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Europe Before the Court: A Political Theory of Legal Integration

Anne-Marie Burley and Walter Mattli

European integration, a project deemed politically dead and academically moribund for much of the past two decades, has reemerged as one of the most important and interesting phenomena of the 1990s. The pundits are quick to observe that the widely touted “political and economic integration of Europe” is actually neither, that the “1992” program to achieve the single market is but the fulfillment of the basic goals laid down in the Treaty of Rome in 1958, and that the program agreed on for European monetary union at the Maastricht Intergovernmental Conference provides more ways to escape monetary union than to achieve it. Nevertheless, the “uniting of Europe” continues.¹ Even the self-professed legion of skeptics about the European Community (EC) has had to recognize that if the community remains something well short of a federal state, it also has become something far more than an international organization of independent sovereigns.²

An unsung hero of this unexpected twist in the plot appears to be the European Court of Justice (ECJ). By their own account, now confirmed by both scholars and politicians, the thirteen judges quietly working in Luxembourg managed to transform the Treaty of Rome (hereafter referred to as “the

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1. The reference is to the title of Haas's magisterial study of early integration efforts focused on the European Coal and Steel Community. See Ernst B. Haas, *The Uniting of Europe* (Stanford, Calif.: Stanford University Press, 1958).

2. See, for example, Robert Keohane and Stanley Hoffmann, “Conclusions: Community Politics and Institutional Change,” in William Wallace, ed., *The Dynamics of European Integration* (London: Pinter, 1990), pp. 280–81.

treaty") into a constitution. They thereby laid the legal foundation for an integrated European economy and polity.³ Until 1963 the enforcement of the Rome treaty, like that of any other international treaty, depended entirely on action by the national legislatures of the member states of the community. By 1965, a citizen of a community country could ask a national court to invalidate any provision of domestic law found to conflict with certain directly applicable provisions of the treaty. By 1975, a citizen of an EC country could seek the invalidation of a national law found to conflict with self-executing provisions of community secondary legislation, the "directives" to national governments passed by the EC Council of Ministers. And by 1990, community citizens could ask their national courts to interpret national legislation consistently with community legislation in the face of undue delay in passing directives on the part of national legislatures.

The ECJ's accomplishments have long been the province only of lawyers, who either ignored or assumed their political impact.⁴ Beginning in the early 1980s, however, a small coterie of legal scholars began to explore the interaction between the Court and the political institutions and processes of the EC. However, these approaches do not explain the *dynamic* of legal integration. Further, they lack microfoundations. They attribute aggregate motives and interests to the institutions involved to illustrate why a particular outcome makes theoretical sense, but they fail to offer a credible account of why the actual actors involved at each step of the process might have an *incentive* to reach the result in question.

On the other side of the disciplinary divide, political scientists studying regional integration in the 1950s and 1960s paid, surprisingly, little attention to the role that supranational *legal* institutions may play in fostering integration.⁵

3. The definitive account of the "constitutionalization" of the treaty is an article by Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law* 75 (January 1981), pp. 1-27. For a more recent account from an ECJ judge, see G. Federico Mancini, "The Making of a Constitution for Europe," *Common Market Law Review*, vol. 26, 1989, pp. 595-614.

4. This apparent indifference to larger political questions has been so profound as to earn reproach even from a member of the ECJ itself. Judge Ulrich Everling offered his own account of the relationship between the Court and the member states in 1984, beginning, "The central problem of the European Community is the tension which exists between it and its Member States." He further observed in a footnote that "this problem is largely ignored and underestimated in the legal literature." See Ulrich Everling, "The Member States of the European Community Before Their Court of Justice," *European Law Review*, vol. 9, 1984, p. 215. See also Everling's works "Das Europäische Gemeinschaftsrecht im Spannungsfeld von Politik und Wirtschaft" (EC law in tension between politics and economics), in Wilhelm G. Grewe, Hans Rupp, and Hans Schneider, eds., *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit: Festschrift zum 70. Geburtstag von Hans Kutscher* (European jurisdiction and national constitutional jurisdiction: Festschrift on the 70th birthday of Hans Kutscher) (Baden-Baden: Nomos, 1981), pp. 155-87; and "Europäische Politik durch Europäisches Recht?" (European politics through European law?), *EG-Magazin*, February 1984, pp. 3-5.

5. A noteworthy exception is Stuart Scheingold, *The Rule of Law in European Integration* (New Haven, Conn.: Yale University Press, 1965). Other early works on the Court will be discussed below.

Even more puzzling is that much of the recent literature on the EC by American political scientists continues to ignore the role courts and community law play in European integration.⁶

We seek to remedy these deficiencies by developing a first-stage theory of the role of the Court in the community that marries the insights of legal scholars in the area with a theoretical framework developed by political scientists. We argue that the legal integration of the community corresponds remarkably closely to the original neofunctionalist model developed by Ernst Haas in the late 1950s.⁷ By legal integration, our dependent variable, we mean the gradual penetration of EC law into the domestic law of its member states. This process has two principal dimensions. First is the dimension of formal penetration, the expansion of (1) the types of supranational legal acts, from treaty law to secondary community law, that take precedence over domestic law and (2) the range of cases in which individuals may invoke community law directly in domestic courts. Second is the dimension of substantive penetration, the spilling over of community legal regulation from the narrowly economic domain into areas dealing with issues such as occupational health and safety, social welfare, education, and even political participation rights.⁸ Cutting across both these categories is the adoption of principles of interpretation that further the uniformity and comprehensiveness of the community legal system.

We find that the independent variables posited by neofunctionalist theory provide a convincing and parsimonious explanation of legal integration. We argue that just as neofunctionalism predicts, the drivers of this process are supranational and subnational actors pursuing their own self-interests within a politically insulated sphere.⁹ The distinctive features of this process include a widening of the ambit of successive legal decisions according to a functional logic, a gradual shift in the expectations of both government institutions and

6. The one major exception, discussed below, is Geoffrey Garrett, "International Cooperation and Institutional Choice: The European Community's Internal Market," *International Organization* 46 (Spring 1992), pp. 533-60. See also Geoffrey Garrett and Barry Weingast, "Ideas, Interests and Institutions: Constructing the EC's Internal Market," manuscript, Dept. of Political Science, Duke University, Durham, N.C., 1992.

7. After reviewing the events of the late 1980s and the new flurry of interest in the literature, Keohane and Hoffmann resurrected neofunctionalism and restored it to the agenda of EC research, reminding their readers of its more sophisticated aspects. See Keohane and Hoffmann, "Conclusions," p. 286 ff. In the same article, drawing on the work of Joseph Weiler and Renaud Dehousse, Keohane and Hoffmann also acknowledge that the "Community legal process has a dynamic of its own," (p. 278). They fail to put these two insights together, however. An argument that neofunctionalists mistakenly overlooked the ECJ is found in Philippe C. Schmitter, "Interests, Powers and Functions: Emergent Properties and Unintended Consequences in the European Polity," in Peter Lange and Gary Marks, eds., *The Future European Polity*, forthcoming.

8. A quantitative illustration of the growing importance of community law is the number of cases referred to the ECJ by domestic courts. The number jumped from a low of nine in 1968 to a high of 119 in 1978.

9. Legal integration does not necessarily need to take place within the framework of supranational institutions, although that is our focus here. For a noninstitutional analysis of the dynamics of legal integration among liberal states, see Anne-Marie Burley, "Liberal States: A Zone of Law," presented at the annual meeting of the American Political Science Association, Chicago, 3-6 September 1992.

private actors participating in the legal system, and the strategic subordination of immediate individual interests of member states to postulated collective interests over the long term.

Law functions as a mask for politics, precisely the role neofunctionalists originally forecast for economics. The need for a “functional” domain to circumvent the direct clash of political interests is the central insight of neofunctionalist theory. This domain could never be completely separated from the political sphere but would at least provide a sufficient buffer to achieve results that could not be directly obtained in the political realm. Law, as Eric Stein recognized, is widely perceived by political decision makers as “mostly technical,” and thus lawyers are given a more or less free hand to speak for the EC Commission, the EC Council of Ministers and the national governments.¹⁰ The result is that important political outcomes are debated and decided in the language and logic of law. Further, although we make the case here for the strength of neofunctionalism as a framework for explaining *legal* integration—an area in which the technicality of the Court’s operation is reinforced by the apparent technicality of the issues it addresses—the principle of law as a medium that both masks and to a certain extent alters political conflicts portends a role for the Court in the wider processes of economic and even political integration.

This specification of the optimal preconditions for the operation of the neofunctionalist dynamic also permits a specification of the political *limits* of the theory, limits that the neofunctionalists themselves recognized. The strength of the functional domain as an incubator of integration depends on the relative resistance of that domain to politicization. Herein, however, lies a paradox that sheds a different light on the supposed naiveté of “legalists.” At a minimum, the margin of insulation necessary to promote integration requires that judges themselves appear to be practicing law rather than politics. Their political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning. In a word, the staunch insistence on legal realities as distinct from political realities may in fact be a potent political tool.

The first part of this article surveys the political and legal literature on theories of the ECJ’s contribution to the broad processes of European integration, offering a typology based on the extent to which these theories see the Court as having had a direct impact on economic and political integration. The second part focuses the inquiry on the more specific question of explaining legal integration and offers a brief review of the principal elements of neofunctionalist theory. The third part details the ways in which the process of legal integration as engineered by the Court fits the neofunctionalist model. The final part returns to the larger question of the relationship between the ECJ and the member states and reflects on some of the broader theoretical implications of our findings.

10. Stein, “Lawyers, Judges, and the Making of a Transnational Constitution,” p. 3.

Legal and political theories of juridical contribution to European integration

In this section we review the main themes and conclusions of two sets of approaches inquiring about the role of the ECJ in European integration. Most of the European legal literature begins and ends with law, describing a legalist world that is hermetically closed to considerations of power and self-interest. A handful of "contextualists" do go further in an effort to place law in a broader political context. As an explanation of the actual process of legal integration, legalism fails for assuming that law can operate in a political vacuum. The contextual approaches are a considerable improvement in this regard and often yield a treasure trove of valuable information about the Court, but ultimately, they offer only hypotheses about underspecified relationships between law and politics.

The writings of American political scientists on European integration are equally unsatisfactory. Realism, the dominant paradigm in the field of international relations, assumes away the relevance of supranational institutions. Thus, the ECJ has received perfunctory attention at best—a most unsatisfactory state in light of the data that have accumulated over the past three decades. Nevertheless, even those writers most sympathetic to a neofunctionalist point of view have overlooked the Court's contribution to integration.

Legal approaches

Legalism: pure law. Legalism is an approach to the study of the ECJ that denies the existence of ideological and sociopolitical influences on the Court's jurisdiction. Microfoundational explanations of the roles of individual actors give way to an all-purpose emphasis on the "rule of law." Martin Shapiro put the essence of legalism as follows: "The Community [is presented] as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology."¹¹

Legalism is embraced by the vast majority of European legal scholars specializing in EC law. Its appraisal of the Court's substantive contribution to European integration and of its juridical method of treaty interpretation is unanimously positive. Charges of judicial activism, that is, of undue judicial policymaking, are either denied¹² or viewed as a necessary stand against the

11. Martin Shapiro, "Comparative Law and Comparative Politics," *Southern California Law Review* 53 (January 1980), p. 538. For a similar view, see Karl Kaiser, "L'Europe des Savants. European Integration and the Social Sciences," *Journal of Common Market Studies* 4 (October 1965), pp. 36–46, esp. pp. 39–40.

12. Justice Lord Mackenzie Stuart writes: "It is the Treaties and the subordinate legislation which have a policy, and which dictate the ends to be achieved. The Court only takes note of what

complete disintegration of the community. This argument, known as the "ruin"—or the "or else"—justification, runs as follows: The political actors in the community, confronted with unexpected problems, often are unable or unwilling to stick to their treaty obligations. In such moments, the Court dutifully intervenes and temporarily assumes policymaking leadership to prevent the rapid erosion of the community, "a possibility that nobody really envisaged, not even the most intransigent custodian of national sovereignty."¹³

Legalists thus uniformly view the ECJ as a great boon to European integration. The Court acts based upon its vast formal powers and according to its treaty-based duty to exploit those powers to their utmost.¹⁴ It thereby scrupulously observes the inherent limitations of the community's judicial function.¹⁵

Contextualism: law and politics. A few legal scholars recently have extended their analytic focus and proposed to substitute a law-politics duality for the "rule of law." They endeavor to analyze the reciprocal relationship between the legal and political spheres in European integration.¹⁶ These approaches suffer generally from two problems: first, the nature of the relationship is often fuzzy and claims of cause and effect are qualified so as to be rendered almost empty. Second, the incentives for action are not spelled out. We briefly review the conclusions of three studies in the contextualist tradition.

Joseph Weiler juxtaposes the ECJ and EC law—or "normative supranationalism"—squarely on one side, and community politics—or "decisional

has already been decided." See Mackenzie Stuart, *The European Communities and the Rule of Law* (London: Stevens, 1977), p. 77. For a similar argument, see Robert Lecourt, *L'Europe des Juges* (The Europe of the judges) (Brussels: E. Bruylant, 1976), p. 237.

13. Mancini, "The Making of a Constitution for Europe," p. 600. For variations on the same theme, see Lecourt, *L'Europe des Juges*, pp. 241-47; Pierre Pescatore, *The Law of Integration* (Leyden: Sijthoff, 1974), pp. 89-90; Hans Kutscher, "Methods of Interpretation: As Seen by a Judge at the Court of Justice," presented at the Judicial and Academic Conference, Luxembourg, 1976, as cited by Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht: M. Nijhoff, 1986), pp. 179-83; Ulrich Everling, "The Court of Justice as a Decisionmaking Authority," *Michigan Law Review* 82 (April/May 1984), pp. 1294-310; Mario Bettati, "Le 'law-making power' de la Cour" (The law-making power of the court), *Pouvoirs*, no. 48, 1989, pp. 57-70; and Ami Barav, "The Judicial Power of the European Economic Community," *Southern California Law Review* 53 (January 1980), pp. 461-525.

14. Writers in this tradition point frequently to Article 4 of the Rome treaty, which lists the court as one of the institutions to carry out the tasks entrusted to the community by member states who, according to the treaty's preamble, are "determined to lay the foundations of an ever closer union among the people of Europe." See *Treaties Establishing the European Communities* (Luxembourg: Office for Official Publications of the European Communities, 1987).

15. Rasmussen, *On Law and Policy in the European Court of Justice*, pp. 195-96, n. 127.

16. This approach was pioneered by Scheingold in a study of the early Court (1953 to the early 1960s) when it served as the judicial arm of the European Coal and Steel Community (ECSC) and in 1957 extended its activities to the European Economic Community (EEC) and the Atomic Energy Community. See Stuart Scheingold, *The Rule of Law in European Integration* (New Haven, Conn.: Yale University Press, 1965).

supranationalism”—on the other.¹⁷ Normative supranationalism describes the process of integration in the legal sphere, that is, the growth in scope and depth of community law and policies. Weiler claims that “from a juridical point of view . . . certain fundamental facets of the supranational system took crucial, even revolutionary strides ahead” during the first decade of the European Economic Community.¹⁸ Paradoxically, during that same period, a decline of decisional supranationalism set in. The member states grew unwilling to entrust the execution of policies to the EC Commission and instead channeled most of the community work through a growing number of intergovernmental committees within the Council of Ministers.

Weiler suggests that the decline of decisional supranationalism was at least partly caused by the rapid deepening of normative supranationalism. To this extent, the Court has had “a negative effect”¹⁹ on decisional supranationalism.²⁰

The most outspoken work critical of the Court to date is Hjalte Rasmussen’s *On Law and Policy in the European Court of Justice*. The methodology underlying Rasmussen’s discussion is similar to that of Weiler. However, the focus is geared more toward the interface of the law and the Court’s judicial pro-EC policymaking. At the outset, Rasmussen observes that “it is widely known but rarely recorded in print that even firm believers in a federal Europe occasionally are baffled by the Court’s strong and bold pro-Community policy preference.”²¹ This leads him to examine the extent of judicial policymaking and its impact on the process of European integration. Rasmussen acknowl-

17. Joseph Weiler, “The Community System: The Dual Character of Supranationalism,” *Yearbook of European Law*, vol. 1, 1981, pp. 268–306.

18. *Ibid.*, p. 270.

19. *Ibid.*, p. 291.

20. In his most recent article, Weiler retreats from his earlier causal proposition, claiming instead to offer a “synthesis and analysis . . . in the tradition of the ‘pure theory of law’ with the riders that ‘law’ encompasses a discourse that is much wider than doctrine and norms and that the very dichotomy of law and politics is questionable.” See Joseph Weiler, “The Transformation of Europe,” *Yale Law Journal* 100 (June 1991), p. 2409. As a newly self-proclaimed legalist, Weiler avoids the difficulties of empirical proof. He borrows two concepts from Albert Hirschman’s *Exit, Voice, and Loyalty—Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass.: Harvard University Press, 1970). The concept of *exit* describes the mechanism of organizational abandonment in the face of unsatisfactory performance; *voice* describes the mechanism of intraorganizational correction and recuperation. Weiler claims that the process by which community norms and policy hardened into binding law with effective legal remedies constitutes “the closure of Selective Exit” in the EEC. This in turn increased the importance of voice. Crucially, Weiler adds: “Instead of simple (legal) cause and (political) effect, this subtler process was a circular one. On this reading, the deterioration of the political supranational decisional procedures, the suspension of majority voting in 1966, and the creation and domination of intergovernmental bodies such as COREPER [the Committee of Permanent Representatives] and the European Council constituted the political conditions that allowed the Member States to digest and accept the process of constitutionalization.” See *ibid.*, pp. 2428–29. The direct causal sequence of his earlier work is now reversed, and his conclusion as to the ultimate nature of the Court’s impact on the integration process is equivocal, simultaneously recognizing the positive contributions of the Court and warning against the dangers of excessive judicial activism.

21. Rasmussen, *On Law and Policy in the European Court of Justice*, p. 3.

edges that judicial activism may well be a “social good” as long as it agrees with the wishes of the majority of the member states.²² However, applied to the ECJ of the 1960s and 1970s, his conclusions are strongly negative. He notes that the Court was guided by its own rigid policy preferences and repeatedly went “way beyond the textual stipulations [of the treaty] leaving behind it a variety of well-merited, legal-interpretative principles”²³ thus severing its world from the “world of the real events.”²⁴ This alienation produced, at times, disruptions and stoppages in the political decision-making process and endangered the Court’s judicial authority and legitimacy.

A further example in this class of contextualist approaches is a forthcoming study by Koen Lenaerts, himself a judge of the Court of First Instance of the European Communities.²⁵ Lenaerts identifies four strands that characterize the contextualist process between law and politics in the context of European integration. The first strand relates to a series of Court rulings that turned a public international law construction, the Treaty of Rome, into a novel kind of legal order, the community legal order. The second strand depicts the Court as a catalyst of integration. The Court signals and paves the way to explicit terms on which the political actors can further integration. Lenaerts’s description of the reactions of the member states to these judicial “invitations” sharply contrasts both with Weiler’s and especially with Rasmussen’s accounts. Lenaerts notes that “rather than provoking some kind of aversion on the part of . . . [the political] process against the dynamics of what might have appeared at times as excesses of judge-made law, the Court kept the confidence of the institutions of the Community and saw them often move forward from where it had itself left an issue at the outer boundary of what was still solvable on the basis of the existing texts.”²⁶ The last two strands coincide with the entry into force of the Single European Act (SEA) in 1987, signaling the revival of the political will to accelerate the integrative process. Lenaerts observes that after the SEA, the Court retreated from its activist stand to assume the more traditional functions of constitutional and administrative courts.

Political science theories

Realism. Realism is the antithesis of legalism. From a realist perspective, supranational organizations such as the ECJ are essentially ineffectual at forcing upon sovereign states a pace of integration that does not conform to the states’ own interests and priorities. The ECJ’s role is best described as fulfilling

22. *Ibid.*, p. 8.

23. *Ibid.*, p. 12.

24. *Ibid.*, p. 13.

25. Koen Lenaerts, “The Role of the Court of Justice in the European Community: Some Thoughts About the Interaction Between Judges and Politicians,” *University of Chicago Legal Forum*, 1992, forthcoming.

26. *Ibid.*, p. 35.

an essentially "technical servant" role.²⁷ Faced with a dispute, legal technocrats simply apply treaty provisions and rules formulated by the policymaking organs of the EC. Judicial interpretation, according to this model, is nothing more than a translation of these rules into operational language, devoid of political content and consequence.²⁸

Realists view the notion of supranational community law as an absurdity, on the ground that "if a national legislature decided to limit the effect of a Communities' regulation, or to nullify it, and if this intention was made plain to the national courts by the legislature . . . the national courts would not apply the Communities' law."²⁹ In short, realism asserts the primacy of national politics over community law and emphasizes the limits that the member states have imposed upon their involvement in community affairs "which stops well short of any grant of sovereignty to the regional institutions."³⁰

An example of a critique of the legalist approach that agrees with the realist premises is Stuart Scheingold's *The Law in Political Integration*.³¹ Scheingold revisits the claim of the federalizing role of the Court. He finds that the impact of judicial decisions upon the substance of community policy has been "rather modest. . . . By and large, the Court of Justice has operated as a validator of decisions . . . rather than as a policymaker."³² He finds no hard evidence that the Court has contributed *directly* to the capacity of imposing "constitutional" solutions on difficult problems. Thus, he concludes that the "legal process *seems* to incorporate the member-states into a federal system. But the political process is basically consensual and pays more than lip service to the autonomy and integrity of national units in decision-making."³³ Nonetheless, Scheingold grants the possibility that the Court has had an *indirect* impact on European integration. He explains that by repeatedly and vigorously asserting federal prerogatives, the Court was "feeding into the symbiotic relationship emerging between Community institutions and existing national structures—mobilizing national elites, enlisting national institutions in behalf of Community goals, and generally blurring the lines which divide[d] one set of structure from the other."³⁴

27. We borrow this expression from Joseph Weiler, "Community, Member States, and European Integration: Is the Law Relevant?" *Journal of Common Market Studies* 21 (September-December 1982), pp. 39-56.

28. Paul Taylor, *The Limits of European Integration* (New York: Columbia University Press, 1983), p. 280.

29. *Ibid.*, p. 284.

30. *Ibid.*, p. 294.

31. Stuart A. Scheingold, *The Law in Political Integration: The Evolution and Integrative Implications of Regional Legal Processes in the European Community*, Occasional Papers in International Affairs, no. 27, (Cambridge, Mass.: Center for International Affairs, Harvard University, 1971).

32. *Ibid.*, p. 16.

33. *Ibid.*, p. 3, emphasis added.

34. *Ibid.* For a related argument on the virtues of the "federal rhetoric," see Roy Pryce, "Past Experience and Lessons for the Future," in Roy Pryce and Wolfgang Wessels, eds., *The Dynamics of European Union* (London: Croom Helm, 1987), pp. 273-96.

Neorationalism. Geoffrey Garrett's and Barry Weingast's studies are two rare examples by political scientists that deal explicitly with the ECJ.³⁵ They rely on a "rationalist" approach to the study of institutions, one that proceeds from the basic realist premises of sovereign and unitary actors but which accepts a role for institutions based on rational choice and game theoretic studies of cooperation.³⁶

Garrett begins with the proposition that the Court is in fact able to impose constraints on national political authorities within the community.³⁷ Its continued ability to play such a role, however, does not result from any autonomous power. Rather, the maintenance of the community legal system is actually "consistent with the interests of member states."³⁸ Member states' continuing collaboration within the EC indicates that they value the gains from effective participation in the internal market more highly than the potential benefits of defecting from community rules.³⁹ However, due to the complexity of the community system, the incentives for unilateral defection may be considerable, especially if cheating is hard for other governments to spot or if the significance of defection is difficult to evaluate. Logically, if cheating is endemic, there are no gains from cooperation. It is thus in the member states' selfish interest to delegate some authority to the ECJ to enable it to *monitor* compliance with community obligations, to facilitate "the logic of retaliation and reputation in iterated games,"⁴⁰ or, more broadly, to create a shared belief system about cooperation and defection in the context of differential and conflicting sets of individual beliefs that would otherwise inhibit the decentralized emergence of cooperation.⁴¹ The ECJ performs a further valuable role for the member states: it mitigates the *incomplete contracting problems* by applying the general rules of the Rome treaty 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.⁴²

These various benefits notwithstanding, however, the Court would still not be worth the costs it imposes on individual member states unless "it faithfully implement[s] the collective internal market preferences of [Community] members."⁴³ Garrett concludes that the ECJ, and the domestic courts that

35. See Garrett, "International Cooperation and Institutional Choice"; and Garrett and Weingast, "Ideas, Interests, and Institutions."

36. For a discussion of the "rationalist" approach versus the "reflectivist" approach to institutions, see Robert O. Keohane, "International Institutions: Two Approaches," *International Studies Quarterly* 32 (December 1988), pp. 379-96.

37. Garrett, "International Cooperation and Institutional Choice," p. 556.

38. *Ibid.*, p. 557.

39. See Garrett and Weingast, "Ideas, Interests, and Institutions," p. 27; and Garrett, "International Cooperation and Institutional Choice," pp. 540 and 557.

40. Garrett and Weingast, "Ideas, Interests, and Institutions," p. 27.

41. *Ibid.*, p. 13.

42. See Garrett, "International Cooperation and Institutional Choice," p. 557; and Garrett and Weingast, "Ideas, Interests, and Institutions," pp. 27-28.

43. Garrett, "International Cooperation and Institutional Choice," p. 558.

follow its judgments, meets this criterion as well, on the ground that its rulings "are consistent with the preferences of France and Germany."⁴⁴ This assertion is simply wrong. Garrett cites one case in support of his thesis, the Court's 1979 ruling in *Cassis de Dijon*, in which the Court reached a ruling consistent with Germany's export interests.⁴⁵ Yet, in that case, as in five other landmark constitutional cases, the German government argued explicitly and strongly against the Court's ultimate position. Indeed, Germany's lawyers put forth views opposed to those of the Court more often than any other country.⁴⁶ The French government did not make an appearance in any of these cases but battled the Court ferociously in other forums.⁴⁷ Further, there is absolutely no evidence that the Court actually attempts, as Garrett and Weingast contend, to track the positions of the member states. Stein argues that the Court follows the lead of the *commission*, using it as a political bellwether to ascertain how far member states can be *pushed* toward the Court and the commission's vision of maximum integration.

With the luxury of hindsight and the ability to manipulate the analysis at a very high level of generality, it is easy to assert that a particular decision was "in the interests" of a particular state. Indeed, since the Garrett and Weingast approach assumes that states will only comply with judicial decisions if in fact those decisions are in their interests, they have an obvious incentive to deduce interest-compatibility from compliance. More generally, since the last five years have been a period in which all the principal EC member states have strongly supported continued integration, judicial decisions that retrospectively can be seen to have strengthened integration seem automatically congruent with the interests of those states. What we know is that at the time a particular case is brought, different governments strongly disagree as to its outcome. Over time, however, they tend to accept the Court's position and regard the path chosen as inevitable. *It is precisely this process that needs to be explained.* Here neorationalism is at a loss. Neofunctionalism is in its element.

Other approaches. Much of the remaining recent literature on the EC by political scientists has been characterized by (1) continuing disregard for the role of courts and EC law in the process of integration and (2) an increasingly eclectic methodology. Andrew Moravcsik's study on the negotiation of the SEA, for example, proposes an "intergovernmental institutionalist" approach that combines an emphasis on state power and national interests with the role of domestic factors in determining the goals that governments pursue.⁴⁸ Wayne

44. *Ibid.*, p. 559.

45. See discussion below.

46. For a compelling overview of the evidence, see Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," p. 25.

47. See discussion of the *Sheepmeat* cases below.

48. Andrew Moravcsik, "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community," *International Organization* 45 (Winter 1991), pp. 19-56.

			Direct impact	No impact	Enhances integration	Disrupts integration
Legal approaches	Legalism		X		X	
	Contextualism	Weiler	X		(X)	X
		Rasmussen	X			X
		Lenaerts	X		X	
Political science theories	Realism			X		
	Neorationalism	Garrett and Weingast	X		X	
	Other approaches			(X)		

X = Primary classification

(X) = Article also contains material supporting classification in this category.

FIGURE 1. *Studies of the impact of the European Court of Justice on European integration*

Sandholtz and John Zysman's study on Europe 1992 comes *in spirit* closest to a neofunctionalist analysis.⁴⁹ Sandholtz and Zysman claim that the institutions of the community, in alliance with a transnational industry coalition and aided by international structural changes as well as shifts in domestic politics, revived the Common Market project. Surprisingly, the Court remains unnamed. Finally, Sandholtz's article on monetary politics and Maastricht proposes an analytical framework that combines elements of intergovernmentalism, institutionalism, functionalism, and domestic politics.⁵⁰ A summary of several studies' findings as to the ECJ's impact on European integration is shown in Figure 1.

A return to neofunctionalism

An account of the impact of the Court in terms that political scientists will find as credible as lawyers must offer a political explanation of the role of the Court from the ground up. It should thus begin by developing a political theory of how

49. Andrew Moravcsik also has pointed out this parallel. See *ibid.*, p. 24, n. 17. Ironically, the authors themselves explicitly disavow the usefulness of neofunctionalism to the understanding of Europe 1992; see Wayne Sandholtz and John Zysman, "1992: Recasting the European Bargain," *World Politics* 42 (October 1989), pp. 95-128.

50. See Wayne Sandholtz, "Choosing Union: Monetary Politics and Maastricht," this issue of *International Organization*.

the Court integrated its own domain, rather than beginning with legal integration as a *fait accompli* and asking about the interrelationship between legal and political integration. The process of legal integration did not come about through the “power of the law,” as the legalists implicitly assume and often explicitly insist on. Individual actors—judges, lawyers, litigants—were involved, with specific identities, motives, and objectives. They interacted in a specific context and through specific processes. Only a genuine political account of how they achieved their objectives in the process of legal integration will provide the basis for a systematic account of the interaction of that process with the political processes of the EC.

Such an account has in fact already been provided, but it has never been applied to the Court as such. It is a neofunctionalist account.

Neofunctionalism in historical perspective: a theory of political integration

The logic of political integration was first systematically analyzed and elaborated by Ernst Haas in his pioneering study *The Uniting of Europe*.⁵¹ This work and a collection of later contributions⁵² share a common theoretical framework called neofunctionalism. Neofunctionalism is concerned with explaining “how and why nation-states cease to be wholly sovereign, how and why they voluntarily mingle, merge, and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts between themselves.”⁵³ More precisely, neofunctionalism describes a process “whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities towards a new and larger center, whose institutions possess or demand jurisdiction over the pre-existing national states.”⁵⁴

As a theory of European integration, neofunctionalism was dependent on a set of highly contingent preconditions: a unique constellation of exogenous historical, international, and domestic variables. For present purposes, however, the principal contribution of neofunctionalist theory is its identification of the functional categories likely to be receptive to integration and its description

51. See Haas, *The Uniting of Europe*.

52. See in particular the following works by Ernst Haas: “International Integration: The European and the Universal Process,” *International Organization* 15 (Summer 1961), pp. 366–92; *Beyond the Nation-State* (Stanford, Calif.: Stanford University Press, 1964); “Technocracy, Pluralism, and the New Europe,” in Stephen Graubard, ed., *A New Europe?* (Boston: Houghton Mifflin, 1964) reprinted in Joseph Nye, *International Regionalism* (Boston: Little, Brown, 1968), pp. 149–79 (our citations refer to this latter version); and “The Study of Regional Integration: Reflection on the Joy and Anguish of Pretheorizing,” *International Organization* 24 (Autumn 1970), pp. 607–46. See also Ernst B. Haas and Phillippe Schmitter, “Economic and Differential Patterns of Political Integration: Projections About Unity in Latin America,” *International Organization* 18 (Autumn 1964), pp. 705–37.

53. Haas, “The Study of Regional Integration,” p. 610.

54. Haas, “International Integration,” p. 366. See also, Haas, *The Uniting of Europe*, p. 12.

of the actual mechanics of overcoming national barriers within a particular functional category *after the integration process has been launched*.

*Neofunctionalism as a theory of the integration process:
overcoming national barriers*

The actors: circumventing the state. The primary players in the integration process are above and below the nation-state. Actors *below* the state include interest groups and political parties. Above the state are supranational regional institutions. These supranational institutions promote integration, foster the development of interest groups, cultivate close ties with them and with fellow-technocrats in the national civil services, and manipulate both if necessary.

The Commission of the European Communities, for example, has the "power of initiative."⁵⁵ To have its proposals accepted by the Council of Ministers, the commission forges behind-the-scene working alliances with pressure groups. As its policymaking role grows, interest groups coalesce across national boundaries in their pursuit of communitywide interests, thus adding to the integrative momentum. Note that these groups need not be convinced "integrationists." The very existence of the community alters their situation and forces them to adjust.⁵⁶

What role is there for governments? According to neofunctionalism, government's role is "creatively responsive."⁵⁷ As holders of the ultimate political power, governments may accept, sidestep, ignore, or sabotage the decisions of federal authorities. Yet, given their heterogeneity of interests in certain issue-areas, unilateral evasion or recalcitrance may prove unprofitable if it sets a precedent for other governments.⁵⁸ Thus governments may either choose to or feel constrained to yield to the pressures of converging supra- and subnational interests.

The motives: instrumental self-interest. One of the important contributions of neofunctionalism is the introduction of an unambiguously utilitarian concept of interest politics that stands in sharp contrast to the notions of unselfishness or common goods that pervades functionalist writing.⁵⁹ Assumptions of good will, harmony of interests, or dedication to the common good need not be postulated to account for integration. Ruthless egoism does the trick by itself.⁶⁰ As Haas puts it, "*The 'good Europeans' are not the main creators*

55. Stuart A. Scheingold and Leon N. Lindberg, *Europe's Would-be Polity* (Englewood Cliffs, N.J.: Prentice-Hall, 1970), p. 92.

56. *Ibid.*, p. 78.

57. We borrow this expression from Reginald Harrison, *Europe in Question: Theories of Regional International Integration* (London: Allen and Unwin, 1974), p. 80.

58. Haas, *The Uniting of Europe*, p. xiv.

59. Haas, *Beyond the Nation-State*, p. 34.

60. This idea points to an affinity of neofunctionalism with rational choice theories. Self-interest need not be identical with selfishness. The happiness (or misery) of other people may be part of a rational maximizer's satisfaction.

of the . . . community; the process of community formation is dominated by nationally constituted groups with specific interests and aims, willing and able to adjust their aspirations by turning to supranational means *when this course appears profitable*.⁶¹ The supranational actors are likewise not immune to utilitarian thinking. They seek unremittingly to expand the mandate of their own institutions to have a more influential say in community affairs.

The process: incremental expansion. Three related concepts lie at the very core of the dynamics of integration: functional spillover, political spillover, and upgrading of common interests.

*Functional spillover*⁶² is based on the assumption that the different sectors of a modern industrial economy are highly interdependent and that any integrative action in one sector creates a situation in which the original goal can be assured only by taking further actions in related sectors, which in turn create a further condition and a need for more action, and so forth.⁶³ This process is described by Haas: "Sector integration . . . begets its own impetus toward extension to the entire economy even in the absence of specific group demands."⁶⁴

Political spillover describes the process of adaptive behavior, that is, the incremental shifting of expectations, the changing of values, and the coalescing at the supranational level of national interest groups and political parties in response to sectoral integration. It is crucial to note that neofunctionalism does not postulate an automatically cumulative integrative process. Again, in Haas's words, "The spillover process, though rooted in the structures and motives of the post-capitalist welfare state, is far from automatic,"⁶⁵ and "Functional

61. Haas, *The Uniting of Europe*, p. xiv, emphasis added.

62. Note that the idea of spillover is not new. There are numerous variations on the theme. Claude notes that

writing before World War I, Paul S. Reinsch adumbrated a "concentric circles" concept of International Organization, according to which the idea of multilateral attack upon world problems will function like a pebble dropped into the international pond, giving rise to a series of circles of cooperation which will expand from a limited area of technical agencies to vast circumference of a global political and security organization (*Public International Union*, Boston, Ginn, 1911). Paul Hoffman has suggested that "the good thing about the spirit of unity is that it ramifies out; when you cultivate habits of unity in the economic sphere, they naturally spread over to the political sphere and even to the military sphere when the need arises." (*Peace Can Be Won*, New York, Doubleday, 1951, p. 62).

See Inis L. Claude, *Swords into Plow Shares*, 4th ed. (New York: Random House, 1971, p. 384).

63. Leon Lindberg, *The Political Dynamics of the European Economic Integration* (Stanford, Calif.: Stanford University Press, 1963), p. 10. We follow George's suggestion of strictly distinguishing those two types of spillover. See Stephen George, *Politics and Policy in the European Community* (Oxford: Clarendon Press, 1985), pp. 16-36. George also offers a compelling illustration of functional spillover. He argues that the removal of tariff barriers will not in itself create a common market. The fixing of exchange rates also is required in order to achieve that end. But, the surrender of control over national exchange rates demands the establishment of some sort of monetary union, which, in turn, will not be workable without the adoption of central macroeconomic policy coordination and which itself requires the development of a common regional policy, and so forth (pp. 21-22).

64. Haas, *The Uniting of Europe*, p. 297.

65. Haas, "Technocracy, Pluralism, and the New Europe," p. 165.

contexts tend to be autonomous; lessons learned in one organization are not generally and automatically applied in others, or even by the same group in a later phase of its life."⁶⁶ In other words, neofunctionalism identifies certain linkage mechanisms but makes no assumptions as to the inevitability of actor response to functional linkages.

Upgrading common interests is the third element in the neofunctionalist description of the dynamics of integration. It occurs when the member states experience significant difficulties in arriving at a common policy while acknowledging the necessity of reaching some common stand to safeguard other aspects of interdependence among them. One way of overcoming such deadlock is by swapping concessions in related fields. In practice, the upgrading of the parties' common interests relies on the services of an institutionalized autonomous mediator.⁶⁷ This institutionalized swapping mechanism induces participants to refrain from vetoing proposals and invites them to seek compromises, which in turn bolster the power base of the central institutions.

The context: nominally apolitical. The context in which successful integration operates is economic, social, and technical.⁶⁸ Here Haas seems to accept a key assumption of the predecessor to his theory, functionalism, which posits that functional cooperation must begin on the relatively low-key economic and social planes. In David Mitrany's words, "Any political scheme would start a disputation, any working arrangement would raise a hope and make for confidence and patience."⁶⁹ However, economic and social problems are ultimately inseparable from political problems. Haas thus replaced the dichotomous relationship between economics and politics in functionalism by a continuous one: "The supranational style stresses the indirect penetration of the political by way of the economic because *the 'purely' economic decisions always acquire political significance in the minds of the participants.*"⁷⁰ "Technical" or "noncontroversial" areas of cooperation, however, might be so trivial as to remain outside the domain of human expectations and actions vital for integration.⁷¹ The area must therefore be economically important and endowed with a high degree of "functional specificity."⁷²

66. Haas, *Beyond the Nation-State*, p. 48.

67. "The European executives [are] able to construct patterns of mutual concessions from various policy contexts and in so doing usually manage to upgrade [their] own powers at the expense of the member governments." Haas, "Technocracy, Pluralism, and the New Europe," p. 152.

68. *Ibid.*

69. David Mitrany, *A Working Peace* (Chicago: Quadrangle Books, 1966), p. 99. Besides Mitrany's work, see also James Patrick Sewell, *Functionalism and World Politics*, (Princeton, N.J.: Princeton University Press, 1966); Ernst Haas, *Beyond the Nation-State*, especially chaps. 1-4; and Claude, *Swords into Plowshares*, especially chap. 17.

70. Haas, "Technocracy, Pluralism, and the New Europe," p. 152, emphasis added.

71. Haas, "International Integration," p. 102.

72. *Ibid.*, p. 372.

A neofunctionalist jurisprudence

The advent of the first major EC crisis in 1965, initiated by De Gaulle's adamant refusal to proceed with certain aspects of integration he deemed contrary to French interests, triggered a crescendo of criticism against neofunctionalism. The theory, it was claimed, had exaggerated both the expansive effect of increments within the economic sphere and the "gradual politicization" effect of spillover.⁷³ Critics further castigated neofunctionalists for failing to appreciate the enduring importance of nationalism, the autonomy of the political sector, and the interaction between the international environment and the integrating region.⁷⁴

Neofunctionalists accepted most of the criticism and engaged in an agonizing reassessment of their theory. The coup de grace, however, was Haas's publication of *The Obsolescence of Regional Integration Theory*, in which he concluded that researchers should look beyond regional integration to focus on wider issues of international interdependence.⁷⁵

With the benefit of greater hindsight, however, we believe that neofunctionalism has much to recommend it as a theory of regional integration. Although it recognizes that external shocks may disrupt the integration process,⁷⁶ it boasts enduring relevance as a description of the integrative process *within a sector*. The sector we apply it to here is the legal integration of the European Community.

The creation of an integrated and enforceable body of community law conforms neatly to the neofunctionalist model. In this part of the article we describe the phenomenon of legal integration according to the neofunctionalist categories set forth above: actors, motives, process, and context. Within each category, we demonstrate that the distinctive characteristics of the ECJ and its jurisprudence correspond to neofunctionalist prediction. We further show how the core insight of neofunctionalism—that integration is most likely to occur within a domain shielded from the interplay of direct political interests—leads to the paradox that actors are best able to circumvent and overcome political obstacles by acting as nonpolitically as possible. Thus in the legal context, judges who would advance a pro-integration "political" agenda are likely to be maximally effective only to the extent that they remain within the apparent bounds of the law.

73. Joseph Nye, "Patterns and Catalysts in Regional Integration," *International Organization* 19 (Autumn 1965), pp. 870–84.

74. See Stanley Hoffmann, "Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe," *Daedalus* 95 (Summer 1966), pp. 862–915; Stanley Hoffmann, "Discord in Community: The North Atlantic Area as a Partial System," reprinted in Francis Wilcox and Henry Field Haviland, eds., *The Atlantic Community: Progress and Prospects* (New York: Praeger, 1963).

75. Ernst B. Haas, *The Obsolescence of Regional Integration Theory* (Berkeley: University of California Press, 1975). See also Ernst B. Haas, "Turbulent Fields and the Theory of Regional Integration," *International Organization* 30 (Spring 1976), pp. 173–212.

76. Haas and Schmitter, "Economic and Differential Patterns of Political Integration," p. 710.

Actors: a specialized national and supranational community

On the supranational level, the principal actors are the thirteen ECJ judges, the commission legal staff, and the six advocates-general, official members of the Court assigned the task of presenting an impartial opinion on the law in each case. Judges and Advocates-General are drawn from universities, national judiciaries, distinguished members of the community bar, and national government officials.⁷⁷ Judges take an oath to decide cases independently of national loyalties and are freed from accountability to their home governments by two important facets of the Court's decision-making process: secrecy of deliberation and the absence of dissenting opinions.

A quick perusal of the Treaty of Rome articles concerning the ECJ suggests that the founders intended the Court and its staff to interact primarily with other community organs and the member states. Articles 169 and 170 provide for claims of noncompliance with community obligations to be brought against member states by either the commission or other member states. Article 173 gives the Court additional jurisdiction over a variety of actions brought against either the commission or the council by a member state, by the commission, by the council, or by specific individuals who have been subject to a council or commission decision directly addressed to them.

Almost as an afterthought, Article 177 authorizes the Court to issue "preliminary rulings" on any question involving the interpretation of community law arising in the national courts. Lower national courts can refer such questions to the ECJ at their discretion; national courts of last resort are required to request the ECJ's assistance. In practice, the Article 177 procedure has provided a framework for links between the Court and subnational actors—private litigants, their lawyers, and lower national courts.⁷⁸ From its earliest days, the ECJ waged a campaign to enhance the use of Article 177 as a vehicle enabling private individuals to challenge national legislation as incompatible with community law. The number of Article 177 cases on the Court's docket grew steadily through the 1970s, from a low of 9 in 1968 to a high of 119 in 1978 and averaging over 90 per year from 1979 to 1982.⁷⁹ This campaign has successfully transferred a large portion of the business of

77. For a cross-section of the résumés of both judges and advocates general, see L. Neville Brown and Francis Jacobs, *The Court of Justice of the European Communities* (London: Sweet and Maxwell, 1977), pp. 33–48.

78. It may seem odd to characterize lower national courts as subnational actors, but as discussed below, much of the Court's success in creating a unified and enforceable community legal system has rested on convincing lower national courts to leapfrog the national judicial hierarchy and work directly with the ECJ. See Mary L. Volcansek, *Judicial Politics in Europe* (New York: Peter Lang, 1986), pp. 245–67; and John Usher, *European Community Law and National Law* (London: Allen and Unwin, 1981).

79. Rasmussen, *On Law and Policy in the European Court of Justice*, p. 245.

interpreting and applying community law away from the immediate province of member states.⁸⁰

As an additional result of these efforts, the community bar is now flourishing. Groups of private practitioners receive regular invitations to visit the Court and attend educational seminars. They get further encouragement and support from private associations such as the International Federation for European Law, which has branches in the member states that include both academics and private practitioners. Smaller practitioners' groups connected with national bar associations also abound.⁸¹ The proliferation of community lawyers laid the foundation for the development of a specialized and highly interdependent community above and below the level of member state governments. The best testimony on the nature of the ties binding that community comes from a leading EC legal academic and editor of the *Common Market Law Review*, Henry Schermers. In a recent tribute to a former legal advisor to the commission for his role in "building bridges between [the Commission], the Community Court and the practitioners," Schermers wrote,

Much of the credit for the Community legal order rightly goes to the Court of Justice of the European Communities, but the Court will be the first to recognize that they do not deserve all the credit. Without the loyal support of the national judiciaries, preliminary questions would not have been asked nor preliminary rulings followed. And the national judiciaries themselves would not have entered into Community law had not national advocates pleaded it before them. For the establishment and growth of the Community legal order it was essential for the whole legal profession to become acquainted with the new system and its requirements. Company lawyers, solicitors and advocates had to be made aware of the opportunities offered to them by the Community legal system.⁸²

In this tribute, Schermers points to another important set of subnational actors: community law professors. These academics divide their time between participation as private consultants on cases before the court and extensive commentary on the Court's decisions. In addition to book-length treatises, they edit and contribute articles to a growing number of specialized journals devoted exclusively to EC law.⁸³ As leading figures in their own national legal and political communities, they play a critical role in bolstering the legitimacy of the Court.

80. The Court's rules allow member states to intervene to state their position in any case they deem important, but this provision is regularly underutilized.

81. See Brown and Jacobs, *The Court of Justice of the European Communities*, pp. 180-81.

82. Henry Schermers, "Special Foreword," *Common Market Law Review*, no. 27, 1990, pp. 637-38.

83. Prominent examples include *The Common Market Law Review*, *The European Law Review*, *Yearbook of European Law*, *Legal Issues of European Integration*, *Cahier de Droit Européen*, *Revue trimestrielle de Droit Européen*, and *Europarecht*. A vast number of American international and comparative law journals also publish regular articles on European law.

Motives: the self-interest of judges, lawyers, and professors

The glue that binds this community of supra- and subnational actors is self-interest. In the passage quoted above, Schermers speaks of making private practitioners aware of the "opportunities" offered to them by the community legal system. The Court largely created those opportunities, providing personal incentives for individual litigants, their lawyers, and lower national courts to participate in the construction of the community legal system. In the process, it enhanced its own power and the professional interests of all parties participating directly or indirectly in its business.

Giving individual litigants a personal stake in community law. The history of the "constitutionalization" of the Treaty of Rome, and of the accompanying "legalization" of community secondary legislation, is essentially the history of the direct effect doctrine. And, the history of the direct effect doctrine is the history of carving individually enforceable rights out of a body of rules apparently applicable only to states. In neofunctionalist terms, the Court created a pro-community constituency of private individuals by giving them a direct stake in promulgation and implementation of community law. Further, the Court was careful to create a one-way ratchet by permitting individual participation in the system only in a way that would advance community goals.

The Court began by prohibiting individuals from seeking to annul legal acts issued by the Council of Ministers or the EC Commission for exceeding their powers under the Treaty of Rome. As noted above, Article 173 of the treaty appears to allow the council, the commission, the member states, and private parties to seek such an injunction. In 1962, however, the Court held that individuals could not bring such actions except in the narrowest of circumstances.⁸⁴ A year later the Court handed down its landmark decision in *Van Gend & Loos*, allowing a private Dutch importer to invoke the common market provisions of the treaty directly against the Dutch government's attempt to impose customs duties on specified imports.⁸⁵ *Van Gend* announced a new world. Over the explicit objections of three of the member states, the Court proclaimed:

the Community constitutes a *new legal order* . . . for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and *the subjects of which comprise not only Member States but also their nationals*. Independently of the legislation of the Member States, Community law *therefore not only imposes obligations on individuals but it also intended to confer upon them rights which become part of their legal heritage*. These rights arise

84. See Case 25/62, *Plaumann & Co. v. Commission of the European Economic Community*, *European Court Reports (ECR)*, 1963, p. 95. See also Hjalte Rasmussen, "Why is Article 173 Interpreted Against Private Plaintiffs?" *European Law Review*, no. 5, 1980, pp. 112-27.

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

not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.⁸⁶

The Court effectively articulated a social contract for the EC, relying on the logic of mutuality to tell community citizens that since community law would impose new duties of citizenship flowing to an entity other than their national governments, which had now relinquished some portion of their sovereignty, they must be entitled to corresponding rights. Beneath the lofty rhetoric, however, was the creation of a far more practical set of incentives pushing toward integration. Henceforth importers around the community who objected to paying customs duties on their imports could invoke the Treaty of Rome to force their governments to live up to their commitment to create a common market.

The subsequent evolution of the direct effect doctrine reflects the steady expansion of its scope. Eric Stein offers the best account,⁸⁷ charting the extension of the doctrine from a "negative" treaty obligation to a "positive" obligation⁸⁸; from the "vertical" enforcement of a treaty obligation against a member state government to the "horizontal" enforcement of such an obligation against another individual⁸⁹; from the application only to treaty law to the much broader application to secondary community legislation, such as council directives and decisions.⁹⁰ After vociferous protest from national courts,⁹¹ the Court did balk temporarily at granting horizontal effect to community directives—allowing individuals to enforce obligations explicitly imposed by council directives on member states against other individuals—but has subsequently permitted even these actions where member governments have failed to implement a directive correctly or in a timely fashion.⁹²

Without tracking the intricacies of direct effect jurisprudence any further, it suffices to note that at every turn the Court harped on the benefits of its

86. *Ibid.*, p. 12, emphasis added.

87. See Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*.

88. Case 57/65, *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis*, ECR, 1986, p. 205.

89. See Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union Cycliste Internationale*, ECR, 1974, p. 1405; and Case 149/77, *Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aeriennne Sabena*, ECR, 1978, p. 1365.

90. See Case 9/70, *Franz Grad v. Finanzamt Traunstein*, ECR, 1970, p. 825; and Case 411/74, *Yvonne Van Duyn v. Home Office*, ECR, 1974, p. 1337.

91. *Bundesfinanzhof*, decision of 25 April 1985 (VR 123/84), *Entscheidungen des Bundesfinanzhofes*, vol. 143, p. 383 (noted by H. Gerald Crossland, *European Law Review*, 1986, pp. 476–79). The decision was quashed by the *Bundesverfassungsgericht* (the German Constitutional Court) in its decision of 8 April 1987 (2 BvR 687/85), [1987] *Recht der Internationalen Wirtschaft* 878. See also the *Cohn Bendit* case, *Conseil d'Etat*, 22 December 1978, Dalloz, 1979, p. 155.

92. See Case 152/84, *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)*, *Common Market Law Review*, vol. 1, 1986, p. 688; and Case 152/84, ECR, 1986, p. 737. On the relationship between *Marshall* and *Marleasing*, See Hjalte Rasmussen, "The Role of the Court in the European Community: Towards a Normative Theory of Interpretation of Community Law," *University of Chicago Legal Forum*, forthcoming.

judgments for individual citizens of the community. In *Van Duyn*, for instance, the Court observed: "A decision to this effect (granting direct effect to community directives) would undoubtedly strengthen the legal protection of individual citizens in the national courts."⁹³ Conversely, of course, individuals are the best means of holding member states to their obligations. "Where Community authorities have, by directive, imposed on Member states the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law."⁹⁴

The net result of all these cases is that individuals (and their lawyers) who can point to a provision in the community treaties or secondary legislation that supports a particular activity they wish to undertake—from equal pay for equal work to a lifting of customs levies—can invoke community law and urge a national court to certify the question of whether and how community law should be applied to the ECJ. When litigants did not appear to perceive the boon that had been granted them, moreover, the Court set about educating them in the use of the Article 177 procedure.⁹⁵ The Court thus constructed a classically utilitarian mechanism and put it to work in the service of community goals. Citizens who are net losers from integrative decisions by the council or the commission cannot sue to have those actions declared *ultra vires*. But citizens who stand to gain have a constant incentive to push their governments to live up to paper commitments.⁹⁶ As Haas argued in 1964, a successful international organization can achieve "growth through planning . . . only on the basis of stimulating groups and governments in the environment to submit new demands calling for organizational action."⁹⁷

Courting the national courts. The entire process of increasing the use of the Article 177 procedure was an exercise in convincing national judges of the desirability of using the ECJ. Through seminars, dinners, regular invitations to Luxembourg, and visits around the community, the ECJ judges put a human

93. *Van Duyn*, p. 1342.

94. *Ibid.*, p. 1348. For a discussion of more recent cases in which the Court explicitly has carved out individual rights in the enforcement of community directives, see Deirdre Curtin, "Directives: The Effectiveness of Judicial Protection of Individual Rights," *Common Market Law Review*, vol. 27, 1990, pp. 709–39.

95. Mancini describes this process in great detail; see Mancini, "The Making of a Constitution for Europe," pp. 605–6. See also Pescatore, *The Law of Integration*, p. 99; and Rasmussen, *On Law and Policy in the European Court of Justice*, p. 247.

96. More prosaically, but no less effectively for the construction of a community legal system, the Article 177 procedure offers "clever lawyers and tacticians . . . the possibility of using Community law to mount challenges to traditional local economic restrictions in a way which may keep open a window of trading opportunity whilst the legal process grinds away." In a word, delay. See L. Gormley, "Recent Case Law on the Free Movement of Goods: Some Hot Potatoes," *Common Market Law Review*, vol. 27, 1990, pp. 825–57.

97. Haas, *Beyond the Nation-State*, p. 128.

face on the institutional links they sought to build.⁹⁸ Many of the Court's Article 177 opinions reenforced the same message. It was a message that included a number of components designed to appeal to the self-interest primarily of the lower national courts. It succeeded ultimately in transforming the European legal system into a split system, in which these lower courts began to recognize two separate and distinct authorities above them: their own national supreme courts, on questions of national law, and the ECJ, on questions of European law. Judge Mancini explains quite candidly that the ECJ needed the "cooperation and goodwill of the state courts."⁹⁹

Shapiro expresses surprise at the willingness of lower national courts to invoke Article 177 against the interests of their own national supreme courts, noting that lower court judges "must attend to their career prospects within hierarchically organized national judicial systems."¹⁰⁰ Weiler offers several explanations, beginning with the legitimacy of ECJ decisions conferred by the national prestige of individual judges and the precise reasoning of the opinions themselves. He ultimately concludes, however, that the "legally driven constitutional revolution" in the EC is "a narrative of plain and simple judicial empowerment."¹⁰¹ And further, that "the E.C. system gave judges at the lowest level powers that had been reserved to the highest court in the land." For many, "to have de facto judicial review of legislation . . . would be heady stuff."¹⁰²

Perhaps the best evidence for this "narrative of empowerment" comes from the ECJ itself. Many of the opinions are carefully crafted appeals to judicial ego. In *Van Gend & Loos* itself the Belgian and Dutch governments had argued that the question of the application of the Treaty of Rome over Dutch or Belgian law was solely a question for the Belgian and Dutch national courts. The ECJ responded by announcing, in effect, that the entire case was a matter solely between the national courts and the ECJ, to be resolved without interference from the national governments. When the Belgian government objected that the question of European law referred by the national court could have no bearing on the outcome of the proceedings, the ECJ piously responded that it was not its business to review the "considerations which may have led a

98. Rasmussen describes a "generous information campaign," as a result of which a steadily increasing number of national judges traveled to the *Palais de Justice*, at the ECJ's expense, for conferences about the court and the nature of the Article 177 procedure. See Rasmussen, *On Law and Policy in the European Court of Justice*, p. 247.

99. Mancini, "The Making of a Constitution for Europe," p. 605. In this regard, Mary Volcansek offers an interesting discussion of the various "follow-up mechanisms" the ECJ employed to further an ongoing partnership with the national courts, including positive feedback whenever possible and gradual accommodation of the desire occasionally to interpret community law for themselves. See Volcansek, *Judicial Politics in Europe*, pp. 264-66.

100. Martin Shapiro, "The European Court of Justice," in Alberta M. Sbragia, ed., *Euro-politics: Institutions and Policymaking in the New European Community* (Washington, D.C.: Brookings Institution, 1991), p. 127.

101. Weiler, "The Transformation of Europe," p. 2426.

102. *Ibid.* Anecdotal evidence also suggests that lower national courts who refer questions to the ECJ save themselves the work of deciding the case themselves and simultaneously protect against the chance of reversal.

national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions."¹⁰³ In this and subsequent direct effect cases the ECJ continually suggested that the direct effect of community law should depend on judicial interpretation rather than legislative action.¹⁰⁴

Finally, in holding that a national court's first loyalty must be to the ECJ on all questions of community law,¹⁰⁵ the Court was able simultaneously to appeal to national courts *in their role* as protectors of individual rights—a very effective dual strategy.¹⁰⁶ Such argumentation simultaneously strengthens the force of the Court's message to national courts by portraying the construction of the European legal system as simply a continuation of the traditional role of European courts and, indeed, liberal courts everywhere: the protection of individual rights against the state. At the same time, as discussed above, the Court strengthens its own claim to perform that role, building a constituency beyond the Brussels bureaucracy.

Reciprocal empowerment. This utilitarian depiction of the integration process must include the ECJ itself. It is obvious that any measures that succeed in raising the visibility, effectiveness, and scope of EC law also enhance the prestige and power of the Court and its members, both judges and advocates general. In addition, however, by presenting itself as the champion of individual rights and the protector of the prerogatives of lower national courts, the ECJ also burnishes its own image and gives its defenders weapons with which to rebut charges of antidemocratic activism. Rasmussen points out that the encouragement to use Article 177 procedure meant that the Court visibly sided with "the little guy," the underdog against state bureaucracies, "the 'people' against the 'power-elite'."¹⁰⁷ Strikingly enough, this is a characterization with which Judge Koenrad Lenaerts essentially concurs.¹⁰⁸

The empowerment of the ECJ with respect to the national courts is more subtle. While offering lower national courts a "heady" taste of power, the ECJ simultaneously strengthens its own legal legitimacy by making it appear that its own authority flows from the national courts. It is the national courts, after all, who have sought its guidance; and it is the national courts who will ultimately *decide* the case, in the sense of issuing an actual ruling on the facts. The ECJ

103. *Van Gend & Loos*, p. 22.

104. See, e.g., *Lütticke*, p. 10, where the ECJ announced that the direct effect of the treaty article in question depends solely on a finding by the national court; see also Case 33/76 *Rewe-Zentralfinanz Gesellschaft and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, ECR, 1989, p. 1998; and Case 45/76 *Comet BV v. Produktschap voor Siergewassen*, ECR, 1976, pp. 2052–53.

105. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* [1978] ECR 629.

106. *Ibid.*, p. 643.

107. Rasmussen, *On Law and Policy in the European Court of Justice*, p. 245.

108. See Koenrad Lenaerts, "The Role of the Court of Justice in the European Community: Some Thoughts About the Interaction Between Judges and Politicians," *University of Chicago Legal Forum*, forthcoming.

only “interprets” the relevant provision of community law, and leaves it for the national court to apply it to the facts of the case. In practice, of course, the ECJ frequently offers a virtual template for the subsequent lower court decision.¹⁰⁹ But, the all-important fiction is preserved.

Finally, the empowerment of the ECJ simultaneously empowers all those who make their living by analyzing and critiquing its decisions. Here community law professors and their many assistants join with members of the community bar to form a communitywide network of individuals with a strong stake in bolstering the Court’s prestige. On the most basic level, the growing importance of community law translates into a growing demand for professors to teach it and hence, funding for chaired professorships.¹¹⁰ The holders of these chairs are likely, in turn, to aspire to become judges and advocates general themselves, just as many current judges and advocates general are likely to return to the professoriate when their terms expire. This is a neofunctionalist interest group par excellence.

Process

As discussed above, the neofunctionalist description of the actual process of integration focused on three major features: functional spillover, political spillover, and upgrading of common interests. All three dynamics are clearly present in the building of the EC legal system.

Functional spillover: the logic of law. Functional spillover presupposes the existence of an agreed objective and simply posits that the jurisdiction of the authorities charged with implementing that objective will expand as necessary to address whatever obstacles stand in the way. This expansion will continue as long as those authorities do not collide with equally powerful countervailing interests. Alternatively, of course, one objective might conflict with another objective. Such limits define the parameters within which this “functionalist” logic can work.

In the construction of a community legal system, such limits were initially very few, and the functional logic was very strong. Judge Pierre Pescatore has attributed the ECJ’s success in creating a coherent and authoritative body of community law to the Court’s ability—flowing from the structure and content of the Treaty of Rome—to use “constructive methods of interpretation.”¹¹¹ One of the more important of those methods is the “systematic method,” drawing on “the various systematic elements on which Community law is based:

109. For a number of specific examples, see Everling, “The Court of Justice as a Decisionmaking Authority,” pp. 1299–1301.

110. The “Jean Monnet Action,” a program of the European Commission, has recently created fifty-seven new full-time teaching posts in community law as part of a massive program to create new courses in European integration.

111. Pescatore, *The Law of Integration*, pp. 89–90.

general scheme of the legislation, structure of the institutions, arrangement of powers . . . , general concepts and guiding ideals of the Treaties. Here is a complete 'architecture,' coherent and well thought out, *the lines of which, once firmly drawn, require to be extended.*"¹¹² Interpretation according to the systematic method means filling in areas of the legal structure that logically follow from the parts of the structure already built.

A well-known set of examples confirms the power of this functional logic as applied by the ECJ. After *Van Gend & Loos*, the next major "constitutional" case handed down was *Costa v. Enel*, which established the supremacy of community law over national law. In plain terms, *Costa* asserted that where a treaty term conflicted with a subsequent national statute, the treaty must prevail. Predictably, Judge Federico Mancini justifies this decision by reference to the ruin argument.¹¹³ He argues further, however, that the supremacy clause "was not only an indispensable development, it was also a logical development."¹¹⁴ Students of federalism have long recognized that the clash of interests between state and federal authorities can be mediated in several ways: either (1) by allowing state authorities to implement federal directives at the time and in the manner they desire, or (2) by allowing both state and federal authorities to legislate directly, which entails formulating guidelines to establish a hierarchy between the two. On this basis, Mancini (and Eric Stein before him) points out that *because* the Court had "enormously extended the Community power to deal directly with the public" in *Van Gend & Loos*, it now became logically necessary to insist that community law must prevail over member state law in cases of conflict.¹¹⁵ In short, the "full impact of direct effect" can only be realized "in combination with" the supremacy clause.¹¹⁶

The evolution of community law also has manifested the substantive broadening typical of functional spillover. EC law is today no longer as dominantly economic in character as in the 1960s.¹¹⁷ It has spilled over into a variety of domains dealing with issues such as health and safety at work, entitlements to social welfare benefits, mutual recognition of educational and professional qualification, and, most recently, even political participation rights.¹¹⁸ Two notable examples are equal treatment with respect to social benefits of workers, a field developed almost entirely as a result of Court

112. *Ibid.*, p. 87, emphasis added.

113. Mancini, "The Making of a Constitution for Europe," p. 600.

114. *Ibid.*

115. *Ibid.*, p. 601.

116. This is the way Joseph Weiler describes the supremacy cases, again tacitly emphasizing a necessary logical progression. See Weiler, "The Transformation of Europe," p. 2414.

117. Neil Nugent, *The Government and Politics of the European Community* (Durham, N.C.: Duke University Press, 1989), p. 151.

118. See "Council Directive on Voting Rights for Community Nationals in Local Elections in Their Member States of Residence," *Official Journal*, 1988, C 256/4, and Amended Proposal, *Official Journal*, 1989, C 290/4.

decisions,¹¹⁹ and the general system of community trademark law—again formed entirely by the Court's case law.¹²⁰ In both areas the Court gradually extended its reach by grounding each new decision on the necessity of securing the common market.

Political spillover: "transnational incrementalism." The neofunctionalists argued that integration was an adaptive process of gradually shifting expectations, changing loyalties, and evolving values.¹²¹ In trying to explain why member states responded positively to the Court's legal innovations, Joseph Weiler writes: "it is clear that a measure of transnational incrementalism developed. Once some of the highest courts of a few Member States endorsed the new constitutional construct, their counterparts in other Member States heard more arguments that those courts should do the same, and it became more difficult for national courts to resist the trend with any modicum of credibility."¹²²

Beyond the Court's specific machinations, however, law operates as law by shifting expectations. The minute a rule is established as "law," individuals are entitled to rely upon the assumption that social, economic, or political behavior will be conducted in accordance with that rule. The creation and application of law is inherently a process of shifting expectations. A major function of a legal rule is to provide a clear and certain standard around which expectations can crystallize.

As long as those actors to which the Court's decisions are directed—member state governments, national courts, and individuals—accept one decision as a statement of the existing law and proceed to make arguments in the next case from that benchmark, they are shifting their expectations. This is precisely the process that court watchers, even potentially skeptical ones, have identified. Hjalte Rasmussen demonstrates that even governments overtly hostile to the Court's authority do not seek to ask the Court to overturn a previous ruling but rather accept that ruling as a statement of the law and use it as a point of departure for making arguments in subsequent cases. After reviewing an extensive sample of briefs submitted to the Court by member governments, Rasmussen was unable to find even one instance in which a member state suggested that a prior precedent be overruled.¹²³

119. For further reading, see Paul Leleux, "The Role of the European Court of Justice in Protecting Individual Rights in the Context of Free Movement of Persons and Services," in Eric Stein and Terrence Sandalow, eds., *Courts and Free Markets*, vol. 2 (Oxford: Clarendon Press, 1982), pp. 363–427.

120. Henry Schermers, "The Role of the European Court of Justice in the Free Movement of Goods," in Eric Stein and Terrence Sandalow, eds., *Courts and Free Markets*, vol. 1, pp. 222–71.

121. See Haas, "International Integration," p. 366; and Haas, *The Uniting of Europe*, p. 12.

122. Weiler, "The Transformation of Europe," p. 2425.

123. Rasmussen, *On Law and Policy in the European Court of Justice*, pp. 275–81.

This finding is particularly striking given that states do often strongly object to a proposed interpretation or application of a particular legislative term in its briefs and arguments *prior* to a particular decision.¹²⁴ One of the most celebrated instances of member state defiance of the Court is the *Sheepmeat* case. This represented the culmination of a line of precedents in which the Court had held repeatedly that the treaty prohibited intra-EC agricultural trade restrictions created by national market organizations for specific products.¹²⁵ The French government fought bitterly against this position at every turn but after losing in the first two cases, it chose to argue in the third for a delay in implementing its obligations—rather than to dispute the earlier decisions by the Court that had established those obligations in the first place.¹²⁶

Upgrading common interests. For the neofunctionalists, upgrading common interests referred to a “swapping mechanism” dependent on the services of an “institutionalized autonomous mediator.” The Court is less a mediator than an arbiter and has no means *per se* of “swapping” concessions. What it does do, however, is continually to justify its decisions in light of the common interests of the members as enshrined in both specific and general objectives of the original Rome treaty. The *modus operandi* here is the “teleological method of interpretation,” by which the court has been able to rationalize everything from direct effect to the preemption of member state negotiating power in external affairs in every case in which the treaty grants internal competence to community authorities.¹²⁷ All are reasoned not on the basis of specific provisions in the treaty or community secondary legislation but on the accomplishment of the most elementary community goals set forth in the Preamble to the treaty.

According to Judge Pescatore, the concepts employed in the teleological method include “concepts such as the customs union, equality of treatment and non-discrimination, freedom of movement, mutual assistance and solidarity, economic interpenetration and finally economic and legal unity as the supreme objective.”¹²⁸ He goes on to cite two examples from early cases concerning the

124. As is now widely recognized, Belgium, Germany, and the Netherlands all filed briefs strongly objecting to the notion of direct effect in *Van Gend & Loos*. None subsequently suggested revisiting that decision.

125. The first of these cases was Case 48/74, *Mr. Charrasson v. Minister for Economic Affairs and Finance*, ECR, p. 1383, involving a suit by a French banana importer challenging import restrictions imposed by the French banana market organization; the second was the *Potato* case, Case 231/78, *Commission v. UK*, ECR, 1979, p. 1447, an action by the commission against Britain for the activities of its potato market organization in which the French government supported the British position against the interests of its own potato exporters. The final installment in this saga was a challenge by the commission against the French again, this time for restrictions on sheepmeat from Britain. See Case 232/78, *Commission v. France*, ECR, 1979, p. 2729.

126. For a more detailed account of the arguments of the various parties in these cases, see Rasmussen, *On Law and Policy in the European Court of Justice*, pp. 281–84 and 338–45.

127. Case 22/70, *Commission of the European Communities v. Council of the European Communities*, ECR, 1971, p. 363.

128. Pescatore, *The Law of Integration*, p. 88.

free movement of goods and the customs union. He points out that “formulas” such as describing the customs union as one of the “foundations of the Community,” the role of which is “essential for the implementation of the Community project . . . have been repeated and developed in very varied circumstances since this first judgment.”¹²⁹

Rhetorically, these formulas constantly shift the analysis to a more general level on which it is possible to assert common interests—the same common interests that led member states into the community process in the first place. French sheepfarmers might fight to the death with British sheepfarmers, but the majority of the population in both nations have a common interest in “the free movement of goods.” “Upgrading the common interest,” in judicial parlance, is a process of reasserting long-term interest, at least as nominally perceived at the founding and enshrined in sonorous phrases, over short-term interest. In the process, of course, to the extent it succeeds in using this method to strengthen and enhance community authority, the Court does certainly also succeed in upgrading its own powers.

Context: the (apparent) separation of law and politics

The effectiveness of law in the integration process—as Haas predicted for economics—depends on the perception that it is a domain distinct and apart from politics. Shapiro has argued, for instance, that the Court, aided and abetted by its commentators, has derived enormous advantage from denying the existence of policy discretion and instead hewing to the fiction, bolstered by the style and retroactivity of its judgments. An absolute division between law and politics, as between economics and politics, is ultimately impossible. Nevertheless, just as Haas stressed that overt political concerns are less *directly* engaged in economic integration, requiring some time for specific economic decisions to acquire political significance, so, too, can legal decision making function in a relative political vacuum. Although the political impact of judicial decisions will ultimately be felt, they will be more acceptable initially due to their independent nonpolitical justification.

The importance of undertaking integration in a nominally nonpolitical sphere is confirmed by the underlying issues and interests at stake in the nascent debate about judicial activism in the community. As periodic struggles over the proper balance between judicial activism and judicial restraint in the United States have demonstrated, assertions about the preservation of the legitimacy and authority necessary to uphold the rule of law generally have a particular substantive vision of the law in mind.¹³⁰ In the community context, the response to Rasmussen’s charge of judicial activism reveals that the

129. *Ibid.*, p. 89.

130. See, for example, Martin Shapiro, “The Constitution and Economic Rights,” in M. Judd Harmon, ed., *Essays on the Constitution of the United States* (Port Washington, N.Y.: Kennikat Press, 1978), pp. 74–98.

substantive stakes concern the prospects for the Court's self-professed task, integration. In heeding widespread advice to maintain a careful balance between applying community law and articulating and defending community ideals, the Court is really preserving its ability to camouflage controversial political decisions in "technical" legal garb.

Maintaining the fiction. The European legal community appears to understand the importance of preserving the Court's image as a nonpolitical institution all too well. The dominant theme in scholarship on the Court in the 1970s and 1980s was reassurance that the Court was carrying out its delicate balancing act with considerable success.¹³¹ Rasmussen describes a widespread refusal among community lawyers and legal academics to criticize the Court on paper. The consensus seems to be that overt recognition of the Court's political agenda beyond the bounds of what "the law" might fairly be said to permit will damage the Court's effectiveness.¹³² Commenting on the same phenomenon, Shapiro has observed that the European legal community understands its collective writings on the Court as a political act designed to bolster the Court. By denying the existence of judicial activism and thus removing a major potential locus of opposition to the Court, they promote an institution whose pro-community values accord with their own internalized values.¹³³

The Court itself has cooperated in burnishing this nonpolitical image. Pescatore set the tone in 1974, contending that the first reason for the "relative success of Community case law" is "the wide definition of the task of the Court as custodian of law."¹³⁴ And certainly the Court has carefully crafted its opinions to present the results in terms of the inexorable logic of the law. To cite a classic example, in the *Van Gend & Loos* decision, in which the Court singlehandedly transformed the Treaty of Rome from an essentially nonenforceable international treaty to a domestic charter with direct and enforceable effects, it cast its analysis in the following framework: "To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme, and the wording of those provisions."¹³⁵

131. See F. Dumon, "La jurisprudence de la Cour de Justice. Examen critique des methodes d'interpretation" (The jurisprudence of the ECJ. Critical study of methods of interpretation) (Luxembourg: Office for Official Publications of the European Communities, 1976), pp. 51-53; A.W. Green, *Political Integration by Jurisprudence* (Leiden: Sijthoff, 1969), pp. 26-33 and 498; Clarence Mann, *The Function of Judicial Decision in European Economic Integration* (The Hague: Martinus Nijhoff, 1972), pp. 508-15; Scheingold, *The Rule of Law in European Integration*, pp. 263-85; and Stein, "Lawyers, Judges, and the Making of a Transnational Constitution, *passim*."

132. For a discussion of "the oral tradition" of criticism that European scholars refuse publicly to acknowledge, see Rasmussen, *On Law and Policy in the European Court of Justice*, pp. 147-48 and 152-54.

133. Shapiro, "Comparative Law and Comparative Politics," p. 542.

134. Pescatore, *The Law of Integration*, p. 89.

135. *Van Gend & Loos*.

Judge Mancini recently has continued this tradition in his description of the Court's success in winning over national judges. Referring to the ECJ's "courteously didactic" method, Mancini ultimately attributes the rise of the Article 177 procedure to the "cleverness" of his colleagues not in devising political strategies but in fashioning the law in such a way that its autonomous power and ineluctable logic would be clear to the benighted national judges. He seems astonishingly candid, observing, with an insider's wink: "The national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child's play."¹³⁶ In fact, however, his "revelations" amount to a story about the power of law, thus continuing the Court's proud tradition of insisting on the legal-political divide.

Mancini also has joined with other judges, most notably Ulrich Everling, in public penance to reassure concerned onlookers that the Court was very aware of the need for prudence. By the early 1980s, responding to simmering criticism, Judge Everling published several articles announcing that much of the foundational work in establishing the Treaty of Rome as a community constitution was done and that the Court could now afford to take a lower political profile. In 1989 Judge Mancini applauded the work of the Court to date but noted that the political relaunching of the community embodied in the SEA and the progress of the 1992 initiative toward a genuine common market would now permit the Court essentially to confine its activities to the more purely legal sphere.¹³⁷

Transforming the political into the legal. Court watchers have long understood that the ECJ uses the EC Commission as a political bellwether. In any given case, the ECJ looks to the commission's position as an indicator of political acceptability to the member states of a particular result or a line of reasoning.¹³⁸ From the Court's own perspective, however, the chief advantage of following the commission is the "advantage of objectivity," resulting from the commission's supranational perspective.¹³⁹ In neofunctionalist terms, the Court's reliance on what Pescatore characterizes as "well-founded information and balanced legal evaluations," as "source material for the Court's decisions" allows it to cast itself as nonpolitical by contrasting the neutrality and objectivity of its decision-making processes with the partisan political agendas of the parties before it.

Relatively less attention has been paid to the role of the commission in depoliticizing potentially inflammatory disputes among the member states. Judge Pierre Pescatore credits the procedure set forth in Article 169 (whereby

136. Mancini, "The Making of a Constitution," p. 606.

137. *Ibid.*, pp. 612-14.

138. The classic study documenting this proposition is Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," p. 25. Out of ten landmark cases, Stein found only two in which the Court had diverged from the Commission.

139. Pescatore, *The Law of Integration*, p. 80.

the *commission* initiates an action against a member state for a declaration of default on a community legal obligation) with defusing the potential fireworks of an Article 170 proceeding, in which one state would bring such a charge directly against another.¹⁴⁰ By allowing default proceedings to be initiated by “an institution representative of the whole, and hence objective both by its status and by its task,” this device “permits the Member States more easily to accept this process of control over their Community behavior and the censure which may arise for them from the judgments of the Court.”¹⁴¹ Against this backdrop, it is of signal importance that the Court itself actively and successfully encouraged the increased use of the Article 169 procedure.¹⁴²

This perspective reveals yet another dimension of the Court’s encouragement of the Article 177 procedure. The increased use of Article 177 shifted the vanguard of community law enforcement (and creation) to cases involving primarily *private* parties. It thus further removed the Court from the overtly political sphere of direct conflicts between member states, or even between the commission and member states. The political implications of private legal disputes, while potentially very important, often require a lawyer’s eye to discern. Following Haas’s description of economic integration, Article 177 cases offer a paradigm for the “indirect” penetration of the political by way of the legal.

Law as a mask. The above discussion of context reveals that the neofunctionalist domain is a domain theoretically governed by a distinct set of nonpolitical objectives, such as “the rule of law” or “economic growth and efficiency,” and by a distinctive methodology and logic. These characteristics operate to define a purportedly “neutral” zone in which it is possible to reach outcomes that would be impossible to achieve in the political arena. Neofunctionalists also insisted, however, that this neutral zone would not be completely divorced from politics. On the contrary, “economic”—or, in our case, “legal”—decisions inevitably would acquire political significance. This gradual interpenetration was the mechanism by which economic integration might ultimately lead to political integration.

The key to understanding this process is that even an economic decision that has acquired political significance is not the same as a “purely” political decision and cannot be attacked as such. It retains an independent “nonpolitical” rationale, which must be met by a counterargument on its own terms. Within this domain, then, contending political interests must do battle by proxy. The chances of victory are affected by the strength of that proxy measured by independent nonpolitical criteria.

From this perspective, law functions both as mask and shield. It hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere. In specifying this dual

140. *Ibid.*, pp. 80–82.

141. *Ibid.*, p. 82.

142. See Rasmussen, *On Law and Policy in the European Court of Justice*, pp. 238–40.

relationship between law and politics, we also uncover a striking paradox. Law can only perform this dual political function to the extent it is accepted as law. A “legal” decision that is transparently “political,” in the sense that it departs too far from the principles and methods of the law, will invite direct political attack. It will thus fail both as mask and shield. Conversely, a court seeking to advance its own political agenda must accept the independent constraints of legal reasoning, even when such constraints require it to reach a result that is far narrower than the one it might deem politically optimal.

In short, a court’s political legitimacy, and hence its ability to advance its own political agenda, rests on its legal legitimacy. This premise is hardly news to domestic lawyers. It has informed an entire school of thought about the U.S. Supreme Court.¹⁴³ It also accords with the perception of ECJ judges of how to enhance their own effectiveness, as witnessed not only by their insistence on their strict adherence to the goals of the Treaty of Rome but also by their vehement reaction to charges of activism. Mancini again: “If what makes a judge ‘good’ is his awareness of the constraints on judicial decision-making and the knowledge that rulings must be convincing in order to evoke obedience, the Luxembourg judges of the 1960s and 1970s were obviously *very good*.”¹⁴⁴

What is new about the neofunctionalist approach is that it demonstrates the ways in which the preservation of judicial legitimacy shields an entire domain of integrationist processes, hence permitting the accretion of power and the pursuit of individual interests by specified actors within a dynamic of expansion. Moreover, the effectiveness of “law as a mask” extends well beyond the ECJ’s efforts to construct a community legal system. To the extent that judges of the European Court do in fact remain within the plausible boundaries of existing law, they achieve a similar level of effectiveness in the broader spheres of economic, social, and political integration.

Implications and conclusions

The Maastricht treaty

The Maastricht Treaty on European Union reflects a determination on the part of the member states to limit the ECJ. The Court is entirely excluded from two of the three “pillars” of the treaty: foreign and security policy and cooperation in the spheres of justice and home affairs. In addition, a number of specific articles are very tightly drafted to prevent judicial manipulation. For instance, in the provisions on public health, education, vocational training, and culture, the treaty provides that the council shall adopt necessary measures to achieve the common objectives set forth, “*excluding any harmonization of the*

143. The most notable proponents of this approach to American judicial politics were Justice Felix Frankfurter and his intellectual protégé Alexander Bickel. See Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970).

144. Mancini, “The Making of a Constitution for Europe,” p. 605, emphasis original.

laws and regulations of the Member States."¹⁴⁵ This explicit prohibition of harmonization is an effort to ensure that the expedited decision-making procedures under Article 100 for the completion of the internal market cannot be interpreted to apply to those additional substantive areas.¹⁴⁶ On the other hand, another amendment allows the Court for the first time, at the commission's request, to impose a lump-sum or penalty payment on a member state that fails to comply with its judgment.¹⁴⁷

At first glance, the Maastricht provisions appear to confirm the Garrett-Weingast theory of the Court. The member states chose to strengthen the Court's power to monitor and punish defections from those areas of the treaty where it exercises jurisdiction; they chose to exclude it altogether in areas of lesser political consensus. Yet, Garrett and Weingast conclude that the single most important factor behind the maintenance of the community legal system is not the Court's performance of monitoring and incomplete contracting functions but rather the alignment of its judgments with the interests of the member states holding the balance of power in the community. If so, and if indeed the Court ensures the protection of its authority and legitimacy by assiduous fidelity to state interests rather than to the law, then why worry? Why should not the member states permit unrestricted jurisdiction, secure in the knowledge that the political constraints on the Court are safeguard enough? In areas of member state consensus, the Court will follow that consensus; in areas of continuing disagreement at least among the big states, the Court could be expected to decline jurisdiction or to decide on a technicality.

The answer can only be that the Court does have the power to pursue its own agenda, and that the personal incentives in the judicial and legal community, as well as the structural logic of law, favor integration. Further, the autonomy of the legal domain means that once started down a particular path, the Court's trajectory is difficult to monitor or control. It can be slowed by countermeasures carefully constructed on its own terms; the exclusion of harmonization, for instance, can be understood as a direct check on spillover crafted in legal language and according to legal rules. However, only exclusion provides certainty. Such exclusion will indeed stop the integration process in those areas; as fully admitted by neofunctionalists, neofunctionalism is a stochastic process, sensitive to political constraints. Absent such extreme measures, however, when not specifically cabined, the neofunctionalist dynamic does indeed produce incremental but steady change.

The sources of judicial autonomy

Accepting our argument thus far, a larger question nevertheless remains to be addressed—one that exceeds the scope of this article but that intersects

145. *Treaty on European Union*, Articles 126–129 (Luxembourg: Office for Official Publications of the European Communities, 1992).

146. We are indebted to Joseph Weiler for this reading of the Maastricht Treaty.

147. *Treaty on European Union*, Article 143.

larger debates in international relations theory about the role of institutions. Why do nation-states permit law an autonomous realm, even on the condition that its practitioners will remain faithful to its language and logic? Why not politicize the courts? Another way to ask the same question is to ask why member states do not seek to control the Court on a much more micro level—not by cabining the scope of judicial interpretation or by jurisdiction-stripping provisions but by seeking to control the political orientation of individual judges or requiring the publication of the actual votes in individual cases.

The potential answers to these questions pit rationalism against reflectivism: the cool calculation of exogenously determined interests versus the culturally conditioned operation of shared belief systems.¹⁴⁸ Reflectivists might argue that judicial independence is a bedrock norm of Western liberal democracies. It has arguably never even been questioned in civil law countries—the substantial majority of community members—because the “law-making” functions of civil law courts are paltry in comparison with their common law brethren. Rationalists could counter with a demonstration of the utility of an independent judiciary for the “juridicization” of politics, the oppositional use of a third-party tribunal to check the power of the majority party.¹⁴⁹ These are questions we can only pose, but their answers are important for theories about the power and strength of all institutions.

A return to sophisticated legalism

Before concluding, it is worth returning for a moment to the various categories of existing theories about the role of the ECJ in European integration described in the first part of this article, particularly the contextualist theories. We argued that those theories lacked microfoundations and failed to specify causal mechanisms. A brief review of several of those theories here demonstrates that the neofunctionalist approach supplies the missing elements in ways that strengthen the conclusions of theorists such as Weiler, Shapiro, Lenaerts, and Rasmussen, and adds a new dimension to the arguments of Garrett and Weingast.

In his most recent article, Weiler depicts much of the “systemic evolution of Europe” as the result of the self-created and internally sustained power of law.

148. For a discussion of the distinctive characteristics of reflectivism, see Keohane, “Two Views of Institutions,” pp. 389–93. See also Friedrich Kratochwil and John Gerard Ruggie, “International Organization: A State of the Art on an Art of the State,” *International Organization* 40 (Autumn 1986), pp. 753–75; Friedrich V. Kratochwil, *Rules, Norms, and Decisions* (Cambridge: Cambridge University Press, 1989); John Gerard Ruggie, “Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis,” *World Politics* 35 (1983), pp. 261–85; and Alexander Wendt, “Anarchy is What States Make of It,” *International Organization* 46 (1992), pp. 391–426.

149. See Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford: Oxford University Press, 1992); and Alec Stone, “Judging Socialism: Constitutional Politics in France and Germany,” *Comparative Political Studies*, forthcoming.

Shapiro made a similar point in the article in which he first threw down the gauntlet to community legal scholars to take account of the larger political context in which the Court was acting. He concluded that the legalist analysis might ultimately be the more “politically sophisticated one” on the ground that “legal realities are realities too.”¹⁵⁰ Both Lenaerts and Rasmussen would agree, although Rasmussen fears that legal realities are likely to be overborne by political realities as a result of a loss of judicial legitimacy. This position might be described as the “sophisticated legalist” position—one that recognizes the existence of countervailing political forces but that nevertheless accords a role for the autonomous power of law.¹⁵¹

The neofunctionalist approach integrates that insight with a carefully specified theory of the individual incentives and choices facing the servants of law and a description of the processes whereby they advance their own agenda within a sheltered domain. Thus, although we agree with Weiler’s conclusion, we go far beyond his general claim that the power of law within the community emanates from the “deep-seated legitimacy that derives from the mythical neutrality and religious-like authority with which we invest our supreme courts.”¹⁵² The power flows from a network of strongly motivated individuals acting above and below the state. To enhance and preserve that power, they must preserve and earn anew the presumed legitimacy of law by remaining roughly faithful to its canons.

In conclusion, neofunctionalism offers a genuine political theory of an important dimension of European integration. It is a theory that should be equally comprehensible and plausible to lawyers and political scientists, even if European judges and legal scholars resist it for reasons the theory itself explains. Previously, those who would argue for the force of the law had to forsake “political” explanations, or at least explanations satisfactory to political scientists. Conversely, most of those seeking to construct a social scientific account of the role of the Court typically have eschewed “fuzzy” arguments based on the power of law. We advance a theory of the interaction of law and politics that draws on both disciplines, explaining the role of law in European integration as a product of rational motivation and choice. Lawyers seeking to offer causal explanations, as well as political scientists trying to explain legal phenomena, should be equally satisfied.

150. Shapiro, “Comparative Law and Comparative Politics,” pp. 540–42.

151. It should be noted here that Volcansek has integrated similar arguments into a more comprehensive political theory about the impact of ECJ judgments on national courts, arguing for the importance of “legitimacy and efficacy” as one of four factors determining the nature of that impact. See Volcansek, *Judicial Politics in Europe*, pp. 267–70.

152. Weiler, “The Transformation of Europe,” p. 2428.