countries accepted direct effect and supremacy in keeping with the general attitudes of the electorate toward European integration: the Dutch first, the British last. At the same time, the Dutch Supreme Court accepted both of these doctrines within a year after the Dutch executive argued fervently against the interpretation of the Treaty of Rome that gave rise to them in the landmark case of *Van Gend en Loos*.⁶⁸ In France the highest private court accepted direct effect and supremacy fifteen years before the highest administrative court, the Conseil d'Etat, which plays the dual role of adviser to the executive and most closely identifies with what it perceives to be the executive's interests. In Germany the executive unsuccessfully sought to intervene in the judicial process on the side of the highest financial court against a decision of a lower financial court mandating compliance with an ECJ judgment on the basis of supremacy.⁶⁹ The stakes in these cases concerned less the desirability of European integration per se than a struggle over which domestic branch of government would control decisions over the pace, scope, and manner of integration within the broad outlines of the treaty.

National legal culture. Judges are products of specific national legal systems. Their training within particular systems gives rise to a set of professional values and attitudes that overlay, mediate, and temper their political instincts. They not only learn a body of national legal rules, but also absorb specific features of their national legal culture. At the core of this culture are particular modes of legal reasoning—formal versus pragmatic, deductive versus inductive, abstract versus contextual—that give rise to a distinctive style of framing and resolving legal questions. Other features of national legal culture include a particular understanding of the role of courts in relation to legislative bodies, differing specifically on the extent to which judges “make” law in the process of interpretation and application of legislative provisions and the extent to which they can fill the gaps in those provisions.

Even wider is the gap between common law judges, who elaborate rules without legislative guidance based on the doctrine of precedent, and civil law judges, whose only source of authority flows from national legal codes. Yet both systems contain room for a third feature of national legal culture: relative judicial activism or restraint. How far should a judge depart from a previous decision or from the strict letter of a particular statute? Individual judges within a particular national legal system can differ on this question, of course, but an entire national legal culture—due largely to the influence of national history and tradition—can lean in one direction or the other. Finally, national legal culture may reflect national legal structure: different types of federalism, as in Belgium or Germany, or systems divided into substantively

68. Case 26/62, *N.V. Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

69. Alter 1996c. It is important to note, however, that this interbranch struggle does not always cut in favor of increased integration. The German Constitutional Court, for instance, took a stronger position against the Maastricht Treaty than the German executive. See Kokott 1995, 43.

specialized courts (labor courts, tax courts, constitutional courts) in which each court develops its own tradition of protecting a specific set of interests.

These features of national legal culture ultimately condition the relationship between national courts and a supranational tribunal. The idea of “a community of law” requires that the participants recognize one another as equivalent legal actors speaking a common language and sharing a common legitimacy. Nevertheless, the forging of such a relationship between specific national courts and the ECJ has depended on a number of preconditions. Judicial preferences, constrained by national political attitudes toward integration, created a predisposition; ECJ decisions provided the opportunity by creating the doctrinal “hook.” But an additional factor constraining or facilitating the establishment of this relationship—particularly the acceptance of the legal hierarchy between the ECJ and national courts created by the doctrine of supremacy—is the relative “fit” between the two legal systems, a fit optimized by traits of national legal culture.

A core element of national legal culture is delimiting the scope of judicial relative to legislative power. All the members of the EU uphold the general liberal principle of dividing legislative and judicial power; however, implementing it in each country is historically and culturally conditioned. A principal indicator of this distribution of power is recognition of the principle of judicial review, even if it is exercised only by constitutional courts. The existence of judicial review anywhere in the national legal system embodies recognition of a higher law constraining the will of the people as expressed through the legislature. On this dimension, not surprisingly, German and Italian courts, from national legal systems that have judicial review, were quicker to recognize supremacy than French and British courts, which have traditionally been wholly deferential to the national legislature.⁷⁰ On the other hand, countries that do not have judicial review, such as the Netherlands, can nevertheless recognize supremacy as the result of the will of the legislature expressed either in the constitution or the treaty itself. This is the route that was ultimately taken by both British and French courts.⁷¹

Legal culture is also conditioned by the specific historic role of courts within a particular society. Here German and Italian courts face specific constraints that other courts do not. The constitutional courts in both countries are specifically charged with safeguarding individual rights and the rule of law against the revival of fascism. In the German case, the commitment to *Verfassungspatriotismus*, or constitutional patriotism, results in the Constitutional Court’s unusual willingness to decide cases with important foreign policy implications. According to Juliane Kokott, this willingness flows from the renewed German commitment to the *Rechtstaat* in the wake of World War II—no questions are above or beyond the law. The Constitutional Court thus conceives itself as an equal participant with the political branches of the German government in the process of European integration.⁷² At the same time, however, the

70. See Plötner 1995, 4, on the “traditionally very parliament-centered philosophy of French law.”

71. De Witte 1995.

72. Kokott 1995, 20, 43.

Court's primary commitment to individual rights and the preservation of German democracy has led it to apply the brakes to that process in ways that may well constrain the German government's pursuit of its perception of the national interest.⁷³ Conversely, the members of the French Conseil d'Etat are educated at the elite Ecole Nationale d'Administration and trained to serve as personal advisers to the most important members of government—to be, as the name suggests, “counselors to the state.” They thus understand their function as definers and defenders of the “French national interest,” seeing themselves not as checks on executive power but as representatives of it.⁷⁴ From this perspective, it is not surprising that the Conseil d'Etat took it upon itself to combat the “virus of supranationality,” holding out until the “government and even Parliament [were] urging it to change its jurisprudence.”⁷⁵

A third element of national legal culture concerns style of legal reasoning. Writing about Britain, Paul Craig notes that the “common law mode of adjudication is pragmatic and non-doctrinaire.”⁷⁶ He argues that these characteristics allowed British courts early on to “acknowledge that they were part of a Community legal order, and that the ECJ was the proper court to pass judgment on issues concerning the interpretation of the Treaty.”⁷⁷ This acceptance included the doctrine of direct effect. At the same time, however, he asserts that the common law method helps explain why British courts had difficulty with the doctrine of indirect effect, which required them to read national legislation to be in conformity with an EU directive even when the national legislature has not implemented the directive directly. The trick is to perform this feat of construction without actually rewriting the statute, often a difficult task. The common law requirement, unlike in civil law countries, that courts write lengthy opinions explaining their reasoning to reach a particular result tends to highlight this tension in ways that lead British courts to stop short of the result desired by the ECJ.⁷⁸

National legal doctrine. In the most general sense, to say that national judges are constrained by national legal doctrine is to say that courts are constrained by the shape and specific form of national law. Legal doctrines frame particular issues: for an American judge a question concerning abortion must be understood in terms of a right of privacy or perhaps of a question of equal protection of the laws; for a German judge it must be analyzed in terms of specified textual rights to life and to human dignity.⁷⁹ Legal doctrines also provide the baselines against which the legitimacy of a particular judicial decision can be measured, in terms of linguistic, logical, and teleological consistency with stated principles or precedents. Specific doctrines can thus

73. *Ibid.*, 43.

74. Plötner 1995, 17–18, 22–23, 31, 34.

75. *Ibid.*, 23–24, 30.

76. Craig 1995, 23–24.

77. *Ibid.*

78. *Ibid.*, 24–25.

79. Currie 1994, 310–14.

provide either obstacles or channels to achieving particular results, particularly when a national court faces the task of harmonizing a new set of doctrines laid down by another court outside the national legal system with long-standing national doctrinal traditions and formulations. The resulting constraints, where they exist, are likely to act more as temporary checks than absolute bars, as courts identify various incremental strategies to mesh apparently conflicting principles or to graft new doctrinal formulations onto old.

To some extent, particular national legal doctrines simply reflect and codify aspects of national history and culture that define the role of courts within a particular national legal system. The best example in this category is the “eternal guarantee clause” (Ewigkeitsklausel) in the German constitution, which prohibits amendment of the constitution to abridge fundamental individual rights.⁸⁰ A less obvious way in which national legal doctrine can shape judicial identity in ways that can constrain national courts in accepting direct effect and supremacy concerns the distinction between “monism” and “dualism”: between a conception of the national legal order existing as an integrated part of the international legal order and a conception of two distinct legal orders in which rules from the one must be “translated” into the other through specified processes to have any legal effect. The Netherlands has the strongest tradition of monism, leading the Dutch Supreme Court to declare in 1906 that treaties were directly applicable in Dutch law without “transformation” or transposition into national statutes by the Dutch parliament.⁸¹ This tradition made it particularly easy for Dutch courts to accept direct effect of EU law in the wake of *Van Gend en Loos*. Italy, on the other hand, has a centuries-old dualist tradition, referred to in Italian law as the “plurality of legal orders.”⁸² After World War II, this tradition became linked with the primacy of the Italian constitution.⁸³ The Italian country study documents the ways in which the dualist approach hampered acceptance of EU law supremacy by the Italian Constitutional Court for decades.⁸⁴

A final example of the interrelationship between specific national legal doctrines and judicial perceptions of their ability to act as autonomous actors concerns different national conceptions of “sovereignty.” In France, Belgium, and the Netherlands constitutional provisions and doctrinal traditions recognizing the primacy of international treaty law (another facet of a monist tradition) have meant that the absolute supremacy of EU law could be accepted as international law without a perceived infringement of national sovereignty. In Germany and Italy, by contrast, international treaties are regarded as comprising part of a separate legal order, which cannot alter fundamental aspects of the national legal order. In both countries supremacy was ultimately accepted on the basis of a specific constitutional provision authorizing membership in the Community. The difficulty is that the constitutional courts in both countries interpret these specific constitutional provisions as containing their own

80. Kokott 1995, 6.

81. Claes and De Witte 1995, 2–3.

82. Laderchi 1995, 8–9.

83. *Ibid.*, 10.

84. *Ibid.* See also De Witte 1995, 15.

implied limits embedded elsewhere in the national constitution, limits that can be asserted as necessary against EC law. The result is ultimately a conditional acceptance of supremacy, reserving a core of absolute power for the national courts contrary to the doctrine of the ECJ itself.⁸⁵ The German Constitutional Court reasserted this power in its Maastricht decision, in ways that will shape the next stage of development of the EU legal system.

Conclusion

The explosion of literature on the ECJ has moved beyond the initial theoretical debate between neofunctionalists and intergovernmentalists. Participants in that initial debate have converged toward a synthetic understanding of the circumstances in which the ECJ enjoys relative autonomy from the member states and in which it must adhere more closely to member state preferences. At the same time, critiques of both of these analytical frameworks as incomplete and oversimplified, together with the emergence of significant new data, have shifted the theoretical focus toward explaining variation in the degree and timing of legal integration both across countries and within them. Of particular interest is the role of both individual litigants and national courts in facilitating or hampering legal integration. Generating theoretical hypotheses at this level requires departing from a basic assumption of both the neofunctionalist and intergovernmentalist models—that of a unitary state.

In reviewing this more recent literature, we have added an alternative model of a disaggregated state to the existing analysis of links between individuals and supranational institutions, a model of national government institutions interacting quasi-autonomously with both individuals and other private entities in domestic society and with the ECJ. This approach is generally consistent with the focus on state-society relations emphasized by liberal international relations theory.⁸⁶ We suggest, however, that the approach improves on unitary-state liberal theories by (1) directing attention to the specific nature of the way in which social interests are aggregated by state institutions as a function of the form of the interaction between them (litigation versus lobbying versus voting), and (2) recognizing that the interests of social actors may be refracted through the lens of the particular interests of different government institutions in competition with one another. The disaggregated state model also overlaps with two-level game theory, which clearly recognizes the ways in which executives can work within international institutions to strengthen their bargaining position with regard to their own legislatures.⁸⁷

The flowering of interest in the ECJ and in the relationship between legal and political institutions throughout the EU among political scientists may bear particular fruit when cross-pollinated with a new generation of EU legal scholarship.⁸⁸ It thus

85. *Ibid.*, 18.

86. Moravcsik 1997.

87. See Putnam 1988; and Evans, Jacobson, and Putnam 1994.

88. Perhaps a leading example of such cross-fertilization is the collection of essays by both legal scholars and political scientists in Shaw and More 1995.

seems appropriate to conclude with a review of some new developments in legal scholarship that are likely to prove conducive to more interdisciplinary collaboration. Six trends are particularly relevant.

First, the era of respectful and unquestioning adulation of the Court is over. Where Hjalte Rasmussen was once ostracized for overtly criticizing the Court and laying bare its constituency-building strategies, he is overshadowed today by radical critics, such as Jason Coppel and Aidan O'Neil.⁸⁹ Documenting and encouraging this trend, Shaw has challenged the traditional assumption that European law and European integration are mutually reinforcing, articulating a "counter principle" of disintegration. From her perspective, EU law can promote diversity and differences as well as consensus, fragmentation as well as unity and cohesion, disruption of rational norms as well as uniformity, and illegitimacy and weakness as well as legitimacy and authority. Fighting words these, particularly in the tightly knit web of pro-EU lawyers, judges, and academics. They reflect a new willingness to see the Court in the round and to move away from implicitly teleological scholarship.

Second, the Court itself is retrenching. Recent decisions sharply curtailing the scope of the prohibition on nontariff barriers in Article 30 and slapping down the Commission for exceeding its powers under the treaty have evoked howls of protest from the older and more activist generation of judges such as Federico Mancini, themselves following in the founding footsteps of Pierre Pescatore and Robert Lecourt.⁹⁰ Legal scholars are already actively engaged in speculating about the reasons behind this shift, ranging from strategic calculation in light of the 1996 intergovernmental conference to the maturation of the Court to the emergence of a different legal vision of the Community itself.

Third, legal scholars and the Court itself increasingly recognize the need to amend the Community's basic legal architecture. The overload on the Court's docket is becoming painfully apparent, with accompanying calls for both doctrinal change and the creation of new EU lower courts.⁹¹ Attention will also focus increasingly on the Court of First Instance.

Fourth, EU legal scholars will be increasingly engaged in the task so dear to the hearts of American legal academics: debating the role of a court in a democracy. Some of these debates are being powered by changing conceptions of law—the introduction of legal realist perspectives on traditional European legal formalism. Others flow from changing conceptions of democracy—the reevaluation of the role of non-elected institutions and their ability to serve the underlying values of the democratic process.⁹²

89. Coppel and O'Neill 1992.

90. Mancini and Keeling 1995. For a review of cases reining in the Court's previously expansive interpretation of Article 30, see Peter Oliver, "Customs Union and Practice," *Financial Times*, 21 February 1996, 12.

91. For an excellent discussion of this problem, see Strasser 1995.

92. Joseph Weiler is once again leading the way in this regard, seeking to articulate the values of an emerging European democracy. See Weiler, Haltern, and Mayer 1995. For another provocative meditation on the nature of sovereignty and democracy in the EU, see MacCormick 1993, 1–18.

Fifth, many analysts of EU law are likely to reengage the debate concerning the relationship of EU law to international law more generally. The revisiting of these issues will be fueled by the German Constitutional Court's rejection of the landmark depiction by the ECJ of the EU legal order as *sui generis* in *Van Gend en Loos*, reemphasizing the status of the Treaty of Rome as a treaty and the role of the member states as the "masters of the treaty." As the country studies reviewed in this essay demonstrate, a number of national courts and commentators never fully accepted the distinction between EU and international law. To the extent that this link is reformed, EU legal scholarship will feed more directly into international legal scholarship on EU law as emblematic of international law in a community of liberal states.

Sixth, and finally, legal scholars are beginning to address the larger question of the impact of EU law on European economic, political, and social integration. Such studies must proceed issue area by issue area. The European University Institute is currently sponsoring a series of papers by a multinational team of researchers on the relationship between national courts and the ECJ in the field of labor law.⁹³ Preliminary papers on the impact of EU rules and ECJ decisions interpreting those rules on British and German national law have already generated interesting findings about the motives of national courts, the significance of a preexisting body of national law directly conflicting with EU law, and specific litigation strategies of state and private parties opposed to EU law.⁹⁴

These six trends are part of a larger whole. To quote Shaw, "what is slowly emerging, out of the traditions of a number of disciplines and out of interdisciplinary work, is a body of commentary which examines European legal processes and legal institutions in their broader social, economic, and political context, rather than regarding legal processes as an object of study in themselves."⁹⁵ Indeed, several European legal scholars have launched the *European Law Journal* as a forum for such scholarship. It is appropriately subtitled *Review of European Law in Context*.⁹⁶

As political scientists focus on specific developments within national legal systems and the motives driving national and transnational litigants, even tracking the trajectory of individual cases, their work will intersect much of this new legal scholarship. They will learn to take courts more seriously, even while teaching many legal scholars to take them less seriously—at least in terms of looking beyond the formal authority of the law as written or judicially pronounced. They may even come to understand doctrinal constraints, even if such constraints need to be filtered through the lens of judicial identity. More generally, as broad generalizations concerning "national interest" or "self-interest" give way to a more nuanced understanding of the complex interaction of multiple sub- and supranational actors, as well the interaction of different government entities jockeying with one another while subject to

93. This project is being led by Professor Silvana Sciarra.

94. See Davies 1997; and Koerner 1996.

95. Shaw 1995, 2.

96. The journal is published by Basil Blackwell for the European University Institute. The editors are Brian Bercusson, Christian Joerges, Antoine Lyon-Caen, Francis Snyder, and Joseph Weiler. The first issue was published in March 1995.

international, subnational, and supranational pressures, the study of legal integration will take its rightful place alongside studies of political and economic integration. With luck, the results will mirror the rich interaction of law, politics, and economics in the European Union.

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