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

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INTRODUCTION

The European Court of Justice is in fashion, at least in academic circles. Hailed as the creator of the Community legal system and the constitutionaliser of the EC Treaty, the ECJ is no longer the specialised province of European law experts. This renewed interest is particularly evident among political scientists, who long ignored the Court as a technical and largely irrelevant institution. In the last four decades the literature on the Court has dramatically expanded, nourishing a lively debate between supranationalists and neogovernmentalists and spawning a new generation of dissertation research and detailed country studies of the relationship between the ECJ and national courts. All students of legal integration now agree that the Court is not only an important actor in the process of European integration but also a strategic actor in its own right.

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

The new interest in the Court was sparked in large part by the unexpected reintegration of European integration itself, beginning with the Single...
European Act in 1986 and the drive toward the completion of the single market in 1992. In discovering that regional integration was no longer obsolete, political scientists also became aware of what lawyers had known for some time—that legal integration had significantly outpaced economic and political integration. Moreover, the Court became the poster child for a revival of neo-functionalism. At a time when the Single European Act was being described as an intergovernmental bargain, we argued that the Court’s success in constructing an effective Community legal system was best explained in neo-functionalist terms. Scholars have challenged the neo-func- tionalist explanation of legal integration from two different directions. First, in the intergovernmentalism or more-
alist view that the ECJ has actually had little independent or even indirect impact on European integration; that although existing occasionally, it has acted largely as the faithful agent of Member State interests. In response, we challenged the empirical evidence of congruence between ECJ decisions and Member State interests, and questioned the identification of state “interests” as unitary economic interests. From this perspective, the value of a neo-functionalist analysis is its emphasis on microfoundations, on specifying the interests of particular actors in the process of European integration.

The second challenge to the neo-functionalist explanation of European legal integration concerned its teleological quality. Just as Hans’s original neo-functionalist analysis worked and worked with the fortunes of the Community itself, so too do neo-functionalist dynamics seem less compelling in 1996 than in 1992. Neo-functionalism seems to be a relic tailored for success, an account of how different actors can overcome obstacles to achieve a common goal. It is less a theory of how integration will and will not happen than a description of the process of how it does. To understand when the conditions favorable to this process are most likely to occur, we need a theory of interest formation. In response to these challenges, and to a crop of new data, we propose to reframe the neo-functionalist framework we put forward. Much of the empirical evidence that has emerged in the interim confirms the value of this framework in terms of its identification of the key actors in the legal integration process, their motives, the dynamics of their interactions, and the context in which they operate. EU lawyers themselves are increasingly willing to acknowledge the existence of a closely connected network of sub- and supra-national actors acting within an insulated and self-consciousness constructed “community of law.” At the same time, the limits of the initial framework are also now becoming clear. This chapter seeks to address some of these limits in ways that we hope will contribute to further research.

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

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

In lieu of standard models of the unitary state, the picture that emerges is one of “disaggregated sovereignty”, an image of different governmental institutions interacting with one another, with individuals and groups in domestic and transnational society and with supra-national institutions. This picture is closer to general liberal theories of international relations than it is to any particular account of European integration.

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

In our original account, drawing on the work of legal scholars such as Joseph Weiler, we identified the article 177 procedure in the EC Treaty as providing a framework for links between the European Court of Justice and subnational actors—private litigants, their lawyers, and lower national courts.

More specifically, we noted the Court’s efforts to make European law attractive to individual litigants and their lawyers through its case law and its efforts to educate and appeal to national judges through tactics ranging from weekend seminars in Luxembourg to tacit offers of a judicial partnership. A number of the national reports offer additional evidence for this picture. The judges of lower Italian courts, for instance, were assiduously motivated by a desire to have their cases referring issues to the ECJ “feature at the center of the attention of the world of lawyers.” This narrative resulted from approval of their analysis by the ECJ, in the face of the apparent ignorance of EC law on the part of many law professors and higher court judges.

The French report (Ch 2) also highlights the potential importance of the socialisation of individual national judges through a tour on the ECJ. Plotner tells the tale of Yves Salmon, the first member of the French Conseil d’État nominated as a judge on the ECJ, who was sent off to Luxembourg with the expectation that he would hold the line against judicial activism at the European level. A year after he returned to the Conseil d’État—thoroughly converted to Community doctrines—the Conseil took its famous Nicola decision that implicitly authorised judges to make treaties prevail over national law. Much of the remaining time is spent in each other’s company. More
generally, many of the country studies emphasise the small size and relatively close knit character of the legal community in each country, forged by ties of education, socialisation, and professional mobility between the professoriate, private practitioners, and the judiciary.

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

Borrowing from our critics, and drawing on the data presented in the country studies, we offer a more refined and differentiated definition of the kinds of power that courts actually seek. First is the power of judicial review to establish the validity of national legislation, which is an increase in power with respect to national legislatures. Some national courts, notably constitutional courts, already exercise this power within their domestic legal systems; others gained this power with respect to at least some subset of national statutes in partnership with the ECJ. Second is the pursuit of institutional power and prestige relative to other courts within the same national judicial system. Here we draw primarily on the work of Karen Alter, who has developed an “inter-court competition” approach to explain European legal integration. Third is the power to promote certain substantive policies through law. In other words, where European law and national law promote different policies or have different distributive effects with respect to a particular class of litigants, a national judge may have the opportunity to achieve the result that she favours through the application of European law.14

14 Rees and Myths, “Europe beyond the Court,” in 4 above, pp. 63.
16 See, Stone also comments on the limitations of the nonintervention model as to unconstitutional reformulated it, particularly with its inability to explain how to integrate law. (see Stone, Constitutional Dialogues in the European Community, (European University Institute, Florence, working paper, 1996), p. 15).

18 Let us emphasise here that this point does not rely on a model of judges “making” the law, in the sense of simply entreating their policy preferences. On the contrary, the assumption is that a national judge who consistently seeks to apply the law as written or intended will not vote her policy preferences where they appear in conflict with that law unless she can achieve the result

A noteworthy aspect of this refinement of judicial interests or preferences, is that each factor may explain resistance to as well as acceptance of ECJ law. Courts that already exercise the power of judicial review, for instance, are likely to perceive the “parallel” exercise of that power by the ECJ regarding matters of national governmental as a threat. Also Stone emphasises this tension in light of the particular incentives facing national constitutional courts, typically the only European courts entitled to engage in any form of judicial review.16 Similarly, the inter-court competition model posits that courts that already enjoy substantial prestige and power relative to other courts within the same national legal system are likely to object to the extension or even transfer of that power elsewhere in the system; they may thus reject ECJ law for the same reasons that their counterparts accept it. Finally, the congruence of ECJ law with a particular set of substantive legal outcomes in different issue areas can produce opposition from national courts who favour the outcomes produced by the application of national law as easily as it can marshal support from judges who would like to see a change in national law.

The following subsections discuss each of these strands of judicial interests in turn, drawing on evidence from the country studies. The result is a more nuanced and sophisticated understanding of “judicial empowerment.” Note, however, that this typology is inevitably stylised. A quest for power has both personal and professional aspects. It reflects a universal desire for individual recognition and acknowledgment by others as well as an instrumental effort to acquire the means to achieve specific goals. Judicial empowerment is likely also to partake of the ideals of the judiciary, closely aligned with both the idea and the ideal of the rule of law. Self-images forged in this crucible include courts as protectors of the weak, as impartial dispensers of justice, as checks on the abuse of power by their fellow branches of government, and as guardians of social order through faithful application of the law as written and—occasionally—as felt.

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

Judicial preferences

Judicial review

A number of the country studies offer evidence of a link between acceptance of ECJ law through adoption of the doctrines of direct effect and supremacy, the former by a legitimate legal route. Following European law within a framework in which a tribunal convicted to do so by the national government has interpreted and applied it to trump national law offers such a route.19

19 Stone, Constitutional Dialogues in the European Community, in 13 above, pp. 15-16.
and a desire to exercise some judicial review powers. In the Netherlands, for example, Parliament amended the Dutch Constitution in 1956 (introducing articles 65 and 66), giving national courts the power to review legislation for its compatibility with international treaties. This new power was at odds with a long tradition that barred judicial review of the constitutionality of legislation. Judges could now set aside statutes that violated international obligations, but at the same time, the invisibility of these statutes against any judicial review of their constitutionality was maintained. In the beginning the judges remained reluctant to use their new powers. Only when encouraged by the European Court of Justice did they assume their new task. Clues and de Witte note that in the landmark Van Gend en Loos case, the ECJ’s willingness to accept the role of “accomplice” in Van Gend encouraged Dutch courts to exercise their constitutionally recognized powers against the national legislature.17

The British situation is similar to the Dutch in that the doctrine of Parliamentary sovereignty precluded any courts from attacking primary legislation. With the formal acceptance of EU supremacy in the Factortame case of 1990, however, national courts were granted the right to set aside primary legislation that violated Community obligations. Craig notes that “the UK jurisdiction provides a good example of how readily the national courts can embrace their new found authority.”18 Perhaps the best example, however, of the way in which a desire to exercise judicial review shaped acceptance of direct effect and supremacy comes from the Italian experience. As told by Ruggeri Laderchi, the Italian story is a drama with three principal characters: the ECJ, the Italian Constitutional Court, and the lower courts. Again aided and abetted by the ECJ, lower court judges understood that supremacy afforded them the opportunity to control Italian national legislation for consistency with Community law. The Italian Constitutional Court under stood equally well that its prerogative of exclusive constitutional review was in jeopardy and sought to supervise the application of EC law in the face of contrary national legislation by the lower courts. Only in the 1980s, after it perceived that it was lagging behind the supreme courts of virtually all other Member States, did it finally accept supremacy more or less on the ECJ’s terms.19

In France, the monopoly of interpretation of public and constitutional law belonged to the Conseil d’État until 1958. In that year, the power to review the constitutionality of legislation passed to the newly-established Conseil Constitutionnel. This body decided in 1975 to abstain from examining the conformity of international treaties with national laws. The Conseil d’État—a particularly elitist group of French civil servants—considered any interference by the ECJ in French domestic affairs as a direct menace to its administrative and political power and chose therefore to ignore the ECJ.20

Not so the Cour de Cassation. It decided only four months after the Conseil Constitutionnel’s refusal to review legislation on its compatibility with international treaties to accept the supremacy doctrine in the landmark Jacques Valbré case.21 Up to that point, the Cour de Cassation had followed the famous “Matter” doctrine, requiring judges to avoid conflicts between domestic law and international obligations using rules of construction; but if such avoidance was impossible, judges had to enact national law for they “cannot know other will than that of the law.”22

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

Judicial competition

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

19 Cl. S., Report on Italy, p. 800. Also: some also recapitulates this story with a particularly attentive eye to the desire of the Italian Constitutional Court to preserve its prerogative of constitutional review. See stories: “Constitutional Disputes in the European Community”, in 13 Enero (above) pp. 10-11.
22 Alter, Cl. S. above, p. 241.
The exercise of judicial review involves a "horizontal" competition between courts and legislatures, allowing a judge to invoke the higher law of the constitution or a treaty as a bar to enforcement of a particular legislative product. Pure inter-court competition, on the other hand, can occur both horizontally, between high courts each charged with supervising a different body of law, and "vertically", between higher and lower courts within different branches of a national court system.

The court model contains substantial evidence for the inter-court competition model, as Alter documents.24 The model is particularly appropriate to Germany, as benefits to lower national courts from integration are less apparent in Germany than in most other member states. The power to conduct judicial review was already present in the German legal system and cannot be seen as a new introduction of the EC legal system.25 Vertical competition between lower and higher courts offers a better account of the incentives propelling German courts to accept direct effect and supremacy. But the model also relates to a common framework within which to analyse variation in other Member States. Indeed, it dovetails with Ake Stone's emphasis on the competition between constitutional courts and other national courts, another important chunk of the story.

Judicial interests flowing from inter-court competition reflect interests in relative judicial power—power and prestige relative to other courts within the same national legal system. These interests may intersect interests in gaining the power of judicial review in national legal systems in which some courts exercise judicial review while others do not, for instance, those courts lacking the power under the national system may seek to equalise their status with other national courts by arrogating the power to review national law for comparability with EC law in partnership with the ECJ. For instance, Pitner argues that the Cour de Cassation's institutional position vis-à-vis the Conseil d'État improved greatly with its swift endorsement of EC supremacy.26 Such competitive interests may also intersect with interests in promoting particular substantive policies, to the extent that a lower national court disagrees with a higher national court on a particular set of doctrinal outcomes and seeks to leapfrog that higher court by reference to the ECJ. It is the interests in promoting substantive policies that we now turn.

Promotion of substantive policies

Jonathan Goldub has recently demonstrated the ways in which a desire to shape specific policy outcomes may motivate national courts to limit the number of references to the ECJ. He shows that British courts have been reluctant to make references in cases in which the environmental protection require-ments in EC law are less stringent than in British environmental law.27 Goldub seeks to explain patterns of references, not acceptance of the doctrines of direct effect and supremacy. But other analysts of the reception of Community law by national courts have similarly pointed to judicial policy preferences as an explanatory factor. For Stone, a court has an "interest in using its decisions to make good policy".28 Alter notes that "lower courts can use EC law to get to policy outcomes which they prefer, either for policy or legal reasons".29 How are we to identify and assess judicial policy preferences? The question has long bedevilled students of judicial politics, who have been singularly unsuccessful at generating an algorithm that can help predict the political attitudes of individual judges.30 It is much easier to demonstrate a correlation between the policy posture of a particular judge and a particular set of judicial outcomes than to identify which judge will favour which policies.

This uncertainty is multiplied in the present context by the difficulty of predicting how acceptance of direct effect and supremacy will affect outcomes in individual cases. Suppose, for instance, that a British judge favours high levels of environmental protection. At a given moment, EC directives and ECF interpretations of those directives might mandate higher levels of environmental protection than British law. Yet those directives could change, as could the composition or disposition of the ECJ. Further, the acceptance of direct effect and supremacy cannot be limited to a particular class of cases. EC law and the ECJ's interpretation of that law could contradict the same national judge's policy preferences with regard to state subsidies for particular industries, gender discrimination, immigration law, or any other substantive area. But why cannot an individual national judge accept direct effect and supremacy and then control the actual application of EC law simply by manipulating references? Goldub's findings suggest that British courts may be pursuing this strategy. However, courts' ability to pick and choose cases to refer will be progressively limited both by the pressure of individual litigants and lower courts, as well as by the overriding need for minimum consistency and coherence in the law itself. Once a court has declared that EC law is supreme over national law, litigants will cite favourable doctrines of EC law and appeal national court decisions that do not follow those doctrines where they clearly apply to the facts in a particular case. Lower courts will similarly seek clarification in cases of apparent conflict between EC and national law. And to the extent that higher national courts refuse to provide such clarification, or selectively apply EC law in individual cases, the resulting patchwork will endanger the legitimacy of the national legal system.

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26 Alter, Ch. 8 above: p. 242.
Such pressure from litigants and the requirements of the legal process are more properly classified as constraints, as discussed below. For purposes of analytical clarity, a judge's preferences regarding any individual case or class of cases will be a compound of views on a range of substantive issues: highly individualised preferences over specific policy outcomes combined with more general preferences concerning modes of statutory interpretation, the optimal relationship between courts and the legislature, and the need to protect specific classes of litigants. These preferences will then be tempered by a need for consistency, coherence, and generalizability, which is important to note, however, that legal education, training, and socialization often result in the internalization of the constraints of clarity and predictability as independent preferences. Judges will thus often refer to these attributes as goals that they seek to pursue in upholding the "rule of law".

Returning to the question of preferences concerning direct effect and supremacy, it is still possible to identify situations where accepting direct effects, and supraneity, is a judge's substantive policy preferences. First, some number of national judges may simply favour European integration and would see participation in the construction of the European legal system as an important step in that direction. Secondly, a national court might have a particular "constituency", such as workers or traders, that will be systematically advantaged by EC law. Plotner appears to provide such an example, noting that the judges of the Cour de Cassation "had to mind the interests of French economic agents and citizens" in a way that the members of the Conseil d'Etat did not. These judges "realized that the impossibility of referring to certain Community regulation was bound to represent a serious economic disadvantage in comparison to their national competence and that it might also hamper the protection of civil rights". Kokott's study also suggests a similar dynamic with respect to the willingness of German labour courts to make references to the ECJ on the assumption that EC law would be more "employee-friendly" than national law, although she points out that the ECJ has recently gone too far in this regard.

Overall, however, such examples are few, hard to prove, and easy to challenge. Courts typically do not have readily identifiable constituencies; further, it is very difficult to predict the ultimate effect of acceptance of any legal doctrine. It is therefore more likely that a judge's preferences for coherence, consistency, and generalizability will produce a preference for direct effect and supremacy in situations in which other national courts have already accepted these doctrines, creating a patchwork that can now only be remedied by universal acceptance. Plotner's discussion of the Cour de Cassation, for instance, assumes that national judges across Europe were already applying EC law. The Italian Constitutional Court explicitly noted in accepting supremacy in the 1980s that other high courts across Europe, including Germany, had already taken this step. Indeed, the phenomenon of "judicial cross-fertilization" identified in many of the country studies—meaning instances in which courts of one nation refer to the decisions of another—may be understood not only as a pure intellectual exchange and as a risk minimization strategy with respect to incurring obligations already accepted by other Member States, but also as recognition of the need to harmonize European law as well.

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

CONSTRAINTS ON THE PROCESS OF LEGAL INTEGRATION

In the end, even the most precise specification of the preferences of individual litigants and national courts provides an incomplete account of the legal integration process. It is simultaneously necessary to identify the constraints operating on these actors in their pursuit of their preferences. As outlined above, different courts within different national legal systems have different preferences. However, to the extent that we observe rationalization in the timing and scope of acceptance of EC legal doctrine by national courts that should have roughly the same preferences (two national constitutional courts, for instance) those differences are likely to flow from the relative constraints that those courts face in pursuing their preferences. We discuss these constraints as they operate on national courts in terms of a more refined conception of judicial identity.
In our initial analysis we focused principally on one very general, albeit fundamental, aspect of judicial identity: the self-conception of courts in countries upholding the rule of law as non-political actors. These courts invariably conceive of themselves as agents and servants of the law, and thus as participants in a specialised normative discourse with other courts. Their receptivity to participation in a dialogue with the ECJ depends in part on their perception of it as a court like themselves, as a fellow member of "a community of law". This conception of judicial identity as fundamentally non-political was crucial to our "mask of law argument". Political considerations attach to judicial decisions and may motivate those decisions at the margin. Nevertheless, overt political arguments are illegitimate; actions must be justified with reference to generalisable principles and in a technical discourse that imposes its own constraints. Law thus operated as a mask to conceal the full political import of the ECJ's decisions.

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

A court in a liberal democracy is charged with interpreting and applying the law without regard to the judge's own political preferences, the power and political preferences of the parties appearing before her, or the power and political preferences of any other branch of government with an interest in the case. Two principal constraints shape this process of rule interpretation and application. First is the constraint of minimum fidelity to the demands of legal discourse: the language of reasoned interpretation, logical deductions, systemic and temporal coherence . . . .41 Reasoning and results that do not meet these requirements may be challenged as "unfounded in law", or as indicative that a court is acting ultra vires—in excess of its mandate.

Second is a constraint of minimum democratic accountability: the requirement that a court not stray too far from majority political preferences. At first glance, this constraint may seem completely at variance with the conception of courts as non-political actors. By definition, surely, courts are not accountable to voter preferences. A closer look, however, reveals that although judges are not and cannot be directly accountable to the voters, and indeed are specifically safeguarded by guarantees of life tenure and prohibitions on judicial salary reduction from feeling the full effects of electoral disagreement with their decisions, judicial decisions that consistently and sharply contradict majority policy preferences are likely to undermine perceptions of judicial legitimacy and can result in legislative efforts to restrict or even curtail judicial jurisdiction—the scope of judicial power over particular classes of cases. An astute judge will anticipate these reactions and seek to avoid them.

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

Both these constraints—the demands of legal discourse and democratic
accountability—are likely to vary from country to country. The sources of this variation are three:

1. variation in national policy preferences concerning the desirability of European integration;
2. variation in national legal culture; and
3. variation in specific national legal doctrines.

In the first category, a national court that readily accepts direct effect and supremacy will face less of a challenge to its legitimacy in a policy where public support for European integration is generally strong than in one with a split in public attitudes. In the second category, the demand for legal discourse will vary depending on the nature and strength of the links between the legislature and the judiciary and different styles of legal reasoning. Some national legal cultures prove more hospitable to national judicial participation in the EC legal system than others. In the third category, doctrines governing the relationship between national and international law, the specific function of particular national courts, and the definition and operationalization of national sovereignty pose particular obstacles within national legal discourse and may themselves reflect majority preferences. The remainder of this section explores the ways in which factors in each of these categories produced variations in the constraints facing different national courts.

National policy preferences

As discussed above, the case studies show that the rate of acceptance of supremacy doctrine in particular, and to a lesser extent direct effect, generally track national attitudes toward European integration. Figure 1 shows that the first countries to accept the doctrines of direct effect and supremacy were the Netherlands, Germany, and Belgium, followed by Italy, France, and Great Britain, in that order.20 No surprises here; an observer ignorant of EC law and national legal doctrine but knowledgeable about relative political support for the EC in these various countries is likely to have predicted a similar sequence. It is possible, of course, that national judges simply shared the prevailing attitudes toward European integration held by their fellow citizens and interpreted the law accordingly. We cannot know without interviewing individual judges, who would in any event be reluctant to confirm such speculation. However, such evidence is unnecessary insofar as the democratic accountability thesis would lead to the same result. Based on our assumption that national judges across countries shared uniform preferences concerning the advantages and disadvantages of entering into a partnership with the EC, the pursuit of these preferences would be constrained by the need not to allow their decisions to diverge too far from majority political preferences.

Behind the aggregate statistics presented in Figure 1 are a number of stories linking judicial outcomes with national policy preferences concerning European integration; policy preferences that are themselves derived from a composite of historical, geographical, and political factors. Herein Biba, author of the Belgian case study, notes that Belgium’s size and export-dependent economy produce favourable national attitudes toward European integration, a factor that he addresses as a partial explanation for the willingness of the Belgian Court de Cassation (the highest private law court) to take a high profile stance accepting supremacy in 1971.21 Monica Claeys and Bruno De Witte, writing on the Netherlands, are even more explicit. They trace Dutch support for the direct enforcement and application of international treaties back to Hugo Grotius’s magisterial seventeenth-century treatise on the freedom of the seas, locating these attitudes in small size and dependence on open borders for economic prosperity: “[T]he willingness to cooperate with foreign nations is clearly in the interest of a small trading nation that is too small to preserve its dependence on its own and needs open borders for its prosperity.”22 It is no coincidence that ten out of the first thirteen references to the European Court of Justice came from Dutch Courts.

On the other side of the ledger, Paul Craig observes that the reluctance of British courts to accept supremacy was but “one part of [Britain’s] more general approach toward the EC.”23 However, he argues further that the view of Britain as consistently seeking to slow the pace of integration is discredited, that the majority of the British population accept EC membership as the political norm, and that the House of Lords simply sought to “bring constitutional doctrine up to date with political reality” when it finally accepted supremacy in 1990.24 If judges are constrained by majority preferences, however, how then is the construction of the European legal system even a puzzle? What of our story that the system was built by the ECJ and national judges, lawyers, and legislators against the wishes, or at least behind the backs of, Member State Governments? Are we not now advancing a version of Garner’s claim that the ECJ was able to do its job because both its substantive decisions and the legal opportunities created to enforce them advanced the interests of the states that created it? The answer, of course, is no. But to advance our argument at this
Role of National Courts in European Integration

In the context of the European Union, national courts and their decisions play a crucial role in shaping and interpreting European law. This is particularly evident in the area of European integration, where national courts interpret and apply European law in their domestic proceedings. The principle of national courts interpreting European law is enshrined in the Charter of Fundamental Rights of the European Union and is further reinforced by the jurisprudence of the European Court of Justice (ECJ).

The role of national courts in European integration is not limited to interpreting European law. They also contribute to the harmonization of national law with European law, thereby ensuring the consistency and coherence of the legal order within the Union. Moreover, national courts can play a crucial role in upholding the rule of law and ensuring that the democratic principles are respected at the national level.

In the context of the Treaty of Maastricht, which established the European Union, the role of national courts in European integration became even more significant. The establishment of the ECJ as a court of last resort for disputes arising under the Treaty of Maastricht was a significant step in establishing the supremacy of European law over national law.

In subsequent Treaties, such as the Treaty of Amsterdam and the Treaty of Nice, the role of national courts in European integration was further strengthened. These Treaties recognize the importance of national courts in interpreting and applying European law, and provide for mechanisms to ensure the effective implementation of European law at the national level.

In conclusion, the role of national courts in European integration is crucial in ensuring the coherence and consistency of the legal order within the European Union. Their ability to interpret and apply European law in a manner that is consistent with the principles of the Treaty of Maastricht and the subsequent Treaties is essential in upholding the rule of law and ensuring the democratic principles are respected at the national level.

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*Note: The text is a simplified explanation of the role of national courts in European integration, based on the information available.*
of national legal rules, but also absorb specific features of their national legal culture. At the core of this culture are particular modes of legal reasoning—formal versus pragmatic, deductive versus inductive, abstract versus contextual—that give rise to a distinctive style of framing and resolving legal questions. Other features of national legal culture include a particular understanding of the role of courts in relation to legislative bodies, differing specifically on the extent to which judges "make" law in the process of interpretation and application of legislative provisions and the extent to which they can fill the gaps in those provisions.

Even wider is the gap between common law judges, who elaborate rules without legislative guidance based on the doctrine of precedent, and civil law judges, whose only source of authority flows from national codes. Yet both systems consist of a mixture of national legal culture—relative judicial activism or restraint. How far should a judge depart from a previous decision, or from the strict letter of a particular statute? Individual judges within a system can differ on this question, of course, but an entire national legal culture—like the legacy of national history and tradition—can lean in one direction or the other. Finally, national legal culture may reflect national legal structure: different types of federalism, as in Belgium or Germany, or systems divided into sub- and specialized courts (labor law courts, tax courts, constitutional courts) in which each court develops its own tradition of protecting a specific set of interests. These features of national legal culture ultimately condition the relationship between national courts and a supra-national tribunal. The development of "a community of law," requires that the participants recognize one another as equivalent legal actors speaking a common language and sharing a common legitimacy. Nevertheless, the forging of such a relationship between specific national courts and the ECJ depended on a number of preconditions. Judicial preferences, constrained by national political attitudes toward integration, created a predisposition; ECJ decisions provided the opportunity by creating the doctrinal "hook." But an additional factor constraining or facilitating the establishment of this relationship—particularly the acceptance of the legal hierarchy by the ECJ and national courts created by the doctrine of supremacy—was the relative "fit" between the two legal systems, a fit optimised by transnationalism.

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

Legal culture is also conditioned by the specific historic role of courts within a particular society. Here German and Italian courts face specific constraints that other courts do not. The constitutional courts in both countries are specifically charged with safeguarding individual rights and the rule of law against the encroachment of Fascism. In the German case, the commitment to Verfassungspatriotismus, or constitutional patriotism, results in the Constitutional Court's unswerving willingness to decide cases with important foreign policy implications. According to Jürgen Kohsert, this willingness flows from the renewed German commitment to the Rechtstaat in the wake of the Second World War—no questions are above or beyond the law. The Constitutional Court thus conceives itself as an equal participant with the political branches of the German Government in the process of European integration. At the same time, however, the Court's primary commitment to individual rights and the preservation of German democracy has led it to apply the brakes to that process in ways that may well constrain the German Government's pursuit of its perception of the national interest.

A third element of national legal culture concerns style of legal reasoning. Writing about Britain, Paul Craig notes that the "common law mode of adjudication is pragmatic and non-discriminatory." He argues that these characteristics allowed British courts early on to "acknowledge . . . that they were part of a Community legal order, and that the ECJ was the proper court to pass judgment on issues concerning the interpretation of the EC Treaty." This acceptance included the doctrine of direct effect. At the same time, however, he cautions that the common law method helps explain why British courts had difficulty with the doctrine of indirect effect, which required them to read national legislation to be in conformity with an EC directive even when the national legislature has not implemented the directive directly. The trick is to perform this feat of construction without actually rewriting the statute, often a difficult task. The common law requirement, unlike in civil law countries,
that courts write lengthy opinions explaining their reasoning to reach a particular result tends to highlight this tension in ways that lead British courts to stop short of the result desired by the ECJ.\textsuperscript{46}

\textbf{National legal doctrine}

In the most general sense, to say that national judges are constrained by national legal doctrine is to say that courts are constrained by the shape and specific form of national law. Legal doctrines frame particular issues: for an American judge a question concerning abortion must be understood in terms of a right of privacy or perhaps of a question of equal protection of the laws; for a German judge it must be analysed in terms of specific textual rights to life and to human dignity.\textsuperscript{47} They also provide the baselines against which the legitimacy of a particular judicial decision can be measured, in terms of linguistic, logical, and ideologically consistent with stated principles or precedents. Specific doctrines can thus provide either obstacles or channels to achieving particular results, particularly when a national court faces the task of harmonising a novel set of doctrines laid down by another court concerning the national legal system with long-standing national doctrinal traditions and formulations. The resulting constraints, where they exist, are likely to act more as temporary checks than absolute bars, as courts identify various incremental strategies to push apparently conflicting principles or to graft new doctrinal formulations onto old.

To some extent, particular national legal doctrines simplify reflect and codify aspects of national history and culture that define the role of courts within a particular national legal system. The best example in this category is the "eternal guarantee clause" (Ewigkeitsklause) in the German Constitution, which prohibits amendment of the constitution to abridge fundamental individual rights.\textsuperscript{48} The German Constitutional Court thus had strong textual support for its claim that the Maastricht Treaty could only be consistent with the German Constitution to the extent that it did not abridge the fundamental rights of German citizens.\textsuperscript{49}

A less obvious way in which national legal doctrine can shape judicial identity in ways that can constrain national courts in accepting direct effect and supremacy concerns the distinction between "monism" and "dualism": between a conception of the national legal order existing as an integrated part of the international legal order and a conception of two distinct legal orders

\textsuperscript{46} Ch. 7, Report on the United Kingdom, p. 219.
\textsuperscript{48} Ch. 5, Report on Germany, p. 156.
\textsuperscript{49} The controversy of course concerns its definition of those basic rights. It interpreted the right to vote, guaranteed in article 36 of the German constitution, as entitling German citizens to an undivided voice in the German Parliament. It thus blocked further transfer of law-making power to the European Parliament in the absence of the development of a genuine German "people".

in which rules from the one must be "translated" into the other through specified processes to have any legal effect. The Netherlands has the strongest tradition of monism, leading the Dutch Supreme Court to declare in 1986 that treaties were directly applicable in Dutch law without "transformation" or incorporation into national statutes by the Dutch parliament.\textsuperscript{50} This tradition made it particularly easy for Dutch courts to accept direct effect of EC law in the wake of Van Gend en Loos. Italy, on the other hand, has a centuries-old dualist tradition, referred to in Italian law as the "plurality of legal orders."\textsuperscript{51} After the Second World War, this tradition became linked with the supremacy of the Italian constitution.\textsuperscript{52} The Italian case study documents the ways in which the dualist approach hampered acceptance of EC law supremacy by the Italian Constitutional Court for decades.\textsuperscript{53}

A final example of the interrelationship between specific national legal doctrines and judicial perceptions of their ability to act as autonomous actors concerns different national conceptions of "soverignty": Bruno de Witte documents the role of the "principle of sovereignty" in all the countries under consideration as a principle "known to all the legal systems under review" and that "can be considered part of the common traditions of European constitutional law."\textsuperscript{54} Nevertheless, its different treatment within these national legal systems strongly affected relative receptivity to acceptance of direct effect and supremacy, as well as, more recently, acceptance of the Maastricht Treaty.

In France, Belgium, and the Netherlands, constitutional provisions and doctrinal traditions recognising the primacy of international treaty law (another facet of a monist tradition) has meant that the absolute supremacy of EC law could be accepted as international law without a perceived infringement of national sovereignty. In Germany and Italy, by contrast, international treaties are regarded as comprising part of a separate legal order, which cannot alter fundamental aspects of the national legal order. In both these countries supremacy was ultimately accepted on the basis of a specific constitutional provision authorising membership in the Community. The difficulty is that the constitutional courts in both countries interpret these specific constitutional provisions as containing their own implied limits embedded elsewhere in the national constitution, limits that can be asserted as necessary against European Community law. The result is ultimately a conditional acceptance of supremacy, reserving a core of absolute power for the national courts contrary to the doctrine of the ECJ itself.\textsuperscript{55} The German Constitutional Court reaffirmed this power in its Maastricht decision, in ways that will shape the next stage of development of the EC legal system.

\textsuperscript{50} Ch. 6, Report on the Netherlands, p. 172.
\textsuperscript{51} Ch. 5, Report on Italy, p. 154.
\textsuperscript{52} Ibid., p. 155.
\textsuperscript{53} Ibid., see also De Witte, "The Role of the Principle of Sovereignty", in id., above, p. 15.
\textsuperscript{54} De Witte, "The Role of the Principle of Sovereignty", in id., above, p. 1.
CONCLUSION

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

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

The result moves away from neo-functionalism per se; it may be time to leave such labels behind. The rich empirical data presented in this volume challenges scholars to forge new paradigms and to concentrate on developing more specific hypotheses that can account for variation in the legal integration process across countries and among courts within a particular national legal system. The precision of such hypotheses, however, is a move towards the development of a more general theory of legal integration, but it is necessary in order to understand the intricacies of the ECJ’s achievement.

10
Sovereignty and European Integration: the Weight of Legal Tradition

BRUNO DE WITTE

INTRODUCTION: THE MEANING OF SOVEREIGNTY

The relation between European legal integration and the fundamental principles and values of the constitutions of the Member States is far from settled. This is an issue that has been discussed at length in recent years, and in particular in the context of the constitutional law of the European Union. The new stage of the integration process has been, for all the Member States, the most obvious and immediate challenge to the constitutional status quo. Questions have been raised such as whether EC law should have primacy over national constitutional law, whether the European Court of Justice or national supreme courts should have final authority over the limits of EC competence, and whether there are constitutional limits to further moves of European integration beyond “Maastricht”. This article will examine, from a comparative perspective, one concept which is at the heart of this debate but whose role has been insufficiently acknowledged in legal writing on Community law, namely the concept or principle of sovereignty. The concept of sovereignty is a product of the legal imagination and, beyond that, of a political ideology emerging in a particular historical context. That context is sometimes described as the “Westphalian model” which is marked by the coexistence of independent nation states. “Independence”, wrote Dionisio Agostini, “is really no more than the normal condition of States according to international law; it is the constitutional reforms and judicial rulings induced by the Maastricht Treaty in the single country of the European Union have received ample attention in the journals of European and constitutional law. Two monographs may be specifically mentioned here, although they primarily examine the constitutional position in the author’s own country, they also offer a valuable comparative analysis of the relation between Community law and national constitutional law. P. Peter Thijs, Constitutiones Europaeae y Comunitas Europaea (Coutts, 1994); Th. de Rondt, Constitutional Integration et Constitutions Communautaires (Tilburg, 1994).

The term “sovereignty” will be used when dealing with sovereignty as a legal philosophical construct, and the term “principle” when dealing with sovereignty as an element of positive constitutional law.