The European Court and National Courts—Doctrine and Jurisprudence

Legal Change in Its Social Context

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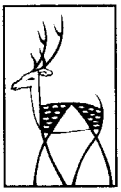

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The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints

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INTRODUCTION

The European Court of Justice is in fashion, at least in academic circles. Hailed as the creator of the Community legal system and the constitutionaliser of the EC Treaty, the ECJ is no longer the specialised province of European law experts.[1] This renewed interest is particularly evident among political scientists, who long ignored the Court as a technical and largely irrelevant institution. 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. All students of legal integration now agree that the Court is not only an important actor in the process of European integration but also 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 EU law, or at least for the examination of EU law in political, economic and social context. 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.[2] Nevertheless, the overwhelming majority of political scientists studying and writing about the European Union 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

[1] A note on terminology. We use "EC" or "the Community" when referring to the construction of the legal system of the European Union, as the Court's landmark cases were all decided before the metamorphosis of the EC into the EU. We use "EU" to describe the Community today.

[2] Mary Volcansek, *Judicial Politics in Europe: An Impact Analysis* (New York: Peter Lang, 1986).

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 child for a revival of neofunctionalism. At a time when the Single European Act was being described as an inter-governmental bargain,[3] we argued that the Court's success in constructing an effective Community legal system was best explained in neofunctionalist terms.[4]

Scholars have challenged the neofunctionalist explanation of legal integration from two different directions. First is the intergovernmentalist or neorealist claim that the ECJ has actually had little independent or unforeseen impact on European integration; that although straying occasionally, it has acted largely as the faithful agent of Member State interests.[5] In response, we challenged the empirical evidence of congruence between ECJ decisions and Member State interests. More fundamentally, we questioned the identification of state "interests" as unitary economic interests. From this perspective, the value of a neofunctionalist analysis is its emphasis on microfoundations, on specifying the interests of particular actors in the process of European integration.

The second challenge to the neofunctionalist explanation of European legal integration concerned its teleological quality. Just as Haas's original neofunctionalist analysis waxed and waned with the fortunes of the Community itself, so too do neofunctional dynamics seem less compelling in 1996 than in 1992. Neofunctionalism seems to be a tale tailored for success, an account of how different actors can overcome obstacles to achieve a common goal. It is less a theory of when integration will and will not happen than a description of the process of how it does. To understand when the conditions favourable to this process are most likely to occur, we need a theory of interest formation.

In response to these challenges, and to a crop of new data, we propose to reexamine the neofunctionalist framework we put forward. Much of the empirical evidence that has emerged in the interim confirms the value of this framework in terms of its identification of the key actors in the legal integration process, their motives, the dynamics of their interaction, and the context in which they operate. EU lawyers themselves are increasingly willing to

[3] Andrew Moravcsik, "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community", *International Organization* 45 (1991), 19–45.

[4] Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration", *International Organization* 47 (Winter 1993), 41–76; also Walter Mattli and Anne-Marie Slaughter, "Law and Politics in the European Union", *International Organization* 41 (Winter 1995), 183–90.

[5] Geoffrey Garrett, "International Cooperation and Institutional Choice: The European Community's Internal Market", *International Organization* 46, 533–60; *id.*, "The Politics of Legal Integration in the European Union", *International Organization* 49, no. 1 (1995), 171–81.

acknowledge the existence of a closely constructed network of sub- and supranational actors acting within an insulated and self-consciously constructed "community of law". At the same time, the limits of the initial framework are also now becoming clear. This chapter seeks to address some of those limits in ways that we hope will contribute to further research.

In the context of European legal integration, we originally argued that subnational actors (private litigants, their lawyers, and lower national courts) cooperated with the ECJ in the construction of the EC legal system. We paid relatively little attention, however, to the specific motives animating these actors, beyond the broad assertion that they were generally pursuing their self-interest. Such generalisations cannot explain the considerable variation in the timing and the extent of acceptance of key doctrines of EC law among different national courts (see Figure 1).

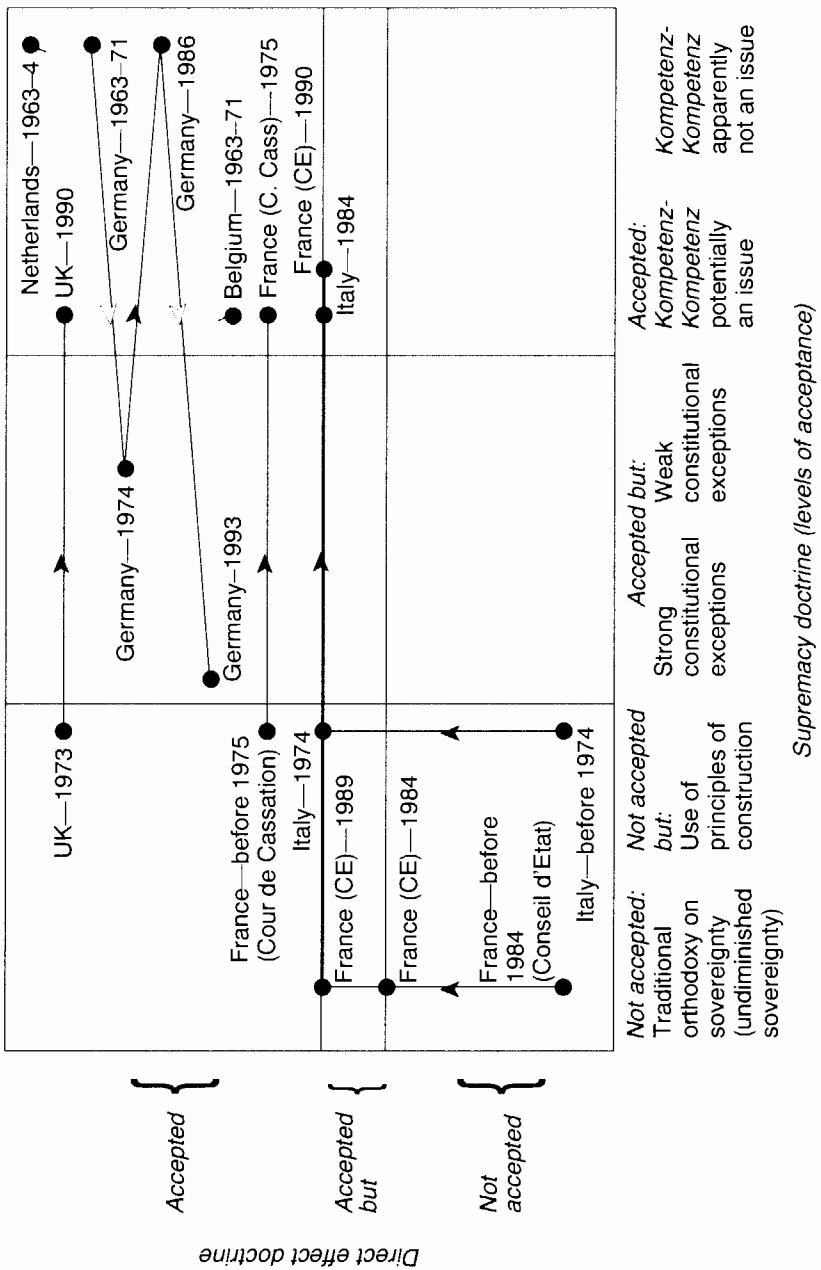
We argue in this chapter that a theoretical account capable of explaining variation in the pace and scope of European legal integration among different Member States must disaggregate the state itself. The standard neofunctionalist model assumes that the "state" is a monolith, to be circumvented and influenced by coalitions of sub- and supra-national actors. Yet closer examination of the actual process of integration, with starts and stops, as well as national variation, reveals courts, legislatures, executives, and administrative bureaucracies interacting as quasi-autonomous actors. Each of these institutions has specific interests shaped by the structure of a particular political system, the need to perform specific socio-political functions such as judging or legislating, and the demands of specific political constituencies.

In lieu of standard models of the unitary state, the picture that emerges 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 supra-national institutions.[6] This picture is closer to general liberal theories of international relations than it is to any particular account of European integration.

Therefore, what is needed is a more nuanced specification of the interests (preferences) of the actors involved in the process of integration. We offer such an account based on the six reports presented in this volume. The reports examine the process of reception of the supremacy and direct effect doctrines in Belgium, France, Germany, Great Britain, Italy, and the Netherlands. However, a refinement of the specification of the interests is not enough; it must be complemented by a careful study of the constraints that actors face when pursuing their preferences. We analyse these constraints in the context of specific conceptions of judicial identity and the constraints imposed by legal legitimacy and democratic accountability. The next generation of scholarship on EC legal integration, as with European integration more generally, will require far more

[6] Anne-Marie Slaughter, "International Law in a World of Liberal States", *European Journal of International Law* 6 (1995), 503–38; *id.*, "The Real New World Order", *Foreign Affairs* Vol. 76, No. 5 (Sept/Oct 1997), pp. 183–197.

Figure 1: Summary of time of reception of Community doctrines by the Member States



nuanced attention to the identification of both interests and constraints. Such a task demands that we move away from contending paradigms such as realism and neofunctionalism and toward the development of mid-range hypotheses that are both theoretically sophisticated and empirically informed.

THE ROLE OF NATIONAL COURTS IN EC LEGAL INTEGRATION

In our original account, drawing on the work of legal scholars such as Joseph Weiler, we identified the article 177 procedure in the EC Treaty as providing a framework for links between the European Court of Justice and subnational actors—private litigants, their lawyers, and lower national courts.[7] More specifically, we noted the Court's efforts to make European law attractive to individual litigants and their lawyers through its case law and its efforts to educate and appeal to national judges through tactics ranging from weekends in Luxembourg to tacit offers of a judicial partnership. A number of the national reports offer additional evidence for this picture. The judges of lower Italian courts, for instance, were assertedly motivated by a desire to have their cases referring issues to the ECJ "feature at the center of the attention of the world of lawyers".[8] This notoriety resulted from approval of their analysis by the ECJ, in the face of the apparent ignorance of EC law on the part of many law professors and higher court judges.[9]

The French Report (Ch 2) also highlights the potential importance of the socialisation of individual national judges through a tour on the ECJ. Plötner tells the tale of Yves Galmot, the first member of the French Conseil d'Etat nominated as a judge on the ECJ, who was sent off to Luxembourg with the expectation that he would hold the line against judicial activism at the European level. A year after he returned to the Conseil d'Etat—thoroughly converted to Community doctrines—the Conseil took its famous *Nicolo* decision that implicitly authorised judges to make treaties prevail over national law.[10] Much of the remaining time is spent in each other's company.[11] More

[7] Burley and Mattli, "Europe Before the Court: A Political Theory of Legal Integration", (n. 4 above); Mattli and Slaughter, "Law and Politics in the European Union" (n. 4 above). See also: Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policy-making* (Dortrecht: M. Nijhoff, 1986); Martin Shapiro, "The European Court of Justice", in Alberta Sbragia, (ed.), *Euro-Politics: Institutions and Policymaking in the New European Community* (Washington, D.C.: Brookings Institution, 1991); Joseph Weiler, "The Community System: The Dual Character of Supranationalism", *Yearbook of European Law* 1 (1981); *idem*, "Community, Membership and European Integration: Is the Law Relevant?" *Journal of Common Market Studies* 21 (1983); *idem*, "The Transformation of Europe", *Yale Law Journal* 100 (1991); Jean-Paul Jacque and Joseph Weiler, "On the Road to European Union—A New Judicial Architecture. An Agenda for the Intergovernmental Conference", *Common Market Law Review* 27 (1990), 185.

[8] Ch 5, Report on Italy, p. 149.

[9] *Ibid.*

[10] Ch 2, Report on France, p. 68–9.

[11] "A Law Unto Many", *Financial Times*, 3 April 1995) p. 15.

generally, many of the country studies emphasise the small size and relatively close knit character of the legal community in each country, forged by ties of education, socialisation, and professional mobility between the professoriate, private practitioners, and the judiciary.

To the extent that we focused on national courts as independent participants in this community of sub- and supranational legal actors, we argued that they were motivated largely by self-interest, borrowing Joseph Weiler's concept of "judicial empowerment".[12] A number of scholars have argued convincingly that this analysis is too crude.[13] It does not specify what power judges seek, nor how they were able to obtain it through acceptance of the authority of the ECJ. We also conflated the professional and personal interests of individual interests with the institutional interests of judges.[14] Finally, such a general concept cannot explain differences in the rate of acceptance of critical ECJ doctrines such as direct effect and supremacy among different courts within the same national legal system. Nor can it account for limits to integration. A much more precise specification of judicial interests is needed, as well as of the constraints on the pursuit of those interests.

Borrowing from our critics, and drawing on the data presented in the country studies, we offer 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 systems; 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. Here we draw primarily on the work of Karen Alter, who has developed an "inter-court competition" approach to explain European legal integration. Third is the power to promote certain substantive policies through law. In other words, where European law and national law promote different policies or have different distributional effects with respect to a particular class of litigants, a national judge may have the opportunity to achieve the result that she favours through the application of European law.[15]

[12] Burley and Mattli, "Europe before the Court", (n. 4 above) p. 63.

[13] See Alter, Ch 8 above, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration"; *idem*, "The European Court's Political Power" *West European Politics* 19/3 (July 1996), pp. 458–487.

Alec Stone also comments on the limitations of the neofunctionalist model as we originally formulated it, particularly with its inability to explain limits to integration (see Stone, "Constitutional Dialogues in the European Community", (European University Institute, Florence, working paper, 1996), p. 11).

[14] Stone, "Constitutional Dialogues in the European Community", (n. 13 abve) p. 8.

[15] Let us emphasise here that 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 a national judge who conscientiously seeks to apply the law as written or interpreted will not vote her policy preferences where they appear to conflict with that law unless she can achieve the result she favours by a legitimate legal route. 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 offers such a route.

A noteworthy aspect of this refinement of judicial interests, or preferences, is that each factor may explain resistance to as well as acceptance of EC 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. Alec Stone emphasises this tension in light of the particular incentives facing national constitutional courts, typically the only European courts entitled to engage in any form of judicial review.[16] Similarly, the inter-court competition model posits that courts that already enjoy substantial prestige and power 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 EC law for the same reasons that their counterparts accept it. Finally, the congruence of EC law with a particular set of substantive legal outcomes in different issue areas can produce opposition from national courts who favour 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 is a more nuanced and sophisticated understanding of "judicial empowerment". Note, however, that this typology is inevitably stylized. A quest for power has both personal and professional aspects. It reflects a universal desire for individual recognition and acknowledgment by others as well as an instrumental effort to acquire the means to achieve specific goals. *Judicial* empowerment is likely also to partake of the ideals of the judiciary, closely allied with both the idea and the ideal of the rule of law. Self-images forged in this crucible include courts as protectors of the weak, as impartial dispensers of justice, as checks on the abuse of power by their fellow branches of government, and as guardians of social order through faithful application of the law as written and—occasionally—as felt.

The categories we advance here cannot capture this complexity. Our specification of both judicial interests, and, in the following section, the constraints attendant on the pursuit of those interests, are efforts to isolate specific elements of this mix as part of a more generalisable model.

Judicial preferences

Judicial review

A number of the country studies offer evidence of a link between acceptance of EC law through adoption of the doctrines of direct effect and supremacy

[16] Stone, "Constitutional Dialogues in the European Community", (n. 13 above) pp. 10–15.

and a desire to exercise some judicial review powers. In the Netherlands, for example, Parliament amended the Dutch Constitution in 1956 (introducing articles 65 and 66), 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. In the beginning the judges remained reluctant to use their new powers. Only when encouraged by the European Court of Justice did they assume their new task. Claes and de Witte note that in the landmark *Van Gend en Loos* case, the ECJ's willingness to accept the role of "accomplice" in *Van Gend* encouraged Dutch courts to exercise their constitutionally recognised powers against the national legislature.[17]

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 new found authority".[18] Perhaps the best example, however, of the way in which a desire to exercise judicial review shaped acceptance of direct effect and supremacy comes from the Italian experience. As told by Ruggieri 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 EC 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.[19]

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

[17] Ch 6, Report on the Netherlands, p. 192, discussing *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 [1963] ECR 1.

[18] Ch 7, Report on the United Kingdom, p. 216.

[19] Ch 5, Report on Italy, p. 000. Alec Stone also recapitulates this story with a particularly attentive eye to the desire of the Italian Constitutional Court to preserve its prerogative of constitutional review. (See Stone, "Constitutional Dialogues in the European Community", (n. 13 above) pp. 10–11.)

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.[20] Not so the Cour de Cassation. It decided only four months after the Conseil Constitutionnel's refusal to review legislation on its compatibility with international treaties to accept the supremacy doctrine in the landmark *Jacques Vabre* case.[21] 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".[22]

What motivated the Cour de Cassation to abandon the "Matter" doctrine? Plötner argues in favour of the judicial review thesis. He writes: "From now on, any simple court could not only control all acts of parliament but also became . . . the common judge of Community law".[23]

Judicial competition

Karen Alter has developed an "inter-court competition" model to explain variations in the scope and pace of national court acceptance of the doctrines of direct effect and supremacy.[24] She argues: "different courts have different interests *vis-à-vis* EC law . . . national courts use EC law in bureaucratic struggles between levels of the judiciary and between the judiciary and political bodies, thereby inadvertently facilitating the process of legal integration".[25]

[20] 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 Ch 2, Report on France, p. 66.)

[21] Alec Stone argues that the Cour de Cassation was not necessarily waiting for "permission" from the Conseil Constitutionnel. As he reminds us, the lower court decision that was being appealed in *Vabre*, refusing to apply French law in violation of the EC Treaty, had been decided in 1971. (See Stone, "Constitutional Dialogues in the European Community", (n. 13 above) p. 12.)

[22] Ch 2, Report on France, p. 45. Similar doctrines were in place in most other Member States of the European Union prior to their acceptance of EU supremacy. In UK jurisprudence, for example, the predominant strand before *Factortame* sought to "blunt the edge of any conflict between the two sytems 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 Ch 7, Report on the United Kingdom, p. 198–9. The Dutch situation is discussed in Ch 6, Report on the Netherlands, p. 171.

[23] Ch 3, Report on France, p. 63.

[24] See Alter, "The Making of a Rule of Law: The European Court and the National Judiciaries", unpublished dissertation, Department of Political Science, MIT, June 1996; and *idem*, "The European Court's Political Power (above n. 13);" and *idem*, Ch 8 above, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration".

[25] Alter, Ch 8 above, p. 241.

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 inter-court 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.

The country studies contain substantial evidence for the inter-court competition model, as Alter documents.[26] The model is particularly appropriate to Germany, as benefits to lower national courts from integration are less apparent in Germany than in most other member states. The power to conduct judicial review was already present in the German legal system and cannot be seen as a new introduction of the EC legal system.[27] Vertical competition between lower and higher courts offers a better account of the incentives propelling German courts to accept direct effect and supremacy. But the model also offers a convincing framework within which to analyse variation in other Member States. Indeed, it dovetails with Alec Stone's emphasis on the competition between constitutional courts and other national courts, another important chunk of the story.

Judicial interests flowing from inter-court 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 equalise their status with other national courts by arrogating the power to review national law for compatibility with EC law in partnership with the ECJ. For instance, Plötner argues that the Cour de Cassation's institutional position *vis-à-vis* the Conseil d'Etat improved greatly with its swift endorsement of EC supremacy.[28] 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. It is to the interests in promoting substantive policies that we now turn.

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 EC law are less stringent than in British environmental law.[29] 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".[30] Alter notes that "lower courts can use EC law to get to policy outcomes which they prefer, either for policy or legal reasons".[31]

How are we 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 judges.[32] 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 favour 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 favours high levels of environmental protection. At a given moment, EC 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. EC law and the ECJ'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 EC 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 lower courts, as well as by the overriding need for minimum consistency and coherence in the law itself. Once a court has declared that EC law is supreme over national law, litigants will cite favourable doctrines of EC 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 EC and national law. And to the extent that higher national courts refuse to provide such clarification, or selectively apply EC law in individual cases, the resulting patchwork will endanger the legitimacy of the national legal system.

[26] *Ibid.*, p. 241.
[27] See Alter, "The Making of a Rule of Law", (above n. 24) Ch 2, pp. 16–55.
[28] Ch 2, Report on France, p. 62.
[29] Golub, "The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice", *West European Politics* 19/2 (April 1996), pp. 360–385.
[30] Stone, "Constitutional Dialogues in the European Community", (n. 13 above) p. 26.
[31] Alter, Ch 8 above, p. 242.
[32] See Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press: 1981), p. 29.

Such pressure from litigants and the requirements of the legal process are more properly classified as constraints, as discussed below. For purposes of analytical clarity, 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 individualised 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 results in the internalisation of the constraints of clarity and predictability as independent preferences. Judges will thus often refer to these attributes as goals that they seek to pursue in upholding the "rule of law".

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 favour European integration and would see participation in the construction of the European legal system as an important step in that direction. Secondly, a national court might have a particular "constituency", such as workers or traders, that will be systematically advantaged by EC law. Plötner appears to provide such an example, noting that the judges of the Cour de Cassation "had in mind the interests of French economic agents and citizens" in a way that the members of the Conseil d'Etat did not. These judges "realized that the impossibility of referring to certain Community regulation was bound to represent a serious economic disadvantage in comparison to their European competition and that it might also hamper the protection of civil rights".[33] Kokott's study also suggests a similar dynamic with respect to the willingness of German labour courts to make references to the ECJ on the assumption that EC law would be more "employee-friendly" than national law, although she points out that the ECJ has recently gone too far in this regard.[34]

Overall, however, such examples are few, hard to prove, and easy to challenge. Courts typically do not have readily identifiable constituencies;[35] further, it is very difficult to predict the ultimate effect of acceptance of any legal doctrine. It is far more likely that a judge's preferences for coherence, consistency, and generalisability will produce a preference for direct effect and supremacy in situations in which other national courts have already accepted

[33] Ch 2, Report on France, p. 61.

[34] Ch 3, Report on Germany, p. 112.

[35] It might be argued that courts regard minorities as their special concern; more generally still, that courts tend to favour "the little guy", individuals against corporatist entities, "David" against "Goliath". While it is true that the early cases in which national courts accepted direct effect and supremacy tended to involve presumptively weak individuals fighting for their rights against the state customs apparatus or some similar bureaucracy and seeking to enlist Community law on their side, such plaintiffs cannot readily be identified as part of a defined constituency.

these doctrines, creating a patchwork that can now only be remedied by universal acceptance. Plötner's discussion of the Cour de Cassation, for instance, assumes that national judges across Europe were already applying EC law. The Italian Constitutional Court explicitly noted in accepting supremacy in the 1980s that other high courts across Europe, including Germany, had already taken this step.[36] Indeed, the phenomenon of "judicial cross-fertilization" identified in many of the country studies—meaning instances in which courts of one nation refer to the decisions of another—may be understood not only as a pure intellectual exchange and as a risk minimisation strategy with respect to incurring obligations already accepted by other Member States,[37] but also as recognition of the need to harmonise European law as law.

In sum, judicial preferences over specific policy outcomes are unlikely to be sufficiently generalisable 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. Preferences for consistency and coherence across a body of rules are generalisable and may provide motives for acceptance of direct effect and supremacy. But they are more likely to operate at the end rather than the beginning of the first stage of constructing an EC legal system. Kokott points to the German Labour Court's "right and obligation to ensure a coherent legal system" as the driving factor behind a new phase of references to the ECJ, which she reads as inviting the ECJ to change its case law to conform better to the realities of national labor conditions and the specific contours of national law.[38]

CONSTRAINTS ON THE PROCESS OF LEGAL INTEGRATION

In the end, 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 above, different courts within different national legal systems have different preferences. However, to the extent that we observe variation in the timing and scope of acceptance of EC 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 their preferences. We discuss these constraints as they operate on national courts in terms of a more refined conception of judicial identity.

[36] Ch 5, Report on Italy, p. 156.

[37] Joseph Weiler, "A Quiet Revolution: The European Court of Justice and its Interlocutors", *Comparative Political Studies* 26 (1994).

[38] Ch 3, Report on Germany, p. 113.

In our initial analysis we focused principally on one very general, albeit fundamental, aspect of judicial identity: the self-conception of courts in countries upholding the rule of law as non-political actors.[39] These courts universally conceive of themselves as agents and servants of the law, and thus as participants in a specialised normative discourse with other courts. Their receptivity to participation in a dialogue with the ECJ depends in part on their perception of it as a court like themselves, as a fellow member of "a community of law".[40] This conception of judicial identity as fundamentally non-political was crucial to our "mask of law argument". 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 generalisable principles and in a technical discourse that imposes its own constraints.[41] Law thus operated as a mask to conceal the full political import of the ECJ's decisions.[42]

In this account, judicial identity helped to insulate the pursuit of judicial preferences from political interference; it thus functioned primarily to facilitate the pursuit of those preferences as protected participants in a "community of law".[43] We paid less attention to the ways in which a particular conception of judicial identity in liberal democracies committed to the rule of law can function as a constraint on the pursuit of judicial preferences. A closer examination of the constraints flowing from this conception of judicial identity reveals parameters that can vary across countries. Identification and exploration of these constraints thus provides a critical piece in an account of variation in the acceptance of the foundational doctrines of the EC legal system across national courts.

A court in a liberal democracy 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 her, 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,

[39] Burley and Mattli, "Europe Before the Court", (n. 4 above) pp. 74–5.

[40] We did not use this term in our original article, but Slaughter has subsequently used it to describe the type of relationships between courts that we described through the neofunctionalist lens. See Anne-Marie Slaughter, "A Typology of Transjudicial Communication", *University of Richmond Law Review* 29 (1994), 99–137, at 133.

[41] This point remains valid with regard to the way in which national courts can exercise their policy preferences through the choice of either EC or national law. To say that judges can use EC law to advance their individual policy preferences is not to say that they do not remain constrained by the demands of legal reasoning in either case.

[42] It was this insight that led us to conclude that "sophisticated legalists", such as Joseph Weiler, who offered an account of the evolution of legal doctrine "in political context", ultimately provided the best account (see Burley and Mattli, "Europe Before the Court", (n. 4 above) pp. 75–6.)

[43] *Ibid.*, p. 70.

systemic and temporal coherence . . . ".[44] 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.[45] At first glance, this constraint may seem completely at variance with the conception of courts as non-political actors. By definition, surely, courts are *not* accountable to voter preferences. A closer look, however, reveals that although 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, 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 even curtail judicial jurisdiction—the scope of judicial power over particular classes of cases.[46] 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, then 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, 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".

Both these constraints—the demands of legal discourse and democratic

[44] Joseph Weiler, "*A Quiet Revolution*", (n. 37 above) p. 521.

[45] 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.

[46] Consider the proposals floated at Maastricht and by some parties prior to the 1996 IGCC to curtail the jurisdiction of the ECJ. See Alter, "The Making of a Rule of Law", (above n. 24) Ch 6, pp. 282–5; Kevin Brown, "Government to Demand Curb on European Court", *Financial Times*, 2 February 1995 at p. 10; Anthony Arnull, "Judging the New Europe", *European Law Review* 19 (February 1994), p. 13.

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 to national judicial participation in the EC legal system than others. In the third category, doctrines governing the relationship between national and international law, the specific function of particular national courts, and the definition and operationalisation of national sovereignty pose particular obstacles within national legal discourse and may themselves reflect majority preferences. The remainder of this section explores the ways in which factors in each of these categories produced variations in the constraints facing different national courts.

National policy preferences

As discussed above, the case studies show that the rate of acceptance of supremacy doctrine in particular, and to a lesser extent direct effect, 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.[47] No surprises here; an observer ignorant of EC law and national legal doctrine but knowledgeable about relative political support for the EC 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. We cannot know without interviewing individual judges, who would in any event be reluctant to confirm such speculation. However, such evidence is unnecessary insofar as the democratic accountability thesis would lead to the same result. Based on our 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.

[47] It should be noted that direct effect and supremacy were accepted at different times by each country, with often an appreciable lag concerning acceptance of supremacy. The Netherlands quickly accepted both doctrines in 1963/64; Germany accepted direct effect in 1963 and partial supremacy in 1971, with subsequent modifications; Belgium accepted direct effect in 1963 and supremacy in 1971; Italy accepted direct effect in 1974 and supremacy unreservedly in 1984; the highest French private law court (Court de Cassation) accepted direct effect and supremacy in 1975, although the highest administrative court (Conseil d'Etat) held out until 1990; Great Britain accepted direct effect in 1973, upon its accession to the Community, but did not accept supremacy until 1990. This account omits other variations among different courts within these various national systems.

Behind the aggregate statistics presented in Figure 1 are a number of stories linking judicial outcomes with national policy preferences concerning European integration, policy preferences that are themselves derived from a composite of historical, geographical, and political factors. Hervé Bribosia, author of the Belgian case study, notes that Belgium's size and export-dependent economy produce favourable national attitudes toward European integration, a factor that he adduces as a partial explanation for the willingness of the Belgian Cour de Cassation (the highest private law court) to take a high profile stance accepting supremacy in 1971.[48] Monica Claes and Bruno De Witte, writing on the Netherlands, are even more explicit. They trace Dutch support for the direct enforcement and application of international treaties back to Hugo Grotius's magisterial seventeenth-century treatise on the freedom of the seas, locating these attitudes in small size and dependence on open borders for economic prosperity: "[T]he willingness to cooperate with foreign nations is clearly in the interest of a small trading nation that is too small to preserve its dependence on its own and needs open borders for its prosperity".[49] It is no coincidence that ten out of the first thirteen references to the European Court of Justice came from Dutch Courts.

On the other side of the ledger, Paul Craig observes that the reluctance of British courts to accept supremacy was but "one part of [Britain's] more general approach toward the EC".[50] However, he argues further that the view of Britain as consistently seeking to slow the pace of integration is distorted, that the majority of the British population accept EC membership as the political norm, and thus that the House of Lords simply sought "to bring constitutional doctrine up to date with political reality" when it finally accepted supremacy in 1990.[51]

If judges are constrained by majority preferences, however, how then is the construction of the European legal system even a puzzle? What of our story 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? Are we not now advancing a version of Garrett's claim that the ECJ was able to do its job because both its substantive decisions and the legal apparatus it created to enforce them advanced the interests of the states that created it? The answer, of course, is no. But to advance our argument at this

[48] Ch 1, Report on Belgium, p. 32.

[49] Ch 6, Report on the Netherlands, p. 189. See also J. J. C. Voorhoeve, *Peace, Profits and Principles: A Study of Dutch Foreign Policy* (Boston: Nijhoff, 1979).

[50] Ch 7, Report on the United Kingdom, p. 209.

[51] *Ibid.*, p. 211.

level we must move beyond a unitary conception of the state. Our argument, in essence, pits courts and national executives against each other not in deciding whether to support further European integration (a decision ultimately up to the electorate) but in determining the balance of power among governmental institutions in an integrated Europe.

If we assume that the Member States of the European Union are arrayed along a spectrum in terms of favourable attitudes toward integration, attitudes broadly determined by the electorate as a reflection of economic interest, historical experience, and geopolitical position, we can nevertheless imagine alternative architectures for an integrated Europe that would be relatively more or less favourable to the interests of national executives, legislatures, and courts. For instance, a Union that required provisions of the EC Treaty 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. There is thus no contradiction between our original (and continuing) assertion that national courts did not follow the preferences of national executives in accepting direct effect and supremacy and our recognition that *both* national courts and national executives are more or less constrained by majority preferences concerning European integration.

The country studies provide considerable evidence for both 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 these doctrines within a year after the Dutch executive argued fervently against the interpretation of the EC Treaty that gave rise to them in the landmark case of *Van Gend en Loos*.[52] 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.[53] 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.

This inter-branch struggle, however, does not always cut in favour of increased integration. A case in point is the relationship between the German

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

[53] See Alter, "The European Court's Political Power" (above n. 13).

constitutional court, the German government, and the ECJ. Like the German Government, which has long perceived itself as a "motor of integration", the German Constitutional Court has sought to develop a special relationship with the ECJ, generally supporting the creation of the EC legal system but periodically applying the brakes by insisting that the ECJ develop Community-wide protections for human rights or, more recently, insisting on delimiting a core area of national sovereignty. The German court's contributions to this dialogue reflect *its* assessment of a number of different factors: the requirements of domestic constitutional law, the proper interpretation of the EC Treaty, and the mood of the people, among others. This assessment may overlap with the German Government's position, but may also diverge in ways that can bring the legal and the political branches into conflict. Thus, regarding its recent *Maastricht* decision, in which a German legislator challenged the Maastricht Treaty as a violation of the German Constitution, the Federal Constitutional Court essentially found for the Government by upholding the constitutionality of the Treaty. However, as Juliane Kokott explains: "[T]he Court tried . . . to assure itself of wide support for its judgment" by taking account of rising opposition to monetary integration among the German people in emphasizing the many strict preconditions for monetary union embedded in the Treaty, preserving the right of withdrawal from the monetary union should it prove to be unstable, and upholding the right of the German people to be represented by the German Parliament rather than the European parliament.[54]

These constraints may prove tighter than Kohl and his successors would like in pushing for monetary union as the bargaining chip with which to achieve widening of the Community. More generally, however, the Federal Constitutional Court has created a legal situation that will allow and may even spur Germany's negotiating partners to customise their acceptance of Community law. The Court emphasised that the Member States remained "masters of the treaties", thereby denying Community institutions complete supra-national authority. In the legal sphere, the Court translated this principle into a claim that it retained the power to determine the scope of Community competence. The ECJ would remain supreme with regard to the interpretation and application of Community law, but the Federal Constitutional Court would determine the scope of that law. Should the supreme courts of other EC members follow suit, the uniform administration of EC law, and the bargaining that now depends on the assumption that the deals struck will be uniformly enforced, could be imperiled.

National legal culture

Judges are products of specific national legal systems. Their training within particular systems gives rise to a set of professional values attitudes that overlay, mediate, and temper their political instincts. They not only learn a body

[54] Ch 3, Report on Germany, p. 110.

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 yet 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 specialised courts (labour 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 supra-national tribunal. The development of "a community of law", requires that the participants recognise 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 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—was the relative "fit" between the two legal systems, a fit optimised by traits of national legal culture.

A core element of national legal culture is the delimitation of the scope of judicial relative to legislative power. All the members of the EU uphold the general liberal principle of a division between the legislative and the judicial power; however, its implementation 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, it

is not surprising that 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.[55] On the other hand, countries that do not have judicial review, such as the Netherlands, can nevertheless recognise 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.[56]

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 the Second World War—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.[57] At the same time, however, the 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.[58]

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*".[59] 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 EC Treaty".[60] 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 EC 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,

[55] See Ch 2, Report on France, p. 42.
[56] See Bruno De Witte, "The European Court and National Courts—The Role of the Principle of Sovereignty", (unpublished manuscript, March 1995).
[57] Ch 3, Report on Germany, p. 92.
[58] *Ibid.*, p. 112.
[59] Ch 7, Report on the United Kingdom, p. 218.
[60] *Ibid.* 218.

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.[61]

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 a right of privacy or perhaps of a question of equal protection of the laws; for a German judge it must be analysed in terms of specified textual rights to life and to human dignity.[62] They 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 provide either obstacles or channels to achieving particular results, particularly when a national court faces the task of harmonising 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.[63] The German Constitutional Court thus had strong textual support for its claim that the Maastricht Treaty could only be consistent with the German Constitution to the extent that it did not abridge the fundamental rights of German citizens.[64]

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

[61] Ch 7, Report on the United Kingdom, p. 219.

[62] See David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press, 1994), pp. 310–14.

[63] Ch 3, Report on Germany, p. 116.

[64] The controversy, of course, concerned its definition of those basic rights. It interpreted the right to vote, guaranteed in article 38 of the German constitution, as entitling German citizens to an undiluted voice in the German Parliament. It thus blocked further transfer of law-making power to the European Parliament in the absence of the development of a genuine German "people".

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.[65] This tradition made it particularly easy for Dutch courts to accept direct effect of EC 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".[66] After the Second World War, this tradition became linked with the primacy of the Italian constitution.[67] The Italian case study documents the ways in which the dualist approach hampered acceptance of EC law supremacy by the Italian Constitutional Court for decades.[68]

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". Bruno de Witte documents the role of the "principle of sovereignty" in all the countries under consideration as a principle "known to all the legal systems under review" and that "can be considered part of the common traditions of European constitutional law".[69] Nevertheless, its different treatment within these national legal systems strongly affected relative receptivity to acceptance of direct effect and supremacy, as well as, more recently, acceptance of the Maastricht Treaty.

In France, Belgium, and the Netherlands, constitutional provisions and doctrinal traditions recognising the primacy of international treaty law (another facet of a monist tradition) has meant that the absolute supremacy of EC 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 these countries supremacy was ultimately accepted on the basis of a specific constitutional provision authorising membership in the Community. The difficulty is that the constitutional courts in both countries interpret these specific constitutional provisions as containing their own implied limits embedded elsewhere in the national constitution, limits that can be asserted as necessary *against* European Community 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.[70] The German Constitutional Court reasserted this power in its *Maastricht* decision, in ways that will shape the next stage of development of the EC legal system.

[65] Ch 6, Report on the Netherlands, p. 172.

[66] Ch 5, Report on Italy, p. 154.

[67] *Ibid.*, p. 155.

[68] *Ibid.*, see also De Witte, "The Role of the Principle of Sovereignty", (n. 56 above) p. 15.

[69] De Witte, "The Role of the Principle of Sovereignty", (n. 56 above) p. 1.

CONCLUSION

The explosion of literature on the ECJ has provided important new data and analytical insights in the context of a flourishing theoretical debate. The neofunctionalist model continues to provide a remarkably accurate account of the process of legal integration, with its emphasis on a community of sub- and supra-national actors pursuing their self-interest in a nominally apolitical context. However, the model must be refined and coupled with more precise specifications of the interests driving participants in the process and the constraints they face in pursuing those interests. These participants include both state and social actors as well as the ECJ. This chapter has sought to draw on the new literature to specify those interests and constraints, taking a preliminary look at the types of litigants most likely to use the ECJ and parsing the motives of national courts in accepting or rejecting the doctrines of direct effect and supremacy.

In addition, a genuine theory of legal integration must move beyond the assumption of a unitary state, taking account of differences between different levels of courts as well as between courts and other state institutions. Courts are not just the relevant "face of the state" for purposes of legal integration; they are quasi-autonomous actors in the wider integration process. A full explanation of this process thus requires combining the neofunctionalist framework with a model of the disaggregated state.

The result moves away from neofunctionalism *per se*; it may be time to leave such labels behind. The rich empirical data presented in this volume challenges scholars to forsake contending paradigms and to concentrate on developing more specific hypotheses that can account for variation in the legal integration process across countries and among courts within a particular national legal system. The precondition for such hypotheses, however, is a more precise specification of the incentives and constraints facing all the different actors in the process: individuals, supra-national institutions, and the contending branches of domestic governments. Further, the findings in this volume must be combined with findings concerning the variation of such incentives and constraints in different issue areas, such as labour law, competition law, and environmental law.[71] The result will not be a comprehensive single theory of legal integration, but a better understanding of the richness and complexity of the ECJ's achievement.

[70] De Witte, "The Role of the Principle of Sovereignty", (n. 56 above) p. 18.

[71] 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 labour law. Preliminary papers on the impact of EU rules and ECJ decisions interpreting those rules on British and German national law have already generated very interesting findings about the motives of national courts, the significance of a pre-existing body of national law directly conflicting with EU law, and specific litigation strategies of state and private parties opposed to EU law. This project is being led by Professor Silvana Sciarra.