

**The Making of a Rule of Law in Europe:
The European Court and the National Judiciaries**

by

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ABSTRACT:

In the European Union, the European Court of Justice can strike down national policies which violate European Community (EC) laws, and compel national governments to comply with EC law. Nowhere else has a foreign court penetrated so deeply into national sovereignty, influencing relations among states and policy within states. Such an intrusive legal system was not intended by European governments. As legal scholars have shown, the European Court of Justice (ECJ) transformed the original EC legal system by creating the Doctrines of Direct Effect and EC Law Supremacy. The Doctrine of Direct Effect allowed individuals to raise national violations of European law in national courts. The Doctrine of EC Law Supremacy compelled national courts to accord European law primacy over national law. These legal doctrines were based on controversial legal interpretations, which clashed with national legal practices, subjugated national high courts to the ECJ, and compromised of national sovereignty. Why did national judiciaries accept the Court's polemic legal declarations? How did national courts become enforcers of European rules and regulations against their own governments?

As national courts competed with each other, trying to enhance their independence, influence and authority vis-à-vis other courts, they pulled the European Court into domestic political struggles and created pressure within the national legal system promoting national doctrinal change regarding the primacy of European law. The limitations on interpretation of national law created by national high courts provoked lower courts to send preliminary ruling questions to the ECJ so that the lower courts could deviate from established jurisprudence or get new legal outcomes which they preferred for legal or policy reasons. Lower courts put pressure on higher national courts to change their jurisprudence through references to the ECJ and by following the ECJ rather than their own higher courts. National high courts adapted themselves to regain influence and control over the national legal process, adjusting national constitutional doctrine to make it compatible with enforcing EC law over national law. National governments were unable to overturn national judicial acceptance of EC law supremacy, and the lack of political consensus limited member states from reversing the ECJ's jurisprudence or credibly threatening the ECJ into quiescence. European governments were forced to accept a significant compromise of national sovereignty and the involvement of the ECJ in national policy.

The European Union offers the best example of an international rule of law that works. Three components have been critical to the success of the EC legal system: wide access to international legal mechanisms, the expectation of a sanction for violating international law, and a means to coordinate legal interpretation across countries. National judicial support has made all three of these components possible. National courts referred cases to the ECJ expanding access to the Court and giving the ECJ the opportunity to develop its jurisprudence. National court application of ECJ jurisprudence created a sanction for violating EC law so that national governments could expect breaches of EC law to be costly. References to the European Court and national court application of ECJ jurisprudence allowed the ECJ to coordinate the interpretation of EC law so that national governments could not interpret their way out of compliance. No other international legal system has a mechanism for national courts to interact directly with an international court, and most other international legal systems lack substitutes for the three functions served by national judiciaries in the transformed EC legal system. The transformation of the EC legal system suggests that access to international legal bodies, the expectation of a sanction for violating international law, and a means to coordinate the interpretation of international law, either through national courts or some other means, may be crucial if international law is to be more effective in other contexts.

Thesis Supervisor: Suzanne Berger, Professor of Political Science

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Acknowledgments

My interest in the European Community's legal system was piqued by two talks given at the Center for European Studies at Harvard in 1989 and 1990. The first talk was by a Justice at the European Court of Justice, Federico Mancini, who told an intriguing story of how the European Court had constructed a "constitution" for the EC through its legal decisions, and by convincing national courts about the virtues of this system during champagne dinners at the Court in Luxembourg. The implication of Mancini's account was that judges talking to judges built an international legal institution. They agreed to what politicians could not agree to. They traded state sovereignty for the ideal of an EC federal system where conflicts of interest either did not exist or they were easily resolvable through law and the legal process.

The second talk was by Joseph Weiler, who presented an early version of his seminal article later published in the Yale Law Journal. Professor Weiler offered a similar account to that of Justice Mancini, although champagne was less of a factor. Weiler argued that the ECJ's jurisprudence changed the context in which politicians and states interacted, closing political exit from the European Community. In his talk Professor Weiler implied that the ECJ had basically created a common market through law, independent of the actions or non-actions of national governments. The implication of Weiler's account was that legal decisions of an international court had re-defined the political environment in which states operated. Stanley Hoffmann was the moderator of the talk, and with his usual sharp wit he quipped that Weiler's presentation reminded him of why he switched from international law to international relations and political science: lawyers think that a judge says something and it becomes a reality.

Every account of the EC legal system I later read supported the arguments of Professor Weiler and Judge Mancini: judges had created an international rule of law in Europe. Professor Hoffmann's retort, however, provided healthy skepticism. The more I read, the more my curiosity grew. If all it takes is judges declaring new authority for themselves, or international judges talking to national judges and smoothing out disagreements which national governments seem unable to smooth out, then why isn't international law more effective in other international contexts? If all

judge are socialized to facilitate respect for the law, why aren't all national judges forcing national governments to respect international law more? Why isn't the International Court of Justice more like the European Court of Justice? Why aren't international courts or even national courts more involved in international relations? If the EC legal system is about judicial empowerment—judges seizing new powers of judicial review by accepting the supremacy of international law over national law— then why aren't judges around the world empowering themselves by declaring the supremacy of international law and holding their governments accountable to international legal agreements? Why did it take ECJ's decisions to empower national judges? Why within Europe was there such variation in the timing of when courts in different countries accepted the ECJ's invitation for empowerment? Why have national courts on occasion defied of ECJ authority—what legal commentators have called declarations of war by national courts? These were the questions which motivated this study.

As I pursued this study, I was fortunate in having significant financial and intellectual support from Europe and the United States. The MacArthur Summer Research Grant administered by the Center for International Studies at M.I.T funded preliminary research on this topic. A Doctoral Dissertation Fellowship from the European Communities Study Association covered my travel expenses during this period. The Deutscher Akademischer Austauschdienst (DAAD) and the Chateaubriand fellowship from the French government supported nineteen months of field research in Europe. Follow-up research and writing was supported by a research grant, opportunity grant and a dissertation writing grant from the Program for the Study of Germany and Europe at the Center for European Studies, Harvard University. I am extremely grateful to these programs for the support they provided during my research, and to M.I.T. and the Center for European Studies at Harvard which have made funding graduate research a high priority.

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I was invited to the European Court of Justice by Justice Mancini, and welcomed by the library staff and the Research and Documentation Division of the Court. The helpful and courteous staff of the library, especially Carlos Correia, Maria Rodriguez and Maria Martin-Hardt, made me feel very welcome and helped me find the may obscure documents I requested. I am grateful to the Research and Documentation division, and especially Timothy Millett and Luigia Maggioni, which shared statistics and coding of national court cases involving European law and their dossiers on major national court decisions.

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Chapter 1

The Making of a Rule of Law In Europe: The European Court and the National Judiciaries

In the European Union, the European Court of Justice can strike down national laws, and compel compliance by national governments with European Community law. European Court decisions shape inter-state relations, guide national and EC policy, and influence the behavior of public and private actors. The European Court of Justice's¹ influence extends to areas of policy usually considered to be purely the prerogative of national governments, such as the distribution of educational grants, the advertisement of abortion services, the granting of subsidies to national industries, the protection of female equality in the workplace, the establishment of works councils within firms, and the mandatory enforcement of a 48-hour work week. Nowhere else has a foreign court been able to delve so deeply into issues of domestic policy. In no other international context has law become so authoritative in guiding actions between states and in limiting policy within states. This dissertation explains how this supra-national legal system, neither designed nor intended by the member states, was constructed in the European Union.

The legal system created by the Treaty of Rome started out quite weak, suffering from the classic limitations of international legal systems. When confronted with alleged Treaty violations, politicians did not give the Court a chance to issue an interpretation which might differ from their own. Instead, they used political channels to circumvent the legal mechanisms of the Treaty and negotiated outcomes which did not necessarily conform to the letter or the spirit of the Treaty of Rome. With few cases to consider, no coercive tools to compel compliance, and a limited legal and political authority, the European Court was a marginal political actor in Europe and European Community (EC)² law was not very constraining on states.

¹ The European Court of Justice is the Court of the European Union, located in Luxembourg. It is often confused with the European Court of Human Rights, which hears cases involving the European Convention on Human Rights and is located in Strasbourg, and the International Court of Justice which is the international court of the United Nations System and is located in the Hague. I will refer to the European Court of Justice as the ECJ, the European Court or the Court with a capital "C". I will refer to these other international courts located in Europe by their abbreviations (ECHR and ICJ) or by their name.

² The European Community changed its name to European Union when the Treaty on a European Union came into effect. For most of the period of this study, the European Union was called the European Community. Technically

As legal scholars have shown, the original legal system was transformed through key legal decisions by the European Court of Justice (ECJ). In 1963 the Court established the Doctrine of Direct Effect which created individual rights which plaintiffs could claim in their national courts, and thus the legal standing to invoke EC law to challenge national policy and law. In 1964 the Court established the Doctrine of EC Law Supremacy which asserted the primacy of EC law and made it the obligation of national courts to enforce European law over conflicting national law.³ Together these two doctrines established a legal basis for individuals to pull the European Court into national policy debates,⁴ and for national courts to set aside laws and policies which violate European law.⁵

The importance of the Court's revolutionary legal doctrines in fundamentally transforming the EC legal system cannot be underestimated. But simply declaring that EC law created direct effects and was supreme to EC law was not enough to create a rule of law in Europe. To put it bluntly, the Court of Justice can say whatever it wants, the real question is why anyone would follow. The Court's legal doctrines were based on very controversial interpretations of the Treaty of Rome. The doctrines clashed with national legal practices, threatened to subjugate national high courts to the ECJ, and implied a great compromise of national sovereignty. Especially in the political context of the 1960s and 1970s, when supra-nationalism was rejected by politicians, and when national sovereignty concerns were largely winning out over European integration, the Court's legal declarations were easy for national courts to reject and politicians to ignore. Why did national judiciaries accept the Court's controversial legal declarations? How did national courts

speaking, the laws of the European Union are still known as "European Community law", thus I will usually refer to the European Union and its laws under its old nomenclature, the European Community.

³ Mancini, Federico. 1989. The Making of a Constitution for Europe. *Common Market Law Review* XXIV:595-614. Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers. Stein, Eric. 1981. Lawyers, Judges and the Making of a Transnational Constitution. *American Journal of International Law* 75 (1). Usher, John. 1981. *European Community Law and National Law—The Irreversible Transfer?*, *University Association for Contemporary European Studies*: George Allen & Unwin Press. Weiler, Joseph. 1991. The Transformation of Europe. *Yale Law Journal* 100:2403-2483.

⁴ Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court. *International Organization* 47 (1):41-76.

⁵ De Witte, Bruno. 1984. Retour à «Costa» La primauté du droit communautaire à la lumière du droit international. *Revue Trimestrielle du Droit Européen* 20:425-454.

become enforcers of European rules and regulations against their own governments? And why did national politicians let this happen?

National court enforcement of EC law supremacy has been critical to the success of the EC legal system and in many respects national judicial support provides the bases for the European Court's political influence. National courts references allow disputes which members states or the Commission never would have raised to make it to the European Court. National court enforcement of ECJ jurisprudence creates a domestic political constraint against violating European law. With numerous opportunities to interpret EC law and with national courts enforcing its decisions, the European Court has been able to develop an increased political and legal authority and intervene in many areas of EC and national policy. The outcome has been the development of a rule of law where disputes are mediated through legal forums, judicial outcomes are respected, and within the legal realms law, not power, determines what is and is not acceptable.

In this introduction, I will present an overview of the dissertation's argument. Section one summarizes why national courts accepted a role enforcing international law against their own governments, and section two briefly explains why member states failed to stop or reverse this institutional development. Section three lays out the structure of the dissertation. And section four discusses evidence and the research sources.

I. The Acceptance of EC Law Supremacy by the National Judiciaries: The Argument in Brief

The European Court's jurisprudence on the supremacy of EC law was based on a controversial reading of the Treaty of Rome. Nowhere does the Treaty of Rome say that national courts should ensure compliance with European law, or that EC law is supreme to national law. There were also political reasons to expect national judiciaries not to accept the Doctrine of EC Law Supremacy. Conducting judicial review based on the national constitution was politically controversial on its own,⁶ and enforcing international law over national law was even more

⁶ Stone, Alec. 1990. The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe. *Policy Studies Journal* 19 (1):81-95.

controversial. Indeed historically European judges had deferred to their government when conflicts between national law and international law emerged and in the 1960s only the Dutch legal system allowed judges to enforce international law over conflicting and subsequent national law. In addition, the issue raised a dilemma of jurisdictional authority—who would decide about conflicts between national law and EC law, the ECJ or the national courts? The ECJ was adamant that it must decide. It instructed national courts to ignore any national legal restriction which would keep them from enforcing EC law supremacy, and told lower courts to ignore higher court jurisprudence or counter precedents if it kept them from applying EC law and ECJ jurisprudence. Accepting the European Court's supremacy doctrine potentially meant giving up room to maneuver for both the national governments and the national courts, and possibly subjugating national legal and political actors to ECJ authority. In no other international context have national courts taken on for themselves a role policing compliance with international law. Why should they have taken on this role in the European Union?

Within the judiciary invoking European legal arguments and making references to the ECJ became a tool used in struggles over the influence and authority of different courts, and over the meaning of the law. Competition between courts with each court trying to enhance its independence, influence and authority vis-à-vis other courts created a pressure internal to the national legal system promoting doctrinal change on the issue of EC law supremacy. It shaped the behavior of the different national courts in the process of European legal integration, and the way in which EC law supremacy was incorporated into the national legal systems.

At all levels of the judiciary, national judges made calculations about protecting their court's own authority and autonomy, and maximizing their legal and political influence without inciting a conflict with political bodies or a charge that they had exceeded their legal authority. A reference to the ECJ figured differently in each court's strategic calculations. According to Article 177 of the Treaty of Rome, high courts were supposed to send all questions of interpretation to the ECJ to resolve. But high courts were equally as protective of national sovereignty as national politicians,

Stone, Alec, and Martin Shapiro. 1994. The New Constitutional Politics of Europe. *Comparative Political Studies* 26 (4):397-420.

and were hesitant to cede their supreme legal authority to the ECJ lest they subjugate themselves to EC legal authority. Indeed supreme national courts only rarely sent questions to the ECJ, and have made less than 20 percent of all references to the ECJ.⁷ When they did make references the references usually involved narrow technical questions. They interpreted the more legally significant questions about the reach and scope of EC law on their own, issuing narrow interpretations of EC law which left their own supreme authority over national policy largely intact.

The preliminary ruling system, however, allowed *any* national court to send the ECJ a reference. Lower courts, already subject to the precedents of both higher courts and the ECJ, did not have to fear their own subjugation like the higher courts nor were their decisions watched as closely by political bodies. Lower courts could use the preliminary ruling system to play the EC and national high courts off against each other. If for legal or policy reasons they preferred an interpretation based on national law they could refuse a reference to the ECJ and wait for the issue to go up to the higher national court. But if they wanted to escape the national legal hierarchy, challenge national high court precedence, promote policy or political agendas, or develop new areas of law and doctrine, they could make a reference to the ECJ.

The different strategic calculations of national courts vis-à-vis the European Court of Justice created a competition-between-courts dynamic of legal integration, which facilitated the expansion and penetration of European law into the national legal system and came to shift the national legal context from under the more conservative and sovereignty-protective high courts. The limitations on interpretation of national law created by high courts provoked lower courts to make referrals to the ECJ, so that the lower courts could deviate from established jurisprudence or get new legal outcomes which they preferred. Higher courts tried to stop lower courts from making references to the ECJ so as to protect national sovereignty and stop EC law from encroaching in the domain of their supreme authority. But the ability of higher courts to stop lower court referrals was limited. The decision to refer a case to the ECJ had to be appealed to the higher court in order for a high court to be able to quash a referral, and often decisions were not appealed.

⁷ Based on statistics in the ECJ's 1994 annual report (Table 27).

Lower courts also simply ignored the restrictive rulings of the higher courts, and made referrals to provoke the ECJ to issue an alternative interpretation. Because lower courts could circumvent high court jurisprudence by making a reference to the ECJ, high courts like their governments found themselves unable to control which questions made it to the ECJ for resolution.

Through references to the ECJ, lower courts became a source of pressure on higher courts, actually shifting the national legal context from under the high courts. Lower court references allowed the ECJ to expand the reach and scope of EC law and challenge established national policy and national legal interpretations. ECJ decisions created authoritative counter precedents with which higher national courts had to contend. Any direct refusal of an ECJ decision would be legally controversial, politically provocative, and set the undesirable example that legal decisions can be ignored if one thinks that they are wrong. The acceptance of EC law supremacy by some courts and the rejection of ECJ authority by other courts within the same national system also created problems of legal inconsistency which, in communities committed to logic and reasoning, was alarming. Eventually it became clear that high courts had failed in their efforts to stem the legal tide of EC law, or to control the development of national law in certain legal issues. It was not merely the fact that there was more EC legislation, but rather ECJ doctrine had made more areas and types of EC law directly binding. Whole sub-fields of national law, such as tax law, competition law, and equality law, became dominated by ECJ interpretations of European law. Because so much national law touched on EC law, and many lower courts were following the ECJ rather than their own high courts, opposition to ECJ jurisprudence lost its influence and effectiveness.

National high courts re-positioned themselves to the new reality, reversing their jurisprudence which challenged EC law supremacy and adjusting national constitutional doctrine to make it compatible with enforcing EC law over national law. In most member states this change occurred before national governments re-committed themselves to European integration in the late 1980s. Accepting EC law supremacy removed divisive internal inconsistencies in the application of law and the perception that the higher courts were anti-integration, nationalist, or atavistic. More

important, in accepting the ECJ's doctrine, national high courts drew lines in the sand to limit future expansions of EC law. They signaled that any EC law or ECJ jurisprudence which violated national constitutional provisions would be inapplicable in the national realm, allowing high courts to gain influence over ECJ jurisprudence in the future. Thus they conceded the past in order to influence the future.

High court doctrinal reversals on the issue of EC law supremacy embedded the primacy of community law into the national legal orders. While high courts have threatened to find ECJ rulings to be inapplicable in the national realm, thus far they have never refused a lower court decision based directly on an ECJ ruling. This means that a single national court, sitting anywhere in the national legal hierarchy, can through a reference to the ECJ expand the reach and scope of EC law and establish a broader doctrinal change within the national legal system. High courts work to influence the ECJ to temper its jurisprudence so as not to upset national policy, but like their governments they too can not keep the ECJ out of the national legal process. This allows the ECJ to shape the interpretation of EC law, limiting the ability of member states or national high courts to "interpret" their way out of EC legal obligations.

II. The Role of Member States in Legal Integration: The Argument in Brief

Member states influence the process of legal integration by controlling the legislative process and the creation of EC laws. But often EC legislation is purposely limited or ambiguous so that member states can have a significant margin of maneuver in how they bring national policy into compliance with the EC legislation. ECJ jurisprudence, based on national court references, has constrained the room for maneuver of national governments and created legal obligations which member states did not intend when the legislation was drafted. ECJ jurisprudence has also encroached on national sovereignty. The ECJ has found authority for itself to rule on issues member states considered to be purely national, thus within their sovereign domain. Why did member states not stop the ECJ from encroaching into areas of national political authority. Why didn't they stop national courts from sending references or enforcing EC law against them? Once it

was apparent that the Doctrine of EC Law Supremacy was undermining national sovereignty, why didn't member states reverse legal integration of the Doctrine of EC Law Supremacy?

Evidence suggests that member states wanted a limited EC legal system, one which they could control and which would not encroach unduly on national sovereignty. The expansion of the EC legal system was unintended, and at least in certain member states seemingly undesired. According to Joseph Weiler and Stuart Scheingold, member states thought that they could control the EC legal process through their control of the legislative process, through "selective exit" meaning non-compliance, and through their controls of the appointment process to the Court.⁸ But the ECJ escaped these control mechanisms. By playing off politician's short time horizons, the ECJ built legal doctrine without provoking political responses. Politicians care most about the material and political impact of court decisions, and were willing to overlook the doctrinal implications of ECJ jurisprudence as long as the ECJ was not creating significant material or political costs. The Court took advantage of the political fixation on the material consequences of cases to build legal doctrine without provoking a political response. It developed legal principles but found reasons not to apply them to the case and it minimized the material impact of its decisions. As long as ECJ decisions did not upset national policy, there was nothing concrete for politicians to oppose.

But the doctrine the ECJ was establishing would come back to haunt the politicians. The legal process works by developing legal principles and applying the principles across cases. The ECJ was using an incremental strategy,⁹ creating legal doctrine to build institutional capacity. National courts battled over the rules while the ECJ was still tempering its jurisprudence thus while the issues at stake were not politically contested. Once the doctrine had gained acceptance, national courts did not hesitate to apply the ECJ's jurisprudence to polemic cases. With the doctrine widely accepted within national legal communities, the ECJ revealed the full force of the legal rules.

⁸ Op. cit. Weiler (1991). Scheingold, Stuart. 1965. *The Rule of Law in European Integration*. New Haven: Yale University Press.

⁹ Op. cit. Burley and Mattli (1993) see p. 55. Op. cit. Weiler (1991) see p. 2447-2448. Hartley, Trevor. 1988. *The Foundations of European Community Law*. Second ed. Oxford: Clarendon Press. See p. 78-79

Politicians were shocked by the ECJ's rulings, but for lawyers the rulings were the logical result of applying rules across cases.

Once the supremacy of EC law was firmly entrenched within national legal systems, national courts defended EC law and politically controversial but legally sound ECJ rulings. Some national governments tried to reverse these developments by challenging the authority of their courts to enforce ECJ jurisprudence or by re-legislating at the national level so that national courts would have to apply national law instead of European law. But national courts refused to be intimidated lest they appear to be caving to political pressure. The choice of politicians at that point was either to forge ahead in a constitutional battle with the judiciary over judicial independence and the separation of powers, or to try to find less confrontational and less transparent legal and political strategies to eliminate the unwanted ECJ jurisprudence as it emerged. In choosing a legal and political strategy over a battle with national courts, member states essentially conceded the transformation of the EC legal system to the ECJ and the national judiciaries.

Why did member states then not re-assert control at the EC level? Some member states suggested re-writing the authority of the Court of Justice, but institutional rules limited their ability to change the ECJ's jurisdiction or reverse advances in ECJ jurisprudence. To legislate over an ECJ decision required unanimous consent, and to attack the Court's jurisdiction required an amendment to the Treaty. As long as a single member state preferred the status quo, legislating over ECJ jurisprudence was impossible. The small states rallied to the defense of the ECJ because the EC legal system helped equalize the power differentials between large and small member states. Germany also rallied in support of the EC legal system because it was committed to building a federal Europe and saw the development of more federal-looking EC legal system as a positive step in this direction. The support of these member states undermined the credibility of political threats against the ECJ. As long as national courts were sending references to the European court and enforcing ECJ jurisprudence, member states could not control legal interpretation. The requirement of unanimity then undermined their ability to reverse ECJ legal advances and gave the

ECJ significant room to maneuver free of concerns about an attack on its authority or jurisprudence.

III. Case Selection and the Plan of the Dissertation

This dissertation examines the transformation of the European Union's legal system from a relatively traditional system of international law where states interpreted European law for themselves and decided which legal issues made it to the European Court, to a system where individuals challenge national violations of European law in national courts, national courts send cases to the European Court, and national courts enforce European Court jurisprudence against their own governments. In this new system, national governments cannot control which disputes are brought into the legal realm, and they often find themselves truly constrained by the law.

Chapter two sets the developments in the European legal system discussed above into the political and legal context of the 1960s. For most European lawyers today, an EC legal system without national courts enforcing EC law supremacy is inconceivable. Chapter two explains the political understandings behind the creation of the EC legal system, and shows how the ECJ's Doctrine on EC Law Supremacy fundamentally altered the way the EC legal system had been intended to function. It also identifies the legal and political hurdles the Court's controversial doctrine had to overcome to achieve acceptability within the national systems. By understanding how politicians, lawyers and judges conceived of the EC legal system in the 1960s we can better appreciate the conceptual, political and institutional transformations involved in making a European rule of law.

Chapter three examines alternative explanations of the transformation of the EC legal system, including legal reasoning explanations, neo-realist explanations, and neo-functionalist explanations. It develops the competition-between-courts explanation of legal integration discussed above, showing how the European Court's position outside of the traditional legal hierarchy opened up possibilities for lower courts to circumvent national legal and political barriers

through a reference to the ECJ. This in turn allowed the ECJ to influence interpretation of EC law in the national realm.

The two subsequent chapters analyze and explain national doctrinal change, thus the process through which the supremacy of European law became embedded within the national legal systems. They focusing on the acceptance of the Doctrine of EC Law Supremacy within two of the original member states: Germany and France. I selected among the original member states because they joined the Community before the supremacy of European law had been established. States that joined the Community later accepted EC law supremacy as part of the existing rules—the *acquis communautaire*. Indeed the supremacy of EC law over national law was openly debated before British accession and was formally inscribed into the European Communities Act in Britain.

Chapter four focuses on Germany, a most-likely case of legal integration of EC law supremacy. Germany is a rule-bound country and post-war Germany has a tradition of constitutional judicial review, thus German lawyers, judges and politicians were relatively used to law creating constraints on political actions and to politicians being bound by a “higher” law. The German constitution was also written to be *Volkerrechtsfreundlich*, friendly to international legal obligations, and the German government has been among the member states most committed to European integration and a European *Rechtstaat*, a state ruled by law. German courts send the largest number of preliminary references to the European Court and the German Constitutional Court was the first supreme national court to accept the supremacy of European law over national law. But even within Germany legal integration was not a smooth process. Chapter 4 traces contentious legal debates over EC law supremacy including questions in the 1960s over the constitutionality of the Treaty of Rome, and higher court judicial revolts against ECJ authority in 1974, 1987, and 1993. As the chapter reveals, while Germany is the most-likely case of legal integration, the German Constitutional Court has gone farther than any national court in creating limits to the reach of European law in the national sphere and creating political and legal constraints on what German politicians can agree to at the EC level.

Chapter five focuses on France, a least-likely case for legal integration. France has traditionally been jealous of its national sovereignty, and there was no tradition of judicial review in France when the Treaty of Rome was ratified. The 1958 French constitution established the supremacy of international law over national law, but in France judicial subservience in international legal matters has been higher than in any other member state. French courts were required to refer questions regarding the interpretation of international law to the Foreign Ministry to resolve, and the traditional judicial orthodoxy forbid judges from setting aside national law for any reason. Of the original member states, the French judiciary had the hardest time incorporating the supremacy of EC law into national legal practice. From 1961 to 1974 the French judiciary sent fewer references than the much smaller Dutch and Belgium judiciaries, and six times fewer references than German courts. But even in France the supremacy of EC law was ultimately accepted. The civil and penal branch of the judiciary accepted EC law supremacy in 1975, despite the opposition and threats of the French Gaullists. The Constitutional Council accepted the supremacy of EC law in the 1980s as part of a larger trend of expanding the authority of the constitution over the political process. The high administration court (the *Conseil d'État*) held out until 1989, at which point it became clear that its opposition to EC law supremacy had lost out within the French legal system, and that the French government was greatly committed to European integration.

Chapter six explains how the EC legal system escaped member state control and why member states did not reverse a judicial transformation which they clearly did not want. In analyzing why member states did not control or reverse this fundamental transformation of the EC legal system, a more general theory of member state-ECJ relations is developed. I argue that the supremacy of EC law will be an enduring feature of the EC legal system, limiting member state control over when interpretative disputes enter the legal realm and how the ECJ resolves these disputes. Member states have developed some tools of control over future legal ECJ legal expansions, and these suggest the legal and political constraints on ECJ activism in the future.

Chapter seven examines how the European legal system influencing national policy and politics. It then examines the differences between the EC legal system and other systems of international law to try to understand why the EC legal system has been more successful in creating the conditions for an international rule of law than other international legal mechanisms.

IV. Research Sources

Research for this dissertation was conducted from 1992 to 1995, in Luxembourg, Belgium, Germany, France and Britain. I am grateful to the German Academic Exchange Council (DAAD), the Chateaubriand grant of the French Government, the Program for the Study of Germany and Europe, the European Communities Studies Association and the MacArthur Foundation for their financial support for researching this dissertation, and the Program for the Study of Germany and Europe for its support of writing this dissertation.

The findings for Chapter two on the original design and intent of the Treaty of Rome is based on scholarly analysis of the Communities legal system written in the early 1960s, analysis of the national ratification debates of the Treaty of Rome, and interviews with negotiators of the Treaty of Rome responsible for drafting the sections of the Treaty relating to the Court . I also interviewed members of the Court, the legal services of the Commission, and a few other divisions of the Commission to ascertain how the EC legal system was intended to function and how it did function in the 1960s.

The research for chapters four and five are based on a temporal analysis of doctrinal debates through which I reconstructed transformations in the interpretation of EC and national law. I traced national doctrinal debates over EC law from the 1960s through the 1990s, drawing on the conference proceedings and numerous articles published by lawyers, academics, judges and government officials in legal journals. The legal decisions and legal commentaries are supplemented by interviews with actors involved at the legal process at different periods of time. In Germany I interviewed founding members of the *Wissenschaftliche Gesellschaft für Europarecht*, a national legal organization dedicated to promoting the understanding of EC law in the national

legal realm. The academic and professional members of this organization were active in the legal debates and court cases regarding EC law throughout the period studied. I also examined the group's archives. In France I interviewed past and current members of the *Association des Juristes Européen* and *Commission pour l'étude des communautés européennes*, the sister organizations of the *Wissenschaftliche Gesellschaft für Europarecht*. In both countries I interviewed lawyers, academics, national judges, former ECJ judges and government officials who worked with EC legal issues in the 1960s, 1970s, 1980s and 1990s, including judges who were present when many of the legal decisions I analyzed were taken. I also interviewed officials at the legal services of the Council and the Commission. The job titles, location and the dates of the people I interviewed are included in an appendix, although the names of the sources are withheld to protect confidentiality.

I am extremely grateful to the Research and Documentation division of the Court of Justice for sharing their archives with me, including hard to find and unpublished national court decisions, legal notes written on national court and ECJ decisions, and copies of the references made by national courts to the ECJ. The Court's research division also provided data and statistics on national court references to the European Court, Commission infringement suits raised against member states, and suits raised by member states against each other. Many of the important national court decisions were translated into English and published in the Common Market Law Reports. I relied on these translations when possible, and most of the translations in this dissertation come from the Common Market Law Reports. But where English translations did not exist I used the original texts from the Court's archives or transcripts of decisions published in national legal journals. I also drew on the press archives at the Court of Justice, the Presse und Informationsamt in Bonn, and the Institute des Etudes Politique in Paris, and where possible, I examined parliamentary debates regarding EC legal issues and government documents pertaining to EC legal issues.

For Chapter six I used secondary sources and interviewed current members of the permanent representations of the members states, and individuals in the Department of Justice and

the Foreign Ministries in Germany, France, the Netherlands and Britain. Because of the specialized nature of EC law, I was able to find people within government ministries who had dealt with EC legal issues since the foundation of the Community. I am especially grateful to members of the German Ministry of Justice, the German Ministry of Economics and the legal services of the Commission and the Council who shared their recollections with me, and even consulted their personal archives to find the information I requested.

Chapter 2

The Transformation of the EC Legal System: The European Court of Justice and the Doctrine of EC law Supremacy

In the EC legal system of today, the European Court can rule on domestic policy and strike down national laws which conflicts with European law. The cases the European Court hears do not only included issues of creating market barriers to keep other countries' goods out. Most challenges to national laws are brought by individuals seeking to negate or circumvent domestic regulations and laws, raised in national courts, for reasons often having little to do with creating a common market or enforcing EC legal obligations. National courts send these challenges to the ECJ, essentially inviting the European Court to intervene in domestic political system. Using the EC legal system, French firms have challenged national regulations giving the monopoly of gas distribution to certain enterprises, Irish students have challenged the government's ban on the advertising of British abortion services, British shop owners have challenged Sunday trading laws, and German firms have challenged government affirmative action policies. Using national courts as intermediaries, the European Court has been able to strike down national laws in areas seemingly tangentially related to the Common Market, awarding penalties to individuals hurt by government policies which the Court found to have violated EC law.

This was not the EC legal system created by the Treaty of Rome. The original EC legal system was created to protect member states by ensure that EC institutions did not run amok, and secondarily to help enforce compliance with European law. The system was quite limited and rather weak. Most importantly, it was designed to encroach as little as possible into the realm of national sovereignty. To keep the Commission and the Council in check, access to the ECJ was extended to any individual or firm affected by EC law. For politically sensitive issues of member state violations of EC law access to the ECJ was restricted—only other member states or the Commission could raise infringement charges. Furthermore, the ECJ's coercive tools to deal with national violations of EC law were weak. The most the ECJ could do was declare that a member state had failed to fulfill its Treaty obligations, but no penalties could be assessed. This limited EC

legal system was arguably quite ineffectual at catching violations of European law or inducing greater national respect for EC law. Few cases of member state non-compliance made it to the ECJ in the early years and ECJ decisions were quite easy to ignore. But the system had the merit of not intruding too deeply into national sovereignty.

This dissertation explains how we got from the original weak enforcement system designed to protect national sovereignty, to the European Community legal system of today where the European Court is in a position to intervene in domestic political affairs and essentially strike down policies enacted by national governments. This chapter describes the institutional transformation of the European legal system, showing how the Court fundamentally re-organized the enforcement system for EC law originally intended by politicians through its legal decisions, and thereby laid the foundations for a more independent and politically powerful court.

A significant piece this story has been developed by legal specialists, who have shown how the European Court transformed the EC legal system through its revolutionary legal doctrines and how these doctrines were constructed for maximum appeal to national judicial interests and the interests of groups within society.¹ I draw heavily on their accounts of how the European Court's Doctrine of Direct Effect and Doctrine of EC Law Supremacy created an institutional mechanism for the ECJ to be pulled into domestic political battles in policy areas affected by EC law.

One cannot underestimate the importance of these doctrines and of the European Court's efforts in transforming the EC legal system, but the doctrinal story is inevitably lacking. It focus only on what the ECJ wanted and what the ECJ declared. But to put it bluntly, the ECJ can say whatever it wants. The real question is why anyone would follow what it says. The transformed EC legal system relies greatly on national judicial support to send references to the ECJ and to

¹ Hartley, Trevor. 1988. *The Foundations of European Community Law*. Second ed. Oxford: Clarendon Press. Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers. Stein, Eric. 1981. Lawyers, Judges and the Making of a Transnational Constitution. *American Journal of International Law* 75 (1). Usher, John. 1981. *European Community Law and National Law—The Irreversible Transfer?*, *University Association for Contemporary European Studies*: George Allen & Unwin Press. Weiler, Joseph. 1991. The Transformation of Europe. *Yale Law Journal* 100:2403-2483. Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court. *International Organization* 47 (1):41-76. Mancini, Federico. 1989. The Making of a Constitution for Europe. *Common Market Law Review* XXIV:595-614.

enforce EC law over national law, and political support to accept ECJ jurisprudence. The support of these critical intermediaries can not be assumed, rather it must be explained.

When the European Court declared the Direct Effect and Supremacy of EC law in the 1960s, the doctrines were extremely controversial and most politicians and jurists rejected them out of hand. This chapter focuses on the political and legal context of the Court's key doctrinal decisions. By setting the Court's young legal doctrines into their historical context of the 1960s we can better understand the fragility and contingency of the Court's Supremacy Doctrine. The purpose is to paint a picture of the barriers and limitations confronting the ECJ in the 1960s, so as to identify which aspects of national judicial practices and political conceptions had to be transformed to get to the system of today.

The historical analysis raises two large questions to be addressed in this dissertation: Why did national high courts, which rejected the Court's legal reasoning and saw themselves as losing influence and authority to the ECJ, nonetheless accept a role enforcing EC law against national politicians, a role which inevitably created conflict with political bodies, and which greatly compromised national sovereignty? Why did politicians ultimately accept the legal constraints created by the European Court, even though it compromised national sovereignty, undermined political influence over the European Court, and limited political options of national governments? Only when we know the answers to these two questions, can we understand why the European Court has become a powerful political and legal actor in national and EC politics.

The organization of the chapter is as follows. Section I will describe the historical origins and original intent of the European Community's legal system, focusing on how politicians conceived of and understood the role the ECJ was to play in the process of integration. Drawing on the legal literature, section II will describe how the ECJ's legal doctrines of Direct Effect and EC law Supremacy changed the structure, functioning and thus the politics of the EC legal system. Together, sections I and II present a before and after picture of the institutional mechanisms of the EC legal system and the capacity for the ECJ to influence national and EC politics. As section II will show, the transformed legal system relied on the willingness of national judges to accept

extremely controversial rulings from the ECJ, and to agree to act as intermediaries in the enforcement of EC law. Section III focuses on the historical and political barriers to national judiciaries embracing the ECJ's controversial doctrines, and embracing a role enforcing EC law over national parliamentary law. Section IV focuses on the political barriers to the transformation of the EC legal system, examining the political climate of the 1960s which was decidedly inhospitable to the extension of supra-national jurisdictional authority within the national realm. Finally, in the conclusion to this chapter I draw out of the analysis the main questions which will shape the rest of this study.

I. Historical Origins of the EC Legal System²

The idea that the European Court could ever wield substantial political influence at the national level or EC level was unforeseen by national politicians and the negotiators of the European Community in the 1950s.³ The operating assumption was that compliance with European law and European integration could only emerge through a political will, skillful diplomacy and ultimately voluntary compliance. In terms of formal powers, the enforcement system designed for European treaties was decidedly weak in that it ultimately relied on political will to see that the Treaty was complied with. The creation of an inherently weak enforcement system for the EC must be seen as a political choice. Other models of potentially more effective systems were on the table, and it would have been possible to give the Court more tools with which to work. But any such system would infringe on national sovereignty, and thus was politically undesirable.

²There are no historical works on the creation of the ECJ and the preparatory works on the Treaty of Rome were destroyed, so that archivally documented historical accounts do not yet exist. Instead I have analyzed the formal mechanisms designed in the founding Treaties to identify an intent, and examined the understanding behind the EC legal system which was presented to national parliaments in the ratification debates. These accounts are supplemented with interviews and written accounts of Treaty negotiators, early literature analyzing the EC and the EC legal system written in the period of 1958 to 1970, and reference to historical accounts in other written sources although it must be said that such accounts usually amount to no more than a few paragraphs.

³ Pescatore, Pierre. 1981. Les Travaux du <<Groupe Juridique>> Dans la négociation des Traités de Rome. *Studia Diplomatica (Chronique de Politique Etrangère)* XXXIV (1-4):159-178. Also based on interviews with French and Luxembourg negotiators to the Treaty of Rome.

The first question to ask is why would member states want create a European Court at all? The European Court was created to protect firms and states *from* the European institutions by ensuring that Community institutions did not exceed their authority.⁴ To understand how member states conceived of the Court, one must remember the uneasy conditions in which the European Coal and Steel Community (ECSC), the predecessor organization to the European Economic Community, emerged. The Coal and Steel Community was a French idea, the purpose of which was to increase French control over the German coal and steel industry both to make French industry competitive with the more efficient German industry and to ensure that Germany would not be able to create a new war machine. Only a strong Community would allow France the influence over German industry it desired. But a strong central authority frightened the smaller states, because they feared it could be easily dominated by France and Germany : their expense. A compromise was adopted whereby the High Authority was granted much independence and authority to regulate national coal and steel industries and markets, but additional European institutions were created to monitor and if necessary check the exercise of power by the High Authority.⁵

The European Court was one of these checking institutions, modeled on the format of the French Administrative Court—the *Conseil d'État*⁶—which in France provides a judicial redress against the abuse of power by the government. The High Authority was to enforce the ECSC Treaty through decisions and recommendations and could apply fines against member states which failed in their obligations, and collect these fines by suspending payments to member states in breach of their obligations. It could also allow other member states to take corrective measures which deviated from Treaty provisions in the event of a Treaty breach by another member state. The checks on abuse of these enforcement tools was that they could only be used upon two-thirds

⁴ Haas, Ernst. 1958. *The Uniting of Europe*. Palo Alto: Stanford University Press. See p. 56. Robertson, A.H. 1966. *European Institutions—Cooperation: Integration: Unification*. Second ed. New York: Frederick A. Praeger. See p. 150

⁵ Milward, Alan. 1984. *The Reconstruction of Western Europe 1945-1951*. London: Methuen & Co. LTD. See chapter 12.

⁶ Kari, Jutsamo. 1979. *The Role of Preliminary Rulings in the European Community*, *Dissertationes Humanarum Litterarum* 16. Helsinki: Suomalainen Tiedeakatemia.

consent of the Council (Article 88 ECSC)⁷ and any High Authority decision could be appealed to the Court, which had the authority to reverse a High Authority decision and award damages to injured parties (See appendix I for the articles of the ECSC Treaty pertaining to the Court).

When it came time to negotiate the Treaty of Rome, the role of the different European institutions were re-considered. Many possible models of reforming the legal institution existed. The European Political Community, which had proposed creating lower tribunals so that the ECJ would be a type of supreme court,⁸ served as one possible model in the minds of negotiators.⁹ Negotiators also considered that the ECJ could be made a sort of supreme court by allowing direct appeals of national court decisions contrary to European law.¹⁰ Another option would have been to continue or enhance the system of the ECSC, having a monitoring body with the tools and independence to really monitor enforcement and giving the Court the authority to issue fines to encourage compliance. These ideas were considered, but there was a palpable limit of what was politically feasible. Given the recent rejection by the French parliament of the European Defense Community, negotiators were especially sensitive that too bold of a political initiative would jeopardize passage of the Treaty. In the end, the general approach in designing the Treaty of Rome seemed to have been to start with the model of the ECSC treaty, but to strengthen the authority of the member state-dominated Council in order to protect national sovereignty, at the expense of the supra-national institutions of the High Authority and the Court.¹¹ Indeed the monitoring and enforcement tools of European institutions were actually weakened in the EEC Treaty compared to what they were in the Coal and Steel Community. Given that the negotiating team was committed to promoting European integration to “the extreme limit of what would be politically tolerable”,¹²

⁷ With respect to firms, however, the High Authority could suspend payments to collect fines or penalty payments without Council approval (Article 91 ECSC).

⁸ Op. cit. Kari (1979).

⁹ Pescatore, Pierre. 1981. Les Travaux du <<Groupe Juridique>> Dans la négociation des Traités de Rome. *Studia Diplomatica (Chronique de Politique Etrangère)* XXXIV (1-4):159-178. See p. 165

¹⁰ Pescatore, Pierre. 1992. Conversation with Michel Gaudet.

¹¹ Scheingold, Stuart. 1965. *The Rule of Law in European Integration*. New Haven: Yale University Press. See p. 265. Op. cit. Pescatore (1981).

¹² Ibid. Pescatore p. 168.

the outcome of an incredibly weak enforcement system must be seen as a compromise solution, and in that as a political choice of the contracting parties.

According to the Treaty of Rome, the Court was still to serve the key purpose of protecting individuals, firms and states against EC institutions by ensuring that EC organs did not exceed their powers (Articles 173-176 EEC. See Appendix 1 for a text of the Treaty of Rome provisions concerning the ECJ). The main change in the enforcement procedure was that the High Authority (now the Commission) lost most of its unilateral and coercive tools of Treaty enforcement. Instead of making decisions on infringements open to appeal, the Commission or another member state had to bring charges of Treaty infringements before the Court of Justice (Article 169 & 170 EEC). The system was designed to encourage diplomatic resolution of disputes before initiating legal proceedings, requiring a confidential “pre-contentious” period during which the Commission and the member state negotiated, passing through the formal stages of a “formal notice” to a “reasoned opinion.”¹³ In the event that diplomacy failed to rectify the treaty breach, the Court of Justice could be called on as a last resort to determine if a member state had infringed on the Treaty. If a breach was found, the Court could issue a declaratory statement which essentially pronounced that the member state had failed to fulfill its Treaty obligations. But the right for European institutions to fine non-compliant states, or to withhold transfer payments was removed. Given the absence of any coercive tool, this enforcement mechanism was much weaker than that of the ECSC Treaty.

This system, because of its limits, had merits which made it attractive and even preferable to member states when compared to the other models of legal enforcement considered. It relied largely on diplomacy and political will¹ to realize the goals of the Treaty, but allowed a means through which disputes could be resolved through a relatively benign legal process. National governments, in presenting the system to their parliaments, emphasized the coercive limits of the system- the fact that only the Commission or another member state could raise a case, and that no sanctions were involved—as if these were the merits of the system.¹⁴ If diplomacy failed, the

¹³ Interview with a member of the Legal Services of the Commission, 11 January 1994, Brussels Belgium.

¹⁴ For example see: Document 5266, annex to the verbal procedures of 26 March 1957 of the debates of the French National Assembly, prepared by the Commission of the Foreign Ministry; “Entwurf eines Gesetzes zu den Verträgen vom 25 März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen

European Court had the power to “paint scarlet letters”¹⁵ on member state which infringed on the Treaty. Member states were willing to tolerate scarlet letters, which in contemporary times clearly carried less weight than in Hawthorn’s famous tale, but apparently nothing stronger.

Despite its weaknesses, it must be said certain aspects of the EC legal system were significant improvements on existent models of international courts and international systems. Whereas the International Court of Justices depends on the voluntary consent of both parties to the dispute in order to have jurisdiction in a case,¹⁶ the European Court’s jurisdictional authority is compulsory, meaning that no member state can refuse to participate in legal proceedings if called before the Court. Furthermore unlike the International Court of Justice, the EC legal system is not reliant only on states to raise cases; the Commission was also empowered to bring cases against member states. This last innovation greatly increased the likelihood that cases would perhaps be brought, since the Commission did not have to worry about legal retaliation as much as a member state might.

But it is not for these attributes that the EC legal system has ended up working better than the United Nation’s legal system. Despite compulsory jurisdiction, almost no infringement cases have been raised by member states, which prefer to leave the dirty work of enforcement to the Commission.¹⁷ The Commission, for its part, has proven to be neither an efficient nor an independent and disinterested body for Treaty enforcement. The Commission’s monitoring resources are rather limited, so that it is not in a position to pursue all cases of Treaty infringements, but it also has not displayed any particular zeal in using the monitoring and enforcement resources it has. Rasmussen noted that especially in the 1960s and early 1970s:

Atomgemeinschaft” Anlage C; Report of representative Dr. Mommer from the Bundestag debates of Friday 5 July 1957, p. 13391; Atti Parlamentari, Senato della Repubblica; Legislatura II 1953-1957, disegni di legge e relazioni-document, N. 2107-A, and Camera dei deputati document N. 2814 seduta del 26 marzo 1957.

¹⁵ This terminology comes from Garrett, Geoffrey, and Barry Weingast. 1993. *Ideas, Interests and Institutions: Constructing the EC’s Internal Market*. In *Ideas and Foreign Policy*, edited by J. Goldstein and R. Keohane. Ithaca: Cornell University Press.

¹⁶ Singh, Nagendra. 1989. *The Role and Record of the International Court of Justice*. Dordrecht: Martinus Nijhoff publishers.

¹⁷ In the history of the Community, Member States have only raised 3 cases against another member state. The cases were raised in 1977, 1979 and 1992; Ireland vs. the French Republic, case 58/77; France vs. Great Britain and Northern Ireland, case 141/78; Spain vs. Britain, case 349/92. Data from the European Court of Justice.

Citizens of the several member states often in vain, drew the attention of the services of the Commission on flagrant breaches of Community obligations. The implicit or explicit invitations which the Commission was given to commence Article 169 proceedings were too often either rejected or neglected. To observers outside the Commission, the reluctance to file suit yielded an impression of weakness and of imperfect safeguards ensuring it a real independence. This behavior was hardly conducive to a high level of State compliance with Community Law...¹⁸

The Commission's reluctance to pursue breaches was most likely based on political concerns. As Stein has argued, "until quite recently the Commission obviously hesitated to aggravate its fragile relationships with member governments by bringing them into Court—and a decision by a member government to sue another posed political difficulties of a similar nature."¹⁹ For the Commission it was better to accept some Treaty breaches than to create conflict by pursuing a rigorous enforcement of the Treaty. The Commission's main responsibility is to promote the integration goals of the Treaty, meaning drafting legislation and persuading the Council to adopt the legislation. While it is also the responsibility of the Commission's to monitor compliance with the Treaty, rigid enforcement of EC law may not always be the best way to promote further integration—especially given the fact even if the ECJ did find a member state to have violated the Treaty, the decision would remain unenforceable.²⁰ In the first ten years of the Economic Community, the Commission brought only 27 cases against member states.²¹ Speculating what would have happened if the ECJ had followed the advice of national governments and not established the direct effect of EC law, Eric Stein argued:

It is safe to say, with the benefit of hindsight, that had the Court followed the Governments, Community law would have remained an abstract skeleton, and a great variety and number of Treaty violations would have remained undisclosed and unredressed...²²

Reflecting back on what would have become of the EC legal system had the Court relied exclusively on the enforcement system designed by the Treaty, an ECJ justice who was key in authoring the Courts most revolutionary and activist decisions of 1963 and 1964 basically agreed with Stein, writing:

¹⁸ Op. cit. Rasmussen (1986) p. 238.

¹⁹ Op. cit. Stein (1981) p. 6.

²⁰ Op. cit. Weiler (1991) p. 2420 and Weiler, Joseph. 1981. The Community System: The Dual Character of Supranationalism. Yearbook of European Law 1:257-306.

²¹ Data from the Service Informatique Juridique of the Court of Justice.

²² Op cit. Stein (1981) p. 6.

If the realisation of the common market had to depend only on the will of the Member States to implement all the provisions required of them, one can doubt, based on experience, the efficacy of the ultimate infringement sanction.²³

The legal system originally designed, and in all appearances originally desired by the member states was inherently weak and limited. It was not a system which could effectively monitor Treaty breaches, nor was it a system which, through the painting of scarlet letters, could induce compliance with EC law. It should not be surprising that ECJ decisions carried no particular moral or political influence in the 1960s—the mere fact that an obscure international court in Luxembourg had found a national government to be in violation of their international legal obligations was not enough to embarrass a member state into voluntary compliance. It was a system through which few cases would ever make it to the Court, and through which the largest infractions could easily and without repercussion persist until a political will to rectify the situation emerged.

In 1971, Stuart Scheingold concluded that “except for a brief period in the life of the Coal and Steel Community, there is little, if any, evidence that the Court has contributed directly to the Community’s capacity to impose “constitutional” solutions on difficult problems”²⁴. Given the structural weaknesses of the original EC legal system, such a conclusion is not surprising. But despite its weaknesses, there is no evidence that member states pined for change in the enforcement system. In cases where an expansion of the ECJ’s jurisdictional authority was suggested, representatives of member states argued in favor of the status quo.²⁵ As section IV of this chapter will discuss, the period of 1963-1973 was one of much political ambivalence regarding European integration- not a time when member states would have wanted to increase the power and authority of the Community’s supra-national institutions.

²³ Lecourt, Robert. 1991. *Quel Eut été le Droit des Communautés sans les arrêt de 1963 et 1964?* In *Mélanges en Hommage à Jean Boulouis: L’Europe et le Droit*. Paris: Edition Dalloz. See p. 356-359

²⁴ Scheingold, Stuart. 1971. *The Law in Political Integration: The Evolution and Integrative Implications of Regional Legal Processes in the European Community*: Harvard University Center for International Affairs, Cambridge Massachusetts. See p. 47

²⁵ *Op. cit.* Stein (1981).

The Original Intent of the Preliminary Ruling System

Focusing on the enforcement mechanisms of the Community—which most politicians and analysts did—allowed a more innocuous change to the EC legal system in the Treaty of Rome to be easily overlooked. The ECJ was given new powers of interpretation in the Treaty of Rome; national courts could refer preliminary ruling questions regarding both the *validity* and the *interpretation* of EC law. Article 177 EEC read:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of the bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

This provision was an expansion of the ECSC Treaty (Article 41 ECSC) where national courts were required to request preliminary rulings in all cases where the validity of a High Authority decision was at question. It must be said that what it meant to extend to the ECJ “interpretation” powers in Article 177 cases was poorly understood even by the authors of the clause.²⁶ It is impossible to know exactly what negotiators and politicians thought they were getting when they extended the European Court’s preliminary ruling system to questions of interpretation, but some conjectures can be made.

The expansion of the preliminary ruling procedure in the Treaty of Rome was most likely designed to facilitate national administration of EC policy by helping national courts interpret EC regulations and directives. The Common Market was to be achieved through the creation of EC secondary legislation (regulations and directives) which were to be applied by national administrative agencies. These regulations and directives, which were usually agreed to by unanimous consent, specified how EC programs such as the Common Agriculture Policy and the

²⁶ Pescatore was the legal negotiator for Luxembourg (Op. cit. Pescatore (1981) p. 173). This point was confirmed in interviews with French and German negotiators of the Treaty.

Common Customs Policy were to be implemented, and they harmonized national production standards and tax codes to help remove barriers to trade. National courts would inevitably be called upon not only to assess the validity of these regulations and directives, but also to interpret these regulations and directives. Given that all countries had agreed to these rules, having national courts work with the ECJ to interpret them was not a significant compromise of national sovereignty.

It is quite clear that the preliminary ruling procedure was not designed to allow national courts to refer individual challenges to national policy to the ECJ. When national courts sent their first challenges to national law to the ECJ, member states insisted that the references were invalid. They argued that only questions about the meaning or the validity of EC laws—that is EC directives, regulations or Treaty articles— could be referred to the ECJ in the preliminary ruling process.²⁷ Formally the ECJ respected this limitation to its Article 177 authority. But it nonetheless accepted national court references challenging the compatibility of national laws with EC law. The ECJ got around this violation of its jurisdictional authority through a formalist trick. It interpreted national court references as simple demands for an interpretation of EC legal texts not as questions about the compatibility of national law with these texts. Meanwhile in the text of the Court's decisions, the Justices clearly indicated to national courts whether or not the national law in question violated EC law. Furthermore, the ECJ implicitly instructed national court to make the final step over the ECJ's boundaries of authority by finding the national law in question to be a violation of EC law. As Justice Mancini candidly acknowledged:

It bears repeating that under Article 177 national judges can only request the Court of Justice to interpret a Community measure. The Court never told them they were entitled to overstep that bound: in fact, whenever they did so—for example, whenever they asked if national rule A is in violation of Community Regulation B or Directive C—, the Court answered that its only power is to explain what B or C actually mean. But having paid this lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the court usually went on to indicate to what extent a certain type of national legislation can be regarded as compatible with that measure. 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.²⁸

²⁷ This was the argument of the member state argumentation in the 1963 *Van Gend* case and the 1964 *Costa* case (op. cit. Stein (1981)) also see *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ. Case 6/64 (1964) ECR 583. See p. 602

²⁸ Op. cit. Mancini (1989) p. 606.

In an interview, a negotiator of the Treaty of Rome and the director of the Commission's legal services argued that states did not really think about the implications of the preliminary ruling procedure. According to this negotiator, who was also the first director of the Commission's legal services, 'the member states didn't want to bother with the organization of legal problems. They accepted the idea of a uniform interpretation of law, without thinking what this meant. The idea that national courts would be applying community rules—against national rules— wasn't even discussed in the legal group- let alone by the politicians. Thus there was no real appreciation by politicians of how the EC legal system would function, or what its purpose would be.'²⁹ Whatever the intention or understood meaning, the seemingly innocuous Article 177 became the loophole through which the entire enforcement system indeed the entire EC legal system was transformed.

II. Institutional Transformation—The ECJ and the Doctrine of EC Law Supremacy

Most non-specialists do not realize that the institutional foundations for the current EC legal system were judicially created in the early 1960s. As legal scholars have shown, the ECJ essentially “transformed” the preliminary ruling process, creating a legal bases for national courts to enforce European law in the national realm. The two key institutional transformations were created by the European Court Doctrine of Direct Effect and the Doctrine of EC Law Supremacy. The *Doctrine of Direct Effect* declared that European law creates individual rights which can be claimed in front of national courts, and which national courts must protect. The *Doctrine of EC Law Supremacy* declared that EC law is absolutely supreme to national law, *and* that national courts have an obligation to apply supreme EC law over conflicting national law. Together these two doctrines expanded access to the ECJ and created a means for EC law to be enforced in the member states, independent of politicians' will to comply. The effect of these doctrines was to fundamentally alter the enforcement system for EC law, and put the ECJ in the position to influence national and EC policy. This section will describe the Court's key decisions in their legal and political context, briefly analyzing how the Court's new legal doctrines altered the structure of the EC legal system and the politics of legal integration.

²⁹ Interview with member of the legal group of the Treaty of Rome negotiations, Director of the Legal Services of the Commission (1958-1970), July 7, 1994, Paris.

There has been much written on the contribution of the ECJ's jurisprudence to legal integration, and the following is only a brief treatment of a rich subject.³⁰ Compared to traditional accounts of the ECJ's jurisprudence, most of which take the ECJ's arguments at face value, this account puts more stress on the controversial nature of the ECJ's legal reasoning, and on the political implications of the Court's in terms of the ability of member states to limit the political effects of ECJ jurisprudence.

The legal cases leading to the key Court decisions were quite technical, and the actual material and political impact of the Court's decisions in the cases were not particularly significant. But from a legal perspective, the decisions were monumental. The *Doctrine of Direct Effect* was declared in 1963, in a case known as *Van Gend en Loos*.³¹ Van Gend en Loos objected to the imposition by the Dutch customs authorities of an 8% tariff on ureaformaldehyde imported from Germany. It brought suit in the Dutch Tariff Commission, claiming that when the Dutch law reclassified ureaformaldehyde under a new tariff category, it resulted in an increase in the tariff rate in violation of the Article 12 EEC, which prohibits member states from increasing tariffs on goods from other member states after the coming into force of the Treaty. The Dutch Tariff Commission used the preliminary ruling procedure to send the issue to the ECJ, asking if an individual may invoke Article 12 before a national court and if the reclassification of ureaformaldehyde constituted a violation of Article 12 EEC. The question posed to the European Court by the Dutch judge in itself was provocative, openly challenging established legal doctrine and conventional wisdom. It was clear under existing Dutch legal doctrine that since the EC Treaty in general, and Article 12 in

³⁰ For a detailed legal analysis of the ECJ's decisions see: Hartley (op. cit. 1988) De Witte, Bruno. 1984. Retour à «Costa» La primauté du droit communautaire à la lumière du droit international. *Revue Trimestrielle du Droit Européen* 20:425-454. Donner, A.M. 1974. The Constitutional Powers of the Court of Justice of the European Communities. *Common Market Law Review* 11. For work which puts the legal developments in a political and institutional context, see Weiler (op. cit. 1991); Rasmussen (op. cit. 1986); Stein (op. cit. 1981); Mancini (op. cit. 1989) and Cappelletti, Mauro, Monica Seccombe, and Joseph Weiler. 1986. Integration Through Law: Europe and the American Federal Experience- A General Introduction. In *Integration Through Law: Europe and the American Federal Experience Book 1*, edited by M. Cappelletti, M. Seccombe and J. Weiler. Berlin: Walter de Gruyter. For more information on the doctrines of Direct Effect and EC law supremacy, see note 42.

³¹ (*Van Gend en Loos*) *Van Gend en Loos v. Nederlandse Administratie Belastingen*. Case 26/62 (1963) ECR I

specific, was addressed to member states, it could not be considered to be “self-executing”, and thus it could not create individual rights which the plaintiff could claim in court.³²

The European Court took the relatively novel view that the Treaty could indeed create direct effects, and it defended its position on the following rather disputable grounds:

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.

The objective of the EEC Treaty, which is to establish a Common Market, the function of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to government but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and their citizens.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States, but also their nationals. Independent of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise 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 Member States and upon the institutions of the Community.

From a legal perspective, the ECJ’s decision was radical. It reversed fundamental presumptions regarding how Treaties were to be interpreted by courts, at least in the European Community context, granting quite broad interpretations to texts which according to past practice would have been interpreted very narrowly, and establishing new legal doctrines tailor made for the European legal system. Under traditional practice, international law was binding only on the signatory states to the agreement, so that individuals were not allowed to base their legal claims directly on international law. Furthermore, whereas before it was assumed that “a direct internal effect of treaty provisions is an exception that is not to be presumed, but that must at least be shown to be implicitly intended,” the *Van Gend* decision turned this assumption on its head

³² Based on an interview with Judge Kapteyn at the European Court of Justice. For more on Dutch legal doctrine regarding the direct effect of Treaties see: Claes, Monica, and Bruno De Witte. 1995. *The European Court and National Courts. The Netherlands. European University Institute. 95/26. National Report for the Project: The European and National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context.*

asserting by implication “that henceforth for the interpretation of the EEC Treaty...provisions reasonably capable of having such an effect are to be presumed to have it.”³³ The *Van Gend* decision created new legal concept of “direct effect,”³⁴ which implied that EC law could create individual rights which national courts had an obligation to protect. This meant in essence that citizens had a right to have international treaties adhered to by their government, and to that end they could, in certain circumstances,³⁵ have legal standing to demand the application of international law over national law. Such broad interpretation was also a departure for the European Court which had in the Coal and Steel Community established a pattern of narrowly interpreting EC Treaties.³⁶

The *Van Gend* decision was expanded on with the creation of the *Doctrine of Supremacy*, which was declared in the 1964 *Costa v. Enel* decision.³⁷ *Costa*, in a dispute arising out his failure to pay an electricity bill of roughly \$3.00, challenged the validity of the 1962 Italian nationalization act which created the state run electricity company ENEL. *Costa* was clearly a test case designed to probe the supremacy of EC law over subsequent national acts, a principle directly implied by the *Van Gend* decision. The Italian small claims court sent preliminary ruling references simultaneously to both the Italian Constitutional Court,³⁸ and the ECJ. At stake was whether EC law was supreme to national law passed both before and after the coming into force of EC law, thus whether EC legal obligations were inalterable through unilateral national action.

³³ Donner, André. 1968. *The Role of the Lawyer in the European Communities: The Rosenthal Lectures*. See p. 72

³⁴ In 1931, the notion that Treaties could be “directly applicable” in the national realm was introduced by the International Court of Justice. However this decision was only an advisory opinion and the question of individual rights being created by international law was not addressed (Rec. CPJI série B. no. 15) cited in Wyatt, Derrick. 1982. *New Legal Order, or Old? European Law Review*: 147-166. . In the *Van Gend* decision, the Court split the concept of “direct applicability” to create a new concept of “direct effect” which implied that not only was EC law directly applicable in the national realm, it could also create individual rights which national courts had an obligation to protect. For more on this point see De Witte (op. cit. 1984).

³⁵ Not every EC law or Treaty article can create direct effects. In the *Van Gend* and other decisions, the Court established rules and guidelines for when Treaty provisions and directives can create direct effects, depending among other things on the clarity of the text and the unconditionally of the obligation (Hartley, (op. cit. 1988 see Chapter 7). The ECJ must decide on an issue by issue basis if direct effects are created.

³⁶ Haas, Ernst. 1958. *The Uniting of Europe*. Palo Alto: Stanford University Press. See p. 473

³⁷(*Costa v. Enel*) *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)*, Case 6/64 (1964) ECR 583

³⁸ Italy has a similar preliminary ruling procedure in its constitution.

In its decision, the Court argued that the EC law must be seen as supreme to national law adopted both before and after the coming into force of EC law. It supported this position on the following grounds:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from the limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

This decision was revolutionary in that the European Court was indirectly asserting the authority to rule a national law inapplicable,³⁹ and because the ECJ was asserting that EC law has supremacy over subsequent national acts. In asserting the supremacy of EC law over subsequent national acts, the Supremacy Doctrine challenged the tradition of *lex posterior derogat legi priori* (last law passed trumps all previous laws), which was a fundamental component of many countries' legal doctrine on the relationship of international law to national law.

In addition to making EC law hierarchically supreme to national law, the newly created Supremacy Doctrine carried with it an instruction to national courts to accord EC law supremacy in their application of law. According to De Witte, this instruction is what makes the ECJ's supremacy claim so unique in international law.⁴⁰ The instruction was already present in the *Costa v. Enel* decision, but it was made even more explicit in the ECJ's *Simmenthal* decision in 1978.⁴¹ After re-stating the principle of EC law supremacy, the Court said:

³⁹ In order to rule on a national law without violating the jurisdiction of the national courts, the ECJ asserted a distinction between determining the direct effect and meaning of EC law and "apply(ing) the treaty to a specific case... or decid(ing) upon the validity of a provision of domestic law in relation to the Treaty". This distinction lost any practical significance when, later in the decision, the Court asserted that national courts were not bound to apply national laws which violated the Treaty, and were instead bound to apply the supreme EC law. Bermann, George, Roger Goebel, William Davey, and Eleanor Fox. 1993. *Cases and Materials on European Community Law, American Casebook Series*. St. Paul: West Publishing Co. See p. 172.

⁴⁰ Op. cit. De Witte (1984).

⁴¹ (*Simmenthal*) Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II), Case 106/77 (1978) ECR 629

It follows from the forgoing [argument supporting the primacy of EC law] that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights of individuals and must accordingly set aside any provision of national law which may conflict with it; whether prior or subsequent to the Community rule.

Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

...

[Thus] a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation.

Thus the Supremacy Doctrine implied that national courts must, in their application of national law, apply the supreme EC law.⁴²

It bears repeating that these two decisions were extremely controversial, not just because they challenged traditional international law interpretations, but because the interpretive arguments underpinning the ECJ's interpretation were not widely shared. The ECJ based its decisions on the "special" and "original" nature of the Treaty of Rome, but few politicians or legal scholars saw the Rome Treaty as anything more than a traditional international treaty. While the Court pointed out many supposedly "original" features of the Treaty, it is questionable if these features actually are that unusual as far as treaties go, and even if they are extraordinary, it would not necessarily mean that EC law creates direct effects or is supreme to national law.⁴³ Indeed the whole idea that Treaty of Rome created a "new legal order," was really nothing more than an assertion of the Court.

Nowhere did the Treaty say that a new legal order was created. No where did the Treaty say that

⁴² For more literature on the Doctrine of Supremacy, see: De Witte (op. cit. 1984); Hartley (op. cit. 1988) Bebr, Gerard. 1981. *Development of Judicial Control of the European Communities*. The Hague: Martinus Nijhoff Publishers. De Witte, Bruno. 1984. Retour à «Costa» La primauté du droit communautaire à la lumière du droit international. *Revue Trimestrielle du Droit Européen* 20:425-454. Docksey, Christopher and Fitzpatrick, Barry. 1991. The Duty of National Courts to Interpret Provisions of National Law in Accordance with Community Law. *Industrial Law Journal* 20:113-120. Hartley, Trevor. 1988. *The Foundations of European Community Law*. Second ed. Oxford: Clarendon Press. Mancini, Federico. 1989. The Making of a Constitution for Europe. *Common Market Law Review* XXIV:595-614. Stein, Eric. 1981. Lawyers, Judges and the Making of a Transnational Constitution. *American Journal of International Law* 75 (1). Usher, John. 1981. *European Community Law and National Law—The Irreversible Transfer?*, *University Association for Contemporary European Studies*: George Allen & Unwin Press. Weiler, Joseph. 1981. The Community System: The Dual Character of Supranationalism. *Yearbook of European Law* 1:257-306. Weiler, Joseph. 1991. The Transformation of Europe. *Yale Law Journal* 100:2403-2483.

⁴³ Mann, C.J. 1972. *The Function of Judicial Decision in European Economic Integration*. The Hague: Martinus Nijhoff Press.

individual rights were created, or that EC law was supreme to national law. Some legal scholars argued that the ECJ was putting too much weight on the preamble of the Treaty which mentioned the “peoples of Europe”, a preamble which was added at the end of the negotiations when each country was allowed to add one statement regarding their view of the goal of the Treaty.⁴⁴ Others questioned whether there was any sound legal basis for the ECJ’s decisions. German legal scholar Rupp joined Münch in calling the ECJ’s legal argumentation “wishful thinking”⁴⁵ and in 1972, Scholar C.J. Mann wrote:

the Treaties themselves, viewed in their entirety, can not be said to establish the supremacy of Community law over municipal law. The very absence of express agreement in the Treaties to that or equal effect speaks against such a revolutionary presumption...Further despite the fact that all the Member States have made constitutional provisions for the transfer of sovereign rights to international or supranational organizations, the abdication of important State powers can not be hereby implied.⁴⁶

Writing later in the 1970s and 1980s, observers continued to note national judicial reticence to the Doctrine of EC law supremacy despite the years of campaigning of the ECJ and its proponents.⁴⁷ As late as 1989 Ronny Abraham was still asking if “in effect,... the court has not exceeded its authority in pretending to dictate to national judiciaries the attitude to adopt in the case of a conflict between two norms.”⁴⁸

The institutional consequence of these two doctrines was a fundamental transformation of the functioning of the European legal system’s enforcement mechanism, and the harnessing of the national courts to enforce European law in the national realm. Without direct effect, the Court had few cases and thus few opportunities to pronounce a breach of EC law. With the Doctrine of Direct Effect, individual citizens became the new monitors of compliance with EC treaties and EC law.

⁴⁴ Op. cit. Rasmussen (1986).

⁴⁵ Rupp, Hans Heinrich. 1970. Die Grundrechte und das Europäische Gemeinschaftsrecht. Neue Juristische Wochenschrift Heft 9:353-359. See p. 356

⁴⁶ Op. cit. Mann (1972) see p. 26-17.

⁴⁷ Jacqué, Jean-Paul. 1981. The Individual Member States’ Community Obligations: Faithful Implementation or Realization of Unilateral Goals with a particular view to EC-Member States’ Court’s Defiance of the European Court of Justice- France. Conference on “The Individual Member States’ Community Obligations: Faithful Implementation or Realization of Unilateral Goals with a particular view to EC-Member States’ Court’s Defiance of the European Court of Justice” 12-14 November 1981. Vedel, Georges. 1987 L’attitude des juridictions françaises envers les traités européens. Speech given at Europa-Institut der Universität des Saarlands im Rahmen der Reihe “Deutsch-Französischer Dialog”. February 18, 1987: Europa-Institut der Universität des Saarlands.

⁴⁸ Abraham, Ronny. 1989. Droit international, droit communautaire et droit français, Le Politique, L’Economie, Le Social. Paris: Hachette. See p. 184

Self-interested individuals⁴⁹ were much more likely than either member states or the Commission to bring cases. In addition, whereas in the past Member states had been able to convince the Commission not to bring politically contentious cases—through delaying tactics, through compromises, and even through threats—individuals and national courts were much harder to influence, so that political control over the Court’s docket was significantly diminished. The Doctrine of EC Law Supremacy allowed the ECJ to “dialogue” with national courts about the meaning of European law, and thus to influence national legal interpretation of EC law.⁵⁰ Finally, the transformation of the preliminary ruling procedure turned national courts into enforcers of European law in the national realm, making ECJ decisions harder to circumvent. Whereas it was essentially politically and financially costless to ignore the ECJ, it was not politically and financially costless for national politicians to ignore their own national courts. National judicial support added both important moral force to ECJ decisions,⁵¹ and coercive power since national courts could issue fines.

The ECJ’s doctrines also led to a fundamental change in the political relationship between the ECJ and the member states. As far as national courts were willing to enforce EC law against national governments, the burden of responding to unpopular ECJ decisions was shifted to the member states. Before if politicians did not like an ECJ decision, they could respond by ignoring it. Fearing that non-compliance with ECJ decisions would make them dead letters, the Court was rather meek in demanding change of national practices in the 1960s and early 1970s, finding technical ways to limit the substantive impact of its decisions.⁵² As national courts became more willing to apply ECJ decisions against national governments, the Court became much more willing in the 1970s and 1980s to issue bold decisions with significant political and material impact. Now if politicians did not like an ECJ decision, they had to actively fight to have it reversed at the EC or

⁴⁹ Op. cit. Burly and Mattli (1993) .

⁵⁰ As Mann put it, “The task of the Community Court is, so far as possible, to maintain control of this dialogue and to turn it in favor of Community law.” (op. cit. Mann (1972) p. 384) For more on the evolution of trans-judicial dialogues see: Slaughter, Anne-Marie. 1994. A Typology of Transjudicial Communication. *University of Richmond Law Review* 29 (1):99-137.

⁵¹ Op. cit. Weiler (1991).

⁵² See Chapter 6 section II for more on this.

the national level. Reversing a court decision takes much more effort and mobilization than simply ignoring a decision. Knowing that reversing an ECJ decision was politically and institutionally difficult, and that national courts would enforce its jurisprudence, the Court gained political leverage over national governments—it gained the ability to induce compliance by national governments despite their possible disagreement with its jurisprudence. But the entire system depended on national courts' willingness to apply ECJ decisions, and politicians' ultimate acquiescence in the face of unpopular decisions. Neither of these were guaranteed, and there are limits for both of them.

From the ECJ's perspective, the transformed preliminary ruling system clearly brought many benefits. It helped the ECJ more effectively and efficiently fulfill its institutional mandate of ensuring that EC law is respected.⁵³ The preliminary ruling procedure, or as it commonly referred to by legal scholars the “Article 177 procedure”, has become by far the most effective enforcement mechanism of the European Community. The vast majority of decisions of the ECJ are issued in cases brought to the Court through the preliminary ruling procedure (2893 rulings from 1959-1994 as compared to 1045 rulings in infringement proceedings in the same period).⁵⁴ The doctrines of Direct Effect and EC law Supremacy also gave the Court more opportunities to issue influential decisions, more legal tools at its disposal, and access to the moral, coercive and political power of national judiciaries.⁵⁵ The types of questions which national courts have asked the ECJ have differed significantly from those of member state or the Commission. Where state leaders did not go abroad to ask for a binding external expert opinion regarding what national policy should be, national judges have gone to the ECJ with such questions. Acting on references from national courts—such as the *Van Gend* and *Costa* references—the ECJ has issued some of its most expansive and provocative legal decisions. Finally the transformed system helped promote the

⁵³ Functionalist arguments are often used to explain the Court's decisions. For one example see: Lecourt, (op. cit. 1991)

⁵⁴ See Table 1.1. for the statistics.

⁵⁵ Op. cit. Burley and Mattli (1993).

ECJ's political agenda of creating promoting European integration, "constitutionalizing" the EC Treaty, and creating the legal foundations for a European Federation.⁵⁶

Less clear, however, is what the transformed preliminary ruling procedure brought to national judges or politicians. The Court's legal doctrines were quite controversial, both legally and politically. They clashed with national legal practices, threatened to subjugate national high courts to the ECJ, and implied a great compromise of national sovereignty. Especially in the political context of the 1960s and 1970s, when supra-nationalism was being rejected by politicians, and when national sovereignty concerns were largely winning out over European integration, the Court's legal declarations were easy for national courts to reject and politicians to ignore. The next two sections consider the legal and political barriers to the acceptance of the ECJ's controversial legal doctrines.

III. A New Role for National Judiciaries—But Do They Want the Job?

In the 1960s, national judicial reticence towards the ECJ's new doctrines was formidable. Not only was there significant legal controversy about the reasoning behind the supremacy of EC law over national law, there were entrenched national legal traditions, and political and judicial interests which worked against the acceptance of EC law supremacy by the national judiciaries. There was solid empirical evidence which lent support national judicial concerns, and those opposing the European Court's legal doctrines in the 1960s most definitely had the upper hand within the national judiciaries. This section analyzes some of the forces working against the European Court's legal doctrines.

⁵⁶ In 1964 Feld noted an ideological preferences in the Court for European integration (Feld, Werner. 1964. *The Court of the European Communities: New Dimensions in International Adjudication*. The Hague: Martinus Nijhoff.). In an interview, it was suggested that a certain judge was particularly important in convincing the Court to be more activist, and that this judge was politically motivated. According to this participant's account, in 1962, a small party within the French Gaullist ruling coalition resigned over de Gaulle's European policy. A leader of the former coalition party, the former Minister of Justice, ended up being sent to the European Court of Justice, which was then considered to be political exile in the remote Duchy of Luxembourg. Knowing de Gaulle's intention to obstruct European integration, it is argued that this judge became the mastermind and activist behind the Court's efforts to transform the European legal system. Justice Mancini has also made the Court's political intentions clear arguing that "the court has sought to "constitutionalise" the Treaty, that is to fashion a constitutional framework for a federal-type structure in Europe" (op. cit. Mancini 1989 p. 596).

The Supremacy of EC Law: A Clash with National Legal Traditions

National judiciaries were accustomed to allowing significant deference to the executive and legislative branches. In European civil law systems, legislatures are considered democratically empowered to make laws, and judges are supposed to merely apply the general will as embodied in parliamentary law. Stone argued:

...the role and function of the judiciary in the classic European politico-legal system were rigidly circumscribed. The judge's role was a subservient and bureaucratic one: he was required to verify the existence and applicability of statutory norms to a case at hand, but he could investigate the work of the legislature no further. To recognize a judge-made law in this system was to diagnose pathology: that is, lawmakers had promulgated either an unclear law or one in conflict with established legal regimes, precipitating judicial interpretation; or the judge had simply, and illegitimately, overstepped constitutional bounds. Judicial review was all but unthinkable. From 1780 in Germanic states and from 1791 in France, judicial interpretation of statutes was explicitly prohibited by constitutions, and penalties were prescribed in the penal codes for any transgression.
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To deal with conflicts between national law and international law, national judges had adopted a practice which, according to Manin, "was a compromise between the court's desire to ensure the primacy of treaties, and their concern not to appear to be encroaching on parliamentary prerogatives."⁵⁸ In France, the practice had come to be known as the "Matter Doctrine" which implied that judges should assume that legislators did not intend to contravene international law, interpreting national laws as much as possible in ways consistent with international law, and reading Treaties as the latest statement of the legislative will.⁵⁹ In Italy and Germany this judicial practice was known by the Latin phrase *lex posterior derogat legi priori*. In the case of a direct conflict between an international law and a subsequent national law, however, there was no way for judges to finesse the situation without choosing between the national law which represented the latest will of the national legislatures, and the international law. In France, if an irreconcilable conflict between subsequent national law and international laws existed, tradition implied that the 'legislative will' had to be followed. In dualist legal systems like Germany and Italy, where

⁵⁷ Stone, Alec. 1990. The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe. *Policy Studies Journal* 19 (1):81-95. See p. 82.

⁵⁸ Manin, Philippe. 1991. The Nicolo case of the Conseil d'État: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law over Subsequent National Statute. *Common Market Law Review* 28:499-519. See p. 502.

⁵⁹ Louis, Jean-Victor. 1973. Observations. *Journal des Tribunaux* (4848):693-696. Rideau, Joël. 1974. Note. *Recueil Dalloz Sirey* (9):Jurisprudence, 162-165. Ruzié, David. 1975. Note. *Journal du Droit International* (4):805-808.

international law is considered equal to national law in status, there also was no accepted legal basis upon which to accord international law supremacy over national law.⁶⁰

These traditional legal doctrines were based on older pre-war constitutional orders, but most European countries had new constitutions following World War II, and these constitutions were much more open to international law, allowing national judges a potential avenue out of the old international law/national law conundrum. In France, both the 1946 and the 1958 constitutions explicitly stated that international law was supreme to national law, on the requirement of reciprocal implementation of the Treaties.⁶¹ The Netherlands had similar statements in its constitutions.⁶² In Germany, Article 24 of the Basic Law allowed for the “transfer of sovereignty” to international institutions. The Luxembourg and Italian Constitutions had similar provisions.⁶³ While these constitutional articles could be read as providing for the supremacy of international law—and many legal scholars argued for such an interpretation—because the revisions were not addressed to the judiciary, and because the constitutions did not grant new powers to the judiciary or explicitly instruct the judiciary to change its previous legal practice, many judges chose to stick with pre-war practices of interpretation.⁶⁴

As chapters four and five will show, the reluctance to change traditional interpretive practices regarding the relationship of international law to national law was based in large part on deeply embedded conceptions about the proper role of the judiciary within the national political system. National judges worried that the supremacy of EC law potentially challenged their societal mission, in ways which undermined the functioning of democracy. Undeniably, these concerns about the role of judiciary in society were also linked to the belief that EC law supremacy undermined national sovereignty in a fundamental way. The national sovereignty fears were

⁶⁰ In the US as well the doctrine of “*The Charming Betsey*,” created in an early case decided by John Marshall, established that judges should assume that legislatures do not intend to contravene international law. Henkin, Louis. 1972. *Foreign Affairs and the Constitution*: Foundation Press.

⁶¹ Weiss, Freidl. 1979. Self Executing Treaties and Directly Applicable EEC Law in French Courts. *Legal Issues in European Integration* vol 1:51-84.

⁶² Bermann, George, Roger Goebel, William Davey, and Eleanor Fox. 1993. *Cases and Materials on European Community Law*, American Casebook Series. St. Paul: West Publishing Co. See p. 214.

⁶³ *Ibid.* p. 216 and 228.

⁶⁴ Kovar, Robert. 1975. La primauté du droit communautaire sur la loi Française. *Cahiers de droit européen*:636-664. Lagrange, Maurice. 1968. Note sur arrêt Semoules. *Recueil Dalloz-Sirey* (15):286-289.

directly raised in different places by national judges. In France, the Commissariat du Gouvernement⁶⁵ argued “the argument (of EC law supremacy) is enticing order to encourage the development of a Community legal order; its evolution is more difficult to imagine if it withdraws from the action of the legislator whole sections of the life of the country because treaties have appeared in the area in question.”⁶⁶ A Frankfurt Administrative Court posed the question even more boldly, saying “surely it is legitimate to question whether or not a decline in the national state institutions and rule of law must be paid as a price for the building of a political united Europe.”⁶⁷ This latter concern has been reiterated in numerous places, most recently by the German Constitutional Court.⁶⁸

EC Law Supremacy as a Threat to the Independence and Authority of National Judges

There were also concerns about national high courts ceding interpretive authority to the European Court of Justice. While no judge wants to say it is basing its legal interpretation on its interest as a national high court, it is clear that a concern about the loss of influence of state institutions, and high courts in specific, was of great concern. National judges feared that changing old interpretive practices would undermine their own judicial authority by subjugating national legal practice to the European Court of Justice, and compromise national sovereignty. But they also feared that embracing EC law supremacy might create undue conflict and problems with political bodies, provoking an unwelcomed political response which might undermine their authority in the national political system. Maurice Lagrange argued that “the truth is that the judges do not dare to enter into open conflict with the parliament which is traditionally considered to be the

⁶⁵ Despite what the phrase “Commissariat du Gouvernement” would imply, the Commissariat du Gouvernement is not a representative of the French government. Rather, he or she is a member of the *Conseil d'État*, who offers a reasoned opinion for the rest of the *Conseil d'État* to consider before rendering their decision. Commissariat du Gouvernement are selected individually for each case, and the responsibility of serving in this role is rotated among junior members of the *Conseil d'État*, who also serve on the decision-making body of the *Conseil d'État*. The ECJ's Advocat General was modeled directly on the Commissariat du Gouvernement in the French administrative system, and the Commissariat du Gouvernement and the Advocat General perform identical functions in the judicial process.

⁶⁶ “*Semoules decision*” Syndicat General de Fabricants de Semoules de France- Commissaire du Gouvernement 1 March 1968 Common Market Law Report 1970 vol 9.

⁶⁷ VWG Frankfurt reference to BVerfG- decision from 14.7.1971 II/2- E 228/69 Außenwirtschaftsdienst des Betriebs-Beraters November 1971/Heft 11 p. 541-546

⁶⁸ BVerfG “Maastricht decision” of 12 October 1993 2 BvR 2134/92 and 2 BvR 2159/92

only body qualified to sovereignly express the national will."⁶⁹ Certainly accepting EC law supremacy would be going out on a political limb at a time when the European Community was in political crisis and politicians were divided with respect to their enthusiasm for creating a Common Market or for working towards political union.

While judges do not, in general, plan all their actions with the sole intention of avoiding political confrontation, like all actors with limited resources they pick and choose their battles. EC law supremacy was an issue where national judges themselves did not have strong feelings or interests at stake, thus for many national judges it was not a fight worth picking. To the extent that national judges did have strong feelings or interests at stake, these interests generally cut *against* the enforcement of EC law. Indeed in the 1960s, the perceived benefits from taking on a role enforcing EC law in the national realm were few. Many national judges saw the implementation of international treaties as the responsibility of political bodies and the enforcement of the EC treaties as the responsibility of the Commission. They did not see why, just because politicians had failed to provide for an effective enforcement or compliance mechanism for EC law, they should have to fill the job of treaty enforcement. In the face of 15,000 pending legal suits based on an ECJ decision,⁷⁰ in already overburdened national tax court system where it took on average 10 years to resolve any dispute, the Federal Tax Court explicitly challenged the idea that national courts were responsible for ensuring compliance with EC law.⁷¹ The *Conseil d'État* also saw no responsibility and no gain to be made in righting what the president of the *Conseil d'État* characterized as 'regretful' situation that French public internal law had no way to assure for the supremacy of international law.⁷²

EC law supremacy created other logistical inconveniences for national courts as well. In 1960's and early 1970's, it was argued that an appeal to EC law was usually a dilatory attempt on the part of the plaintiff, to obstruct the legal process, thus judge should not make a reference to the

⁶⁹ Op. cit. Lagrange (1968) p. 288.

⁷⁰ Europarecht, Heft 4, 1967 p. 363.

⁷¹ BFH reference of 27 July 1967 to the ECJ in the "Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn" case.

⁷² Druesne, Gérard. 1975. La primauté du droit communautaire sur le droit interne- L'arrêt de la Cour de Cassation du 24 Mai 1975. Revue du Marché Commun:378-390. See p. 381-382.

ECJ and reward the plaintiff.⁷³ Certainly making a reference added delay and cost to the national legal process, which was already very slow and expensive. Some feared that referring questions to the ECJ was an arduous process, where numerous references for one case might be necessary⁷⁴ and where “the effort of interpretation would in any case be frustrated by the redoubled inconvenience of having to compare the national statute, once the European Court had given its reply.”⁷⁵ For lawyers and judges, invoking EC law meant familiarizing themselves with an entirely new set of statutes and laws.

ECJ Justices and pro-EC law academics tend to dismiss these concerns of national judges, implying that they are relatively isolated anachronisms of small minded people who fear change. Those espousing this criticism usually have their own agenda, sharing a belief that European integration is a good idea, that future peace and prosperity in Europe can only be achieved through European unification, and that any actor who opposes such a future does so out of personal laziness, unfounded fear of the unknown, a lack of understanding about the European Community, or outdated nationalism.⁷⁶ It would be easy to conclude that since national judges have ultimately relinquished their historical practices and seemingly overcame their fears, that perhaps the concerns voiced in the 1960s were not so strongly felt or so well based. But these concerns of national judiciaries should be taken seriously. They were not only well founded, but in the 1960s and 1970s they were widely spread.

The vast majority of the national legal community were reluctant to draw on EC law in their legal practice—and it was not for ignorance of EC law. In interviews, French lawyers told me that plaintiffs did not want them to raise EC legal issues, fearing it would compromise their chances in

⁷³ *Conseil d'État's Shell Berre decision*- 19 June 1964- *Revue du droit public et de la science politique en France et en étranger* No. 5 p. 1034-1041 and Mazard. 1971. *Rapport de M. le conseiller Mazard. Recueil Dalloz Sirey* 14e Cahier:Jurisprudence 221-222.

⁷⁴ *S.A. des Etablissements Petitjean et autres- Conseil d'État* 10 February 1967, *Revue trimestrielle de droit européen* p. 681-696. *Commissaire du Gouvernement- Mme Questiaux*

⁷⁵ *Op. cit. Semoules decision* (1968).

⁷⁶ *Op. cit. Kovar* (1975); *op. cit. Feld* (1964). Lecourt, Robert. *L'Europe Méconnue: Les Français et la Cour de Justice. Le Monde*, p. 5-6. Meier, Gert. 1990. *Zur Mitverantwortung deutscher Richter für die Vollendung des Europäischen Binnenmarktes. EuZW* Heft 3:81-83. Pescatore, Pierre. 1973. *Community Law and the National Judge. The Law Guardian* (January).

the case or open them to retaliation from an administration on which they were dependent.⁷⁷

European institutions went to great lengths to influence national judges and lawyers to accept a role enforcing European law. But even lawyers and national judges who read the legal literature supporting the ECJ's legal arguments, and visited the European Court in Luxembourg were not convinced to accept the Court's controversial new legal doctrines. That these efforts were not more successful in the 1960s is testament to the depth of ambivalence among lawyers and judges, as well as the great uncertainty that the European Court's jurisprudence was either legally or politically well grounded. Writing in 1971, Stuart Scheingold noted "The picture with respect to the recognition of the authority of the Court of Justice and the supremacy of Community law is a mixed one...in most matters there has been a real reluctance by national courts to use Article 177...only in Holland can the primacy of Community law be taken for granted. Elsewhere, the status of Community law and the willingness to use Article 177 remain in doubt, although national judges seem increasingly receptive on both counts."⁷⁸ Mann's analysis in 1972 came to a similar conclusion.

National judicial concerns should also not be discounted, as through time they have proven to have been well founded. ECJ jurisprudence has challenged cherished legal and political traditions, deeply impinged on the exercise of parliamentary sovereignty, provoked unwanted political responses, and led to the subjugation of some national high courts. ECJ jurisprudence has challenged well accepted national tenets; such as the idea that judges should not conduct judicial review, that judges should not unduly stretch legal interpretation to the point of re-writing parliamentary law, and the idea that all potentially objectionable government laws and practices—EC law included—should be reviewed by *national* courts in light of the *national* constitution.

The ECJ has tried to take these concerns of national judges into account, adjusting aspects of its jurisprudence in an effort to assuage national court concerns.⁷⁹ But at the same time

⁷⁷ Interview with French lawyers (May 26, 1994; July 7, 1994).

⁷⁸ Op cit. Scheingold (1971) p. 34.

⁷⁹ The ECJ's jurisprudence on human rights and the right of national courts to interpret "clear" EC law on their own reflects the ECJ's attempts to address national high court concerns. Mancini, Federico, and David Keeling. 1992. From CILFIT to ERT: The Constitutional Challenge Facing the European Court. *Yearbook of European Law* 11:1-

European Court interpretations has through time become ever broader, impinging increasingly on national sovereignty. The ECJ has claimed in certain instances an exclusive policy-making authority for the Community so that member states have lost their legal authority to make policy in these areas—even if the policy does not contravene EC law.⁸⁰ In the eyes of some French and British politicians and legal scholars, some ECJ decisions have been a veritable affront to parliamentary sovereignty. It has been argued that the ECJ has abandoned the law in favor of policy-making,⁸¹ that accepting some ECJ decisions is tantamount to endorsing “a purely praetorian modification of the division of competences between the member states and the Community”,⁸² that the ECJ has illegitimately exceeded its competences⁸³ and encroached too far into national sovereignty.⁸⁴ Even pro-EC law scholars will often agree that there is no sufficient check on the ever broadening interpretations of the ECJ.

Accepting ECJ jurisprudence has also created conflict with politicians for national judiciaries, forcing national judges to take sides in legal-political disputes where ECJ legal positions were far from unambiguous. In Germany, the Federal Tax Court was unhappily brought in to mediate between the Ministry of Finance and the ECJ, in a case where the Federal Tax court found the ECJ decision to be legally questionable.⁸⁵ And for their role in enforcing EC law, national judiciaries have also been attacked by politicians. In Belgium, the legislature attempted to reverse the *Cour de Cassation*'s decision to accept EC law supremacy.⁸⁶ In France the National Assembly actually passed a measure sanctioning the Court of Cassation for applying supreme EC

13. Rasmussen, Hjalte. 1984. The European Court's Acte Clair Strategy in C.I.L.I.T. or Acte Clair, of Course! But what does it Mean? *European Law Review*:242-259.

⁸⁰ See Weiler's discussion of the doctrine of “exclusivity” or “preemption” (op. cit. 1991 p. 2417).

⁸¹ Smith, Gavin. 1990. *The European Court of Justice: Judges or Policy Makers?*: The Bruges Group Publication, Suite 102 Whitehall court, Westminster, London SW1A 2EL. Op. cit. Rasmussen (1986).

⁸² Dutheillet de Lamothe, Olivier, and Yves Robineau. 1979. *Chronique générale de jurisprudence administrative française. L'actualité juridique- Droit Administratif* (3):27-34. See p. 29.

⁸³ Abraham, Ronny. 1989. *Droit international, droit communautaire et droit français, Le Politique, L'Economique, Le Social*. Paris: Hachette.

⁸⁴ Denning, Lord. 1990. Introduction to article “The European Court of Justice: Judges or Policy Makers?”: The Bruges Group Publication, Suite 102 Whitehall Court, Westminster, London SW1A 2EL.

⁸⁵ The Lütticke case will be discussed in Chapter 4.

⁸⁶ Bribosia, Hervé. 1995. *Direct Applicability and the Primacy of European Community Law in the Belgian Legal Order*. European University Institute. 95/24. National Report for the Project: *The European and National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context*.

law over national law.⁸⁷ The French legislature also removed the competences of the Court of Cassation over areas of indirect taxation, because it was unhappy with its jurisprudence applying EC law.⁸⁸

ECJ jurisprudence has also directly encroached on high court prerogatives, providing ample fodder to feed high court concerns that they would lose authority to the ECJ. In appeals to lower courts the ECJ has directly suggested and even instructed lower courts to ignore the jurisprudence of higher courts. In conflicts between lower tribunals and higher courts, such as the turnover equalization tax struggle in Germany, the ECJ openly took the side of the lower courts in an interpretive dispute with the Federal Tax Court.⁸⁹ In the *Costa* and *Simmenthal* decisions, the ECJ told lower courts to ignore national legal rules- including procedures established through constitutional court decisions- if these rules would keep them from applying EC law supremacy.⁹⁰ Indeed certain national high courts have, for all practical purposes, become completely subjugated to the jurisprudence of the European Court. Writing in 1987, German judge Voss wrote:

The logical continuation of this case law will have the result that in the field of harmonized taxes the Court of Justice will have to take over the role of the national tax courts. Considering the advanced level of harmonization of the value added tax, this might have the consequence for the Federal Republic of Germany that the Chamber of the Bundesfinanzhof, that is the five judges who are in charge of VAT jurisdiction, would hardly be needed any more.⁹¹

The Employment Appeals Tribunal in Britain is another example of a national court which has found its interpretive influence greatly diminished because of EC law supremacy.⁹²

It is of course true that there was a small faction of national legal communities that were ready and willing to be convinced that European law should be seen as supreme to European law. These were the few lawyers who chose to specialize in European law, and a small group of

⁸⁷ Isaac, Guy. 1980. A propos de l' <<amendement Aurillac>>: Vers une obligation pour les juges d'appliquer les lois contraires aux traités? *Gazette du Palais II:Doctrine*: 583-585.

⁸⁸ Buffet-Tchakaloff, Marie-France. 1984. *La France devant la cour de justice des communautés européennes*. Aix-en-Provence: Presses universitaires d'Aix-Marseille. See p. 343-348.

⁸⁹ Meier, Gert. 1994. Der Streit um die Umsatzausgleichsteuer aus integrationspolitischer Sicht. *Recht der Internationalen Wirtschaft* 3/94.

⁹⁰ Op. cit. *Simmenthal* decision of the ECJ (1978).

⁹¹ Voss, R. 1987. Federal Republic of Germany National Report. In *Article 177 Experience and Problems*, edited by H. Schermers, C. Timmermans, A. Kellermann, W. J and Stewart: Elsevier Science Publishing Company. See p. 65.

⁹² Vargas, Jeannette. 1995. *Shifting the Balance of Power Between Domestic Groups: The European Court and British Equal Treatment Policy*. Dissertation in Honor's Thesis for a Bachelor of Arts degree, Harvard University.

academics which acted as virtual legal lobbies for ECJ jurisprudence in the national realm, groups which in some respect tied their professional future to EC legal system.⁹³ By the early 1970s, the achievements of these groups were becoming noticeable. The Court's jurisprudence had won the support of some important legal actors within national judiciaries, pro-EC law legal reviews were appearing fairly regularly in national legal journals, specialty journals for EC law had been established, and European law courses appeared on the curriculum in some national universities. References from national courts to the ECJ were also slowly increasing. Thus the efforts of EC institutions to build support for ECJ jurisprudence in the national legal community were having a very modest but nonetheless important success in the 1960s, a success which gained in importance through time.

These small successes were not inconsequential, but the achievements must be viewed in perspective. Reading the EC legal literature it is easy to conclude that there was a significant consensus behind the supremacy of EC law from the get go. But those academics, lawyers and judges embracing EC law supremacy while organized, loud, and highly visible, remained only a very small minority of the larger national legal communities—just as the world federalists and the *movement europeenne* were. The silent majority of the national legal community was neither convinced nor supportive of EC law supremacy, and it was in no way pre-ordained that the legal

⁹³ In all member states, national legal associations dedicated to promoting "integration through law" were founded by influential Commissioners and former Treaty negotiators in 1961. These associations waged both information and lobbying campaigns within national legal systems, offering seminars to lawyers and judges to inform them on the European legal system, actively working to shift national legal doctrine by writing legal articles on the supremacy of EC law over national law, by touting pro-EC law national court decisions in legal journals and waging writing campaigns against anti-EC law supremacy national court decisions. They created a specialized scholarly field of EC law, with its own journals and doctoral programs, which promoted a one sided, non-critical, pro-ECJ doctrinal interpretation of EC law. Financial support for national organizations, for newly founded legal journals, and for doctoral research was provided by the Commission, which had as a policy the goal the creation of a generation of scholars specializing in EC law, the development of a debate on EC legal issues, and the incorporation of EC studies into the formal training curriculum of the legal community. The Court invited national judges and lawyers to the European Court for information visits, offering lawyers, lower magistrates, through supreme court judges an all expense paid trip to drink champagne and dine with European Court Justices. Thousands of law students, lawyers, and national judges visited the Court through arranged trips. Exchanges of entire national high courts occurred, and the ECJ even took its show on the road, traveling to different cities to sit in session in front of national audiences. ECJ justices also engaged in personal lobbying, returning often to their country of origin to attend conferences and keep up their rapport with national judges. Finally, ECJ justices wrote articles for major legal journals and for national newspapers, defending ECJ jurisprudence prodding national legal communities to 'modernize' their practices. Based on interviews with founders of and participants in French and German EC legal organizations, and interviews with a former high ranking Commissioner, and the Director of Academic Affairs. These are the types of groups identified and discussed in Burley and Mattli (op. cit. 1993)

ideas of what was rightly seen as a bunch of ideologically committed “United States of Europe” enthusiasts would succeed in permeating the larger legal and political audience, or that the doctrines of Direct Effect and EC law Supremacy would come to be incorporated into national legal systems. So while one could see the seeds of doctrinal change planted by the EC institutions starting to germinate by the early 1970s, it was entirely unclear that the young sprouts would grow and flourish in a national legal context dominated by legal traditions and political concerns with a far more developed root structures.

Given the significant reasons to oppose the ECJ’s supremacy jurisprudence, how did the European Court’s fragile legal doctrines come to dominate in national legal contexts? Why did what was clearly a minority view come to be thoroughly accepted within national legal communities, held by people with no particular commitment to facilitating European integration and even shared by people who still see little legal basis to support the ECJ’s *Van Gend* and *Costa* decisions? This virtually wholesale transformation of the unbelieving and uncommitted, and the bringing on board of the losers in the process of legal integration, is precisely what needs to be explained.

IV. National Governments and the Doctrine of EC Law Supremacy—Muted Opposition

National judges had their own reticence towards accepting EC law supremacy, but in the context of the 1960s this reticence was neither isolated nor anachronistic. One could easily have argued that rather than national judges being out of sync, it was the ECJ which was out of sync with larger political movements pulling back from the supra-national pretensions of the Treaty of Rome. Politicians were openly antagonistic to the idea of EC law supremacy, and there was a strong movement of politicians actively working to weaken the supra-national elements of the Treaty of Rome. This section examines politician’s response to the ECJ’s bold legal doctrines, putting political action and non-action in the context of the process of political integration in the 1960s. I argue that the political context of the 1960s was hostile to the extension of supra-national authority, but despite unhappiness with the ECJ’s legal argumentation in political circles, politicians reacted to the ECJ’s doctrines with muted opposition. The failure to react more strongly

should not, however, be interpreted as a tacit agreement to legal integration by political bodies. Rather it should be viewed as a rational response to what was really only a *hypothetical* extension of ECJ authority, a sort of wait and see response on the part of politicians who did not expect the ECJ's bold legal proclamations to amount to much in practice.

The period of the 1960s was one of political turmoil and retrenchment within the political institutions of the EC, an environment decidedly inhospitable to the expansion of supra-national authority. The political backlash against supra-nationalism was already brewing when the ECJ was declaring the doctrine of Direct Effect and the Doctrine of EC law supremacy, and while many observers blame General de Gaulle for single handily breaking the momentum towards integration, other member states were also uneasy about integration and were quite willing to put a break on supra-national power expansion.

In the context of the political turmoil in the EC in 1964 and 1965, the ECJ's decisions were easily dwarfed by "high politics" events. What had been a growing political tension within the Council, and between the Council and the Commission, finally erupted in 1965 after the Commission made a proposal to enhance the budget making authority of the Parliament, and to give the Commission an independent budgetary source from agricultural levies. De Gaulle was adamant that the Commission should not get its own funding source, that the Parliament's powers should not be increased, and that the envisioned switch to majority voting in the Council should not occur. According to Gerbet's analysis of the crisis, the Commission's proposal was miscalculated not only because it was first presented to the Parliament, but also because the Commission had assumed that the French were politically isolated in their ambivalence towards progressing integration.⁹⁴ The crisis led to de Gaulle's empty chair policy, and was ultimately resolved through the so-called "Luxembourg compromise", where the move to qualified majority voting was put off indefinitely.⁹⁵

⁹⁴ Gerbet, Pierre. 1983. *La Construction de l'Europe*. Paris: Imprimerie nationale. See p. 323. Van der Groeben also supports this analysis Van der Groeben, Hans. 1985. *The European Community: The Formative Years, The European Prospectives Series*. Brussels: The Commission of the European Communities.

⁹⁵ Nicoll, W. 1984. *The Luxembourg Compromise*. *Journal of Common Market Studies* XXIII (1 September). Teasdale, Anthony. 1993. *The Life and Death of the Luxembourg Compromise*. *Journal of Common Market Studies* 31 (4):567-578.

The Luxembourg compromise did not, however, resolve the underlying tension between national governments and the European institutions. De Gaulle continued to lobby for a weakening of the powers of supra-national authorities and for the continued exclusion of the British from the Union, and he succeeded in blocking numerous Commission proposals, and in forcing the replacement of the Commission's president Hallstein. To further weaken the influence of the Commission, the Council turned the newly created Committee of Permanent Representatives (COREPER) into a shadow bureaucracy which allowed member states to better monitor the Commission and provided national governments with an independent information source regarding Commission proposals. In addition, member states instituted a practice of extra-institutional meetings of the European heads of states as a non-community form for decision-making on important EC issues.⁹⁶ It was into this tense political context, where politicians were trying to limit the supra-national aspects of the EC, that the Court's revolutionary decisions were launched.

Given the political climate, one might have expected fairly strong reactions against the Court's bold jurisprudence in 1963 and 1964, but actually the political reaction was fairly mild. The lack of political backlash has been read as tacit support for the ECJ's decisions,⁹⁷ but there are strong reasons to question if there was significant political support for the ECJ's actions—tacit or otherwise. Member states did not want or welcome the doctrine of EC law supremacy. Their failure to legislatively respond to these unwanted doctrines was more a result of uncertainty regarding the future costs of not responding to the legal argumentation supporting what were otherwise acceptable ECJ legal decisions, and institutional barriers to creating a political response. While the decisions contained bold language, there was really nothing concrete about the *Van Gend* or the *Costa* decisions themselves which could be addressed through a legislative response in the Council, and it was quite difficult in 1964 to imagine that these decisions were planting the seeds of a judicial revolution. Take for example the *Costa* case, where the plaintiff used a 3 dollar electric

⁹⁶ Pescatore, Pierre. 1978. L'Executif Communautaire: Justification du Quadripartisme Institué par les Traités de Paris et de Rome. Cahiers de droit européen (4):387-406. Weiler, Joseph. 1981. The Community System: The Dual Character of Supranationalism. Yearbook of European Law 1:257-306. Weiler, Joseph H. H. 1985. Il sistema comunitario europeo; Struttura giuridica e processo politico. Bologna: Il Mulino.

⁹⁷ Garrett, Geoffrey. 1995. The Politics of Legal Integration in the European Union. International Organization 49 (1):171-181. and op. cit. Rasmussen (1986 p. 289)

bill to challenge the right of national governments to nationalize industries. The Court rejected the plaintiff's charge, finding that he had no legal standing since the Treaty articles in question did not create direct effects.⁹⁸ The ECJ's *Costa* decision was also really a non-decision, in that it did not imply that any action be taken by either the national judge or the Commission. Given that the Italian nationalization law was upheld, what was there for politicians to protest?

Member states had complete control of the legislative process, and because of the Luxembourg Compromise they could veto any EC legislation which conflicted with their vital interests. According to Joseph Weiler, this control of the legislative process made the European Court's supremacy declarations less threatening.⁹⁹ Even if politicians were ultimately concerned about the doctrinal implications of the *Van Gend* and *Costa* decisions, it was very unclear that the Court's controversial legal proclamations would be picked up within broader national judicial circles. For all practical purposes the ECJ's decision was dead before it was even issued. Before the ECJ had even ruled in the *Costa* case, the Italian Constitutional Court had rejected the notion that EC law could be supreme to subsequent national law, siding with the Italian government's position that the reference to the ECJ by the small claims court was invalid.¹⁰⁰ Other national courts also did not appear to be convinced by the ECJ's argumentation. Twice in the 1960s plaintiffs tried to get the French *Conseil d'État* to refer challenges to French policy to the Court, and twice the *Conseil d'État* refused jurisdiction for itself or for the ECJ. In the 1968 case, the French *Conseil d'État* explicitly rejected the ideas underpinning the ECJ's legal reasoning, refusing for itself any role enforcing the supremacy of EC law over national law.¹⁰¹ And while in 1967 the German Constitutional Court issued a decision which seemed to support parts of the ECJ's argumentation, German politicians were probably mostly relieved with the decision since the Constitutional Court agreed that the EC Treaty- and thus membership in the E —was compatible

⁹⁸ Op. cit. Mann (1972) p. 406-410.

⁹⁹ Op. cit. Weiler (1991).

¹⁰⁰ Op. cit. Stein (1981) p. 11.

¹⁰¹ *Conseil d'État's Shell Berre decision*- 19 June 1964- *Revue du droit public et de la science politique en France et en étranger* No. 5 p. 1034-1041; *Syndicat General de Fabricants de Semoules de France*- *Commissaire du Gouvernement* 1 March 1968 *Common Market Law Report* 1970 vol 9

with the Basic Law and asserted that it would not interfere in the Germany's EC policy by examining the constitutionality of acts agreed to in the Council.¹⁰²

Indeed, there were not really any ECJ decisions in the 1960s which had significant negative material or political impact in the national legal or political systems.¹⁰³ Because the ECJ was institutionally weak, it was purposely limiting its decisions so as to avoid creating too much political pain. Mann (1972) noted that in the 1960s "by narrowly restricting the scope of its reasoning, [the ECJ] manages to avoid almost every question in issue." Mann finds this strategy to be prudent, saying

The Court has been conscious in the *Vloeberghs* and *Albatros* judgments on the real limits on its authority when faced with the unwillingness and indifference of the High Authority or Commission and the Member States. It has prudently avoided issues which might better be resolved at a future date.¹⁰⁴

The one time when the ECJ made a decision which created significant political problems for the German government, under mounting political pressure from the German government and the Federal Tax Court, the ECJ amended its jurisprudence so as to make the political problem disappear.¹⁰⁵ Since ECJ and national court rulings had not created any real political problems for the member states up until then, it was quite easy to discount the strong wording in the body of the *Costa* and *Van Gend* decisions.

While national governments did not respond to the ECJ's 1963 and 1964 decisions through legislative action, they made it clear at the time of the decisions and afterwards that they disagreed with any transformation of the Article 177 system and the expansion of the ECJ's judicial powers. Even the member states more inclined to support supra-nationalism had felt unable to support the

¹⁰² BVerfG decision of 18 October 1967, 1BvR 248/63, 1 BvR 216/67 Common Market Law Review 1968 p. 483-484

¹⁰³ ECJ decisions in the 1960s certainly were extremely bold as far as legal doctrine went. But the actual application of the decisions was far less consequential than the doctrine alone would apply. For example, the Court's bold *Lütticke* decision of 1965 potentially effected many areas of German turnover equalization taxes, creating financial consequences which would have been incalculable. But subsequent ECJ and German Tax Court decisions narrowed the scope of the ruling so much, that in effect only one plaintiff received a 1% refund of a German turnover tax levied on milk powder. More concerned with legal precedent than actual implementation of ECJ decisions, legal analysis of ECJ jurisprudence can create a misleading perception of the material and political impact of ECJ jurisprudence.

¹⁰⁴ Op. cit. Mann (1972) p. 432.

¹⁰⁵ See the discussion of the turnover equalization tax struggle in Chapter 4.

Court's readings of the Treaty of Rome. In the *Van Gend* proceedings, the German, Dutch and Belgium governments opposed in no uncertain terms the idea that national courts should look to the European Court in order to question the validity of a national law, invoking legally based arguments to support their positions. In the *Van Gend* decision,

[t]he Governments denied the jurisdiction of the Court to deal with the request from the Dutch tribunal at all. They relied both on an interpretation of the Treaty and on international practice with respect to treaties. In the Community system, the argument went, a charge against a member state of Treaty infringement as was involved in this case might be brought before the Court only by the Commission or by another member state pursuant to the procedure specifically made available in Articles 169 and 170; it could not be referred to the Court of Justice by a national court under Article 177 lest "the legal protection" of the state be "considerably diminished." Moreover, the jurisdictional argument continued, even if such a reference was admissible in principle, the issue was the effect in Dutch internal law of an international treaty; according to established international law practice, this issue must be determined exclusively by Dutch constitutional law.¹⁰⁶

In the *Costa* decision, the Italian government argued that the reference was "absolutely inadmissible," and re-iterated the argument that only the Commission or another member state could challenge a national law. It added that even if the Court did find a breach in treaty implementation, the rules of national law remain valid until such a time as the State takes an action to rectify the situation. In 1968 de Gaulle suggested that the competences and powers of the Court should be revisited and weakened,¹⁰⁷ and while this proposal was not realized, given De Gaulle's convictions and influence, the suggestion of such a proposal should not be treated lightly. In addition, between 1968 and 1970, the issue of expanding the European Court's jurisdictional authority to include dispute resolution for newly adopted political conventions was raised, and a special committee of legal experts was convened to evaluate the issue. Member states could not agree on if the Court should be given this new jurisdictional authority, or if Article 177 should be extended to cover these new conventions. Officially, opposing governments said that they feared overburdening the ECJ with too many cases. But they had just rejected a proposal to address the over-burdening issue by creating a court of first instance.¹⁰⁸ Rasmussen suggests that given that there were numerous ways to address the problem of an over-burdened court:

¹⁰⁶ Op. cit. Stein (1981) p. 5 and *Costa* decision p. 602.

¹⁰⁷ Noted in the Foyer-Debré proposition de Loi- (Tabled in the French Assemblée National. No 917 of 17 February 1979 (Rasmussen (1986) p. 351).

¹⁰⁸ Ibid. Rasmussen p. 371 note 119.

the real motive for the rejection of a single-formula concept modeled after Article 177 was that deeper ripples existed among the Six Member States as to how to assess the Court's undoubted success in promoting integration achieved under the auspices of Article 177. These disagreements reflect differing evaluations of the desirability of the supra-national aspects of the Community Treaties and institutions.¹⁰⁹

Rather than choosing to accept the new legal system in the 1960s, there is ample evidence that at least some politicians disagreed fundamentally with notion of the supremacy of EC law over national law. The failure of politicians more vigorously to the Court's controversial legal doctrines can be explained by the Court's strategy of limiting the material impact of its decision, and by uncertainty over the future effect of the Court's bold early doctrinal decisions. But uncertainty as to the ultimate impact of the Court's early jurisprudence can only explain so much. At some point it became clear to politicians that the Court's doctrines were gaining ground at the national level and that the ECJ was willing to apply its doctrine in ways which actually created undesirable political outcomes. At this point, one must ask why politicians did not react more strongly. Politicians are in a position to seriously threaten the independence, influence and authority of the ECJ, so that politicians can have decisive influence over the Court's jurisprudence. Once it became clear that the Doctrine of EC Law Supremacy was a real threat to national sovereignty, why did politicians not squelch the supremacy of EC law or reign in the ECJ or their national judiciaries?

V. Explaining Legal and Political Acceptance of EC law Supremacy

The European Court fundamentally transformed the EC legal system, from a system where access to the EC legal system was quite restricted and ECJ decisions were basically unenforceable, to a system where individuals raise challenges to national law and in national courts and national courts enforce EC law supreme the national realm. This system has greatly increased the enforceability of the EC law. As Justice Federico Mancini has argued:

Without the doctrine of direct effect the enforceability of the basic rights created by the Treaty would have been dependent on the willingness of the Council of Ministers to adopt the necessary implementing regulations or on the willingness of the Council of Ministers to adopt the necessary implementing regulations or on the readiness of the Commission to prosecute Member States under Article 169 of the Treaty (which was of course a toothless remedy in the pre-Maastricht version of the Treaty). Without direct effect, we would have a very different Community today—a

¹⁰⁹ Ibid. p. 338.

more obscure, more remote Community barely distinguishable from so many other international organizations whose existence passes unnoticed by ordinary citizens...¹¹⁰

In addition to increasing the enforceability of EC law, the transformed EC legal system had another consequence. It made it harder for member states to protect national sovereignty, and allowed the European Court to intervene into domestic political disputes and issue rulings regarding national policy in areas only tangentially related to creating the Common Market.

From the vantage point of today, the steps in the transformation of the EC legal system seems quite clear. Most accounts of legal integration focus on the important legal decisions which the ECJ established key legal doctrines, and to a lesser extent on national courts decisions in which these doctrines were accepted. This technique creates the impression that each step in the process was politically uncontroversial and pretty much a win-win situation for all actors involved. The European Court got a more effective legal system. The national courts got a new opportunity to conduct judicial review. And politicians got European integration and a system to better enforce the Treaty. But the transformation of the EC legal system was not universally praised, indeed many actors lost out in the process. High national courts have lost important aspects of their legal autonomy and supreme authority in the legal realm, and legal safeguards of great concern to national judiciaries have also been compromised. Perhaps more importantly, member states have lost national sovereignty and the ability to control when and how the ECJ intervenes into domestic political matters.

In the 1960s the European Court's doctrines were very controversial within national legal systems, and did not have significant support among the governments of the member state either. Within national legal communities there were powerful legal and political traditions and entrenched judicial interests working against the Court of Justice's Supremacy doctrine. Indeed the vast majority of national judges saw enforcing EC law as a hassle with few benefits. Politicians were also concerned about the legal developments. Indeed it would be a mistake to see national politicians as duped lackeys that were too unorganized or thrown off by legal mysticism or the legal terminology

¹¹⁰ Mancini, Federico, and David Keeling. 1994. Democracy and the European Court of Justice. *Modern Law Review* 57 (2):175-190. See p. 19.

to notice what was going on. National politicians followed the process as it was unfolding and expressed clear preferences in the legal cases and political debates. But they found themselves hamstrung to do anything about the Court's emerging influence and power.

There were significant contingencies in the process of legal integration, many reasons to have doubted that the European Court would have succeeded in its bold endeavor. All it really would have taken to derail the Court's project was for national courts to refuse to send cases to the ECJ, reject the notion of EC law supremacy, and refuse to accept ECJ jurisprudence which conflicted with national law and established national legal precedent. How were the national judicial barriers to legal integration overcome? When it became apparent that the ECJ's doctrines were encroaching on national sovereignty, why didn't national politicians or the Council intervene and change the system? In an international organization where member states were so jealous of their national sovereignty that it once took twelve years to agree to common standards for jam, how could the member states have conceded so much? How could the European Court have gained so much autonomy and political power?

Chapter 3

Explaining the Acceptance of the European Court's "New Legal Order": An Inter-Judicial Politics Explanation of Legal Integration

...The (European) Community constitutes a new legal order of international law 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 Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

Van Gend & Loos decision written by the
European Court of Justice, 1963

In 1963, the European Court boldly declared the establishment of a new legal order affecting both state sovereignty and the rights of individuals within the member states. This "new legal order" was dependent on national judicial support for its growth and sustenance. The individual rights under the "new legal order" were to be asserted through national courts and national court references were necessary to give the European Court the cases through which it could develop the legal principles underpinning the European legal order. If national courts rejected the direct effect or supremacy of EC law the Court's project would have remained what it was in 1963—simply a proposition.

Explaining the behavior of national courts in the process of legal integration is critical to understanding how the European Court has come to wield significant influence and authority in the political process. As chapter two showed, there were ample legal and political reasons for national courts to reject the Court's declaration of the supremacy of EC law over national law. Why did national judges facilitate the development of the new legal order? Why did they reverse their legal precedents and enforce EC law against their own governments? Why did national politicians accept the revolutionary transformation of the EC legal system which gave the ECJ the authority and the opportunity to strike down national laws and policies?

Within national legal communities, the debate over national courts enforcement of EC law took the form of a legal doctrinal debate about the relationship of European law to national law. If European law was supreme to subsequent national law, then national courts would have to review

the compatibility of national law with EC law, and disapply any provisions of the national law which conflicted with EC law. But if European law was not supreme to subsequent national law, then national courts did not have consider whether or not national law violated EC law. In all of the original member states national courts had to change existent legal precedents in order to enforce EC law over subsequent national law re-interpreting the constitution. Within the national judiciaries, there was a virtual battle over whether or not legal precedent should change, and on what basis it should change. Different courts took different positions on the issue, and the positions changed across time.

The European Court was indirectly part of these national doctrinal debates. The European Court's role was indirect because the doctrines which needed to be re-interpreted were based on national constitutions, and the ECJ had no authority to interpret national constitutional provisions. But the ECJ was nonetheless involved because the supremacy issue was confronted because when there was a clear conflict between national law and ECJ jurisprudence. Because lower courts were taking positions on the ECJ jurisprudence, higher courts had to deal with the issue of EC law supremacy directly.

This chapter develops an inter-judicial politics explanation of national doctrinal change regarding the issue of EC law supremacy and of national judicial support in legal integration. I argue that the EC legal system, because it offered a way to escape national rules and national legal hierarchies, became a tool of national courts in struggles among themselves. National courts were interested in protecting or expanding their influence, independence, and authority vis-à-vis each other which led to differing strategies vis-à-vis the ECJ and EC law. Lower courts found that sending references to the ECJ increased their influence and independence in the national legal system without compromising their authority over the national law, while higher courts—reacting to ECJ decisions made in lower court references—tried to stop the expansion and penetration of ECJ legal doctrine which compromised their independence, influence and supreme authority regarding national law. The different strategic calculations regarding the benefit of referring cases to the ECJ and appealing to EC law created a dynamic of legal integration, actually driving the

expansion and penetration of European law into the national legal systems. This dynamic created significant pressure on higher courts to change national legal precedent which conflicted with ECJ jurisprudence.

The inter-judicial struggles among the courts interpreting EC law had lasting consequences for the relationship between the ECJ and politicians, and for national sovereignty. Because national courts were sending cases to the ECJ, national governments could no longer keep the Court out by asserting national sovereignty. National court enforcement of ECJ jurisprudence also meant that politicians could no longer ignore unwanted ECJ decisions, thus the threat of non-compliance was significantly diminished. National court acceptance of EC law supremacy closed extra-legal avenues of defiance, such as national political vetoes of ECJ decisions. And because of divergent interests among the member states, national governments found themselves unable to overturn ECJ jurisprudence or to credibly threaten the ECJ not to intervene in national policy issues. National judicial support thus created significant political autonomy for the ECJ, and gave the ECJ the power to compel compliance with its decisions.

Section I considers three alternative explanations of legal integration: legalism, neo-functionalism, and neo-realism. The second section will develop an inter-judicial politics explanation of legal integration. Section three will examine why politicians did not stop a development which undermined national sovereignty, and how national judicial support has undermined the national government control over the ECJ. Section four examines limitations to ECJ autonomy and influence emerging from the interests and strategies identified in the inter-court competition explanation. While I will present some evidence to support the arguments developed in this chapter, most of the evidence is provided in the case studies which follow.

I. Alternative Explanations of Legal Integration

There is a large amount of literature on the European legal system, but there is not a well developed scholarship on the role of national courts in the European legal system.¹ Much of the EC law literature is directed at a legal audience and basically reports on legal decisions, the workings of the EC legal process, and jurisprudence of the Court of Justice. The non-legal oriented scholarship focuses on explaining legal integration. To the extent these studies have addressed the issue of national judicial support, this question was usually secondary to the larger analysis and perhaps for this reason usually not very well developed or supported. Specific arguments about national judicial support are made, but these arguments run into difficulties when pushed to account for the most basic variation in national court behavior vis-à-vis the ECJ across time, across countries or even within a single country.

Legal integration refers to the expansion and penetration of EC law into the national legal order. Three different theories of legal integration have been developed in the literature, each implying fundamentally different mechanisms driving legal expansion, identifying different motivations for judges in facilitating legal integration, and providing different explanations of political acquiescence in the process of legal integration.

Legalist theories explain the expansion and penetration of EC law based on legal logic inherent in the Treaty of Rome, which is embodied by ECJ jurisprudence. National court acceptance of ECJ jurisprudence is explained by the compelling legal reasoning in the Court's

¹ This question is starting to be addressed more. See: Alter, Karen. 1995. Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration. European University Institute. 95/27. Claes, Monica, and Bruno De Witte. 1995. The European Court and National Courts. The Netherlands. European University Institute. 95/26. National Report for the Project: *The European and National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context*. Craig, Paul. 1995. The European Court and National Courts— Doctrine and Jurisprudence: Legal Change in Its Social Context: Report on the United Kingdom. European University Institute. 95/29. National Report for the Project: *The European and National Courts—Doctri.e and Jurisprudence: Legal Change in its Social Context*. Golub, Jonathan. 1996. The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice. *West European Politics* 2. Weiler, Joseph. 1994. A Quiet Revolution- The European Court of Justice and its Interlocutors. *Comparative Political Studies* 26 (4):510-534.

jurisprudence. Political acquiescence is explained by judicial independence and judicial legitimacy which limit the ability of politicians to influence legal interpretation.

Neo-functional theory explains legal integration in terms of functional logic and empowerment. Legal reasoning, empowerment, and functional spillovers shape judicial decision-making and drive the expansion and penetration of European law into the national legal systems. National governments do not play a significant role in the process, instead the technical separation of law and politics provides a mask and shield protecting courts from direct political influence. Political spillover (incrementalism) slowly shifts political preferences, which explains political acquiescence to legal integration.

Neo-realist theory explains legal integration by the national interests of member states. National interest concerns are seen as driving the expansion of EC law, and shaping ECJ and national court-decision-making. The overlap of ECJ jurisprudence and national interests explains political acquiescence to the process of legal integration—politicians accept legal integration in general, and specific ECJ decisions, because these decisions reflect their interests.

In what follows I consider these theories in more detail and how they can account for variation in judicial behavior. Since I am most interested in how the theories account for national judicial support and political acquiescence, I will focus mainly on these two variables.

Legalist Theories of Legal Integration²

Legalists theories of legal integration focus on the role of legal logic and legal reasoning in shaping judicial behavior. In their purest form, the legal texts are seen as embodying an integrative logic, and this logic drives judicial decision-making. Shapiro captures the essence of

² The strongest proponents of legalism in the EC context tend to be ECJ justices themselves, and legal scholars who were at one point affiliated with the Court or the Commission. As Shapiro, Burley and Mattli have pointed out, these actors are motivated by a political agenda which can help explain a willingness to overlook certain activist and political elements of the process of legal integration. As Shapiro put it: "To treat the law as autonomous is to accentuate the positive; that sort of accentuation is important to institutional building." Shapiro, Martin. 1980. Comparative Law and Comparative Politics. *Southern California Law Review* 53. See p. 542.

the legalist analysis in his critique of a legalist account of the transformation of the EC legal system:

the Community [is presented] as a juristic idea; the written constitution (the treaty) 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 (the ECJ) as the disembodied voice of right reason and constitutional teleology.³

Legalist approaches focus mostly on the European Court and how it drives the process of legal integration through its legal decisions. According fundamental importance to the compelling nature of the ECJ's legal doctrine to explain legal integration, legalist approaches see national judiciaries as having been convinced by logic and the legal arguments embodied in the ECJ's jurisprudence. Mancini explains the process this way:

Knowing that the Court had almost no powers that were not traceable to its institutional standing and the persuasiveness of its judgments they made the most of these assets. Thus they developed a style that may be drab and repetitive, but explains as well as declares the law and they showed unlimited patience vis-à-vis the national judges....It was by following this courteously didactic method that the Luxembourg judges won the confidence of their colleagues from Palermo to Edinburgh and from Bordeaux to Berlin; and it was by winning their confidence that they were able to transform the procedure of Article 177 into a tool whereby private individuals may challenge their national legislation for incompatibility with Community law.⁴

Certainly legal reasoning and legal logic influences judicial decision-making. But legal logic and legal reasoning cannot easily explain the significant variation in national judicial acceptance of ECJ jurisprudence across courts, across countries, and across time. The legal literature has offered a host of ad hoc "explanations" for this time lag and for cross national, and cross-court variation, such as the influence of dualist doctrine on national judiciaries,⁵ the lack of a tradition of judicial review in some member states,⁶ the lack of a federalist or constitutional

³ Ibid. p. 538.

⁴ Op. cit. Mancini (1989) p.605-606 Similar arguments have been made by Cappelletti: Cappelletti, Mauro, and David Golay. 1986. *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration. In Methods, Tools and Institutions: Political Organs, Integration Techniques and Judicial Process*, edited by M. Cappelletti, M. Seccombe and J. Weiler. Berlin: Walter de Gruyter. See p. 333; and Cappelletti, Mauro. 1989. *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press. See p. 371

⁵ Bebr, Gerard. 1981. *Development of Judicial Control of the European Communities*. The Hague: Martinus Nijhoff Publishers.

⁶ Maher, Imelda. 1994. *The Common Law Courts as Community Courts*. 2nd ECSA World Conference May, 1994. Vedel, Georges. 1987. *L'attitude des juridictions françaises envers les traités européens*. Speech given at Europa-Institut der Universität des Saarlands im Rahmen der Reihe "Deutsch-Französischer Dialog". February 18, 1987: Europa-Institut der Universität des Saarlands.

model,⁷ problems of diffusing information across national judiciaries, old habits embedded in judges not used to the new and strange EC law,⁸ and legal parochialism and judicial nationalism.⁹ But none of these arguments consistently hold true. Doctrinally dualist Germany and Italy have had an easier time accepting EC law supremacy than doctrinally monist France. The Netherlands and Belgium, which also lack traditions of judicial review, have also had less trouble than France. Generational and information diffusion explanations fall short when accounting for the 1993 decision of the German Constitutional Court which was more reticent on the issue of EC law supremacy than its “Solange I” decision issued 20 years earlier.¹⁰ And in France, despite common legal traditions, the three different branches of the legal system for many years adopted different doctrinal stances regarding EC law.¹¹

Legalist theories also have difficulty accounting for why one persuasive legal argument wins out over another persuasive argument. National courts rejected the legal argumentation for EC law supremacy based on the EC Treaty instead insisting that there must be a national legal basis to accord EC law supremacy over national law. There were entrenched national legal precedents which contradicted the ECJ’s supremacy arguments. These precedents were maintained for a long time despite the ECJ’s declaration of EC law supremacy, and despite the arguments of supporters of European integration who called for a re-interpretation of the Constitution and a reversal of legal precedent. For example, in France the *Conseil d’État* rejected the ECJ’s Supremacy jurisprudence and argued that reviewing the compatibility of French law with international law would violate the prohibition against judges conducting constitutional

⁷ Op. cit. Cappelletti and Golay (1986)

⁸ Meier, Gert. 1994. Der Streit um die Umsatzausgleichsteuer aus integrationspolitischer Sicht. *Recht der Internationalen Wirtschaft* 3/94.

Pescatore, Pierre. 1970. L’attitude des juridictions nationales à l’égard du problème des effets direct du droit communautaire. *Revue trimestrielle de droit européen* (2):296-302.

⁹ Abraham, Ronny. 1989. Droit international, droit communautaire et droit français, Le Politique, L’Economie, Le Social. Paris: Hachette. See pp. 170-171.

¹⁰ *Brunner and others v. The European Union Treaty* BVerfG. 2 BvR 2134/92 and 2 BvR 2159/92. *Common Market Law Reports* (11 January 1994):57-108.

VWG Frankfurt reference to BVerfG- decision from 14.7.1971 II/2- E 228/69 VWG Frankfurt decision of July 14, 1971. *Außenwirtschaftsdienst des Betriebs-Beraters* 1971(Heft 11):541-546.

¹¹ Op. cit. Vedel (1987).

review. Pro-integration French legal scholars argued that French judges could “apply” article 55 of the French constitution without conducting constitutional review. The *Cour de Cassation* endorsed this argument, but the *Conseil d’État* rejected it. In 1989 the *Conseil d’État* re-interpreted Article 55 of the constitution to find itself empowered to enforce EC law supremacy, an interpretation of the article it had rejected for over twenty years. Why should the pro-EC law supremacy arguments have been refused in the 1960s and 1970s but then accepted in the 1980s? Why are certain legal arguments accepted by some courts but rejected by others? Why does legal interpretation eventually converge around a common understanding of the law?

As a theory, legalism has little to say about how politics or politicians influence judicial decision-making and why member states acquiesced to the ECJ’s “new legal order.” Legal scholars point out that institutions designed to facilitate judicial independence protect judges from political influence, that the apparent neutrality of the legal process makes it hard for politicians to attack unwanted decisions, and the legitimacy of the judiciary limits the ways in which politicians can respond to judicial policy-making.¹²

There are many situations in which the law is indeterminate and where a judge must choose among competing legal argumentations. This is the situation confronting national courts faced with competing national legal precedents and EC legal precedents. Legalist theory provides little insight into how this conflict is resolved, or why legal argumentation varies by court or changes over time. The choice of which legal reasoning is accepted matters both because the outcome of the case can turn on the choice, and because the choice will effect how future cases are resolved.

A Neo-Functionalist Theory of Legal Integration

Anne-Marie Burley and Walter Mattel offer a neo-functionalist account of legal integration which focuses on the critical role played by sub-national legal actors in the process of legal

¹² For example see Weiler, Joseph. 1991. The Transformation of Europe. *Yale Law Journal* 100:2403-2483. .

integration. The neo-functional and legal accounts are similar in that both rely on the functionalist logic of the law to explain the expansion of EC law, and the separation of law and politics and incremental developments (what Burley and Mattel call political spillover) to explain political acquiescence to legal integration. Neo-functionalism adds to legalism a theory of interests showing how the interests of supra-national and sub-national actors contribute to the outcome of legal integration.¹³

Burley and Mattel argue that the genius behind the transformation of the preliminary ruling system was that it created a system where the pursuit of self interest would lead to the expansion and penetration of European law into the national legal systems:

The Court...created...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.¹⁴

Individual European citizens could support the development of the EC legal system by bringing cases which promoted their individual interests; lawyers specializing in EC law could encourage plaintiffs to bring cases, and national judges to make references to the ECJ and thereby benefit personally from the growth and expansion of EC law; legal scholars could support the system through favorable doctrinal writings which granted credence to the ECJ's legal interpretations, and parenthetically increased the demand for university professors to teach EC law and enhanced individual career prospects within the legal services of the European Union and the ECJ itself; national judges could refer cases to the ECJ and gain a chance to practice judicial review, a practice involving more interesting legal questions, and a practice which gave the judge more power vis-à-vis politicians, and which gave lower court judges the power to conduct the same type of review as higher court judges or constitutional court judges; and the ECJ could make far

¹³ Burley and Mattli point out this similarity on pp. 75-76 (op. cit. 1993).

¹⁴ Ibid. p. 60.

reaching decisions which enhanced its own prestige and authority. The pursuit of self interest is supposed to lead towards the promotion of “community goals.”¹⁵

The insight that numerous legal actors actually gain through legal integration is very important. But Burley and Mattel imply that everyone involved in the legal process has an interest in the expansion of ECJ authority, and that everyone wins through legal integration. There are of course actors which do not see an interest in the expansion of ECJ authority in the national realm. Many national judges, especially judges on high courts, have found their supreme authority over national law and their autonomy to have been diminished because of EC law supremacy. Some have seen legal integration undermining national sovereignty, and national constitutional safeguards. Others have seen unwelcome changes in the nature of the law they are used to interpreting, and unpleasant effects of EC law on national law and policy. In addition, in each legal case there is a loser as well as a winner, and quite often the loser is the national government or national administration. Within the public as well there has been significant unhappiness with ECJ decisions and the effect of EC policy on national policy. In other words, there are conflicts of interest which the neo-functionalist account does not consider. To say that certain actors win is not to explain who wins and who loses, why those actors which win from an outcome prevail over those actors which lose, and why the losers in the process accept their losses.

Regarding the question of politicians in the process of legal integration, the neo-functionalist account explains political acquiescence in large part on the technical separation of law and politics. Law acts as a mask obscuring the issues at stake from the eyes of non-specialists. And law acts as a shield protecting courts from political attack. Burley and Mattli’s most compelling insight is that political interests must be “masked” in the language of law in order to have influence in the legal realm. That being said, it has little to say about which political interests

¹⁵ When discussing individual’s empowerment, Burley and Mattli argue “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.” Ibid. p. 60.

are in fact articulated in the legal realm and the arguments do not get us very far in understanding *how*, *why* and *when* politics will shape judicial behavior.

Neo-Realist Theories of Legal Integration

Neo-realist accounts of legal integration assert a direct relationship between national interest and judicial behavior. In its strongest form, the neo-realist argument claims that legal decisions at the EC level and at the national court level are shaped by the national interest calculations. Because legal decisions reflect national interest, the EC legal system does not compromise the independence of national governments. Because national governments largely control judicial decision-making, the EC legal system does not significantly compromise national sovereignty.¹⁶

Existent neo-realist explanations suffer from underspecification. First, it is extremely unclear how national interests are defined,¹⁷ indeed often the posited national interests offered by the authors appear quite fungible.¹⁸ Second, it is unclear how these national interest are conveyed to courts. Garrett argues that national governments control judicial decision-making through the appointment process, the ability of member states to overturn ECJ decision, and the ability of

¹⁶ Two scholars have offered arguments in this vein: Mary Volcansek and Geoffrey Garrett. The scholars differ in how they identify the national interest of the member states, but they agree that national interest calculations shape judicial behavior with respect to legal integration. Volcansek, Mary. 1986. *Judicial Politics in Europe*. Vol. 7, American University Studies Series X Political Science. New York: Peter Lang publishers. Garrett, Geoffrey. 1992. The European Community's Internal Market. *International Organization* 46 (2):533-560. Garrett, Geoffrey. 1995. The Politics of Legal Integration in the European Union. *International Organization* 49 (1):171-181. Garrett, Geoffrey, and Barry Weingast. 1993. Ideas, Interests and Institutions: Constructing the EC's Internal Market. In *Ideas and Foreign Policy*, edited by J. Goldstein and R. Keohane. Ithaca: Cornell University Press.

¹⁷ For Volcansek, the government's national interest in integration at any given time is deduced from external and internal structural factors (including international systemic forces, domestic institutional structures, and economic pressures), as well as domestic political factors (including public opinion, historic traditions, national character influences and various other ad hoc political factors). For Garrett, national interest is deduced from a loose calculus of economic interest defined by economic endowments and comparative advantage, and domestic political interests based on the political and economic strength of the interest groups which may lose in any given ECJ decision compared to the political and economic strength of interest groups which may win in any given ECJ decision. Op. cit. Garrett (1995).

¹⁸ For an example of the problem of specifying and thus assessing how national interests are reflected in court decisions, see the exchange regarding the interpretation of national interest definitions and the *Cassis de Dijon* decision. Garrett (1995) Alter, Karen, and Sophie Meunier-Aitsahalia. 1994. Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* decision. *Comparative Political Studies* 24 (4):535-561. Slaughter, Anne-Marie, and Walter Mattli. 1995. Law and politics in the European Union: a reply to Garrett. *International Organization* 49 (1):183-190.

member states to attack the independence and jurisdictional authority of the ECJ.¹⁹ But he offers no evidence that these tools have been used to influence judicial decision-making, and if a disinterested observer has difficulty in hindsight determining the national interest, one must really wonder how judges know what the national interest is. It is quite easy to construct post hoc a "rational" national interest calculations to accommodate almost any government response or court action, but creating such an explanation does not show that the interest was shaping the outcome. Similarly, possessing tools of influence is not the same as exercising influence.

Before the theories are specified with more detail, it is hard to identify when and how national interest might be shaping judicial decision-making. But the significant variation in the acceptance of ECJ doctrines by national courts suggests that posited tight link between national interest definitions and judicial behavior may be exaggerated. In Germany, there is evidence of cross temporal variation in the acceptance of EC law supremacy, but there is no evidence that German national interest in European integration was fluctuating significantly. And within both the French and German national legal systems, different courts took opposing positions on ECJ legal doctrine even though they presumably were influenced by the same national interests! There is also evidence in both the French and German cases that political leaders disagreed strongly with the position of the national judiciaries on the issue of EC law supremacy. In France the national assembly voted overwhelmingly for an amendment designed to reverse the *Cour de Cassation's* acceptance of EC law supremacy.²⁰ In Germany, the government went so far as to buy off a plaintiff raising a challenge to EC law for fear that the German Constitutional Court would find the law to be in violation of the German Basic Law.²¹ And there are numerous cases where the

¹⁹ Op. cit. Garrett (1992 and 1993).

²⁰ Isaac, Guy. 1980. A propos de l' <<amendement Aurillac>>: Vers une obligation pour les juges d'appliquer les lois contraires aux traités? *Gazette du Palais II:Doctrines*: 583-585. A similar amendment was passed overwhelmingly in the Belgium parliament. Bribosia, Hervé. 1995. Direct Applicability and the Primacy of European Community Law in the Belgian Legal Order. European University Institute. 95/24. National Report for the Project: *The European and National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context*.

²¹ The case was Hauer, and with intervention of the Economics Ministry the state government agreed to give the plaintiff the subsidies she wanted so that she would withdraw the constitutional complaint filed at the German Constitutional Court. ECJ decision of December 13, 1979. *Case 44/79 ECR* 1979: 3727. *K 205/76 VW Neustadt/Weinstraße* decision of January 31, 1980. *Europarecht* 1980(Heft 4):360.

ECJ decided against a country's specific economic interests in the case, where the leadership of the country issued threatening statements, but the national courts applied the decision nonetheless.

The argument that member states can influence judicial interpretation is well taken, and is an important contribution to the debates over legal integration which have not taken politician interests and the tools of political leverage seriously enough. But beyond the general claim that politics can influence judicial behavior, the neo-realist literature can offer little insight into how or when political factors will influence judicial behavior.

The Insights of the Legalist, Neo-Functionalist and Neo-Realist Literature

The three theories of legal integration evaluated above provide important insights into what shapes national judicial behavior with respect to European law and ECJ doctrine. Their most general insights cannot be disputed: self interest motivates the national legal actors involved in the legal process, legal logic and legal argumentation shape judicial decision-making, national governments can influence judicial behavior, and the independence of the judiciary limits the tools of leverage politicians have to influence judicial decision-making. But these insights don't get us very far in understanding judicial decision-making or the process of legal integration. What are the interests of judicial actors in the process of legal integration? Why do certain interests prevail over others? Why does legal interpretation change over time? How do we explain the variation in the process of legal integration across countries, across courts, and across time? What are politicians doing as legal integration is unfolding? Why don't politicians reverse ECJ decisions with which they do not agree? Why have politicians tolerated the ECJ's encroachments into national sovereignty?

II. An Inter-Judicial Politics Explanation of the Acceptance of EC Law Supremacy and a More General Theory of Judicial Behavior

This section puts forward an inter-judicial politics explanation of the acceptance of EC law supremacy by the national judiciaries. Like all other bureaucracies,²² courts engage in turf battles over their authority and over the legal issues they govern. I argue that all that competition between courts, each trying to promote their influence and authority vis-à-vis other courts, shaped the process of the legal integration of the Doctrine of EC Law Supremacy. The acceptance of EC law supremacy by national judiciaries created the institutional basis for national court enforcement of ECJ jurisprudence. Competition between courts also accounts for the variation we observe in national court acceptance and rejection of key pieces of the ECJ's doctrine.

In what follows I specify the interests of the different courts, and how these differing interests led to an inter-court competition dynamic of legal integration which shifted the national legal context and shaped national legal doctrine on the issue of EC law supremacy. Some evidence to support the argument is provided, but the arguments will be supported and animated more thoroughly in the case studies which follow.

What are the General Institutional Interests of Judges?

Members of the judiciary as a whole share an interest in maintaining the legitimacy of the judiciary. As Shapiro and others have argued, judges maintain legitimacy by adhering to legal norms which create the appearance of judicial neutrality and thereby make their decisions acceptable to the parties in the dispute.²³

As members of a specific court, judges want to protect and promote their independence, influence and authority. By independence, I mean that courts want to protect their autonomy in the judicial process, their freedom to decide a case in the way they feel appropriate, without interference by political actors or by other courts. By influence, I mean that courts want to

²² In Europe courts are bureaucracies. Judges are civil servants. Like any organization, politics influences promotions and appointments. But unlike the U.S. system, judges are not elected nor are politicians directly deciding on appointments or promotions (with the exception of constitutional court judges). Judicial terms are typically not subject to re-appointment, and judges have the job protection of all other civil servants.

²³ Shapiro, Martin. 1981. *Courts: A comparative political analysis*. Chicago: University of Chicago Press.

promote their ability to make decisions which can influence the policy process. Courts also want to influence each other through the development of legal doctrine; they want their legal interpretations to be accepted by other courts and other legal and political actors. By authority, I mean that judges protect their legal turf and the finality of their decisions. In aspiring to be independent and influential, I do not mean that judges desire to concentrate power in the judiciary or take over policy-making. Judges are socialized into the norms of the legal community,²⁴ norms which are designed to build influence and legitimacy for the judiciary as a whole,²⁵ so that the realm of independence and influence courts seek lies within a set of norms and world views which tells its members what is appropriate and legitimate *judicial* behavior. In addition there are many touchy issues in which courts do not want to become politically entangled. What judges want is the ability to choose in which issues they become involved, choose how their power is legitimately exercised, and be able to influence policy in the areas of choice when they feel it appropriate.

Courts protect their independence, influence, and authority by defending access to their court, defending the scope of the types of issues their court is competent to entertain, and defending the finality of their court's decisions by warding off reversals. Courts act strategically vis-à-vis other courts, and vis-à-vis politicians, calculating the political context in which they operate so as to avoid provoking a response which will close access, remove jurisdictional authority or reverse their decisions.

The Specific Interests of Different Courts

Judges share common interests so far as their power derives from their legal office. But as actors on a court they also care about their influence, authority and autonomy within the legal system. They have certain legal interpretations which they think are more right than others, and they want these interpretations to be accepted by others. They also want to protect their

²⁴ Merryman, John. 1969. *The Civil Law Tradition*. first ed. Stanford: Stanford University Press.

²⁵ Op. cit. Shapiro (1981).

independence from other actors in the legal process and have autonomy in how they interpret and apply the law. Finally, they want to maintain their supreme authority and not have their decisions challenged or reversed by other courts, and they want to protect their legal turf from other judicial actors.

The doctrine of EC law supremacy touched directly on the strategic issues of access to courts based on EC law, the authority of individual courts to decide different questions of law, and the division of jurisdictional authority between courts, and between courts and political bodies. But EC law supremacy effected the interests and thus the strategies of courts differently, so that acting strategically led different courts to adopt divergent positions regarding the supremacy of EC law. For some courts, EC law was a tool to promote their independence and authority, and for other national courts the existence of the ECJ as the highest authority of EC law made EC law and some ECJ jurisprudence threatening.

Lower National Courts

The EC legal system is no threat to the jurisdictional authority or finality of lower court decisions. As long as a lower court agrees with ECJ interpretations, ECJ decisions actually lend legal credibility to a lower court decision and thus bolster the influence of the lower court within the national legal system. Especially in the face of conflicting higher court jurisprudence, references to the ECJ have become a convenient means to circumvent higher courts.²⁶ A lower court decision based on an ECJ decision is politically harder to challenge and reverse. Legal scholars take note of the failure of higher courts to apply ECJ jurisprudence, writing vehement

²⁶ Murphy, in his well known study of judicial strategy, found that in the U.S. as well lower courts often disagreed with higher courts and used the protections of their office to circumvent higher court jurisprudence. He argued:

if and when lower court judges choose not to follow Supreme Court decisions they are far more insulated against retaliation than are administrators.... judges in (most lower) courts do not owe their original appointment or tenure to the pleasure of the Supreme Court. Since they are chosen according to different considerations, it is inevitable that, although Supreme Court and lower court judges share many basic values of American society, they have many different specific values, outlooks and ambitions which produce conflicting interpretations of law and policy.

In the EC, they could promote these values, outlooks and ambitions through references to the ECJ. Murphy, Walter. 1964. *Elements of Judicial Strategy*. Chicago: Chicago University Press. Quote on p. 25

critical commentaries on decisions contradicting ECJ jurisprudence, and the Commission can pressure the national government and threaten an infringement suit.²⁷ Lower courts are not bound by ECJ decisions in subsequent cases, and lower courts always retain the right not to make a reference to the ECJ in future cases. The ECJ is like a second parent in a battle where parental permission wards off a potential sanction for misbehavior— if the lower court does not like what they think Mom (the higher court) will say, they can go ask Dad (the ECJ) to see if they will get a more pleasing answer. Having Dad's approval increases the likelihood that their actions will not be challenged. If the lower court does not think they will like what Dad will say, they simply do not ask.

Higher National Courts

Many high courts, having a dominant influence over both the development of national law and the execution of public policy, are threatened by the existence of the European Court as the highest court on questions of European law. On a general level, high courts have a preference to limit the doctrinal and substantive expansion of European law so as to limit the areas where the ECJ will become a higher court and they will be subjugated. They try to limit the expansion of “direct effects” because every time “direct effect” is extended to another Treaty article or another area of EC policy, the ECJ became the highest authority over that area of law. High courts refer very few questions of interpretation to the European court, and virtually no questions which could allow the European Court to expand the reach of European law into their own sphere of jurisdictional authority. The statistics on references to the ECJ by national courts bear out this reticence.²⁸ The type of references made by higher courts also bear out this reticence— scholars

²⁷ In Germany, a failure to apply a lower court decision based on an ECJ decision can lead to sanction by the Constitutional Court. High court challenges to ECJ jurisprudence can also give rise to a Commission infringement proceeding. For example, after the German Constitutional Court's Solange I decision, the Commission initiated infringement proceedings.

²⁸ References from supreme courts comprise roughly 20% of all references to the ECJ. Between 1964 and 1994, the French Court of Cassation referred 8% and the French Council of the State referred 2% of all French preliminary ruling questions to the European Court. The German Constitutional Court referred zero questions to the ECJ, the Federal Tax Court referred 15% of all German references to the ECJ (many of which were picky technical questions), and other federal high courts referred only 15% of all German preliminary ruling references. (These statistics come from the European Court's 1994 annual report. It is not surprising that there are some references to

have noted the tendency of the German Federal Tax Court and the French *Conseil d'État*, for example, to send primarily narrow technical questions and interpret more significant issues on their own. Bebr argued:

The *acte clair* doctrine is of course not systematically used by the *Conseil d'État* or by the *Bundesfinanzhof* to block off a reference to the Court. These courts did make references but they did so primarily in those cases which concerned rather technical questions. It is typical for their attitude that precisely in matters of principle, particularly those concerning the supremacy of Community Law, the delimitation of Community and State competence, or the nature and effect of directives, they have avoided, under the cover of this doctrine, a mandatory reference. In these instances, they so vindicated their jurisdiction to interpret Community rules and to "overrule" the jurisprudence of the (European) Court, defied the supremacy of Community law and reasserted thereby State powers...In this respect the practice of the *Conseil d'État* and of the *Bundesfinanzhof* seeking to reserve questions of fundamental importance to themselves in fact challenges the exclusive interpretative jurisdiction of the (European) Court.²⁹

High courts protest and challenge ECJ doctrine when it infringes on their own jurisdictional authority and hence implies a de facto subjugation to the ECJ on important aspects of national law, and when ECJ doctrine would undermine the influence of the national court within the national legal and political system. High courts also try to limit lower court references to the ECJ when these references will allow the ECJ to make a ruling with which the higher court disagrees.³⁰

While high courts have significant leverage over courts below them by their ability to reverse lower court decisions, in the end even high courts must seek acceptance of their decisions

the ECJ, as there are always narrow technical questions regarding EC law to refer, and national courts have no qualms about referring questions regarding the validity of EC laws to the ECJ.)

²⁹ Bebr, Gerard. 1983. The Rambling Ghost of "Cohn-Bendit": Acte Clair and the Court of Justice. *Common Market Law Reviews* (20):439-472. See pp. 465-457. Buffet Tchakaloff has also noted: "If certain of the questions posed by administrative judges have favored the very vast praetorian construction carried out by the Court of Justice, (the *Conseil d'État*) has tended for a while to limit itself to technical points of a very weak juridical amplitude." Buffet-Tchakaloff, Marie-France. 1984. *La France devant la cour de justice des communautés européennes*. Aix-en-Provence: Presses universitaires d'Aix-Marseille. See p. 95.

³⁰ For example the Italian Constitutional Court ruled a reference to the ECJ regarding the supremacy of EC law to be invalid *Costa c. E.n.e.l. & Soc. Edisonvolta* Italian Constitutional Court decision of March 7, 1964. Judgement No. 14. *Foro Italiano* 87(I):465. . The *Bundesfinanzhof* tried to limit the direct effect of EC law regarding turnover equalization taxes (see Alter, Karen. 1994. *The Rule of Law in Europe: Theories of Legal Integration and Judicial Politics in Germany*. European Community Studies Association Second World Conference May 5, 1994: European Commission.). The *Bundesfinanzhof* and the *Conseil d'État* both overruled references to the ECJ based on the direct effect of directives. (*BFH Kloppenburg I V B 51/80-* decision of 16. Juli 1981; *Europarecht* 1981, p. 442, *Common Market Law Reports* 1982 vol 1 p. 527-531; *Minister of Interior v. Daniel Cohn-Bendit*, French *Conseil d'État*, 22 December 1978, *Common Market Law Report* 1980 p. 545-562 1980 p. 545-562. This strategy is limited in that not all decisions to make references are appealed to higher courts, so that references can and do slip through.

by lower courts. High courts must take into account that lower courts may go to the European Court of Justice, and also that lower courts can simply ignore higher court decisions counting on the fact that most legal decisions do *not* get appealed up the legal hierarchy. In his well-known study of judicial strategy in the U.S. Supreme Court, Murphy found that high courts and lower court interests often diverged, and that high courts had to seek support of lower courts in the U.S. too.³¹ Lower courts were thus able to pressure higher courts through their defections to ECJ jurisprudence, compelling them to change their strategies to re-gain lower court support.

While lower courts and higher courts in general have divergent interests with respect to EC legal integration, the classificatory distinction between "low" and "high" courts should not be drawn too starkly. Not all high courts share the same interests with respect to a given ECJ doctrine, and an ECJ doctrine which threatens one high court may not threaten another—it depends on the jurisdictional authority of each high court. In addition, there are some issues where an ECJ decision helps bolster the influence, independence and authority of national high courts. If a high court wants to challenge the validity of an EC law, a favorable decision of the ECJ bolsters their position with respect to EC organs and national governments. If a high court wants to assert new powers within the national legal system, a statement by the ECJ that these new powers are consistent with EC law can bolster the high court's position with respect to political bodies. Finally, if a high court does not want to be challenged by lower courts, a willingness to refer questions which clearly fall under the ECJ's jurisdictional authority can convince lower courts to rely on the court of last instance to refer relevant questions to the European Court, passing up opportunities to make a reference themselves. To bring back the

³¹ Murphy argues

lower court judges are apt to have different orientations, different loyalties, different values, and different interests and policy objectives than supreme court justices, and intellectual or emotional arguments alone no matter how convincing their rhetoric and how close their appeal to self-interest, are not likely to bridge all or possibly even most of these gaps.

Op. cit. Murphy (1964) p. 92. He notes that high courts seek support of lower courts (pp. 24-25). For an account of differences of opinions and judicial strategies between the N.Y. Court of Appeals and the U.S. Supreme Court, see Kramer, Daniel, and Robert Riga. 1982. *The New York Court of Appeals and the U.S. Supreme Court, 1960-1976*. In *State Supreme Courts: Policymakers in the Federal Systems*, edited by M. C. Porter and G. A. Tarr. Westport CN: Greenwood Press.

analogy used earlier, such a tact convinces the lower court that Mom and Dad will decide together so that there is no advantage to making the extra effort to appeal to Dad first.

The European Court of Justice

The European Court has its own interests in national judicial politics.³² The European Court has an interest in having access to national courts for questions of EC law remain open. Since lower courts are the largest and richest source of provocative references to the ECJ, it especially has an interest in having access to lower courts remain open. The ECJ has an interest in facilitating the independence of lower courts vis-à-vis higher courts, so that higher courts will be unable to block lower court references or the development and incorporation of EC law into national legal systems. And the ECJ ultimately has an interest in having its decisions accepted and applied by all national courts. Since high courts are crucial in establishing national legal precedent regarding the application of European law in the national legal system, it has an interest in having high courts accept its jurisprudence too. It has thus worked to smooth over dissent with high courts, adjusting its jurisprudence to take into account their specific concerns.

Finally, the ECJ acts strategically so as to avoid a political response which would reverse a decision, close access to the ECJ or circumscribe its jurisdictional authority. National politicians are in a position to close access at the national level, and the Council of Ministers is in a position to close access, reverse its jurisprudence, and circumscribe its jurisdictional authority at the EC level. The issue of how the ECJ acts strategically with respect to politicians will be addressed in the next section.

An Inter-Court Competition Dynamic of Legal Integration

The different strategic calculations of national courts vis-à-vis the European Court of Justice created a competition-between-courts dynamic of legal integration, which fed the process

³² As many scholars have pointed out, the evolution of EC law supremacy and a rule of law in Europe has greatly increased the influence and authority of the European Court. Op. cit. Weiler (1991 and 1994); op. cit. Burley and Mattli (1993) Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers.

legal integration and came to shift the national legal context from under high courts. The limitations on interpretation of national law created by high courts provoked lower courts to make referrals to the ECJ, so that the lower courts could deviate from established jurisprudence or get new legal outcomes which they preferred for legal or policy reasons. In using EC law and the ECJ to achieve outcomes which they were institutionally and politically unable to achieve through the domestic legal process alone, lower courts created opportunities for the ECJ to expand its jurisdiction and jurisprudence, and in some cases lower courts actually goaded the ECJ to expand the legal authority of EC law more and more.

The ECJ expanded the scope of its supreme jurisdictional authority, declaring that more and more articles of the EC Treaty created direct effects, rights which individuals could draw on in front of their national courts and which national courts had to protect. The ECJ also found legal authority for itself in more and more circumstances. The ECJ found that on ratification the EC treaty created positive obligations for national governments not to enact laws conflicting with EC law and to remove conflicting national laws.³³ It found that after the expiration of the transition period (1970) certain Treaty articles created legal obligations for national governments despite the lack of political actions at the EC level to help realize the Treaty's goals. This meant that the ECJ had authority to evaluate national laws even in areas which were yet not part of EC legislation. The Court also granted, in certain circumstances, individual rights based on unimplemented or misimplemented EC directives, further increasing its jurisdictional authority to include all substantive areas legislated through directives.³⁴ These legal expansions increased the amount of national law which could be influenced by EC law, and created new access to lower courts. It thus increased the number and types of challenges to national laws which could be brought based on EC law, and which lower courts could entertain.

³³ *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ. Case 6/64 (1964) ECR 583. *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis* ECJ. Case 57/65 (1966) ECR 205.

³⁴ *Van Duyn v. Home Office* Case ECJ. 41/74 (1974) ECR 1337.

Higher courts tried to stop lower courts from making references to the ECJ so as to stop EC law from encroaching in their legal domain. In Britain, the Court of Appeals and the House of Lords developed narrow guidelines about when a lower court referral to the ECJ was justified.³⁵ In Italy the Constitutional Court declared that all issues of the validity of European law and national law were constitutional issues, so that only it could decide if EC law was supreme to subsequent national law.³⁶ In other cases, high courts issued their own narrow interpretations of EC law to limit its applicability in the national realm and ward off referrals to the ECJ.³⁷ Sometimes high courts even quashed lower court decisions to refer a case to the ECJ, or directly challenged ECJ jurisprudence to discourage courts below it from accepting ECJ doctrine.³⁸ But the ability of higher courts to stop lower court referrals or their acceptance of ECJ jurisprudence was limited. The decision to refer a case to the ECJ had to be appealed to the higher court in order for a high court to be able to quash a referral, and often decisions were not appealed. And lower courts often simply ignored the rulings of the higher courts, and made referrals anyway to provoke the ECJ to contradict the higher court.³⁹

The ECJ for its part encouraged the competitive dynamic between lower and higher courts. It defended the right of lower courts to refer any question they wanted, and encouraged lower courts by seriously evaluating their questions, while dismissing higher court refutations of

³⁵ Bermann, George, Roger Goebel, William Davey, and Eleanor Fox. 1993. *Cases and Materials on European Community Law*, American Casebook Series. St. Paul: West Publishing Co. See p. 261-266.

³⁶ *Costa c. E.n.e.I. & Soc. Edisonvolta* Italian Constitutional Court decision of March 7, 1964. Judgement No. 14. *Foro Italiano* 87(I):465.

³⁷ For example, in the Turnover Tax Struggle, the Federal Tax Court used narrow legal interpretations to stop lower courts from sending references to the ECJ or interpreting the compatibility of national turnover equalization taxes with EC law. *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis* BFH decision of January 15, 1969. Case 57/65 (1966) ECR 205VII R 13/67.

³⁸ For example: *Minister of Interior v. Daniel Cohn-Bendit* Conseil d'État decision of December 22, 1978. *Common Market Law Report* 1980:545-562. BFH decision of July 16, 1981. *Common Market Law Reports* 1982(I):527-531.

³⁹ To name but two examples, lower finance courts in Germany ignored Federal Finance Court's jurisprudence on the direct effect of directives, making references to the ECJ to challenge the Federal Tax Court's jurisprudence, (FG Munster decision of 24 May, 1984, EFG 1985 310; FG Niedersachsen decision of 9 February, 1984, EFG 1984 p. 527-528; FG Hessen decision of 24 April, 1985) and British industrial appeals tribunals ignored the Employment Appeals Tribunal's jurisprudence on pregnancy dismissals, relying on EC law instead. Alter, Karen, and Jeannette Vargas. 1996. *Shifting the Domestic Balance of Power in Europe: European Law and UK Social Policy*. Tenth Annual Conference of Europeanists March 14-16, 1996.

ECJ authority or ECJ jurisprudence. In direct challenge to the Italian Constitutional Court, the ECJ even instructed lower courts to ignore the constitutional rules, guidelines or jurisprudence of higher courts if such rules would lead the lower court not to give effect to EC law.⁴⁰

Because of the actions of lower courts, EC law expanded into new issue areas and came to influence national law. Since all it takes is one court referral to allow the ECJ to expand its jurisdictional authority, the possibilities for legal expansion presented by the preliminary ruling system were abundant. The influence of EC law spread to areas never envisioned by national politicians, such as the provision of education grants to non-nationals, the provision of equal pay to men and women, industrial relations, and the advertisement of British abortion services in Ireland.⁴¹

As legal questions were appealed up the national judicial hierarchies, higher courts were put in the position of either rejecting ECJ jurisprudence, or accepting it. High courts freely accepted ECJ jurisprudence so far as it did not encroach on their own authority. When the ECJ encroached too far into their own jurisdictional authority, high courts rejected the aspects of ECJ doctrine which undermined their own jurisdictional authority. The confrontational responses of high courts to ECJ jurisprudence, especially to jurisprudence which asserted ECJ authority over national legal issues, led legal commentators to invoke the terminology of 'war' to describe the relationship between the ECJ and higher national courts. And in some cases the commentators baldly concluded that higher national courts had chosen war over cooperation. Since ECJ jurisprudence did not affect all high courts equally, there was seldom a unified opposition by national courts to any given ECJ decision. Thus a varied pattern of acceptance and refusal of ECJ jurisprudence and jurisdictional authority by national high courts emerged within and across national legal systems.

Lower courts referred to the ECJ questions high courts would not have asked and the actions of the lower courts came to actually shift the national legal context from under the high

⁴⁰ *Aminministrazione delle Finanze dello Stato v. Simmenthal SpA (II)* ECJ. Case 106/77 (1978) ECR 629.

⁴¹ *Ibid.*

courts. It shifted the context in two ways. The acceptance of EC law supremacy by some courts and the rejection of ECJ authority by other courts within the same national system created problems of legal consistency which, in legal communities committed to legal logic and legal reasoning, was alarming. Observing the legal inconsistency created by the different positions of the French *Conseil d'État* and *Cour de Cassation* regarding EC law supremacy, French legal scholar and Conseiller d'État Ronny Abraham wrote:

This discord is very troublesome... a disputant can receive a different solution depending on if the case involves administrative or civil jurisdiction: in one case it will be decided by the rules of the legislature and in the other by rule of the treaty. But intellectually, such different treatment is not justified by any account. It is without relation to logic which should rule over the division of competences between the two legal jurisdictions. That one jurisdiction would apply private law and the other public law, that corresponds to the logic of the system. But that one would apply the treaty and the other national law, that doesn't correspond to any logic.⁴²

In Germany, concerns about legal inconstancy motivated the German Constitutional Court to address legal issues which it had avoided or allowed to languish in its docket, deciding the issue in order to restore legal order.⁴³ But in France the divergence in the legal positions of the *Conseil d'État* and the *Cour de Cassation* was maintained for fourteen years, and there is no evidence that the legitimacy of either institution was seriously damaged or that the consistency concerns were enough to encourage one of the two courts to change their jurisprudence.

More important seems to be that at a certain point it became clear that high courts had failed in their efforts to stem the legal tide of EC law, or to decisively control the development of national law in certain legal issues. As the French Commissariat du Gouvernement argued in the famous *Nicolo* case:

It cannot be repeated often enough that the era of the unconditional supremacy of internal law is now over. International rules of law, particularly those of Europe, have gradually conquered our legal universe, without hesitating furthermore to encroach on the competence of Parliament... In this way certain entire fields of our law such as those of the economy, employment or protection of human rights, now very largely originate genuinely from international legislation.⁴⁴

⁴² Op. cit. Abraham (1989) p.119-120.

⁴³ Torelli argued that mounting conflicts over legal interpretation among German ordinary courts provoked the German Constitutional Court to enter into the legal debate to resolve the legal issue. Torelli, Maurice. 1968. La Cour Constitutionnelle Fédérale Allemande et le Droit Communautaire. *Revue du marché commun*:719-723.

⁴⁴ Raoul Georges Nicolo and another Conseil d'État decision of October 20, 1989. M. Frydman, Commissaire du Gouvernement. *Common Market Law Report 1990, vol. 1, p. 173-191* Despite what the name would imply, the Commissariat du Gouvernement is not a representative of the government. He/She is a member of the Conseil

It was not merely the fact that there was more EC legislation, but rather ECJ doctrine had made more areas and types of EC law directly binding. As ECJ doctrine expanded and was applied to more issue areas, more and more areas of national law came to be influenced by EC law and the ECJ. Pinpointing the ECJ's doctrine as source of legal expansion, former House of Lord's judge Lord Denning re-configured his famous metaphor of EC law as an incoming tide, arguing:

Our sovereignty has been taken away by the European Court of Justice. It has made many decisions impinging on our statute law and says that we are to obey its decisions instead of our own statute law...It has put on the Treaty an interpretation according to their own views of policy... the European Court has held that all European directives are binding within each of the European countries; and must be enforced by the national courts; even though they are contrary to our national law...No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses-- to the dismay of all. ⁴⁵

Because so much national law touched on EC law, and so many lower courts were following the ECJ rather than their own high courts, opposition to ECJ jurisprudence lost its influence and effectiveness. National high courts re-positioned themselves to the new reality, reversing their jurisprudence which challenged EC law supremacy and adjusting national constitutional doctrine to make it compatible with enforcing EC law over national law.

But they did not accept the legal reasoning offered by the ECJ. By basing the supremacy of EC law on national constitutions and not tying themselves to the ECJ's legal reasoning regarding EC law supremacy, high courts left open legal avenues through which they could refuse the authority of the ECJ in the future without contradicting their jurisprudence on EC law supremacy.

Explaining Cross National Variation in National Judicial Behavior

Certain aspects of the variation we observe in national judicial behavior follow directly from the different interests of lower and higher courts identified above. Lower courts are more

d'État who offers a reasoned opinion to the Conseil to consider. Since Conseil d'État decisions are short and cryptic, the argument of the Commissariat is often printed along with the Conseil's decision, and used to help interpret the legal basis for Conseil judgments.

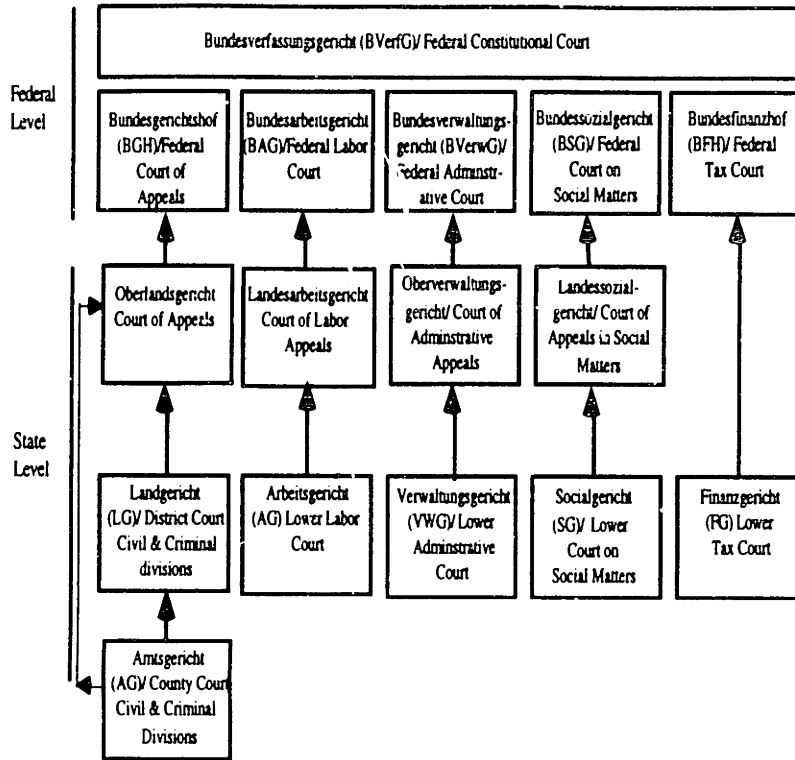
⁴⁵ Denning, Lord. 1990. Introduction to article "The European Court of Justice: Judges or Policy Makers?": The Bruge Group Publication, Suite 102 Whitehall Court, Westminster, London SW1A 2EL.

willing to send references to the ECJ than higher courts because a reference to the ECJ helps them escape the national legal hierarchy and creates pressure on other courts in the system to accept the lower court's jurisprudence. Because expansions of ECJ doctrine do not directly undercut the supreme authority of lower courts, lower courts are also more willing to accept expansions of ECJ doctrine. Higher courts accept aspects of ECJ jurisprudence which do not threaten their independence, influence and authority, and challenge ECJ jurisprudence which does threaten their independence, influence and authority. Thus some of the cross-temporal variation we observe is actually variation based on the legal issue at stake in the case, and how this legal issue effects the independence, influence and authority of the higher court.

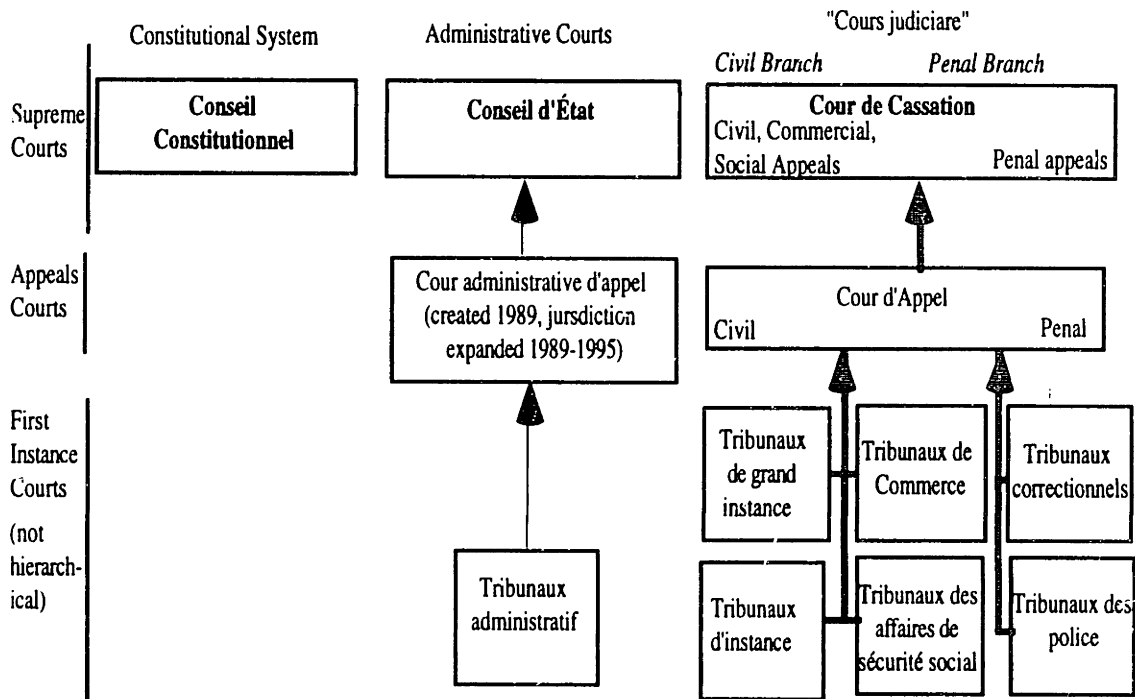
There is also cross-national variation, and variation among high courts which cannot be explained by the legal issue at stake. Much of the cross national variation can seemingly be accounted for by differences in the institutional organization of different judiciaries. The lower court-higher court distinction is based on legal hierarchies. But not all national legal systems are equally hierarchical, and not all lower courts put pressures on their higher courts. This dissertation compares national judicial acceptance of EC law supremacy in the German and French judiciaries. The German legal system is extremely hierarchical. There are five branches of the legal system, each with its own Federal Supreme Court. And sitting above the Federal Courts is the Constitutional Court. Lower courts can circumvent the Federal Supreme Courts through references to the ECJ and through references to the Constitutional Court. And individuals can appeal Federal Supreme Court decisions to the Federal Constitutional Court creating additional pressure of Federal Supreme courts. The French legal system is far less hierarchical and it is impossible for a supreme court decision to be reviewed by another national supreme court. Only two of the three branches of the judiciary really have lower courts which could put pressure on the higher courts by sending a reference to the ECJ (lower administrative courts only have jurisdiction over local administrative matters and until 1995 the *Conseil d'État* was the first and last instance court for challenges to executive orders and national administrative decisions). The charts below present this difference schematically.

Chart 3.1: The German and French Judicial Systems Compared

The German Judicial System



The French Judicial System



Because the German system is more hierarchical, lower courts were better placed to pressure higher courts through appeals to EC law. Thus there was more internal pressure on higher courts in Germany compared to France.

The institutional interests of higher courts also varied to some extent because of variation in political organization within states which created a different institutional context for different courts in the different countries.⁴⁶ For example the French *Conseil d'État* was also involved in reviewing legal texts for the government. This gave the *Conseil d'État* a dual interest as far as EC law was concerned. It wanted to influence the drafting process of French laws (and was dismayed that law was being drafted more and more often at the EC level) and it wanted to influence how these laws were interpreted.

The competition between courts dynamic also varied in intensity depending on the strength of the legal disagreements between higher and lower courts. Judges may not have personal interests at stake in the case, but they have strong opinions about the law and want to be right. To the extent that there was agreement within the national legal bureaucracy there was no need to go to an outside judge to get an opinion a lower court might like better. When there was disagreement, a reference to the ECJ became a tool for lower courts to challenge the legal interpretations of other courts.

There was also variation in references across courts which was not based on the choices of judges, but rather on variation in the substance of EC law or variation in the willingness of lawyers to draw on EC law in their legal cases. For example, one of the reason why tax courts have been more involved in EC legal issues than penal courts is that much of the financial law tax courts interpret is based on EC legal texts whereas penal law is almost exclusively national law. And one of the reasons why British labor courts have been more involved in litigation of gender equality issues than French courts is that the British Employment Opportunities Council generates

⁴⁶ All of these points will be developed more in the case studies.

equality test cases while French lawyers have exhibited a reluctance to raise EC gender-equality issues in front of French labor courts.⁴⁷

The issue of EC law supremacy was more contentious than many disputes over the law because what was at stake is “who decides” or “who is the final authority.” Thus the interests of the different national courts in the legal outcome were perhaps more intense than judicial interest might be where less personal interest is at stake. But the institutional interests which influenced when and how national judiciaries incorporated the supremacy of EC law into the national legal system continue to shape national court and European court interaction, and judicial behavior more generally. First, the national court interests have been translated into national legal doctrine and national legal rules regarding European legal issues, thus they define the rules of the EC legal game at the national level. Second, the interests continue to influence the willingness of different national courts to make references to the ECJ and enforce ECJ jurisprudence. Third, the interests continue to directly shape all EC doctrinal issues that affect the question of “who is the ultimate authority deciding” thus they continue to guide which ECJ doctrines will be considered controversial within the national legal systems, and which courts will be most resistant to certain doctrinal advances. Fourth, policy-motivated judges also care about who decides legal issues, especially if the higher court has a different opinion on the substantive legal matter than the lower court.

III. Member States and the Process of Legal Integration

With national courts sending challenges of national policy to the ECJ, and enforcing EC law over national law, the ECJ is in a position to decide on what national policies are and are not acceptable. The ECJ has used this power to interpret EC law in ways unintended by national governments when they agreed to the EC legislation, and to extend the reach of EC law into areas

⁴⁷ Blom, Judith, Barry Fitzpatrick, Jeanne Gregory, Robert Knegt, and Ursula O'Hare. 1995. *The Utilisation of Sex Equality Litigation Procedures in the Member States of the European Community, a comparative study*: Commission of the European Union, DG V. p. 35 and 36.

national governments considered to be purely their domain. By the late 1970s the ECJ had clearly crossed over the comfort zone of politicians. In 1979 Former French Prime Minister Michel Debré attacked an ECJ decision saying “once again...the attitude of the Court [leads to a] usurpation of the sovereignty of the member states.” In the 1980s Helmut Kohl attacked the ECJ and its jurisprudence in an address in the Bundestag.⁴⁸ In 1981 French President Giscard d’Estaing called on the Council to do something about “the Court and its illegal decisions.”⁴⁹ In 1990 Britain’s Lord Denning declared “Our sovereignty has been taken away by the European Court of Justice”⁵⁰ and one outraged British MP argued that a ruling of the ECJ had “set aside the British constitution as we have understood it for several hundred years.”⁵¹

How could the ECJ have escaped member state control and encroached on national sovereignty? Why didn’t politicians block this development while it was happening? If ECJ decisions were upsetting national politicians, as the quotes above imply, why didn’t politicians break the link between national courts and the ECJ or circumscribe the ECJ’s authority?

Escaping Member States’ Control

One of the reasons that politicians did not react strongly to ECJ jurisprudence which undermined national sovereignty is that politicians and judges have different time horizons, a difference which manifests itself in terms of differing interests for politicians and judges in each court decision. Because politicians must concentrate their political resources and ensure their electability, they tend to concentrate on immediate issues and discount the long term effects of their actions, or in this case, inactions.⁵² Pursuant to these interests, the highest priority of

⁴⁸ Mancini, Federico, and David Keeling. 1994. Democracy and the European Court of Justice. *Modern Law Review* 57 (2):175-190.

⁴⁹ Op. cit. Rasmussen (1986) p. 354.

⁵⁰ Denning, Lord. 1990. Introduction to article “The European Court of Justice: Judges or Policy Makers?”: The Bruge Group Publication, Suite 102 Whitehall Court, Westminster, London SW1A 2EL.

⁵¹ Curtin, Deidre, and Kamiel Morelmans. 1994. Application and Enforcement of Community Law by Member States: Actors in Search of a Third Generation Script. In *Institutional Dynamics of European Integration*, edited by D. Curtin and T. Heukels. Dordrecht: Martinus Nijoff Publishers. See. p. 456

⁵² Pierson draws on Shepsle and others who note that the short time horizons of leads politicians to discount the long term consequences of non-action and in the end limit their ability to control the integration process and the

national governments was to avoid court decisions which upset public policies or created a significant political or financial impact. Politicians were willing to accept doctrinally bold ECJ jurisprudence as long as the decision did not compromise their interest *at that moment*.

The Court took advantage of this political fixation on the material consequences of cases to construct legal precedent without arousing political concern. Following a well known judicial practice, it expanded its jurisdictional authority by establishing legal principles, but not applying the principles to the cases at hand. For example, the ECJ declared the supremacy of EC law in the *Costa* case but it found that the Italian law privatizing the electric company did not violate EC law.⁵³ Given that the privatization was legal, what was there for politicians to protest, not comply with or overturn? Hartley noted that the ECJ repeatedly used this practice:

A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.⁵⁴

To say that politician's had short time horizons is not to say that politicians did not care or notice the developments going on at the EC level, or that politicians are myopic. National governments did care about the implication of ECJ doctrine for national sovereignty, and they argued strongly against legal interpretations which undermined national sovereignty in their submissions to the Court. Once the ECJ decided against their arguments, however, it was easy to discount the potential long term consequences of the decisions. Indeed there were many reasons to believe that the ECJ's *Costa* jurisprudence establishing the supremacy of EC law would not lead to a significant compromise of national sovereignty. It seemed unlikely that the ECJ's supremacy declarations would be accepted by national judiciaries especially in light of the Italian Constitutional Court's decision rejecting EC law supremacy in the same case in which the ECJ

actions of supra-national institutions. Pierson, Paul. 1996. The Path to European Integration: A Historical Institutional Perspective. *Comparative Political Studies* 29 (2):123-163. See p. 135-136.

⁵³ *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ. Case 6/64 (1964) ECR 583.

⁵⁴ Hartley, Trevor. 1988. *The Foundations of European Community Law*. Second ed. Oxford: Clarendon Press. See p. 78-79.

declared EC law supremacy.⁵⁵ There were also strong reasons to believe that politicians could keep the ECJ from making decisions which compromised national interest. Member state had a great deal of success in the 1960s in keeping the ECJ out of debates over sensitive political issues, convincing the Commission not to pursue cases which would create significant political ill will. And as Weiler and Scheingold have argued, member states also thought they could control the ECJ by controlling the decision-making process and the appointment process.⁵⁶ And in the end ECJ decisions were purely declaratory, so member states had the option of ignoring them.

In retrospect political non-action seems quite short-sighted. But it was very hard to predict what would happen in light of the Court's declarations. In the 1960s, the ECJ's jurisprudence did not compromise politician interests and there were many reasons to believe that the doctrine would not compromise their interests in the long run either. Given that politicians have limited resources and that EC policy-making is complex so that countries must pick and choose their battles, it would be unrealistic to expect national governments to fight every expansion of ECJ authority which had the *potential* to harm their long term interests.⁵⁷

The supremacy of EC law came to undermine long term political interests in protecting national sovereignty in many ways. Not only could national policy be reviewed by the ECJ, but politicians lost their largest sources of political leverage over the ECJ. With national courts sending cases to the ECJ, disputes were not so easily kept out of the legal realm. National courts would also not let politicians ignore or cast aside as invalid unwanted decisions; the option of

⁵⁵ Lending further credence to this belief, in 1968 the French *Conseil d'État* refused to even review the question of whether or not a French law was compatible with EC law because 'it had no authority to set aside a French law for any reason.' *Costa c. E.N.E.I. & Soc. Edisonvolta* Italian Constitutional Court decision of March 7, 1964. Judgement No. 14. *Foro Italiano* 87(I):465. *Syndicat General de Fabricants de Semoules de France* Conseil d'État decision of March 1, 1968. *Common Market Law Report* 1970(vol 9):395.

⁵⁶ Op. cit. Weiler (1991) p. 2427-2429. Scheingold, Stuart. 1965. *The Rule of Law in European Integration*. New Haven: Yale University Press. See Chapter 2.

⁵⁷ Indeed McCubbins and Schwartz argue that from a political perspective waiting until "fire alarms" go off (in this case, until a court decision creates significant material or political costs) is a wise strategy. Politicians can conserve political resources by not fighting every fire (in this context every court decision that could *potentially* create political problems in the future), and they can take credit and win public support for addressing the public and political concerns (in this case by dealing with the adverse consequences of Court decisions). McCubbins, Mathew, and Thomas Schwartz. 1987. *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*. In *Congress: Structure and Policy*, edited by M. McCubbins and T. Sullivan. Cambridge: Cambridge University Press.

non-compliance was largely gone. Once national courts became involved in the application of EC law, the ability of politicians appeal to extra-legal means to avoid complying with EC law was also diminished. National governments could no longer veto ECJ decisions through a national political vote because national courts would apply the ECJ jurisprudence over conflicting national law. Nor could national governments instruct their courts to ignore ECJ jurisprudence. In other words *because national courts were enforcing EC law over national law* politicians had to follow the legal rules of the game, finding legally defensible solutions to their EC legal problems.⁵⁸ National court support is essentially the reason why the ECJ escaped member state control.

Why Did National Governments Not Regain Control?

Why didn't politicians then dismantle the ECJ's system? Why didn't they break the link between national courts and the ECJ? Why didn't they change the authority of the Court so that it could not encroach on national sovereignty? There is much to suggest that politicians actually tried to reverse the ECJ's advances and to re-gain control over the ECJ. But dismantling the system or punishing the ECJ for its transgressions proved quite difficult. Once the Doctrine of EC Law Supremacy became embedded in the national legal systems, the changes in the EC legal system were very hard to reverse. National governments found that they could not muster a credible threat to seriously attack the Court for its excesses, and that the remaining tools of political leverage they had were actually quite weak.

In some cases, national governments did actually try to break the link between national courts and the ECJ. In 1966 the German Finance Ministry issued an edict saying: 'We hold the decision of the European Court as invalid. It conflicts with well reasoned arguments of the Federal government, and with the opinion of the effected member states of the EU,' and it instructed customs officials and national tax courts to ignore the ECJ decision in question and to reject all claims based on the ECJ decision.⁵⁹ In 1978, in response to an unwanted ECJ decision,

⁵⁸ Weiler makes this argument as well. (Op. cit. Weiler (1994) p. 519)

⁵⁹ July 7, 1966 (IIIB.4-V 8534- 1/66), republished in *der Betrieb* (1966) p. 1160

a law was passed in the French National Assembly making it a punishable offense for anyone holding public office in France to follow the Court's doctrine announced in the contested opinion.⁶⁰ Just one year later, the French National Assembly tried to sanction the *Cour de Cassation* for accepting EC law supremacy by re-iterating a prohibition against French courts from interfering in the legislative process. The Aurillac amendment passed overwhelmingly in the National Assembly.⁶¹ A bill sanctioning national courts for accepting EC law supremacy also passed the Belgium legislature in 1973.⁶²

In the end, politicians backed down from confrontation with national courts. There seemed to be two reasons why attempts to threaten or sanction the national judiciary for following unwanted ECJ jurisprudence failed. The first was that many of the attempts were seen as unconstitutional. Adhering to constitutional principles was an embedded norm for many national politicians who often had formal legal training, but moreover it was a political position with significant domestic political support. Attempts by politicians to sanction courts were rallying cries for the advocates and supporters of a rule of law to come to the defense of the national courts. For example in response to the German Finance Ministry's edict to ignore an ECJ decision, legal scholars and the Association of German Exporters organized a writing campaign to attack the government's position. This writing campaign seemed to have worked, and members of the Bundestag ended up officially questioning a representative of the German Finance Ministry about how he could reconcile the Ministry's decree against following an ECJ decision with the principles of a *Rechtsstaat*, a state ruled by law.⁶³ In France, the Aurillac amendment was allowed to die in the Senate in part because it was seen as unconstitutional. Had the Senate decided to pick up the issue, the amendment would likely have ended up in front of the Constitutional Council, which would likely have quashed the amendment forcing politicians to either abandon the effort or

⁶⁰ Op. cit. Rasmussen (1986) p. 352.

⁶¹ Isaac, Guy. 1980. A propos de l' <<amendement Aurillac>>: Vers une obligation pour les juges d'appliquer les lois contraires aux traités? *Gazette du Palais II:Doctrines*: 583-585.

⁶² Op. cit. Bribosia (1995)

⁶³ Meier, Gert. 1967. Zur Aussetzung der Einsprüche gegen Umsatzausgleichsteuerbescheide. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 2 (15 February, 1967):75-77.

to change the French constitution. Whether it was because politicians held deep respect for the constitution, or because of considerable domestic political support for a rule of law, or because institutional rules would have made it difficult for political edicts to become legally enforceable, politicians apparently lacked the will to engage in a constitutional battle over judicial independence the separation of powers. In this sense, 'law' was acting as a 'shield' against politicians.⁶⁴

Secondly, the executive branches of the national governments had an incentive to keep other branches of government from interfering too much in EC policy-making, and they worked to quell domestic disputes over EC law. In France the executive branch circumvented parliamentary revolts, either ignoring them, outmaneuvering them or encouraging other branches of government to let the issue die. For example, the French executive lobbied the Senate not to debate the Aurillac amendment, so that the amendment never became law. In Germany, the national government devised legal strategies to circumvent unwanted ECJ jurisprudence and to circumvent opposition to EC law as well. The Federal Government went so far as to buy off plaintiffs who threatened to raise EC legal disputes which were bound to provoke conflict.⁶⁵ These attempts to mitigate the effects of contested ECJ jurisprudence while formally complying with EC law often worked, quelling the dispute but leaving the legal principle intact.

Unable to stop national courts from applying unwanted ECJ jurisprudence, politicians turned to the EC level to try to stop the encroachment of European law on national prerogatives. But institutional constraints at the EC level kept politicians from credibly threatening the Court into quiescence. Fritz Scharpf labeled the institutional barriers to policy reform a 'joint decision trap'.⁶⁶ According to Scharpf, a 'joint decision trap' emerges when 1) the decision-making of the central government (the Council of Ministers in the case of the EU) is directly dependent on the

⁶⁴ Op. cit. Burley and Mattli (1993).

⁶⁵ For examples of how the French executive worked to circumvent the parliament see Rasmussen (op. cit. (1986) at pp. 352-3) and Buffet-Tchakaloff (op. cit. (1984) at 336 and 341). In interviews, members of the German Economics Ministry also acknowledged working to circumvent German high court challenges to the ECJ authority, because the High Court challenges were creating problems with the Commission and undermining German influence in EC negotiations.

⁶⁶ Scharpf, Fritz. 1988. The Joint-Decision Trap: Lessons from German Federalism and European Integration. *Public Administration* 66 (Autumn):239-278.

agreement of constituent parts (the member states in the case of the EU); 2) when the agreement of the constituent parts must be unanimous or nearly unanimous; and 3) when the default outcome of no agreement is that the status quo policy continues. Because it is difficult to create a reform which is better for every member state, often no agreement is reached and the status quo continues even though the status quo may be sub-optimal for all.

Scharpf's analysis is helpful in understanding why the member states have failed to respond to the ECJ's judicial activism. To reverse an ECJ decision based directly on the EC Treaty, or to attack the ECJ's independence or authority, member states would have to amend the Treaty. Amending the Treaty requires unanimity, as well as the ratification of the changes by national parliaments. Even if all national governments agreed that the ECJ has been very activist and perhaps even issued illegitimate decisions which compromised their national interest, in any given substantive dispute member states usually have differing interests undermining efforts at political consensus building. There are also pockets of political support for the Court, even when the Court's decisions compromise the supporter's interests. Unsurprisingly small states have been big supporters of increased ECJ authority and autonomy from member states. Common EC institutions magnify the political power of small states; within the EC legal system, small member states have equal say in the interpretation of EC law, and in front of the Court the power differential of member states is equalized. And Germany has strongly defended the ECJ because it sees a strong legal system as a positive step towards the creation of a Federal Europe. Even when attacks on the Court are cloaked in the language of law, these states block the attacks.

The impact of institutional rules on political attempts to sanction the ECJ are manifest in the pattern of political response to the ECJ. It has been a frequent occurrence within the Council that initiatives to expand the authority of EC legal institutions are blocked, while calls to sanction the ECJ go nowhere.⁶⁷ Given the well known disagreements among member states over what to

⁶⁷ For example in 1968 President De Gaulle demanded a revision of the Treaty addressing the jurisdiction and powers of the Court (op. cit. Rasmussen (1986) p. 351), but failed to get a political sanction against the ECJ. In 1971 efforts to expand the ECJ's preliminary ruling jurisdiction to some new international conventions were blocked. The issue was resolved through a compromise agreement: a small enumerated list of national high court

do about ECJ activism or unwanted ECJ jurisprudence, threats to sanction the ECJ by angry politicians usually ring hollow. As long as there is not a credible threat of action against the ECJ, the Court can be comfortable that so long as national courts will go along with them, the national governments will acquiesce, bringing their policy into accordance with EC law.

Member states retain their control over the appointment process to the ECJ and they have increasingly turned to this tool to help curb judicial activism. But this is a blunt tool at best. One never knows how a judge will act once they are appointed to the court, and the ability of politicians to replace a judge after six years does not afford politicians a great amount of influence over their appointees. In addition, not all member states are willing to adopt an activism litmus test for their appointees, and decisions are based on a majority vote only. Politicians can also try to manipulate access to courts by setting limits on legal aid and statute of limitations to hinder access to the ECJ. This has been tried in some countries, with varying degrees of success. Usually national laws on legal aid and statute of limitations exist, and these laws are not always alterable for the purpose of EC law. But in Britain, legal aid for appeals to the ECJ was made available only once the case has reached a certain level of the national legal hierarchy, so that parties without deep pockets discouraged lower courts from making a reference to the ECJ.

This is not to say that member states can never influence the ECJ. Politicians can influence ECJ decision-making through their legal arguments, appeals to public opinions,⁶⁸ and even

were be allowed to send references regarding the conventions to the ECJ. In 1978 new conventions regarding fraud against the Community and criminal activities of EC officials were shelved because some member states would not even accept the compromise agreement of 1971 with respect to the new conventions (based on interviews at the German Ministry of Justice and the Legal Services of the Council, October and November 1995). In 1980 French political leaders again called on other member states to act to limit the power and jurisdiction of the ECJ saying "we must do something about the Court and its illegal decisions" (Op. cit. Rasmussen (1986) p. 354), but he failed to get enough consensus to act. In 1989 and 1991 member states refused to expand ECJ authority over justice and home affairs, and in 1995 the ratification of three conventions regarding customs information systems, fraud and criminal jurisdiction and Europol are being blocked because of disagreement over extending ECJ authority (specifically pertaining to Article 177 EEC, the preliminary ruling system) to the conventions (based on interviews with government legal advisors to the Netherlands, Britain and Germany November, 1995). In 1991 politicians also killed a Commission proposal to inscribe a role for national courts into the EC Treaty (op. cit. Curtin (1994) p. 462)

⁶⁸ Joseph Weiler sees political appeals to public opinion as tool of politicians which is increasingly used. Weiler, Joseph. 1993. Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration. *Journal of Common Market Studies* 31 (4):417-446.

threats against the ECJ. And politicians can overcome the joint-decision trap thus they can, under certain conditions, muster a credible threat. (The conditions under which politicians will have more or less influence are discussed in Chapter 6.) But as long as national courts are willing to enforce ECJ jurisprudence against them, and as long as there are significant divisions in member state interests regarding the ECJ, the Court enjoys significant political autonomy.

IV. Limits to ECJ Autonomy

National Courts have accepted the supremacy of EC law, and politicians have found their tools of political influence undermined by national judicial support and the requirement of unanimity to sanction the ECJ. As long as the ECJ maintains national judicial support, and as long as there is a core of political support that will block attacks on the ECJ, the Court will have significant autonomy in its decision-making. But there are of course limits to ECJ autonomy. The limits come from the legal process itself, from the need to maintain the support of the national courts, from the need to avoid the emergence of a consensus to attacking the Court, and from public opinion.

Perhaps the largest limitation on what the ECJ can do comes from the legal process itself. Cappelletti and Murphy argue that courts are inherently limited in their ability to influence the policy-making process because they can only intervene when cases are brought before them, and they cannot address legal questions not raised by parties to the dispute.⁶⁹ Shapiro argues that courts rely a great deal on the consent of the parties which is why they develop and rely on legal principles and legal precedent. The principles and precedents are designed to convince the parties of the neutrality of judicial decisions, but they also constrain what courts can do.⁷⁰

In the EC context, the limitations created by the legal process are exacerbated by the ECJ's dependence on national courts. To maintain national judicial support, the ECJ must stick to acceptable methods of legal reasoning and take into account the political sensitivities of the

⁶⁹ Op. cit. Cappelletti (1989) p.35. Op. cit. Murphy (1964) p. 20-25.

⁷⁰ Shapiro, Martin. 1981. *Courts: A comparative political analysis*. Chicago: University of Chicago Press.

national judiciaries. National high courts only sometimes see the expansion of EC law and ECJ authority as an opportunity for empowerment and quite often see the expansion of ECJ authority as a threat to their own influence and authority. As the case studies will show, after witnessing the expansion of ECJ jurisprudence into more and more areas of national law and national court authority, higher courts have created national constitutional limits on ECJ legal expansions, and even on what their governments can agree to at the EC level. The German Constitutional Court signaled to the ECJ that it expects the ECJ to respect states' subsidiarity rights and opened a legal avenue for Länder to challenge EC legal expansion agreed to by the German government. By threatening to find future ECJ legal expansions inapplicable in Germany, the German Constitutional Court drew lines in the sand which influence the process of legal integration at both the legislative and the interpretive level, and ensure a greater respect for regional and states rights within the EC legal and political system. Since EC law is not supreme to national constitutions, lower courts cannot be expected to side with the ECJ in a constitutional dispute. The ECJ must respect the constitutional and jurisdictional concerns of by national high courts, lest these courts carry through on their threats to find ECJ jurisprudence unconstitutional and inapplicable in the national realm.

The ECJ must also take into account the legal and political proclivities of lower national courts. Lower courts do not always see an interest in making a reference to the ECJ or pressuring high courts to accept ECJ jurisprudence. Indeed while lower courts have been a strong force promoting the expansion of European law, they have also been a force creating limits on European law and European integration. Lower courts turn to EC law or references to the ECJ to bolster the influence of their decisions, but this tool is only useful when the lower court expects that it will agree with or prefer the EC law outcome. When lower courts do not like the legal outcome created by EC law, either because they feel that it is unjust, disagree with the ECJ's legal reasoning, or simply prefer the national solution, they do not make a reference to the ECJ. And when they disagree with an ECJ decision, they have even tried to get higher courts to contradict what the ECJ said.

These inter-judicial dynamics create constraints on the ECJ's ability to expand its legal doctrine and legal authority. National judicial constraints have influenced ECJ jurisprudence regarding human rights, the right of national courts to interpret "clear" EC law on their own, and the direct effect of directives.⁷¹ They are currently affecting the legal debates over the authority of the ECJ to expand its jurisdiction at will (Kompetenz-Kompetenz) and state's rights (subsidiarity).⁷²

The ECJ must also take into account political concerns. Member states could eventually gather enough support to attack ECJ authority (though probably not to dismantle the current system). The Barber Protocol⁷³ was the first successful effort on the part of member states to limit the effects of an ECJ decision. The protocol got through because the member states were already in the process of negotiating a Treaty revision, and because it was spearheaded by the ECJ's traditional supporters, the Dutch and the Germans. But with the advance scheduling of the 1996 inter-governmental conference (IGC) to discuss the competences of EC institutions, member state's threats against the ECJ have become more credible. In 1993 the ECJ issued its first decision ever in which it qualified and limited previous jurisprudence to scale back EC authority in the national realm.⁷⁴ There have been a few other such decisions showing the Court's recognition that national high courts, some national governments, and some national populations

⁷¹ These issues will be discussed in more detail in the case studies. For additional literature on ECJ-national court interaction on these issues see: Mancini, Federico, and David Keeling. 1992. From CILFIT to ERT: The Constitutional Challenge Facing the European Court. *Yearbook of European Law* 11:1-13. Morris, P.E., and P.W. David. 1987. Directives, Direct Effect and the European Court: The Triumph of Pragmatism. *Business Law Review* (April, May):85-88 and 116-118, 135-136. Rasmussen, Hjalte. 1988. Between Self-Restraint and Activism: a Judicial Policy for the European Court. *European Law Review*:28-38.

⁷² As chapter four will discuss, the German Constitutional Court's *Maastricht* decision raised the issue of Kompetenz-Kompetenz, that is the jurisdictional authority of the ECJ to define the limits of its own authority. National high courts do not want the ECJ to claim this authority for itself, and have started to signal to the ECJ that they will limit the ECJ's ability to define at will its own jurisdiction or to expand at will the reach and scope of EC Treaties. The German Constitutional Court also insisted that the ECJ better respect the division of EC and member state authority, calling on it to stop its previous practice of nearly always finding in favor of an EC authority.

⁷³ Protocol concerning Article 119 of the Treaty establishing the European Community, attached to the Treaty on a European Union.

⁷⁴ French penal authorities v. Keck and Mithouard ECJ decision of decision of 24 November 1993, 267 and 268/91. not yet published.

do not want to see more authority transferred for to the EC level. Chapter six will discuss these developments in more detail.

Finally, public opinion is also a constraint on the ECJ. Unfavorable public responses to ECJ decisions could unravel the legal consensus underpinning the Court's legal doctrines, and undermine the willingness of national courts to send references or apply ECJ jurisprudence. Public backlash is felt within the ECJ. ECJ Justice Mancini helped explain the ECJ's "retreat from activism" this way:

The hostility which the [Maastricht] Treaty elicited among the more nationalist-minded political circles is well known. Less known is the fact that the Court was a favourite target of that hostility in the campaigns preceding the Danish and French referenda and, with particularly nasty tones, in the debates which took place at the British House of Commons. The disappointing outcome of these battles (the Treaty was rejected in the first Danish referendum and approved by a thin majority of the French electorate and the British Parliament) obviously impressed the judges in Luxembourg: for as Mr. Dooley, the clear-thinking saloon-keeper created by Finley Peter Dunne, said in his rich Irish brogue, "th' Supreme Coort follows th' illiction returns." But an even deeper mark was left on the judges by their discovery of antagonism, however uneducated, which the Court's case-law had provoked; and that mark became indelible when Germany entered the field.⁷⁵

Studies have shown that the ECJ has little institutional legitimacy among the European population. In a 1992 Eurobarometer survey, individuals were asked whether they agreed with the following statement: When the laws of the European Community are in conflict with (my country's) laws, (my country's) laws ought to be the ones that apply (q. 69). On average, 58% of European respondents believed that national laws should apply, while only 16% felt that EC laws should apply. In West Germany, 62% of respondents felt that national law should be given priority while only 13% supported giving EC law priority. In France 55% of respondents felt that national law should apply, while only 19.8% felt that EC law should apply.⁷⁶ If there were a serious crisis of ECJ legitimacy, national courts would break from the ECJ. The German

⁷⁵ Mancini, Federico, and David Keeling. forthcoming. Language, Culture and Politics in the Life of the European Court of Justice. *Columbia Journal of Law*.

⁷⁶ Analyzing these and other findings, Gibson and Caldeira have concluded that the ECJ lacks significant legitimacy and support in European populations, and there is little public willingness to accept ECJ decisions with which individuals disagree. Caldeira, Gregory, and James Gibson. 1995. The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support. *American Political Science Review* 89 (2):356-376. Gibson, James, and Gregory Caldeira. 1995. The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice. *American Journal of Political Science* 39 (2):459-89.

Constitutional Court has indicated its willingness to do this, and really these courts have no choice. Their authority and legitimacy rests on national constitutional legal texts and their political loyalty is to the nation first.

The ECJ is not alone in these constraints. Indeed Murphy identified similar constraints for the U.S. Supreme Court.⁷⁷ But the ECJ is in a more vulnerable political situation because of its dependence on national judiciaries for cases and because it lacks public legitimacy. In a very real sense, the national judiciaries are the ECJ's constituency. They provide the ECJ with cases, make ECJ jurisprudence enforceable, and according to Gibson and Caldiera, to the extent the ECJ has any public legitimacy it is thanks to the public's respect for their own legal institutions.⁷⁸ For all of these reasons, the ECJ must make sure it fulfills the needs and interests of national courts.

If the ECJ strays from conventional legal interpretation and applies its doctrine in ways which rouse significant political concerns, the ECJ may find national courts unwilling to apply its jurisprudence and member states willing to sanction the ECJ. The Court must be aware of these constraints, and must make sure that it maintains national judicial support and a core political support. Public support for Europe integration is currently at a low, so it is not surprising that the limits of ECJ autonomy are being revealed or that we see some retreat on the part of the Court. But the ECJ retains all of its institutional tools of political leverage. The supremacy and direct effect of EC law remain firmly entrenched in the national legal systems, and the institutional rules which make sanctioning the Court so difficult are still in place. The Court may enter a period of relative inactivity, but the European Court's source of political leverage will not disappear.

⁷⁷ *Op. cit* Murphy (1964) pps. 1-45.

⁷⁸ *Op. cit.* Gibson and Caldiera (1995, 1995).

Chapter 4
**“No”...“Yes”...“Only As Long As”...“Maybe”...“Only when we think you
... are right”...“Yes O.K.”...“Well...”:**
German Judicial Acceptance of EC Law Supremacy

Germany represents in many ways the great success of legal integration, with national courts vigorously requiring the German government and the German administration to follow through on European legal obligations and implement European law correctly. The German Constitutional Court was one of the first national high courts to accept the supremacy of EC law over German law. The Constitutional Court has gone further than any other high court in helping to facilitate the incorporation of EC law into the national legal system, by endorsing the principle of EC law supremacy over national law, and by creating a judicial sanction against national judges who refuse to refer questions to the ECJ or who refuse to apply ECJ jurisprudence. Germany also looks like one of the best case examples of legal integration in Europe so far as German courts refer more preliminary ruling questions to the ECJ than any other national judiciary. They refer broad and far reaching legal questions allow the ECJ to expand the reach and scope of European law into the national realm. They have unambiguously declared the supremacy of European law over conflicting German law. And they have significantly influenced national policy regarding the implementation and application of European law.

At the same time, German courts have been among the most critical of the ECJ's jurisprudence, to the point of creating potential barriers to legal integration. The German Federal Tax court rejected ECJ jurisprudence regarding the direct effect of directives, replacing the ECJ's interpretation of the EC Treaty with its own analysis of the meaning and intent of the EC Treaty. The Federal Constitutional Court has told the ECJ that it cannot expand EC law in certain directions, and that it must better respect both individual and states rights. It has asserted its own right to interpret the EC Treaty, to find limits to EC and ECJ authority, and to conduct constitutional review of EC laws. And it drew lines in the sand demarcating the limits of ECJ authority, threatening that it might find European law and ECJ jurisprudence unconstitutional and inapplicable in Germany should the ECJ step over these lines.

The defiance of ECJ authority by German courts is especially surprising in light of the strong and unwavering commitment of the German government to European integration and to a strong European legal system. Indeed the German government has had to defend both European integration and the ECJ in front of its national courts. And the German courts have even questioned the ability of the government and the parliament to make appropriate decisions about European integration. How can we understand the national judicial challenges to the ECJ and the German government at a time when Germany is very committed to European integration? How can we reconcile this opposition with simultaneous strong support for European legal integration?

German judicial opposition to ECJ authority has seemed to strengthen over time. German courts first accepted EC law supremacy in 1971, and then started to create caveat's to their acceptance in 1974, 1985, and again in 1993. The German judiciary's response to the doctrine of EC law supremacy has changed from a "No" position where European law was not supreme to subsequent national law (1960s), to "Yes" (1971) , to "Only As Long As..." (1974), to "Maybe Yes" (1979), to "Only When We Think You are Right, then Yes" (1985) , to a "Yes O.K." (1987) to a very hesitant "Well...only under certain conditions" (1993). The changing German positions on the issue of EC law supremacy have shaping judicial interpretation at both the EC and national level, and the process of legal integration more broadly.

This chapter traces the process of legal integration of the Doctrine of EC Law Supremacy in Germany, showing how competition between courts fueled the process of legal integration and contributed to the seemingly erratic German judicial support for the ECJ and its jurisprudence across time. Lower courts were the driving motor in this process, using the EC legal system to challenge national legal barriers to integration, and the national legal system to challenge ECJ barriers to their ability to conduct their own reviews of EC law and ECJ jurisprudence. Lower courts shifted the legal and political context from under high courts pushing higher courts to change the strategies they were using to protect their own autonomy and influence. The references by lower courts also provided the ECJ with the opportunity to expand the reach of EC

law and to develop European jurisprudence to counter the arguments of those higher courts seeking to limit the reach of EC law in the national realm.

Section I of this chapter explains the development of a legal basis for the supremacy of European law, showing how pro-integration legal scholars and practitioners worked to create a doctrinal legal bases for EC law supremacy within the German system and to convince other German legal and political actors of the validity of their interpretation of the German constitution. Section II identifies which German courts were most involved in promoting legal integration in Germany and explains why these courts were most involved. Section III traces the process of legal integration from 1963 to 1995, examining 5 rounds of judicial interaction which facilitated doctrinal change around the issue of EC law supremacy, leading to the development of a national legal basis for European law supremacy. Section IV examines the role of political forces, the ECJ, legal doctrine, pro-integration organizations, and competition between courts in facilitating the acceptance of the doctrine of EC law supremacy in Germany.

I. Creating a Legal Basis for EC Law Supremacy in Germany: The Role of Pro-Integration Academics and Practitioners in Jump-Starting Legal Integration

When Germany joined the European Community, and when the Court of Justice declared the Supremacy of EC law, Germany had a traditional dualist interpretation of the relationship of treaty law to national law. International law was considered an entirely separate realm of law, which operated in a different plane than national law. Treaty law became part of German law through its formal incorporation by the German parliament. Once a treaty became part of national law, it was subject to the same constitutional constraints as national law and it could be repealed or superseded by an act of parliament. This meant in practice that to the extent that European law was the last law passed, German courts did not hesitate to apply EC law over national law. But to the extent that national law was subsequent to international law or treaty ratification, the last statement of parliament was to be applied. In order for national courts to be able to apply European law over subsequent and conflicting national law, a legal basis for the supremacy of European law had to be created.

Pro-integration legal associations set about creating this legal basis. In the 1960s few scholars or practitioners had an understanding of EC law. Those who specialized in EC law were a coherent and well organized group, ideologically committed to European integration. They set about creating a legal basis for EC law supremacy and promoting this vision to national judges, drowning out those who opposed their legal interpretations. While ultimately the judges were in the driving seat of the process, German pro-integration scholars and practitioners provided a road map and the cables to jump-start the engine.

The *Wissenschaftliche Gesellschaft für Europarecht* (Scientific Society for European Law or WGE) was formed in 1961 to develop and promote an alternative view about the relationship between European law and national law to the traditional German dualist doctrine.¹ It was founded by academics specializing in civil law, constitutional law and coal and steel issues, but membership quickly spread to include lawyers and in house councils for large corporations. (Noticeably absent were the traditional scholars of international law who continued to cling to dualist conceptions about the relationship of EC law to national law). German members of the legal services of the Commission and at the ECJ were also very active in the groups conferences.² Like its counterparts in other member states, the German pro-integration legal community had a symbiotic relationship with the ECJ in the early years of legal integration. National academics and practitioners worked on the ground to influence national legal discourse in favor of legal integration (and to influence ECJ jurisprudence!), and ECJ worked from above to provide jurisprudence which furthered the goal of integration. EC institutions used the WGE and other national associations to sound out ideas about EC law doctrine, and as a nationally based legal

¹ Whenever a new topic of law emerges in Germany, associations form which are designed to be the center of research, meetings, and discussions. Membership in the WGE grew almost immediately, quickly reaching 200-300 members, but 30-40 members remained at the core of the group. Upon the 25th anniversary of *Europarecht*, the founder of the WGE gave a speech on the history of the WGE and on the founding of the WGE and *Europarecht*. (Ipsen, Hans Peter. 1990. "Europarecht"- 25 Jahrgänge 1966-1990 "in Verbindung mit der Wissenschaftlichen Gesellschaft für Europarecht". *Europarecht* 25. Jg. (Heft 4):323-339.) Other information about the actions of the WGE was gathered in interviews with current and founding members of the governing board of the WGE (January, 1994; June 1994; January 1994).

² Based on an interview with the first secretary of the WGE, January 11, 1994 (Brussels).

lobby promoting ECJ doctrine.³ The WGE established a specialized field of EC law, introduced EC law to the legal educational curriculum and bar exams, and created a specialized journal for EC law, *Europarecht*. To spread their influence beyond the circle of EC law specialists, the WGE instituted a quarterly series in a German legal journal read by the nearly the entire German legal community of judges, scholars and practitioners, the *Neue Juristische Wochenzeitschrift*,⁴ and spoke on European law issues at meetings and conferences of German judges, and administrative and constitutional law scholars.

The pro-integration community tried in 1963 and 1964 to convince the German legal community that European Community was not a typical international organization, so that the traditional *lex posteriori derogat legi priori* doctrine and the traditional dualist doctrine did not apply to EC law.⁵ The European Court's *Van Gend* and *Costa* decisions also tried to develop the idea that the EC Treaty was "special" and created a new legal order, different from traditional international law. The virtue of this approach was that it would apply across countries, and relieve the ECJ from limitations inherent in national constitutional legal orders. Seeing that the 'special nature' argument was not winning over the wider legal community, pro-integration academics turned instead to developing a national constitutional basis for international to be supreme to national law. At first this approach seemed fully compatible with the ECJ's doctrine, but in the end the incompatibility of the constitutionally based doctrine and the ECJ's doctrine became apparent.

The German Constitution was seemingly quite favorable to EC law supremacy, but German jurists were constrained by past legal interpretations which, based on the original intent

³ The academic side of the WGE was informally but nonetheless closely tied to EC institutions. German representatives on the Commission and the ECJ were at times on the governing board of the WGE, and along with members of the Commission's legal services picked conference topics and participated in conferences sponsored by the WGE. The Commission helped support international exchanges of national legal associations, the development of international European legal journals, as well as the training of more specialists in EC law. (Based on interviews with current and former members of the Commission's legal and academic services who were involved in efforts to promote legal integration through links with national legal communities, and the original secretary of the WGE. January, 1994; June, 1994; July, 1994; July 1994.)

⁴ Ophüls, C.F. 1963. Quellen und Aufbau des Europäischen Gemeinschaftsrechts. *Neue Juristische Wochenzeitschrift* (Heft 38):1697-1701.

⁵ Op. cit. Ophüls (1963) and Ipsen, Hans Peter. 1964. Rapport du droit des communautés Européennes avec le droit national. *Le Droit et les Affaires* October 24 (47).

of the Basic Law articles, limited German courts from according international law supremacy over national law. It was here that pro-integration scholars had their greatest initial success in influencing German legal interpretation. Article 25 GG (*Grundgesetz*) made international law an integral part of German law creating rights and duties for German citizens and having precedence over German law, but it was traditionally seen as applying to customary international law and not to Treaty law⁶ thus in the 1960s it was not seen as being applicable to the EC context. Article 24 GG allowed the German government to “by legislation transfer sovereign powers to intergovernmental institutions,” but Article 24 GG was created for collective security organizations⁷ and it was also not seen as being intended for or applicable to an economic organization such as the European Community. In the 1960’s a virtual battle broke out among German legal scholars regarding the relationship of European law to national law, with international law scholars arguing for traditional dualist limited interpretations and pro-EC law scholars arguing for broader constitutional interpretations congruent with the supremacy of European law over national law.⁸ The pro-integration scholars developed a legalistic argument about how Article 24 GG implied the supremacy of EC law. This created a constitutional justification for German judges to accord EC law supremacy over national law, making it more legitimate for national judges to apply EC law over conflicting and subsequent national law even before the Constitutional Court issued its authoritative decisions in 1967 and 1971 requiring national judges to do so.

⁶ Henkin, Louis, Richard Crawford Pugh, Oscar Schachter, and Hans Smit. 1993. *International Law: Cases and Materials*. Third ed, *American Casebook Series*. St. Paul: West Publishing Co. See p. 154.

⁷ Menzel. 1981. *Bonner Kommentar*. Bonn. Tomuschat, Christian. 1989. Les rapports entre le droit communautaire et le droit interne allemand dans la jurisprudence récente de la court constitutionnelle allemande. *Cahiers de droit européen*:163-178.

⁸ In the early stages of European law, different fields of law wanted to claim European law as their own. International public law professors naturally saw EC law as a subset of international law, and wrote many articles about EC law based on the dualist vision of law (these were the disciples of the most famous International law expert, Scheuner). The WGE was comprised of constitutional law and coal and steel law specialists, and there were no representatives on the public international law view on the board and leadership of the organization. The second half of the ‘60s led to the victory of the constitutional and economic administrative lawyers who co-opted EC law as a subset of their fields. But to this day many constitutional law experts and international law experts disagree with pro-integration scholars on the extent to which EC law is supreme to national law (based on an interview with founding members of the WGE January, 1994).

Legal scholars in civil law systems help develop legal theories and promote these theories in articles, conferences and talks. In creating an alternative legal doctrine to that of *lex posteriori*, pro-integration academics were playing a familiar role in the German legal process. The WGE's larger influence on the process of legal integration in Germany came through their efforts to influence German judicial decisions and doctrinal development directly, and thereby jump-start the process of legal integration in Germany. Practitioner members of the WGE created legal cases which promoted legal integration in Europe and Germany, using their position as lawyers in these cases to inform judges about the preliminary ruling reference procedure and about the emerging academic opinion regarding EC law. Succeeding in convincing some judges to make references to the ECJ, the national judicial decisions then became data which pro-integration academics could point to show that national legal doctrine on *lex posterior* did not apply to EC law. The WGE coordinated writing campaigns in major legal journals supporting pro-integration national court decisions, so that in the early years the legal community was informed when even a first instance tax court made a 'correct' decision according EC law supremacy. They also wrote articles chastising national courts for decisions which did not support ECJ jurisprudence. For national judges deciding on technical issues of law, these stingingly critical articles came as a surprise, and discouraged them from intentionally or unintentionally challenging ECJ jurisprudence in the future. Members of the WGE even contacted national court presidents to "inform" them that their jurisprudence was not up to date with European law, referring them to articles written by famous law professors in the WGE to support their case.⁹ While most of the German legal community probably remained unconvinced about the legal basis for the supremacy of EC law, almost any source one might consult to learn about European law would provide the same pro-EC answer regarding the meaning of EC law and the role of national courts in enforcing European law. By 1970, the sheer volume of the WGE's written output as well as the nascent German constitutional court doctrine cast a shadow over German judicial practices discouraging judges and scholars

⁹ In interviews, members of the WGE recalled contacting national judges, and national judges being "welcoming" of their advice. They could cite concrete cases where their phone call changed subsequent judicial interpretation.

from openly dissenting about an area which was not their expertise, lest they appear misinformed, anachronistic or anti-European.¹⁰

Legal theories and legal arguments ultimately only become “doctrine” when national courts apply the arguments in their cases. While the idea was suggested to them in the scholarship, and pressed on them by WGE lawyers and telephone campaigners, ultimately German judges were responsible for re-interpreting Article 24 of the German constitution so as to create a legal basis for EC law supremacy in the national realm. The next section will consider who the judicial protagonists to this doctrinal change were.

II. Identifying the Key Judicial Actors in the Process of National Doctrinal Change

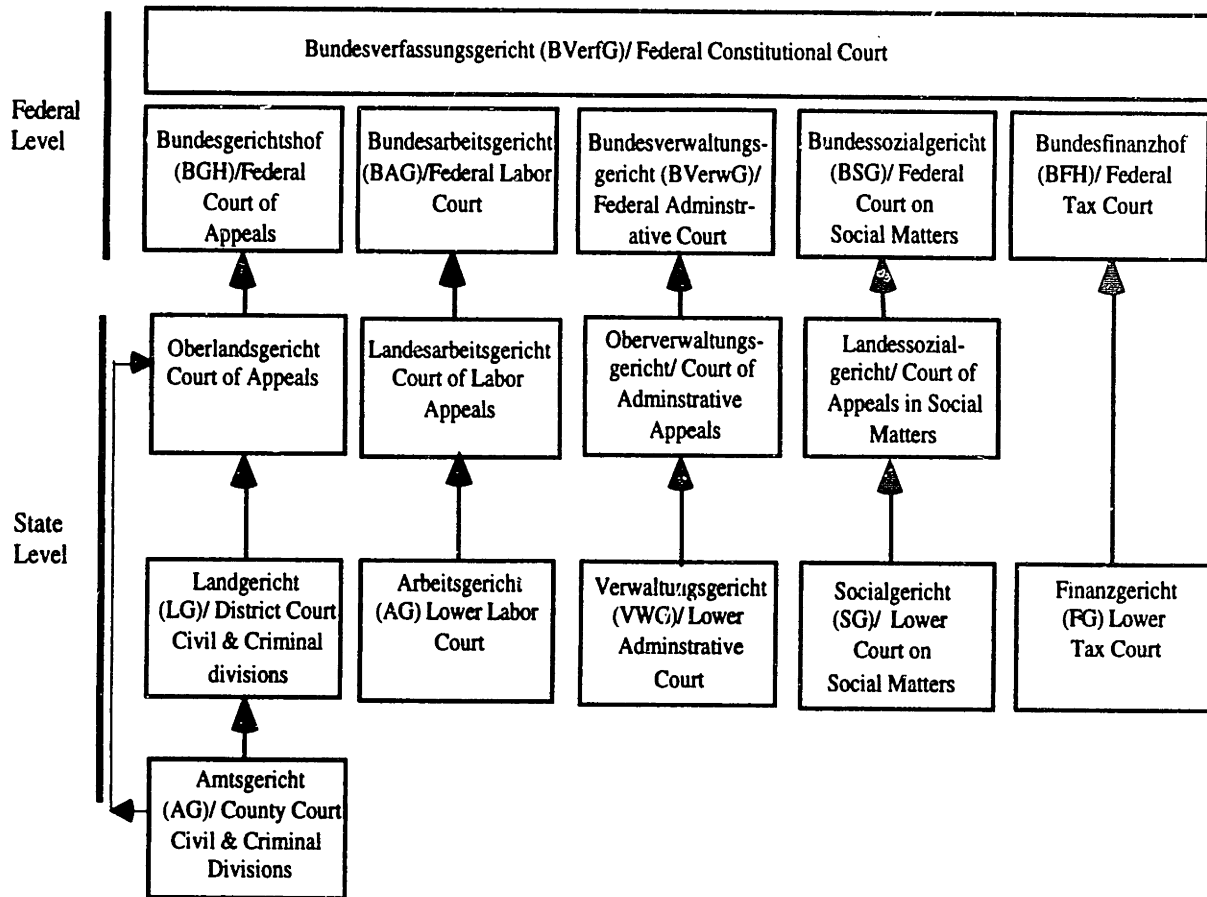
The German judiciary in general favored the creation of a rule of law at the European level because it would promote adherence to EC law across member states and, as citizens of a rule bound country, German judges believed in the inherent good of adhering to clear rules (national or international). The prestige in Germany accorded to contributing to the development of legal doctrine also made German judges unusually eager to play a role in the European and national doctrinal change, especially compared to courts in other countries. As long as the EC legal system did not upset the national legal system too much, there was a willingness throughout the German judiciary to help promote European legal integration.

But once the ECJ started to expand its jurisprudence into more issue areas, it began to encroach more into national court’s jurisdictional authority and the ECJ jurisprudence upset more areas of national law and policy. The interests of different German courts in facilitating legal integration started to diverge, and certain courts appealed to German constitutional provisions to challenge ECJ jurisprudence and doctrine. National judicial interests diverged in larger part based on the position of the court within the German legal hierarchy. For higher German courts, the

¹⁰ In an interview a former German tax court judge said that by 1970 there was such a governing opinion in the literature regarding EC law supremacy that judges did not want to challenge it. While this judge was still today not convinced of the legal basis of EC law supremacy, he said that by 1970 those who disagreed with the doctrine did not want to write articles against it because there was too much countervailing literature and they would be seen as anti-European.

ECJ's doctrine threatened their independence and authority. For lower German courts, the EC legal system became a means to escape the legal hierarchy. The chart below shows the hierarchical organization of the German judiciary.

Chart 4.1: Organization of the German Judiciary¹¹



The high courts which had the most to lose in the expansion of European law into national law were the “Federal” courts, which are portrayed on the chart as sitting under the Constitutional Court. They are the highest national courts on substantive questions of law, such as the meaning of a specific social or tax provision. Every time European law entered a new area of national law, the European Court became the highest court on the substantive legal issue. ECJ jurisprudence also at times upset the smooth functioning of the EC legal system, which is of particular concern

¹¹ This chart is modified from a chart in Horn, Norbert, Hein Kötz, and Hans G. Leser. 1982. *German Private and Commercial Law: an Introduction*. London: Oxford University Press. (Reprinted in Glendon, Mary Ann, Michael Wallace Gordon, and Christopher Osakwe. 1985. *Comparative Legal Traditions, American Casebook Series*. St. Paul: West Publishing Co. See p. 111

to higher courts. Finally, making a reference to the European Court could potentially create political conflict with politicians, who might be angered that the Court of Justice was invited to interfere in domestic issues of law and policy. High courts are more sensitive to political concerns both because their jurisprudence is more carefully watched than that of lower courts, and because the “federal” level courts are accountable to the German Ministries. The fear that ECJ jurisprudence could undercut their authority, disrupt the national legal system, or create conflict with politicians made high courts inherently conservative vis-à-vis the ECJ.

First and second instance courts, (those sitting in the ‘state’ level because they are officially under the legal authority of the state), were less threatened institutionally by references to the European Court and by the extension of European Court authority into new areas of national law. Lower instance courts do not have as decisive an influence over the development of law, thus they do not have to fear subjugation to the ECJ to the same extent as higher courts. Lower courts focus on legal questions applying to each case, and do not need to think about facilitating the over-all functioning of the legal process. Nor are lower court decisions monitored by the government.¹² There are also many benefits to lower courts in seizing the ECJ and invoking EC law. It allows lower courts to escape the German hierarchy and circumvent the restrictive jurisprudence of higher courts, re-opening legal debates which had been closed, and creating the possibility for legal outcomes which from a policy or legal perspective may be preferable. With an ECJ decision behind a lower court, it is less likely the decision will be reversed by a higher court, thus having an ECJ decision actually bolsters the influence of lower courts, increasing their ability to influence the development of legal doctrine. Given the prestige of developing legal doctrine in Germany, the ability of the lower court to contribute decisively to the development of European legal integration was also an incentive in itself.

Lower courts have played an extremely important role in the process of legal integration in Germany. Lower courts made nearly 70 percent of all of the German references to the European

¹² Even though lower courts are often if not usually applying federal law, lower courts are under the administration and political authority of the Länder governments. The Ministry of Justice only has responsibility for the “Federal” courts, and in general does not monitor or scrutinize the decisions of lower courts, relying on higher courts to reverse errant judgments.

Court, and were the most active in sending the European Court legal questions which allowed it to expand the reach and scope of EC law. The table below shows number and percent of references of legal cases to the European Court made by the different levels of German courts, and the number of references made by different branches of courts in the German judiciary.

Table 4.2 Preliminary Ruling References of German Courts (1960-1994)

Civil & Penal Courts			Labor Courts			Administrative Courts			Social Courts			Tax Courts			Totals		
# ref.	% ref.		# ref.	% ref.		# ref.	% ref.		# ref.	% ref.		# ref.	% ref.		# ref.	% ref.	
Federal Court of Appeals	27	3%	Federal Labor Court	10	1	Federal Administrative Court	37	4%	Federal Social Court	43	5%	Federal Tax Court	140	16%	All Federal Courts	257	29
Court of Appeals	27	3%	Court of Labor Appeals	2	0	Court of Administrative Appeals	10	1	Social Court of Appeals	27	3%				All Appeal Courts	66	7%
District & County Courts	58	6%	Lower Labor Courts	38	4%	Lower Administrative Courts	148	16%	Lower Social Courts	31	3%	Lower Tax Courts	303	33%	All Lower Courts	578	64%
Total by Branch	112	12%		50	5%		195	22%		101	11%		443	49%	n=	901	100

Percent equals the percent of total references by German courts. The figures in this chart are calculated based on data provided by the research and documentation division of the Court of Justice. Included are references for opinions even if the opinion did not result in an ECJ decision reported in the ECJ's Annual Report, thus the total number of references varies slightly from the number reported by the ECJ. *= <1%

The Federal level courts made 257 references to the European Court, or 29% of all references to the European Court. From 1960 to 1994, appeals courts made 66 references (7% of all references)¹³ and first instance courts made 550 references to the European court during that time (64 percent of all references). The Federal Tax Court comprised 16% of high court references, indeed the Federal Tax Court has probably sent more references to the European court than any other individual court in Europe. This may seem paradoxical since federal level courts had the most to lose by making references to the European Court. But nearly half of all references from the Federal Tax Court to the European are technical questions concerning the classification of goods under the EC customs categories, or challenges to the validity of EC laws, thus questions which do not extend the reach of European law, nor involve conflicts between EC and German law and nor involve broader legal principles.¹⁴ In questions of legal substance, the Federal Tax

¹³ The especially low number of references from appeals court has to do with the organization of appeals courts in Germany. Appeals courts often do not meet on a full time basis and appeals court judges often have other jobs in addition to their judicial job, thus they are less likely to undertake the time commitment involved in walking a case through the preliminary ruling procedure.

¹⁴ Writing on these references, the German judge on the European Court wrote:

Court tends to decide the case on its own, insisting that the European law is sufficiently clear as to be interpreted without a reference to the European Court.¹⁵

Within branches of the judiciary there was also significant variation. The tax branch, the smallest branch of the German judiciary with less than 3% of all judges, accounts for 49 percent of all references to the European Court, the administrative branch 22 percent, the social and civil/penal branches 10 percent each, and the labor courts 5 percent. (The clumping of cases was even more of a factor in the 1960s and 1970s when tax courts accounted for nearly sixty percent of all references). When one breaks down the above statistics by individual courts, the pronounced role of certain courts becomes even more apparent. Just eleven individual courts account for 65% of all references.¹⁶ Of the 22% of all Administrative Court references to the

The Federal Tax Court came on the EC legal scene before everything else regarding the issue of classification of EC tariffs and tolls. The Court considered these qualifications to be unimportant. But since then, the BFH has felt obliged to seek clarification of legal questions, where the tariff-levels of goods are central. It is not for the legal difficulty, but rather for curiosity that the classifications of jeans as men's clothing according to the direction of buttons has become well known. Also noteworthy is the difference between material for sculpture, paintings and similar decorative materials.

Zuleeg, Manfred. 1993. *Bundesfinanzhof und Gemeinschaftsrecht*. In *75 Jahre Reichsfinanzhof-Bundesfinanzhof*. Bonn: Stollfuß Verlag.

¹⁵ In interviews Federal Tax Court judges expressed a concern that they did not want to be reduced to mere "Briefträger", letter carriers for the Court of Justice, and that in order to avoid this outcome the Federal Tax Court considered on its own any legal question where it was 'valid' for them to do so. The tendency of Federal Tax Court judges to avoid sending questions of substance to the ECJ has been observed by German legal scholars (Meier, Gert. 1970. Anmerkung. *Außenwirtschaftsdienst des Betriebs-Beraters* (Mai, Heft 5):233- 234.). One scholar noted:

It is typical for their attitude that precisely in matters of principle, particularly those concerning the supremacy of Community Law, the delimitation of Community and State competence, or the nature and effect of directives, [the French *Conseil d'État* and the German *Bundesfinanzhof*] have avoided, under the cover of this [Acte Clair] doctrine, a mandatory reference. In these instances, they so vindicated their jurisdiction to interpret Community rules and to "overrule" the jurisprudence of the Court, defied the supremacy of Community law and reasserted thereby State powers...In this respect the practice of the *Conseil d'État* and of the *Bundesfinanzhof* seeking to reserve questions of fundamental importance to themselves in fact challenges the exclusive interpretative jurisdiction of the Court

Bebr, Gerard. 1983. The Rambling Ghost of "Cohn-Bendit": *Acte Clair* and the Court of Justice. *Common Market Law Reviews* (20):439-472. See p. 465-457.

¹⁶ The table below lists all of the courts which have made more than 20 references to the European Court from 1960 to 1994:

Individual Courts with 20 or more references from 1965-1994

Name of Court	# refs	%	German References
Federal Court of Appeals (BGH)	27	3%	
Federal Social Court (BSG)	43	5%	
Federal Administrative Court (BVerwG)	37	4%	
Federal Tax Court (BFH)	140	16%	

European court, forty percent originate from the administrative court in Frankfurt. Of the 33% of all lower tax court references to the European Court, 28% come from the tax courts in Baden-Württemberg, Düsseldorf, Hamburg, Hessen and Munich, and often one of the senates of the court is responsible for the lion's share of references. Within the Federal Tax Court, 95% of all references originate from the seventh senate, the senate involved in customs matters. Given the significant clumping in the distribution of references to the European court across German courts, it is not so surprising that the lower tax courts and the administrative court in Frankfurt have been at the heart of the development of the supremacy doctrine in Germany. The numerous references by these court's to the ECJ and the vigorous involvement of these courts in the development of German legal doctrine regarding EC law can be explained in part by jurisdictional divisions across courts and by the development of EC law. Because the Federal Office of Nutrition and Forestry and the Federal Office for the Regulation of the Agricultural Market are located in Frankfurt, the Frankfurt administrative court hears nearly all challenges to the validity of EC agricultural policies. Because customs regulations of the EC were the first to be harmonized (in the 1960s) and because tax law is one of the most harmonized areas of European Community law, tax courts have also been involved in legal integration from an early period. Hearing more cases involving European law, the Frankfurt administrative court and the German tax courts are most familiar with the strengths and weaknesses of the European legal system and the national legal system (at least with respect to European law). But this can explain only part of the large number of German court references coming from these courts. German tax courts have referred a disproportionate

Tax Court (FG)- Baden-Württemberg	23	3%
Tax Court (FG)- Düsseldorf	41	5%
Tax Court (FG)- Hamburg	86	10%
Tax Court (FG)- Hessen	42	5%
Tax Court (FG)- Munich	47	5%
Administrative Court (VWG)- Hessen	20	2%
Administrative Court (VWG)- Frankfurt	81	9%
Total References from Above Courts	587	65%

In the last ten years, a broader range of German courts have started making references which has led to a decrease in the overall proportion of references from these courts. A study on German reference patterns conducted in 1986 and 1987 revealed that up until 1985, tax courts accounted for 58% and seventy eight percent of all German references came from just 13 courts. Of the references made to the ECJ, 37% concerned whether or not national law was compatible with EC law. Schwartz, Jürgen. 1988. *Die Befolgung von Vorabentscheidungen des Europäischen Gerichtshofs durch deutsche Gerichte*. Baden-Baden: Nomos Verlagsgesellschaft.

number of cases compared to the courts responsible for financial matters in other member states; indeed German tax courts in the 1960s and 1970s referred more cases than the entire judiciaries of Belgium, France, the Netherlands and Italy. The intense level of inter-court competition within the tax branch of the judiciary (as will be discussed in rounds 2 and 4 in the next section) helps explain the large number of references from the tax courts.

The Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) is the highest court in Germany. Because it can only examine constitutional questions, the significant substantive expansion of EC law does not in itself undermine BVerfG authority or influence. The Federal Constitutional Court did not appear on the table regarding references to the European because it did not make any references to the ECJ in the period of this study (apparently the Constitutional Court made one reference in 1995). Despite its lack of references, the Federal Constitutional Court has played a pivotal role in the development of legal integration in Germany. The BVerfG has been motivated in the process of legal integration by its mission in protecting basic rights and the German constitutional order, by a desire to create a check on ECJ authority, and by its desire to ensure that it is the final authority on EC legal issues. As will be shown in the discussion of round three and five, the BVerfG created constitutional limits on the applicability of EC law in Germany which have allowed it to significantly influence ECJ jurisprudence and what the German government agrees to at the EC level. How the BVerfG identifies its interests vis-à-vis the ECJ can be summed up by this comment of a German Constitutional Court judge: 'EC legal order and the national legal orders are two separate entities connected by a bridge. EC law flows into the national legal order over this bridge, and the BVerfG sits on this bridge and decides which law can and cannot come in.'¹⁷

Rules of access to the Constitutional Court determine the types of legal questions that the Constitutional Court can evaluate, how the legal questions are framed, and when and how the Constitutional Court can influence the process of legal integration. There are four different ways that cases can make it to the Constitutional Court for decision: 1) "*Concrete Judicial Review*"—

¹⁷ Interview with a judge at the Bundesverfassungsgericht, Karlsruhe Germany. December 8, 1993.

references from a national court— When a legal case raises constitutional questions which must be answered in order for the national court to render a decision, the national court can stop the case and refer the question to the Constitutional Court for resolution.¹⁸ This mode of access was used by lower courts to pull the Constitutional Court into EC legal debates in “rounds one” and “two” discussed below; 2) *Individual Constitutional Complaints*— individuals can file charges of a constitutional violation of their rights by any state entity, including national courts.¹⁹ This mode of access was crucial in rounds “four” and “five” where individuals challenged the integration process. 3) *“Federal-State disputes”—references by state governments*— State governments can challenge in front of the Constitutional Court Federal laws which encroach on their jurisdictional authority. This mode of access could be very important as the debate over European Union, Federal Government and Land legislative authority develops. 4) *“Abstract Review “of German laws*— On the request of the federal government, a state government, or one third of the members of the *Bundestag*, the Constitutional Court can be called upon to review the compatibility of a German law with the Basic Law. This mode of access has never been used as German parties have been generally united in the goal of European integration.

How the different interests and different courts interacted with each other and with the ECJ to influence the development of a national legal basis for EC law supremacy will be examined in the next section.

III. The Process of Doctrinal Change in Germany

German positions on the issue of EC law supremacy have fluctuated across time, going from “No,” to “Yes,” to “Only As Long As” certain conditions are met, to “Maybe”, to “Only When We Think You are Right”, to “Yes O.K.” to “Well...”. This section traces these doctrinal changes across time, dividing doctrinal change into “rounds” of legal integration. Each “round”

¹⁸ The preliminary ruling process of the German and Italian constitutional systems were the model for the EC’s system, and they work much the same way as the European Court’s preliminary ruling system.

¹⁹ The Constitutional Court receives around 3500 complaints a year. While it grants full review to about 1 percent of all claims, according to Kommers “these cases are among its most significant decisions and make up about 55% of [the Constitutional Court’s] published decisions.” Kommers, Donald. 1989. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham: Duke University Press. See p. 17.

represents a major stage in which German doctrine on the issue of supremacy of EC law was developed, and thus a stage in legal institution building within Germany and within Europe. Round one discusses the debate over the constitutionality of EC membership (1963-1967) through which a national constitutional basis for the transfer of sovereignty to the EU level was found. Round two examines the “Turnover Tax Struggle” (1965-1971), through which the supremacy of EC law and the obligation of national courts to accord EC law supremacy was established. Round three examines the “Solange I” and “Solange II” debates (1971-1985) where the German Constitutional Court established the supremacy of the German constitution over EC law, and influenced ECJ human rights jurisprudence. Round four examines the Federal Tax Court’s rejection of the ECJ’s jurisprudence on the direct effect of directives, and the German Constitutional Court’s sanctioning of this defiance (1981-1987). The round created an obligation for German courts to accept ECJ decisions. Round five discusses the German Constitutional Court’s Maastricht decision which was more critical of the ECJ than even its Solange I decision had been. The German Constitutional Court created limits to what the German government could agree to at the EC level, opened the door to Länder to challenge EC acts which encroach on their authority, and signaled to the ECJ that the German Constitutional Court would define the limits of EC and ECJ authority in the national realm.

Traditional legal accounts of doctrinal change remove legal decisions from political context, highlighting mainly the legal aspects underpinning a judicial decision-making and portraying indeterminate aspects of the law in unequivocal terms. This account, in contrast, highlights the indeterminate aspects in the law and situates legal decision-making into political context in order to understand the political forces influencing legal interpretation and the legal process. This requires a significant amount of contextual detail. In the end of each ‘round’ I summarize the important doctrinal advances achieved in the round, and how competition between courts influenced the round of integration. The conclusion also provides a chart summarizing the doctrinal development and the interests of the different legal and political actors involved in the doctrinal development.

As German legal doctrine on the issue of EC law supremacy matured across time, new judicial tools of influence were created, allowing national courts greater influence in the process of legal integration, and national courts and the European Court greater influence in national and European policy-making. Like most experiences of political institution building, legal institution building developed in a path-dependent way; doctrinal developments in round 1 shaped doctrinal developments in round 2 etc. Legal interpretation did change across time, and at times interpretations were revised in light of new circumstances. The examples of judicial revision show that legal integration is not necessarily a one directional trajectory towards the expansion and deeper penetration of European law into national spheres. But even the legal reversals and the retrenchments did not alter the core institutional development of legal integration. There remained an unbending commitment to the principle that European legal obligations were binding, that national courts had an obligation to ensure the correct application of European law, and that European law was ultimately supreme to conflicting national law. Because the doctrinal reversals did not revise this core tenets, the institutional underpinnings of European law supremacy were in the end ultimately strengthened from the experience.

Round 1: From Absolutely No to Hinting Yes: Establishing the Possibility of EC law Supremacy 1960-1967

The German legal community never accepted the 'special' nature of the EC treaty or that EC law was in some fundamental way different from international law. But the ability of EC institutions to pass regulations which are "directly applicable" in national settings (Article 189 EEC) created a new legal situation to which the traditional notion that international law became part of national law through parliamentary ratification clearly did not apply. The European Court and pro-integration scholars drew from the legislative capacity of the EC that European law constituted a "new legal order" of international law,²⁰ not bound by traditional international public law doctrines. In Germany, constitutional law scholars drew from the unusual legislative capacity of the EC that the Treaty of Rome was quite possibly unconstitutional. German constitutional law

²⁰ *Van Gend en Loos v. Nederlandse Administratie Belastingen* ECJ. 26/62 (1963) ECR 1.

scholars and judges were concerned that the constitutional safeguards in the national system were jeopardized by the EC system. There was a serious debate over the constitutionality of European Community membership between 1958 and 1967. At stake was whether or not the terms of EC membership needed to be re-negotiated and if European regulations were legally binding in Germany.

What had been largely a theoretical debate became part of the judicial debate in 1963, when a tax court in Rheinland-Pfalz challenged the constitutionality of the ratification act of the Treaty of Rome, and questioned whether Article 24 of the German constitution could validly be used to justify a transfer of legislative authority to the European Community. The tax court was being asked to review the validity of an EC regulation. Rather than sending the question to the ECJ, it took the provocative position that Article 189 of the EEC Treaty was unconstitutional and therefore the regulation was not valid. The tax court voiced the fear that allowing the European Council to pass regulations would undermine judicial protections in the constitution, and it indirectly criticized legal scholars who were embracing legal integration uncritically, likening them to the academics who embraced Nazi doctrine uncritically. It argued:

The transfer of sovereignty to an international institution must not become a means of upsetting, from outside, the balance of power carefully worked out and protected by the Constitution for setting up a free society...

The most important aim of the Constitution is to avoid a repetition of the developments which, in the Weimar Republic, led to the abolition of the separation of powers, and thus to the collapse of the rule of law. The path to the complete surrender of the doctrine of the separation of powers through the Special Powers Act of 24 March 1933 took its first open form in the excessively wide interpretation of Art. 48 (2) of the Weimar Constitution in favor of the executive. As early as this, the thinking of leading academic lawyers had reached the highly dangerous stage, in which an inadequately circumscribed clause in the Constitution had itself become a gap in the Constitution. The undermining and destruction of the rule of law for a second time can be avoided only by the courts opposing every attempt to interpret another inadequately circumscribed constitutional provision so as to weaken Article 189 (3) of the Constitution's protection of the principle of separation of powers, and reduce the significance of the rule of law to a sham.²¹

The Rheinland-Pfalz judge stopped its legal proceedings and referred the constitutionality question to the Constitutional Court in order to bring the Constitutional Court into the debate.²²

²¹ FG Rheinland-Pfalz decision of 14 November 1963. (10):130-141.

²² The bold nature of a lower court challenging the constitutionality of membership in the European Community triggered a response in other judges and in politicians who disagreed with its finding. One month after the Rheinland-Pfalz judgment the Frankfurt administrative court issued a decision which came to exactly the opposite conclusion to that of the Rheinland-Pfalz court. The administrative court's case did not raise a question of the

While the Rheinland-Pfalz court could point to legal scholarship supporting its legal reasoning, in the aftermath of its judgments only those scholars disagreeing with the Rheinland-Pfalz decision wrote articles strongly criticizing the tax court's judgment. The strongest voices came from members of the *Wissenschaftliche Gesellschaft für Europarecht*.²³ Probably because of the Rheinland-Pfalz decision implied that Germany could not be a member in the EC, at least as long as the EC was organized as it was, German legal thought regarding the legal basis of the European Community membership started to shift.²⁴ This early movement of national legal consensus towards WGE positions and the ECJ's *Van Gend* and *Costa* decisions was apparent at the Assembly of Constitutional Law Scholars. According to Mann, "in stark contrast to a similar conference five years earlier, there was now general agreement that Community law should be granted a position independent of member state constitutions and must be understood in terms of its own needs and conceptions."²⁵ Such a view would allow for German membership in the European Community. The German Bundestag also weighed to counter the Rheinland-Pfalz decision, passing a resolution stating that the ratification law on the EEC was constitutional.²⁶

The Rheinland-Pfalz court remained defiant. Faced with the application of the same EEC regulation a year later, it refused to revise its earlier opinion, and criticized the legal arguments being used to support the constitutionality of EC membership. The Rheinland-Pfalz Court referred to the Assembly of Constitutional Law Scholars and summarized what it saw as the weak position in favor of the constitutionality of EC membership, arguing:

constitutionality of the Treaty of Rome, but the court used the fact that an issue of European law was raised, however tangentially, to speak to the Rheinland-Pfalz judgment. The administrative court used legalist arguments to support why it was constitutional to transfer legislative authority to the European Community, indicating which legal scholars it disagreed with and which legal arguments supported the administrative court's view.

²³ Mann notes that the Rheinland-Pfalz decision was "sharply attacked" in the literature, and cites articles by Ophüls, Ipsen and Nicolaysen, three of the founders of the WGE. In a 1965 decision which upheld its earlier 1963 decision, the Rheinland-Pfalz court reviewed the attacks to its decisions in the literature, noting that the defendant in the case "referred to the work of three authors, Nicolaysen, Ophüls and List, whose arguments however have done nothing to remove the Court's doubts." Mann, C.J. 1972. *The Function of Judicial Decision in European Economic Integration*. The Hague: Martinus Nijhoff Press. See p. 419. FG Rheinland-Pfalz decision of March 25, 1965. *Common Market Law Report* 1967(5):67. See p. 69.

²⁴ In a 1965 decision which upheld its earlier 1963 decision, the Rheinland-Pfalz court reviewed the report from a 1964 law conference and said "there was a shift of emphasis towards Ophüls' view, and it seems to have been a reaction against this Court's judgment." Ibid. Rheinland Pfalz decision of March 25, 1965

²⁵ Op. cit. Mann (1972), p. 420.

²⁶ Op. cit. Mann (1972), page 419 note 485.

Ipsen and Scheuner took the view that the European Communities had specific economic functions...and that the transfer of certain rule-making powers to such an association with limited functions did not constitute a surrender of national sovereignty—it was a step in the emergence of a new federal pattern. However, a number of speakers [at the 1964 conference] conceded that the unsatisfactory separation of powers in the EEC was a threat to the constitutional structure of the Federal Republic and other Member States, and the views expressed by Ipsen and Scheuner cannot wholly conceal the fact that the legislative functions bestowed on the Council by Article 189 of the EEC Treaty appear to be repugnant to the principles of the Federal Constitution. Ipsen finally said that the member states had accepted the terms of the treaties and could not now resale [sic] from them: but that is a weak argument, and underlines the absence of any other arguments of law to support that position...²⁷

The Rheinland-Pfalz court took the view that “the main task of all the lawyers and politicians involved must be to find ways of removing these [unconstitutional] discrepancies...not just by refined legal arguments, but by reorganizing the European Communities.”²⁸ The tax court’s argumentation in its second decision makes it clear that the court was not interested in foiling the German role in European integration, but rather in provoking the Constitutional Court to become involved and to push for a re-organization of the European Community along more democratic institutional lines.

Given the turmoil in the European Community at that time, including De Gaulle’s empty chair policy and the crisis which led to the Luxembourg compromise, it was clear that any re-opening of the organization of the European Community would lead to a significant weakening of the Community institutions. German public policy was committed to a European Community, and even hoped one day that the Community would evolve into a “United State’s of Europe.”²⁹ Challenging the constitutionality of German membership was entirely out of sync with the larger political trend in Germany, and it was likely to have a the opposite effect undermining the German goal of European unification and undermining the nascent ECJ doctrine.

While many scholars criticized the Rheinland-Pfalz Court’s position, the Constitutional Court continued to let the issue fester. According to Mann, the Constitutional court was “biding its time for decision until the issue had been thoroughly discussed in the literature and legal opinion had tended to consolidate.”³⁰ Mann found this festering period to be useful, because it

²⁷ Op. cit. Rheinland Pfalz decision of March 25, 1965 p. 71.

²⁸ Ibid. Rheinland Pfalz decision cited in op cit. Mann (1972), p. 420.

²⁹ Fackler, Maxim. Zeichen am europäischen Horizont. *Süddeutsche Zeitung*, January 3, 1967.

³⁰ Op. cit. Mann (1972) p. 420.

forced other national courts to take positions on the issue. But the political reality was clear to all and staying silent on the issue did nothing to bolster the authority of European law or the new jurisprudence of the European Court of Justice regarding EC law supremacy. German courts were taking quite contradictory opinions on the status of EC law in Germany,³¹ and on December 12, 1966, the administrative court in Frankfurt refused to apply an EC regulation, declaring it invalid and therefore challenging the interpretive authority of the European Court.³² The Turnover Tax Struggle, which will be discussed next, was also beginning to heat up at that time leading to a huge number of cases involving European law, and German government attempts to tell its administrative authorities to ignore a recent European Court decision.

Faced with a growing body of cases and no indication that the Constitutional Court was going to wade into the debate, the Federal Tax Court decided that it had to go forward on its own. On April 25, 1967 it rejected the Rheinland-Pfalz court's arguments,³³ taking into account the German government's political goal of European unification and the difficult political context within Europe. The Federal Tax Court argued

The political unification of Europe, to which the Basic Law is committed, can be realized only step-by-step under the [prevailing political] circumstances. The EEC represents a significant step in this direction... Article 24 of the Basic Law, therefore, should be interpreted to mean that the transfer of sovereign powers to the EEC cannot be measured by the strict standards which apply to the exercise of these sovereign powers by the constitutional authorities within the State itself.
34

The Constitutional Court had refrained from entering the debate, because it was itself significantly divided on the issue raised by the Rheinland-Pfalz court. On July 5, 1967 the second senate of the Constitutional Court (BVerfG) finally issued a decision on the Rheinland-Pfalz case, but it was a split decision which used a technical interpretation to avoid dealing with

³¹ See discussion of divergent legal positions of German courts in Torrelli, Maurice. 1968. *La Cour Constitutionnelle Fédérale Allemande et le Droit Communautaire*. *Revue du marché commun*:719-723. See pps. 720-721.

³² VWG Frankfurt decision of December 12, 1966. *Außenwirtschaftsdienst* 1967:67. cited in Darras, Jean, and Olivier Pirotte. 1976. *La Cour Constitutionnelle Fédérale Allemande a-t-elle mis en danger la primauté du droit communautaire?* *Revue Trimestrielle de Droit Européen*:416-438. See p. 422.

³³ BFH decision of April 25, 1967. *Aussenwirtschaftsdienst* 1967(6):227-229. discussed in Lauwaars, R.H. 1967. 45. *Bundesfinanzhof, Firma Max Neumann v. Hauptzollamt Hof/Saalen*. *Common Market Law Review* 1967-1968:211-212.

³⁴ Cited in Mann (op. cit. 1972) p. 421. Even though the Federal Tax Court is the appeals court and the higher court to the Rheinland-Pfalz court, its decision was not binding on the Rheinland-Pfalz court. Since what was at stake was a constitutional question, only the Constitutional Court could resolve the issue decisively.

the larger question of the constitutionality of the EC's legislative process.³⁵ The second senate did declare that the unconstitutionality of a single provision would not render the entire Treaty unconstitutional, but it left the question over the constitutionality of EC regulations conspicuously open. The fact that the decision was split (4 judges to 3), and that the largest issue at stake was left unanswered, revealed the lack of consensus in the Constitutional Court itself. While deciding the case on a technicality “permitted the Constitutional Court to sidestep a potentially embarrassing constitutional conflict with the Treaty”³⁶ the decision left open the possibility that all European regulations would be invalid in Germany.

This unresolved outcome was unsatisfactory, especially because German courts were increasingly being called upon to interpret EC regulations. The first senate of the Constitutional Court took the opportunity offered by an individual appeal to clarify the constitutional position of Article 189 EEC. In the case at hand, some trading companies were challenging an EC regulation on the basis of a constitutional violation on their individual rights to life, liberty, equality before the law, free choice of occupation, and security of property. While the BVerfG found the constitutional complaint itself to lack foundation, it used the case as an opportunity to speak on the constitutionality of Article 189 of the EC Treaty, and to give the EC Treaty firm rooting in German constitutional law. In its decision, the first senate affirmed the independent nature of the EC, and the EC's right to issue regulations which are binding inside of Germany. The language the first senate used lent credence to the developing German doctrine on Article 24 of the Constitution, and the European Court's doctrine in its *Van Gend* and *Costa* decisions on the “special” nature of the EC Treaty. The BVerfG wrote:

The institutions of the EEC exercise sovereign rights of which the member states have divested themselves in favor of the Community set up by them. The community itself is neither a state nor a federal state. It is a gradually integrating Community of a special nature, an “interstate institution” in the sense of Article 24 of the Grundgesetz to which the Federal Republic of Germany—like many other member states—has “transferred” certain sovereign rights. A new

³⁵ The Constitutional Court found the reference from the tax court to be inadmissible because the constitutionality of the Treaty was not relevant for the case before it. It summarized the arguments regarding the constitutionality of Article 189 put forth by the Rheinland-Pfalz court and by the German government, but did not speak itself to the debate except to say that the unconstitutionality of that single article would not render the entire Treaty invalid. BVerfG decision of July 5, 1967. BVerfG 2 BvL 29/63. *Europarecht* 1967(2):351.

³⁶ Op. cit. Mann (1972) p. 422.

public authority was thus created which is autonomous and independent with regard to the state authority of the separate member states' consequently its acts have neither to be approved ("ratified") by the member states nor can they be annulled by them. The EEC Treaty is as it were the constitution of this Community.

The October 18th decision closed off an important legal avenue through which private litigants had been attempting to challenge Commission regulatory policies and regulations passed in the Council. Sending a message to other litigants who might want to appeal EC decisions to the BVerfG, the first senate declared that since EC regulations are not acts of German authorities, it lacked the jurisdiction to assess the validity of them. While it did seem to leave open the possibility that individuals could raise cases if their basic rights were violated, the first senate stressed that the EC had its own legal system to deal with challenges to the validity of European law.

The debate over the constitutionality of EC membership has become a footnote in German doctrinal development, having been overtaken by subsequent doctrinal developments. But the debate reveals that despite the surface appearance of wide-spread consensus for EC law supremacy created by the pro-integration legal community, there was a deep ambivalence about the legal consequences of EC membership shared by German legal scholars and jurists. It was not for nothing that the Constitutional Court's second senate took 4 years to issue its decision on the constitutionality of EC membership, and then abstained from closing the largest debate over the constitutionality of Article 189 EEC. And while the Rheinland-Pfalz court's position has been cast as a minority position, Mann has pointed out that the tax court's opinion in many respects "voice[d] the doubts of German jurists in previous years."³⁷ Indeed as time wore on, the argument that the EC was 'special'—seemingly accepted in the 1967 decision—came to change and the arguments used by the Rheinland-Pfalz judge to question the constitutionality of EC membership resurfaced.

The issue of national courts losing authority over national law was not directly at stake in the debate over the constitutionality EC membership, which may explain why the German Constitutional Court seemingly accepted ECJ doctrine in 1967 while the Constitutional Court in

³⁷ Ibid. p. 422.

Italy and the French *Conseil d'État* rejected the ECJ's doctrine. The debate was motivated by a concern for the how EC membership would effect the safeguards of the Constitution. Believing in the somewhat self-serving necessity of judicial review, the Rheinland-Pfalz judge was hoping that constitutional limitations on EC law would be created so that EC law would be subject to national judicial review.

The BVerfG's second senate was too ambivalent to endorse the ECJ's doctrine on the new and special legal order, but the first senate went a way towards endorsing the ECJ's new legal order. The first senate was seemed to wan to stop national courts from refusing the validity of EC laws, and to endorse the weak and fragile EC legal system. That the Constitutional Court would not want to be an appeals court for anyone unhappy with an EC law or a Commission decision seems reasonable. But by denying any authority to assess the validity of EC laws, the BVerfG was denying itself a large source of cases and therefore of future influence in the process of legal and political integration. The argument used to get out of this situation—that the Constitutional Court was not competent to assess the validity of acts of European institutions—conceded too much, and much acrobatics were needed in future decisions to re-claim its right to assess the validity of laws emanating from European institutions. But reclaim its right it did.

When the first senate eventually accepted the constitutionality of Article 189 EEC, it paved the way for the acceptance of EC law supremacy by German courts.³⁸ In 1967, the Constitutional Court had gone further than any other high court in affirming the European Court's *Van Gend* jurisprudence.

Round 2: From Hinting Yes to Definitely Yes- 1965-1971

The BVerfG's 1967 decision on the constitutionality of EC membership was very "friendly" towards ECJ doctrine, and once an Article 24 basis for EC law authority in Germany was created, acknowledging the supremacy of EC law over subsequent national law was a relatively small step. The way in which the absolute supremacy of EC law over "simple" German

³⁸ Frowein, Jochen. 1968. Annotation. *Common Market Law Review* 1968:484-487. Ipsen, Hans Peter. 1968. Anmerkung zu Beschluss 10/18/67. *Europarecht* Heft 1:137-141.

law was pronounced was almost anti-climatic, in part because it was so anticipated and in part because the supremacy of EC law over subsequent national law was the least controversial aspect of the case in hand. National courts and politicians were more focused on diffusing the “*Umsatzausgleichsteuerstreit*” (the turnover equalization tax struggle), which led them to largely overlook the doctrinal aspects of the case. The turnover-equalization tax struggle shows how competition between courts can shift the underlying legal and political context in which politicians and higher courts choose their strategies. While in the end the politicians and the Federal Tax Court achieved their goal of removing the material impact of the ECJ’s jurisprudence, the legal principles established in the struggle remained firm and became a key institutional building block in the EC legal system, and in the German legal order.

The “struggle” began in 1965 when a German lawyer challenged a German turnover equalization tax in a lower tax court in Saarland, and the tax court sent the case to the ECJ. “Turnover equalization taxes” were taxes on imports designed to equalize the level of taxes paid on both domestic and imported products. Because turnover taxes were levied at each stage of the production process, it was very difficult to know how much tax had been paid during the domestic production process. Importers charged that the German government was using ‘equalization taxes’ as a form of hidden tariff and they tried to get the Commission to crack down on the German government. After failing to get the Commission to force the removal of the German tax, the German lawyer tried to get the European Court to declare the direct effect of Article 95 of the EC Treaty, which prohibits discriminatory taxation on imports, to create a legal basis for individuals to challenge German turnover taxes in national courts. The case he chose to bring in the Saar court was carefully selected so as to present a clear German violation of the EC Treaty. The legal dispute involved an “equalization” tax levied on milk-powder imports when German milk powder was explicitly tax exempt.

In the European Court’s case the German government argued that the Commission was responsible for policing the enforcement of European law, so that only the Commission could raise a case involving a turnover tax violation. The Commission had reviewed German taxes on

milk powder in 1965, and found the taxes to be too high, at which point the Parliament had lowered the tax rate from 4% to 3%. Since the Commission did not raise another case, the German government argued that the new tax rate must be in conformity with European law. The ECJ rejected the government's arguments, and found that Article 95 of the Treaty created direct effects, that is individual rights which national courts had to protect. It implied from its decision that the German milk powder tax was illegal.³⁹ The doctrinal implications of the 1966 *Lütticke* decision were extremely significant. Finding that Article 95 created direct effects and that the German tax was discriminatory implied that a member state had an obligation to pro-actively change all of national legislation which conflicted with the EC Treaty, even in the absence of commonly adopted EC tax rules.⁴⁰ Like the *Costa* decision, the *Lütticke* decision also implied that the ability of the Commission to raise cases did not mean that national courts could avoid enforcing EC law. Since in 1965 the Bundestag had changed the level of its milk-powder import tax rate, the issue of the supremacy of EC law over a subsequent legislative act also entered the debate.

The *Lütticke* decision raised the prospect that all sorts of German turnover equalization taxes could violate EC law. Lawyers and the *deutschen Verbände der Außenwirtschaft* (German Association of Exporters) vigorously solicited copy-cat cases by,⁴¹ resulting in a flood of challenges to 'illegal' taxes filed with tax authorities and in tax courts. Faced with staggering number of claims and court cases⁴² the German government tried various extra-legal means to make the problem simply disappear. The Ministry of Finance issued a decree saying that "We hold the decision of the European Court as invalid. It conflicts with well reasoned arguments of the Federal government, and with the opinion of the effected member states of the EU." The

³⁹ Reference to the ECJ from FG Saarland decision of November 26, 1965. *Europarecht* 1966(2):145. Background to the case is presented in the ECJ decision on the case: *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis* ECJ. Case 57/65 (1966) ECR 205.

⁴⁰ Waelbroeck, Michael. 1967. Observations: L'Applicabilité Directe de l'Article 95 du Traité CEE. *Cahiers de droit européen* (2):184-194.

⁴¹ A small group of lawyers sent letters to all of their clients, and published complaint forms in trade journals.

⁴² 330,000 refund claims and 25,000 legal suits were eventually filed. Meier, Gert. 1971. Anmerkung. *Neue Juristische Wochenzeitschrift* (Heft 47):2122.

decree instructed customs officials to ignore the ECJ decision and to reject all legal claims based on the ECJ decision.⁴³

Lower courts and lawyers interpreted the government decree as an attempt to intimidate plaintiffs and to stifle a legitimate legal debate, and simply refused to follow the Minister's decree.⁴⁴ Lower tax courts admitted the legal claims forcing customs officials to respond to the legal challenges in court. Pressure from lawyers and from the *deutschen Verbände der Außenwirtschaft* mounted and even representatives in the Bundestag challenged the Ministry of Finance's edicts for being inconsistent with the principle of a *Rechtstaat*, a state ruled by law.⁴⁵ Lower court insistence in sending more cases to the ECJ and keeping the legal debate open meant that government fiat could not make the legal challenges disappear. A solution which addressed the legal issues had to be found. The Ministry of Finance, Ministry of Justice, Ministry of Economics, the *deutschen Verbände der Außenwirtschaft* and the Federal Tax Court (the Bundesfinanzhof (BFH)) agreed that a test case would be sent to the ECJ, and the ECJ would be asked to re-evaluate the issue.⁴⁶ This created an opening for the ECJ, the BFH and the government to create a legally justifiable solution to the problem.

The BFH's arguments in its reference make it clear that left to its own the BFH would not have allowed the challenges to the German equalization tax system. In its reference to the ECJ, the BFH asked the ECJ to re-consider its *Lütticke* decision. It noted that there were 200,000 complaints and 15,000 legal cases pending in an already overburdened tax court system and asked the ECJ to consider that "neither the tax courts or the BFH are authorized by German legislation to examine the complex question which tax...is in accordance with the Treaty." The BFH argued that it was not a legitimate task of German tax courts to be required to review thousand of single decisions taken in application of material tax law especially because the Community had its own

⁴³ July 7, 1966 (IIIB.4-V 8534- 1/66), republished in *der Betrieb* (1966) p. 1160.

⁴⁴ Wendt, Peter. 1967a. Kein Rechtsschutz im Umsatzausgleichsteuer-Sachen? *Der Betrieb* (Nr. 48):2047-2048. Wendt, Peter. 1967b. Ungeklärte Fragen im Streit um die Umsatzausgleichsteuer. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 9 (September):348-354.

⁴⁵ Meier, Gert. 1967. Zur Aussetzung der Einsprüche gegen Umsatzausgleichsteuerbescheide. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 2 (15 February, 1967):75-77. Meier, Gert. 1994. Der Streit um die Umsatzausgleichsteuer aus integrationspolitischer Sicht. *Recht der Internationalen Wirtschaft* 3/94.

⁴⁶ Interview with Gert Meier, October 1994.

means of enforcing the Treaty (namely infringement suits raised by the Commission). It asserted that the ECJ's Doctrine of Direct Effect was "in essence of a political nature", and pointed out that in Germany there was no legal directive which gave national courts the responsibility or authority to control of implementation of Community law. It added that "in any case, in Germany the ECJ's jurisprudence in the area of turnover taxes had led to a troubling condition of legal uncertainty."

Within the legal debate of the test case, a politically inspired legal slight of hand was adopted by the BFH and the German government to eliminate the legal standing of the numerous claimants and remove the issue from the jurisdiction of the lower tax courts. The original *Lütticke* case centered around the question of whether a tax levied on imports which was not also levied on domestic products was a disguised tariff, thus it centered on Article 95 EEC. In the BFH's test case, the legal debate was shifted to the question of whether states were allowed discretion in devising "average tax rates", and whether or not Article 97 EEC which concerned "average tax rates", created direct effects. The solution was suggested by the German government, and seized by the BFH, that the lower tax court had asked the wrong question of the ECJ, and that really Article 97—not Article 95—was the relevant treaty article.⁴⁷ The government worked within the legal debate to shift the focus to Article 97 and thus influence the legal outcome. Government officials published legalistic articles supporting this position⁴⁸ and the Ministry of Finance issued a new decree saying:

The German turnover equalization taxes are average tax rates in the sense of Article 97 EEC. In the system of a cumulative multi-phase taxes, it is not possible make an exact comparison between every exact or similar internal product. The German turnover equalization taxes can therefore only on average equalize the tax charges. The aforementioned average tax rates are not based in Art. 95 EEC, and by Art 97 ¶2, only the Commission has the authority to raise cases against specific guideline or the effected country. The aforementioned ECJ decision therefore did not open any means for the German turnover tax to be challenged before tax courts.⁴⁹

The Federal Tax Court also embraced this argument, hoping that lower courts would lose their authority to evaluate the compatibility of German equalization taxes with the EC Treaty.

⁴⁷ Everling, Ulrich. 1967. Sprachliche Mißverständnisse beim Urteil des Gerichtshofes der Europäischen Gemeinschaften zur Umsatzausgleichsteuer. *Außenwirtschaftsdienst des Betriebs-Beraters* 5 (15 Mai):182-184.

⁴⁸ Stöcker, Hans A. 1967. Einzelklagebefugnis und EWG-Kommissionsentscheidung: Alternative oder kumulierter Rechtsschutz in Umsatzausgleichsteuersachen. *Der Betrieb* (40):1690-1692.

⁴⁹ Außenwirtschaftsdienst des Betriebs-Beraters 1966, Heft 2 p. 449.

Lower German tax courts saw the BFH's reference as an attempt to stifle legal debate, and exclude them from examining legal issues of Treaty compliance. They also felt that the BFH was giving the administration too much the benefit of doubt.⁵⁰ As the political bodies were trying to shift focus to Article 97 EEC, lower court judges sent a flurry of references to the European Court arguing that Article 95 also applied to the issue. They also tried to develop legal rules to evaluate if tax rates were "average tax rates" trying to create for themselves the jurisdictional authority to decide if a German tax fell under article 95 or 97 EEC.⁵¹

The ECJ allowed the Germans their legal exit to relieve the pressure of so many legal claims. It refused to reverse its position regarding the direct effect of Article 95, but it did agree that Article 97 could not create direct effects. It turned over to the national courts the issue of if a German turnover equalization tax was an "average tax rate" and thus fell under article 97, or if it was a specific tax and thus fell under Article 95.⁵² The ECJ also answered the lower court references one by one, addressing in detail the legal issues raised by the lower courts and thus allowing them to participate in the legal debate from which the BFH had tried to exclude them. The BFH, for its part, overruled the Saar court's decision, interpreting the milk powder case so narrowly as to make the case virtually ungeneralizable, and minimizing the tax refund awarded to the plaintiff so as to discourage others from raising cases.⁵³ For the test case, the BFH created a broad definition of what constituted an "average tax rate" so that only a narrow category of importers were entitled to a small refund, and all of the other plaintiffs lost their standing to raise

⁵⁰ Interview with Gert Meier, October 1994. Dr. Meier published an account of the turnover-tax struggle in light of questions I posed him on the subject. Op. cit. Meier (1994). In interviews, lower tax court judges pointed out that Federal Tax Court judges have close ties to the Ministry of Finance. There was a concern that the Federal Tax Court was too willing to give the government the benefit of the doubt. (Interviews January 27 1994 in Hamburg and February 22, 1994 in Munich).

⁵¹ *Firma Gebrüder Lück v. Hauptzollamt Köln-Rheinau* FG Düsseldorf decision of April 4, 1968. ECR 1968 p. 245. *Firma August Stier v. Hauptzollamt Hamburg-Ericus* FG Hamburg decision of April 4, 1968. ECR 1968 p. 235. *Firma Kunstmühle Tivoli v. Hauptzollamt Würzburg* FG Munich decision of May 17, 1967. FG III 419/66 - Z 1 and 2. ECR 1968 p. 199. *Firma Milch-, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken* FG Saarland decision of April 4, 1968. ECR 1968 p. 207. FG Saarland Lütticke case, FG II 357 case 358/64, decision of November 15, 1966. There were also arguments trying to develop if a tax was really an "average tax" as implied by Article 97 EEC made by lower tax courts from Munich and Hamburg in references to the ECJ.

⁵² *Case 28/67* ECJ decision of 3 April 1968. ECR 1968:143.

⁵³ *VII B 106/67* BFH decision of October 19, 1968.

suit.⁵⁴ This solution made the pending cases disappear, however, it implied huge concessions to ECJ doctrine. It implied 1) that EC law now governed the issue of taxes on imports from other member states; 2) that individuals could challenge in their national courts any import fee or tax which looked like a disguised tariff (Article 95 EEC); 3) that EC law was supreme to subsequent national law; and 4) that national governments had an obligation to pro-actively change national law to bring it into accordance with EC law even if there was no EC level agreement to replace national law.

In a constitutional appeal, the German Constitutional Court upheld the BFH's decision, but it criticized arguments the BFH had raised in its reference to the ECJ.⁵⁵ The BVerfG's decision enshrined the supremacy of EC law over "simple" German law and the responsibility of national courts to control for the compatibility of national law and EC law into German legal doctrine. The BVerfG argued:

Article 24 Paragraph 1 Grundgesetz implies...not only that the transfer of sovereignty to interstate organs is valid, but also that *decisions of the ECJ...are to be recognized*. The conclusion from this legal situation must mean that...*German courts must also apply these legal rules*, including laws which come from autonomous sovereign authorities but through the ECJ become directly effective within the national sphere and conflicting national law; for only this way can the citizens of the Common Market claim their given rights.⁵⁶

Thus in 1971, the Constitutional Court became one of the first European supreme court to change its national legal doctrine, to accord EC law supremacy over subsequent national law, and to declare a role for national courts in enforcing EC law.⁵⁷

The turnover tax struggle is revealing of the differing incentives motivating lower and higher courts, and of how these differing institutional incentives created a dynamic promoting legal integration. The BFH wanted to make the overwhelming legal backlog go away and

⁵⁴ *Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn* BFH decision of reference of 27 July 1967 to the ECJ. *Common Market Law Reports* 1969(8):300-314.

⁵⁵ The plaintiffs challenged the constitutionality of the BFH's decision. They argued that in reversing a national court decision which implemented an ECJ decision, without having made a new reference to the ECJ regarding the case, the BFH had denied the plaintiff their constitutional right to a legal judge.

⁵⁶ *Firma Alfons Lütticke GmbH, Köln-Deutz* BVerfG. 2 BvR 225/69. *Europarecht* 1972(Heft 1):51-57. Author's translation. Emphasis added.

⁵⁷ The Belgium Cour de Cassation was the first national supreme court to enshrine the supremacy of EC law into national doctrine, beating out the BVerfG by a short 3 weeks. (*Ministre des Affaires Economiques v. SA Fromagerie Franco-Suisse "Le Ski"* Belgium Cour de Cassation decision of May 21, 1971. *Common Market Law Review* 1972:330.)

minimize the Finance authority's costs in the case. It also had an incentive to find that Article 95 and 97 EEC did not create direct effects, so that it could control the interpretation of German turnover tax code. Lower tax courts were unconcerned about the logistical difficulties created by their actions and wanted to be able to review what they considered to be legally valid complaints. Their desire to influence legal doctrine and circumvent restrictive BFH rulings further motivated the lower courts to send numerous references to the ECJ. Inter-judicial dynamics overtook BFH control of the issue—lower court judges worked to influence doctrinal development through references to the ECJ, and these references in themselves meant that BFH judicial fiat or government fiat could not make the issue simply disappear.

A lasting legacy of the turnover-tax struggle was a distinct cooling of the BFH's relationship with the ECJ, and a clear willingness of lower tax courts to refer broad legal questions to the European Court and to challenge BFH jurisprudence on EC law. In 1967 the BFH had come out in support the constitutionality of EC membership and had advocated a broad interpretation of transfer of sovereignty to the EC level. In part because of the harsh attacks on its jurisprudence in the legal literature, and in part because of the increasing encroachments of European law into its domain,⁵⁸ the BFH increasingly decided cases on its own, often reaching opposite conclusions to those of the ECJ.⁵⁹ Whereas lower tax courts had originally displayed a willingness if not a preference to let higher courts send important legal issues to the ECJ,⁶⁰ after learning that the BFH would not send important questions of EC law to the ECJ lower tax courts became more willing to refer them on their own.

The passivity of the Constitutional Court is not surprising when one considers that the Constitutional Court had no jurisdictional issue at stake. Not competent to decide substantive questions of law, it had no interest in waging into the minutia of whether Article 97 or 95 EEC

⁵⁸ Based on interviews with German lawyers and a retired tax court judge who served as a clerk at the BFH in the late 1960s (November 1993 and February 1994).

⁵⁹ Meier, Gert. 1970. Anmerkung. *Außenwirtschaftsdienst des Betriebs-Beraters* (Mai, Heft 5):233- 234.

⁶⁰ In 1963, a Nuremberg tax court "ruled out submission to the European Court at this stage, not least, because this is a test case of fundamental importance, at the beginning of a line of tax court decisions on the EEC excess profits levy, and it would be better if they went to the European Court at the last instance". *Re Potato Flour Tax* FG Nuremberg decision of October 9, 1963. Case K II 9/10/63 Z. *Common Market Law Reports* 1964(9):96-107. Citation from p. 106.

applied to the case. Its 1971 judgment resolved the issue of the supremacy of EC law over subsequent national law, and of the supremacy of ECJ interpretations in substantive legal matters. But it deliberately left open the question of whether or not EC law was supreme over the German constitution, its own area of jurisdictional authority.

This case also shows the political limits of controlling the judicial process once a competitive judicial dynamic develops. The Ministry of Finance stated that it disagreed with the ECJ decision, and this only encouraged lower court judges to refer more cases to the ECJ. Because of the lower tax courts actions, the Government had to find a more legally solid argument to counter the material impacts of the ECJ's jurisprudence. The government's second strategy of using a test case to push its legal argument regarding Article 97 EEC was less overtly political and confrontational, giving the ECJ the opportunity to correct itself without appearing to have buckled to political pressure. The ECJ embraced the opportunity and took into account the government's concerns. While it did not reverse its decision regarding Article 95 EEC, it accepted the government's argument about Article 97 EEC knowing the BFH would rely on this interpretation to dismiss all pending legal claims—including potentially legitimate complaints. The success of the German government in shifting the legal debate shows that political pressure can and does influence legal interpretation and therefore legal integration. But while the German government won the battle regarding turnover equalization taxes, it lost the war so to speak. The government managed to make the legal claims of the 1960's disappear. But the government lost in the larger issue of allowing national courts to play a role enforcing the European Treaty—a point it had argued against in the original *Lütticke* case. Indeed the government's test case strategy implicitly conceded the supremacy and direct effect of EC law, the authority of the ECJ to use the preliminary ruling procedure to indirectly strike down national laws, and the direct effect of Article 95 EEC. The ECJ has developed its *Lütticke* jurisprudence in subsequent cases and ultimately national tax schemes which created disguised tariffs were struck down. National governments also became accountable for implementing goals in the Treaty of Rome despite the lack of EU legislation to replace the national laws.

Round 3: From “Yes” to the Supremacy of EC law to Creating Conditions on the Supremacy of EC Law–1971-1985

By 1971, the German legal community had fully embraced the constitutionality of EC membership and the supremacy of EC law over simple German law. The Constitutional Court’s 1967 and 1971 jurisprudence lent legitimacy to EC legal integration and the ECJ’s early *Van Gend* and *Costa* decisions. But whether there were constitutional limits to the supremacy of EC law remained an open question. Indeed the Constitutional Court had been careful to circumscribe its declarations of EC law supremacy, and had made it clear that its jurisprudence up until that point was *not* intended to address the issue of the supremacy of EC law over the constitution.

Pro-integration legal scholars tried to paper over the importance of the nagging concerns about the constitutional limits to EC law raised in legal conferences and articles. They argued that it was “inconceivable” or at least extremely “improbable” that EC law could violate the Basic Law and that national limitations on the supremacy of EC law would undermine uniform legal interpretation within the EC. But a significant part of the German legal and political community remained uneasy about the lack of basic rights protection and the lack of democracy in the EC. The ECJ had been somewhat dismissive of basic rights concerns raised in legal cases in the 1950s,⁶¹ but in light of the German legal community’s unease the European Court made overtures to its critics. ECJ Justice Pescatore wrote a treatise on human rights and European integration (1968)⁶² and the Court’s jurisprudence started to take basic rights issues more seriously. But this was too little too late. In failing to address fairly widely shared and politically defensible concerns about EC law supremacy, the ECJ made a significant miscalculation.

Like the debate over the constitutionality of EC membership, the debate over the constitutional limits of EC law was transformed from the theoretical realm to the practical realm by a single lower court. The administrative court in Frankfurt (Verwaltungsgerichtshof or VWG) challenged the supremacy of EC law over basic rights protection in the German constitution and tried to establish its own authority to conduct constitutional review of EC laws. The legal case

⁶¹ See the discussion regarding basic rights in Möhring, Philipp. 1965. Rechtsvereinheitlichung und Rechtsgarantien im EWG-Bereich. *Neue Juristische Wochenschrift* 18. Jg. (Heft 48):2225-2230.

⁶² Pescatore, Pierre. 1969. Die Menschenrechte und die europäische Integration. *Integration* 1969:103-136.

involved an EC regulation requiring deposits for firms wanting import licenses. The import licenses were free, but the deposits were forfeited if the firm failed to import the goods. In its past jurisprudence the administrative court had refused the validity of deposit forfeiture because of its conflict with German basic rights protections. But it decided finally to send to the ECJ a test case in which an importer had lost his deposit for reasons which, while perhaps not beyond the importers control, were at least defensible. In making the reference, the Frankfurt court expected the ECJ to agree that EC law could not violate German basic laws protections, and that the license forfeiture scheme was invalid. The VWG was, however, mistaken.

In its *International Handelsgesellschaft* decision, issued on December 17, 1970, European Court challenged the administrative court's claim "that the primacy of European law must yield before the principles of the German basic law." It asserted the supremacy of EC law even over national constitutions. It agreed that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice,"⁶³ but after an analysis of the administrative court's arguments regarding the deposit scheme's basic rights infringements, it found the EC regulation not to violate any basic rights.

The assertion that EC law was supreme even to the German constitution lent credence to the argument that EC membership could undermine democratic and basic rights protections in Germany. Just a few weeks after the ECJ's ruling, a German law professor made a fiery speech at the *Deutsche Richterakademie* (German Academy of Judges). He called the EC was a "Herrschaft Ohne Herrn" (a government without a sovereign) and a "Herrschaft Ohne Grundrechte" (a government without basic rights), highlighting the potential for the EC to run amok without proper democratic (meaning judicial) safeguards. Rupp encouraged the BVerfG to become involved and argued that the ECJ did not have the competence to decide in the case of a collision between basic law provisions. Instead, the Constitutional Court should be the final arbiter of collisions between EC law and basic rights issues in Germany. The provocative speech

⁶³ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECJ decision of December 17, 1970. Case 11/70 ECR 1970 p. 1125. Especially pps. 1133-1134.

was published shortly thereafter as the lead article in the widely read legal trade journal, the *Neue Juristische Wochenzeitschrift*.⁶⁴

The Frankfurt Verwaltungsgerichtshof refused to accept the ECJ's decision in the *Internationale Handelsgesellschaft* case, calling it unconstitutional and therefore not binding. Hoping that the BVerfG would restore its right to review the constitutionality of EC law, the Frankfurt Court referred to the Constitutional Court the same questions it had sent to the ECJ. In addition it asked if national courts could review EC law that the ECJ had already reviewed, and how far EC law could be reviewed with respect to constitutional principles.⁶⁵ It wrote its reference to the BVerfG for maximum effect within the Constitutional Court, criticizing those who would defend the supremacy of EC law over the constitution as trying to facilitate European integration at the expense of basic rights protection. The VWG argued: "Surely it is legitimate to question whether or not a decline in the national state institutions and rule of law must be paid as a price for the building of a political united Europe."⁶⁶ The VWG then appealed to the Constitutional Court's own interests and mission, arguing:

If one exempts the EC legal order from all the obligations envisioned in Art 19§2 and Art 79§ 3 of the basic law, that would create a *constitutional and juridical vacuum*. In effect, constitutional law would be eliminated as a means to control supreme national bodies, in exchange for an ever expanding EC legislation without equivalent guarantees of basic rights. (*emphasis added*)

The VWG exhorted the Constitutional Court to find that ECJ decisions are only binding in their interpretations of EC law, and not in terms of what they say about the compatibility of EC law with national law.

The Constitutional Court had a legal basis it could use to extricate itself from the controversy provoked by the VWG Frankfurt, had it wanted to. The BVerfG could have relied on its 1967 jurisprudence, re-asserting its incompetence to assess the validity of acts not

⁶⁴ Rupp, Hans Heinrich. 1970. Die Grundrechte und das Europäische Gemeinschaftsrecht. *Neue Juristische Wochenzeitschrift* Heft 9:353-359.

⁶⁵ VWG Frankfurt reference to BVerfG- decision from 14.7.1971 II/2- E 228/69 VWG Frankfurt decision of July 14, 1971. *Außenwirtschaftsdienst des Betriebs-Beraters* 1971(Heft 11):541-546.

⁶⁶ VWG Kassel decision of March 1, 1971. VI OE 85/69.

emanating from German authorities and by extension asserting the VWG's incompetence.⁶⁷ But the majority of the Second Senate wanted to enter the debate. In a split decision the Second Senate issued what came to be known as its "*Solange I*" decision,⁶⁸ using the VWG Frankfurt's reference as an opportunity to assert its own authority to find EC law and ECJ decisions inapplicable in the German realm. The decision was very controversial, and the three judges in the minority wrote a highly critical dissenting opinion in the case.

For all practical purposes, the majority repudiated the Constitutional Court's 1967 decision, asserting the authority to review the constitutionality of EC law. The BVerfG argued that it was not reversing its previous jurisprudence.⁶⁹ But by fudging the distinction between what were German and non-German acts, and by creating a substantively meaningless distinction between finding an act "invalid" and finding an act "inapplicable," it found for itself the authority to review EC law where before it had found none. In 1967 the BVerfG had argued that being "autonomous and independent," EC acts "neither [have] to be approved ("ratified") by the member states nor can they be annulled by them." At the time it refused the idea that EC regulations could be seen as acts of German authorities, arguing "if one wanted to see as an act of German public authorities every type of supranational or international public authority which...involved the Federal Republic of Germany, then the current decision's decisive difference between "German" and "non-German" public authorities would be lost...for no supra or international authority can without some involvement of the German State's power take any action."⁷⁰ In 1974, the BVerfG argued: "if a Community regulation is implemented by an administrative authority of the Federal Republic of Germany or dealt with by a court in the Federal Republic of Germany, then this is an exercise of German State Power." This meant that by bringing a case in a national court, any EC regulation could become an act of a German authority.

⁶⁷ Ehlermann, C. 1975. *Primauté du droit communautaire mise en danger par la Cour Constitutionnelle Fédérale Allemande. Revue du Marché Commun*:10-19. Riegel, Reinhard. 1973. *Zum Verhältnis von EWG-Recht und staatlichem Verfassungsrecht. Bayerische Verwaltungsblätter* 104 (4):96-100.

⁶⁸ 2 BvL 52/71 BVerfG decision of 29 May 1974. BVerfGE 37, p. 271. *Common Market Law Reports* 1975(2):540-569.

⁶⁹ Ibid. p. 549.

⁷⁰ Op. cit. Constitutional Court decision of October 18, 1967 p. 136. Author's translation.

The BVerfG admitted that the ECJ was the sole court with the authority to find an EC law to be “invalid”, but it gave itself the authority to find an EC act inapplicable in Germany. Reigel argued that this distinction between “invalidating” law and finding it “inapplicable” was merely euphemistic.⁷¹ The dissenting judges also found the distinction dubious, arguing that

this distinction between invalidity and inapplicability of a norm exhausts itself in the use of different words. If a court declares a legal norm generally inapplicable because of a violation of superior law, it is thereby stating, on a commonsense view, that the norm does not apply, that is, that it is invalid.⁷²

The BVerfG’s power-grab was undeniable. In 1967 it found itself incompetent to review the constitutionality of EC acts, and in 1974 the BVerfG found itself competent to review the constitutionality of EC law, at least as far as basic rights were concerned. The silver lining in the *Solange I* decision was that basic rights challenges to EC law had to first be sent to the ECJ before being appealed to the BVerfG. This gave the ECJ an opportunity to speak on basic rights issues first, to let the ECJ work to try to avoid a conflict. It also lessened the likelihood that plaintiffs would be able to use the EC legal system to circumvent BVerfG jurisprudence.

The majority of the legal press was extremely critical of the *Solange* decision, finding significant flaws in its legal reasoning and seeing the BVerfG’s assertion of an authority to review European law as an explicit threat to the EC legal system.⁷³ The lightning rod in the *Solange* judgment which attracted the most criticism was the statement by the Constitutional Court that it would exercise its authority to review the “applicability” of EC law only

⁷¹ Riegel, Reinhard. 1976. Das Grundrechtsproblem als Kollisionsproblem im europäischen Gemeinschaftsrecht. *Bayerische Verwaltungsblätter* Heft 12 (15 Juni, 1976):354-360.

⁷² Op. cit. *Solange I* (1974) p. 565. As Chapter 5 will discuss, a similar debate about the difference between “applying” the Constitution versus conducting constitutional review (and thereby assessing the “validity” of a French law) took place in France.

⁷³ Cohen-Jonathan, G. 1975. Observations. *Cour constitutionnelle allemande et réglements communitaires. Cahiers de droit Européen*:173-206. Hilf, Meinhard. 1975. Auswirkung auf die Gemeinschaftsrechtsordnung. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* Bd. 35 (1):51-66. Ipsen, Hans Peter. 1975. BVerfG versus EuGh re “Grundrechte”. *Europarecht* Heft 1/2 (Januar-Juni):1-19. Soulas de Russel, Dominique, and Ulfert Engels. 1975. L’intégration de l’Europe à l’heure de la décision de la Cour Constitutionnelle Fédéral du 29 mai 1974. *Revue internationale de droit comparé* XXVIIe année (2):377-384. The Commission also took this view, sending a letter to this effect to German Foreign Minister Hans Dietrich Genscher Die Kommission kritisiert das Bundesverfassungsgericht. *Frankfurter Allgemeine*, December 21, 1974.

[a]s long as (*solange*) the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament of settled validity,⁷⁴ which is adequate in comparison to the catalogue of fundamental rights contained in the Constitution.⁷⁵

Critics of the *Solange* decision used this “as long as” statement to argue that the Court’s goals were not the noble protection of basic rights. If the BVerfG cared only about violations of basic rights, why should the Constitutional Court only want to consider such violations in ‘the current stage’ of EC development? They argued that it is not necessary to have a catalogue of rights that resembles the German one to have basic rights protection, and that having such a catalogue and having the catalogue decided on by a democratically elected and politically powerful parliament in no way ensures the greater respect of basic rights.⁷⁶ They found the BVerfG’s criteria for ensuring basic rights onerous and given the political climate unfeasible, and questioned if the BVerfG had set the conditions high so as to make them unachievable.

One can certainly doubt if the protection of basic rights was at the bottom of the BVerfG’s concerns. The BVerfG did not find the regulation in question to violate basic rights, and has never found an EC law to violate the Basic Law. Similarly, the *Solange I* decision did not acknowledge or encourage the efforts being made by the ECJ to respect national constitutional provisions regarding basic rights.⁷⁷ Protecting its own jurisdictional authority and influencing the political process seemed to be at the core of the Constitutional Court’s *Solange I* decision. In asserting the supremacy of EC law over national constitutions, as the ECJ had done in the *Internationale Handelsgesellschaft*, the ECJ had stepped into the Constitutional Court’s own jurisdictional turf, and the Constitutional Court was sending the ECJ a message that it would not see its authority subjugated. The minority dissenting judges picked up on the jurisdictional

⁷⁴ The Constitutional Court defined what a parliament of “settled validity” would look like when it argued that basic rights protection could not be seen as having been transferred to an organization lacking a “legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level.” Op. cit. *Solange I* decision (1974) p. 551.

⁷⁵ Ibid. p. 545.

⁷⁶ Op. cit. Cohen-Jonathan (1975) and Ehlermann (1975). Zuleeg, Manfred. 1975. Das Bundesverfassungsgericht als Hüter der Grundrechte gegenüber der Gemeinschaftsgewalt. *Die Öffentliche Verwaltung* (Heft 1-2):44-46.

⁷⁷ Just five weeks before the BVerfG issued its *Solange I* decision, the ECJ had issued a decision in which it stated that no European legal measure could be recognized as lawful if it was incompatible with the fundamental rights recognized and protected by the constitutions of the member states. This decision was cited by the dissenting judges as proof that if left to itself the ECJ would develop adequate protections for basic rights. *Nold v. Commission* ECJ decision of May 14, 1974. Case 4/73 ECR 1974 p. 491.

struggle going on, arguing that basic rights were adequately protected in the EC, refusing the distinction between assessing the 'validity' and assessing the 'applicability' of EC law, and interpreting the majority's position as a trespass into the ECJ's authority and as an attempt to widen the BVerfG's own competences. They argued:

The Bundesverfassungsgericht possesses no jurisdiction to examine rules of Community law against the criteria of the Constitution, in particular of its section on fundamental rights, in order, on this basis, to answer the question of their validity...The fact that the majority of the Court nonetheless claims this power is an inadmissible trespass on the jurisdiction reserved to the European Court...

...

[t]he duty of the Bundesverfassungsgericht to act as guardian of the constitution cannot lead to a broadening of its jurisdiction, not even in the presence of a need of legal policy, however urgent.⁷⁸

Darras and Pirotte reached a similar conclusion:

the *Semoules de France* decision of the *Conseil d'État* and the *Internationale Handelsgesellschaft (Solange I)* decision are very comparable. They both have as their underlying motivation a defensive reflex against a power which pretends to exclude their control and which puts in check the hierarchy of internal rules for which these jurisdictions are the supreme guardians.⁷⁹

To be sure the BVerfG cared about the substance at stake. Its mission was to protect basic rights and democracy. By creating a constitutional obligation for democracy and basic rights protection, it influenced the German government to push hard for this position it cared greatly about. But many felt that the method was heavy handed, going beyond what was necessary to achieve the goal of basic rights protection. This was also clearly the opinion of the minority on the court.

Many legal articles openly called for a reversal of the decision, either by a plenary session of the BVerfG or a decision by the first senate. A pro-integration lawyer even created a case which he submitted to the First Senate in hopes of encouraging the first senate to wade into the debate.⁸⁰ There were also vocal political attacks against the decision. The European Parliament condemned the decision. The Commission attacked the decision in a press conference and

⁷⁸ Op. cit. *Solange I* decision (1974) pps. 564-565, and p. 567.

⁷⁹ Darras, Jean, and Olivier Pirotte. 1976. La Cour Constitutionnelle Fédérale Allemande a-t-elle mis en danger la primauté du droit communautaire? *Revue Trimestrielle de Droit Européen*:416-438. See p. 420.

⁸⁰ Meier, Gert. 1975. Verfassungsbeschwerde gegen Verordnungen der EWG—Anmerkung. *Europarecht* Heft 1/2 (Januar-Juni):168-169.

threatened to bring Article 169 infringement proceedings against the German government.⁸¹ In exchange for dropping Article 169 infringement charges against the BVerfG's decision, the German government promised to work to ensure that the BVerfG did not carry out its threat of finding an EC law 'invalid' in Germany.⁸² The German Minister of Justice conveyed to the president of the Constitutional Court that the government was getting political heat and the BVerfG's jurisprudence was undermining German participation and influence in the EC by calling into question whether or not Germany would follow through in applying EC law. The Ministry of Economics monitored the issue of EC law and basic rights, participating more actively in basic rights cases in front of the ECJ and following cases involving basic rights within the German legal system. But the Constitutional Court did not back down, at least not immediately.

Pro-integration advocates had been concerned that the Frankfurt Administrative court's refusal of an ECJ decision would set a bad precedent. They had argued that

[i]f this practice became a model (*faire école*), it could take away all practical significance of European Court preliminary ruling decisions. Such a practice would ineluctably degrade a preliminary ruling decision of the Court of Justice to a mere consultative opinion which the national judge could if it wanted not respect.⁸³

The BVerfG's *Solange I* decision did not refuse the ECJ decision, but it did open up the possibility that ECJ decisions could be inapplicable if they were unconstitutional. Some lower courts worked with the ECJ to develop its basic rights jurisprudence further in order to promote legal integration, and the ECJ embraced the issue of basic rights with a new enthusiasm.⁸⁴ A few German courts, however, continued to try to provoke the BVerfG to undermine ECJ rulings. These courts were trying to challenge ECJ jurisprudence with which they disagreed, and create for themselves the option of not following ECJ jurisprudence when they disagreed with it. They

⁸¹ Brüssel kritisiert Verfassungsgericht. *Handelsblatt*, December 23, 1974. Brüssel pocht auf Vorrang für EG-Recht. *Die Welt*, December 23, 1974. Die Kommission kritisiert das Bundesverfassungsgericht. *Frankfurter Allgemeine*, December 21, 1974.

⁸² Based on interviews with current and former officials at the German Ministry of Justice and the German Ministry of Economics (May, 1993; December 1993 and February, 1994).

⁸³ Bebr, Gerhard. 1973. Case law review: Note on the Frankfurt Verwaltungsgericht's Internationale Handelsgesellschaft Decision. *Common Market Law Review* 10 (1):96-99. . This view was also voiced in a memo prepared by the Legal Services of the Council, JUR/3095/71-F, December 9, 1971.

⁸⁴ Mancini, Federico, and David Keeling. 1994. Democracy and the European Court of Justice. *Modern Law Review* 57 (2):175-190.

were essentially playing the BVerfG and the ECJ off against each other, in order to get the courts to contradict each other and say what they wanted to hear.⁸⁵

Overall, however, the constitutional challenges to EC law which continued in the late 1970s and early 1980s were not as numerous as one might have expected nor were they the type of cases which would allow the BVerfG to influence big policy or constitutional issues in European integration. The *Solange I* decision had given the BVerfG significant influence over EC legal and political development. It had catalyzed politicians and the ECJ to take basic rights more seriously and pushed the German government to promote a democratically elected parliament. Combing through EC policy and finding specific regulations to be unconstitutional would not influence policy-making more broadly.

In 1977 the VWG Frankfurt sent another reference to the BVerfG challenging the validity of an ECJ decision.⁸⁶ The Constitutional Court refused the admissibility of this case for the procedural reason,⁸⁷ but took the case as an opportunity to signal its willingness to revise the most controversial aspects of its earlier *Solange I* jurisprudence.⁸⁸ It suggested that “in view of political and legal developments in the European sphere occurring in the meantime” its *Solange* decision might no longer apply to “derived” Community law (meaning regulations and directives). The more friendly stance taken by the BVerfG in this decision led academic commentators to call it the “*Vielleicht*” (“Perhaps”) decision. The softening of the BVerfG’s *Solange* position was further evidenced in the “*Eurocontrol*” decision where the BVerfG implied that a catalogue of basic rights and a democratic parliament may no longer be necessary, as long

⁸⁵ For example, in 1979 an administrative court in Neustadt challenged the constitutional validity of an EC regulation. The case involved a plaintiff who was refused a license to grow grapes and thereby did not qualify for subsidies. The administrative court first referred the issue to the ECJ, but the VWG made it clear that the reference was only made as a necessary step in bringing the case to the BVerfG. The case went to the BVerfG on January 31, 1980, and languished on the BVerfG’s docket until June of 1982, at which point the plaintiff received the subsidies from the Land government and dropped the case. (Based on interviews with German government officials May, 1993; December 1993 and February, 1994). ECJ decision of December 13, 1979. *Case 44/79 ECR* 1979: 3727. *K 205/76 VW Neustadt/Weinstraße* decision of January 31, 1980. *Europarecht* 1980(Heft 4):360.

⁸⁶ The VWG was challenging an ECJ decision that found Article 92 EEC not to create direct effects, so that the administrative court could not hear challenges to national law based on that Treaty article. *I/I- E 331/74 VW Frankfurt* decision of July 28, 1977. *Recht der Internationalen Wirtschaft* 1977:715.

⁸⁷ It dismissed the claim by arguing that the VWG Frankfurt was challenging an ECJ interpretation of “primary” EC law (Treaty law) but not challenging the constitutionality of the EC Treaty.

⁸⁸ BVerfG decision of July 25, 1979. *Common Market Law Reports* 1980(2):531-541.

as there is an adequate system in place to protect basic rights. The *Eurocontrol* case did not deal with an aspect of EC law, but it implied that EC legal protections might be sufficient to relieve the Court's constitutional concerns over basic rights protections.⁸⁹

In 1980 and again in 1985, the Federal Tax Court challenged the validity of ECJ jurisprudence on the Direct Effect of Directives, marking an escalation of German judicial attempts to challenge the ECJ by finding constitutional limits to ECJ jurisprudence (this challenge will be dealt with in the discussion of "round 4"). The Constitutional Court had little institutional interest in the Federal Tax Court's substantive complaints, nor did it have an interest in encouraging judicial mutiny to ECJ authority. The Constitutional Court took the advantage of a provocative and annoying constitutional complaint to try discourage national courts and individuals from using the German constitutional system to attack unwanted ECJ jurisprudence.

The plaintiff, in what came to be known as the *Solange II* case, was challenging a Commission decision regarding the saturation of the EC preserved mushroom market, which had thwarted the plaintiff's plans to import preserved mushrooms to Germany. The Commission had a clear legal authority to act in order to ensure an adequate market and price for preserved mushrooms coming from France and the Netherlands, and its short-lived assessment that the EC market was saturated was well documented in Commission records. The administrative court in Frankfurt refused the plaintiff's charges that the Commission had acted illegally, without even referring the case to the ECJ. On appeal, the Federal Administrative Court took more seriously the plaintiff's own statistics showing that the mushroom market was not saturated, and referred the case to the ECJ. The ECJ compared the figures offered by the plaintiff to those offered by the Commission, and determined that the Commission had sufficient reason to believe that the market was saturated and that its actions were within the Commission's legal authority. The Federal Administrative Court applied the ECJ's decision, but the plaintiff continued to protest. He argued that the ECJ's decision was clearly wrong, and that the Federal Administrative Court should refer the case to the ECJ again to allow the ECJ to clarify the ruling and that the Federal Administrative

⁸⁹ Case 1124/77 BVerfG decision of July 23, 1981. BVerfGE 58 p. 1.

Court should also refer the case to the BVerfG because his constitutional right to due process had been breached by the ECJ. When the Federal Administrative Court refused this appeal, the plaintiff brought the issue directly to the BVerfG alleging numerous violations of his constitutional rights. The plaintiff wanted the BVerfG to order a new reference to the ECJ and to find the ECJ decision to be unconstitutional, because "incorrect" or "unclear" ECJ decisions cannot be binding.

The plaintiff's case was extremely weak, and was exactly the type of case that the Constitutional Court wanted to avoid. The dispute came down to a factual disagreement between the Commission and an importer. It was not in the interest of the BVerfG to open up factual disputes or to make itself available as an appeal tribunal for Commission and ECJ decisions. The stated reason given by the BVerfG for hearing the case was that 'it involved an issue of basic rights violations under EC law.' But the BVerfG had refused in 1980 to hear a case which also involved basic rights violations under EC law, and in all likelihood there were other cases involving challenges to basic rights which the BVerfG could have drawn on. By intervening in the *Wünsche* case, however, the BVerfG was able to nip an emerging squabble between the VWG Frankfurt and the ECJ in the bud and make a significant peace gesture to the ECJ, without giving up any influence for itself.⁹⁰

In the *Wünsche* case (more commonly known as "Solange II"),⁹¹ the Federal Government, the Federal Supreme Court and the Federal Social Court all submitted arguments. The Federal Government, now watchful of BVerfG cases involving basic rights, argued against

⁹⁰ On November 25, 1982 the VWG Frankfurt sent references to the ECJ in another case brought by the plaintiff *Wünsche*. The reference asked to the ECJ to assess the validity of a Commission decision regarding a tariff on imported preserved mushrooms from China. When the ECJ upheld the Commission's decision, the Frankfurt court made another reference, this time criticizing the ECJ's decision and asking the ECJ to re-assess its jurisprudence using more objective statistics than those supplied by the Commission. In these cases, the importer was again disputing the Commissions findings as simply being wrong. Intervening and siding with the EC made what became known as the *Solange II* decision seem all the more a goodwill gesture to the EC on the part of the BVerfG. (The legal decisions are *Wünsche Handelsgesellschaft GmbH & Co. v. Federal Republic of Germany* VW Frankfurt decision of referred to ECJ on November 21, 1982. I/2E 2957/81. *Wünsche Handelsgesellschaft GmbH & Co. v. Federal Republic of Germany* case 345/82 ECJ decision of April 12, 1984. ECR 1984:1995. *Wünsche Handelsgesellschaft GmbH & Co. v. Federal Republic of Germany* ECJ decision of March 5, 1986. case 69/85. ECR 1986:947. *Wünsche Handelsgesellschaft GmbH & Co. v. Federal Republic of Germany* case I/2 E 2957/81 VW Frankfurt decision of reference to the ECJ February 21, 1985.)

⁹¹ *Wünsche Handelsgesellschaft* BVerfG decision of October 22, 1986. Case 2 BvR 197/83. *Common Market Law Review* 1987(3):225-265.

the factual merits of the case. The Federal Social Court and the Federal Supreme Court were most concerned that the case might establish a precedent of individuals using Constitutional complaints to re-open factual interpretations of the ECJ and by extension their own factual interpretations and their own application of ECJ decisions. The Federal Supreme Court argued that the “European Court is solely competent to decide what factual and legal circumstances are relevant for the purposes of its decisions” and without any new facts, there was no reason for the Federal Administrative Court to have made a new reference. The Federal Social Court also encouraged the BVerfG to extend its “*Vielleicht*” jurisprudence to cover secondary EC law and thereby revise its *Solange I* decision.

The Federal Constitutional Court used the case to close off the sprouting attempts to use the Constitutional legal system to challenge ECJ judgments. It ruled out the argument that if one thought an ECJ decision to be “incorrect”, it was not binding. Such a principle is not in the interest of any judicial body, because it legitimizes the idea that one can ignore a court decision because they think the judgment is wrong. Developing a doctrine which it would use six months later to deal with the Federal Tax Court’s refusal to follow the ECJ’s direct effect of directives jurisprudence, the BVerfG declared that the ECJ was the “*gesetzlicher Richter*” (lawful judge) in EC legal matters so that national courts were required to refer EC legal issues to the ECJ.⁹² The BVerfG also took the opportunity to greatly soften its *Solange I* jurisprudence to discourage plaintiffs from raising basic rights challenges to EC law in front of the BVerfG. The way it softened the jurisprudence, however, left the new powers asserted by the Constitutional Court in the *Solange I* decision fully intact.

In the *Solange II* decision the constitutional court abandoned all pretense that it saw the EC as a “special” international institution, and made it clear that EC law only gained internal validity and internal primacy because of internal legal rules. It argued:

Current international law does not contain any general rule arising out of the agreed practice of States or undoubted legal acceptance to the effect that States are obliged to incorporate their treaties into their internal law and to accord them thereunder priority of validity or application as against internal law...Article 24(1) [GG], however, makes it possible constitutionally for treaties

⁹² Frowein, Jochen. 1988. Note on *Solange II* decision. *Common Market Law Review* 25:201-206.

which transfer sovereign rights to international institutions and the law established by such institutions to be accorded priority of validity and application as against the internal law of the Federal Republic by the appropriate internal application-of-law instruction...From the application-of-law instruction of the Act of Accession to the EEC treaty, which extends to Article 189 (2) EEC, arises the immediate validity of the regulations of the Community for the Federal Republic and the precedence of their application over internal law.⁹³

By refusing an international or EC legal basis for EC law supremacy, the Constitutional Court reinforced its supreme authority to review the “applicability” of EC law in the German sphere.

The Constitutional Court also maintained its own authority to review the compatibility of EC law with German constitutional protections for basic rights. Having influenced politicians and the ECJ to take basic rights into account, and since the EC now had a democratic (though still politically weak) Parliament, the BVerfG qualified its demands for a catalogue of human rights adopted by a democratic parliament with real powers. The decision sent a message to plaintiffs to stop using the German constitutional system to challenge EC laws and ECJ interpretations. The Constitutional Court declared:

In view of [the democratic and basic rights developments in the EC] it must be held that, so long as the European Communities generally ensure an effective protection of fundamental rights... the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation...and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution; reference to the Court under Article 100 (1) for that purpose are therefore inadmissible.⁹⁴

This statement was seen as ending the conflict between the ECJ and the Constitutional Court regarding the issue of basic rights protection in the ECJ.

Most observers interpreted the “*Solange II*” judgment as a victory for the ECJ, because the Constitutional Court took itself out of the loop of challenging ECJ decisions regarding basic rights and acknowledged the ECJ’s efforts to protect basic rights. But one could also say that the entire *Solange I-Solange II* interaction was a victory for the Constitutional Court. The *Solange I-Solange II* exchange significantly enhanced the BVerfG’s authority as far as EC law was concerned. The constitutional court established the supremacy of the German constitution over EC law, and the substantively meaningless distinction between finding an EC law “inapplicable” and finding an EC law to be “invalid” became accepted. In other words, the Constitutional Court

⁹³ Op. cit. *Solange II* (1986) p. 256-257.

⁹⁴ Ibid. p. 265.

prevailed in its attempt to create a legal-institutional basis for it to influence the development of European law.

The *Solange I* debate marked the beginning of a more confrontational relationship between national courts and the ECJ. There were many aspects of ECJ jurisprudence which were controversial in the 1960s and 1970s, but before the *Solange I* decision the ECJ and national courts had taken pains to avoid openly confronting and contradicting each other. To challenge ECJ jurisprudence, it was felt, would undermine the fragile legal authority of the ECJ and detract from the goal of creating a uniform interpretation of EC law. It would create a “war of courts” which would undermine faith in the legal process. While disagreement with ECJ jurisprudence was voiced in academic debates and evident in national court decisions which contradicted ECJ jurisprudence, one had to know the substance of ECJ jurisprudence and the details of individual court decisions to know if there was a contradiction between national judicial practices and ECJ jurisprudence. This form of non-compliance was fairly invisible, so that detractors appeared relatively isolated compared to the overwhelming support of ECJ jurisprudence in the literature and the touting of pro-integration national court jurisprudence in the academic press.

In openly refuting a fundamental aspect of the ECJ’s jurisprudence the Constitutional Court broke the “taboo” against openly challenging ECJ jurisprudence. The pro-integration scholars and the legal services of the Council had been right, the VWG’s and BVerfG’s actions legitimated challenges to ECJ authority. There seemed to be benefits for national high courts in openly disagreeing with aspects of ECJ jurisprudence in that it gave the national court more influence over the ECJ’s jurisprudence. Whereas in the 1970’s it was feared that disagreement between national courts and the ECJ could have “disastrous effects”, by the 1980s there was a perception that a bit of disagreement between national courts and the ECJ was healthy, part of a maturing legal process where national courts and the ECJ were relative equals. Some courts started to think that refusing a certain aspect of the ECJ’s jurisprudence could have the salutary effect of making the ECJ back away from more politically controversial aspects of its jurisprudence.

In the end, the Constitutional Court's provocation in the *Solange I* decision contributed significantly to legal integration both in Germany and at the EC level. In requiring national courts to first send challenges to the validity of EC law to the ECJ, the Constitutional Court stopped the earlier practice of the VWG Frankfurt of ruling itself on the validity of EC law. While few admitted it at the time, since many scholars felt that the ECJ's supremacy doctrine and basic rights jurisprudence rested on weak foundations, the respect for EC law was actually strengthened by having the BVerfG assert the final and monopolistic role of assuring a constitutionally correct application of EC law.⁹⁵ The *Solange I* decision motivated the German government and EC institutions to work harder to ensure the protection of basic rights at the EC level,⁹⁶ and made it acceptable for the ECJ to further "constitutionalize" the EC Treaty by developing for it a bill of rights.⁹⁷ The ECJ's basic rights jurisprudence is now offered as evidence that the ECJ is the supreme *constitutional* court of the EC.

The *Solange I* decision provided a carrot along with the stick. The stick was the refusal to accept the supremacy of EC law over the constitution and the threat to find EC law inapplicable in Germany. The carrot was that the German Constitutional Court might relinquish its threat if the

⁹⁵ The Constitutional Court had argued in its *Solange I* jurisprudence that having the BVerfG control the constitutionality of EC law was ultimately "in the interests of the Community and of Community law, because it would keep other national actors from refusing to apply EC law because of an alleged conflict with basic rights clauses of the constitution." This argument was rejected by most pro-EC law advocates, but having this extra check on the expansion of EC law did re-assure EC law supremacy skeptics within Germany and undermine the argument that integration was being achieved at the cost of German democracy. Most scholars were critical of the BVerfG's *Solange I* decision at the time. But a couple of scholars did envision that the BVerfG decision would have the salutary effect of furthering legal integration in Germany (for example, see Rupp, Hans Heinrich. 1974. Zur bundesverfassungsgerichtlichen Kontrolle des Gemeinschaftsrechts am Maßstab der Grundrechte. *Neue Juristische Wochenschrift* Heft 48:2153-2156. and Scheuner, Ulrich. 1975. Der Grundrechtsschutz in der Europäischen Gemeinschaft und die Verfassungsrechtsprechung. *Archive des Öffentlichen Rechts* Band 100 (1):30-52.)

⁹⁶ In light of the German Constitutional Court's decision, the European parliament passed a resolution which re-affirmed the supremacy of Community law and the protection of basic rights. (OJ No C 159/13)

⁹⁷ European Court Justice Mancini acknowledged the contribution of the BVerfG's jurisprudence to the development of a European Human Rights jurisprudence:

the German and Italian constitutional courts goaded the Court of Justice into confronting the problem squarely by threatening to carry out their own review of the compatibility of Community provisions with the bill of rights enshrined in their respective Constitutions; in addition, there were various lower or intermediate courts that offered the Court of Justice the opportunity to recognize that fundamental rights form part of the general principles of law, the observance of which it ensures, and to establish, step by step, the criteria that serve to identify those rights and their scope.

Mancini, Federico, and David Keeling. 1992. From CILFIT to ERT: The Constitutional Challenge Facing the European Court. *Yearbook of European Law* 11:1-13.

ECJ showed that it respected basic rights, and if the EC made general progress towards a more democratic institution. The *Solange II* decision awarded the EC and the ECJ with the carrot it had promised. But as the next round will show, other national courts were less encouraging of the ECJ, and took from the BVerfG's strategy that a stick was an appropriate tool to use if they disagreed with the ECJ.

Round 4: Creating a Constitutional Sanction for National Courts which Refuse ECJ Authority-1981-1987

As the BVerfG was resolving its dispute with the ECJ, other German (and French) courts were openly challenging aspects of ECJ jurisprudence with which they disagreed. The BFH, embolden by the *Conseil d'État's* rejection of the direct effect of directives, refused the ECJ's jurisprudence on the direct effect of directives which greatly compromised its independence and influence over German tax law.

In the 1970s, EC directives were contested within national administrations and national parliaments. Directives were intended to be broad directions to member states to adapt national legislation in order to achieve certain EC level goals. But directives had become increasingly specific, leaving little discretion to national parliaments or national administrations. The decision to draft specific directives rested with the member states themselves. The member states wanted specific directives to avoid cheating. But national administrations and national parliaments did not like the specificity. In Germany the tax administration was bitter about the detailed directives on Value Added Tax (VAT) transformed German law, limiting tax administration's discretion and making their work more confusing and difficult.⁹⁸ In France, the advisory wing of the *Conseil d'État* complained about detailed directives changing the style and language of French laws, and the parliament refused to ratify one of the detailed tax directives because it undermined legislative prerogatives. The executive branch did not support these groups in their grumbling. Indeed in

⁹⁸ Stein, Torsten. 1986. National Courts—Note on decision of Bundesfinanzhof of 25 April 1985. *Common Market Law Review* 23:727-736.

France the executive simply forced a contested VAT directive on the Parliament by forcing them to either accept the directive or call vote of confidence on the president.⁹⁹

The ECJ's jurisprudence on the direct effect of directives added grist to this political debate. The ECJ's doctrine on the direct effect of directives strayed quite far from the wording of the EC Treaty. The Treaty of Rome was clear that "regulations" were "directly applicable" pieces of European legislation, not requiring national implementing legislation. "Directives," however, were not directly applicable but had to be transposed by national parliaments into national law in order to gain legal effect, and national authorities were to have discretion in how they achieved the goals of the directive. The ECJ argued that just because Article 189 made regulations explicitly directly applicable, did not mean that 'other categories of acts mentioned in that Article can never have similar effects.' It declared that in certain limited circumstances, directives could be called upon by individuals in front of national courts.¹⁰⁰ National judges and politicians argued that this jurisprudence turned a directive into a regulation, and violated the country's sovereign authority to decide how the goals of the directive were achieved.

The Court's jurisprudence on the direct effect of directives also affected national court authority. If directives gained legal force by virtue of their implementation by national parliaments, directives were national law, and thus part of the exclusive interpretive domain of national courts. If the EC legislation created direct effects, however, the ECJ would be the supreme authority in interpreting areas of EC law governed by directives, thus the ECJ would gain supreme interpretive authority over a new area of national law.

In 1978, in defiance of the ECJ's jurisprudence on the direct effect of directives, the French *Conseil d'État* quashed a lower court preliminary ruling reference which asked the ECJ to

⁹⁹ Séance du 30-11-78, *J.O. Débats, Ass. Nat.* p. 8571; Isaac, Guy. 1979. Observations: Le juge administratif français et les directives communautaires. *Cahier de droit Européen*:267-290.

¹⁰⁰ Directives only create direct effects after the specified period of time for their formal adoption had expired, after which it had to be determined on a case by case basis based on the clearness of the directive, if a given provision of a directive created direct effects. The first decision on this issue was based on a reference by a German tax court. *Grad v. Finanzamt Traustein Case 9/70* ECJ. ECR 1970:838. cited in Betten, Rijkele, and Servaas van Thiel. 1986. Direct Effect of Sixth VAT directive Denied—Kloppenburger Revisited. *European Taxation* (January):22-25. See p. 24. This jurisprudence was expanded in *Van Duyn v. Home Office Case* ECJ. 41/74 (1974) ECR 1337.

interpret a provision of a directive (see chapter 5 for more on this).¹⁰¹ In 1981, the Federal Tax Court followed suit, quashing a reference to the ECJ made by a lower tax court. In its decision quashing the reference, the BFH ruled out the possibility that directives could create directly applicable law inside of member states, stating that the BFH judges “concur in every respect” with the *Conseil d'État*'s 1978 decision. As for “the settled case law of the European Court of Justice” regarding directives, the BFH found that it “relates to EEC law only” and therefore was not binding on the member state or the national court. The BFH judges took the added provocative step of sending a copy of their judgment to the ECJ.¹⁰²

The BFH was able to quash the lower court's reference to the ECJ because the decision to refer the case to the ECJ had been appealed by the tax authorities to the BFH. But a similar case from the tax court in Munich had already been sent to the ECJ (*Becker*), the decision to refer the case having not been appealed.¹⁰³ Certainly the BFH knew of this case,¹⁰⁴ and was trying to influence the ECJ's jurisprudence in the *Becker* case through its 1981 decision. Undeterred by the *Conseil d'État*'s or the BFH's jurisprudence on the issue, the ECJ's decision in the *Becker* case created a counter precedent in Germany to that of the BFH. After the *Becker* decision, and a related ECJ judgment in the *Grendel* case, the Minister of Finance issued a statement designed to incorporate the ECJ's jurisprudence and to avoid future conflicts arising from the late implementation of the 6th VAT directive. While the statement did not alter the German law in question, it created a rule tax authorities could use to determine if the plaintiff had been relying on the EC directive and therefore should not be accountable to pay the German VAT tax during the six month period of time between when the directive should have been adopted and when a formal extension to the adoption period was passed in the Council.¹⁰⁵ But tax authorities did not universally follow this Ministry of Finance's instructions, so that cases regarding the non-implementation of the EC 6th tax directive continued to appear in front of the lower tax courts.

¹⁰¹ *Minister of Interior v. Daniel Cohn-Bendit* Conseil d'État decision of December 22, 1978. *Common Market Law Report* 1980:545-562.

¹⁰² BFH decision of July 16, 1981. *Common Market Law Reports* 1982(I):527-531.

¹⁰³ *Becker v. Finanzamt Münster-Innenstadt* ECJ. ECR 1982:53.

¹⁰⁴ Op. cit. Stein (1986).

¹⁰⁵ 1983. Letter from the Minister of Finance of June 27, 1983. *Bundessteuerblatt* Teil 1 (Art. 318).

Given the choice of following the BFH's jurisprudence and relying only on German law, or following the ECJ's jurisprudence and relying on the EC directive, lower courts mostly followed the ECJ's jurisprudence. Furthermore, in direct defiance of the BFH's 1981 decision, lower tax courts deliberately sent the ECJ cases dealing with directives to allow the ECJ to develop its jurisprudence on the issue further.¹⁰⁶ The Federal Administrative Court also disagreed with the BFH's refusal of the direct effect of directives, for reasons of legal argumentation. It sent a reference involving the direct effect of directives to the ECJ, making an argument in the reference which clearly ran counter to that of the BFH.¹⁰⁷

The Federal Administrative Court's reference to the ECJ was pending when in 1985 the BFH got another opportunity to review a case where a plaintiff was relying directly on an EC directive. This time, however, the BFH was not reviewing the decision to make a reference to the ECJ, but rather the lower court's decision applying an ECJ preliminary ruling judgment. In the proceedings, the plaintiff argued that in anticipation of the timely adoption of the EC directive, she had not passed on the VAT tax to her customers and therefore should not be liable for the tax. The government argued that the plaintiff had not been following the EC directive and had in fact collected the VAT, which the government was demanding. The BFH could have used the government's argument as a basis to overturn the lower court's decision, without raising an issue of the direct effect of the directive in question. But instead the fifth senate of the BFH took the opportunity presented by the case to reassert and better support its earlier jurisprudence refusing the direct effect of directives.

The BFH's decision was a direct rebuke of the ECJ decision in the very case it was reviewing, and a challenge to the supremacy of EC law. In its *Kloppenburg* decision, the BFH laid out its legal argument as to why directives could not be seen as creating direct effects, and

¹⁰⁶ In interviews, lower tax court judges acknowledged that they looked for cases to send to the ECJ in order to challenge the BFH jurisprudence with which they disagreed. Examples of references regarding the direct effect of directives included: * FG Munster decision of May 24, 1984. *EFG* 1985:310. FG Niedersachsen decision of February 9, 1984. *EFG* 1984: p. 527-528. FG Hessen decision of April 24, 1985. *EFG*

¹⁰⁷ BVerwG decision of reference for a preliminary ruling, May 24, 1984. *Außenwirtschaftsdienst des Betriebs Beraters* 31 Jf/1985(2):143-144. Emphasis added.

why the ECJ's jurisprudence in this area could and should be ignored.¹⁰⁸ The BFH relied on national law and national legal texts only, so that it was not obliged to make a reference to the ECJ and so that the ECJ's legal decision in the case, and the ECJ's general jurisprudence, would not apply. The BFH argued that there was no German statute giving directives direct effects so that "the individual has no claims against the State if it has not fulfilled, or does not fulfill within the due time limit, one of its obligations towards an international institution and towards other States to bring about a certain legal situation." The BFH argued that the ECJ's decision was not binding because Article 177 EEC (preliminary rulings) only relates to interpreting the content of community law, not to interpreting the jurisdictional reach of community law. The ECJ did not have the jurisdictional authority "to create rules having force within the national sphere," instead the national court "has to decide in the context of interpreting the [national] EEC Membership act whether the legal instruments of institutions of the European Community take effect within the national jurisdiction." Focusing on the text of the German Ratification Act, the BFH conducted its own interpretive review of the meaning of Article 189 EEC and it examined how the article had been discussed in the German parliamentary ratification debates. It concluded, not unsurprisingly, that directives did not create direct effects, and that agreeing to use directives in the area of turnover taxes was not intended to mean that member states were transferring the national legislative jurisdiction to the EC level.

The approach of determining EC legal obligations from national ratification laws and using national debates to determine the original intent of the founding member states was new, and potentially very powerful. Relying on national ratification texts left only EC regulations to the authority of the ECJ, returning the interpretive authority for the EC treaties and for EC directives to the national realm. According the BFH's method of analysis, much of the ECJ's jurisprudence could, in theory, have no legal effect in Germany—including the direct effect and supremacy of EC law! In the 1967 debate over the constitutionality of EC membership, the BFH had argued that the transfer of powers to the EEC via Article 24 of the German constitution should be

¹⁰⁸ BFH decision of April 25, 1985. BFH Kloppenburg II V R 123/84. *Common Market Law Reports* 1989(I):873-883. Emphasis added.

interpreted broadly, as a step toward a European union favored in the preamble of the German Constitution, and should not be subject to the same "strict standards" that traditionally apply to German institutions.¹⁰⁹ Why was the BFH now advocating a very narrow and strict interpretation of the Article 24 transfer of sovereignty in this case?

Some have explained the BFH's strong reaction by saying that the legal foundations of the ECJ's doctrine on direct effects were especially weak.¹¹⁰ The ECJ's doctrine regarding the direct effect of directives has come to be seen within the legal community as one of the larger interpretive leaps the ECJ has made, and even pro-integration legal scholars, who generally accept the ECJ's expansive legal interpretations without question, questioned the legal basis of the Court's doctrine of the direct effect of directives. But as former legal director at the German Ministry of Economics and future ECJ Justice Ulrich Everling pointed out, the ECJ jurisprudence on directives had been around for a long time and was based on a widespread legal consensus. The issue had been under discussion in academic circles since 1966, and the ECJ's jurisprudence on the issue had been around since the early 1970s. The jurisprudence was consistent with the ECJ's general practice of integration-oriented jurisprudence and judge-made building of EC law, and the ECJ had been careful to create strict conditions for when directives could create direct effects.¹¹¹ In other words, the ECJ's jurisprudence on the direct effect of directives had not been so controversial in the past, and was really a relatively typical and prudent example of the teleological method of interpreting EC texts.

The BFH had been willing to accept relatively controversial aspects of the ECJ's jurisprudence in the past because it had less of an institutional interest at stake. But this time, because of its direct interests at stake, the BFH decided to take a stand. In its *Kloppenburg* decision, the 5th senate seemed mostly concerned with ruling out the possibility that the EC's tax

¹⁰⁹ Op. cit. Betten and van Thiel (1986).

¹¹⁰ Op. cit. Stein (1986) 1985. The Bundesfinanzhof rebels again. *European Law Review* 10 (5):303-304. Friedrich, Klaus. 1985. Bundesfinanzhof contra Europäischen Gerichtshof. *Recht der Internationalen Wirtschaft* Heft 10 (October):794-796. Hilf, Meinhard. 1988. Der Justizkonflikt um EG-Richtlinien: gelöst. *Europarecht* 23 Jg. (Heft 1):1-19.

¹¹¹ Everling, Ulrich. 1984. Zur direkten innerstaatlichen Wirkung der EG-Richtlinien: Ein Beispiel richterlicher Rechtsfortbildung auf der Basis gemeinsamer Rechtsgrundsätze. In *Einigkeit und Recht und Freiheit-Festschrift für Karl Carstens*. Köln: Carl Heymanns Verlag. See p. 98.

legislation could create individual legal rights. The BFH categorically stated that “the German Act of 27 July 1957 did not transfer to the European Economic Community the sovereign right to legislate with immediate effect within the country *as regards to turnover tax*” (emphasis added) and the BFH tied its arguments specifically to the issue of turnover taxes throughout its decision. Its argument was a comprehensive refutation of all the legal arguments the ECJ had used in the past to declare individual rights under EC law, so as to counter the myriad of arguments which could be used to justify an Article 177 jurisdiction for the ECJ in the area of turnover taxes. Since all tax related EC legislation had to be adopted in the form of directives, the BFH focused primarily on ruling out the direct effect of directives in every and all circumstances. But it also focused on limiting its own obligation to draw on European legal texts instead of national texts, so that it would not be compelled to make references or take into account ECJ jurisprudence in the area of turnover taxes. The interest of the BFH in this outcome was clear. If individuals could draw directly on tax directives, then the European Court would become the highest court on issues of TVA. As lower court tax judge Voß observed:

The logical continuation of [the ECJ's] case law will have the result that in the field of harmonized taxes the Court of Justice will have to take over the role of the national tax courts. Considering the advanced level of harmonization of the value added tax, this might have the consequence for the Federal Republic of Germany that the Chamber of the Bundesfinanzhof, that is the five judges who are in charge of VAT jurisdiction, would hardly be needed any more.

Having seen the 7th Senate subjugated to the ECJ in the area of customs duties, the 5th Senate was aware of the consequences of giving ECJ jurisdictional authority over its substantive area of law.

It is one thing to criticize the legal reasoning of the ECJ's jurisprudence, but quite another to refuse the ECJ's authority. In overturning a lower court ruling based directly on an ECJ decision, the BFH had crossed the line of acceptability. It had gone where the BVerfG had only threatened to go. The Commission considered the BFH's action to be very serious, and it contemplated bringing an infringement suit against the German government, but since the plaintiff had appealed the decision to the Constitutional Court, the Commission decided to wait.

While the case was pending in front of the Constitutional Court, the Federal Administrative Court issued its decision based on the reference it had made to the ECJ in 1984. The Federal Administrative Court, not sharing the BFH's concern about directives since it usually dealt with EC regulations, agreed with the ECJ's jurisprudence on the direct effect of directives. It argued that to apply national legislation in the face of a clear EC legal obligation violated the principle of "good faith." Since "good faith" had to be assessed on a case by case basis, the Federal Administrative Court insisted that its jurisprudence did not directly contradict that of the BFH. This avoided the need for high courts to call into play the *Act to Ensure Uniformity of Decisions of Highest Courts of the Federal State*, but there was clearly a national legal inconsistency on the issue of the direct effect of directives.

The Constitutional Court's decision, issued just six months after the *Solange II* decision, strongly rebuked the BFH for challenging the authority of the ECJ.¹¹² By the time it got to the case, a legal and judicial consensus against the BFH had emerged. The BVerfG joined this consensus, defending the ECJ's jurisprudence on the direct effect of directives as being a legitimate development of EC law. It argued:

In reaching [its] conclusion, the Court of Justice is not, as the Federal Supreme Fiscal Court says, claiming for the Community a legislative power authorizing it to make regulations, so to speak, in a field (turnover tax law) in which it only has power to issue directives...the actual purpose of enabling an individual to invoke a directive is not to extend the Community's legislative power, but to sanction effectively and, in particular, constitutionally, the member-state's obligation created by the directive: independent courts should find that the obligation exists and sanction the failure to fulfill it by judgment in the particular case.

No doubt this does amount to a slight development of the law by the Court of Justice and is not merely an amplification in a particular case of a system of sanctions already provided generally by the Treaty...[It] creates a new category of sanction....

[but] it is compatible with Article 24 (1) of the Constitution to assign to the Court of Justice, an international institution, an authority of this kind to develop the law in the sphere of the jurisdiction of that institution...

The Constitutional Court was clear, however, that the ECJ's power to develop the law was not limitless. It stated that

The community has not been given adjudicative power by the EEC Treaty to extend its jurisdiction limitlessly. The Community is not a sovereign State within the meaning of international law, which would have authority to resolve conflicts concerning responsibilities for

¹¹² 2 BvR 687/85 BVerfG decision of 8 April 1987. BVerfGE 75. *Common Market Law Reports* 1988(3):1021.

internal matters. Neither the territorial sovereignty nor the personal jurisdiction of member-States has been transferred to the Community; its external powers cover limited fields even though they may not be restricted by the principle of special authorization as they are in relation to other Treaty objectives. In the framework of the general law of international treaties, the member-States are now, and always have been, the masters of the Community treaties... ¹¹³

The Constitutional Court did not go into where the limits in developing the law lay, saying that in the particular case the ECJ was “far from overstepping those limits” so that the question did not have to be addressed.

The Constitutional Court displayed no sympathy for the Federal Tax Court’s arguments that it could interpret the treaty via the German Ratification acts, and thereby ignore ECJ jurisprudence on the issue. The BVerfG categorically declared that “in relation to the courts of the member states, Article 177 confers upon the Court of Justice the power of final decision on the interpretation of the Treaty and the validity and interpretation of the acts of secondary Community law specified therein.”¹¹⁴ The most the national court could do was make a second reference to the ECJ if it disagreed with the ECJ’s ruling in the case. The BVerfG found that by refusing to follow the ECJ’s decision in the preliminary ruling, and refusing to make a new reference to the ECJ the BFH had acted arbitrarily and denied the plaintiff her constitutional right to a legal judge. Finding a national court in violation of the constitution is about the highest sanction the Constitutional Court can apply and as a sanction it stings.

The threshold needed for a court to be found to have acted “arbitrarily” is very high. Quite a few cases where the BFH has refused to make a reference to the ECJ have been appealed to the Constitutional Court, which has let them languish for years on its docket. But in light of the BVerfG’s decision, no German high court will refuse to apply, or will reverse, an ECJ preliminary ruling decision directly. Lower courts can go to the ECJ when they disagree with BFH jurisprudence, and they can be sure that if they refer a case to the ECJ and apply its decision, the ruling will not be overturned in appeal. Taking advantage of this situation almost immediately, a lower tax court in Düsseldorf referred to the ECJ a case where its ruling had twice

¹¹³ Ibid. p. 18.

¹¹⁴ Ibid. p. 12.

been quashed by the BFH.¹¹⁵ In its decision of September 6, 1989, the tax court ruled that it did not have to follow a BFH interpretation when the ECJ made a different interpretation of the same law through an Article 177 proceeding. In an interview a BFH judge expressed annoyance with the Düsseldorf court's action. He argued that it was wrong for the tax court to turn to the ECJ in this instance, but there was nothing he could do since the BFH is bound by ECJ decisions.

Why did the Constitutional Court take the side of the ECJ in this dispute? Some have argued that the Constitutional Court was in a more ECJ-friendly mode under the tutelage of Constitutional Court Judge Steinburger who, being an international law specialist, "understood" European law. But "understanding" ECJ jurisprudence had nothing to do with it. The BFH had understood all of the reasoning given by the ECJ, but just disagreed with them. Because of its interest at stake, the BFH had acted on its disagreement and defiantly declared a counter argument of why the ECJ did not have the authority to decide on the direct effect of directives. The BVerfG did not have this interest at stake, so it let the disagreement slide and accepted the ECJ's *Van Duyn* jurisprudence on the direct effect of directives. While Steinburger may have been somewhat more Euro-friendly than previously BVerfG judges, neither the BVerfG's decision on the direct effect of directives nor the *Solange II* decision qualified the BVerfG's position on the ultimate supremacy of the constitution and the ultimate authority of the BVerfG to determine the limits of EC law in the national realm. Instead, the Constitutional Court sanctioned the BFH for going too far and directly rebuking the authority of the ECJ.¹¹⁶

The BVerfG's decision contributed directly to EC legal integration and the supremacy of European law. By rejecting the BFH's attempt to interpret the German ratification texts, and by declaring that national courts are bound by ECJ interpretations of EC law it essentially bound the courts below it to follow the substantive interpretations of the ECJ. Meanwhile, it reserved for itself the exclusive authority to find limits to the reach of EC law based on constitutional provisions.

¹¹⁵ ECJ case 74/89.

¹¹⁶ It is worth pointing out that while the Constitutional Court threatens the ECJ in order to influence the *future* development of EC law, it has never directly rejected ECJ authority by refusing *past* EC legal developments.

Round 5: Creating a Role for the Constitutional Court in Monitoring the Expansion of EC law

In its ruling on the direct effect of directives, the BVerfG refused to endorse the BFH's strategy of using the ratification texts of the EC Treaties to determine the limits to the expansive reach of EC law. In its *Maastricht* decision,¹¹⁷ issued just 5 years later with 4 of the same judges from the *Kloppenburg* and *Solange II* decisions, the Constitutional Court issued a new challenge to EC law supremacy and ECJ authority. It declared for itself the authority to determine the expansive reach of EC law based on the ratification laws of the EC Treaties. The BVerfG's *Maastricht* decision was a direct outgrowth of the Maastricht Treaty on a European Union (TEU). But while the TEU was the proximate cause of the decision, the BVerfG's *Maastricht* decision was but a continuation of the struggle between the European Court and the German Constitutional Court over the influence, autonomy, and jurisdictional authority of each court.

The constitutional complaint which allowed the BVerfG to issue its *Maastricht* decision was a direct result of the German ratification debates regarding the Maastricht Treaty. To quell parliamentary concerns about the loss of German sovereignty implied by the Maastricht Treaty, the German government agreed to grant the two houses of parliament more influence in the EC policy-making process, and to get parliamentary approval for any further transfers of sovereignty and for the decision to proceed to a Monetary Union. The political deal was codified in the form of a new article in the Basic Law—Article 23 GG—which made the goal of a United Europe an explicit part of the body of the German constitution (it had been in the preamble before), and authorized the further transfer of sovereignty upon a two-thirds vote of the two houses of Parliament. Article 23 GG supposedly ensured the democratic participation of the German people in the process of integration, but really it mostly ensured that the German parliament would have more influence in the EC policy-making process. Having failed to convince the parliament or any of the national parties to demand a public debate,¹¹⁸ opponents of the Treaty and proponents of

¹¹⁷ *Maastricht decision Brunner and others v. The European Union Treaty* BVerfG. 2 BvR 2134/92 and 2 BvR 2159/92. *Common Market Law Reports* (11 January 1994):57-108.

¹¹⁸ Apparently some SPD representatives wanted to refer the ratification act to the Constitutional Court, but were forbidden to do so by their party (based on interviews at the Constitutional Court, December 1993)

having a public debate about the Treaty turned to the BVerfG.¹¹⁹ Four members of the European Parliament from the Green party, and a high ranking civil servant of the European Commission, in their capacity as individual German citizens, brought constitutional complaints against the ratification law hoping that the Constitutional Court would force a referendum on the issue so that a public debate would be held. The former civil servant hired a law professor to write his complaint, which was especially comprehensive and well argued in the parlance of constitutional law. The President refused to sign the ratification law until the Constitutional Court decision had been rendered, thus ratification of the Maastricht Treaty became dependent on the BVerfG's decision.

The validity of the constitutional complaints against the German ratification act has been hotly contested, and it is questionable if the complaints were legally admissible. But the Constitutional Court was not going to pass up a captive audience, and an opportunity to review the Treaty on a European Union in detail. The Constitutional Court sought three broad objectives with its *Maastricht* decision: 1) to send a message to the European Court that it had been too activist in the past, expanding European Court authority at the expense of national sovereignty and endorsing nearly all Council expansions of Community legislative jurisdiction; 2) to position itself to influence the legal and political debate on the division of authority between member states and the European Union, so that German sovereignty and its own authority over the German constitution would not be eroded; 3) to influence the EU policy-making process in Germany and in the Council. The constitutional complaint gave the Constitutional Court much ammunition for its argument that the Maastricht Treaty must be interpreted narrowly so as to protect national legislative authority, and it allowed the Court to play to public opinion and to explain its own power grab under the blanket of the noble goal of protecting German democracy.

The decision's main message was to the European Court of Justice. The BVerfG had seen the ECJ grant extremely broad interpretations to the Treaty of Rome. In light of the new Treaty, however, the BVerfG made it clear that while it had tolerated legal expansions in the past,

¹¹⁹ Wieland, Joachim. 1994. Germany in the European Union—The *Maastricht* decision of the *Bundesverfassungsgericht*. *European Journal of International Law* 5 (2):259-266. See p. 260.

it would do so no further. The BVerfG fingered three expansive aspects of the ECJ's jurisprudence regarding the Treaty of Rome (liberal use of Article 235 EEC, ECJ jurisprudence regarding the 'implied powers' of the community, and ECJ jurisprudence basing expansive interpretations on need to create an 'effet utile') and argued:

Whereas a dynamic extension of the existing Treaties has so far been supported...in future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty...interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.¹²⁰

Trying to rule out in advance significant jurisdictional expansions of European Union and European Court, the Constitutional Court walked through in detail different provisions of the Maastricht Treaty offering its own interpretations of the provisions. The complainant had charged that the Treaty of a European Union so reduced the German parliament's legislative autonomy that it violated his constitutional right to vote for representatives governing the polity. In light of this argument, the German government and the Commission had taken pains to show that the TFEU protected national legislative authority and prerogatives. The BVerfG used the submissions of the government and the Commission to document the narrow intentions of the contracting parties, and to make it clear to the German government and the European institutions that it expected the national parliaments to remain the drivers of the EU and national legislative processes.

It specifically targeted two areas where it wanted to be sure that the Treaty was not interpreted broadly. The BVerfG's was concerned that the ECJ would use the Treaty to interpret for itself and the Union a "Kompetenz-Kompetenz", that is the power to grant itself more authority. Anticipating legal arguments which could be used by the ECJ, the Constitutional Court went through various aspects of the Treaty and argued that they could not be interpreted to mean that the Union could provide itself with the powers necessary to achieve the ends of the Treaty.¹²¹ The BVerfG was also very clear that the subsidiarity principle could not be interpreted as

¹²⁰ Op. cit. *Maastricht* decision (1993) p. 105

¹²¹ Ibid. pp. 94-98.

establishing powers in favor of the Community, but must instead be interpreted as setting limits on the powers already given specifically in the Treaty.¹²²

The BVerfG was concerned that broad interpretation of the TEU would shrink the realm of national legislative authority and therefore limit its own realm of influence. As the decision noted, by 1993 over 80% of all economic regulations and 50% of all German legislation had originated at the EU level, limiting the realm of national policy-making into which the Constitutional Court could be pulled. Just to be sure that the Treaty was not used by EC institutions as a blank check to expand EC authority into other policy-areas, the Constitutional Court declared for itself the ultimate authority to interpret the ratification texts of the Treaty to determine the limits of EC law and of ECJ interpretations. It argued that the Act of Accession could be seen as the document defining the limits of what had been agreed to by the parliament, and that any European level decision or action which exceeded the transfer of sovereignty agreed to in the Act of Accession would be invalid in Germany.¹²³ As one commentator put it, "in other words the Community legal order is subject to the approval of the Federal Constitutional Court."¹²⁴

The Constitutional Court also tried to create limits on the German government's ability to give away the store. In interviews, members of the German Constitutional Court expressed concern that most politicians hardly understood the Treaty on a European Union, and that they did not fully appreciate the how much of their own authority they were giving away. The BVerfG's authority to interpret the Act of Accession was designed to limit what had already been given away in the TEU, but the new Article 23 GG created the distinct possibility that the German

¹²² Ibid. p. 106.

¹²³ The Constitutional Court argued:

... if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly the Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them.

Op. cit. *Maastricht* decision (1993) p. 89

¹²⁴ Foster, Nigel G. 1994. The German Constitution and E.C. Membership. *Public Law* 1994:392-408.

parliament could decide to transfer more and more sovereignty to the EC level. The Maastricht Treaty had been passed with 543 out of 562 votes in the Bundestag and unanimously in the Bundesrat;¹²⁵ well over the 2/3 threshold needed according to the new Article 23 GG. The Constitutional Court questioned whether Parliament could be trusted not to give away important aspects of national sovereignty and legislative authority. To keep the parliament from giving away too much of their authority, and by extension the authority of the Constitutional Court, the BVerfG created a limit on the transfer of national political authority to the EC level, based on the inviolability of German democracy:

If the peoples of the individual States provide democratic legitimation through the agency of their national parliaments (as at present) limits are then set by virtue of the democratic principle to the extension of the European Communities' functions and powers. Each of the peoples to the individual States is the starting point for a state power relating to the people. The states need sufficiently important spheres of activity of their own in which the people can develop and articulate itself in a process of political will-formation which it legitimates and controls, in order thus to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically.¹²⁶

The inherent limit to transferring national political authority created by the “democratic principle” could only be overcome by the emergence of a real democracy at the European level. Real European level democracy required certain “pre-legal” social conditions to exist, including:

continuous free debate between opposing social forces, interests and ideas, in which political goals also become clarified and change course and out of which comes a public opinion which forms the beginning of political intentions (politischen Willen).¹²⁷

European integration had to develop “in step” with the development of a European level democracy, and until the “factual conditions” fulfilling the “pre-legal conditions” were realized democratic legitimation could only be maintained by giving national parliaments a substantial role in the integration process. The BVerfG's argument implied that if transferring legislative authority to the European level undermined the ability of the German people to articulate their political will through the legislative process, this transfer would be unconstitutional despite parliamentary assent. This argument had the double bonus of creating limits to the process of

¹²⁵ The voting figures are from Wieland (op. cit. 1994).

¹²⁶ Op. cit. *Maastricht* decision (1993) p. 88.

¹²⁷ Ibid. p. 87.

integration itself and legitimating the Constitutional Courts power grab under the guise of concern for democracy.

Finally, the Constitutional Court's *Maastricht* decision created leverage the BVerfG could use to influence EC policy-making. Throughout the BVerfG decision, the Constitutional Court was showing the German political organs, European institutions, and the German government how to anticipate which actions would be unconstitutional so that the Constitutional Court would not have to exercise its authority to create constitutional barriers to European integration. This strategy also revealed to opponents of European integration the types of legal arguments they could use to challenge national and European decisions regarding integration.¹²⁸ In the end of the judgment the Constitutional Court actually spelled out the role each political institution should play in ensuring that European integration remained constitutional and limited. The BVerfG argued:

How far the subsidiarity principle will counteract an erosion of the jurisdictions of the member-states, and therefore an exhaustion of the functions of and powers of the Bundestag [*these are code words meaning how long EC legislation remains constitutional*], depends to an important extent (apart from the case law of the European Court relating to the subsidiarity principle) on the practice of the Council as the Community's real legislative body. It is there that the Federal Government has to assert its influence in favor of a strict treatment of Article 3b(2) of the E.C. Treaty and so fulfill the constitutional duty imposed on it by Article 23(1), first sentence, of the Constitution. The Bundestag for its part has the opportunity, by using the right of cooperation in the formation of Germany's internal political intentions established by Article 23(3) of the Constitution, to have an effect on the Council's practices and to exercise and influence on them

¹²⁸ For example, in reviewing the admissibility of one of the complainants arguments the BVerfG countered the complainants assertion that the Maastricht Treaty created a lacunae of legal protection with respect to Article K (3)-2 with the argument that:

If co-operation in the areas of justice and home affairs under Article K.3(2) takes place in the form of international conventions these could confer a jurisdiction on the European Court. To that extent no unconstitutional lack of legal protection can be said to arise at present. Furthermore such conventions require a further act of ratification, which will also be subject to review by the Constitutional Court when it arises. (Ibid. p. 81)

This phrasing intentionally touched on a legislative debate in the Council. As Chapter 6 will discuss, the role for the European Court in interpreting Community-wide agreements negotiated in the form of international conventions has been controversial within the EC for many years. Creating the "possibility" as opposed to the "obligation" to confer a jurisdiction for the Court of Justice was a compromise outcome of the Maastricht negotiations because the Benelux and German countries had been unable to secure a guarantee of ECJ participation in the conventions regarding justice and home affairs. Paul Kirchhof, the author of the *Maastricht* decision, participated in the negotiations of the Maastricht Treaty. In this provision of the Constitutional Court's 1993 decision, the BVerfG sent the message that the conventions would only be constitutional if the ECJ were included, thus throwing its own influence and weight behind the German negotiating position on the subject, and influencing the German government to hold strong on the position. In 1995, the German, Danish and Dutch governments refused to ratify the conventions in the areas of justice and home affairs unless there was a role for the ECJ. The above-cited provision offers legal recourse to challenge the conventions should the German government give in on this point.

within the terms of the subsidiarity principle. In so doing the Bundestag will also be performing a constitutional duty incumbent upon it under article 23(1), first sentence, of the Constitution. In addition, it is to be expected that the Bundesrat, too, will pay particular attention to the subsidiarity principle.¹²⁹

To the extent that the European Council, the German Government, the Bundestag or the Bundesrat do not exercise their legal obligations, challenges to EC policy can be raised in front of the Constitutional Court.

The Constitutional Court's decision in the "Broadcasting Directive" case shows how the BVerfG can use its *Maastricht* jurisprudence to influence the policy making process.¹³⁰ In the Broadcasting Directive case, the Bavarian government was challenging the applicability of the EC Directive in Germany on the grounds that it encroached into the Länder's legislative authority. The German government argued that its "promise" to work with the Länder in EC policy-making was not justiciable and that the concession secured by the German government in the negotiation process meant that the directive was essentially non-binding, so that the Länder's authority over cultural policy was not violated.¹³¹ The ECJ had yet to hear a challenge to the directive. Instead of preempting the European Court, the BVerfG declared that the extent of Germany's obligation under the directive was not clear enough to know if the directive constituted a violation of the constitutional separation of powers. While the decision left the EC directive intact, it essentially voided the directive of having a legally binding effect within Germany.

¹²⁹ Ibid. p. 106-107.

¹³⁰ The 1995 decision was actually the second case on the issue. In the first case concerning the broadcasting directive, Bavaria tried to force the Federal government to vote against the EC's broadcasting directive which encroached on Länder prerogatives in the area of television and radio policy by bringing suit in front of the BVerfG. At that time, the BVerfG refused to order the Federal government to vote against the directive, on the grounds that such a decision would undermine the bargaining leverage of the Federal government. Seemingly granting the government the license to give away Länder legislative authority, the BVerfG found that even if the German government failed to influence the EC not to legislate, it would have stepped on provincial power but it would have none-the-less used its freedom of maneuver to bring the final text as close as possible to the wishes of the Länder (this decision was issued in 1989, four years before the *Maastricht* decision). This analysis focuses on the second decision, from 1995 *Bayerische Staatsregierung v. Bundesregierung* BVerfG decision of April 11, 1989. 2 BvG 1/89. *CMLR* 1990(1):649-655. 2 BvG 1/89 BVerfG decision of March 22, 1995. *EuGRZ* 1995:125-137.

¹³¹ In negotiations on the broadcasting directive, the German government won concessions in the form of protocols attached to the directive. Protocol 4 and 5 declared that the directive was only binding in the end to be achieved, and Protocol 7 made the end of the directives relatively vague and unenforceable, implying that the goal of the directive was simply to achieve a higher audiovisual capacity in Europe 'with each member state working towards the goal within their constitutional capacities to do so'.

In the text of the decision, the BVerfG also laid out exactly what the Federal Government had to do to avoid a negative decision in the future. It said that the Federal Government must test if the legislation is important for communal interests of the member states and if the Federal government can support the measure, and defend the EC authority in front of the Bundesrat, giving the Länder the opportunity to offer their legal opinion and working together prospectively to ensure no encroachment of Länder legislative authority occurs. The Federal government must then represent the Bundesrat opinion at the EC level, and if it is outvoted it must do everything within its power to change or overturn the Council decision, if necessary bringing a case to the ECJ. The decision also made it clear to the ECJ that if the directive were to be found valid and legally binding, it would violate the separation of powers clause in the German constitution. Finally, the decision established consultative rights which the Länder could demand in future EC policy-making, and the right to demand that the German government to challenge questionable EC laws in front of the ECJ.

The *Maastricht* decision was in method similar to what the BVerfG had sanctioned the BFH for doing in the *Kloppenburg* case: in both cases a national court was asserting its authority to find limitations to the applicability of EC law in the national Acts of Accessions (thus based on the Treaty itself). However the BVerfG's decision differed in two important ways. First, whereas the BFH found ECJ jurisprudence to be inapplicable because it deviated from what the parliament had agreed to in the Act of Assessment, the BVerfG only threatened to find EC law or ECJ jurisprudence inapplicable. The purpose of the threat is not so much to find EC law inapplicable, but to create influence for the Constitutional Court (as was shown in the broadcasting directive case). The real sign of the BVerfG's judicial influence, just as the real measurement of political power, is not needing to exercise the power. The second crucial difference was that BVerfG is the highest German court, and the BFH is not. As mentioned earlier, a German Constitutional Court Judge explained its role in the process of legal integration through the analogy of a watchman on a bridge, saying that the 'EC legal order and the national legal orders are two separate entities connected by a bridge. EC law flows into the national legal

order over this bridge, and the BVerfG sits on this bridge and decides which law can and cannot come in.’¹³² In the Constitutional Court’s view, it alone sits on the bridge—not the ECJ and not other German Courts. The BVerfG has the power to find EC law and ECJ jurisprudence inapplicable in Germany. The rest of the German national courts are bound by the ECJ’s jurisprudence.

The BVerfG’s *Maastricht* decision was hailed as a victory for the German government because the decisions upheld the government’s EC policies. The Broadcasting Directive decision was seen as a peace offering to the ECJ because the BVerfG did not find the directive to be unconstitutional. But the *Maastricht* decision was a significant expansion of the powers the BVerfG had declared for itself in the *Solange I* and *Solange II* jurisprudence, and an extension of the tools which could be used in Germany to challenge EC laws. Not only was the BVerfG there to ensure the compatibility of EC law with German basic rights provisions, it could ensure the compatibility of EC law with the EC Treaty itself! To use a Constitutional Court judge’s own metaphor, the new power meant that BVerfG could play a role refereeing of the rules of the political policy-making game.¹³³

There have been a few BVerfG decisions involving the applicability of EC law, such as the Broadcasting Directive decision. But so far the Constitutional Court has been laying low. The message sent in the *Maastricht* decision has been clearly received by the European Court, and the Court has been taking states rights into account more in its jurisprudence. One month after the *Maastricht* decision, the European Court issued one of its first decisions limiting the competences of the European Union. The *Keck* case examined whether or not a French law regulating store discounting policies violated EC law. While the ECJ could have found many reasons based in their existent jurisprudence for why the French law was acceptable, it went out of its way to say that the EC has no authority over the issue of how goods are marketed in a country. Such a

¹³² Interview with a judge at the Bundesverfassungsgericht, Karlsruhe Germany. December 8, 1993.

¹³³ This metaphor was used in an interview with a judge at the Bundesverfassungsgericht, Karlsruhe Germany. December 8, 1993.

statement was a real departure for the European Court, which usually found extensions but no limits to the reach of European law.¹³⁴

Inter-judicial Politics as a Force of Legal Integration from 1963-1995

Each of the five rounds of legal integration examined above contributed significantly to the development of a national legal basis for EC law supremacy by eliminating stumbling blocks to EC law supremacy and potential forces for legal disintegration and by establishing national legal doctrine in favor of EC law supremacy. Table 3 summarizes the challenges to EC law supremacy and the advances in EC legal doctrine in each round of integration, as well as the interests of the different levels of courts and of the government in each round.

¹³⁴ *French penal authorities v. Keck and Mithouard* ECJ decision of decision of 24 November 1993, 267 and 268/91. not yet published.

Table 4.3: Summary of Rounds of Legal Integration

Case Law	Challenges to EC law Supremacy	Advances in German Legal Doctrine	Interests of German Courts	Interest of Government
<p>Round 1: 1963-1967 1963 Rheinland-Pfalz 1967 BVerfG ECJ: (+) <i>Van Gend en Loos</i> (Accepted)</p>	<p>* Is Article 189 EEC constitutional? * Can the Constitutional Court review the constitutionality of EC regulations?</p>	<p>* EC membership and Article 189 EEC are constitutional * Art. 24 GG basis for EC Membership, sovereignty has been transferred to EC * BVerfG can't review acts from non-German (i.e. EC) authorities * Supremacy of EC law over simple German law * National court obligation to ensure EC law supremacy</p>	<p><i>No issue of who decides at stake</i> * Lower: (<i>Rheinland-Pfalz</i>) push for re-negotiation of Treaty * Fed- resolve issue so BFH can deal with cases * BVerfG- close issue once consensus develops</p>	<p>(+) No Constitutional constraints on EC membership</p>
<p>Round 2: 1965-1971 "Turnover Tax Struggle" 1965 <i>Lütticke</i> 1967 BFH 1971 BVerfG ECJ: (+) <i>Lütticke</i> <i>Costa</i> (Accepted)</p>	<p>* Are national courts obliged to control for the compatibility of national law with EC law?</p>	<p>* National courts can not refuse to apply EC law, but must refer basic rights concerns to ECJ. * BVerfG can review acts of EC authorities to ensure basic rights protection, but BVerfG will defer to ECJ first (reversal of 1967 doctrine) * Supremacy of Constitution over EC regulations and directives.</p>	<p>(-) Lower- maintain authority to review German turnover equalization taxes (+) Fed- no direct effect for Article 97 EEC, turnover equalization tax cases fall under Article 97 EEC * BVerfG (no issue of who decides at stake)- do not re-open debate, endorse BFH resolution of dispute</p>	<p>(+) Make numerous challenges to German turnover taxes disappear (+/-) Keep German turnover taxes from being reviewed by ECJ (won battle, lost war)</p>
<p>Round 3: 1971-1985 1971 VW Frankfurt 1974 <i>Solange I</i> 1979 <i>Vielleicht</i> 1985 <i>Solange II</i> ECJ: (-) <i>International Handelsgesellschaft</i> (rejected)</p>	<p>* Are ECJ decisions binding on national courts if the decision violates the German constitution? * Can national courts refuse to apply EC law or ECJ jurisprudence if they think it violates the German Constitution? * Is EC law supreme to the constitution?</p>	<p>* National courts can not refuse to apply EC law, but must refer basic rights concerns to ECJ. * BVerfG can review acts of EC authorities to ensure basic rights protection, but BVerfG will defer to ECJ first (reversal of 1967 doctrine) * Supremacy of Constitution over EC regulations and directives.</p>	<p>(-) Lower- maintain authority to ignore EC law and ECJ decisions if it violates German basic rights protection, unless BVerfG says otherwise (-) Fed- maintain authority to ignore EC law and ECJ decisions if it violates German basic rights protections, unless BVerfG says otherwise (+) BVerfG- Maintain supreme authority- last word on EC law in Germany</p>	<p>(-) No Constitutional constraint on EC membership (-) Minimize conflict between national courts and ECJ by eliminating cases of conflict and working at EC level to ensure basic rights protection</p>

For national courts

- + = autonomy for action and/or supreme jurisdictional authority maintained
- = autonomy for action and/or supreme jurisdictional authority undermined
- * = no issue of who decides at stake

For ECJ

- + = jurisprudence accepted, ECJ authority accepted
- = jurisprudence rejected, limits to EC law and ECJ authority created

For Government

- + = Government's goal achieved, political autonomy maintained
- = Government's goal not achieved, political autonomy undermined

<p>Round 4: 1981-1987 "Direct Effect of Directives" 1981 BFH 1985 Kloppenburg (BFH) 1987 B VerfG</p> <p>ECJ: (+) <i>Van Duyn</i> (on the direct effect of directives) (Accepted)</p>	<p>* Are national courts obliged to send questions of EC law to the ECJ? * Are ECJ decisions binding on national courts if the ECJ is applying judge-made law?</p>	<p>* German courts must refer questions of EC law to ECJ * German courts must accept ECJ decisions in cases * Constitutional violation if national courts refuse ECJ authority in issues of EC law</p>	<p>(+) Lower- maintain authority to review compatibility of EC law with EC directives directly (-) Fed- (BFH)- keep EC law out of domain of turnover taxes * BVerfG (no issue of who decides at stake)- keep courts below it from challenging EC law or ECJ authority, maintain own concentrated authority to determine constitutionality of ECJ jurisprudence</p>	<p>(+) Avoid conflict between national courts and EC institutions</p>
<p>Round 5: 1993-1995 "Maastriht" 1993 BVerfG 1995 BVerfG</p> <p>ECJ: (-) General jurisprudence expanding EC jurisdictional authority (previous jurisprudence accepted, breaks on future expansions).</p>	<p>* Does the Maastriht Treaty violate the German Constitution? * Are there limits to what the German politicians can agree to in the process of European integration? * If the ECJ is ensuring that EC institutions do not exceed their authority, who's watching the ECJ?</p>	<p>*Maastriht Treaty is Constitutional * The German constitution creates absolute limits to the transfer of sovereignty to EC level * BVerfG can review "transfer of sovereignty" in EC Treaty to find limits to EC law (in Germany)</p>	<p>BVerfG- * send message to ECJ to interpret Maastriht Treaty narrowly, respect state's subsidiarity rights, and not find for itself a Kompetenz-Kompetenz * send message to German government to fight for subsidiarity rights in EC position itself to limit erosion of national legislative authority and by extension the realm of policy over which BVerfG is authoritative (+) position itself to influence EC policy-making process by allowing Länder to challenge EC policy agreed to by Federal government, and by overseeing "rules of game" in EC policy-making process</p>	<p>(+) Maastriht Treaty is constitutional (-) No constitutional constraint on EC policy-making</p>

For national courts

- + = autonomy for action and/or supreme jurisdictional authority maintained
- = autonomy for action and/or supreme jurisdictional authority undermined
- * = no issue of who decides at stake

For ECJ

- + = jurisprudence accepted, ECJ authority accepted
- = jurisprudence rejected, limits to EC law and ECJ authority created

For Government

- + = Government's goal achieved, political autonomy maintained
- = Government's goal not achieved, political autonomy undermined

Round 1 concerned the lack of constitutional safeguards in the EC policy-making process. The Rheinland-Pfalz judge was mainly worried that pro-integration forces were uncritically transferring legislative authority to an executive body which lacked judicial review mechanisms. It used the constitutional legal system to challenge the authority of EC law and the developing doctrine on the special nature of the EC legal system. Given the limited development in EC law and ECJ doctrine at the time, and the supra-national Court's weak institutional foundations, it was hard to envision how integration might compromise constitutional safeguards or encroach significantly on the national policy-making process or on the authority of national courts. The German Constitutional Court's decision was not surprising or controversial. Germany was committed to European integration and the political turmoil at the EC level would have made any attempt to re-negotiate the Treaty along more democratic lines unwise. The shared commitment of the German political and legal elite and of the ECJ to creating a *Rechtstaat* at the European level made supporting ECJ authority a more appealing choice than trying to force treaty re-negotiation or fomenting challenges to EC law and ECJ authority.

In round 2, the BFH and the German government were concerned with the large number of challenges to German turnover equalization taxes, and wanted to close off the appeal to EC law to challenge German turnover equalization taxes. Lower courts found the challenges to German turnover equalization taxes to be valid, and they wanted to maintain their authority to hear the challenges. They used the EC legal system to circumvent BFH attempts to interpret EC legal obligations narrowly and government attempts to ignore ECJ jurisprudence. The ECJ resolved the conflictual issues of "who decides," and the issue of if the German government was bound by ECJ interpretations with which it disagreed were resolved through a diplomatic compromise. The German government got all of the legal challenges to German turnover equalization taxes to disappear, but conceded EC law supremacy and national court authority with respect to Article 95 EEC. The Federal Tax Court was able to interpret the ECJ's *Lütticke* jurisprudence narrowly so that lower courts could not evaluate the compatibility of German turnover equalization taxes with the EC Treaty. While the lower courts maintained the right of direct access to the ECJ and the

authority to enforce Article 95 EEC, they lost in their goal to evaluate the compatibility of German turnover-taxes with EC law. The BVerfG's endorsed the deal and declared the supremacy of EC law over national law. Its own authority and autonomy was not in any way undermined by the granting of the supremacy of EC law over German law, especially because the BVerfG is only competent to examine constitutional questions. Lower court objections undermined Government attempts to rule ECJ jurisprudence inapplicable, and required the government and the BFH to develop a legalistic argument of attack which, while it achieved their short-term goals, let the ECJ's doctrine set the future rules of the game.

While the Article 24 basis for EC law supremacy developed in rounds 1 and 2 differed from the ECJ's legal reasoning, as long as national courts agreed with ECJ jurisprudence the difference between national doctrine and ECJ doctrine appeared to be mostly a difference of semantics. Once the ECJ started to expand its jurisprudence into more issue areas and apply its supremacy doctrine, the ECJ started to encroach more into national court's jurisdictional authority and the ECJ jurisprudence upset more areas of national law and policy. When German courts and the ECJ started to disagree with the expansion and penetration of EC law supremacy, Article 24GG became a basis to find constitutional limits to EC law supremacy, and to reject ECJ jurisprudence and legal reasoning.

In round 3, the ECJ's *Internationale Handelsgesellschaft* jurisprudence on the supremacy of EC law over the German constitution provoked a reaction from the administrative court in Frankfurt which wanted to conduct judicial review of EC laws with respect to the German constitution. It also angered the Constitutional Court whose own jurisdictional authority was threatened. The BVerfG refused the supremacy of EC law over the German constitution, but it agreed with the ECJ in the substance of the case and it refused the right of lower courts on their own to rule EC law unconstitutional and thereby inapplicable in Germany. Lower national courts lost their authority to challenge the validity of EC law. Federal courts also lost their ability to find national constitutional bases to reject ECJ authority. And the BVerfG maintained its authority to review the compatibility of EC law with basic rights protections. This outcome was not,

however, what the German government had wanted because it created constitutional constraints on EC policy-making, political headaches at the EC level and doubts about the German government's ability to implement bargains struck at the EC level. Nor was it what the ECJ wanted because it suggested limits to ECJ authority, and the possibility that national courts could refuse to apply EC law or an ECJ decision. Jurisdictional concerns had provoked the strong reaction of the Constitutional Court in the *Solange I* decision, and had led to the creation of limits to EC law supremacy.

In round 4, the BFH was worried about losing its supreme authority in the interpretation of VAT taxes, and advocated taking a stand against an ECJ-made law which deviated from what member states had agreed to when ratifying the Treaty. Lower tax courts did not share the BFH's concern over losing its supreme interpretive authority and wanted to be able to hear challenges to national law based on EC directives. The Federal Administrative Court, which was used to the supremacy of EC regulations over its area of interpretive authority, did not see itself as gaining anything by refusing the direct effect of directives and agreed with the ECJ's reasoning for the direct effect of directives. The BVerfG, which was not responsible for the substantive interpretation of national or EC law, also saw no interest in refusing the direct effect of directives. The issue at stake was whether national courts could interpret the limits of EC law and ECJ jurisprudential authority. 'Round 4' ended with the acceptance of the ECJ's jurisprudence on the direct effect of directives and with the creation of a constitutional sanction against high courts which refuse to make a reference to the ECJ or which refuse to accept the ECJ's decision in a case. The Federal Tax Court failed in its attempt to stem the encroachment of European law into its substantive area of expertise, having been undermined by its lower courts and by other higher courts with different institutional interests and legal beliefs in the matter. In the end, federal courts lost their ability to refuse an ECJ decision based on constitutional concerns.

Round 5 was provoked by the Treaty on a European Union which offered the prospect of enhanced EC authority and diminished member state autonomy. The BVerfG feared that the ECJ would use the vague language in the TEU as a blank check to increase its authority at the expense

of national parliaments and that it would compromise constitutional safeguards. It was also concerned that the parliament would consent to further shrinking the realm of national policy-making, undermining national judicial checks on the policy-making process. The *Maastricht* decision established the authority of the BVerfG to review expansions of EC law through ECJ legal interpretation, and the authority of the BVerfG to find absolute limits in the process of legal integration. This expansion of BVerfG authority created a new potential limitation on ECJ autonomy and authority. While the German government won its effort to have the Maastricht Treaty adopted, it will find its freedom of action considerably constrained in future EC policy-making. The *Maastricht* decision created a new tool for individuals and Länder to use when challenging EC law, creating a potential breaking mechanism for the process of integration.

IV. Explaining Legal Integration in Germany

German judicial positions on the issue of EC law supremacy fluctuated greatly across time. Indeed German courts seem to have become more ambivalent rather than less ambivalent about EC law supremacy as time went on. As the EC gained influence and authority over more areas of domestic policy-making, and as the ECJ expanded its jurisdiction and influence over more areas of national law and policy, German courts became increasingly concerned about how EC integration was affecting the German constitutional order and the German legal process. While one might question (as many Germans have) whether the German system should be the model for Europe, it is hard to blame the Germans for wanting to protect their constitutional order from being undermined by European integration.

By way of conclusion, this section considers the role of broader political factors, the ECJ, legal reasoning arguments, pro-integration lobbies and competition between courts on the process of legal integration in Germany.

The Role of Political Factors

Doctrinal change on the issue of EC law supremacy was shaped by the political decision to be a member of the European Community. But one cannot explain the fluctuations in German jurisprudence or the way EC law supremacy has been incorporated into the German legal system by changes in the German commitment to European integration, by calculations about narrow economic national interests, or by larger domestic political battles between political parties. German political support for European integration was unwavering in the 1970s and 1980s, and in some respects the German judicial opposition to EC law supremacy was a blemish on the German record of being "good Europeans." Indeed rather than shaping the judicial process on European integration, the German government was often put in the position of having to defend ECJ jurisprudence and EC policy in the national realm against their national courts, and then having to defend their courts' actions at the EC level.

Nor can one say that Federal-State conflicts or public opinions were driving the Constitutional Court to create constitutional limits on European integration. There were certainly voices of concern about basic rights and Federal-State divisions of authority in Germany, but the cases precipitating the Constitutional Court's *Solange I* and *Maastricht* decision did not emerge from political struggles over these issues. Indeed political bodies criticized the *Solange I* decision, and the Bundesrat chose not to challenge the Maastricht Treaty in front of the BVerfG. A more likely explanation of these decisions is that the Constitutional Court was responding to its own concerns about EC legal integration, and drawing on voices in the legal community (and to a lesser extent political community) for support of its positions.

Politicians tried to directly influence the process of legal integration mainly when ECJ decisions created significant material and political costs in the national realm (such as the Lütticke case) and when national court decisions created political troubles for the German government at the EC level. In these cases the German government focused on its short term objectives of making the political troubles go away. The government was quite successful at making the legal claims disappear in the turnover tax struggle, and while it did not convince the BVerfG to back

down from its *Solange I* jurisprudence, it did manage to convince the Commission to drop the infringement suit against Germany.

The German government's focus on the short term interests led it to accept significant constraints on its freedom of movement at both the EC and the national level. It quickly conceded the supremacy of EC law in the turnover tax struggle. And it welcomed the *Maastricht* decision which upheld the Treaty on a European Union, even though the decision was highly critical of the ECJ and implied significant constraints on the Federal government's freedom of maneuver at the EC level. If similar judicial constraints had been created in France, one could surely have expected a stronger reaction. But Germans are well used to the rule of law, and to legal and constitutional limits in the policy-making process. The extension of these limits to the EC policy-making process may not have been the first choice of the executive branch, and it certainly makes EC policy-making more difficult for the German government. But it was well within the political (and legal) rules of the game.

Finally, political concerns have influenced the appointment process of judges to the European Court of Justice. The early appointments were not designed to influence the ECJ in any one direction, but some have claimed that Judge Everling was selected to address concerns that the European Court did not sufficiently respect the borders of its own jurisdictional authority. Everling was replaced after one term because of party politics within Germany. But his successor, Judge Zuleeg, was also replaced after one term. While one cannot know for sure what motivated Zuleeg's replacement, one can take as signs that Zuleeg was personally criticized in the BVerfG's *Maastricht* decision for supporting broad readings of EC authority, and that his successor comes from Bavaria—the state most demanding limitations on EC authority. These signs would imply that the German government was trying to appease domestic concerns or influence the ECJ, or both.

The Role of the ECJ

The ECJ played a central role in the process of legal integration in Germany. German courts strove to make their jurisprudence compatible with that of the ECJ, allowing the ECJ much influence over how EC law is interpreted in Germany. Ultimately it was up to the national courts to decide which aspects of ECJ jurisprudence they would accept, but by interacting strategically with lower German courts the ECJ could create an internal pressure for higher courts to accept ECJ jurisprudence. Once the BVerfG created a constitutional sanction against German courts which refuse ECJ jurisprudence, the ECJ was able to directly influence how German courts interpret EC law. A reference has to be made in order to allow the ECJ to influence legal interpretation, but any lower court can send a reference to the ECJ and basically force the courts above it to accept the ECJ's interpretation.

The ECJ was not in complete control of how German courts resolve EC legal issues. Many cases never get referred to the ECJ, and as long as a lower court will not make a reference to the ECJ Federal courts can interpret EC law on their own. In addition, lower courts use the national constitutional system to challenge ECJ jurisprudence with which they disagree. In the challenges to EC law, the ECJ became the court to circumvent. When the ECJ failed to give the Frankfurt court the answers it wanted, the Frankfurt court went to the BVerfG for an answer it liked better. The ECJ was also forced to be responsive to the concerns of the Constitutional Court, and to recognize the BVerfG's power to limit the authority of EC law in the national realm.

The Role of Legal Doctrinal Debates

The process of legal integration in Germany was clearly influenced by legal discourse and doctrinal debates. But legal discourse and doctrinal debates do not explain the fluctuations in German judicial positions over time, or the way in which EC law supremacy came to be incorporated into the German legal system.

It is not surprising that debates over legal doctrine influenced judicial decision-making in Germany. As Glendon et al. have argued:

The official reports of cases do not necessarily report all court opinions, nor do they always set forth the opinions in full. The bar tends therefore to rely on the editors of the privately published legal journals who select and print what they consider to be the important cases. Typically each case is followed by an annotation written by an expert (not necessarily a professor) who may amplify the facts of the case, relate the case to other decisions, and discuss its general significance... Though not a formal source of law, the weight of scholarly authority, known in civil law terminology as "the doctrine," is everywhere taken into account by legislators and judges when they frame, interpret or apply law... A critical case note by a leading author, is, in effect, like an important dissenting opinion, indicating where controversy exists and the possible future direction of the law.¹³⁵

Glendon et al's comment is especially applicable to Germany where legal decisions often read like academic articles, including citations to legal literature and where it is also a fairly common practice for courts to hire academics to give a consultation on a case, and for academics to serve on mid-level appellate courts reviewing decisions from lower courts. National judges responded to issues raised in the legal commentaries. And doctrinal debates influenced the process of legal integration so far as contributing to the development of legal doctrine was in itself an incentive for some judges.

But "the doctrine" was overwhelmingly supportive of ECJ jurisprudence. The legal challenges raised by the BVerfG and the BFH were not concerns that had been significant parts of debates in legal commentaries. Nor can one say that the criticism of the BVerfG jurisprudence raised in the commentaries significantly influenced the BVerfG to change its jurisprudence. The *Solange I* decision was highly criticized in the legal press, yet for many years the Constitutional Court refused to address the concerns raised in the literature. And when the BVerfG later qualified its *Solange I* decision, it never really reversed itself.

Instead of having its decisions shaped by the commentary, the BVerfG has shown significant ability to shape German legal consensus through its decision-making. For example, in the 1960s EC legal experts agreed that German courts could not review acts of EC institutions, and thus they could not set aside EC law. The BVerfG developed a substantively meaningless distinction between finding an EC law "invalid" and finding an EC law "inapplicable" and created for itself the authority to set aside EC law which conflicted with the German constitution. This

¹³⁵ Glendon, Mary Ann, Michael Wallace Gordon, and Christopher Osakwe. 1985. *Comparative Legal Traditions, American Casebook Series*. St. Paul: West Publishing Co. See p. 162-163.

distinction was criticized in the 1970s, but it came to be accepted within the legal community. German academics still criticize certain aspects of the BVerfG's EC law jurisprudence, but no one questions the authority of the Constitutional Court to review the compatibility of EC law with the German constitution.

The Role of Pro-Integration Legal Lobbies

The *Wissenschaftliche Gesellschaft für Europarecht* worked like a lobby for the cause of European integration. It had its greatest influence in the early stages of the process of legal integration when there was a small group of ideologically cohesive core members, and it was easy to coordinate efforts at influencing national judicial behavior. Members of the WGE targeted attacks on national court jurisprudence which conflicted with ECJ jurisprudence through the writing of legal commentaries in major legal journals and through personal contacts with national judges. They put together "information campaigns" to spread knowledge about European law and how it affected the German legal process. And lawyers who participated in the group brought test cases to help develop EC law.

The group was perhaps most successful at creating an appearance of consensus on EC legal issues in the 1960s. Their written campaigns basically drowned out the opposition. For judges who did not attend academic conferences where there was much debate and disagreement on EC legal issues, the academic press seemed to largely agree on the issue of EC law supremacy. This appearance was reinforced by the Constitutional Court's 1967 decision which adopted the language of the "new legal order" advocated by the academics. In an interview a tax court judge confessed that he had significant questions about the legal basis for EC law supremacy (in the 1960s and to this day), but after seeing the attacks of the BFH (where he was a clerk in the 1960s) and the apparent consensus on the issue, he kept his questions to himself.¹³⁶

By the 1970s, the WGE was a larger and less cohesive group and had less influence in the process of legal integration. With more scholars and practitioners involved in the European legal

¹³⁶ Interview with the former president of a German tax court, February 22, 1994 (Füßen).

issues came a variety of often conflicting legal arguments.¹³⁷ While the BVerfG's *Solange I* and *Maastricht* decisions united the supporters of EC law in their opposition, they also legitimated the arguments of the critics of the pro-integration positions. By 1980, the concentrated lobbying focus of the WGE had disappeared almost entirely. At this point, the WGE became an organizer of the many scholars who contribute legal commentaries, but as discussed above, the ability of these commentaries to influence opponents of ECJ jurisprudence and ECJ authority has been limited.

The Role of Competition between Courts

Across the five rounds of integration, competition between courts served as a motor of legal integration, both creating the legal obstacles as EC law challenged national legal traditions and precedents, and helping to overcome the obstacles. Competition between courts created an incentive for lower courts to challenge national jurisprudential limits to reach of EC law, and thereby created the opportunity for the ECJ to expand its jurisdictional authority into new areas of law. By appealing directly to the ECJ and the BVerfG, lower courts were able to shift the legal context from underneath the generally more conservative higher courts. Lower tax courts could circumvent BFH attempts to interpret EC legal obligations narrowly, by going to the ECJ to get a decision which contradicted BFH jurisprudence. They could also give the ECJ the opportunity to develop a more solid arguments which would undermine the arguments used by the higher courts to limit the reach of European law. By creating a more comprehensive pro-integration jurisprudence, and by creating within the national legal systems counter-precedents to high court jurisprudence which limited the effects of EC law in the national legal realm, opposition to legal integration became isolated and overwhelmed within the national system. Competition between courts also served as a break to legal integration, as each court sought to keep its margin of maneuver open. Lower courts challenged national limits to EC legal authority, and EC limits to

¹³⁷ Weiler has discussed this change, characterized it as the transformation to a more "mature" legal system. Weiler, Joseph. 1994. A Quiet Revolution- The European Court of Justice and its Interlocutors. *Comparative Political Studies* 26 (4):510-534.

national court autonomy and authority. Along with individuals, they used the Constitutional legal system to challenge EC legal and political developments which encroached into the national realm and undermined the influence of national actors in the policy-making process—including themselves.

The different negative reactions to ECJ jurisprudence in the midst of an overall positive trend in support of legal integration arose from the impact of new ECJ jurisprudence on the institutional interests of the different courts. When EC law encroached on the realm of the Constitutional Court, it reacted by creating limits to EC law supremacy and established legal doctrines which allowed it to remain a player in the national and EC policy-making process. This ensured that the ECJ was not the only actor authorized to determine the limits of integration, so that legal integration did not become one-way ratchet of ever expanding European law. When ECJ doctrine encroached on the BFH's authority, it reacted by rejecting the ECJ's offensive jurisprudence. Its counter-reaction was unsuccessful however, because both the courts below it, other federal courts and the court above it did not share its institutional interests and did not agree with its legal arguments.

German courts also had agendas which transcended narrow institutional self-interests which they tried to promote in the legal integration process as well. Higher courts were concerned with policing the over-all functioning of the legal system and tried to strike a balance between upsetting ECJ jurisprudence and government policies, and maintaining legal certainty and the smooth functioning of the legal system. The BFH's interest in closing off legal appeals in the turnover-tax affair came in no small part from its desire to free up the already over-burdened tax court system and to keep different lower courts from finding different individual taxes to be illegal. The Constitutional Court also tried to balance its challenges to ECJ doctrine with efforts to promote the effective functioning of the EC legal system. Thus it forced lower courts to first send challenges to the validity of EC law to the ECJ, and after making its broader statement on the supremacy of the constitution over EC law it abstained from intervening in individual cases. Lower courts did not share the concern about how their individual actions affected the over-all

functioning of the legal process, and at times their actions ran counter to the will of the higher courts for this reason, feeding the inter-judicial politics dynamic of legal integration.

It is also clear that some German courts had political agendas beyond their institutional interests, and that they were trying to use the judicial process to further these agendas. The Rheinland-Pfalz court wanted to promote democracy in the EC and tried to get the more authoritative BVerfG to wage into the debate. Although heavy-handed their method, both the administrative court in Frankfurt and the Constitutional Court clearly wanted to promote better basic rights protections in the EC and their actions contributed to this end. In the *Maastricht* case, the BVerfG wanted to promote the agenda of the elite who were apprehensive about the Maastricht Treaty. Taking the arguments raised by current and former EC officials seriously, they allowed the issues to be aired and examined more fully than they had been in the national parliamentary debate. The Constitutional Court also promoted integration-cautious agenda by creating procedural barriers which would force political reflection on the constitutionality of further steps towards European integration, and which provided procedural ammunition to foes opposed to increased policy-making at the EC level.

The end result of the period of legal integration considered in this chapter is that the supremacy of European law over national law has been accepted, but new avenues to challenge EC legislation, ECJ jurisprudence and the integration process have been created by the German judiciary. For many Germans, the limits to legal integration created by the German Constitutional Court are positive. They address German concerns about extending democracy and protecting basic rights in the EC. And since many Germans do not particularly trust the ECJ to uphold the constitutional checks, and are sometimes wary about their government's enthusiasm for European integration, it is comforting to have the German Constitutional Court as a safeguard. And well it is unlikely that the German government intended legal integration to unfold in Germany as it did, or willed the national court opposition to the ECJ authority an unintended consequence of the judicial constraints created by the German Constitutional Court is that the German government's leverage

in EC negotiations has been strengthened. The limits to European integration do not only affect the German government. Other EC member states and the Commission must also take into account Germany's constitutional constraints in the policy-making process.

But outside of Germany there is less enthusiasm for the Constitutional Court serving as a watchdog of the ECJ or for strengthening the political hand of the Germans. Many Europeans want there to be a check on European integration and on the ECJ, but they don't necessarily want the German Constitutional Court to be this check. There is significant concern about German hegemony in Europe, and discomfort inside and outside of Germany about the references of the BVerfG to old and discredited conceptions of statehood, democracy and 'ethno-culturally homogeneous Volk' in the Maastricht decision.¹³⁸

High courts in other countries have also tried to create a check against the ECJ, and to counter-balance BVerfG's influence. For example, one of the arguments used to influence the *Conseil d'État* to change its jurisprudence on EC law supremacy was that French influence over legal integration was being undermined by a lack of references to the ECJ and the *Conseil d'État's* refusal to play a role in debates over EC law supremacy.¹³⁹ But high courts in other countries are not as well positioned as the BVerfG to influence the legal and political process at the European level. The French Constitutional Council only hears challenges to national laws which are being discussed in the parliament, and does not have the opportunity to hear challenges to EC law raised by individuals or regional governments. While it can influence how EC obligations are assimilated into French law, the French government is often more likely to change the French constitution than to change the terms of EC membership because of a Constitutional Council decision. The House of Lords in Britain is not a constitutional court and cannot influence government decisions

¹³⁸ For an argument against the BVerfG as the final watchdog, see Weiler, Joseph. 1995. The State "über alles": Demos, Telos and the German Maastricht Decision. European University Institute. RSC 95/19. .

¹³⁹ The concern that French legal practices have been losing influence at the EC level has been voiced by many French scholars and practitioners (for example, see Abraham, Ronny. 1989. *Droit international, droit communautaire et droit français, Le Politique, L'Economique, Le Social*. Paris: Hachette. See p. 171). In the *Nicolo* case, Commissariat du Gouvernement Frydman also suggested that the *Conseil d'État* should "break the monopoly" of international courts in developing international law and in deciding how this law influences French policy. *Raoul Georges Nicolo and another Conseil d'État* decision of October 20, 1989. *M. Frydman, Commissaire du Gouvernement. Common Market Law Report 1990, vol. 1, p. 173-191*

on matters of European integration. And because it only hears appeals of cases, it is not in the position to decide on the conditions of EC membership. The Italian Constitutional Court is the best placed national court to counter-act BVerfG influence, but lacks the institutional authority of the BVerfG in either the Italian political process or the European political process.

The supremacy of EC law is assured in Germany so far as the German government cannot avoid its EC legal obligations and national laws which conflict with EC law will be ignored by German courts. But along with EC law supremacy came limits to future integration which ensure that German courts and the ECJ will have a greater role in the political process of European integration. Within Germany, the Constitutional Court has opened up new avenues to challenge European policies, and created political constraints on the German Government which must include the Länder more fully in EC policy-making. At the European level as well, the BVerfG has tried to influence the German government to challenge EC policies which encroach on German constitutional protections, and to influence the ECJ to serve more as a protector of states rights in the process of legal integration. How the BVerfG's shadow will influence EC policy-making is yet to be seen, but the BVerfG has positioned itself to be a co-arbiter of the process of legal integration. It might not have as much influence and authority as the ECJ on EC legal issues, but it can create enough of a problem for politicians inside and outside of Germany, and for the ECJ to assure itself a voice in the process of European integration.

Chapter 5

Rejecting French ‘Revolutionary Traditions’: French Judicial Acceptance of EC Law Supremacy

Germany represented a best case of national courts embracing European legal integration. German lower courts sent numerous references and provocative questions to the European Court to resolve and enforced EC law supremacy already in the 1960s, and the German Constitutional Court ordered federal and lower courts to respect the ECJ’s decisions and authority. Of the original member states, French national courts had the hardest time embracing legal integration. French courts were the slowest in referring preliminary rulings to the ECJ. And they seldom sent provocative questions which expanded the jurisdictional authority of the ECJ or facilitated the penetration of European law into the national realm. High French courts have been the most reticent to embrace EC law supremacy and the most confrontational, challenging and refusing ECJ doctrine and jurisprudence. The refusal of French courts to enforce EC law over national law, made French plaintiffs and lawyers reluctant to bring cases or to draw on the EC legal aspects of their cases, even when there were clear violations of EC law which could have been raised.

Especially from a formal legal standpoint, the difficulty French judges had with the doctrine of EC law supremacy presents a real paradox. The France constitution was very open to the supremacy of European law over national law. Indeed Article 55 of the French constitution clearly states that international treaties and agreements are supreme to national law. Judges usually look to constitutions as the font of guiding legal principles, yet despite this clear constitutional requirement, French judges refused apply EC law supremacy.

French legal scholars have tried to explain this paradox of a clear constitutional requirement for international law supremacy but a refusal by judges to enforce international law supremacy by France’s revolutionary tradition. During the French revolution there was a political backlash against the judiciary which had been corrupt in selling their offices, had liberally interpreted the

King's decrees, and had set aside laws at will.¹ To make sure that judges would not usurp or foil the government again, a ban against judicial review was inscribed into the laws of 16 and 24 August 1790 which stated: "the judicial tribunals shall not take part, either directly or indirectly, in the exercise of the legislative power, nor impede or suspend the execution of the enactments of the legislative body."² A sanction against judges who dared to conduct judicial review was incorporated into the French penal code which stated 'judges shall be guilty of an abuse of their authority and punished with loss of their civil rights' for interfering with the legislature or administration 'by issuing regulations containing legislative provisions, by suspending applications of one or several laws, or by deliberating on whether or not a law will be published or applied.'³ Some legal scholars argued that the failure to repeal these provisions made French judges resistant to EC law supremacy even hundreds of years later.⁴ For others it was less the formal legislative restraints on judicial review, than the larger spirit behind these provisions. French laws, they argued, were the embodiment of "*la volonté générale*" itself, thus it would be undemocratic if they could be set aside by judges. Lachaume summarized the traditional orthodoxy this way:

The national judge should not have doubts in the face of a statute posterior to a treaty which contradicts it, because this statute expresses, if one dare say, the latest state of the general will. He would therefore, that is according to his historical and normal mission, apply (the law). If the law contradicts the treaty, without admitting that it is inconceivable that the legislature did not know what it was doing, this is the general will which—right or wrong—has decided and the judge cannot but yield: his function as judge consists of applying the law, and not of judging it; above all, if in doing so, and in establishing the incompatibility of a law with a previous treaty, he is disposed to disregard the law.⁵

But there are reasons to question the importance of revolutionary traditions in influencing judicial positions regarding EC law supremacy. Many scholars have questioned the depth of the judicial tradition against "criticizing" the law. Alec Stone has argued that the taboo against judicial

¹ Foyer, Jean. 1981. La Justice: histoire d'un pouvoir refusé. *Pouvoirs* 16:17-30. Roseren, Pierre. 1992. Review by French Courts of the Conformity of National Provisions with Community law. In *Constitutional Adjudication in European Community and National Law*, edited by D. Curtain and D. O'Keefe. Ireland: Butterworth Ltd.

² Translation from Cappelletti, Mauro. 1989. *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press. See p. 194.

³ Translation from Stone, Alec. 1992. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. New York: Oxford University Press. See chap 2 note 10.

⁴ For example, Manin, Philippe. 1991. The *Nicolo* case of the *Conseil d'État*: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law over Subsequent National Statute. *Common Market Law Review* 28:499-519.

⁵ Lachaune, Jean-François. 1990. Une victoire de l'ordre juridique communautaire: l'arrêt *Nicolo* consacrant la supériorité des traités sur les lois postérieures. *Revue du Marché Commun*:384-394. See p. 386.

review had been challenged throughout post-revolution France, with a prevalent strain of legal scholarship promoting the “ideology of Constitutionalism,” and the necessity of judges conducting judicial review.⁶ Mauro Cappelletti argued that the French discovered fairly early on that allowing the government to control itself did not work, which is why the *Conseil d'État* increasingly became more independent and took on the role of a court which controlled governmental excesses of power.⁷ And French courts had long been interpreting French law artfully in order to reconcile it with international law.

The logic of the “revolutionary” argument also made increasingly little sense. The traditional orthodoxy was designed to protect parliamentary sovereignty, but in the Fifth Republic Parliament was no longer the boss. The 1958 constitution created clear limits to legislative authority, established a Constitutional Council and declared the supremacy of international law over national law. More importantly, the 1958 constitution reversed the division of powers between the parliament and the President of the Republic.⁸ The executive branch became the chief articulator of the *volonté générale* and freely circumvented the parliament in order to enact its will.⁹ As Cappelletti has pointed out, while the *Conseil d'État* refused to ‘criticize’ parliamentary laws, it did not hesitate to control the validity the legal edicts of the executive branch which had the same effect as French laws.¹⁰

By the time EC law supremacy became an issue, the refusal of judges to review French law was almost entirely symbolic. French judges clung to their historic prohibition against “criticizing the law” but freely criticized numerous French laws which supposedly did not have the legal value of a “*loi*.” The distinction between a “*loi*” and other forms of French law also became increasingly fungible.¹¹ Whether a law was based on a “*loi*,” or based on a *règlement, décret, arrêté* or

⁶ Op. cit. Stone (1992) See Chapter 1.

⁷ Op. cit. Cappelletti (1989) p. 197.

⁸ Lagrange, Maurice. 1968. Note sur arrêt Semoules. *Recueil Dalloz-Sirey* (15):286-289.

⁹ Lagneau-Devillé. 1983. Influences du pouvoir exécutif sur les prérogatives du juge en France, sous la Vème République. In *Fonction de juger et pourvoir judiciaire*, edited by P. Gérard, F. Ost and M. Van de Kerchare. Brussels: Faculté universitaire Saint-Louis. See p. 470.

¹⁰ Op. cit. Cappelletti (1992) chapter on “The Mighty Problem of Judicial Review.” Cappelletti was referring to the judgment of June 26, 1959, *Conseil d'État* 1959 D. Jur. 541.

¹¹ For a discussion of the “flexibility” of the legal categories, see Loschak, Daniele. 1972. *Le rôle politique du juge administratif Français*. Paris: Librairie générale de droit et de jurisprudence. See p. 138-150

ordonnance without the force of a “*loi*” was often quite open for interpretation, and judges in many cases intentionally blurred the legal categories to allow them to get the outcome they wanted. The executive’s authority to act could always be traced back to some parliamentary or constitutional authorization and thus a “*loi*”, and in reality the executive’s practice of governing by decree in the Fifth Republic meant that the distinction between the a “*loi*” and a “*décret*” lost all practical relevance, except for lawyers.

It was not the legal tradition which kept judges from embracing EC law supremacy. It was politics. In the 1960s there was a battle between the judiciary and the executive over military tribunals in Algeria. Judicial opposition to De Gaulle’s handling of these tribunals led to attacks on judicial independence and significant re-organization of the judiciary. The first cases involving EC law supremacy to be raised involved French Algerian policy, and the *Conseil d’État* was reluctant to refer such sensitive issues to the ECJ.¹² De Gaulle left office in 1968, ending the bitter struggle between the judiciary and the executive. Once De Gaulle left office, the *Cour de Cassation* did not hesitate to embrace EC law supremacy in the first clear case which came its way.

After the political threat from De Gaulle’s government subsided, inter-judicial politics came to shape the process of legal integration in France. The three high French courts—the *Conseil Constitutionnel*, the *Conseil d’État* and the *Cour de Cassation*—took different positions regarding EC law supremacy, intentionally contradicting the jurisprudence of each other. The inconsistencies came to create problems of legal consistency and made the legal process appear subjective if not political. The legal community was united in believing that this inconsistency had to be resolved. The only question was which court should change its jurisprudence. French high courts overtly

¹² Stone argues that in the 1920’s politics also influenced the re-introduction of the French judicial orthodoxy. The political campaign was triggered by a book by Edouard Lambert on American judicial politics in which the term “government of judges” was coined. According to Stone:

Lambert’s book had an incredible impact: it destroyed whatever effective political support existed within parliament, and weakened doctrinal consensus. For politicians, according to Lemasurier: “Judicial review was no longer considered ‘a play thing for jurists’ nor even a means of defending individual liberties, but was henceforth a weapon in the hands of reaction”—palatable only to the far Right and to representatives of monopoly capital. Whereas before 1921, the doctrinal community was all but unanimously in favor of judicial review, once dutiful adherents began to express their reticence.

Op. cit. Stone (1992) p. 39-40.

sought to influence each other to accept their position in the doctrinal dispute, and they appealed to lawyers, plaintiffs and politicians to weigh in to support their different positions.

During this period where French judges took different and opposing positions regarding the issue of EC Law Supremacy, there were broader changes in the legal and political contexts which had little to do with inter-judicial politics but which contributed to the changes in legal doctrine. While hard-core De Gaulle supporters carried on De Gaulle's attacks against the EC and the judiciary, subsequent French governments were more pro-integration and more tolerant of judicial independence. The *Conseil Constitutionnel*, which was established in 1958 but was largely a tool of De Gaulle throughout the 1960s, started to act more like an independent constitutional court and reintroduced into the French political context the notion of judges conducting judicial review.¹³ In the late 1980s the reinvigorated political commitment to European integration also influenced the process of French doctrinal change. By 1989, the French government was actively pressuring the *Conseil d'État* to reverse its opposition to EC law supremacy. Finally, the 1992 drive to complete the common market influenced the legal context in France because it precipitated a huge increase in the number of laws being passed at the European level. Because so much French law was of European origin, the *Conseil d'État* became more concerned than it needed to find a better way to influence the process of legal integration.

This chapter traces the changing positions of the three highest French courts, the *Conseil d'État*, the *Conseil Constitutionnel* and the *Cour de Cassation*, on the issue of EC law supremacy from 1964 to 1992. Section I of this chapter explains the development of a doctrinal basis for EC law supremacy in France, setting out the puzzle of why a doctrinal interpretation rejected in the 1950s and 1960s became acceptable in the 1970s and 1980s. Section II discusses the institutional organization of the French judiciary and why it was less amenable to having lower courts force doctrinal change on higher courts. It then identifies the different institutional incentives of the highest courts with respect to EC law supremacy and how these different interests became forces of legal integration. Section III traces the process of legal integration from 1962 to 1992,

¹³ This transformation is explained in Stone (ibid.)

examining four rounds of judicial interaction which facilitated national doctrinal change around the issue of EC law supremacy. Section IV examines the role of legal doctrine, pro-integration organizations and larger political trends in promoting legal integration, and summarizes the role that the ECJ and inter-court competition played in facilitating the acceptance of the doctrine of EC law supremacy in France.

I. Creating a Legal Basis for EC Law Supremacy In France

The debate about EC law supremacy in France was not over whether European law was supreme to national law, but rather if national judges had the authority to enforce the supreme EC law. Since the end of World War II the French constitution has been unambiguous that international law is supreme to national law. The 1946 French constitution stated that “diplomatic treaties...have an authority superior to that of internal laws and their provisions may not be repealed, altered or superseded...”¹⁴ and the 1958 constitution state that “treaties or agreements duly ratified or approved have...an authority superior to that of laws, subject, for each separate agreement of treaty, to reciprocal application by the other party.”¹⁵ While the constitution is clear, there was a legal doctrinal debate about if the constitutional provisions implied that politicians were to respect international law supremacy, or if they implied that judges were to ensure the compatibility of French law with international law.

Many judges and law scholars saw the post-war constitutions as a legal and political opening for judges to re-interpret legal traditions regarding international law established in the inter-war years. Within the *Conseil d'État* the pre-war doctrinal precedent was the 1936 *Arrighi* decision in which the *Conseil d'État* refused any authority for judges to examine the invalidity of a statute, for any reason.¹⁶ This doctrine amounted in practice to the German doctrine *lex posteriori derogat legi priori* (last law passed trumps all previous laws). In the *Cour de Cassation*, the 1931

¹⁴ Article 28 of the 1946 constitution.

¹⁵ Article 55 of the 1958 constitution. For more on the French constitution and international law, see Weiss, Freidl. 1979. Self Executing Treaties and Directly Applicable EEC Law in French Courts. *Legal Issues in European Integration* vol 1:51-84.

¹⁶ *Conseil d'État* 6 November 1936; (1936) *Rec. Lebon* 966.

“Matter Doctrine” was the pre-war precedent. According to the Matter Doctrine, judges should assume that legislators did not intend to contravene international law unless the law specifically said otherwise, in which case the legislative will must be followed over international law.¹⁷ This doctrine was a more flexible version of the *lex posteriori* doctrine, allowing greater room for judges to reconcile national law with international law.

The 1946 French constitution established the direct supremacy of international law and in light of the new constitution, in 1947, some judiciary court judges began according treaties supremacy over posterior laws.¹⁸ In 1950, André Pepy, Procureur Général at the *Cour de Cassation*, argued that the new clause in the 1946 constitution was a sign of the legislative will that judges to apply international law over national law. He stated:

Tribunals, confronted with two juridical rules, one inscribed in a treaty, the other defined by internal law, are advised by the French legislator himself, expressing his will in the form of a constitutional principle, saying that in a conflict between two laws, it is the first which they should apply.¹⁹

This decisions did not, however, create a new doctrinal precedence. In the late 1950’s a judicial debate broke out regarding if a Spanish treaty concluded in 1862 had precedence over a subsequent French law. Different courts took different positions regarding if the Foreign Ministry had to be asked for interpretation and if the courts were competent to set aside conflicting national laws. In the end the old doctrine prevailed; the Foreign Ministry was asked to interpret the Treaty and precedence was given to the subsequent French law.²⁰ This meant that before the issue of EC law supremacy even arose, it had been determined that the constitutional provisions regarding international law supremacy did not empower judges to set aside national laws. The *Arrighi*

¹⁷ Louis, Jean-Victor. 1973. Observations. *Journal des Tribunaux* (4848):693-696. Rideau, Joël. 1974. Note. *Recueil Dalloz Sirey* (9):Jurisprudence, 162-165. Ruzié, David. 1975. Note. *Journal du Droit International* (4):805-808.

¹⁸ Cour d’Aix (10 Nov. 1947, S. 1948.2.83), and Lyon (16 Feb. 1953, D. 1952.801), cited in Druesne, Gérard. 1975. La primauté du droit communautaire sur le droit interne- L’arrêt de la Cour de Cassation du 24 Mai 1975. *Revue du Marché Commun*:378-390.

¹⁹ Criminal branch, decision 3-6-1950, Sirey, 1951, I, p. 109- cited in R.C. 1975. Note. *Gazette du Palais* (194-195):9-11. See p. 11.

²⁰ Constantinesco, L. 1968. Anmerkung zur Semoules Entscheidung des Conseil d’Etats. *Europarecht* (Heft 3):318-330. See pp. 324-325.

decision and the Matter doctrine continued as the basis for French legal practice regarding international law.

A few pro-integration legal scholars tried to re-ignite the legal debate about the international law supremacy in light of the new circumstances created by EC membership and the ECJ's supremacy doctrine. Some resurrected Pepy's argument that Article 55 of the constitution empowered judges, but this argument had already failed to win advocates in the 1950s and its success in the 1960s was no better.²¹ ECJ advocat general Lagrange offered a slightly different argument, distinguishing the act of reviewing the compatibility of national law with the constitution or international law (constitutional review) and "applying" the constitution as one would any legal provision. He argued that

the judge would be restricted to establishing, in the case at hand, the incompatibility of the internal law, sovereignly interpreted by him, with the Treaty, no less sovereignly interpreted by the competent organ; in doing this, he *applies* Article 55 [of the French constitution], privileging those of the two texts which is superior; in no way, not close or far, is he interpreting the Constitution, nor is he judging if the law conforms with the constitution; the eventual non-conformity is only a consequence, pure and simple, of the application of Article 55.²²

Those scholars and judges wanting to embrace the supremacy of international law rallied around this argument that judges were merely "applying" the constitution. In the 1970s this argument was the legal basis used to support French judicial enforcement of EC law supremacy. But it was not an argument to convert the unbelieving and it was never accepted in the wider legal community. In 1989, in the famous *Nicolo* case, Commissaire du Gouvernement Frydman still rejected the argument, saying:

I do not agree for all that with the main argument put forward by most academic lawyers... that the court, by giving the treaty precedence over statute to settle a dispute, is really doing no more than *choosing an applicable rule*, without at the same time criticizing, even by implication, the provision which it excludes. This reasoning seems to me specious. If the court refuses to apply the statute it is because, in the final analysis, regardless of the meanderings of its reasoning—it considers that the statute should not be applied by reason of the very fact that it is contrary to the treaty. It is at least difficult not to regard this approach as a review of the validity of the statute. It would be pointless to object that this amounts only to declaring the statute inapplicable to a particular case, and not to criticizing it. We know that it is precisely by this indirect means that

²¹ For a discussion of these debates see: Lagrange (op. cit. 1968), Kovar, (op. cit. 1975) and Recherche, Clemens. 1990. Ein Sieg für Europa? —Anmerkung zum Urteil des Conseil d'État vom 20. Oktober 1989, Fall *Nicolo*. *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*:599-628.

²² Ibid. Lagrange. This argument was echoed many times in the pro-integration French legal literature.

the validity of legislation is reviewed in countries where this is a function of the ordinary courts, as in the United States.²³

But in the 1980s, Pepy's argument was resurrected and accepted as the legal basis for EC law supremacy by all of the high French jurisdictions. Article 55 was from then on was interpreted as pertaining *not* to politicians but rather to judges, and as empowering judges to enforce the supremacy of international law over national law. From a formal legal standpoint, nothing had changed. The constitution was not amended to spell out that judges were to apply Article 55. The 1790 prohibition against judges practicing judicial review had not been repealed. French judges just decided to interpret Article 55 differently, adopting an interpretation which they had rejected a short time earlier. What had changed?

II. Identifying the Key Judicial Actors in National Doctrinal Change

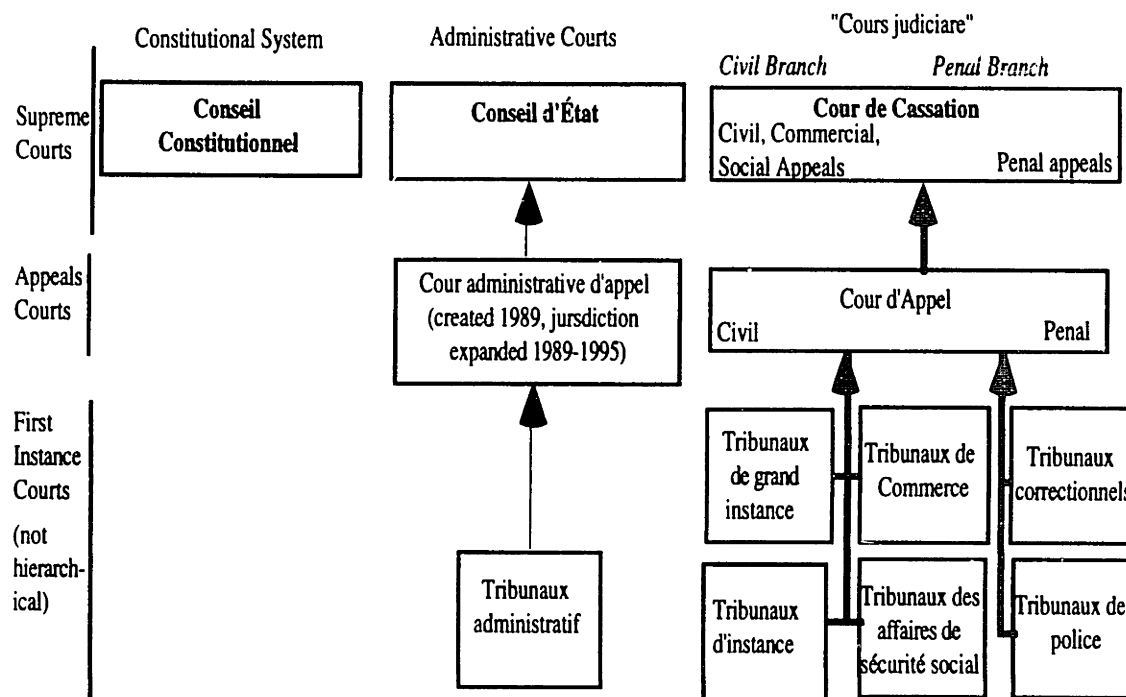
In Germany lower courts were the major force pushing higher courts to bring national doctrine into accordance with EC law. In France the institutional organization of the legal system made it less amenable to lower courts using the EC legal system to push doctrinal change on the higher courts. This is in large part a result of the lack of hierarchy in French legal system. Competition between courts was thus less of a factor in the process of legal integration in France compared to Germany. This section identifies who the key judicial actors were in the process of legal integration in France, and what was motivating these actors. First I consider the organization of the French judiciary, the composition of its interactions with the ECJ, and how French interactions with the ECJ compared to German interactions. Then I will discuss the particular motives of the three highest French courts vis-à-vis the ECJ, and how the divergent incentives of these judicial actors created a more subtle but none-the-less clear competition between courts dynamic of legal integration.

²³ *Raoul Georges Nicolo and another Conseil d'État decision of October 20, 1989. M. Frydman, Commissaire du Gouvernement. Common Market Law Report 1990, vol. 1, p. 173-191*

The Organization of the French Legal System, and the Composition of French References to the ECJ

The French legal system is organized into three separate and distinct branches, the constitutional branch, the administrative branch, and the “*cours judiciaires*” or judiciary branch. The chart below lays out the organization of the French legal system.

Chart 5.1: Organization of the French Judiciary²⁴



In Germany, all of the Federal Constitutional Court’s cases involving EC law came through individual appeals, references of national courts or Länder suits. In France, none of these groups had access to the *Conseil Constitutionnel*. Only the President of the Republic, the Prime Minister, the President of the Senate, the President of the National Assembly or sixty senators or deputies in the National Assembly were allowed to refer cases to the *Conseil Constitutionnel*, and then only as part of the legislative process.²⁵ As the chart shows, the Constitutional system has no institutional link to the rest of the judiciary. The absence of a link between the *Conseil Constitutionnel* and the

²⁴ For reasons of space I have excluded special courts which are not involved in European legal matters, and I have placed the first instance judiciary courts in two rows, although the first instance courts were not hierarchically above one another. I have also left out the *Tribunal des Conflits* which hears disputes about the jurisdictional authority of the two branches. The *Tribunal des Conflits* does not resolve substantive or constitutional disputes among branches of the judiciary, nor can it be seized by individuals or lower courts.

²⁵ Article 61 of the French Constitution.

other French courts meant that there was no supreme court of appeal which could be seized by individuals or lower courts to reverse high court jurisprudence or resolve interpretive disagreements across branches of the judiciary.

Within the administrative branch, there has not until recently been an opportunity to use the EC legal system to challenge higher court jurisprudence. The *tribunal administratif* only heard challenges to prefecture and municipal policy, and the *cour administrative d'appel* was only established in 1989 and did not have full jurisdiction over matters of national policy until 1995. Until 1995, the *Conseil d'État* was the first and last instance court for challenges to national policy.

Only in the judiciary branch is there truly a hierarchy of courts, but there is no evidence that lower courts played the *Cour de Cassation* and the ECJ off against each other. Retribution against lower courts which challenge the status quo is more prevalent in France than in other European countries,²⁶ and this could have been a factor influencing lower court moderation. But there is also no evidence that the battle over EC legal doctrine led to threats against judge's professional futures. Indeed the Procureur Général who pushed the *Cour de Cassation* to accept EC law supremacy was later appointed to a position at the ECJ, and the ECJ Justice who masterminded the ECJ's supremacy doctrine was later appointed to the French *Conseil Constitutionnel*. The general timidity of lower courts in challenging higher court interpretations of national law, and the lack of a lower-higher court dynamic meant that there was little pressure for judicial innovation from below. It also hindered legal innovation in France in general.

While the judicial branches are institutionally separate, their jurisdiction authority can overlap thus divergence in jurisprudence can and does occur. The simple explanation usually given of the division of authority between the judiciary and administrative branches is that judiciary

²⁶ French judiciary court judges are reviewed every three years and they are highly dependent on the evaluations of superiors who influence decisions about promotions and the geographic locations of their appointments, and on the Ministry of Justice which plays a key role in this process. French judges have complained that angry prosecutors exact retaliation on judges by influencing the promotion and location process, and a few observers have noted that individual judges may justly fear being passed over for promotion if their decisions are displeasing to the political power in place. The saving grace for judiciary court judges seems to be that usually politicians do not care greatly what they are doing. For more see: Grivart de Kerstrat, F. 1985. France. In *Judicial Independence: The Contemporary Debate*, edited by S. Shetreet and J. Deschênes. Dordrecht: Martenus Nijhoff Publishers. Rademaker, Dallis. 1988. The Courts in France. In *The Political Role of Law Courts in Modern Democracies*, edited by J. Waltman and K. Holland. London: Macmillan Press.

courts hear issues of private law, while administrative courts hear issues of public law. But this explanation does not capture the complexity of the division of authority. In practice, the division between *Conseil d'État* and *Cour de Cassation* authority is often quite blurred. As a general rule, if an individual or firm (the plaintiff) wants to use European law to challenge the validity of a government policy, or the decision of a Ministry or an administrative agency (the government being the defendant), they had to go to the *Conseil d'État* to have the policy or decision annulled. But EC law challenges to national policy can also be raised in cases in the judiciary branch including civil disputes between private parties and disputes where the government body is the plaintiff and the private citizen the defendant. In nearly a quarter of the judiciary court cases which led to references to the ECJ, the party challenging the validity of the national law was the private defendant arguing against the national government which was trying to enforce national law.²⁷ The legal substance of these cases can overlap with *Conseil d'État* cases involving EC law. Furthermore, the jurisdictions of the *Cour de Cassation* and the *Conseil d'État* can overlap if the defendant in a civil case is a public entity (in which case the *Conseil d'État* hears the civil case), or if there is a fiscal matter at stake (the *Conseil d'État* hears matters of direct taxation (i.e. VAT) and the judiciary branch hears matters of indirect taxation (i.e. import duties and licensing fees)). The jurisdiction of the *Conseil Constitutionnel* and the *Conseil d'État* can also overlap so far as both courts hear challenges to national election processes (although in different electoral realms).

As in Germany, higher French courts shunned references to the ECJ in order to limit the expansion of European law, referring largely technical issues. In France the Doctrine of *Acte Clair* was invoked to avoid references to the ECJ. According to this doctrine, references to the ECJ were unnecessary as long as the EC law was 'clear'. The highest French courts interpreted even unclear texts as being clear in order to avoid references to the ECJ. As Bebr noted:

The *acte clair* doctrine is of course not systematically used by the *Conseil d'État* or by the *Bundesfinanzhof* to block off a reference to the Court. These courts did make references but they did so primarily in those cases which concerned rather technical questions. It is typical for their attitude that precisely in matters of principle, particularly those concerning the supremacy of Community Law, the delimitation of Community and State competence, or the nature and effect of

²⁷ In contrast to Germany where the plaintiff is usually challenging national law in judiciary courts, and the government is almost always the defendant.

directives, they have avoided, under the cover of this doctrine, a mandatory reference. In these instances, they so vindicated their jurisdiction to interpret Community rules and to "overrule" the jurisprudence of the Court, defied the supremacy of Community law and reasserted thereby State powers...In this respect the practice of the *Conseil d'État* and of the *Bundesfinanzhof* seeking to reserve questions of fundamental importance to themselves in fact challenges the exclusive interpretative jurisdiction of the Court.²⁸

Lower courts account for the bulk of French preliminary ruling references, but unlike their German counterpart lower court references were seldom far reaching questions which led to the expansion of the reach and scope of EC law. The highest courts accounted for 12% of all references to the European Court, and appeals courts made 20% of all references. Lower courts references (68%) were comparable to the German system (64%). The table below shows number and percent of references of legal cases to the European Court by the different levels of the French judiciary (In the interest of cross-national comparison, I have divided up the "judiciary" courts into three broad categories of Civil/Commercial courts, social courts and penal courts.)

²⁸ Bebr, Gerard. 1983. The Rambling Ghost of "Cohn-Bendit": *Acte Clair* and the Court of Justice. *Common Market Law Reviews* (20):439-472. See p. 465-467. According to Ruzié, the *Conseil d'État* used *Acte Clair* differently in EC legal matters than it did in other matters of international law: "In the presence of provisions of conventional international law, the High Administrative Jurisdiction adopts a fairly restrictive conception of *acte clair*, whereas in materials of community law, it is the contrary, it adopts a conception which is expansive." Ruzié surmises that the *Conseil d'État* does this to keep the ECJ out of French national sovereignty. Ruzié, David. 1979. Note. *Gazette du Palais* (140-142):14-16.

Table 5.2: Preliminary Ruling References of French Courts to the European Court (1965-1994)

	Civil/Commercial		Social		Penal		Administrative		Other		Total							
	n	% ref.	n	% ref.	n	% ref.	n	% ref.	n	% ref.	n	% ref.						
HIGH	Cour de Cassation (civil & commercial)	19	4%	Cour de Cassation (social)	18	4%	Cour de Cassation (penal)	8	2%	Conseil d'État	13	3%	Cour de Cassation (Plenary)	2	*	Total Supreme Courts	60	12%
APPEAL	Cour d'appel (civil & commercial)	38	7%	Cour d'appel (social)	49	10%	Cour d'appel (penal)	15	3%	Cour admin. d'appel (since 1989)	2	*				Total Appeals Courts	103	20%
LOW	Tribunal de grand instance	146	29%	Tribunal des affaires de sécurité sociale	11	2%	Tribunal Correctionnel	3	*	Tribunal admin.	39	8%						
W	Tribunal d'Instance	66	13%	Commission de 1er instance du contentieux de la sécurité sociale	30	6%	Tribunal de police	27	5%									
	Tribunal commerce	22	4%									Other lower courts	3	*	Total Lower Courts	347	68%	
	Total Civil/Commercial	291	57%	Total Social Courts	108	21%	Total Penal Courts	53	10%	Total Admin. Courts	54	10%					511	

Percent equals the percent of total references by French courts. The figures in this chart are calculated based on data provided by the research and documentation division of the Court of Justice. Included are references for opinions even if the opinion did not result in an ECJ decision reported in the ECJ's Annual Report, thus the total number of references varies slightly from the number reported by the ECJ. *=<1%

While the distribution of references roughly resemble those in Germany, there are a few important distinctions which affected the types of case involving EC law in France and the pressures for French judicial innovation. In France there was no group of courts which accounted for a disproportionate number of references such as the six tax courts and two administrative courts which accounted for 59% of all German references and created most of the provocative legal cases involving EC law supremacy in Germany. The absence of a set of courts with expertise in EC legal issues made the use of EC law less innovative in France. Also, especially in the 1960s and early 1970s, the number of references by French courts is extremely low. From 1961 to 1974, the French judiciary as a whole sent fewer references than the much smaller Dutch and Belgium judiciaries, and six times fewer references than German courts. (Table 5.3 summarizes reference patterns of national judiciaries across time.)

Table 5.3: Reference Patterns in the Original Member States (1961 to 1994)

Country	1961-1969		1970-1974		1975-1979		1980-1984		1985-1990		1990-1994		Total	
Germany	30	40%	121	56%	163	38%	175	34%	171	29%	251	34%	911	36%
France	7	9%	18	8%	67	16%	119	23%	166	28%	123	17%	500	20%
Italy	3	4%	21	10%	63	15%	66	13%	59	10%	153	21%	356	14%
Netherlands	22	29%	32	15%	76	18%	96	19%	93	16%	100	14%	419	16%
Belgium	10	13%	23	11%	54	13%	58	11%	84	14%	93	13%	322	13%
Luxembourg	3	4%	2	1%	2	*	4	1%	13	2%	9	1%	33	1%
Total	75	99%	217	101%	425	100%	518	101%	586	99%	729	101%	2550	100%

Based on the statistics in the European Court's 1994 Annual Report

The lower number of references is in large part an artifact of the dearth of cases involving EC law in France. Part of the problem lay with French lawyers who were rather apathetic in incorporating EC law into their legal practice when compared to their brethren in other countries.²⁹ Part of the problem were French commercial firms which tended to resolve their disputes through arbitration, not adjudication.³⁰ The French political environment of the time was also quite anti-EC, and attacking government policy or public administration was shunned because firms were more dependent on public bodies and feared retribution if they were to pick a fight. As a result of the self-censorship of French lawyers and plaintiffs, there was little pressure from lawyers or plaintiffs to strike down national policy in favor of EC law, and little pressure on judges to change their doctrinal orthodoxy. This started to change in the 1980s as large French firms with in-house counsel and the political weight to challenge government policy started to invoke EC legal arguments more creatively.

²⁹The lack of lawyer initiative comes largely from the organization and legal culture of the French bar. In France, in order to try a case in front of a court one needs an 'avocat' and the number of 'avocats' who can present cases in front of the different national courts is limited. *Avocats* work to develop relationships with businessmen so that when a case arises they are selected, but with a captive audience and a specific and limited role, *avocats* do not cultivate cases by serving as general legal advisors and they generally wait for plaintiffs to approach them with a case in hand. Even when French *avocats* do get a case where EC law could be used, there is the perception that a 'good lawyer' selects his legal arguments judiciously, rather than putting forth every plausible angle, and French lawyers and clients often believe that arguments based on European law may hurt rather than help the client. (Based on interviews with French lawyers.) French scholars and judges are quite critical of French lawyers' lack of initiative regarding European legal cases. They have even suggested that a client seeking advice on European law would rather turn to Belgian lawyers over French lawyers for advice. See: Buffet-Tchakaloff, Marie-France. 1984. *La France devant la cour de justice des communautés européennes*. Aix-en-Provence: Presses universitaires d'Aix-Marseille. Lecourt, Robert. L'Europe Méconnue: Les Français et la Cour de Justice. *Le Monde*, p. 5-6. Touffait, Adolphe. 1975. Les juridictions judiciaires françaises devant l'interprétation et l'application du droit communautaire. In *La France et les Communautés Européennes*, edited by J. Rideau, P. Gerbet, M. Torrelli and R. M. Chevallier. Paris: Librairie Générale de droit et de jurisprudence. See p. 376.

³⁰ Ibid. Touffait.

The largest difference in the French and German reference patterns is the dearth of cases from the administrative branch—10% of all French cases compared to 22% of all German cases. Considering that most of European law is administrative law, that in France the administrative branch is responsible for all direct challenges to public policies, and that administrative court authority includes issues of direct taxation which were handled in Germany by tax courts, one would expect a far larger amount of references to the European Court from this branch. In most cases, the *Conseil d'État* would have been responsible for such a reference. But the *Conseil d'État* was loath to make references to the ECJ, for reasons which will be discussed below.

With the administrative branch refusing to make references, and lower courts not sending provocative legal questions to the ECJ, French legal practice tended to follow rather than push European legal evolution. Virtually no land-mark ECJ cases have come in references from French courts. Since French courts were applying previously developed ECJ jurisprudence, there were also fewer reversals in light of ECJ decisions. Indeed French judicial positions regarding EC law supremacy did not fluctuate as greatly across time as they did in Germany, instead the French experience in integrating EC law supremacy is characterized by steady low level subterfuge of ECJ doctrine by French high courts punctuated by reversals of opposition.

In Germany, lower courts framed the way that legal issues involving EC law were presented to the higher courts. In France, judicial decisions regarding EC law supremacy were framed by of the *Procureur Général* or the *Commissaire du Gouvernement*, the court's lawyer who presents detailed arguments about how the court should decide the case, and on what legal basis the court should render its decision. The most significant cases involving EC law in France were cases where the court's lawyers went out of their way to argue for or against ECJ jurisprudence. Because of the EC law arguments were clearly presented, a refusal of the ECJ's arguments, or a decision to accept certain wordings presented by the court's lawyer revealed a clear and intentional choice on the part of the court. Because French judicial decisions are short and cryptic, scholars usually look to the arguments of the *Procureur Général* or the *Commissaire du Gouvernement* to

gain a better understanding of the meaning of the decisions.³¹ The judicial reversals are mostly dramatic in light of the arguments of the court's lawyers, and because of the tenacity with which French courts had clung to their refusal of a role enforcing international law supremacy or any other form of judicial review.

French Judicial Interests: Competition between Courts and the Process of Legal Integration in France

While lower court/higher court competition was not a significant feature of the French process of legal integration, there was competition between French courts and the ECJ, and between the French courts themselves. The different institutional roles of French high courts created differing institutional incentives within the French judiciary as far as enforcing EC law supremacy was concerned. Because the institutional incentives of the different courts clashed, their jurisprudence on the issue of EC law supremacy diverged. The divergence in high judicial positions became increasingly problematic, and in itself the divergence created pressures on the different high courts to bring their jurisprudence on EC law supremacy into agreement. As long as the divergence persisted, legal scholars and French high court judges were trying to convince the other courts to come over to their position, creating legal arguments to support why their court's interpretation was more correct than the other court's interpretation and soliciting politicians to wage in on behalf of certain arguments. At stake was both the pride of the different high courts, and how the judges identified their role in the political process.

The Conseil Constitutionnel

Because of the institutional structure of the *Conseil Constitutionnel*, embracing a role enforcing EC law supremacy was actually counter to the interests of the *Conseil Constitutionnel*. Bruno Genevois, the Secretary General of the *Conseil Constitutionnel*, identified the reason why the *Conseil Constitutionnel* was hesitant to take on a role enforcing EC law supremacy. Supreme courts do not want to be contradicted by other supreme courts, and the *Conseil Constitutionnel* was

³¹ The ECJ's Avocat General are modeled on the French system.

concerned that a national law that it found to be compatible with EC law could be found to be incompatible by the ECJ. Genevois argued that the *Conseil Constitutionnel* must issue its decisions before the laws are actually promulgated. It would be entirely possible for politicians to pass a law which violates EC law without ever referring the case to the *Conseil Constitutionnel*, or to take a law which had been approved by the *Conseil Constitutionnel* and implement it in a way which violated EC law.³² Indeed a law approved by the *Conseil Constitutionnel* could later be found by the ECJ to be in violation with EC law without any possibility for the ECJ decision to be appealed back to the *Conseil Constitutionnel* itself. Because of its inability to ensure that national law complies with international law, and the embarrassing possibility that it could later be contradicted by the ECJ, Genevois argued that the *Conseil Constitutionnel* preferred not to be involved in enforcing EC law supremacy. This concern was reflected in the *Conseil Constitutionnel's* 1975 decision where the *Conseil Constitutionnel* found that Article 55 of the constitution did not imply that it, as the *Conseil Constitutionnel*, was responsible for ensuring that French law was compatible with international law.³³ The decision did not speak to what other French courts should do.

The *Conseil Constitutionnel* was a relatively new institution in France. In the 1960s the *Conseil Constitutionnel* was basically a pawn of De Gaulle, who used the *Conseil Constitutionnel* to undermine the parliament's influence. Its members at the time only sometimes had a legal background, and some of its key early decisions appeared to directly contradict the wording of the Constitution. In the 1970's, the *Conseil Constitutionnel* started to act more like a court and less like a political body. It defended the constitution more, standing up to the executive and the parliament and developed a jurisprudence based on the 1789 Declaration of the Rights of Man. By the 1980's, the *Conseil Constitutionnel* was much more sure of itself. Increasingly, the *Conseil Constitutionnel* was willing to create constitutional constraints on political actors and the *Conseil Constitutionnel* started to make more overt attempts to have its interpretations of the constitution to guide the

³² Genevois, Bruno. 1989. Note. *Revue française du Droit administratif* 5 (5):824-833. See p. 827.

³³ Conseil Constitutionnel decision of January 15, 1975. *Dalloz- Jurisprudence* 1975:529.

decision-making of the other French courts.³⁴ As the *Conseil Constitutionnel* evolved to into a more authoritative and respected legal institution, it became more interested in having French politicians and other French courts respect Article 55 of the Constitution. In a 1986 decision, the *Conseil Constitutionnel* argued that “the hierarchy of norms which is a result of Article 55 should not be a dead letter” and it encouraged the *Conseil d'État* to take on a role enforcing EC law supremacy by stating that it was the responsibility of different organizations to apply international conventions “in the cadre of their respective competences.”³⁵ In conferences and private lunches as well members of the *Conseil Constitutionnel* indicated they thought that the *Conseil d'État* should change its supremacy jurisprudence.³⁶ And in 1988, in a case where the *Conseil Constitutionnel* was not reviewing parliamentary law but rather was serving as an electoral judge, the *Conseil Constitutionnel* directly controlled the correct application of Article 55. It did this as a clear instruction to the *Conseil d'État*, who also had a role as an electoral judge, that it should follow suit.³⁷

While the *Conseil Constitutionnel* wanted courts to enforce the constitutional clause regarding the supremacy of international law, the *Conseil Constitutionnel* was sensitive to national sovereignty concerns and the *Conseil Constitutionnel* still wanted to make sure that it was the supreme authority on the constitutionality of French law. Thus it interpreted the EC Treaties narrowly, asserted the supremacy of the French constitution over EC law, developed a

³⁴ Stone divides the role and influence of the *Conseil Constitutionnel* into these three periods, analyzing the forces influencing the *Conseil Constitutionnel* and the influence of the *Conseil Constitutionnel* in each period. Op. cit. Stone (1992) pp. 60-91.

³⁵ *Decision No. 86-216 DC* Conseil Constitutionnel decision of September 3, 1986. Rec. Const. Constitut. *Journal de droit international* 1987:289. Cited in Genevois (op. cit. 1989) p. 828

³⁶ In a conference designed to improve the relationship between the *Conseil d'État* and the *Conseil Constitutionnel*, Genevois laid out the reasons why the *Conseil Constitutionnel* was not well placed to enforce EC law supremacy and then argued: “As a function of these considerations, one is driven to recommend an evolution in the jurisprudence of the Conseil d'État.” (op. cit. Genevois (1989) p. 214). In an interview, a former *Conseil Constitutionnel* judge stated that the *Conseil Constitutionnel* tried to influence the *Conseil d'État* to accept EC law supremacy through coded hints in its jurisprudence, and through private contacts. (Interview with a *Conseil Constitutionnel* judge, Paris, June 23, 1994)

³⁷ Conseil Constitutionnel decision of October 21, 1988. *Revue française du droit administratif* 1988:908. For an analysis of the intention of the *Conseil Constitutionnel* in this decision, see Genevois, Bruno. 1988. Le juge de l'élection, le traité et la loi. *Revue française de Droit administratif* 4 (6):908-916. .

jurisprudence which allowed it to find constitutional limits to EC integration in the future.³⁸ Commenting on the *Conseil's* jurisprudence regarding the ECJ, *Conseil Constitutionnel* judge Francois Luchiare wrote: "one can deduce (from the decision of 30 December 1976)... that if the act had gone further from the Treaty, the Conseil could have declared it contrary to the constitution. This is where the powers of the Constitutional Council enter into competition with that of the Court of Justice."³⁹ This way, the *Conseil Constitutionnel* could limit the reach and scope of EC law into its own sphere of influence.

The Conseil d'État

Throughout French history, the *Conseil d'État* had been the most politically and legally influential court in France. But the 1958 French Constitution created two sources of rival judicial authorities. The first was the *Conseil Constitutionnel*, which became the highest authority in interpreting the French Constitution. Before the *Conseil Constitutionnel* was established, the *Conseil d'État* had been the highest authority on the meaning of the French constitution. In the 1960s, the *Conseil Constitutionnel* played such an overtly political role that most commentators did not even consider it to be a court. But as the *Conseil Constitutionnel* gained legal and political authority in the 1970s, it started to replace the *Conseil d'État* as the most authoritative legal body in France. Even though the *Conseil d'État* was never a constitutional court, the *Conseil Constitutionnel's* rising influence debased the *Conseil d'État's* own influence over constitutional legal issues. According to Favoreau

One could say that it is somewhat surprising to see a battle over a terrain which was never, in reality, claimed by the administrative jurisdiction; all legislative acts, parliamentary acts and government acts were always considered to be outside of the authority of the administrative court. But in reality what is at stake is the orientation and even the direction of the legal order: until now the *Conseil d'État* was assured of an important influence if not a decisive influence in this domain; but for some time the influence of the *Conseil Constitutionnel* has tended to substitute for that of the *Conseil d'État*.⁴⁰

³⁸ Genevois, Bruno. 1988. *Le Droit International et le Droit Communautaire*. Paper read at Conseil constitutionnel et Conseil d'État, at Paris, Palais du Luxembourg.

³⁹ Luchaire, François. 1979. *Le contrôle de constitutionnalité des engagements internationaux et ses conséquences relatives à la communauté européenne*. *Revue trimestrielle de droit européen*:391-428. Quote on p. 424.

⁴⁰ Favoreau, Louis. 1988. *Dualité ou Unité d'ordre juridique: Conseil Constitutionnel et Conseil d'État participant-ils de deux ordres juridique différent?* Paper read at Conseil Constitutionnel et Conseil d'État, at Palais du Luxembourg, Paris. See p. 155.

The second rival judicial authority was the ECJ. The *Conseil d'État* main problem with EC law supremacy was that it did not want to be subjugated to the ECJ or bound by ECJ jurisprudence. In an interview, a French negotiator of the Treaty of Rome and a Former *Conseil Constitutionnel* judge explained the mentality inside of the *Conseil d'État's* in the 1960s:

When the EC legal system came along, the *Conseil d'État* could not imagine that the ECJ could somehow be supreme to the *Conseil d'État*. Add to this assumption a bit of nationalism, and the *Conseil d'État* could not see any room for EC law or the ECJ, unless it was a technical question.⁴¹

This reticence was reflected in the *Conseil d'État's* referral pattern to the ECJ. According to Kovar,

it is assuredly not too much to say that the *Conseil d'État* never manifested a lot of sympathy for [the preliminary ruling] procedure. More than any other supreme jurisdiction, the position of the Palais-Royal is particularly allergic to the idea of subordination to a "foreign" legal instance. If in the last few years the *Conseil d'État* has agreed to use this procedure, it is generally because it could foresee that the interpretation solicited from the Court of Justice would be favorable to its views. When...they believed them to be contrary, (the *Conseil d'État*) has always sought to elude its obligation to refer by procedures which were not necessarily inapplicable in principle, but which received incontestably abusive applications.⁴²

As Kovar implied, the *Conseil d'État's* adherence to Acte Clair was based largely on a desire not to be subordinated to the ECJ. This motive was also explicitly noted by Conseiller d'État Abraham who argued that:

It comes to the judge, for motives which one could call "political jurisprudence", to qualify an international act as clear though he does not ignore its ambiguity, for the sole purpose not to dispossess itself from the charge of interpreting it.⁴³

Tied to this "allergic" reaction to the authority of a foreign court was the *Conseil d'État's*, was an ideological identification with the French administration which made it protective of French national sovereignty. The *Conseil d'État's* close ties with the French administration have been pointed out by many. *Conseil d'État* members come from the Ecole National d'Administration, the training ground of French high civil servants. And its members float freely in out of the various government ministries.⁴⁴ The *Conseil d'État's* close ties with the French administration make it

⁴¹ Interview with a negotiator of the Treaty of Rome and a former *Conseil Constitutionnel* judge, Paris, June 23, 1994. This argument was re-iterated in an interview with a member of the *Conseil d'État* who has been at the *Conseil d'État* since 1959 (June 27, 1994, Florence, Italy), and in an interview with the secretary general of the *Conseil d'État* (July 5, 1994, Paris).

⁴² Kovar, Robert. 1979. Observations. *La Semaine Juridique- Juris Classeur Périodique* II. Jurisprudence (19158).

⁴³ Abraham, Ronny. 1989. *Droit international, droit communautaire et droit français, Le Politique, L'Economique, Le Social*. Paris: Hachette. See p. 99.

⁴⁴ Rademaker has argued:

identify with the French state,⁴⁵ and this identification clearly affects the *Conseil d'État's* judicial decision-making. Weil has argued:

the *Conseil d'État* is too close, by virtue of its recruitment, its composition, and the climate in which it is enmeshed, to the centers of political decision-making to not function on the same wavelength as [the government], to not feel vis-à-vis the authority which it is called upon to control a sympathy in the strongest sense of the word, which explains the self-censorship [the *Conseil d'État*] imposes on itself and the selectivity in the control it exercises.⁴⁶

The *Conseil d'État's* identification with the political powers is apparent in its jurisprudence on many issues,⁴⁷ including its jurisprudence on EC law supremacy. Even though EC law supremacy seemingly offered the *Conseil d'État* new powers of judicial review, it also allowed the ECJ to enter into French affairs and it implied a subjugation to the ECJ. Rather than accept the loss of French, and by extension its own sovereign authority, the *Conseil d'État* refused to play a role enforcing EC law supremacy. In 1964 it refused to make a reference to the ECJ on an EC legal

The *Conseil d'État*, far from exercising a disinterested control over the French administration, is the French administration. The President of the Republic is its titular head and its effective head (its vice-president) is the highest ranking civil servant in the employ of the French State. Its members, far from regarding the workings of the bureaucracy from the outside, move with great ease from one ministry to another, enjoying opportunities denied to conventional judicial officers to appreciate the day-to-day methods of operation of the various departments of the state.

Op. cit. Rademaker (1988) p. 144. See Rendel for a discussion on the recruitment for the *Conseil d'État* and the professional lives of Conseillers d'État. Rendel, Margherita. 1970. *The administrative functions of the French Conseil d'Etat*, London School of Economics and Political Science. London: Weidenfeld and Nicolson. See pp 28-44.

⁴⁵ Sociological arguments about the *Conseil d'État's* identification with the state have been made by Bodiguel, Jean-Luc. 1981. L'Ecole Nationale d'Administration et ses Implications sur la Haute Fonction Public. Dissertation in Phd, Institute d'Etudes Politiques. Kessler, Marie-Christine. 1986. *Les Grand Cour de l'Etat*. Paris: Presses de la Fondation Nationale des Sciences Politiques.

⁴⁶ Weil, Prosper. 1972. Preface. In *Le rôle politique du juge administratif Français*, edited by D. Loschak. Paris: Librairie générale de droit et de jurisprudence. See p. IX.

⁴⁷ Daniele Loschak examined the jurisprudence of the *Conseil d'État* in the 1930s, 1940s, 1950s and 1960s and found that

in times of grave crisis, the administrative judge acts more as a collaborator in the exercise of power rather than a censure of power, and this is for many reasons...the judge is fundamentally attached to a certain state order, that it does not want to see put into question and it is thus ready to give government authorities the means necessary to this effect. In the second place, it is sensitive to the state of public opinion and one often finds that in such circumstances it is willing to be more constraining regarding the actions of the government...the attitude of the judge is thus equally guided by a prudence and by a reticence to engage in the affairs which the government considers to be exclusively its own.

In less grave times, Loschak found that the *Conseil d'État* was generally conservative and committed to a liberal economic ideology. The *Conseil d'État* tried to balance individual rights with the needs of the collective, and in economic and social areas it had tried to balance free enterprise with the needs of the collective for which the state was responsible. Op. cit. Loschak (1972) quote from p. 243, argument about economic liberalism from p. 238, argument about conservative nature from chapter 2.

issue, and in 1968 it refused its own authority to enforce EC law supremacy so that it did not have to make a reference.

According to members of the *Conseil d'État*, encroachments on national sovereignty were felt directly within the *Conseil d'État*, as if they were attacks on the *Conseil d'État* itself. In 1974, in one of its first references to the ECJ, the *Conseil d'État* sent the ECJ a case regarding the French government's banana agreement with the Dom-Tom territories. This was an area of policy over which the French government was in a fight with the Commission, and according to members of the *Conseil d'État*, the judges at the *Conseil d'État* sent the reference because they were sure that the ECJ would take the French government's side in the argument. When the ECJ took the Commission's side, and found that the French government could not maintain its special banana importation agreement with the Dom-Tom territories after 1970, the *Conseil d'État*—like the French government—was enraged.⁴⁸ The *Conseil d'État* also became upset over the “dogmatic character” of the ECJ's *Simmenthal* decision.⁴⁹ In the view of the *Conseil d'État*, it was not the job of national courts to enforce the EC Treaty, it was the job of the Commission. The *Simmenthal* decision amounted to an ECJ demand that the national judge enter into risk with the legislature. Finally, the *Conseil d'État* was angry about the extremely detailed directives coming out of Brussels which left the *Conseil d'État* and the French legislature little room for maneuver. According to a member of the *Conseil d'État*: “At the heart of it the *Conseil d'État* saw its statutory role being diminished—it wasn't able to help shape EC law like it was national law, and the specific nature of directives limited its independence and influence.”⁵⁰ These encroachments into French administrative autonomy and into its own sphere of influence led to an overt hostility towards the EC and the ECJ. In the late 1980s, the *Conseil d'État* started to increasingly demand

⁴⁸ The case was “*Charmasson*” Case 48/74 ECJ decision of December 12, 1974. ECR p.1383. Based on an interview with a member of the *Conseil d'État*, May 30, 1994. Buffet-Tchakoloff argues that this decision greatly angered the French government and was a turning point in the relations between the French government and the ECJ. After the Charmasson decision, the French government followed ECJ jurisprudence more intently and participated more vigorously in ECJ cases. Buffet-Tchakoloff, Marie-France. 1984. *La France devant la cour de justice des communautés européennes*. Aix-en-Provence: Presses universitaires d'Aix-Marseille.

⁴⁹ *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II)* ECJ. Case 106/77 (1978) ECR 629.

⁵⁰ Based on an interview with a member of the *Conseil d'État*, May 30, 1994.

that the Commission follow procedural rules in the drafting of EC directives.⁵¹ And in 1978 the *Conseil d'État* flatly rejected the ECJ's jurisprudence on the DE of directives.⁵²

While nationalism influenced the *Conseil d'État's* actions vis-à-vis the ECJ, the *Conseil d'État's* hostility was not just nationalist ideology, but also a narrow perception of the interests of the *Conseil d'État*. By preserving French autonomy it was preserving its own autonomy. It was preserving its influence over the *French* legislative process, embodied in the *Conseil d'État's* advisory role to the government. And it was preserving its supreme authority as judge of whether or not the French government had exceeded its authority. The *Conseil d'État* did not need the ECJ to tell it when it could sanction the government, and it did not want the ECJ to push it to intervening in the affairs of the government when it did not want to.

Cour de Cassation

The *Cour de Cassation* did not share the *Conseil d'État's* concerns about the loss of French autonomy through European integration. Its members were not educated in the training ground of the French government, the *Ecole National d'Administration* (ENA) and seldom left the judiciary for government office, so the it did not identify as closely with national sovereignty concerns about EC law supremacy. Also, unlike the *Conseil d'État* it had no role in the drafting of French law, thus increasingly specified EC directives or the transfer of law-making authority to Brussels did not effect its institutional influence or autonomy. Embracing EC law supremacy offered *Cour de Cassation* judges new powers of judicial review, although these new powers did not amount to the type of constitutional review lower German courts, for instance, were practicing. The *Cour de Cassation* was often confronted with conflicting national laws, and forced to chose which law to apply and how to interpret it. Introducing EC law into the realm of potentially applicable rules was

⁵¹ Based on an interview with the Secretary General of the *Conseil d'État*, July 5, 1994.

⁵² *Minister of Interior v. Daniel Cohn-Bendit* Conseil d'État decision of December 22, 1978. *Common Market Law Report* 1980:545-562.

not as fundamental a change as reviewing the compatibility of national law with abstract constitutional principles would have been.⁵³

Accepting a role enforcing EC law supremacy was less controversial for the *Cour de Cassation*, and there were even advantages to it. One should also not underestimate pride which was at stake when the *Cour de Cassation* introduced an alternative interpretation regarding EC law supremacy to that of the *Conseil d'État*. The judiciary branch is the poor second cousin to the administrative branch, without the same prestige as the elite at the *Conseil d'État* and without the same professional opportunities or chance to influence the policy process as the *Conseil d'État*.⁵⁴ To be a creator of French law was to seize the initiative from the *Conseil d'État*, which fancied itself the most serious and important of the French high courts. Indeed the *Cour de Cassation*'s decision establishing the supremacy of EC law over subsequent national law was one of its most important decisions in years, and gained the court an international profile which it had rarely achieved before.

The next section discusses the process through which French legal doctrine changed, embedding changes in legal doctrine into the larger evolution in the legal and political context.

⁵³ Some French scholars have argued that because the *Cour de Cassation* applies laws, while the *Conseil d'État* invalidates laws, it was politically easier for the *Cour de Cassation* to accept EC law supremacy. A similar argument is that because the *Cour de Cassation* usually hears civil cases involving private parties, while the *Conseil d'État* hears disputes between individuals and the government, the *Cour de Cassation* did not have to worry about creating conflict with political powers like the *Conseil d'État* did. While these differences may be true in the abstract, the vast majority of EC law cases in the judiciary courts involve government ministries, government agencies, or para-public agencies, and regardless of if French law is simply 'not applied' or 'invalidated', the government either wins or loses the case. There is also no evidence that the *Cour de Cassation* has been shy in polemic cases involving the French government, and the *Cour de Cassation* has had its share of conflicts with political bodies. The *Cour de Cassation* ruled against the government when it first declared the supremacy of EC law in the *Jacques Vabre* case, and it later went head to head with the French government and parliament requiring a refund of discriminatory auto registration fees declared illegal by the ECJ, and rejecting newly passed legislation designed to minimize the impact of the ECJ's judgment. While it did not send many references to the ECJ, accepting the principle of EC law supremacy was less difficult for the *Cour de Cassation*. The *Cour de Cassation* did not have interests in refusing to enforce EC law supremacy as the *Conseil Constitutionnel* and the *Conseil d'État* did, and quite a few of its members were part of the pro-integration legal movement which supported European legal integration.

⁵⁴ According to Boigel, with the creation of the Ecole National d'Administration (ENA), the prestige associated with being a judge in the judiciary branch fell. From 1953 the number of male candidates for judicial office fell, as did the number of judges whose parents had also been judges. A sign of the loss of prestige was the "feminization" of the magistrature. The magistrature responded by creating its own version of ENA, but the Ecole National de la Magistrature (ENM) was not as prestigious. "So far as the ENM did not have all of the advantages of ENA, the price to pay for the magistrature was to be put in a position of relative loss of social position." Boigel, Anne. 1995. *Les transformations des modalités d'entrée dans la magistrature: de la nécessité sociale aux vertus professionnelles. Pouvoirs* (74):27-40. See p. 39.

III. The Process of Doctrinal Change

This section traces doctrinal change regarding EC law supremacy across time, dividing doctrinal change into “rounds” of legal integration. Each “round” to be explored represents a major stage in which French doctrine on the issue of EC law supremacy was developed and thus a stage in legal institution building within France. Round 1 chronicles the period of 1960 to 1974 when De Gaulle was at battle with the judiciary over Algerian policy, and when the *Conseil d'État* was drawing on the traditional orthodoxy to avoid making a reference to the ECJ. The *Conseil d'État*'s jurisprudence during this period established a clear precedent for national courts *not* reviewing the compatibility of EC law with subsequent national law. Round 2 focuses on the period from 1970 to 1975 when the *Conseil Constitutionnel* found itself incompetent to enforce international law supremacy and the *Cour de Cassation* used the *Conseil Constitutionnel*'s jurisprudence to establish for itself the authority to enforce EC law supremacy over subsequent national law. The *Conseil Constitutionnel*'s jurisprudence and the *Cour de Cassation*'s enforcement of EC law over subsequent French “*loi*” profoundly changed the French legal context, challenging two of the main arguments the *Conseil d'État* had used to oppose EC law supremacy. Round 3 explores the *Conseil d'État*'s reaction to this new context in which the traditional orthodoxy was called into question (1975-1981). As ECJ jurisprudence encroached more on the *Conseil d'État*'s judicial and administrative authority, the *Conseil d'État* became even more defiant, repudiating the ECJ's jurisprudence on the direct effect of directives and other aspects of the ECJ's jurisprudence. During this period, the *Conseil d'État* was watching the political bodies and the *Conseil Constitutionnel*, expecting a harsh reaction against the *Cour de Cassation*'s audacity and drawing on political tensions regarding European integration for political support of its recalcitrant position. When its defiance of ECJ authority failed to produce the desired effects, and when politicians opposing the ECJ and the *Cour de Cassation*'s acceptance of EC law supremacy lost their political battle, the *Conseil d'État*'s opposition to EC law supremacy was more critically questioned. Round 4 examines the change in institutional context within the French legal system which pushed the *Conseil d'État* to finally reverse its intransigence to EC law supremacy. By 1981, it was clear

that the anti-ECJ political forces lacked the political influence to incite a rebuke of the *Cour de Cassation* and that the *Conseil Constitutionnel*'s 1974 introduction of judicial review was also going to be tolerated. A new era of judicial politics was entered in France, only the *Conseil d'État* was not part of this movement. As the 1980s progressed, the *Conseil Constitutionnel* sent more signals that the *Conseil d'État* should bring its jurisprudence into line with that of the *Cour de Cassation*, and the *Conseil d'État*'s anti-integrationist attitude was starting to cost it legal influence and jurisdictional authority. Round 4 ends with the *Conseil d'État* reversing its intransigent opposition to EC law supremacy, and creating for itself a new role in the EC policy-making process.

Round 1: Non, C'est inconcevable- French Judicial Refusal to Consider EC Law Supremacy (1962-1970)

The French judiciary's early refusal to accept a role enforcing EC law supremacy is usually explained by legal traditions, the conservative nature of the judiciary, and laziness of French lawyers.⁵⁵ While it is certainly true that French cases involving EC law supremacy were slow to trickle up the French legal process, arguments about strong traditions and legal conservatism understate the political limitations to judicial activism in France. In the 1960s the independence and authority of the French judiciary was under attack in all three branches of the judiciary, triggered by judicial stances over the creation of special tribunals in Algeria and influenced by the larger trend of consolidating the executive's power over public policy. Given the political context, it would have been surprising if there had been a judicial repudiation of the traditional orthodoxy.

One might have expected the new Constitutional Council to have taken the lead in holding political figures accountable to constitutional principles (such as the supremacy of international law). But the court set up to enforce constitutional constraints in the policy-making process was a pawn in the hands of De Gaulle, used by the General to strip bills of compromises the executive had reached with the parliament. When the *Conseil Constitutionnel* failed to stop the clearly unconstitutional efforts of De Gaulle to amend the constitution through referendum, most

⁵⁵ Ibid. and op cit. Lachaume (1990).

politicians and legal scholars lost faith in the institution. The political nature of *Conseil Constitutionnel* decisions created a parliamentary constituency in favor of actually abolishing the body to replace it instead with a real supreme court. The seven bills to abolish the *Conseil Constitutionnel* never made it through the legislative process, but it was clear that outside of the Gaullist party there was little support for the *Conseil*.⁵⁶ Given the limited independence of the *Conseil Constitutionnel* and De Gaulle's hostility to European integration, one could not expect the *Conseil* to be a voice promoting legal integration as the German Constitutional Court had been.

The *Conseil d'État* also faced attacks on its independence and influence by De Gaulle. In 1962, in the so-called "Canal Affair", the Conseil d'État annulled a government's decree establishing a special military court. De Gaulle considered the decision an intolerable intervention into French foreign policy and threatened to do away with the Conseil d'État altogether. According to Parris,

there was a general expectation that the government would react violently against the Conseil. It might lower the age of retirement, and having in this way got rid of some of the older members, fill their places with younger men who would be less juridical in their approach and more sensitive to political considerations. Its jurisdiction in cases of excess of power might be abrogated all together.⁵⁷

The original report of the reform commission suggested the creation of a section composed of special appointees to hear important cases, and requiring government permission to allow Conseiller d'État to keep their positions after 60 years of age. After the leaked report provoked a strong press reaction (one journalist called the report a step towards an "avowed dictatorship"), and a vigorous lobbying campaign, the most punitive reforms were abandoned. In the end there was a long-needed administrative reform within the *Conseil d'État*, some of the older members retired and members of the *Conseil d'État* were rotated more frequently through the administration to "improve their chances of gaining experience of active administration outside of the Conseil altogether."⁵⁸ But the attack made judicial evolution regarding EC law supremacy unlikely,

⁵⁶ Op. cit. Stone (1992) p. 60-66.

⁵⁷ Parris, Henry. 1966. The Conseil d'État in the Fifth Republic. *Government and Opposition*:89-104. See p. 98.

⁵⁸ Ibid. p. 103.

especially given that the first cases in which jurisprudence might have evolved were related to France's Algeria policy.

The Algerian conflict and the anti-judicial sentiment of the Gaullist regime also took its toll within the judiciary court branch. Because of positions taken by members of the *Conseil Supérieur de la Magistrature* during the Algerian war, the body created to promote the independence of judges was reformed to the point that it lost all influence. In addition, large changes in the judiciary court system were taking place to 'adapt the judicial apparatus to the new demographic, economic and social realities.' The institutional reforms decreased the number of lower court judges (from 2902 Justice of the Peace before 1958 to 456 Tribunaux d'Instance after the reforms), augmented the influence of appellate courts and Parisian jurisdictions, and devolved judicial functions to extra-judicial conciliatory bodies, which in some respects became a parallel institution to the French judiciary.⁵⁹ According to Lagneau-Devillé, while the reforms were in some cases welcome by French judges they were also clearly motivated by the political power's desire to have a "more controllable (judiciary) from an ideological point of view."⁶⁰ The increased control of Parisian based higher courts made lower court challenges to traditional judicial positions even less likely.

Into the post-Canal affair charged context entered the first cases involving EC law. The Canal affair took place from 1962 to 1963. In 1964 the *Shell Berre* case was raised by major international petroleum firms (Shell, ESSO, Standard, and Mobil Oil) who disagreed with the French government's policy set up by decree and designed to aid the development of an association of gas stations selling gas from Algeria and Gabon. This case was the latest chapter in a 40 year old conflict between the oil companies and the French government, and invoking EC law was but the latest ploy of the oil companies. In the *Conseil d'État* case, the oil companies argued that the French government's regulation and oil monopoly violated European law. The French government, along with the Commission, argued that the French regime was consistent with the Treaty which had included a special article (Article 37 EEC) specifically for the French petroleum

⁵⁹ Judiciary court judges came to view the creation and devolution of power to these bodies as an attempt to undermine their authority. Op. cit. Lagneau-Devillé (1983).

⁶⁰ Ibid. p. 476.

import regime.⁶¹ The *Conseil d'État*'s rejected the validity of the claim, and this decision was viewed by all as being consistent with European law. But what concerned legal commentators was the relatively antagonistic tone of the *Conseil d'État*'s lawyer's argumentation⁶² and that the *Conseil d'État* had refused to make a reference to the ECJ in the case.

In arguing the case before the *Conseil d'État*, *Commissaire du Gouvernement* Questiaux addressed a debate being played out in the academic literature: was a reference to the ECJ obligatory from courts of last instance (the theory of automatism)? Or could high courts interpret clear EC law on their own? Questiaux acknowledged that sticking to the so-called "Acte Clair" doctrine potentially a violation of EC law, and thus risky. But she argued that it was a risk worth taking because the doctrine was:

not inspired by our inability to adapt our methods of reasoning to this new law which is bound to European unification, [rather it is inspired by] the clear disadvantages of the opposite solution in terms of for the good administration of justice for both sides. [Accepting that argument that a reference was required] would open the door to delaying tactics, overcrowding both jurisdictions. Moreover, [the theory of automatism] is irreversible and rigid. On the contrary, the theory of acte clair is not justified by mistrust, rather it is a priori the goal—nothing stops you from grappling with prudence and respect the interpretation of the Treaty... You are, we believe, already competent to apply the treaty in all the areas in which it appears clear to you.⁶³

In France the Doctrine of Acte Clair was well established and widely used to avoid sending cases involving international law to the Foreign Ministry for interpretation⁶⁴ and Questiaux's argument on the surface seemed reasonable enough. But the Acte Clair argument went against the position which was advocated by the ECJ, and the EC legal texts at issue were far from clear. Even

⁶¹ Chevallier, Roger-Michel. 1965. Note on the Shell-Berre decision of the Conseil d'État. *Common Market Law Review* 3 (1):100-107. Fcurré, Jean, and Wolfgang Wenner. 1965. Der EWG-Vertrag in der Gerichtspraxis (Artikel 37 und 177). *Außenwirtschaftsdienst des Betriebs-Beraters* 15 May 1965 (Heft 6):149-152.

⁶² Each case in the *Conseil d'État* is assigned a *Commissaire du Gouvernement*. Despite what the name would imply, the *Commissaire du Gouvernement* is not a representative of the government, rather she or he is a representative of the *Conseil d'État* who offers a reasoned opinion for the *Conseil d'État* to consider. Because *Conseil d'État* decisions are so cryptic, commentators rely on the arguments of the *Commissaire du Gouvernement* to decode the reasoning behind the decision. This method is not as questionable as it might seem. Often the *Commissaire du Gouvernement* suggests language the *Conseil d'État* can use if it supports a given reading of the law. If the *Conseil d'État* adopts the language used, it is a signal that the *Conseil d'État* accepted the legal argumentation.

⁶³ *Société des pétroles SHELL-BERRE et autres, Sociétés "Les Garages de France", Société Esso-Standard, Société MOBIL OIL française, Société française des pétroles B.P.* Conseil d'État decision of 19 June 1964. *Revue du droit public et de la science politique en France et en étranger* 1964 (No. 5):p. 1034-1041.

⁶⁴ Lagrange, Maurice. 1971. The European Court of Justice and National Courts- The Theory of the Acte Clare: A Bone of Contention or a Source of Unity? *Common Market Law Review*:313-324.

scholars open to the Acte Clair Doctrine felt that it was misused in this case.⁶⁵ The *Conseil d'État* was inappropriately invoking Acte Clair to avoid sending a reference to the ECJ, a practice it continues to this day. Given the political sensitivity of the petroleum regime, it is not surprising that the *Conseil d'État* would not want the ECJ involved. But had the case made it to the ECJ, the outcome of the case would probably have been the same⁶⁶ and the seeds for future judicial cooperation could have been planted. The *Shell-Berre* decision was an unsettling precedent and was a step away from rather than a step towards building an atmosphere of judicial cooperation between French courts and the ECJ.

The *Conseil d'État's* skeptical tone and willingness to keep the ECJ out of administration of the French legal process was again portrayed in the 1967 *Petitjean* decision.⁶⁷ In this less polemic case, French tomato growers challenged a French agricultural taxing scheme for tomatoes invoking Articles 91, 92 and 93 of the EC Treaty. *Commissaire du Gouvernement Questiaux* again discouraged *Conseil d'État* from making a reference to the ECJ, arguing that the ECJ's jurisprudence on when EC law created direct effects was clear so that national courts could decide the question of the direct effect of Treaty articles on their own. Finding EC law to create direct effects is the primary way through which the ECJ expands the reach of EC law—thus its own jurisdictional authority—and whether a Treaty article creates direct effects is seldom clear. By asserting the national court's authority to decide when EC law did and did not create direct effects, the *Conseil d'État* was challenging one of the ECJ's main interpretive roles and tools. Unlike the

⁶⁵ Op. cit. Chevallier (1965) and Fourré (1965). de Laubadere, A. 1965. Note sur l'arrêt Shell-Berre. *L'actualité juridique. Droit Administratif* (Juillet-Août):440-444. De Soto, J. 1964. Note sur arrêt Shell Berre. *Journal du droit international* (4):800-806. Wenner, Wolfgang. 1964. Anmerkung zur Entscheidung des französischen Conseil d'État zu Artikel 177 des EWG-Vertrages. *Recht der Internationalen Wirtschaft* (Heft 8):261-262.

⁶⁶ The ECJ was also not about to find a legal reason to invalidate the decree. When the plaintiffs tried to challenge the French decree through an Italian court, this time succeeding in getting a reference made to the ECJ, the ECJ upheld the French decree, vindicating the *Conseil d'État's* decision. ECJ decision of February 4, 1965, case 20/64 (SOPECO). Discussed in Fourré (ibid).

⁶⁷ *S.A. des Etablissements Petitjean et autres* Conseil d'État decision of February 10, 1967. *Revue trimestrielle de droit européen* (1967):681-696.

Shell-Berre case, it is also likely that the ECJ would have decided the case differently, allowing some direct effects to the articles although perhaps finding the taxing scheme acceptable.⁶⁸

The *Shell-Berre* and *Petitjean* cases did not raise the issue of EC law supremacy directly, but they were important because they (especially the *Shell-Berre* case) involved issues of relatively high politics, and they set the tone for how French courts should deal with issues of EC law.

Questiaux's arguments in both *Shell-Berre* and *Petitjean* made it seem like a plaintiff's appeal to EC law was a back-handed and illegitimate strategy, a dilatory tactic or an attempt to obstruct the legal process which should not be rewarded by a reference to the ECJ.⁶⁹ The preliminary ruling reference process was portrayed as if it were a long and arduous process, and it was suggested that sending the ECJ broad cases to decide could open a Pandora's box which would change the nature of French and EC law in unanticipated ways.

The first French case raising the issue of EC law supremacy specifically did not arise until 1968. The case, like *Shell-Berre*, involved a politically sensitive issue associated with French Algerian policy. On April 4, 1962, the EC Council had adopted a regulation requiring that non-EC imports have import certificates and creating an EC level tariff regime.⁷⁰ Nineteen months later the French Minister of Agriculture unilaterally exempted a large import of Algerian semolina from the EC regulation. The legality of the government's decree was unclear because it was issued during a period of transition towards Algerian independence when the status of Algeria as an independent non-EC country was still being worked out. In the *Semoules* case,⁷¹ a French association of producers of semolina wanted the Algerian imports to fall under the EC regime and thus the EC tariffs. Bringing suit in front of the *Conseil d'État*, they asserted that in creating separate trading rules for Algerian Semolina the Minister of Agriculture exceeded his power. The French

⁶⁸ In "EC law in a Nutshell" the EC article in question in the *Petitjean* case is listed as one of the Treaty's article which does create direct effects. Folsom, Ralph. 1995. *European Union Law*. Second ed, *In A Nutshell*. St. Paul: West Publishing. See p. 91-92.

⁶⁹ The notion that an appeal to EC law was a dilatory tactic was raised in both the *Shell-Berre* and *Petitjean* cases. Conseiller d'État Mazard reiterated the belief that many appeals to EC law were not made in good faith, and that the plaintiff should not be rewarded with a reference to the ECJ. See Mazard. 1971. Rapport de M. le conseiller Mazard. *Recueil Dalloz Sirey* 14e Cahier:Jurisprudence 221-222. .

⁷⁰ EC regulation number 19 from April 4, 1962.

⁷¹ *Syndicat General de Fabricants de Semoules de France* Conseil d'État decision of March 1, 1968. *Common Market Law Report* 1970(vol 9):395.

parliament had issued a statute only days after the EC regulation was adopted in order to facilitate transition, a statute which held that during the transition the old bi-lateral rules of exchange would still apply. The dispute went to the core of the issue of if France could conduct an independent trade policy, an issue which was especially sensitive since Algeria had recently been considered part of France itself. It also raised directly the supremacy of a prior EC law over a subsequent French law.

The *Conseil d'État*'s decision was a model of French legal orthodoxy, but the orthodoxy was invoked mainly to avoid a reference to the ECJ. The legal dispute technically involved a Ministerial decree, not a legislative text, and the *Conseil d'État* could have found a way to use its established authority to rule on the compatibility of the decree with EC law. The *Commissaire du Gouvernement* acknowledged that it was unclear if the government decree was covered by a legislative text, but argued that while "[i]t is doubtless possible to give [the legislative text] several interpretations...that which in our opinion should prevail required the administration to adopt the solution which it did." This interpretation was desirable because only if the government decree had the force of a "*loi*", would a reference to the ECJ would not be required. The *Commissaire du Gouvernement* made it clear that the *Conseil d'État* would not be able to decide on the compatibility of the French decree with EC law without making a reference to the ECJ, but if "the decision under attack is in law based on the provisions of national law, and if it is not for you to put aside its application in favor of the provisions of the Community regulation and Treaty, the mere wish to verify its conformity with the international undertakings of France cannot justify sending the case to the European Court."⁷²

Finding that the decree was based on a "*loi*" also allowed the *Conseil d'État* to go on the record in opposition to French scholars advocating judicial enforcement of EC law supremacy. Rejecting Pepy's legal argument which was growing in popularity, Questiaux argued:

To be sure, under Article 55 of the Constitution a treaty which has been duly ratified has...an authority superior to that of statutes. The Constitution thus affirms a preeminence of international law over internal law and numerous voices (nearly all of the academic writers) have been raised to

⁷² Op. cit. Semoules decision (1968) pp. 398-399 and 403.

say that a provision which makes our Constitution one of the most receptive to an international legal order should not remain a dead letter.

But the administrative court cannot make the effort which is asked of it without altering, by its mere will, its institutional position. It may neither criticise nor misconstrue a statute.

Judges typically use lacunae in legal texts as an opening to seize new powers for themselves, but the *Conseil d'État* used a lacunae in the constitution to argue that no new powers were accorded to French judges. It argued that because politicians did not explicitly change the role of the courts while they were changing the role of all the other institutions, the judicial function must presumably have been intended to remain the same as it had before.⁷³

The arguments of *Commissaire du Gouvernement* Questiaux reveal as an ulterior motive a concern about giving up interpretive and national legislative authority because an area of law is governed by international law, a problem which was exacerbated because it would mean that another court—the ECJ— would have interpretive authority over issues of national policy. She argued:

It is difficult to imagine that there should be created in all areas affected by an international treaty whole zones in which the laws would be deprived of effect by the [national] judge, *and on the basis of texts which he is not fully entitled to interpret*. The argument is enticing in order to encourage the development of a Community legal order; its evolution is more difficult to imagine if it withdraws from the action of the legislator whole sections of the life of the country because treaties have appeared in the area in question...⁷⁴

Questiaux saw the existence of the ECJ as actually being an impediment to French courts finding creative ways to enforce international law. In an argument which reinforced that the *Conseil d'État* was mainly trying to avoid a reference to the ECJ, Questiaux stated the *Conseil d'État's* predicament as having to choose between a 'simple' interpretation which opposes EC law supremacy, and a 'simplistic' interpretation which is in the Community spirit but is more "hazardous" because it opens a question of interpretation for the ECJ to decide. Questiaux argued:

⁷³ Questiaux argued:

Certainly it is maintained that the traditional abstention of the courts before acts of the legislature would be less justified once our Constitution no longer recognizes the supremacy of the Parliament. But the Constitution has specifically dealt with the judicial review of legislation by adopting a restrictive view and conferring such review upon the Constitutional Council; above all while modifying the balance of legislative power and regulatory power, it did not think it good to define in a new way the powers of the courts; the task of the latter remains the subordinate one of applying the statute. (Ibid.)

⁷⁴ Ibid. p. 405. Emphasis added.

It is perfectly conceivable, as we have said, that in the interpretation of statutes the judge should reason with regard to Community law just as he reasons with regard to general principles and start from the idea that the legislator did not intend to derogate from it. The only obstacle to such an unofficial collaboration of the national judge in the building of Community law is that it comes up against the problems of interpretation of that law, *and that such rearrangements are easier when the powers of interpretation of the judge are undivided*. But such was the desire of the negotiators of the Treaty. The present case well illustrates these difficulties since it leads you to be the arbitrator between a simple and almost simplistic interpretation, which from the beginning is opposed to the application of the Community regulation, and a more hazardous interpretation which, in the Community spirit, immediately poses problems of interpretation of the Treaty. The effort of interpretation would in any case be frustrated by the redoubled inconvenience of having to compare the national statute once the European Court has given its reply.⁷⁵

This example of a national government unilaterally breaking EC policy by decree, and the *Conseil d'État* condoning the action was exactly the type of case the ECJ was trying to avoid by its supremacy doctrine. Questiaux argued that denying their own competence to review a statute did not imply that international law could be ignored in France because the *Conseil d'État* could use its advisory role to promote the respect of EC law and because the Commission's infringement procedure could be used to ensure that a state does not misconstrue its legal obligations. But clearly denying a judicial role in enforcing EC law was allowing the French government to ignore EC law.

In its nine sentence long decision, the *Conseil d'État* signaled its agreement with Questiaux's argument by finding that the Ministry of Agriculture's decrees had the force of "*loi*." Although the decree and the legislative text were issued subsequent to the EC regulation, the *Conseil d'État* avoided the issue of EC law supremacy altogether, implicitly accepting its own lack of authority to strike down a national law. It simply said that "the complainant syndicate cannot maintain that by taking the attacked decisions the Minister of Agriculture has exceeded its powers."

Writing on this decision, the French Avocat Général at the ECJ said "[i]t's useless to recall that in France tribunals have always refused to recognize their competence to judge the constitutionality of laws. One must note that this is a simple tradition; no formal text, constitutional or legislative, has ever denied or accorded such a competence to the judge." For Lagrange, "the truth is that the judges do not dare to enter into open conflict with the parliament which is traditionally considered to be the only body qualified to sovereignty express the national will."⁷⁶

⁷⁵ Ibid. p. 405. Emphasis added.

⁷⁶ Op. cit. Lagrange (1968) p. 288

While maintaining the fiction of parliamentary sovereignty might have lent legitimacy to the *Conseil d'État*'s action, the parliament did not seem to be the primary concern of the *Conseil d'État*. The *Conseil d'État* mainly wanted to avoid turning over a sensitive issue to the ECJ in a case where EC law was clearly superior to and contradictory of a French policy.

The *Semoules* case did more than leave established legal precedent intact. It asserted orthodoxy once again in what was clearly a new legal situation created by EC membership and by Algerian independence, seizing the opening as a chance to close the door on the possibility of doctrinal evolution in light of the ECJ's supremacy. This decision, while consistent with what the *Conseil d'État* had been doing throughout the 1950s and 1960s, was mainly designed to keep legal issues involving EC law out of the EC legal system, to protect its own authority over EC legal issues and assure that it could find a legal outcome which favored French policy. When the German Constitutional Court rejected the supremacy of EC law over the German constitution in its *Solange I* decision, Darras and Pirotte compared the German Court's action to the *Conseil d'État*'s *Semoules* decision saying:

The *Semoules de France* decision of the *Conseil d'État* and the *Internationale Handelsgesellschaft (Solange I)* decision are very comparable. They both have as their underlying motivation, a defensive reflex against a power which pretends to exclude their control and which puts in check the hierarchy of norms in the internal law of which these jurisdictions are the supreme guardians.
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While the *Conseil d'État*'s attitude towards EC law was not necessarily indicative of a broader judicial antagonism among French courts towards the EC legal order, one cannot really say that the judiciary courts were more enthusiastically embracing EC law or the preliminary ruling process in the 1960s. Between 1965 and 1969 only seven references were sent to the ECJ by judiciary courts. None of them were sent by a first instance court. None involved a law passed subsequent to an EC regulation. And all but one dealt with the complicated technical issue of social security for migrant workers. In more political issues, judiciary courts were deciding the cases on their own, invoking *Acte Clair* even when EC law was not clear.⁷⁸ One scholar talked of a case

⁷⁷ Darras, Jean, and Olivier Pirotte. 1976. La Cour Constitutionnelle Fédérale Allemande a-t-elle mis en danger la primauté du droit communautaire? *Revue Trimestrielle de Droit Européen*:416-438. See p. 420.

⁷⁸ Op. cit. Constantinesco (1968).

where the *Cour de Cassation* refused a reference to the ECJ on the logic that while there might indeed be a conflict between national and EC law, the ECJ was not authorized to decide on such conflicts. The scholar noted that

The reasoning is surely right. But oddly there remains the conclusion that despite the confirmation of their authority to decide on conflicts between national and EC law, French courts seem to do everything to avoid deciding between such conflicts, using sham arguments or circuitous reasoning to content themselves, and to guarantee the application of national law.⁷⁹

Pro-integration advocates generally explained the lack of references and the examples of misapplication of EC law by judiciary courts by well intentioned misunderstandings of the law. They saw a willingness of members of their legal cadre to enforce EC law, the exception being members of the *Cour de Cassation* who “calculated that their jurisdiction would no longer be the supreme and exclusive interpreter of the new texts.”⁸⁰ But the enthusiastic endorsements of the ECJ’s jurisprudence came mainly from French courts staffed with pro-integration advocates. For example, in 1967 the Cour d’Appel in Paris made a reference to the ECJ without even being asked by any of the parties to make a reference, and also in 1967 the Parisian Cour d’Appel made a decision enforcing European law over national law based on the special nature of the EC legal order. At the time pro-integration advocate Adolphe Touffait was president of the court.⁸¹

French politics were rapidly changing in light of the student revolts in 1968 and De Gaulle’s departure from politics. As the Algerian conflict faded into the past, within the other two branches of the judiciary a new sentiment was emerging that perhaps there now was an opening to legal innovation and an assertion of new judicial powers.

Round 2: The *Cour de Cassation* Breaks Ranks and Accepts a Role Enforcing EC Law Supremacy (1971-1975)

By 1970 the effects of the new legal context were becoming evident. As De Gaulle and Michel Debré, the authors of the French Constitution and masters of constitutional manipulation,

⁷⁹ Ibid.

⁸⁰ Op. cit. Touffait (1975).

⁸¹ Ibid. p. 827-829. In an interview, a French legal scholar discussed how Touffait used his position at the Cour d’Appel in the late 1960s to send references to the ECJ. Indeed between 1965 and 1969 nearly half of the references by French courts (3 out of 7) to the ECJ came from the *Cour d’Appel* in Paris.

passed from the scene, the *Conseil Constitutionnel* came into its own as a constitutional court, asserting its independence and its ability to conduct judicial review of parliamentary laws. In 1971 the *Conseil Constitutionnel* incorporated old preambles and statutes into French constitutional doctrine, basically creating for itself a bill of rights to enforce. This decision marked a huge expansion of *Conseil Constitutionnel* jurisdictional authority, and for the first time the *Conseil Constitutionnel* decided against the executive.⁸² The decision introduced into French politics the notion of judicial review and created a new avenue to challenge laws passed by the majority government. In 1974 access to the *Conseil Constitutionnel* was expanded include references from sixty senators or deputies. References from senators and deputies created more opportunities for the *Conseil Constitutionnel* to develop constitutional law. The *Conseil Constitutionnel*'s decisions in these cases allowed the *Conseil Constitutionnel* to gain legal and political authority, and to create constitutional limitations on political action. According to Stone, the *Conseil Constitutionnel*'s 1971 decision and the 1974 reform led to the "Birth of Judicial Politics" in France.⁸³

Beginning in 1970, a new willingness to embrace the ECJ's jurisprudence and doctrine at all levels of the *cour judiciaries* also appeared. This willingness was signaled in the *Cour de Cassation*'s *Ramel* decision which acknowledged the supremacy of EC law over a subsequent national law. The case was not politically controversial, since the government had withdrawn from the case after losing in the first instance. The *Cour de Cassation* seized the opportunity to support the supremacy of EC law declaring that the 1962 EC agreement, as higher international law, took precedence over a subsequent French regulation defining quality wine. The decision was the first clear endorsement of EC law supremacy by a French high court, which boldly declared national laws can "not overrule international law whose authority must prevail by virtue of constitutional law;" and a signal that the highest Cassation court would tolerate the application of EC law supremacy. The case involved the supremacy of EC law supremacy over a "regulation." The supremacy of EC law over a French "*loi*" remained undecided.

⁸² Op. cit. Stone (1992) p. 66-69.

⁸³ For more on "The Birth of Judicial Politics" in France, see Stone (op. cit. 1992)

Following the *Ramel* decision, French judiciary courts began to apply EC law supremacy. Pro-integration forces encouraged the French courts to base their jurisprudence on the special nature of the EC Treaty (the ECJ's judicial reasoning), arguing that it would improve the likelihood that countries in which the constitution did not explicitly accept the supreme authority of international law would reciprocate and apply EC law supremacy. In 1971 a *tribunal d'instance* accorded EC law supremacy over a subsequent French statute, basing its decision on the EC Treaty's special nature and on the French constitution.⁸⁴ In 1972 the *Cour de Cassation* and the Parisian *Cour d'Appel* issued decisions according EC law supremacy over French policy relying on the EC Treaty as the basis for the supremacy of EC law.⁸⁵ Finally, in 1975 a case presented itself in which the *Cour de Cassation* could reinforce its endorsement of EC law supremacy more clearly and directly.

The *Jacques Vabre* case was politically more provocative than *Ramel*. The government thought that the judiciary courts lacked the authority to invalidate a French law, and had appealed its loss in the *tribunal d'instance* up through the judicial hierarchy. The decision was also politically significant because it was issued while sitting in Plenary session and because it involved a "loi." Jacques Vabre had refused to pay a French import tax, arguing that the tax exceeded similar taxes on domestic products and thus violated Article 95 EEC which prohibits import taxes having the effect equivalent of a tariff. The direct effect of Article 95 had been established in the ECJ's 1966 *Lütticke* decision and the German turnover equalization tax struggle (see chapter 4) and there was a well developed EC jurisprudence regarding the limits Article 95 created for national import tax schemes.⁸⁶ The *tribunal d'instance* and the *cour d'appel* had decided in favor of Jacques Vabre, but they used circuitous arguments to avoid the appearance of contradicting traditional jurisprudential orthodoxy. To circumvent the government's argument that judiciary courts lacked the authority to review the validity of national laws, the *tribunal d'instance* argued that what was at

⁸⁴ *Administration des Douanes v. Société Cafés Jacques Vabre and J. Weigel et Compagnie S.à.r.l.* Tribunal d'instance decision of 8 January 1971. *Common Market Law Report* 1976(1):43-56.

⁸⁵ *Joseph Aim and Société SPAD v. L'administration des Douanes* Cour d'Appel decision of April 12, 1972. *Common Market Law Report* 1972(I):901-906.

Cour de Cassation decision of January 7, 1972.

⁸⁶ *Alfons Lütticke GmbH v. Hauptzollamt Saarlouis* ECJ. Case 57/65 (1966) ECR 205.

issue was a calculating error of the customs authority which based its calculations on the wrong text. The *cour d'appel* argued that what was at stake was a French regulation, not a French law, thus it was not challenging the orthodoxy. While they danced around the issue of their legal authority, the lower courts were bold in their declarations that the constitution implied the supremacy of European law over national law.

The *Cour de Cassation* avoided the detours it could have used to weaken the force of its decision, classifying the government act in question as a “*loi*” and declaring the EC law takes precedence over French law. The decision’s notoriety comes in large part from the strong and clear arguments made by Procureur Général Adolphe Touffait.⁸⁷ Touffait addressed directly the questions which other courts had left more latent making it clear that in deciding in favor of Jacques Vabre the *Cour de Cassation* was intentionally establishing a new doctrinal precedent.

In his argument, Touffait tried to draw in the jurisprudence of the other two French high courts so as to make his argument universal and to encourage the other courts to follow his path. He argued that the *Conseil d'État's Semoules* decision was really an exceptional situation given Algeria’s young independence. Touffait also drew on a recent *Conseil Constitutionnel* decision, making it seem like the *Conseil Constitutionnel's* decision was intended to resolve the long-standing debate over whether enforcing EC law supremacy was breaking the prohibition against French courts conducting constitutional review.⁸⁸ Invoking the *Conseil Constitutionnel* lent an air of legitimacy to Touffait’s arguments, since the *Conseil Constitutionnel* was the highest authority on the meaning of the French constitution.

The *Conseil Constitutionnel* decision did not involve an issue of EC law, and the *Conseil Constitutionnel* did not intend to send a message about what other French courts should do regarding international law supremacy. Indeed its decision said nothing about how other French

⁸⁷ The Procureur Général serves the same function as the *Commissaire du Gouvernement*, but unlike the *Commissaire du Gouvernement* position which is rotated among *Conseil d'État* members, the Procureur Général’s position is permanent. The Procureur Général’s arguments are printed along with the *Cour de Cassation's* decision: *Administration des Douanes v. Société Cafés Jacques Vabre and J. Weigel et Compagnie S.à.r.l.* Cour de Cassation (France) decision of May 24, 1975. *Common Market Law Report* 1975(2):343.

⁸⁸ *Conseil Constitutionnel* decision of January 15, 1975. *Dalloz- Jurisprudence* 1975:529.

courts were affected by Article 55 of the French constitution.⁸⁹ The *Conseil Constitutionnel* had argued that “while the provisions of Article 55 of the [French] Constitution confer on treaties an authority which is superior to that of statutes, they do not imply that compliance with the principle is to be enforced by the *Conseil Constitutionnel*.” It had developed a controversial argument that because the supremacy of international treaties is limited and contingent on reciprocal application, the *Conseil Constitutionnel*’s authority to review the conformity of national statutes with the constitution did not apply to international law. This decision called into question the *Conseil d’État*’s argument that the *Conseil Constitutionnel* was the French legal body authorized enforce Article 55 of the French constitution, but it did not challenge the *Conseil d’État*’s interpretation of what Article 55 implied for ordinary courts. Instead, the decision simply removed the *Conseil Constitutionnel* from the politically tricky position of reviewing the compatibility of an abortion law with the European Convention of Human Rights. While Touffait and other pro-integration advocates interpreted the decision as implying that other national courts should therefore enforce international law supremacy, French politicians offered an equally plausible view of the meaning of the *Conseil Constitutionnel*’s 1975 decision; Michel Aurillac argued that if the highest constitutional authority of the state estimated that it was not competent to judge the conformity of laws with international treaties, then certainly ordinary national courts were not competent to do so either.⁹⁰

Touffait had a long history of pro-integration politics. Given Touffait’s proclivities, and given that the *tribunal d’instance* and *cour d’appel* had decided in favor of EC law supremacy before the *Conseil Constitutionnel* even issued its decision, it is likely that Touffait was not inspired by the *Conseil Constitutionnel*’s decision but was merely capitalizing on a decision which offered an argument in support of his position. Touffait drew on the *Conseil Constitutionnel*’s

⁸⁹ Authors noted at the time that the *Conseil Constitutionnel* decision was not intended nor could it necessarily be taken as a signal to other French courts that they should enforce EC law supremacy. Boulouis, Jean. 1975. Note. *L’Actualité Juridique. Droit Administratif* (12):II Jurisprudence, 569-574. Favoreau, Louis, and Phillip Loïc. 1975. Les <<Suites>> de la Décision du 15 Janvier 1975; L’arrêt de la Cour de Cassation du 24 Mai 1975. *Revue de Droit Public et de Science Politique*:1335-1343. This point was confirmed in interviews with members of the *Conseil Constitutionnel*, May 30, 1994 and June 23, 1994.

⁹⁰ J. O. Ass. Nat Deb of October 9, 1980, p. 2644.

decision as proof that applying international law supremacy was not in itself constitutional review. He argued: “[w]e can then conclude that the conflict between subsequent statute and treaty does not raise a question of constitutionality of the statute and so the argument of the ordinary courts is supported by the decision of the *Conseil Constitutionnel*.”⁹¹ Drawing on the recent *Conseil Constitutionnel* decision lent an air of constitutional legitimacy to the *Cour de Cassation*’s actions, and put the *Conseil Constitutionnel* in the position of having to come out explicitly against national courts enforcing EC law supremacy or let the precedent stand.

Touffait shifted the legal context of the debate over EC law supremacy, to get away from the terms of the debate established by the *Conseil d’État*. He argued that times had changed fundamentally since the Matter Doctrine and the *Arrighi* decision, and that as a response to the changes in times legislators had intentionally incorporated a supremacy clause into the French constitution. He went over the political developments leading to the supremacy clause, and argued

[t]he idea emerges irresistibly that there can be no international relations if the diplomatic agreements can be put in balk by unilateral decisions of the contracting powers and the duty of the state to respect its international obligations becomes a fundamental principle, and on the morrow of the liberation politicians who were often lawyers realized that their ideas- which might fall under the weight of legal and judicial tradition-- would have to be incorporated solemnly in the Constitution if they were to triumph.⁹²

Taking up Pepy’s argument, Touffait asserted that if legislators had not intended international law to be applied as the supreme law by national courts, then they would have provided the Treaty with statutory force only “since it is an absolute principle that a subsequent statute prevails over a prior statute.”

Touffait also tried to move the debate away from French constitutional terms entirely, onto the terms of the ECJ’s doctrine. He argued:

If I have directed your attention for so long on Article 55 of our Constitution, it is because the argument of the appeal in discussing its scope relies on the authority of a judgment of the *Conseil d’État* and has led us to follow the plaintiff (the government) onto the ground chosen by him.

...

It would be possible for you to give precedence to the application of Article 95 of the Rome Treaty over the subsequent statute by relying on Article 55 of our Constitution, but personally I would

⁹¹ Op. cit. *Vabre* decision (1975) p. 360.

⁹² Ibid. p. 361.

ask you not to mention it and instead base your reasoning on the very nature of the legal order instituted by the Rome Treaty.⁹³

He went through the constitutions and jurisprudence of high courts in other member states, noting instances where high courts in other member states had accepted a role enforcing EC law supremacy. Appealing to the pride of the *Cour de Cassation*, Touffait closed by arguing "It is in this context that the judgment you are to deliver will be read and commented upon; its audience will extend beyond the frontiers of our country and spread over the whole of the member-states of the Community."⁹⁴

In its decision, the *Cour de Cassation* dismissed the government's arguments about a lack of jurisdiction based on technicalities (the argument was not raised in the first instance and thus could not be raised in appeal). It also rejected the argument that a national judge must first make sure that EC law is being applied reciprocally by other member states, arguing that the EC Treaty had a provision which allowed member states to challenge misapplication of EC law by another member state. Most importantly, the decision firmly endorsed the supremacy of the EC Treaty over national law. The *Cour de Cassation* did not follow Touffait's plea to base EC law supremacy on the nature of the EC Treaty itself, but it did note that the separate nature of the EC legal order was directly applicable to nationals of member states and binding on national courts.

This decision was widely anticipated, and interpreted as a fundamental breakthrough and the most significant decision of the *Cour de Cassation* in years. The decision was also, according to Bebr, "implicitly challenging and criticizing the uncompromising position of the *Conseil d'État*."⁹⁵ Many pro-integration scholars were disappointed that the *Cour de Cassation* had not followed Touffait's plea to base EC law supremacy on the special nature of the EC legal system.⁹⁶ The *Cour de Cassation* seemed to go more in the direction encouraged by Touffait in a March 1976

⁹³ Ibid. p. 364.

⁹⁴ Ibid. p. 367.

⁹⁵ Bebr, Gerard. 1976. French Case Law. *Common Market Law Review*:128-132.

⁹⁶ Jeantet, F-Ch. 1976. La Cour de Cassation et l'ordre juridique communautaire. *La Semaine Juridique, Juris-Classeur Périodique* Edition Commerce et Industrie 4; Etudes et Commentaires (11962):45-50. Pirotte-Gerouville, Janine. 1976. La primauté du droit international et la spécificité de l'ordre communautaire dans l'affaire Jacques VABRE. *Revue Trimestrielle de droit européen*:215-228. Ruzié, David. 1975. Note. *Journal du Droit International* (4):805-808. Op. cit. Boulouis, 1975.

decision, setting aside a French law by referring to EC law and ECJ jurisprudence, without reference to the French constitution (*Von Kempis*).⁹⁷ The *Jacques Vabre* and *Von Kempis* decisions were the only cases, however, where the EC Treaty and doctrine were relied on. In September 1976 the *Conseil Constitutionnel* ruled that the EC Treaty was a Treaty like any other, without a greater or a lesser duty to be followed.⁹⁸ After that *Cour de Cassation* relied on the French constitution to support its actions.

A few authors asserted that the *Vabre* decision was a breakthrough for the entire French legal system,⁹⁹ but the *Cour de Cassation*'s decision did not necessarily have to affect the *Conseil Constitutionnel* or the *Conseil d'État*'s jurisprudence on the issue.¹⁰⁰ Indeed when the *Conseil d'État* was presented with an opportunity to reverse its *Semoules* jurisprudence in 1979, and even nudged to do so by lower administrative tribunals which started to review posterior law in light of international treaties, the *Conseil d'État* eschewed the chance and without comment applied its *Semoules* jurisprudence.¹⁰¹ According to members of the *Conseil d'État*, the *Vabre* decision was dismissed within the *Conseil d'État* as a political move by Touffait, who at the time was a candidate to be ECJ judge. But the *Vabre* decision could not be disregarded so easily, because it introduced into the French legal context a strong and authoritative alternative view to that of the *Conseil d'État*.

The existence of the *Jacques Vabre* decision contributed to changing the overall legal and political context in France, putting the ball in the politician's court to tell the judges that they could not enforce EC law over French law. Conseiller d'État called for political bodies to resolve the problem of divergent interpretations of Article 55, by indicating through a law if judicial bodies had the authority to enforce EC law supremacy. Conseiller d'État also held out the hope that the

⁹⁷ *Clave Bouhaben Von Kempis v. Geldof (Husband and Wife)* Cour de Cassation decision of March 12, 1976. *Common Market Law Report* 1976(2):152.

⁹⁸ Conseil Constitutionnel decision of December 29/30, 1976. 76-71 DC, Rec: 15 Favoreu/Philip (26): 332. Op. cit. Vedel (1987) p. 8.

⁹⁹ Hummings, Neville March. 1975. European National Laws. *The Journal of Business Law*:326-329. Simon, Manfred. 1976. Enforcement by French Courts of European Community Law- II. *The Law Quarterly Review* 92:85-92.

¹⁰⁰ Op. cit. Druesne (1975); Kovar, (1975); Favoreau, (1975); Boulouis, (1975).

¹⁰¹ *Conseil d'État* decision of October 22, 1979, discussed in Genevois, Bruno. 1980. Note. *Actualité Juridique du Droit administratif* (20 January 1980):43-46.

Conseil Constitutionnel would 'correct' its criticized 1975 decision, and make it clear to the *Cour de Cassation* that it did not imply that they were authorized to enforce Article 55.¹⁰² These hopes seemed realistic in the context of the late 1970s, when anti-integration sentiments were being roused within judicial and the political bodies.

Round 3: Encore Non!—*Conseil d'État* steps up its opposition to ECJ jurisprudence (1970-1981)

While the judiciary branch was warming to ECJ jurisprudence in the 1970s, the administrative branch was becoming more opposed to it, turning openly hostile to the ECJ. According to French legal observers and members of the *Conseil d'État*, the change in the *Conseil d'État*'s attitude began with the ECJ's 1974 *Charmasson* decision.¹⁰³ The *Conseil d'État* had referred the case to the ECJ expecting the ECJ to uphold the French government's position. By making a reference to the ECJ in a case where the outcome was practically assured to be positive, the *Conseil d'État* could counter the criticism that it abused the *Acte Clair* doctrine, and reinforce the French position that their special banana import agreement with the Dom-Tom territories was compatible with EC law. But contrary to the *Conseil d'État*'s expectations, the ECJ ruled that after the expiration of the transition period the special national regimes were no longer valid, even if there were no EC level regime to replace the national policy. The ECJ's decision did not apply to the case at hand (which was concerned with a period before the expiration of the transition period), but the decision implied that as of 1974 French sovereignty over bi-lateral trade agreements had been ceded. Furthermore, the *Conseil d'État* was stuck with a binding and 'higher' ECJ decision with which it disagreed.

As the *Conseil d'État* started to realize that its domain of law was—according to ECJ jurisprudence—greatly effected by EC membership, it came to resent the ECJ for having authority over French law, and for exercising this authority in an independent and bold fashion. *Conseil d'État* judges did not like the audacity of the ECJ's assertion of the supremacy of EC law over

¹⁰² Galmont, Yves. 1990. Le Conseil d'État et le contrôle de la conformité des lois aux traités. *Revista de Instituciones Europeas* January-April.

¹⁰³ "Charmasson" Case 48/74 ECJ decision of December 12, 1974. ECR p.1383.

national constitutions in its 1974 *International Handelsgesellschaft* decision, and were angered by the ECJ's *Simmenthal* decision¹⁰⁴ which authorized lower courts to ignore higher court jurisprudence on EC law supremacy. Basically the *Conseil d'État* was uncomfortable with the notion that there was a court superior to itself.

Within the French parliament there was simultaneously a growing disenchantment with the ECJ during the 1970s, which encouraged the *Conseil d'État* that there was political support for its opposition to ECJ doctrine. The parliament's disenchantment was a manifestation of the loss of legislative authority through European integration, and of the waning influence of the more radical Gaullist forces in French politics. Political bodies had been angered by the ECJ's ERTA decision because it found that if an internal economic policy matter was governed by existing EU law, the external aspects of that policy would by implication fall exclusively within EC legislative authority and not national authority.¹⁰⁵ The ECJ's *Charmasson* decision provided a wake-up call to the French government which had until then seen the ECJ as a relatively limited institution.¹⁰⁶ In 1978, the parliament refused to adopt an EC directive, calling it a "misappropriation of the procedure of the directive and a veritable usurpation of the legislative powers of the Member States."¹⁰⁷ For the first time in the Fifth Republic it declared an act of government (namely the government's attempt to reform value added tax through the EC) to be unconstitutional. The political protestations emboldened the *Conseil d'État* to voice its criticisms towards ECJ jurisprudence more clearly, making it think that it had political allies which would support it.

The *Conseil Constitutionnel*'s jurisprudence also implied that the *Conseil Constitutionnel* disagreed with the ECJ's supremacy doctrine. Its 1975 decision had implied that a French law

¹⁰⁴ *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II)* ECJ. Case 106/77 (1978) ECR 629.

¹⁰⁵ *Case 22/70* ECJ. ECR 1971 p. 263. Jacqu , Jean-Paul. 1981. *The Individual Member States' Community Obligations: Faithful Implementation or Realization of Unilateral Goals with a particular view to EC-Member States' Court's Defiance of the European Court of Justice- France*. Conference on "The Individual Member States' Community Obligations: Faithful Implementation or Realization of Unilateral Goals with a particular view to EC-Member States' Court's Defiance of the European Court of Justice" 12-14 November 1981. See p. 4-1.

¹⁰⁶ *Op. cit.* Buffet-Tchakoloff (1984) p. 18.

¹⁰⁷ J. O. Ass. Nat Deb of November 30, 1978 p. 8571.

violating a Treaty did not necessarily violate the Constitution.¹⁰⁸ In subsequent cases involving international law, which usually did not have to do with EC law or the EC Treaty,

[the *Conseil Constitutionnel*] announced principles which are not very favorable towards European integration and in which, it seems the Treaty of Rome is condemned to being, in the absence of a revision of the preamble of the constitution, under its control.¹⁰⁹

It refused to recognize the EC Treaty as anything but a normal treaty, and it rejected the ECJ's terminology of a "transfer of sovereignty," finding that sovereignty resides in the nation state only. While France could agree to 'limit' its sovereignty, French sovereign authority could never be ceded or fully transferred.¹¹⁰ Distinguishing between a 'limitation of sovereignty' and a 'transfer of sovereignty' was a way to keep open the possibility for the *Conseil Constitutionnel* to find limits to EC authority.¹¹¹ While it did not call into question the validity of the EC treaties or challenge any ECJ decisions,¹¹² the *Conseil Constitutionnel* rejected aspects of ECJ's doctrine and implied that it shared the *Conseil d'État*'s interest in keeping the process of legal integration from encroaching on national sovereignty, and firmly under its control.

The *Conseil d'État*'s escalated the negative messages it was sending to the ECJ. It began to intentionally and explicitly issue decisions which contradicted ECJ jurisprudence. The repudiation of ECJ authority was most apparent in the *Conseil d'État*'s *Cohn-Bendit* case, where the *Commissaire du Gouvernement* presented the *Conseil d'État* with three options: 1) accepting the ECJ's jurisprudence even if there was a disagreement over legal interpretation; 2) ignoring ECJ jurisprudence to "draw attention to the fact that the case law of the Court of Justice...puts the national judge in a difficult position" and to 'mark clearly that case law which departs somewhat from the letter of the Treaty can be usefully contested by national courts'; or 3) rejecting extreme

¹⁰⁸ Op. cit. Vedel (1987) See p. 9.

¹⁰⁹ Ibid.

¹¹⁰ *Conseil Constitutionnel* decision of December 29/30, 1976. 76-71 DC, Rec: 15 Favoreu/Philip (26): 332.

¹¹¹ This distinction was eliminated by the *Conseil Constitutionnel*'s Maastricht decision which established a new concept of a "transfer of competence." The *Conseil Constitutionnel* maintained however its authority to determine on a case by case basis if a given "transfer of competence" was compatible with the French constitution. Op. cit. Stone (1993) p. 74; and op. cit. Genevois (1988) p. 201.

¹¹² Ibid. Stone.

positions and entering into a dialogue with the ECJ by raising the concerns in a reference to the Court.¹¹³

The *Commissaire du Gouvernement* admitted that the ECJ's jurisprudence on the direct effect of directives was legally very questionable but he made an impassioned plea for the third "middle ground" approach. He argued that the Treaty clearly requires national courts to refer cases to the ECJ when multiple interpretations could exist and that the *Acte Clair* doctrine should be used judiciously. Not making a reference, he argued, would be a deliberate affront to the ECJ:

[i]t would be singularly lacking in respect for the Community Court, which by the EEC Treaty has the task of ensuring a uniform application of community law over the territory of the member-States of the Community, to interpret the Treaty in a sense which is diametrically opposed to a well-established case law of the Court of Justice of the European Communities.

What's more, it would be hypocritical:

You cannot in my view give absolute priority to the literal interpretation of the text when your own case law itself gives many examples of cases in which you have indulged in constructive interpretation.

Indeed there was no valid reason not to make a reference to the ECJ. *Commissaire du Gouvernement* Genevois argued that because of Article 177 EEC the *Conseil d'État* may simply

have to give way, in the same way as, in exceptional cases, the duty of obedience of an official may have to give way... in my opinion, in the field of Community law you have no valid reason for departing from the case law of the Court of Justice unless it required you to act against the Constitution of the French Republic, which it would not do.

Genevois argued that a dialogue with the ECJ would be a more productive approach, one which allowed the *Conseil d'État* to have more influence over ECJ decisions.

The *Conseil d'État* could have avoided contradicting the ECJ as it had in the past.¹¹⁴ The Interior Minister had relaxed his contested decision against Cohn-Bendit two days earlier, and the *Conseil d'État* could have argued that the case was no longer legally relevant. But despite the non-confrontational avenues available to the *Conseil d'État*, and despite the *Commissaire du Gouvernement's* arguments, the *Conseil d'État* deliberately took the provocative approach of

¹¹³ *Minister of Interior v. Daniel Cohn-Bendit* Conseil d'État decision of December 22, 1978. *Common Market Law Report* 1980:545-562.

¹¹⁴ In the past when a case involving the direct effect of directives had arisen and the *Commissaire du Gouvernement* had advocated accepting the ECJ's jurisprudence on the direct effect of directives, the *Conseil d'État* had avoided the confrontation by basing its decision on a misreading of the decree translating the directive into national law. Vallée, Charles. 1979. Note. *Revue Générale de Droit International* Tome 83 (3):834-848. See p. 838.

refusing a reference to the ECJ, rejecting the ECJ's doctrine regarding the direct effect of directives, and explicitly challenging the legal basis of the ECJ's doctrine.¹¹⁵

Most legal scholars interpreted the *Conseil d'État* decision as a politically inspired attack on the ECJ. One observer called the *Conseil d'État* more nationalist than the national assembly:

The *Conseil d'État* acted like a vigilant guardian, more vigilant than the minister, of the national sovereignty. On its own, it took sides with the National Assembly which, a few days earlier, spectacularly challenged the abusive use which was being made of the instrument of the directive by the community institutions and backed by the French government.¹¹⁶

Whether or not the *Conseil d'État* was being nationalist, it was clearly trying to send a message to the ECJ. *Commissaire du Gouvernement* Genevois had spelled out what its defiance would mean. He had concluded his argumentation by stating "at the level of the European Community there should not be either rule by judges, nor war between judges. There should be place there for dialogue between judges." The *Conseil d'État* had intentionally eschewed dialogue for war. Dutch *Conseil d'État* judge Kapteyn summarized the situation this way:

After the not very constructive decisions of the *Conseil d'État* in the Shell Berre case and the Syndicat de Fabricants de Semoules case the judgment in the [Cohn-Bendit] case openly impairs the authority of the Court of Justice. Here the very system of judicial cooperation of courts in a Community context is deliberately broken: The *Conseil d'État* substitutes its own interpretation of a Treaty provision for that of the Court of Justice and on its part refrains from a dialogue with the Court on the difference of opinion that has arisen. It does so in spite of the scarcely veiled warnings uttered against such a line of conduct by the *Commissaire du Gouvernement* who evidently had rightly fathomed the feeling in the Conseil. Has the "guerre des juges" feared by the *Commissaire du Gouvernement* become a fact with this decision?...it hardly appears possible to avoid the conclusion that a declaration of war was involved.¹¹⁷

As discussed in chapter 4, the ECJ's doctrine on the direct effect of directives was especially polemic. But the issue was greater than a disagreement over legal interpretation. In terms of the legal doctrine at stake, the *Cohn-Bendit* decision left open a door through which individuals could challenge improperly executed EC directives. The *Conseil d'État* declared Cohn-Bendit's case to be unfounded but it implied that all Cohn-Bendit had needed to do was to argue

¹¹⁵ Where the ECJ's had found that detailed directives which created clear legal obligations could create direct effects, and that the specific directive which the *Conseil d'État* was called upon to examine created direct effects, the *Conseil d'État* curtly stated that "whatever the detail that they contain for the eyes of member states, directives may not be invoked by the nationals of such states."

¹¹⁶ Isaac, Guy. 1979. Observations: Le juge administratif français et les directives communautaires. *Cahier de droit Européen*:267-290. See p. 273. A similar point was made by Galmont (op. cit. 1990)

¹¹⁷ Kapteyn, P.J.G. 1979. National Courts- Conseil d'État (Assemblée), Decision of 22 December 1978, *Cohn-Bendit*. *Common Market Law Review*:701-703. See p. 704.

that the Minister's action was illegal.¹¹⁸ Indeed in subsequent decisions, the *Conseil d'État* developed this loophole to bring its jurisprudence much into line with that of the ECJ.¹¹⁹

More important than the legal issue or the case involved, the *Conseil d'État* was trying to show the ECJ what could happen when it exceeded its interpretive authority. According to Dutheillet de Lamothe and Robineau, both Conseillers d'État,

In refusing to bend before the jurisprudence of the Court on directives, the *Conseil d'État*, it seems to us, in return showed that the absolute authority which is attached to decisions rendered by the Court under the auspices of Article 177 does not permit (the Court) to impose on national jurisdictions, by way of its authority, an interpretation of the treaty going far beyond (the treaty's) stipulations. Such a remark does not in any way put into question the liberty, seen in some cases as a necessity, for the Court to do its praetorian work... (The *Conseil d'État*) is showing simply that this praetorian work must, as far as it is bold, correspond to a certain consensus in national jurisdictions.¹²⁰

The *Conseil d'État* was also trying to influence the ECJ to stop its integration-oriented jurisprudence, a jurisprudence which was "systematically favorable to increasing integration to the detriment of the rights of states."¹²¹ Lyon-Caen noted that "sticking to the original function of the directive, the *Conseil d'État* manifested its vigilance over the community dynamic. This vigilance is also an act of resistance."¹²²

¹¹⁸ The *Conseil d'État* had said in its decision: "in absence of any dispute on the legality of the administrative measure taken by the French government to comply with the directives enacted by the Council of the European Communities, the solution to be given to the action brought by M. Cohn-Bendit may not in any case be made..." (Emphasis added)

¹¹⁹ In 1979, the *Conseil d'État* annulled *arrêtés* which had been issued under French law, but violated terms of a previous directive. In 1984 decision the Conseil found that the government had to stick to specific provisions of the directives, and that the government could supplement the text of the Convention and Directives as long as these additions did not run counter to the obligations of the text. In 1989 the *Conseil d'État* found that the administration had an obligation to appeal past regulations which contradicted with directives- thus to change their practices in light of the new legal situation created by the directive. In the 1989 *Alitalia* case, the plaintiff did not challenge the act itself, but the refusal to reverse the act, as an excess of power. This was in essence a back door to challenging individual decisions made in violation of directives. One asked the Minister to stop the practice, and when he does not respond or refuses to stop the practice, you challenge that refusal. This last decision "appears likely to reinforce the sanction for failures of every type committed by the national authority, empowered to issue the necessary *règlements*, contrary to the directive." Tatham, Allan. 1991. Effect of European Community Directives in France: The development of the Cohn-Bendit Jurisprudence. *International Comparative Law Quarterly* (October):907-919. See p. 918.

¹²⁰ Dutheillet de Lamothe, Olivier, and Yves Robineau. 1979. *Chronique générale de jurisprudence administrative française. L'actualité juridique- Droit Administratif* (3):27-34. See p. 30.

¹²¹ Op. cit. Kovar (1979.)

¹²² Lyon-Caen, Antoine. 1979. Du 22 déc. 1978- Conseil d'État (Ass.)- MM. Costa, rapp.- Genevois, comm. du. *Revue critique de droit international privé* (3):649-657. See p. 652.

The *Cohn-Bendit* decision is the most celebrated example of defiance, but not the only one. In 1979, in repudiation of an explicit ECJ instruction to national courts the *Conseil d'État* refused to suspend the application of an EC regulation deemed invalid by the ECJ, adopting a practice it would not have applied under French legal doctrine and forcing a public French body to pay a subsidy declared illegal by the ECJ. In 1980 the *Conseil d'État* made another decision also designed to assert autonomy from the ECJ.¹²³

At first it seemed like the *Conseil d'État*'s strategy was having the desired effects. The German *Bundesfinanzhof* followed the *Conseil d'État* in its defiance of the direct effect of directives, stating that it agreed completely with the *Conseil d'État* on this issue.¹²⁴ The hard core Gaullist party took up the issue of protecting national sovereignty in an attempt to undermine support for Giscard d'Estaing and the Union pour la Démocratie Française (UDF). Former Prime Minister Michel Debré organized *Le Comité pour l'indépendance et l'unité de la France* which made the ECJ one of its principle targets. In 1979, Debré launched an attack on the ECJ, accusing the ECJ “not for the first time or the last” of having “pathological megalomania,” “declaring what is and is not EC law based on pure inventions of law.”¹²⁵ He urged the government to take action against the ECJ, and to declare ECJ decisions in which France was not a party to be non-binding within France. In September 1980 Debré's group sponsored a conference on the “Sovereignty of French Law,” to create an alternative anti-EC law supremacy legal view to that of the prevailing academic literature. Participants challenged what they called ideological (and Leninist) jurisprudence which did not look to existing law but tried to create new law based on a particular ideology of Brussels bureaucrats. The conference's consensus was that the ECJ had gone well beyond its Treaty mandate, and that when the ECJ engaged in its “fantasy exegesis” it went well beyond Article 55 of the French constitution.¹²⁶ Participants called for a constitutional revision and

¹²³ *Syndicat national des Fabricants de spiritueux consommés à l'eau* Conseil d'État decision of July 27, 1979. *Revue du droit public et de la science politique en France et à l'étranger* 1980(219-221) and *Office national interprofessionnel des céréales* Conseil d'État decision of May 3, 1980. discussed in Buffet-Tchakoloff (op. cit. 1984) p. 104-105.

¹²⁴ BFH decision of July 16, 1981. *Common Market Law Reports* 1982(I):527-531. See Chapter 4, round 4 for more on this.

¹²⁵ J. O. Ass. Nat. Deb. of June 1, 1979, p. 4610.

¹²⁶ B.L.G. A boulets rouges contre les juges européens. *Le Monde*, September 23, 1980, p. 14.

a revision of the Treaty of Rome to clarify that national judges could not apply EC law supremacy. Three weeks after this conference, the French national assembly acted by attaching to a judicial reform bill an amendment explicitly designed to counter the *Cour de Cassation's Jacques Vabre* decision and make national court enforcement of EC law supremacy illegal.

M. Aurillac in proposing his amendment presented the “problem” this way; it was clear from both the *Conseil d'État's* jurisprudence and the *Conseil Constitutionnel's* 1975 decision that French judges could not set aside national law in favor of international law. But “unfortunately, to complicate things, the jurisprudence of the *Cour de Cassation* [came out] rigorously opposed... This contrary jurisprudence presents numerous inconveniences; this is all the more true because the *Cour de Cassation* can intervene in commercial law, the regulator of economic life. What's more, through this jurisprudence the *Cour de Cassation* contorted one of the foundations of French law: the prohibition against tribunals getting involved in the exercise of legislative power.”¹²⁷ The solution suggested was to reinstate and modernize the law of 16-24 August 1790 by putting into a proposed judicial reform the statement that:

Judges cannot directly or indirectly, take any part in the exercise of legislative power, nor can they hinder or suspend the execution of laws regularly promulgated *for whatever reason*, without abusing their authority.¹²⁸

This solution was endorsed by the Ministry of Justice who argued:

Clearly I don't have any objection to what is the confirmation and modernization of a provision which is this venerable and which practically has *valeur constitutionnelle*, which has become a fundamental principle of our law... if the judge takes upon himself the authority to refuse to apply a law under the pretext that he estimates that (the law) was contrary to an international accord, in the case where that law was subsequent to the accord in question, that would imply that the judge is assuming the right to disregard a law, thus scorning the will of the parliament which would have recognized, by hypotheses, the previous existence of the contrary international accord. This could clearly not be accepted by the national representation. These are the difficulties M. Aurillac... put his finger on. One could think that the *Conseil d'État* better respected the provisions of the law of 1790... than the *Cour de Cassation*... It is not a question of avoiding what is sometimes called a government of judges, but in some ways, a parliament of judges, the legislative judge. Each to his own domain. The Government could not be anything but favorable to the amendment of the commission which is nothing more than a reaffirmation of a great republican tradition.¹²⁹

Duverger, Maurice. Le gouvernement des juges européens. *Le Monde*, September 20, 1980.

¹²⁷ J. O. Ass. Nat. Deb. of October 3, 1980, p. 2637.

¹²⁸ Ibid. The “modernized” part of the law is in italics.

¹²⁹ Ibid. p. 2644.

The law passed overwhelmingly in the National Assembly, but the executive branch got the Senate to block debate on the amendment because it did not want to create problems for the France at the EC level. Since the issue was not debated in the Senate, the amendment never gained a legal force.¹³⁰

In retrospect, the RPR's attempt to undermine UDF support by appealing to national sovereignty concerns was a losing strategy. The Socialist party won the 1981 election in large part because of the divisions on the right. The *Conseil d'État* had clearly miscalculated the political support for its position.

The Gaullist's failure to have this amendment adopted into law had the opposite effect of that intended by M. Aurillac and his supporters. It signaled clearly that neither the parliament or the government would act against courts applying EC law supremacy. After the failed Aurillac amendment, the political context was changed. While the *Cour de Cassation's Vabre* decision was not legitimated by political bodies, it was clear that politicians would tolerate judges reviewing the compatibility of French law with EC law. Political forces were not going resolve the debate over EC law supremacy. One of the French high courts would have to retreat.

Round 4: Le Petit Oui: The *Conseil d'État's* new strategy revealed (1985-1989)

In the 1980s, pressure started to mount on the *Conseil d'État* to change its *Semoules* jurisprudence. Some of the strongest and most directed pressure came from the *Conseil Constitutionnel*. The *Conseil Constitutionnel* started to stick into its jurisprudence hints that the *Conseil d'État* should change its doctrine. Given that the *Conseil Constitutionnel* was the highest

¹³⁰ For more on the failed Aurillac amendment, see Buffet-Tchakaloff (op. cit. 1984) p. 346. Jacqué, Jean-Paul. 1981. *The Individual Member States' Community Obligations: Faithful Implementation or Realization of Unilateral Goals with a particular view to EC-Member States' Court's Defiance of the European Court of Justice-France*. Conference on "The Individual Member States' Community Obligations: Faithful Implementation or Realization of Unilateral Goals with a particular view to EC-Member States' Court's Defiance of the European Court of Justice" 12-14 November 1981. See p. 4-14 Galmont, Yves. 1990. *Le Conseil d'État et le contrôle de la conformité des lois aux traités. Revista de Instituciones Europeas* January-April. Isaac, Guy. 1980. A propos de l' <<amendement Aurillac>>: Vers une obligation pour les juges d'appliquer les lois contraires aux traités? *Gazette du Palais II:Doctrines*: 583-585.

authority on French constitutional law, it was hard for the *Conseil d'État* to insist that its alternative interpretation of Article 55 was without reproach.

The *Conseil Constitutionnel*'s adoption of a more pro-integration stance reflected a change in *Conseil Constitutionnel* strategy. In its 1975 jurisprudence the *Conseil Constitutionnel* had refused to take on a role enforcing the supremacy of international law, because of the "contingent" nature of international law (international law supremacy only applied when the law was also being respected by other countries). This argumentation had been widely criticized in the legal community, and was rejected by both the *Conseil d'État* and the *Cour de Cassation*. The *Conseil Constitutionnel* was hesitant to change its position. According to a member of the *Conseil Constitutionnel*, the *Conseil Constitutionnel*'s main concern was that the European Court of Human Rights might contradict it on an issue of human rights. This had happened to the Austrian Constitutional Court, and especially on an issue of human rights, the *Conseil Constitutionnel* did not want to see its jurisprudence called into question.¹³¹ As a Constitutional Court, it had an interest in having the constitution and its jurisprudence respected, thus it sought a more compelling legal argument.

According to Alec Stone, beginning in 1981 the *Conseil Constitutionnel* "recognized and actively sought the legitimating power of legal discourse and the judicial function... The Council's work... became more attendant to judicial norms, its decisions lengthened, developed into a technical and closely argued jurisprudence, and became much more explicit about the nature of parliament's legal obligations in the face of censure."¹³² To this end, it started to explicitly court the legal community. It tried to get other French courts to accept its jurisprudence, and it tried to address the concerns of its legal critics.¹³³

Its 1975 jurisprudence was quite criticized in the legal academic press, and the *Conseil Constitutionnel* sought legal arguments that would be more convincing to the critics. The *Vabre*

¹³¹ The potential for this to happen was quite high because the *Conseil Constitutionnel* heard cases before the law was actually promulgated and could not control how the laws were then applied. Based on interviews with members of the *Conseil Constitutionnel*: May 30, 1994, Paris.

¹³² Op. cit. Stone (1992) p. 100.

¹³³ Ibid. p. 98-102. Stone argued that "the Council is not only aware that legal scholars will judge its behavior according to [legal] norms, but it strives to satisfy this community as much as possible." Ibid. p. 103.

solution of having national courts enforce EC law supremacy appeared to be working quite well, and to be accepted by both the academic community and the political bodies. In an article, the Secretary General of the *Conseil Constitutionnel* argued that while the *Conseil Constitutionnel* did not necessarily intend by its 1975 decision that the ordinary courts should exercise control of national laws with treaty obligations, "how could it not be noticed the application made by the judiciary judge in the Jacques Verb jurisprudence gave good results at least as far as Community law was concerned. It then realized that any reversal of this jurisprudence of 1975 by the constitutional judge would have a destabilizing effect."¹³⁴ The move to a more explicitly pro-legal integration position within the *Conseil Constitutionnel* also coincided with a change in composition of *Conseil Constitutionnel* judges to include more academics, a former negotiator of the Treaty of Rome who was positively disposed to legal integration, and a former ECJ justice who was arguably the architect of the ECJ's supremacy doctrine: Robert Lecourt.

In a 1986 decision, the *Conseil Constitutionnel* endorsed the *Vabre* argument that Article 55 of the French constitution implicitly empowered French courts to enforce international law supremacy.¹³⁵ In a message to the *Conseil d'État*, it also declared that "it was the responsibility of the different organs of the state to protect the application of international conventions in the cadre of their respective competence."¹³⁶ which was another way of saying that the *Conseil d'État* should enforce EC law supremacy in its jurisdictional realm. Members of the *Conseil Constitutionnel* also pushed for judicial evolution in the *Conseil d'État* in private contacts, lunches and conferences.¹³⁷

In 1988, the *Conseil Constitutionnel* made it even clearer that the *Conseil d'État* should change its jurisprudence. Acting in its capacity as an election judge, "when (the *Conseil Constitutionnel*) is a simple judge applying norms," the *Conseil Constitutionnel* applied the *Cour*

¹³⁴ Op. cit. Genevois (1989) p. 828.

¹³⁵ Bonichot, Jean-Claude. 1989. Convergences et divergences entre le Conseil d'État et la Cour de justice des Communautés européennes. *Revue française de Droit administratif* 5 (4):579-604.

¹³⁶ *Decision No. 86-216 DC* Conseil Constitutionnel decision of September 3, 1986. Rec. Const. Constitut. *Journal de droit international* 1987:289.

¹³⁷ Ibid. and op. cit. Genevois (1988) and Vedel (1987). Based on interviews with members of the *Conseil Constitutionnel* as well: June 23, 1994 and May 30, 1994, Paris.

de Cassation's *Jacques Vabre* jurisprudence acknowledging its duty to enforce international law supremacy.¹³⁸ Writing on the decision, Genevois commented

The decision of 21 October 1988 cannot but re-enforce the doctrinal current which underlines the interpretation given to Article 55 of the Constitution by the constitutional judge implicitly authorizes the administrative judge like the judiciary judge to assure the respect of the hierarchy of norms which it edicts...one can thus hope that the solution adopted by the *Conseil Constitutionnel* will lead the *Conseil d'État* to reconsider its traditional jurisprudence, that it even recently abstained once again from doing.¹³⁹

The *Conseil Constitutionnel*'s decision was especially significant because the *Conseil d'État* also had a jurisdictional role as an election judge.

The *Conseil Constitutionnel*'s support of EC law supremacy helped to tip the balance in favor of those advocating that French judges enforce EC law supremacy, isolating the *Conseil d'État* within the French legal system and undermining the legal validity of the arguments the *Conseil d'État* used to deny itself a role enforcing EC law supremacy. The *Conseil Constitutionnel*'s not so subtle hints were heard within the *Conseil d'État*. In the 1989 *Nicolo* case, *Commissaire du Gouvernement* Frydman acknowledged the *Conseil Constitutionnel*'s pressure, saying that the *Conseil Constitutionnel* had indicated the "approach [it] would like [the *Conseil d'État*] to take, and it could not, without encroaching on your own free will, express itself more clearly in condemning your traditional reply."

Criticism of the *Conseil d'État*'s jurisprudence was also growing within the ranks of the *Conseil d'État*. *Conseillers d'État* began to call for a change in *Conseil d'État* jurisprudence, some bringing the dispute into the public realm by publishing articles and books which highlighted the disadvantages of the *Conseil d'État*'s *Semoules* jurisprudence.¹⁴⁰ Even within the *Conseil d'État*'s training ground, *ENA*, students were being taught that the *Semoules* jurisprudence was out of date. The divergence in legal outcomes created by the *Conseil d'État*'s refusal to enforce EC law supremacy was also increasingly disconcerting. The divergence in high court jurisprudence was

¹³⁸ *Conseil Constitutionnel* decision of October 21, 1988. *Revue française du droit administratif* 1988:908. Genevois, Bruno. 1988. Le juge de l'élection, le traité et la loi. *Revue française de Droit administratif* 4 (6):908-916. See p. 912.

¹³⁹ *Ibid.* Genevois p. 915.

¹⁴⁰ *Ibid.* and op. cit. Bonichot, 1989; Abraham, 1989 #324; and Hubac, Sylvie, and Yves Robineau. 1988. *Droit administratif: vues de l'intérieur. Pouvoirs* 46:113-126.

uncomfortable for the French legal community because it revealed a breach of legal logic and made the legal process look subjective. Ronny Abraham, a professor at the *Ecole Nationale d'Administration* and a member of the *Conseil d'État*, revealed the extent of the discomfort within the legal community:

This discord is very troublesome... a disputant can receive a different solution depending on if the case involves administrative or civil jurisdiction: in one case it will be decided by the rules of the legislature and in the other by rule of the treaty. But intellectually, such different treatment is not justified by any account. It is without relation to logic which should rule over the division of competences between the two legal jurisdictions. That one jurisdiction would apply private law and the other public law, that corresponds to the logic of the system. But that one would apply the treaty and the other national law, that doesn't correspond to any logic.¹⁴¹

And in 1987 the *Conseil d'État's* jurisdiction was attacked by Parisian lawyers who wanted the *Conseil d'État's* authority to hear appeals against Council of Competition decisions to be transferred to the judiciary branch. The lawyers had a general dislike of the *Conseil d'État*,¹⁴² but the *Conseil d'État's* anti-ECJ stance fueled the lawyer's actions since much of French competition law was being made at the EC level.¹⁴³ The success of the lawyers revealed the *Conseil d'État's* efforts to stem the encroachment of European law into national law were not winning allies within the French legal community, business community or legislature.

The law transferring the jurisdiction from the *Conseil d'État* to the Parisian *Cour d'Appel* ended up in front of the *Conseil Constitutionnel*, which upheld it while offering the *Conseil d'État* a carrot to change its *Semoules* jurisprudence. Before the *Conseil Constitutionnel's* 1987 decision, the legislature had the power to eliminate the *Conseil d'État* as an institution by passing a simple law, and there was always a constituency in favor of eliminating the separation of the

¹⁴¹ Ibid. Abraham p. 120.

¹⁴² The administrative legal system is very opaque and not well liked in France. Only a very few number of lawyers are licensed to practice at the *Conseil d'État*, and *Conseil d'État* decisions are short and cryptic, so that plaintiff usually has little idea why they won or lost the case. There is also the sense that *Conseil d'État* is not a neutral arbiter of disputes with the administration. As Radamaker noted

[i]t would be naive... to pretend that the very close relations between the French administration and the administrative courts had nothing but advantages. In fact, in cases where a choice exists, French litigants have traditionally shown a marked preference for the judicial courts, not only because delays are generally longer in the administrative courts, but also because of a persuasive conviction among the French that the latter are excessively involved with and dependent upon the administration they are supposed to judge. (op. cit. Radamaker (1988) pp. 145-146)

¹⁴³ Op. cit. Galmont (1990).

administrative and judiciary branch by folding all legal disputes into the judiciary branch.¹⁴⁴ The *Conseil Constitutionnel* allowed the transfer of jurisdiction in the case at hand. But to dispel the idea the *Conseil d'État's* jurisdiction could be entirely transferred to the judiciary branch, it stated that the existence and role of the *Conseil d'État* was itself part of the separation of powers.¹⁴⁵ The *Conseil Constitutionnel's* decision meant that to eliminate the *Conseil d'État* would require a much higher threshold of challenging the separation of powers through a constitutional amendment. This decision was mostly a token, but it contributed to weakening one of the key arguments against the *Conseil d'État* enforcing EC law supremacy—that conflict with the legislature was hazardous—and embolden the *Conseil d'État* to change its opposition to EC law supremacy.

The government pushed jurisprudential change through its appointment of Marceau Long as the new head of the *Conseil d'État* in 1987. Long had a more open attitude towards Europe, advocating that “One should not be cold in the face of European law, but come to know it and contribute to its creation.”¹⁴⁶ Long instituted some of the most significant changes within the *Conseil d'État* since the reforms of De Gaulle, creating a system of lower administrative courts and introducing European studies into the training of *Conseiller d'État*. The government also pushed a reconsideration of the *Conseil d'État's* position by commissioning the *Conseil d'État* to do a thorough study of the relation between international law, national law, and European law. In its letter of November 21, 1988, Prime Minister Rocard stressed that:

The construction of Europe is of paramount importance for the entire French society. The government wishes to consider all the elements necessary to take decisions in this matter. The realization of the internal market... requires in particular that we pursue and amplify efforts to adapt our internal law to the demands of the Community. It would be fruitful if state actions in this area were guided by a synthetic vision, the creation of which it seems to me falls within the vocation of the *Conseil d'État* ...

Rocard suggested that it would be nice to have the first reflections in the spring of 1989, during the French presidency of the EC.¹⁴⁷

¹⁴⁴ Ibid. manuscript p. 19-20.

¹⁴⁵ Conseil Constitutionnel decision of January 23, 1987. *Revue française du droit administratif* 1987:287. For commentary on this decision see Genevois, 1987 (op. cit.)

¹⁴⁶ Dauvergne, Alain. “Mutation” au Conseil d'Etat. *Le Point*, November 12, 1989.

¹⁴⁷ Letter from Prime Minister Michel Rocard to Mr. Marceau Long, vice president of the Conseil d'État. Paris, November 21, 1988. Document 978/SG.

Long spearheaded a re-assessment of the *Conseil d'État's* European strategy in light of the new legal and political context in France.¹⁴⁸ According to the *Conseil d'État's* Secretary General, the *Conseil d'État's* isolation within France had become too much once the *Conseil Constitutionnel* took the side of the *Cour de Cassation*. 'The idea that the *Conseil Constitutionnel* could decide one way when it worked as an electoral court, and the *Conseil d'État* another way was not acceptable.' The Semoules jurisprudence had also become increasingly ineffective: 'it was designed to protect the law, but in the end the law wasn't protected, but rather was more vulnerable. Other French courts were setting aside the law, as well as international courts. The law was becoming fragile and vulnerable to these other courts, and the *Conseil d'État's* refusal to review the compatibility of the law with international treaties only exacerbated the problem. It was better that the *Conseil d'État* reviewed the law and establish its compatibility with international treaties than to let international courts do this.'¹⁴⁹ The concern pertained both to the ECJ and the European Court of Human Rights (ECHR). The Secretary General gave the example of a case where the French law regarding the marketing of the abortion pill RU486 was challenged by an anti-abortion group. The *Conseil d'État* found the law to be compatible with the European Convention of Human Rights, but if it had refused to review the issue the feeling was that the anti-abortion group would have gone straight to the European Court of Human Rights. As it was, the anti-abortion could have still gone to the ECHR to try for an outcome they preferred. But it was more likely that the ECHR would uphold the *Conseil d'État's* jurisprudence so as not to create a conflict and in either case, a national court would have decided the issue first so that there would have been a national counter-precedent.

Challenging the authority of European law and ECJ jurisprudence had failed to block the encroachments of EC law into French law. With courts in other member states influencing the development of legal integration, with other French courts sending references and applying ECJ jurisprudence in the French realm, and with more and more French law being made at the

¹⁴⁸ Alain Dauvergne noted in an article in *Le Point* that while Long may not have been the sole artisan of the *Conseil d'États'* European mutation', "he is the principle motor behind it." (op. cit. 1989).

¹⁴⁹ Interview with the Secretary General of the *Conseil d'État*, July 5, 1994 (Paris).

European level, the *Conseil d'État's* opposition to EC law supremacy was costing it political and legal influence.¹⁵⁰ Long summarized the *Conseil d'État's* new perspective: "We do not feel 'threatened' by the existence of European law. Especially because in integrating it into our system of national law it is possible for us to influence it".¹⁵¹ Reversing the *Semoules* jurisprudence became a piece of the *Conseil d'État's* strategy to gain more influence over the development of European law.

The *Conseil d'État* chose to issue its long awaited reversal in a case where the *Conseil d'État*—like the *Conseil Constitutionnel*—sat as an election judge.¹⁵² The substance of the case was insignificant, and the plaintiff's arguments were quite easy to dismiss. As *Commissaire du Gouvernement* Frydman put it:

the whole difficulty is then to decide whether, in conformity with your settled case law, you should dismiss this second argument by relying on the [French] 1977 Act alone, without even having to verify whether it is compatible with the Treaty of Rome, or whether you should break fresh ground today by deciding that the Act is applicable only because it is compatible precisely with the Treaty.

Frydman stated that he had no intention to call into question the solid legal basis of the *Semoules* jurisprudence, but he suggested "that a different reading of Article 55 is certainly equally conceivable in law and is infinitely preferable from the viewpoint of expediency." As in the *Cohn-Bendit* case, this framing of the case by the *Commissaire du Gouvernement's* is what made the otherwise quite modest decision so significant.

Frydman claimed that Article 55 should be seen as implying that judges "are given the task of setting aside statutes which are contrary to treaties, and for this purpose they have a genuine constitutional power which, though only implied, seems to me to be nevertheless intrinsically contained in the text." As Kovar put it, from a legal perspective the "argumentation developed by M. Frydman certainly does not have novelty for its principal merit." This was the same argument Procureur Pepy had used in 1950, which had rejected by *Commissaire du Gouvernement*

¹⁵⁰ Op. cit. Abraham (1989) p.171; Buffet-Tchakaloff (1984) p.318.

¹⁵¹ Desaubliaux, P.-H. Marceau Long: L'Europe du droit se construit. *Le Figaro*, May 21, 1992.

¹⁵² Raoul Georges Nicolo and another Conseil d'État decision of October 20, 1989. M. Frydman, *Commissaire du Gouvernement*. *Common Market Law Report* 1990, vol. 1, p. 173-191

Questiaux in 1968 and refused by the *Conseil d'État* throughout the 1970s and 1980s.¹⁵³

Frydman admitted that this interpretation of Article 55 created challenges to the traditional French notion of the separation of powers, and that it led to the bizarre outcome that Treaties were better protected than the Constitution. In the past these arguments had been used to support that the constitution could *not* be read as empowering judges to conduct judicial review. Frydman, however, put responsibility for these problems on the designers of the Constitution saying that “this violation has its foundations in the Constitution itself” and “it is obviously not your task to correct any imperfections it may have.”

Frydman’s arguments as to why it was expedient for the *Conseil d'État* to change its jurisprudence provide insight into how much the *Conseil d'État*’s institutional interests vis-à-vis legal integration had changed. In the *Semoules case Commissaire du Gouvernement Questiaux* had insisted that even though its refusal to enforce international law supremacy would have made Article 55 “a dead letter”, the Administrative Court could not criticize or misconstrue a statute. To do so would be to illegitimately “alter...by its mere will, its institutional position.” In 1989 Frydman argued that the *Conseil Constitutionnel* had created a constitutional void by refusing to enforce the supremacy of international law and it was “inconceivable that a constitutional provision should remain a dead letter...on the ground that no court considers it has jurisdiction to secure compliance with it.”

Despite the *Conseil d'État*’s efforts to block it, European law had come in. As Frydman made clear, the entire legal and political context had changed. In 1968 *Commissaire du Gouvernement Questiaux* had argued that it was hard to imagine that the legislator should be denied the authority to act in “whole sections of the life of the country because treaties have appeared in the area in question” or that national law should be “deprived of effect by the judge, and on the basis of text which he is not fully entitled to interpret.” In 1989 Frydman acknowledged:

It cannot be repeated often enough that the era of the unconditional supremacy of internal law is now over. International rules of law, particularly those of Europe, have gradually conquered our legal universe, without hesitating furthermore to encroach on the competence of Parliament as

¹⁵³ Kovar, Robert. 1990. Le Conseil d'État et le droit communautaire de l'état de guerre à la paix armée. *Recueil Dalloz-Sirey*:57-64. See p. 61.

defined in Article 34 of the Constitution. In this way certain entire fields of our law such as those of the economy, employment or protection of human rights, now very largely originate genuinely from international legislation...

The main impetus for the *Conseil d'État*'s jurisprudential reversal was to regain the legal initiative from other courts. Frydman pointed out that it was "somewhat paradoxical to see the *Conseil d'État* refusing [its authority to enforce EC law supremacy] because of its humility with regard to the legislature when every day judiciary courts of first instance examine, by this indirect approach, the validity of the laws which they have to apply." Frydman also intimated that the *Conseil d'État*'s refusal was essentially ceding the interpretation of the compatibility of French law with international law to international tribunals. Frydman urged:

at a time when the European Commission and the European Court of Human Rights are for their part beginning occasionally to examine the compatibility of French laws, with the 1950 convention, that you should yourselves assume this function and break their monopoly.

Indeed a large part of the *Commissaire du Gouvernement*'s argument seemed to be designed to seize the interpretive initiative from the ECJ.

Frydman strongly rejected the ECJ's doctrine on EC law supremacy, arguing that the ECJ's jurisprudence as has "no legal foundation whatever—and this is not the least of its disadvantages..." He made it clear that Article 55 of the French constitution was the only legal basis for national judges to enforce EC law supremacy, stating "one would seek in vain for any such enabling power in the EEC treaty." Frydman rejected the ECJ's whole philosophy, arguing:

I do not think you can follow the European Court in this judge-made law which, in truth, seems to me at least open to objection. Were you to do this, you would tie yourself to a supranational way of thinking which is difficult to justify, to which the Treaty of Rome does not subscribe expressly, and which would quite certainly render the Treaty unconstitutional, however it may be regarded in the political context.

Part of his Frydman's rejection of the ECJ's doctrine was an attempt to ease the *Conseil d'État*'s ego by making it clear that a reversal of the *Conseil d'État*'s jurisprudence would not be because of ECJ pressure. His argument that a 'supranational reading of the EC Treaty would render the Treaty unconstitutional' was designed to assert the *Conseil d'État*'s independence from the ECJ.

Dehaussy argued:

"Internationalism" is imprinted in the Nicolo decision, as opposed to "Community." Once again the *independence of the national judge* is affirmed not only with regard to other state powers, but also with regards to the ECJ: (the ECJ) cannot be taken for a supreme federal court whose

decisions impose themselves on national courts, even in the limited competences of the Communities. The independence of the judge, is also *a manifestation of the national independence*, in the face of possible encroachments - which have already been confirmed according to M. Frydman- by the community institutions and notably the ECJ.¹⁵⁴

Sabourin concurred with this analysis, arguing

the *Conseil d'État* felt the need for itself to control the superiority of international norms over laws to be on equal footing with the jurisprudence, at times sources of heavy distortions, issued by the European Court of Justice and the European Court of Human Rights.¹⁵⁵

Kovar saw the decision as mainly designed to fix limits on the ECJ.

The excessive vigor used by the Commissaire du Gouvernement should, perhaps, be explained by the constant calculation to capitalize on the reversal of jurisprudence by the *Conseil d'État* by radically contesting the authority of the European Court of Justice. By the intermediary of the Commissaire du Gouvernement, the *Conseil d'État* could also have wanted to fix the limits that it is not disposed to cross over, even if the Court authorizes it to step over.¹⁵⁶

Ending his address, Frydman said "if you agree [with my arguments], you should then, in the case before you today, take care to point out that the Act of 7 July 1977 is compatible with the Treaty of Rome before relying on its provisions against Mr. Nicolo's arguments." The *Conseil d'État* did just this. First it affirmed the compatibility of the disputed act with the French 1977 act, then it said:

Pursuant to Article 227(1) of the Treaty of 25 March 1957 establishing the European Economic Community, 'this Treaty shall apply to... the French Republic'. The rules set out above, laid down by the Act of 7 July 1977, are not incompatible with the clear stipulations of the above mentioned Article 227(1) of the Treaty of Rome.

The *Nicolo* decision signaled that the *Conseil d'État* was relenting in its opposition to enforcing EC law supremacy. The *Conseil d'État* applied its new jurisprudence one year later in its *Boisdet* decision where for the first time it ruled a statute to be illegal because it violated a prior EC regulation.¹⁵⁷ It also issued a series of decisions more "friendly" to European law and to its own authority vis-à-vis international law. Its 1989 *Alitalia* decision enabled individuals to draw directly on EC directives to challenge national policy.¹⁵⁸ The *GISTI* decision gave the administrative judge the authority to interpret EC treaties without referring them to the Foreign Ministry, and the

¹⁵⁴ Dehaussy, Jacques. 1990. La supériorité des normes internationales sur les normes internes: à propos de l'arrêt du Conseil d'État du 20 October 1989, *Nicolo*. *Journal du Droit International*:5-33. See p. 29.

¹⁵⁵ Sabourin, Paul. 1990. Le jardin à la française du Conseil d'État. *Recueil Dalloz Sirey*:136-141. See p. 137.

¹⁵⁶ Op. cit. Kovar (1990)

¹⁵⁷ Conseil d'État decision of September 24, 1990. *Common Market Law Review* 1990(1):336.

¹⁵⁸ *Compagnie Alitalia* Conseil d'État decision of February 3, 1989. *C.M.L.R.* 1990(1):248. For an analysis of the *Alitalia* decision see: Tatham (op. cit. 1991)

Sociétés Rothman et Philip Morris decision signaled the acceptance of the ECJ's controversial *Francovich* jurisprudence, giving the *Conseil d'État* the authority to find state liabilities for breaches of Treaty law and finding that statutes incompatible with EC directives are illegal.¹⁵⁹

The decision did not, however, mean that the *Conseil d'État* would accept all ECJ jurisprudence. Legal scholars acknowledged that the *Conseil d'État* still had many legal tools to thwart ECJ jurisprudence. Lachaume argued

one can be sure that administrative judges will use all the resources of its craft to reconcile the rules facing it and that the operationalization of the principle of supremacy will not constitute but a last resort used only when reconciliation turns out to be truly impossible.¹⁶⁰

The *Conseil d'État* also changed its practice regarding EC law in its non-judicial functions. The *Conseil d'État* has used its access to public bodies to influence how EC law was presented and interpreted in the French academic and professional environment. Its 1992 report called for an overhaul in how EC law is taught in French universities and the *Conseil d'État* convinced the Prime Minister's cabinet to create a special "European Center of Strasbourg" for initial training of ENA students and for continuing education of civil servants from France and other countries to learn about European rules and the administrative systems of the different member states. For the members of *CEDECE* (*Commission pour l'étude des Communautés Européenne*) who had been working on EC legal training for 30 years, the *Conseil d'État*'s newfound interest in EC law education was both arrogant and a threat. *CEDECE* handled the issue diplomatically, but in interviews the pro-integration academic community expressed concerns that the *Conseil d'État* was trying to appropriate the study of EC law so that they could interpret EC law how they wanted.¹⁶¹

The *Conseil d'État* also negotiated for itself a new role in the EC policy-making process. In its 1992 study researchers at the *Conseil d'État* actually counted the number of EC laws in existence, finding:

¹⁵⁹ Conseil d'État decision of June 29, 1990. *Revue Générale de Droit International Public* 1990:879-911.
Conseil d'État decision of February 28, 1992. For an analysis of the importance of the GISTI decision, see: Buffet-Tchakaloff, Marie France. 1991. L'interprétation des traités par le Conseil d'État: L'arrêt Gisti. *Revue Générale de Droit International Public* (1):109-124.

¹⁶⁰ Lachaume (op. cit. 1990) p. 393

¹⁶¹ Interviews with the leadership of *Conseil d'État*, May 16, 1994, Paris.

At the end of the year, there were within the Community 22,445 EC regulations, 1675 EC directives, 1198 EC agreements and protocols, 185 recommendations of the Commission or Council, 291 Council resolutions, and 678 Communications in force...The rules which a Frenchman must respect are of European origin one out of six times. And this proposition is susceptible to a rapid increase if the current flow of rules from the Commission and the Council is maintained. In the course of 1991, 3925 new regulations, 106 directives, 71 communications, 26 resolutions, 10 recommendations, without counting 82 accords and protocols (were issued)...The Community introduces every year in our legal corpus more rules than the French government (54% vs. 46%). Today in our national law, more than one new text in two is of Brussels origin. *It is urgent to be aware (of this) if one wants to play a more active role in the legal construction in Europe.*¹⁶²

As part of the constitutional revision for the Maastricht Treaty, a clause was inserted into the French constitution which requires the French government to present to the National Assembly and the Senate drafts of Community acts while they are in the negotiating process, in order to give the parliament a greater voice in EC policy-making.¹⁶³ The *Conseil d'État* convinced Prime Minister Beregovoy and then Balladur to give the *Conseil d'État* a new authority to review all EC drafts sent to the French cabinet to see if they were of a legislative nature and thus needed to be referred to the Parliament. The *Conseil d'État* does more than simply decide on procedural rules; it also reviews the utility of the draft legislation, its compatibility with the EC Treaties, and the possible applicability of subsidiarity to the policy area. It identifies the areas of national law that the proposed legislation might effect and lists all the consequences the legislation might entail, assessing the benefits and costs of the proposed legislation. Thus it helps frame how the proposed law is interpreted by political bodies. This procedure allows for an analysis of the legislation within France, before EC legislation is negotiated and agreed to. According to vice-president Marceau Long, this new role is important because it means that EC law is not elaborated by specialists but rather by those who prepare and judge national law on the same issues, and it allows the *Conseil d'État* to “preserve the balance of the French legal system” by contributing to the elaboration of EC law.¹⁶⁴ It can be expected that the *Conseil d'État* will try to stem legal integration by pushing for the application of the subsidiarity principle and by writing into EC legal texts phrases designed to thwart expansive ECJ interpretations.

¹⁶² 1992. Rapport Public: Conseil d'État. See p. 16-17. Translation by the author, emphasis added.

¹⁶³ Vedel, George. 1994. Revisions to the French Constitution (Article 88) for French-EC Affairs. Speech given at the Mentor Group Conference, Conseil d'État, Paris. July, 1994.

¹⁶⁴ Long, Marceau. 1994. The European Community and EC Law: The Responses Given by the Conseil d'État. Speech given at Mentor Group Conference, Conseil d'État, Paris. July, 1994.

The reversal of *Conseil d'État* opposition to EC law supremacy was based on a new strategic calculation in a new institutional context, where the *Conseil Constitutionnel* was the authoritative interpreter of French constitutional law, where half of French law was EC law, where first instance judiciary courts were shaping the interpretation of EC law, and where politicians were tolerating judicial review and advocating greater European integration. The doctrinal interpretation adopted by the *Conseil d'État* had been around since the 1950s, and there was no objective change in the legal texts which would have implied that a new interpretation was warranted. The reversal can only be explained by extra-legal factors pertaining to the change in the *Conseil d'État's* institutional context and the redefinition of the *Conseil's* interests.

Inter-Judicial Politics as a Force of Legal Integration from 1964-1992

Each of the four rounds of legal integration examined above contributed significantly the development of national legal bases for French judges to enforce EC law supremacy by creating and eliminating stumbling blocks to legal integration. Table 5.4 summarizes the challenges to EC law supremacy and the advances in French legal doctrine in each round of integration, as well the interests of the different French courts and of the governing bodies in each round.

Table 5.4: Summary of Rounds of Legal Integration

Case Law	Challenges to EC law Supremacy	Advances in French Legal Doctrine	Interests of French Courts	Interests of Governing Bodies
<p>Round 1: 1962-1970 1964 <i>Shell-Berre</i> 1967 <i>Petitjean</i> 1968 <i>Semoules</i></p> <p>ECJ: (-) <i>Costa</i> (rejected) <i>Van Gend</i> (accepted)</p> <p>Context Change: New Constitution & EC Membership do not change traditional role of judge.</p>	<p>* Do French judges have to refer EC legal questions to ECJ? * Does Article 55 of the French Constitution empower judges to review the compatibility of national law with EC law? * Can French judges apply EC law supremacy over subsequent national law?</p>	<p>* French judges can interpret EC law on their own, without reference to ECJ. * Article 55 is addressed to political bodies only. It does not empower judges to review the compatibility of French law with international law. * French judges can not apply EC law over subsequent national law.</p>	<p>CE- (+) Avoid a reference to the ECJ. (+) Avoid conflict with political bodies.</p> <p>C.de C (+) Avoid reference to the ECJ.</p> <p>CC Not involved in international legal questions in 1960s.</p>	<p>(+) Keep political issues away from ECJ. (+) Maintain French autonomy and French policy.</p>
<p>Round 2: 1970-1976 1970 <i>Ramel</i> 1975 Abortion decision 1975 <i>Jacques Vabre</i> 1976 <i>Von Kempis</i></p> <p>ECJ: (+) <i>Costa</i> <i>Liticke</i></p> <p>Context Change: Both CC and C de C assert authority to conduct judicial review. Ball in politician's and CC's court to reverse court actions.</p>	<p>* Is the CC the only French legal institution with the authority to enforce Article 55? * Is enforcing EC law supremacy conducting constitution review? * Are French judges empowered to apply EC law supremacy?</p>	<p>* CC is not empowered to review compatibility of French law international treaties. Decision is silent on what this means for other courts. * Unclear if enforcing EC law supremacy is conducting constitutional review. * French judges are empowered to apply EC law supremacy.</p>	<p>CE (-) Have other French courts accept its jurisprudence. C.de C (+) Gain new powers of judicial review through enforcing EC law supremacy. (+) Make important decisions, seize legal initiative from CE. CC (+) Avoid getting embroiled in international legal matters. * No defined interest regarding what other courts do.</p>	<p>(-) No authority for national courts to set aside national law.</p>

For national courts

+ = autonomy for action and/or supreme jurisdictional authority maintained
 - = autonomy for action and/or supreme jurisdictional authority undermined
 * = no institutional interest at stake

For ECJ

+ = jurisprudence accepted, ECJ authority accepted
 - = jurisprudence rejected, limits to EC law and ECJ authority created

For Government

+ = Government's goal achieved, political autonomy maintained
 - = Government's goal not achieved, political autonomy undermined

CC = Conseil Constitutionnel CE = Conseil d'État C de C = Cour de Cassation

<p>Round 3: 1970-1981 1974 <i>Charmasson</i> 1977 CC decision 1978 <i>Cohn-Bendit</i> 1981 Aurillac Amendment</p> <p>ECJ: (-) <i>Simmenthal</i> <i>Van Duyn</i> (Direct Effect of Directives)</p> <p>Context Change: Judicial review will be tolerated by politicians.</p>	<p>* Does the special nature of the EC Treaty empower French judges to enforce EC law supremacy? * Is ECJ jurisprudence binding on national courts? * Do national courts have to refer disagreements to ECJ? * Do Directives create direct effects? * Are French judges prohibited from applying EC law supremacy?</p>	<p>* EC Treaty is a treaty like all others. It does not empower French judges to enforce EC law supremacy. * ECJ jurisprudence is not binding on national courts. * National courts do not have to refer disagreements to ECJ. * Directives do not create direct effects. * Aurillac amendment fails—no sanction against C de C's Jacques Vabre decision.</p>	<p>CE (+) Avoid reference to ECJ. (+) Show ECJ limit of is authority. <u>C.de C</u> (-) Have <i>Vabre</i> jurisprudence accepted by CE (rejected again in 1979). (+) No sanction by politicians of <i>Vabre</i> jurisprudence. <u>CC</u> (+) Maintain supreme authority over EC treaties by creating potential limits to integration. * Interests regarding if other national courts should enforce EC law supremacy are evolving as CC gains more independence and authority.</p>	<p>(-) Gaullist faction in national assembly loses bid to sanction C de C, does not succeed in protest of detailed directives. (+) Government quells Gaullist attempts to thwart government implementation of EC policy.</p>
<p>Round 4: 1982-1992 1986 CC decision 1987 CC decision 1988 CC decision 1989 <i>Alitalia</i> 1989 <i>Nicolo Costa</i> <i>Van Duyn</i> (Direct Effect of Directives) Context Change: Politicians want CE enforcing EC law. CC endorsed <i>Vabre</i> jurisprudence making CE isolated within French legal system.</p>	<p>* Does Article 55 empower national courts to enforce EC law supremacy?</p>	<p>* Article 55 empowers national courts to enforce EC law supremacy. * Back door opened for individuals to challenge French implementation of directives.</p>	<p>CE (-) Jurisdiction in area of competition law transferred to Cour d'Appel. (-) CC sides with <i>Vabre</i> jurisprudence, pushes change on CE. (+) New role to play in legal integration. (+) New role to play in EC policy-making process. <u>C.de C</u> (+) Jurisprudence accepted by CE and CC. <u>CC</u> (+) French constitutional provision no longer dead letter. (+) CE changes <i>Semoules</i> jurisprudence, ends divergence in French legal practices.</p>	<p>(+) Create more receptive legal environment in France. (+) Satisfy Parisian lawyers by transferring jurisdiction over competition law to Cour d'appel.</p>

For national courts
+ = autonomy for action and/or supreme jurisdictional authority maintained
- = autonomy for action and/or supreme jurisdictional authority undermined
* = no institutional interest at stake
CC = Conseil Constitutionnel

For ECJ
+ = jurisprudence accepted, ECJ authority accepted
- = jurisprudence rejected, limits to EC law and ECJ authority created
C de C = Cour de Cassation

For Government
+ = Government's goal achieved, political autonomy maintained
- = Government's goal not achieved, political autonomy undermined

Round 1 raised the questions about whether national courts of last resort had to send all EC legal issues to the ECJ, and if national courts could apply EC law over national law. The *Conseil d'État* did not want to refer to the ECJ touchy political issues. It applied the Doctrine of Acte Clair to avoid reference to the ECJ, although the legal issues stake at were far from clear, establishing the precedent that national courts could interpret EC law on their own. The *Conseil d'État* also refused its own authority to enforce international law over subsequent national law. This meant that the *Conseil d'État* did not have to even investigate possible conflicts between EC law and national law. These decisions were influenced by the larger French political climate, but they failed to take account of the new legal situation created by EC membership and the new constitution, taking the new opportunity presented by EC law supremacy to rule out jurisprudential change. The *Cour de Cassation* was also avoiding references to the ECJ. The *Conseil Constitutionnel* was not involved in international legal issues. The *Conseil d'État's* decisions satisfied De Gaulle who did not want EC membership or judges to create any constraints on national policy, especially policy pertaining to Algeria.

In Round 2 the *Conseil Constitutionnel* started to assert its independence, introducing judicial review into France and opening a new chapter in French judicial politics. When an issue of international law arose, however, the *Conseil Constitutionnel* shunned any role enforcing international law supremacy against the legislature. The *Cour de Cassation* used the *Conseil Constitutionnel's* decision as support for its position that enforcing EC law supremacy was not violating the prohibition against French judges conducting judicial review. The *Conseil d'État* found the *Cour de Cassation's Vabre* jurisprudence to be politically motivated and a misreading of the *Conseil Constitutionnel's* 1975 decision. It hoped that politicians would sanction the *Cour de Cassation*, and that the *Conseil Constitutionnel* would make it clear that the *Cour de Cassation's* interpretation was wrong. The *Cour de Cassation's* decision changed the French legal context by introducing an authoritative counter interpretation of the French constitution, supposedly supported by the *Conseil Constitutionnel*, and by putting the ball in politician's court to reverse the *Vabre* precedent.

In Round 3 the *Conseil d'État*, drawing strength from parliamentary attacks on the ECJ, became openly more antagonistic towards the ECJ. It continued to use the Acte Clair doctrine to avoid references to the ECJ, and it began to interpret EC law in ways which clearly contradicted ECJ jurisprudence. The high water mark of its defiance was the *Conseil d'État*'s refusal to make a reference to the ECJ in the *Cohn-Bendit* case and its blatant rejection the ECJ's doctrine on direct effects. At first it looked like other political and legal institutions shared the *Conseil d'État*'s concerns. The parliament resented detailed EC directives and Gaullist factions in the parliament wanted the government to adopt more anti-ECJ positions. The *Conseil Constitutionnel* refused to recognize the special nature of the EC and rejected the notion that sovereignty had been transferred to the EC level. In the National Assembly the Aurillac amendment was passed overwhelmingly. But the Aurillac amendment died in the Senate, and in the 1980s the *Conseil Constitutionnel* brought its jurisprudence into line with the *Cour de Cassation*'s *Vabre* decision. The *Conseil d'État* had played its highest card and lost.

In Round 4 pressure mounted on the *Conseil d'État* to reverse its *Semoules* jurisprudence. The *Conseil Constitutionnel* incorporated hints that the *Conseil d'État* should change its doctrine into its legal decisions in 1986, 1987 and 1988. The government had made European integration one of its highest policy priorities, and Marceau Long was brought in to reform the *Conseil d'État*. The *Conseil d'État* accepted a role enforcing EC law supremacy, in order to regain the initiative from other courts and "break the monopoly" of the ECJ. It also created a role for itself in training practitioners about European law, and in the EC policy-making process. The *Conseil d'État*'s new jurisprudence was welcomed by the government. The parliament gained a larger role in the EC policy-making process through the new Article 88 of the French constitution, and wanted the *Conseil d'État* to ensure that legislative texts would be presented to it. The government wanted the judicial stance to be more in line with its political goals, and was happy that the reversal came during the French presidency of the EC. It can be expected that the *Conseil d'État* will try to influence the expansion of European law from the inside, by promoting the principle of

subsidiarity and by writing into EC legislation clauses which limit the way the legislation can be interpreted by the ECJ.

IV. Explaining Legal Integration in France

All three courts were working from the same legal documents (the French constitution and the EC Treaty), and they were operating in the same overall political context. But they adopted different positions regarding their authority to enforce EC law supremacy, and changed these positions over time. By way of conclusion, this section considers the role political factors, the ECJ, legal reasoning arguments, pro-integration legal lobbies and competition between courts on the process of legal integration in France.

The Role of Political Factors

It is hard to say that French judges were responding to French definitions of national interest throughout the different rounds of legal integration, or that national interest explains the divergent positions taken by French courts on the issue of EC law supremacy across time. But political concerns clearly influenced judicial interpretations in France. In some ways it is to be expected that French courts would take political concerns into account. After all, it used to be the official position that French courts could not question the authority of the French parliament by questioning or criticizing the French laws.

Politicians most directly influenced the process of legal integration the 1960s. In the *Shell-Berre* and *Semoules* decisions the *Conseil d'État* adopted legal interpretations which twisted the meaning of EC law in order to maintain national policy and avoid conflicts with De Gaulle over French Algeria policy.

After 1970, however, the ability of politicians to influence the judiciary waned and national interest or political concerns seem largely unable to explain French judicial behavior. This is especially true as far as judiciary branch was concerned. The *Cour de Cassation* did not hesitate to embrace EC law supremacy at a time when French politicians were still relatively unenthusiastic

about European integration. After the failed Aurillac amendment, it was quite clear that politicians would not attack French courts for accepting a role enforcing EC law supremacy. And indeed the *Cour de Cassation* stood up to French politicians numerous times in the 1980s, enforcing EC law supremacy despite politicians' clear desire to maintain French law.

The *Conseil d'État* was still voicing its national sovereignty concerns in the 1970s, but it is unclear that these concerns were a reaction to French national interests. By the mid-1970s, the Gaullist still protested against European integration very loudly, but their point of view was hardly representative of French political sentiment. That Michel Debré's hard core Gaullist faction applauded the *Conseil d'État's* jurisprudence does not necessarily mean that the *Conseil d'État* was responding to definitions of national interest. At most the *Conseil d'État* was capitalizing on or emboldened by the political protests in the Parliament. If the *Conseil d'État* (and the Gaullists) expected their positions to garner political wider support, they had miscalculated. Neither the executive branch, the broader the political elite, the French business community or the French legal community seemed to have held much sympathy for their position. The French Prime Minister was quite pro-integration and clearly did not advocate the position of the Parliament or the *Conseil d'État* and French lawyers lobbied to have competition policy issues removed from the *Conseil d'État's* authority. Yet on numerous occasions in the late 1970s and throughout the 1980s the *Conseil d'État* still refused to change its jurisprudence on EC law supremacy. The relative disjunction between judicial behavior and political behavior implies that more than national interest concerns were shaping the *Conseil d'État's* behavior. The more likely explanation of the *Conseil d'État's* intransigence vis-à-vis the ECJ in this period was that its interest in protecting its autonomy and influence within the French legal process led it to reject EC law supremacy.

The best evidence for the neo-realist case comes in 1989 when the Socialist government clearly conveyed that it wanted the *Conseil d'État* to change its jurisprudence. It is hard to definitively say if the letter from Rocard pushed the *Conseil d'État* into its decision to reverse its opposition to enforcing EC law supremacy. At that point there were many pressures pushing the

Conseil d'État to change its jurisprudence, including inter-judicial politics and the fact that French law was increasingly of European origin.

The Role of the ECJ

The ECJ had a much less prominent role in legal integration in France. In Germany, the ECJ facilitated legal integration through its decisions which expanded the reach and penetration of European law into legal areas which had traditionally been governed only by domestic law. Lower courts were the motor of national doctrinal change, promoting the expansion of EC law through preliminary ruling references, pulling EC law into new areas of national law, and pushing higher court jurisprudence into line with ECJ jurisprudence by circumventing Federal courts and playing the ECJ and the Constitutional Court off against each other. The relatively less significant role of the ECJ and appeals to the ECJ in France was in part a result of apathetic and timid French lawyers who did not raise innovative legal cases or arguments, and the French legal system's institutional structure which was less amenable to a lower court-higher court competitive dynamic.

The lack of a lower court/higher court competition kept the ECJ out of French debates over EC law. But the existence of the ECJ and the EC legal system was in itself in a force for legal integration in France. Traditionally French courts went to the Foreign Ministry to get interpretations of unclear international treaties or to ask if there was reciprocal application of the treaties. But because the EC Treaty made the ECJ the ultimate interpreter of the EC Treaty, a reference to the Foreign Ministry on an EC legal issue was unthinkable. And because there was an EC wide mechanism to ensure reciprocity, the requirement of reciprocity did not apply to EC law. Because French courts could not legitimately turn to the Foreign Ministry, French courts were forced to resolve their interpretive disagreements with the ECJ on their own.

The existence of the ECJ's jurisprudence on EC law supremacy also created an external pressure on French courts. The ECJ's doctrine lent legal authority and urgency to internal demands for national doctrinal change, and there was a clear desire on the part of the *Cour de Cassation* and the *Conseil Constitutionnel* (in the 1980s) to avoid conflicts between national court jurisprudence

and ECJ jurisprudence. The ECJ's efforts to acknowledge the *Conseil d'État*'s concerns, by recognizing the legitimacy of the Acte Clair doctrine in 1982 in its *CILFIT* decision,¹⁶⁵ and by refusing to follow legal logic and extend its doctrine on the direct effect of directives to include “horizontal direct effects” (rights for individuals to invoke against other individuals),¹⁶⁶ also helped eliminate differences between ECJ and French legal doctrine, and de-emphasize what at become a low level inter-judicial war between the ECJ and the *Conseil d'État*.

The Role of Legal Doctrinal Debates

It is hard to argue that legal integration in France was shaped by the persuasiveness of different legal arguments or by debates over legal doctrine. ECJ doctrine regarding the special nature of the EC treaty was rejected by nearly the entire French legal community, with the exception of the pro-integration legal scholars. The more nationally based doctrinal arguments in support of EC law supremacy, such as the argument that enforcing EC law supremacy was merely “applying” the constitution, also did not have a significant influence outside of small pro-integration legal communities. The legal argument which now shares the widest consensus in the French legal community—that Article 55 of the French constitution empowers national judges to enforce EC law supremacy—did not become more legally persuasive over time, it just became more expedient over time as acknowledged by *Commissaire du Gouvernement* Frydman.

Academic scholarship did not succeed in influencing French ordinary court positions as it had in Germany, for outside of the realm of constitutional law legal scholarship does not have the same level of prestige or influence in France as in Germany. It is not widely read. It is rarely cited in legal decision-making. And contributing to doctrinal development is not so highly valued in France compared to Germany. Pro-integration scholars were considered to be biased in their legal interpretation, especially by members of the *Conseil d'État*, and their legal analyses—if read at all—were not taken very seriously.

¹⁶⁵ *SRL CILFIT v. Ministry of Health (I)* ECJ. Case 283/81, (1982) ECR 1119.

¹⁶⁶ Morris, P.E., and P.W. David. 1987. Directives, Direct Effect and the European Court: The Triumph of Pragmatism. *Business Law Review* (April, May):85-88 and 116-118, 135-136.

Academic scholarship did appear, however, to have influence over *Conseil Constitutionnel* decision-making. It was not the pro-integration scholars who had influence. Rather it was the specialized constitutional law scholars and *Conseillers d'État* whose criticism of the *Conseil Constitutionnel*'s legal arguments influenced the *Conseil Constitutionnel* to find more persuasive legal reasoning to support its position.

The Role of Pro-Integration Legal Lobbies

The influence of pro-integration interest groups was mixed.¹⁶⁷ As mentioned above, the doctrinal efforts to hegemonize the French legal discourse were largely unsuccessful. But the pro-integration legal group had more success in jump-starting the process of legal integration through infiltrating the French judiciary. The *Association des Juristes Européen (AJE)* had among its founding members some prominent leaders within the civil and penal branches of the judiciary. As these members worked their way up the legal hierarchy, they came to find themselves in positions of judicial influence which they used to sway judicial decision-making.¹⁶⁸ The best example of this is Adolphe Touffait, who as a judge on the *Cour d'Appel* in Paris sent some of the first references to the ECJ, and as Procureur Général Touffait in the *Cour de Cassation*'s critical *Jacques Vabre* decision argued passionately in favor of EC law supremacy. Some have claimed that without Touffait, the first French high judicial support for EC law supremacy might not have emerged.

¹⁶⁷ Unlike Germany where scholars and practitioners created a single association for the promotion of European law, in France the professions supporting legal integration were institutionally divided. Academics were organized into the *Commission pour l'étude des Communautés Européenne (CEDECE)* and professionals were organized into the *Association des Juristes Européen (AJE)*. *CEDECE* focused on promoting the teaching of European law within the universities, having modest success in changing the academic curriculum although the level of education regarding European law remained abysmally low in France. The *AJE* had more influence promoting doctrinal change by infiltrating the French judiciary.

¹⁶⁸ The founding members of the *AJE* included Henri Teitigen and Robert Lecourt of the *Mouvement Republicain Populaire (MRP)*, both of whom occupied Ministerial posts in the immediate post-war governments, their right hand man Adolphe Touffait, and many high officials at the *Cour de Cassation*. When the *MRP* broke with the Gaullists over De Gaulle's anti-EC press conferences (1961-62), Lecourt was sent into exile at the European Court where he became the reputed inspiration behind the *Van Gend* and *Costa* decisions, and Teitigen returned to the university where he founded *CEDECE*. Touffait had been the chef du Cabinet for Teitigen and for Lord Chancellor Robert Lecourt. The re-emergence of Robert Lecourt on the *Conseil Constitutionnel* in the 1980s is another example of the *AJE*'s infiltration, although the *Conseil Constitutionnel*'s jurisprudence regarding international law was likely changing independent of the appointment of Lecourt.

The *Vabre* decision certainly would have had a different tone and therefore significance if not for Touffait's bold and clear argumentation in favor of EC law supremacy.

The Role of Competition between Courts

In the 1950s and 1960s there seemed to be an agreement that French courts could not review the compatibility of French law with international law. This agreement broke down because different French courts identified their incentives vis-à-vis EC law supremacy differently. In the 1960's, the *Conseil d'État* applied the traditional jurisprudence to EC law, mainly so that it could avoid a reference to the ECJ and avoid being subjugated to the ECJ. In 1975, enticed by the potential of new powers and international prestige identified by the pro-integration Procureur Général Adolphe Touffait, by the *Cour de Cassation* broke from the traditional jurisprudence and re-interpreted the constitution to find a role for itself enforcing EC law supremacy.

Once the *Cour de Cassation* broke ranks, it was much more difficult for the other high national courts to ignore the question of EC law supremacy or to rely on their standard answers. The *Conseil d'État* had insisted that its refusal to accept EC law supremacy was based on the French constitution itself, and motivated by the prudent desire not to enter into conflict with the legislature. The *Cour de Cassation* challenged the *Conseil d'État's* interpretation of the French constitution, and intimated that it's own interpretation flowed directly from the *Conseil Constitutionnel* itself. The *Cour de Cassation's* bold actions also put the ball in politicians' courts to sanction it for abusing its authority and setting aside a national statute. When politicians failed to do so, the political arguments against judges enforcing EC law supremacy lost their force. But the *Conseil d'État* none-the-less clung to its constitutional interpretation, and it refused to accept EC law supremacy or the ECJ's doctrine on the direct effect of directives. It did this out of an institutional animosity towards the ECJ.

The *Cour de Cassation's* acceptance of EC law supremacy changed the political and legal context in France. It revealed the false nature of the *Conseil d'État's* political arguments that enforcing EC law supremacy would violate the prohibition against judges intervening in the policy-

making process. The variation in French jurisprudence also came to create legal inconsistencies, and thus costs associated with maintaining divergent jurisprudence.

When the *Conseil Constitutionnel* came out in support of the *Cour de Cassation*'s interpretation of the French constitution, basically in order to shore up respect for the Constitution and thus its own institutional position, the *Conseil d'État*'s jurisprudential position became even more difficult to sustain.¹⁶⁹ Even Conseillers d'État started to publish their disagreement with the orthodox mantra, and teach at ENA that the *Conseil d'État* was behind the times.¹⁷⁰

Concerns over re-asserting control over the application of international law in France and the process of legal integration in France clearly drove the *Conseil d'État*'s decision to change its long held opposition to EC law supremacy. Its opposition had failed. Instead of protecting French law from the influence of foreign courts, because other French courts were sending references to the ECJ, and because individuals were taking cases directly to the European Court of Human Rights, French law was being influenced by foreign courts. To make matters worse, the *Conseil d'État*'s refusal to play a role enforcing the supremacy of international law had cost it significant influence over how EC law was interpreted in France and over the process of legal integration. As Conseiller d'État Ronny Abraham pointed out: "The intellectual contribution of French law in the construction of community law risks to find itself reduced in a deplorable way if the French jurisdictions persist in an attitude of too much reserve vis-a-vis the Court of Justice"¹⁷¹

Competition was not the only factor influencing judicial positions regarding EC law supremacy, or pressuring the *Conseil d'État* to change its jurisprudence regarding EC law supremacy. But the desire not to turn French legal matters over to the ECJ and not to be subjugated to the ECJ directly shaped the *Conseil d'État*'s and the *Conseil Constitutionnel*'s jurisprudence regarding EC law supremacy. And competition among French courts was an important factor in the evolution of French constitutional interpretation in favor of the Doctrine of EC law supremacy.

¹⁶⁹ Ibid. p. 17-19.

¹⁷⁰ Op. cit. Genevois (1988); Lonichot (1989); Abraham (1989); and Hubac, Sylvie, and Yves Robineau. 1988. *Droit administratif: vues de l'intérieur*. Pouvoirs 46:113-126.

¹⁷¹ Ibid. Abraham (1989) p. 171.

On the one hand, it is not surprising that the French judiciary was more resistant to legal integration than the judiciaries in the other original member states. France has traditionally been a sovereignty jealous country and the idea that an external actor should have a say over domestic policy was especially hard for the French to accept. There was also no tradition of judicial review in France, thus no tradition of any court—national or international—putting limits on the policy-making process. These difficulties make the French case especially significant. When the last French court reversed its intransigent stance against EC law supremacy, the ECJ's triumph was complete. With the most obstinate hold-out having succumbed to European law supremacy, the supremacy of EC law was considered to be a *fait accompli* throughout the Union.

Chapter 6

Who are the “Masters of the Treaty”?: National Governments and Legal Integration

For all practical purposes, the Court sits in private and this is unhealthy for an institution whose influence on shaping of the Community is more immediate than either that of the Brussels Commission or of the Council of Ministers. Indeed recent experience has shown that the court can even expand the powers of the Commission and curtail those of the Council and never hesitates to turn a blind eye to the Treaty of Rome...Although the Court likes to pose modestly as “the guardian of the Treaties” it is in fact an uncontrolled authority generating law directly applicable in Common Market member states and applying not only to EEC enterprises but also to those established outside the Community, as long as they have business interests within it...

From “More powerful than intended”, Financial Times article, August 22, 1974

Our sovereignty has been taken away by the European Court of Justice. It has made many decisions impinging on our statute law and says that we are to obey its decisions instead of our own statute law. It has not obeyed the words of the Treaty. It has not interpreted those words according to their true meaning. It has put on the Treaty an interpretation according to their own views of policy- which is to make all laws of the European community the same- or in their own words to “harmonise” them... the European Court has held that all European directives are binding within each of the European countries; and must be enforced by the national courts; even though they are contrary to our national law. They are a supreme law overriding all our national laws. Our courts must no longer enforce our national laws. They must enforce Community law...No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses—to the dismay of all.

Introduction to a pamphlet by the anti-integration *Bruges Group*,
written by Lord Denning, of the judicial branch of the House of Lords¹

The ECJ was created to be the servant and protector of the member states in the process of European integration, but as these quotes imply, the ECJ has exceeded the original mandate of the member states, and escaped member state control, encroaching deeply into national sovereignty. The emergence of an activist, authoritative and politically powerful European Court was a surprise for politicians. Few European countries had constitutional courts or a tradition of judges limiting the policies democratically elected politicians could make. European governments were used to ordinary courts being branches of state power, enforcers of national law against those who tried to circumvent public policies and most of all subservient to parliamentary and government will.

In the 1950s and 1960s, there was little to suggest that the European Court could or would act against the interests of the member states. Member states controlled the policy-making process

¹ Denning, Lord. 1990. Introduction to article “The European Court of Justice: Judges or Policy Makers?”: The Bruges Group Publication, Suite 102 Whitehall Court, Westminster, London SW1A 2EL.

and expected the ECJ to primarily be interpreting provisions supported by all.² If there was a violation of EC law based on disagreements on interpretation, the Commission's infringement procedure was designed to allow political negotiation to resolve the issue first, helping politicians keep politically sensitive issues away from the ECJ.³ If a case did make it to the ECJ and the decision was unwelcome, a member state could ultimately ignore the decision with no financial cost and virtually no political cost since ECJ decisions were purely declaratory. Knowing that its decisions were unenforceable, the ECJ had to be careful to craft its decisions to elicit voluntary compliance. Thus the inherent weakness of the EC legal system was a check against political activism.

The transformation of the preliminary ruling system significantly undermined the member states' ability to control legal integration, and judicial activism has become an important concern of member states. The preliminary ruling procedure allowed individuals to bring cases which would have otherwise never made it to the ECJ, including cases the Commission and states tacitly agreed not to pursue. Individuals raised cases involving issues which member states considered to be the exclusive domain of national policy—such as the availability of educational grants to non-nationals, the publication by Irish student groups of a how-to guide to get an abortion in Britain, and the dismissal of employees by recently privatized firms. The extension of direct effects to EC Treaty articles made the Treaty's common market provisions enforceable despite the lack of implementing legislation, so that EC law created constraints member state had not agreed to.

² Joseph Weiler argues that because member states controlled the legislative process they thought that they controlled the process of legal integration. Moravcsik has also argued that because the ECJ was enforcing EC law passed unanimously, there was less fear that the ECJ would stray from the interests of the member states. Moravcsik, Andrew. 1995. Liberal Intergovernmentalism and Integration: A Rejoinder. *Journal of Common Market Studies* 33 (4):611-628. Weiler, Joseph. 1981. The Community System: The Dual Character of Supranationalism. *Yearbook of European Law* 1:257-306.

³ The infringement procedure is designed to allow for diplomacy to be used first. The first stage is a "formal notice" which allows the member state to respond to the charge. The second stage is a "reasoned opinion" where the Commission lays out its arguments again and gives the member state a second chance to respond to the charge. Each of these steps must be approved at the political level by the "College of Commissioners" which has discretion over whether Treaty breaches are pursued. The "reasoned opinion" must also be approved by the relevant Director General of the Commission. The Commission then negotiates with the member state to try to bring national policy into compliance. According to a member of the Commission's legal services, "the purpose of the procedure is to persuade the member state to comply. The entire pre-trial phase is confidential, designed to give the member state a chance to conform with EC law." Based on an interview at the Legal Services of the Commission, January 11, 1994 (Brussels).

Finally, the transformed preliminary ruling system made ECJ decisions enforceable, undermining the ability of member states to ignore unwanted ECJ decisions.

The previous two chapters explained how national courts came to take on a role enforcing EC law supremacy. This chapter asks why politicians did not stop an institutional transformation which they clearly did not want, and which significantly encroached on national sovereignty. How could the European Court expand the legal system beyond the control or desire of member states? Once the ECJ had expanded the EC legal system, why did member states not reassert control and return the system to the one they had designed and intended? If member states failed to control the transformation of the EC legal system or the ECJ's bold application of EC law, what does this mean about the ability of member states to control legal integration in the future?

Section I shows how the transformed preliminary ruling process went beyond the narrow functional roles the ECJ was created to fill. Section II explains how the ECJ was able to transform the EC legal system during a period when the EC legal system was inherently so weak. Section III explains why member states were not able to reform the EC legal system once it was clear that the Court was going beyond the narrow functional interests of the member states. Section IV generates some hypotheses about future member state-ECJ interaction and examines the tools member states have to control legal integration in the future.

I. The European Court as the Agent of the Member States

Garrett and Weingast use principal-agent analysis to explain how the ECJ is an agent of the member states, serving important yet limited functional roles in the EC political process and politically constrained by the member states.⁴ According to Garrett and Weingast, the ECJ was created to serve two important yet limited functional roles in the EC political process: filling in incomplete contracts through dispute resolution and monitoring member state compliance.⁵ A third role should also be added: checking that EC institutions did not exceed their authority.⁶

⁴ Garrett, Geoffrey, and Barry Weingast. 1993. *Ideas, Interests and Institutions: Constructing the EC's Internal Market*. In *Ideas and Foreign Policy*, edited by J. Goldstein and R. Keohane. Ithaca: Cornell University Press.

⁵ Pollack, in a general review of principal agent literature, expanded on the principal agent model applied to EC institutions (including the Court), adding the important insight that different EC agencies have different functional

The table below summarizes the jurisdictional mandate of the ECJ as defined in the Treaty of Rome, classifying the different Treaty articles according to the functional roles of the ECJ. In 1989 and 1992 to the ECJ's jurisdiction was extended to facilitate the "checking" and "co-monitoring" role of the Court, and these extensions are also noted. Chapter 2 of this dissertation provided much of the historical material regarding the original intent of the member states in creating the ECJ.

roles depending on policy areas, and that the oversight mechanisms of the member states, and the credibility of member states exercising oversight mechanisms varies by policy area. Kilroy's dissertation work also conceives of the European Court in principal agent terms, focusing on the role of the ECJ in monitoring defection. Pollack, Mark. 1995. *Obedient Servant or Runaway Eurocracy? Delegation, Agency and Agenda Setting in the European Community*. European Communities Studies Association May 11-14, 1995. See p. 7.

⁶ The argument that the ECJ was created primarily to check the Commission's exercise of authority was articulated in Chapter 2 of this dissertation.

Table 6.1: The European Court's Mandate⁷

Article 164: The European Court shall ensure that in the interpretation and application of this Treaty the law is observed.		
Checking the Commission and the Council	Filling In Contracts-Dispute Resolution	Monitoring Defection
<p>Articles 173, 174, 183 & 184: The Court can hear actions pertaining infringement of the Treaty or any rule of law relating to its application or misuse of power. Member states, the Council, the Commission or individuals can bring suits challenging the legality of EC acts. The Court can declare void acts which it finds illegal. Disputes where the Community is a party are not per se excluded from national court authority, except where jurisdiction is conferred on the ECJ by the Treaty.</p> <p>Articles 175 & 176: Should the Council or the Commission fail to act, Member states and other EC institutions can bring an action to the ECJ to establish an infringement of duty. The ECJ's decision is binding on the EC institution.</p> <p>Articles 178, 179 & 181: The Court can hear disputes regarding contractual liabilities between the EC and private bodies, and disputes between the Community and its employees.</p> <p>Article 177 (§ 2): The Court can hear preliminary ruling references regarding the validity of acts of EC institutions.</p> <p>1989- amendment of Article 173- The Parliament is given authority to challenge Commission and Council acts, and its own legally binding acts can now be challenged.</p> <p>1986 amendment Article 168a- A Tribunal of First Instance can be created. The Tribunal was created in 1989, increasing the Court's resources to examine in detail Commission decisions regarding competition law, anti-dumping and subsidy policy and unburdening the ECJ from personnel and Coal and Steel cases.</p>	<p>Article 182: The Court can hear disputes between member states regarding the substance of the Treaty if both parties agree.</p> <p>Article 177 (§ 1 & 3): The Court can hear preliminary ruling references regarding the interpretation of the Treaty and statutes of the Council ("where those statutes so provide").</p>	<p>Article 169: The Commission can raise infringement suits against the member states.</p> <p>Article 170: Member states can raise infringement suits against other member states, but they must first bring alleged infringements before the Commission.</p> <p>Article 171: ECJ decisions are binding on member states. Member states must do whatever necessary to comply with ECJ decisions.</p> <p>Article 180: The Court can hear disputes about member state compliance with the statutes of the European Investment Bank.</p> <p>1989- amendment of Article 171 revised- The Commission can request a lump sum or penalty to be paid by a member state which fails to comply with an ECJ decision.</p>

Checking the Commission and the Council

The ECJ was modeled after the French *Conseil d'État* which controls government abuses of authority.⁸ Its original role was to protect member states from excesses by the Coal and Steel

⁷ This table paraphrases Treaty of Rome articles pertaining to the ECJ. Not included on this table: Articles 165-168 and Article 188 which concern the composition of the Court, including judges, advocate generals, a registrar and its rules of procedure. Articles 185-188 lay out the legal effect of ECJ decisions. For the complete text of these Articles, see Appendix 1.

⁸ In France individuals can bring charges against the government to the *Conseil d'État*. They cannot challenge the validity of a national law, but if they think that the law was implemented incorrectly, or that a government official

Community's High Authority (the predecessor of the Commission) by reviewing contested decisions, thus to be a check on the High Authority's as well as the Council's actions. The Commission's authority was reduced in the Common Market, but it still maintained significant discretion in implementing the Treaty through enforcing anti-trust provisions, managing agricultural prices by controlling supply and demand, issuing import permits etc. The Court's main role in the Treaty of Rome remained to check the exercise of power of the EC institutions. Indeed most of the Treaty articles regarding the ECJ's mandate deal with this "checking" role, and access to the ECJ is the widest for this function: individuals can bring challenges to Commission and Council acts directly to the Court, and the preliminary ruling system (Article 177 §2) allowed individuals to raise challenges to EC policy in national courts.

Filling in incomplete contracts through dispute resolution

In the EC, the Commission is primarily responsible for filling in contracts in areas delegated to it (competition law, agricultural markets, and much of the internal market) and national administrations fill in the principles in EC regulations and directives they administer. The Court may be seized in the event of a disagreement between member states or firms on the one hand, and the Commission or national governments on the other, about how the Treaty or other provisions of EC law should be interpreted. The Court resolves the disagreement by interpreting the disputed EC legal clause, thus by filling in the contract through its legal decision. The preliminary ruling procedure (Article 177 § 1 & 3) was extended in the Treaty of Rome compared to what it had been in the ECSC treaty to include questions of interpretation to allow individual challenges to national administration decisions based on directly European law (for example, an individual could challenge the government's administration of EC agricultural subsidies.) Article 177 challenges were only to pertain to questions of European law, not to the interpretation of national law or to the compatibility of national law with EC law.

exceeded its authority under the law, they can challenge the government action in front of the Conseil. In the EC, the Court was created to allow states or individuals to challenge acts of the High Authority if they felt that the High Authority's decision violated the Treaty.

Monitoring Defection

The Court was not designed to monitor defection, which has always been the Commission's responsibility.⁹ In the Coal and Steel Community, the Commission monitored defection on its own, and the Court was an appellate body hearing challenges to Commission decisions. Under the Treaty of Rome, the Court was designed to play a co-role in the enforcement process. The Commission was still the primary monitor, but the ECJ mediated Commission charges and member state defenses regarding alleged Treaty breaches. The ECJ was to play this role, however, only if diplomatic efforts to secure compliance failed. The preliminary ruling system was *not* designed to be a "decentralized" mechanism to facilitate more monitoring of member state compliance with the Treaty.¹⁰ Indeed the ECJ clearly lacks the authority to review the compatibility of national law with EC law in Article 177 cases.¹¹

The Transformation of the Preliminary Ruling Procedure into an Enforcement Mechanism

The three roles—checking the Commission and the Council, filing in incomplete contracts through dispute resolution and co-monitoring compliance—were the reason the ECJ was created and member states continue to want the ECJ to fill these roles which is why they have expanded the ECJ's resources with respect to these narrow functional roles. But none of these roles require

⁹ The Commission's first task, as enumerated in Article 155 EEC, is "to ensure that the provisions of [the] Treaty and the measures taken by the institutions pursuant thereto are applied."

¹⁰ Negotiators of the Treaty confirm that member state intended only the Commission or member states to raise infringement charges, through Article 169 EEC and Article 170 EEC infringement cases. Based on interviews with the Luxembourg negotiator of the Treaty of Rome (Luxembourg, November 3, 1992), a Commissioner in the 1960s and 1970s (Paris, June 9, 1994), and a director of the Commission's legal services in the 1960s who also negotiated the Treaty for France (Paris, July 7, 1994). National ratification debates for the Treaty of Rome also reveal that member states believed that only the Commission or other member states could raise infringement charges. (Document 5266, annex to the verbal procedures of 26 March 1957 of the debates of the French National Assembly, prepared by the Commission of the Foreign Ministry; "Entwurf eines Gesetzes zu den Verträgen vom 25 März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft" Anlage C; Report of representative Dr. Mommer from the Bundestag debates of Friday 5 July 1957, p. 13391; Atti Parlamentari, Senato della Repubblica; Legislatura II 1953-1957, disegni di legge e relazioni- document, N. 2107-A, and Camera dei deputati document N. 2814 seduta del 26 marzo 1957.)

¹¹ The preliminary ruling system is designed to allow questions of the interpretation of EC law to be sent to the ECJ. The original idea was that if a national court was having difficulty interpreting an EC regulation, it could ask the ECJ what the regulation meant. It was not designed to allow individuals to challenge national laws in national courts, or to have national courts ask if national law is compatible with EC law. For more on the original intent of the preliminary ruling procedure, see Chapter 2.

or imply that EC law is supreme to national law, that individuals should help monitor member state compliance with EC law through cases raised in national courts, or that national courts should enforce EC law instead of national law and national policy. These aspects of the ECJ's jurisdiction were not part of the Treaty of Rome, rather they were created by the ECJ which transformed the preliminary ruling system from a mechanism to allow individuals to question *EC law* into a mechanism to allow individuals to question *national law*.

The Doctrine of Direct Effect declared that EC law created legally enforceable rights for individuals, allowing individuals to draw on EC law directly to challenge national law and policy. The Doctrine of EC Law Supremacy made it the responsibility of national courts to ensure that EC law was applied over conflicting national laws.¹² In using the direct effect and supremacy of EC law as its legal crutches, the ECJ does not itself exceed its authority by reviewing the compatibility of EC law with national law in preliminary ruling cases. Indeed the ECJ tells national courts that it cannot consider the compatibility of national laws with EC law, but can only clarify the meaning of EC law. But the ECJ intentionally encourages national courts to use Article 177 to do this job for it, by indicating in its decision whether or not certain type of national law would be in compliance with EC law and encouraging the national court to set aside incompatible national policies. ECJ Justice Mancini candidly acknowledged the Court's complicity in this jurisdictional transgression:

It bears repeating that under Article 177 national judges can only request the Court of Justice to interpret a Community measure. The Court never told them they were entitled to overstep that bound: in fact, whenever they did so—for example, whenever they asked if national rule A is in violation of Community Regulation B or Directive C—, the Court answered that its only power is to explain what B or C actually mean. But having paid this lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the court usually went on to indicate to what extent a certain type of national legislation can be regarded as compatible with that measure. 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.¹³

Having national courts monitor Treaty compliance and enforce EC law was not part of the original design of the EC legal system. One might think that member states would welcome any innovation which strengthened the monitoring and enforcement mechanisms of the EC legal

¹² See Chapter 2 for more on how the ECJ's jurisprudence transformed the preliminary ruling system.

¹³ Mancini, Federico. 1989. The Making of a Constitution for Europe. *Common Market Law Review* XXIV:595-614. Quote from p. 606.

system, but member states were not willing to trade encroachments in national sovereignty for ensuring Treaty compliance. Negotiators of the Treaty had actually weakened the enforcement mechanisms of the Treaty of Rome compared to what they were in the European Coal and Steel Community (ECSC) Treaty in order to protect national sovereignty, stripping the sanctioning power from the ECJ.¹⁴ In most of the original member states, ordinary courts lacked the authority to invalidate national law for any reason. It is unlikely that politicians would give national courts to a new power which could only be applied to EC law simply to ensure better Treaty compliance, especially because in some countries it would mean that the EC Treaty would be better protected from political transgression than the national constitution. Indeed if monitoring defection were such a high priority for member states, it might have served member state interests better to have made ECJ decisions enforceable by attaching financial sanctions to ECJ decisions (as was done in 1989),¹⁵ or have made transfer payments from the EC contingent on compliance with common market rules, or to have given the Commission more monitoring resources. This would have given member states the benefits of a court which could coerce compliance and they would not have had to risk having the European Court delve so far into issues of national policy and national sovereignty.

From a narrow functional analysis, the benefits member states derive from having individuals in addition to the Commission monitor compliance is also questionable. National governments pay for national legal systems, which are already overburdened with national cases. Adding to the job of national courts is by no means a costless decision. Also, the preliminary ruling procedure is used most in member states that are generally more compliant in adhering to formal laws and less well in member states where violations of both national law and EC law are prevalent. The Article 177 system is practically unused in two of the countries with extremely low

¹⁴ In the Coal and Steel Community, the Commission and the ECJ could issue fines and extract payments by withholding transfer payments. In the Treaty of Rome, ECJ decisions were purely declaratory.

¹⁵ Frustrated that certain member states (especially Italy and Greece) repeatedly violate EC law and ignore ECJ decisions, in 1989 member states returned to the ECJ some of the sanctioning power it had in the ECSC Treaty granting it authority order lump sum payments. But whereas fines could be extracted through deductions of transfer payments in the ECSC Treaty, for the Treaty of Rome there is still no way for the EC to collect fines for non-compliance.

EC law compliance records—Spain and Greece. Generally compliant states—Germany, the Netherlands, and the UK—on the other hand, are faced with a disproportionate number of Article 177 complaints, as the table below shows.

Table 6.2 Ratio of Commission Infringement Cases to Preliminary Ruling Cases

1981-1993	Germany	Netherlands	UK	France	Portugal*	Belgium	Spain*	Italy	Greece
Commission Infringement cases brought to the ECJ	69	45	29	106	6	130	23	237	86
National Court references to the ECJ	529	259	135	358	11	221	28	213	32
Commission cases to national court cases	.13	.17	.21	.30	.54	.58	.82	1.11	2.68

Based on statistics on Article 169 infringement suits provided by the European Court of Justice, and on statistics regarding preliminary ruling references provided in the Court's 1994 Annual report. The period of 1981 to 1993 was chosen to include the newer member states and because it was a period where eliminating market barriers was increasingly important to member states.

* Portugal and Spain figures are from 1985-1993

Indeed most evidence indicates that politicians did not support the transformation of the EC legal system, and that legal integration proceeded despite the intention and desire of national politicians. As Joseph Weiler has pointed out, the largest advances in EC legal doctrine at both the national and the EC level occurred at the same time that member states were scaling back the supra-national pretensions of the Treaty of Rome, and re-asserting national prerogatives.¹⁶ The supremacy of EC law was declared in 1964 shortly before France began its 'empty chair' policy to block EC policy making and the expansion of Commission authority and before the 'Luxembourg Compromise'; the agreement to halt a move to qualified majority voting in order to protect national sovereignty. Indeed when the issue of the national courts enforcing EC law first emerged in front of the ECJ, representatives of the member states argued strongly against any interpretation which would allow national courts to evaluate the compatibility of EC law with national law.¹⁷ Again in the 1970s, while politicians were blocking attempts to create a common market, EC law supremacy was making significant advances within national legal systems. With politicians actively rejecting supra-nationalism, it is hard to argue that they actually supported an institutional transformation which greatly empowered a supra-national EC institution at the expense of national sovereignty.

¹⁶ Op. cit. Weiler (1981)

¹⁷ Stein, Eric. 1981. Lawyers, Judges and the Making of a Transnational Constitution. *American Journal of International Law* 75 (1).

The Article 177 system, the direct effect and the supremacy of EC law continue to be a strongly contested. The European Council has refused attempts to formally enshrine the supremacy of EC law in a Treaty revision, or to formally give national courts a role in enforcing EC law supremacy.¹⁸ There have also been numerous battles over extending the preliminary ruling process to “intergovernmental” agreements. It took nearly three years after the signing of the 1968 Brussels convention on the mutual recognition of national court decisions for member states to reach a compromise regarding preliminary ruling authority for the Court. For the Brussels convention, member states restricted the right of reference of national courts to a narrow list of high courts¹⁹—courts which have been shown to be reticent to refer cases to the European Court. In the late 1970s negotiations over inter-governmental conventions to deal with fraud against the EC and crimes committed by EC employees broke down altogether over the issue of an Article 177 role for the ECJ. The terms of the conventions had been agreed to, and there was little national sovereignty at stake. But France refused to extend Article 177 authority for the ECJ at all, while the Benelux countries refused to ratify the agreements without an Article 177 role for the ECJ.²⁰ This conflict over extending Article 177 jurisdiction is playing itself out again regarding the 1992 Cannes conventions on Europol, the Customs Information System and the resurrected conventions regarding fraud in the EC.²¹

Transforming the preliminary ruling system was not necessary for the Court to serve the member states’ limited functional interests, and it brought a loss of national sovereignty that the European Council would not have agreed to then, and still would not agree to today. The Doctrines of Direct Effect and EC law Supremacy fundamentally altered the role of national courts in the national legal system, turning them into enforcers of international law against their own

¹⁸ Based on an interview with a member of the German negotiating team who put forward the proposal at the Maastricht negotiations for the Treaty on a European Union, February 17, 1994 (Bonn).

¹⁹ Protocol regarding the interpretation of the Brussels Convention of September 27, 1968, adopted June 3, 1971

²⁰ Based on interviews with French, German and Dutch negotiators for these agreements: October 27, 1995 (Brussels), October 30, 1995 (Paris), and November 2, 1995 (Bonn).

²¹ This time Britain has refused to extend Article 177 authority and Germany, Italy and the Benelux parliaments have refused to ratify the agreements without Article 177 authority for the ECJ. According to sources within the Legal Services of the Council, France and perhaps Spain are hiding behind the British position, laying low so that the British take the political heat for a position they too support.

governments, and allowed national political questions on areas only tangentially related to the Common Market to be decided by a foreign court.

Member states had significant political oversight mechanisms to control the ECJ. As Garrett and Weingast have pointed out:

Embedding a legal system in a broader political structure places direct constraints on the discretion of a court, even one with as much constitutional independence as the United States Supreme Court. This conclusion holds even if the constitution makes no explicit provisions for altering a court's role. The reason is that political actors have a range of avenues through which they may alter or limit the role of courts. Sometimes such changes require amendment of the constitution, but usually the appropriate alterations may be accomplished more directly through statute, as by alteration of the court's jurisdiction in a way that makes it clear that continued undesired behavior will result in more radical changes...²²

Member states controlled the legislative process and could legislate over unwanted ECJ decisions or change the role or mandate of the Court. They could also manipulate the appointments process and threaten the professional future of activist judges.²³ How could the ECJ construct such a fundamental transformation of the EC legal system against the will of the member states?

II. Escaping Member State Control

Agents have interests which are inherently different than principals; principals want to control the agent, but the agent wants as much authority and autonomy from the principals as possible.²⁴ The ECJ preferred the transformed preliminary ruling system for the same reason that member states did not want it: it allowed individuals to raise challenges to national law decreasing the Court's dependence on member states and the Commission to raise infringement cases, and made ECJ decisions enforceable decreasing the Court's need to craft decisions to elicit voluntary compliance.²⁵ In other words, it enhanced the ECJ's power. This inherent difference of interests explains *why* the Court would want to expand its authority, but not *how* it was able to expand its

²² Op. cit. Garrett and Weingast (1993) p. 200-201.

²³ Ibid. p. 200-201.

²⁴ Op. cit. Garrett and Weingast (1993), Pollack (1995) and Moravcsik (1995). Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court. *International Organization* 47 (1):41-76. Pierson, Paul. 1996. The Path to European Integration: A Historical Institutionalist Perspective. *Comparative Political Studies* 29 (2):123-163.

²⁵ Ibid. Burley and Mattli. Alter, Karen. 1996. The European Court's Political Power: The Emergence of the European Court as an Influential Political Actor in Europe. *West European Politics* (July).

authority. If the member states had political oversight controls, how could the agent escape the principals' control?

The answer lies in the different time horizons of politicians and judges, and the lack of a credible political threat which was a direct result of the transformation of the preliminary ruling system. With national courts enforcing EC law against their governments, politicians could not simply ignore unwanted ECJ decisions. They were forced to respond to the issues raised by the ECJ in a way which would be legally acceptable to both the ECJ and the national courts.

Different Time Horizons of Courts and Politicians

Legalist and neo-functionalist scholarship has argued that politicians were simply not paying attention to what the Court was doing, or that they were compelled into acquiescence by the apolitical legal language or by their religious-like reverence of legal authority.²⁶ Another explanation is that politicians and judges have different time horizons, a difference which manifests itself in terms of differing interests for politicians and judges in each court decision. Because of these different time horizons the ECJ was able to be doctrinally activist, building legal doctrine based on unconventional legal interpretations which expanded its own authority, without provoking a political response.

Politicians have shorter time horizons because they must deliver the goods to the electorate in order to stay in office. The focus on staying in office makes politicians discount the long term effects of their actions, or in this case inaction.²⁷ Member states were most concerned with protecting national interests in the process of integration, while avoiding serious conflicts which could derail the common market effort. As far as the ECJ was concerned, member states' short-

²⁶ Joseph Weiler implied that being a supreme court, the ECJ had an inherent legitimacy which it was difficult to politically contest. The Court could "attach to itself that deep seated legitimacy that derives from the mythical neutrality and religious-like authority with which we invest our supreme courts." Weiler, Joseph. 1991. The Transformation of Europe. *Yale Law Journal* 100:2403-2483. See p. 2428. Burley and Mattli argued that it was the non-political veneer of judicial decisions which made them hard for politicians to contest. They acknowledge that this veneer is more myth than reality, but the judicial use of nominally neutral legal principles 'masks' the politics of judicial decisions, gives judges legitimacy, and 'shields' judges from political criticism. "Within this domain...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." Op. cit. Burley and Mattli (1993) p. 72-73.

²⁷ Op. cit. Pierson (1996) 135-136.

term interests were to avoid court decisions which could upset public policies or create a significant material impact (be it political or financial).²⁸ This strategy of relying on “fire-alarms” to be set off by ECJ decisions before politicians actually act has advantages. The benefit of such a system is that politicians do not have to expend political energy fighting every court decision that could potentially create political problems in the future, and they can take credit and win public support for addressing the public and political concerns raised by adverse Court decisions.²⁹ But such an approach leads to a short term focus which prioritizes the material impact of legal decisions over the long term effects of EC doctrine. The short term focus of politicians is the main reason that politicians often fail to act decisively when doctrine which is counter to their long term interest is first established.

The Court took advantage of this political fixation on the material consequences of cases to construct legal precedent without arousing political concern. Following a well known judicial practice, it expanded its jurisdictional authority by establishing legal principles, but not applying the principles to the cases at hand. For example, the ECJ declared the supremacy of EC law in the *Costa* case but it found that the Italian law privatizing the electric company did not violate EC law.³⁰ Given that the privatization was legal, what was there for politicians to protest, not comply with or overturn? Hartley noted that the ECJ repeatedly used this practice:

A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.³¹

²⁸ Rasmussen also observed state’s short term interests influenced their participation in EC legal proceedings. States tended to participate in cases in which the its own national law was at stake, not paying attention to other country’s cases. Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers. Quote from p. 287.

²⁹ In their work on the U.S. Congress, McCubbins and Schwartz develop the notion of “fire alarms” as a form of political oversight and identify the many benefits for politicians of such an approach. McCubbins, Mathew, and Thomas Schwartz. 1987. *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*. In *Congress: Structure and Policy*, edited by M. McCubbins and T. Sullivan. Cambridge: Cambridge University Press. .

³⁰ *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ . Case 6/64 (1964) ECR 583.

³¹ Hartley, Trevor. 1988. *The Foundations of European Community Law*. Second ed. Oxford: Clarendon Press. See p. 78-78.

The Commission was an accomplice in the ECJ's efforts to build doctrinal precedent without arousing political concerns. In an interview, the original director of the Commission's legal services argued that legal means—with or without sanctions—would not have worked to enforce the Treaty if there was no political will to proceed with integration. He argued that the Commission adopted the “less worse” solution of compromising on principles, but working to help the ECJ develop its doctrine. The Commission selected infringement cases to bring which were important in terms of building doctrine, especially doctrine which national courts could apply, and avoided cases which would have undermined the integration process by arousing political passions.³² By making sure that Court decisions did not compromise short term political interests, the judges and the Commission could build a legal edifice without serious political challenges.

Indeed the ECJ's early jurisprudence shows clear signs of caution. While bold in doctrinal rhetoric, the ECJ made sure that the political impact was minimal both in terms of financial consequences and political consequences. Mann commented on the ECJ's early jurisprudence in politically contentious cases saying that “by narrowly restricting the scope of its reasoning, [the ECJ] manages to avoid almost every question in issue.”³³ Scheingold observed that in Article 173 cases, “the ECJ used procedural rules to avoid decisions of substance.”³⁴ A French legal advisor at the *Secretariat General de Coordination Interministerial des Affaires Européen* argued that the ECJ did not matter until the 1980s because the decisions were principles without any reality. Since there was not much EC law to enforce in the 1960s and 1970s, and since national courts did not accept that they should implement European law over national law, ECJ jurisprudence was simply marginal.³⁵

³² A former Commissioner called the Commission's strategy “informal complicity.” Interview with the former director of the Commission's Legal Services (July 7, 1994, Paris) and with a former Commissioner (June 9, 1994, Paris).

³³ Mann, C.J. 1972. *The Function of Judicial Decision in European Economic Integration*. The Hague: Martinus Nijhoff Press. See p. 413.

³⁴ Scheingold, Stuart. 1971. *The Law in Political Integration: The Evolution and Integrative Implications of Regional Legal Processes in the European Community*: Harvard University Center for International Affairs, Cambridge Massachusetts. Quote from p. 21.

³⁵ Based on an interview in Paris, October 31, 1995.

Politicians were myopic in their focus on material consequences, but this does not mean that they did not realize that their long term their interest in protecting national sovereignty might be compromised by the doctrinal developments. The Court's *Van Gend* and *Costa* decisions were filled with enough rhetoric to make politicians uneasy, and lawyers from the member states had argued strongly against the interpretations the ECJ eventually endorsed. The *Van Gend* decision declared that

the Community constitutes a new legal order of international law 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 member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.³⁶

And the *Costa* decision added that

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which subsequent unilateral act incompatible with the concept of the Community cannot prevail.³⁷

It does not take a legal expert to recognize the potential threat to national sovereignty inherent in this rhetoric. Indeed some politicians were clearly unsettled by the legal precedents the Court was establishing in the 1960s. According to former Prime Minister Michel Debré, General de Gaulle *did* ask for revisions of the Court's power and competences in 1968.³⁸ But other member states were unwilling to re-negotiate the Treaty of Rome, especially at a French request, so the political threat to the Court was not credible.

In the 1960s the risk of the ECJ running amok was still fairly low given the inherent weakness of the EC legal system. Most national legal systems did not allow for international law supremacy over subsequent national law (indeed the Italian Constitutional Court and the French *Conseil d'État* rejected a role enforcing EC law supremacy in the 1960s) and there were relatively few national court references to the ECJ. Until the time arrived that the doctrine was being applied in unacceptable ways, there was no compelling interest for politicians to mobilize to attack the

³⁶ *Van Gend en Loos v. Nederlandse Administratie Belastingen* ECJ . 26/62 (1963) ECR I. Quote from p. 12.

³⁷ Op. cit. *Costa v. Enel* (1964).

³⁸ Debré mentioned this in the discussion of the Foyer- Debré's Propositions de Loi, cited in Rasmussen (op. cit. 1986 p. 351)

ECJ's authority. In retrospect political non-action seems quite short-sighted. But it was very hard to predict what would happen in light of the Court's declarations, and the strategy of holding off an attack on the Court was not stupid. EC law supremacy was at that time only a *potential* problem. In any event, it would be a problem for another elected official to face.

The Transformation of the Preliminary Ruling Procedure

By limiting the material impact of its decisions, the ECJ could minimize political focus on the Court and build doctrine without provoking a political response, creating the opportunity for the ECJ to escape member state oversight. What were marginal legal decisions from a political perspective, were revolutionary decisions from the legal perspective. They created standing for individuals to draw on EC law and a role for national courts in enforcing EC law supremacy against national governments. The ECJ ultimately escaped member state control by transforming the preliminary ruling procedure into a mechanism for national courts to enforce EC law in the national realm. Once national courts became involved in the application of EC law, the ability of politicians appeal to extra-legal means to avoid complying with EC law was diminished. Instead, politicians had to follow the legal rules of the game.

Through the doctrines of Direct Effect and EC law supremacy, the ECJ harnessed what became an independent base of political leverage for itself—the national judiciaries. With national courts sending cases to the ECJ and applying ECJ jurisprudence, interpretive disputes were not so easily kept out of the legal realm. National courts also would not let politicians ignore or cast aside as invalid unwanted decisions, nor could politicians veto ECJ decisions through a national political vote because EC law was supreme to national law. National courts could create both financial and political costs for ignoring ECJ decisions.

Because of national court support of ECJ jurisprudence, extra-legal means to avoid ECJ decisions were harder to use, forcing governments to find legally defensible solutions to their EC legal problems. In the EC legal arena, however, member states were at an inherent disadvantage vis-a-vis the ECJ. As Joseph Weiler has argued:

by the fact of their own national courts making a preliminary reference to the ECJ, governments are forced to juridify their argument and shift to the judicial arena in which the ECJ is preeminent (so long as it can carry with it the national judiciary)...when governments are pulled into court and required to explain, justify, and defend their decision, they are in a forum where diplomatic license is far more restricted, where good faith is a presumptive principle and where states are meant to live by their statements. The legal arena imposes different rules of discourse.³⁹

The turnover tax struggle of 1966 offers a clear example of how the ECJ could rely on government's fixations with the short term impact of its decisions to diffuse political protests. It also shows how national judicial support shifted the types of responses available to governments to the advantage of the ECJ. When the ECJ's 1966 *Lütticke* decision created hundreds of thousands of refund claims for "illegally" collected German turnover equalization taxes, the German Finance Ministry issued a statement saying "We hold the decision of the European Court as invalid. It conflicts with the well reasoned arguments of the Federal Government, and with the opinion of the affected member states of the EC", and it instructed customs officials and tax courts to ignore the ECJ decision in question.⁴⁰ The decree would have worked if it were not for the national courts which refused to be told by the government that they could not apply a legally valid ECJ decision. With national courts refusing to follow this decree, lawyers publishing articles about the government's attempts to intimidate plaintiffs and order national courts to ignore a valid EC legal judgment,⁴¹ and members of the Bundestag questioning a Ministry of Finance official on how the decree was compatible with the principles of a *Rechtsstaat*⁴²—a state ruled by law—the German government turned to its lawyers to find a solution to its problem.

The Ministry of Economics' lawyers constructed a test case strategy, suggesting that the wrong legal question had been asked in the 1966 case, that really Article 97 EEC was the relevant EC legal text not Article 95 EEC, and that Article 97 did not create direct effects so that individuals

³⁹ Weiler, Joseph. 1994. A Quiet Revolution- The European Court of Justice and its Interlocutors. *Comparative Political Studies* 26 (4):510-534. Quote from p. 519. Burley and Mattli make a similar point (op. cit. 1994).

⁴⁰ July 7, 1966 (IIIB.4-V8534- 1/66), republished in *der Betrieb* (1966) p. 1160.

⁴¹ Meier, Gert. 1967. Aktuelle Fragen zur Umsatzausgleichsteuer. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 3 (15 March 1967):97-101. Stöcker, Hans A. 1967. Einzelklagebefugnis und EWG-Kommissionsentscheidung: Alternative oder kumulierter Rechtsschutz in Umsatzausgleichsteuersachen. *Der Betrieb* (40):1690-1692. Wendt, Peter. 1967a. Kein Rechtsschutz im Umsatzausgleichsteuer-Sachen? *Der Betrieb* (Nr. 48):2047-2048. Wendt, Peter. 1967b. Ungeklärte Fragen im Streit um die Umsatzausgleichsteuer. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 9 (September):348-354.

⁴² Meier, Gert. 1967. Zur Aussetzung der Einsprüche gegen Umsatzausgleichsteuerbescheide. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 2 (15 February, 1967):75-77. Meier, Gert. 1994. De: Streit um die Umsatzausgleichsteuer aus integrationspolitischer Sicht. *Recht der Internationalen Wirtschaft* 3/94.

did not have legal standing to challenge German turnover taxes in national courts.⁴³ The ECJ accepted the legal argument and all of the plaintiffs lost legal standing, thus the government won in its efforts to minimize the material impact of the ECJ's decision. But the strategy implicitly left the ECJ's precedence established in the *Lütticke* case intact. Article 95 remained directly effective, and even more important member states became obliged to remove national laws which created tariff and non-tariff barriers to trade even though no new EC level policies had been adopted to replace the national policies. The government was quieted because its problem (the numerous pending cases) were gone, but the precedence came back to haunt the Federal government and other member states in subsequent cases. Indeed the first French case to raise the issue of EC law supremacy was based on the Direct Effect of Article 95 and was an application of the ECJ's *Lütticke* decision.

National judicial support was critical in closing the extra-legal avenues of escape for national governments and in forcing national governments to accept and implement ECJ legal decisions. In many countries, national courts did not immediately accept the ECJ's doctrines or use the preliminary ruling procedure. Indeed there was a time when higher national courts were waiting to see which way political and legal consensus would develop on the issue of EC law supremacy.⁴⁴ This was the time for politicians to have challenged the validity of the ECJ's doctrines to stop a national legal consensus in favor of EC law supremacy from forming.⁴⁵ Writing in 1972, Mann argued that

attempts to extrapolate a conflicts' rule from the uncertain language of the Treaties alone ignores the crucial fact that arguments as to the authority of the Treaties rests on consensus of opinion rather than on the hidden logic of the text. Basic disagreements as to the supremacy of Community law cannot be removed or bridged so simply. In the end, nothing less than a constitutive act of the

⁴³ Ibid. Meier (1994); Everling, Ulrich. 1967. Sprachliche Mißverständnisse beim Urteil des Gerichtshofes der Europäischen Gemeinschaften zur Umsatzausgleichsteuer. *Außenwirtschaftsdienst des Betriebs-Beraters* 5 (15 Mai):182-184.

⁴⁴ The German Constitutional Court delayed issuing its early decisions on EC law, waiting for consensus to gel and members of the *Conseil d'État* also made it clear that they were waiting for a political directive on what to do with EC law supremacy. Druesne, Gérard. 1975. La primauté du droit communautaire sur le droit interne- L'arrêt de la Cour de Cassation du 24 Mai 1975. *Revue du Marché Commun*:378-390. and op. cit. Mann (1972).

⁴⁵ Alter, Karen. 1996. The European Court's Political Power: The Emergence of the European Court as an Influential Political Actor in Europe. *West European Politics* (July).

member states, whether singly or in concert, and whether by representative assembly or through the evolution of judicial decision can assure the ascendance of Community law.⁴⁶

During this critical period when ECJ's doctrines were not well established, the Court's early strategy to avoid political controversy was important. With politicians silent on what to do and seemingly not too up in arms about the Court's jurisprudence, national courts went ahead on their own. In the end, the ascendance of Community law was assured through the evolution of national judicial decision.

Once national courts had accepted EC law supremacy, national governments found their tools of influence over the ECJ diminished. When ECJ decisions were unenforceable, the ECJ had to craft its decisions to elicit voluntary compliance by the member states. Once the ECJ had national courts to implement its jurisprudence, the largest political threat against the ECJ—non-compliance—was gone. The relevant question was no longer will the member state comply, but rather will national courts accept this decision.

The acceptance of EC law supremacy by national courts is hard to reverse through political tools of influence, nor is it easy for national governments to convince their national courts not to apply EC law supremacy. Once an important legal doctrine is established and accepted—such as the doctrines on the direct effect and supremacy of EC law—judges are loath to *not* apply it or to reverse it fearing that frequent reversals will undermine the appearance of judicial neutrality, which is the basis for parties accepting the legitimacy of their decisions.⁴⁷ U.S. Supreme Court judge Souter summed up the perceived danger when he explained why the Supreme Court would not overturn *Roe v. Wade*:

The Court's power lies in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands...The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures...The Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation. The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case...There is a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to

⁴⁶ Op. cit. Mann (1972) p. 429.

⁴⁷ Even in civil law systems where judicial decisions do not have the force of law, doctrine and rules are binding an enduring institutional structures for lawyers and judges.

overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade away with the frequency of its vacillation.⁴⁸

Not every legal doctrine is as publicly well known and fundamental as *Roe v. Wade*, and clever judges can often find factual or legal exceptions which allow them to extricate themselves from exceptionally political cases without compromising established doctrine. But in most cases judges will apply established doctrine even if it leads to conclusions which are politically uncomfortable.

The doctrinal precedents stuck into the ECJ's benign legal decisions were in fact formidable institutional building blocks which would be applied in the future to more polemic case. Once national courts had accepted EC law supremacy, they became supporters and advocates of the ECJ in the national legal realm, using their judicial position to limit the types of responses politicians could use to avoid unwanted ECJ decisions. If legal arguments cannot persuade either the national court or the ECJ, in the end there is little that politicians can do to influence the legal outcome. The ECJ is after all the highest authority on the meaning of EC law and national courts will defer to the ECJ for this reason. At this point, the only choice left for politicians is to rewrite the EC legislation itself.

The legal rules of the game limited the realm of political responses to ECJ jurisprudence, but there was still significant room for government manipulation of the EC legal process. Member states could influence the interpretation of the law through legally persuasive arguments, the mobilization of public opinion or political threats. They could re-write the contested legislation without violating the legal rules of the game and even re-write the Court's mandate, limiting access to the Court and cutting back the jurisdictional authority of the Court. The next section considers why member states have not exercised these options.

⁴⁸ *Planned Parenthood of Southeastern Pennsylvania et al v. Robert P. Casey, et al.* US Supreme Court decision of June 29, 1992. Nos. 91-744 and 91-902. For more on how judges search for legitimacy by applying legal principles across cases see: Shapiro, Martin. 1981. *Courts: A comparative political analysis*. Chicago: University of Chicago Press. See chapter 1.

III. Could Member States Regain Control? Why Did They Accept the Doctrine of EC law supremacy?

Some scholars have argued that the fact that member states did not reverse the ECJ's Direct Effect and Supremacy declarations shows that the Court had not deviated significantly from member state interests. The strongest argument of the strongest proponent of this view, Geoffrey Garrett, comes down to a tautology. Garrett argues: 'If member governments have neither changed nor evaded the European legal system, then from a 'rational government' perspective, it must be the case that the existing legal order furthers the interests of national governments,' and thus reflects the interests of national governments.⁴⁹ But the failure to act against judicial activism cannot be assumed to mean political support for the transformation of the preliminary ruling system. It is equally plausible, and more consistent with the evidence, that national governments disagreed with the ECJ's activist jurisprudence but were institutionally unable to reverse it.

Marks has used game theory to show how this outcome is possible. He modeled judicial-political interaction and found that "inaction is neither a sufficient nor necessary condition for acceptability by a majority of legislators. Nor can we conclude that the absence of legislative reaction implies that the court's policy choice leads to a "better" policy in the view of the legislature."⁵⁰ Mark's model was based on a bi-cameral and uni-cameral legislative system. But his basic insight that institutional rules can thwart politicians from responding to judicially imposed policy changes is generalizable to the EC context.

Institutional Constraints: The Joint Decision Trap

EC law based on regulations or directives can be re-written by a simple statute which, depending on the nature of the statute, requires unanimity or qualified majority consent. A few of the ECJ's interpretations have been re-written in light of ECJ decisions, although surprisingly few. This is because an ECJ decision usually affects member states differently, so there is not a

⁴⁹ Garrett, Geoffrey. 1995. The Politics of Legal Integration in the European Union. *International Organization* 49 (1):171-181. Rasmussen also implies that states "tacitly welcomed" ECJ expansions through the in-court behavior of their council, and by their willingness to accept ECJ legal interpretations. Op. cit. Rasmussen (1986) p. 291.

⁵⁰ Marks, Brian A. 1989. A model of Judicial Influence on Congressional Policy Making: *Grove City College v. Bell* (1984). Dissertation in Political Science, University of Washington. See p. 6.

coalition of support to change the disputed legislation. Also, it takes political capital to mobilize the Commission and other states to legislate over a decision. If a member state can accommodate the ECJ's decision on its own, by interpreting it narrowly or by buying off the people the decision affects, such an approach is easier than mobilizing other member states to re-legislate. Legislating over an ECJ decision or interpreting the decision narrowly can reverse substance of the decisions, allowing the specific policies effected by the ECJ's interpretation to remain unchanged. But it does not affect the EC legal system as an institution.⁵¹ It does not undermine the doctrines which form the foundation of ECJ authority: the Supremacy or the Direct Effect of EC law, or the "four freedoms" (the free movement of goods, capital, labor and services). Reversing these core institutional foundations or any ECJ decision based on the EC Treaty would require a Treaty amendment, a threshold which is even harder to reach under the EC's policy-making rules.

In order to change the Treaty, member states need unanimous agreement plus ratification of the changes by all national parliaments. Getting unanimous agreement about a new policy is hard enough. But creating a unanimous consensus to change an existing policy is even more difficult. Fritz Scharpf calls the difficulty of changing entrenched policies in the EU context the "Joint Decision Trap."⁵² According to Scharpf, a "joint decision trap" emerges when 1) the decision-making of the central government (the Council of Ministers in the case of the EU) is directly dependent on the agreement of constituent parts (the member states); 2) when the agreement of the constituent parts must be unanimous or nearly unanimous; and 3) when the default outcome of no

⁵¹ Garrett and Weingast have argued that "Courts whose rulings are consistently overturned typically find themselves and their role in the political system weakened." (op. cit. 1993, p. 200). This is not necessarily true. Courts interpret statutes, but it always remains the legislature's prerogative to re-write the statutes, for whatever reason. In fact, a court's legitimacy could be more adversely affected were it to cave to political will, rather than make a "legally correct" decision which it knew would be overturned by the legislature. A court must stick to what the law says if it wants to maintain its legal legitimacy in the eyes of its constituency (lawyers, legal scholars, plaintiffs, and the society at large). If the statute is written ambiguously, then it is the politician's responsibility to better specify the law to avoid a loose interpretation. In other words, the context in which a reversal occurs is more important than the fact that a reversal occurs, and it is equally possible that a court's stature would be enhanced because it defended the statute, rather than maligned because it did not do what the majority of the day wanted. Slaughter, Anne-Marie, and Walter Mattli. 1995. Law and politics in the European Union: a reply to Garrett. *International Organization* 49 (1):183-190.

⁵² Scharpf, Fritz. 1988. The Joint-Decision Trap: Lessons from German Federalism and European Integration. *Public Administration* 66 (Autumn):239-278.

agreement is that the status quo policy continues. The default outcome is the critical factor hindering changes in existing policies. As Scharpf notes:

What public choice theorists have generally neglected...is the importance of the 'default condition' or 'reversion rule'...The implications of unanimity (or of any other decision rule) are crucially dependent upon what will be the case if agreement is not achieved. The implicit assumption is usually that in the absence of a decision there will be no collective rule at all, and that individuals will remain free to pursue their own goals with their own means. Unfortunately, these benign assumptions are applicable to joint decision systems only at the formative stage of the 'constitutional contract', when the system is first established. Here, indeed, agreement is unlikely unless each of the parties involved expects joint solutions to be more advantageous than the status quo of separate decisions...The 'default condition' changes, however, when we move from single-shot decisions to an ongoing joint-decision system in which the exit option is foreclosed. Now non-agreement is likely to assure the *continuation* of existing common policies, rather than reversion to the 'zero base' of individual action. In a dynamic environment...when circumstances change, existing policies are likely to become sub-optimal even by their own original criteria. Under the unanimity rule, however, they cannot be abolished or changed as long as they are still preferred by even a single member.⁵³

The joint decision trap makes reversing the ECJ's key doctrinal advances all but impossible. Small states gain by having a strong EC legal system. In front of the ECJ political power is equalized and within the ECJ small states have disproportionate voice since each judge has one vote and decisions are taken by simple majority. The Benelux states are unlikely to agree to anything which they perceive will weaken the legal system's foundations and thus compromise their own interests. The small states are not alone in their defense of the ECJ. The Germans have from the outset wanted a "United States of Europe," and consider a more federal looking EC legal system a step in the right direction. They also are supporters of a European *Rechtsstaat*. Germany and the Benelux countries tend to block attempts to weaken ECJ authority and they try to extend the ECJ's authority as the Community expands into new legal areas whenever the political possibility exists. Britain and France, on the other hand, block attempts to expand EC legal authority. The need to call an Inter-Governmental Conference (IGC) to amend the treaty is an additional institutional impediment to member state attacks on the ECJ. Any member state can add an item to the IGC's agenda, making member states hesitant to call for an IGC lest the agenda get out of control.

⁵³ Ibid. p. 257.

The reality of the joint decision trap fundamentally changes the assumptions of Garrett and Weingast regarding member states' ability to control the ECJ through political oversight mechanisms. Recall Garrett and Weingast's argument that:

Embedding a legal system in a broader political structure places direct constraints on the discretion of a court, even one with as much constitutional independence as the United States Supreme Court. This conclusion holds even if the constitution makes no explicit provisions for altering a court's role. The reason is that political actors have a range of avenues through which they may alter or limit the role of courts. Sometimes such changes require amendment of the constitution, but usually the appropriate alterations may be accomplished more directly through statute, as by alteration of the court's jurisdiction in a way that makes it clear that continued undesired behavior will result in more radical changes...*the possibility of such a reaction drives a court that wishes to preserve its independence and legitimacy to remain in the area of acceptable latitude.*⁵⁴

On the one hand there are certainly some political limits to what a court can do, some area of "acceptable latitude" beyond which courts cannot stray. Indeed *all* political actors are ultimately constrained to stay within an "acceptable latitude." But Garrett and Weingast imply that the political latitude of the ECJ is very limited, so limited that the ECJ has to base its individual decisions directly on the economic and political interests of the dominant member states.⁵⁵ They compare the institutional authority of the ECJ to that of the US Supreme Court to highlight what they see as the inherent political vulnerability of the ECJ and of ECJ justices, arguing:

The autonomy of the ECJ is clearly less entrenched than that of the Supreme Court of the United States. Its position is not explicitly supported by a constitution. One of the thirteen judges is selected by each of the twelve member states, and their terms are renewable every six years. Many are likely to seek government employment in their home countries after they leave the ECJ. Moreover, there is no guarantee that the trend to ever greater European integration—legal or otherwise—will continue. At any moment, the opposition of a few states will be enough to derail the whole process.⁵⁶

But the difficulty of changing the Court's mandate given the requirement of unanimity and given the lack of political consensus implies that the European Court's room for maneuver may, in some respects, be even greater than that of the U.S. Supreme Court or other constitutional courts.

Changing the ECJ's authority requires a Treaty amendment, not a simple statute. It could be even harder to get all member states to agree on a Treaty amendment than to get a national parliament to

⁵⁴ Op. cit. Garrett and Weingast (1993) p. 200-201. Emphasis in the original.

⁵⁵ Garrett has made this argument more clearly elsewhere: Garrett, Geoffrey. 1992. The European Community's Internal Market. *International Organization* 46 (2):533-560.

Garrett, Geoffrey. 1995. The Politics of Legal Integration in the European Union. *International Organization* 49 (1):171-181.

⁵⁶ Op. cit. Garrett and Weingast (1993). p. 201.

agree on a statute amending jurisdictional authority, especially if the parliament were dominated by one party. Because of the joint-decision trap, the political threat to alter the European Court's role is usually not credible. The ECJ can safely calculate that political controversy will not translate to an attack on its institutional standing, thus it will not need to alter its behavior in light with a country's political preferences. For these reasons, Pollack calls amending the treaty the "nuclear option—exceedingly effective, but difficult to use—and is therefore a relatively ineffective and non-credible means of member state control."⁵⁷

The joint-decision trap also affects the ability of member states to control the ECJ through the appointment process. The relevant EC institutional feature is that decision-making takes place in the sub-unit of the member state. Using appointments to influence judicial positions is never a sure thing, but without a concerted appointment strategy on the part of a majority of member states, it is extremely unlikely to succeed. Each state has its own selection criteria, and high political appointments such as appointments to the ECJ, national Constitutional Courts or national administration positions, are governed by a variety of political considerations, including party affiliation and political connections. A judge's opinion on EC legal matters is seldom if ever the determining factor and only a few member states have even attempted to use a judge's views regarding European integration as a factor in the selection process.⁵⁸ The individual threat to the judge's professional future is also more hypothetical than real. In most European member states, the judiciary is a civil bureaucracy and judges have all the job protection of civil servants. If an ECJ judicial appointee came from the judiciary (or academia), which the majority do, they are virtually guaranteed that a job will be awaiting them upon their return. Because ECJ decisions are issued unanimously, it is also impossible to know if a given justice is ignoring its state's wishes.

The key to politicians being able to cow the ECJ into political subservience is the credibility of their threat. If a political threat is not credible, politicians can protest all they want without

⁵⁷ Op. cit. Pollack (1995) p. 40.

⁵⁸ In the fall of 1992, I interviewed the Italian, Greek, Dutch, Belgium, French, German, British and Irish judges at the ECJ about how appointments to the European Court were made both in their country and in other countries. The criteria varied across countries but included factors such as party affiliation, ethnicity, legal background, ability to speak French, familiarity with EC law, and immediate political factors. Only in France and to some extent Germany could appointments designed to limit judicial activism be identified.

influencing judicial decisions. That being said, the ECJ is more interested in shaping future behavior than exacting revenge for past digressions, especially if the past digression was not intentional (which is usually the case). It is in no ones interest—not politicians, not the public, and not the ECJ—for a judicial decision to cripple a government bureaucracy by filling it with thousands of claims, to bankrupt a public pensions system, or to force a significant re-distribution of national Gross Domestic Product to pay back a group of citizens for past wrongs. That the ECJ takes these political considerations into account is not a sign of politicians dominating the Court. Rather it is a sign that the ECJ shares a commitment to serving the public interest.

Overcoming the Joint-Decision Trap? The 1996 IGC:

The “joint decision trap” is an institutional predicament which limits the ability of politicians to reform policies. It not mean that policies can never be reformed. Scharpf argues that the joint-decision trap can be overcome in a given policy debate if a member state adopts a confrontational bargaining style, threatening exit or holding hostage something which other member states really want. In negotiations over the Maastricht Treaty, the British forced a discussion on the institutional roles of EC institutions, scheduling an inter-governmental conference on this topic to be convened in 1996. While at first it was mostly the British who wanted this conference, in light of the change in public opinion and the prospect of a significant enlargement of EC membership, other member states have found their own reasons to want to re-negotiate the institutional rules within the EC. In the lead-up to the 1996 IGC, the subject of constraining judicial activism and limiting the material effect of ECJ decisions has been raised. British Euro-skeptics have made it clear that they would like to see the Court’s ‘wings clipped’ and within the Social and Work Ministry of the German government there has been some discussions about addressing ECJ activism.⁵⁹

⁵⁹ Based on interviews in the British Foreign and Commonwealth Office (November 10, 1995), the Tribunal of First Instance (November 2, 1995) and the German Economics Ministry (correspondence from January 6, 1996). The desire to “clip the Court’s wings” was also announced in an article in the *Financial Times* and in an academic article written by a civil servant in the Bundesministerium für Arbeit und Sozialordnung, Mr. Clever. Brown, Kevin. Government to demand curb on European Court. *Financial Times*, February 2, 1995, p. 9. Clever, Peter. 1995. EuGH-Rechtsprechung im Sozialbereich- Kritik, aber auch hoffnungsvolle Zuversicht. *Zeitschrift für Sozialhilfe und Sozialgesetzbuch* (1):1-14.

The IGC will likely involve significant log rolling, but member states will have to prioritize what it is they ask for. Whether a member state gets what it wants in the negotiations will depend greatly on the intensity of their interest. In interviews during the fall of 1995, while meetings of the “Westendorp Reflection Group” were being held to set the agenda for the conference, Dutch, German and French legal advisors and members of the Council’s legal services all agreed that the Court’s mandate, as it stood in the Treaty of Rome, was not up for re-negotiation. The refusal to negotiate about the *acquis communautaire* likely has a few origins. A French advisor voiced the fear that once one opens the discussion about the institutional mandates and rules of the EC, all kinds of unwanted issues could be raised. Small states especially could anticipate that any new bargain regarding the ECJ would be far less favorable to their interests than the current system, which is why they are working to keep the ECJ off the political agenda. Also the UK is the force behind attempts to reform the ECJ (the Germans having dropped their threat). Because of its history of opposing the more integrationist aspects of the EC, the British have little credibility to lead the charge to re-organize the European Court’s mandate. The French, German and Dutch have refused to negotiate about the Treaty of Rome provisions regarding the Court, and the British have also shunned this approach, but for different reasons. In an interview, the chief British legal advisor on European Affairs argued that the British would be willing to negotiate on the *acquis*, but they will not suggest it because other member states will not negotiate on it. In other words, the joint decision trap holds and trying to change the Treaty of Rome is a losing strategy.

The British have put forward proposals in the Westendorp reflection group, but the proposals do not attack the ECJ's authority or autonomy. The British have suggested creating an ECJ appeals procedure which would give the ECJ a second chance to reflect on its decision in light of political displeasure, but according to the proposal it would still ultimately be the ECJ which executed the appeal! The British are also upset about the potential financial liability from ECJ decisions, especially if the ECJ’s judgment can have retrospective effects. Here again the British proposals do not cross into the Court’s realm of legal discretion. The British proposal suggests a treaty amendment to limit liability damages *in cases where the member state acted in good faith*, as

well as an amendment which explicitly allows the Court to limit the retrospective effect of the its judgments. Nothing in the current text of the Treaty denies the authority of the ECJ to limit the liability of member states if they have acted in good faith, or to limit the retrospective effect of its decisions. But the British hope that having these texts in the Treaty would encourage the ECJ to use them, and open the possibility that governments could appeal ECJ findings using good faith and retrospective effects arguments. Being forced to put its ideas in legally acceptable terms which other member states might accept stripped most of the political force from the British government's proposals. The proposals have thus far found little political support outside of Britain, but even if these proposals were to be adopted the ECJ would still retain all of its discretion or jurisdictional authority.

We do not know what will happen at the 1996 IGC but there is much to suggest that the ECJ will get through this next IGC with its jurisdiction intact, and that it will continue to be a bold and activist court. The idea of curbing ECJ juridical activism is not new, but never before has there been such a concrete discussion within government ministries about how to do this, and never has it led to any concrete suggestion of what to do. The ECJ has clearly heard these threats. In an article on the "Language, Culture and Politics in the Life of the European Court of Justice", ECJ Justice Mancini cited three reasons for what he called the ECJ's "retreat from activism": 1) the change in public opinion signaled by the debates of the Maastricht Treaty which identified the ECJ as one of the chief EC villains; 2) two protocols in the Maastricht Treaty designed to circumvent potential ECJ decisions regarding awarding retrospective benefits for pension discrimination and German house ownership in Denmark; and 3) recent criticism from Germany—one of the Court's historic allies—especially in light of the upcoming IGC.⁶⁰ The Court has retreated in some of its jurisprudence, but it has still shown a willingness to make bold decisions. Despite the British government's anger over the cost of ECJ decisions, in March of 1996 the Court ordered the government to pay Spanish fishermen a fine for violating European law. It also ordered the German government—the British Government's presumed ally—to compensate a French brewery

⁶⁰ Mancini, Federico. 1995. *Language, Culture and Politics in the Life of the European Court of Justice*. Speech given at American Law Schools Association. January 6, 1995.

prevented from exporting to Germany.⁶¹ Thus we can expect the ECJ to continue to have the institutional and political capacity and will to make decisions which go against member state interests.

IV. The Future of Member State Control in Legal Integration

It is highly unlikely that ECJ's legal developments thus far will be reversed. Germany, the Benelux states and even the French will block any attempt to change the Court's authority under the Treaty of Rome, and national courts are unlikely to overturn the important national doctrinal changes which allowed them to take on a role enforcing EC law supremacy, for it would appear like they had caved to nationalistic political pressure. The transformation of the preliminary ruling system is here to stay, but politicians still have tools of influence that can be used to influence future ECJ and national court jurisprudence, without violating the legal rules of the game. From the past experience in legal integration and the enduring institutional features which allowed the ECJ to escape member state control, a few hypotheses about the future relationship of between the member states and the ECJ can be developed. Most of these hypotheses could be adapted to apply to political-judicial interactions outside of the EC realm as well.⁶²

The Functional Roles of the ECJ: Member states interest in having the ECJ check the exercise of EC institution authority and resolve disputes among member states is unlikely to change. Similarly, the Commission will remain the monitor and enforcer of choice for member states.

H1a: Expansions of ECJ authority and resources will be focused on helping the ECJ perform the core functions of controlling acts of EC institutions, resolving disputes among member states, and enhancing Commission oversight mechanisms, but not national court oversight mechanisms.

Short Time Horizons: The short time horizons of politicians will limit political responses to ECJ activism.

H2a: Politicians will be more likely to act against ECJ decisions which create significant financial and political consequences.

H2b: Politicians will not act against decisions of strong doctrinal importance which do not create immediate material (financial or political) effects.

⁶¹ Rice, Robert, James Harding, and Deborah Hargreaves. EU states ordered to pay for breaches of European law. *Financial Times*, March 6, 1996, p. 12.

⁶² At least some of these hypotheses have been tested in a study by Bernadette Kilroy (UCLA Dissertation 1997). Kilroy's dependent variable is ECJ decision-making, and she investigates the conditions under which the ECJ rationally anticipates a political response and moderates its jurisprudence.

National Judicial Vigilance and the Legal Rules of the Game: In the areas of EC law where national courts can be invoked, and where national courts accept ECJ jurisprudence, extra-legal political strategies of avoiding unwanted ECJ decisions will be foreclosed.

H3a: When EC law cannot be invoked at the national level (i.e. because it does not create direct effects or the ECJ does not have jurisdictional authority to be seized by national courts), politicians will be more likely to ignore unwanted ECJ decisions or adopt extra-legal means to mitigate the effects of ECJ decisions.

H3b: In countries where national courts are more vigilant and a rule of law ideology prevails, politicians will be less likely to use extra-legal means to circumvent ECJ jurisprudence. In countries where national courts are less vigilant and a rule of law ideology is not a significant domestic political factor, politicians will be more likely to use extra-legal means to circumvent ECJ jurisprudence.⁶³

Joint-Decision Trap- The policy impact and institutional transformations created by ECJ decisions will be difficult to reverse through EC level action. The ECJ will be more sensitive to political concerns when politicians can credibly threaten to overcome the institutional constraints created by the joint decision trap. This is more likely to occur when:

H4a: ECJ decisions which adversely effect a significant majority of member states will be more easily reversed. ECJ decisions which imply adverse consequences for only a small number of countries will not be reversed.

H4b: A coalition for reform against ECJ decisions is more likely to emerge when ECJ decisions adversely effect those countries which traditionally protect the ECJ (small countries and Germany).

H4c: The ECJ will be more attentive to the political concerns of states prone to invoke a confrontational bargaining style to extract concessions from other member states in areas related to legal integration.

H4d. The ECJ will be more attentive to political concerns when an IGC is already scheduled so that mobilizing member states and linking ECJ issues to larger political deals is easier to arrange.

These hypotheses pertain to efforts to reverse judicial activism or threaten the ECJ into quiescence. But politicians can also limit legal integration pro-actively, by acting before the court case is on the ECJ's docket, before the joint-decision trap exists, that is at the initial legislative phase. Having learned from their experience in legal integration in the past, member states have adopted more savvy strategies during the legislative process itself to ward against the adverse expansion and penetration of EC law into the national realm. Member states are using three mechanisms to limit future unwanted legal expansion: 1) They are excluding the ECJ from interpreting politically sensitive new EC legal agreements; 2) They are trying to "repatriate" areas of

⁶³ This hypothesis follows from Slaughter, Anne-Marie. 1995. International Law in a World of Liberal States. *European Journal of International Law* (6).

EC authority to the national realm, and by implication exclude ECJ authority from these realms; 3) They are putting into new EC texts wording designed to 'inoculate' the texts against certain types of interpretations and legal applications in the future.

Excluding the Court from sensitive EC agreements

Burley and Mattli have argued

once started down a particular path, the Court's trajectory is difficult to monitor or control. It can be slowed down 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...⁶⁴

Having seen the ECJ broadly interpret EC agreements, states have been reluctant to extend ECJ authority over new areas of community activity. In the Treaty on a European Union (TEU), member states explicitly limited the ECJ's authority only to the revisions of the Treaty of Rome, the ECSC Treaty and the Euratom Treaty. Excluded were the two new pillars of the Maastricht Treaty: Foreign Policy and Justice and Home Affairs (Article L TEU).

States have also been reluctant to extend ECJ authority over 'intergovernmental agreements' adopted by member states which are not part of the EC legal framework. There is a provision in the TEU which could allow member state to delegate interpretive authority to the ECJ to new intergovernmental agreements (Article K. 3 (2) c), but there is strong disagreement over if interpretive authority should be delegated to the ECJ. In the most recently adopted agreements on a Customs Information System, Europol, and fraud against the Union and criminal jurisdiction pertaining to EC officials, member states have agreed to grant the ECJ authority to adjudicate disputes among themselves, and between themselves and the Commission. But they are deadlocked over extending preliminary ruling jurisdiction for the ECJ. The compromise offered by the Netherlands and Germany is to limit the right of reference regarding these agreements to the highest national courts. Britain has refused this position, but it is clear that if the ECJ's Article 177 authority is extended it will only be with respect to the highest courts of last instance. Another

⁶⁴ Op. cit. Burley and Mattli (1993) p. 74.

possibility is that no agreement will be reached, and the inter-governmental agreements will either never be implemented or there will be “opt out” clauses to limit ECJ authority in certain countries. Small states and Germany are trying to reverse the Court’s exclusion from intergovernmental agreements by changing Article K 3 (2) c), and if the opportunity arises they will seek to include the ECJ into these areas as well as the two pillars of the TEU from which the ECJ is excluded. But for now, the Court’s exclusion limits the ability of the ECJ to interpret the new EU powers in the TEU broadly.

Repatriating Policy Areas Back to the National Realm: The Politics of Subsidiarity

Also included in the TEU is a “subsidiarity clause” which states:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In the areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty. (Art. 3b TEU)

The principle of subsidiarity was not explicitly part of the Treaty of Rome,⁶⁵ but it was implicitly part of the Treaty so far as it was assumed that member states would have to unanimously agree to all legislation to implement the Treaty and any policy area not explicitly mentioned in the Treaty was assumed not to be part of EC jurisdiction. But member states legislated beyond the minimum needed to create a common market, and used the “elastic” clause of Article 235 EEC to undertake collective activities which did not fall under the Community’s authorized jurisdiction.⁶⁶ The ECJ did not stop these political transgressions and arguably committed expansionary transgressions of its own. By incorporating the subsidiarity principle directly into the TEU, member states were trying to shift the burden of proof to the Community institutions to show that the EU action was necessary to achieve the goals of the Treaty, and make it clear that EU authority did not extend outside of the limited jurisdictional realm of the Treaties.

⁶⁵ It was, however, implied in the Single European Act with respect to the environment.

⁶⁶ Mark Pollack has explained the tendency of EC competences to “creep” beyond their initial mandate (Dissertation, Harvard University, 1995). Member state use of Article 235 is discussed in Weiler (op. cit. 1991 p. 2447).

The subsidiarity clause pertains to the European Union's jurisdiction overall, and does not in itself effect the ECJ's doctrine regarding the direct effect and supremacy of EC law. When the subsidiarity clause was inserted, legal scholars and politicians decried its vagueness, and argued that it would fall to the ECJ in the last instance to interpret where EC authority did and did not lay, thus it would only constrain EC law expansion to the extent that the ECJ let it. But there are pressures on the ECJ to apply the subsidiarity principle extensively to protect member state's sovereign rights. Politicians, citizen groups and journalists invoke the subsidiarity clause to argue against proposed EC legislation. In its *Maastricht* decision, the German Constitutional Court also made it clear that it expects the ECJ to enforce the subsidiarity principle and that any EC law or ECJ decision which goes beyond the Treaty's mandate will be non-binding in Germany.⁶⁷ The ECJ seems to be responding to these pressures. In light of the upcoming IGC and German *Maastricht* decision, the ECJ has for the first time found limits to EC authority.⁶⁸

More than an absolute principle, the subsidiarity principle implies that the division of member state and Union jurisdictional authority is up for re-negotiation. Indeed a Financial Times article asserted that the British government saw the upcoming IGC negotiations as a "unique opportunity to seek repatriation of a wide range of powers from Brussels."⁶⁹ Through time a defined and accepted division of jurisdictional authority between member state and the Community will develop (just as a defined division of authority between the US Federal Government and the states has developed), and the joint-decision trap will set in undermining the credibility of member states to invoke the subsidiarity principle at will or threaten the ECJ into finding in the favor their subsidiarity right. But for now the debate over what policy areas are part of the EC realm and what are part of the national realm remains relatively fluid, and certain policy areas where EC legislation exists may be "repatriated" back to the national level.

⁶⁷ *Brunner and others v. The European Union Treaty* BVerfG . 2 BvR 2134/92 and 2 BvR 2159/92. *Common Market Law Reports* (11 January 1994):57-108. .See Chapter 4 for more on this decision.

⁶⁸ In its *Keck* decision the ECJ found that the EC lacks the authority over how countries regulate they way goods enter the national market. The Court also found limits to EC authority to negotiate international agreements on behalf of the member states. *Case 1/94* ECJ decision of November 15, 1994. *French penal authorities v. Keck and Mithouard* ECJ decision of decision of 24 November 1993, 267 and 268/91. not yet published.

⁶⁹ Op. cit. Brown (1995).

Inoculating EC Texts Against Unwanted Interpretations

Another way to avoid unwanted broad interpretations is to write the legal text more clearly, and explicitly limit the law's application in the national realm. If member states can agree to a very specific text, then the Court's interpretive room for maneuver will be limited. But there still remains the problem of what to do if member states cannot agree on the details of the statute. The European Union has adopted a practice which facilitates the negotiating process on EC texts, but undermines the binding nature of the legislation. In the negotiating and drafting stage of EC law, protocols are attached which caveat a member state's legal commitment to implement the law. The Maastricht Treaty added numerous protocols including one which allowed the Danish to keep their legislation limiting the acquisition of second homes (aimed at the wealthy Germans), one which allowed Portugal to maintain an interest free credit facility for the regions of Azores and Madeira (with the commitment to 'pursuing the best endeavors to put an end to the facility as soon as possible'), and an opt-out for the United Kingdom from the Social Protocol.

The process of writing in caveats is not limited to Treaty negotiations. The German government demanded additions to a directive regulating television programming content which declared that the directive was only binding in the end to be achieved and defined the goal of the directive so vaguely that it was unenforceable.⁷⁰ According to an article in the *Economist*, the addition of secret footnotes to laws passed in the Council of Ministers has grown "out of proportion." The article highlighted some of the egregious uses of the practice including:

Last year's directive on data protection attracted 31 such statements. Britain secured an exemption for manual filing systems if—work this one out—the costs involved in complying with the directive outweigh the benefits. Germany secured the right to keep data about religious beliefs under wraps. Since these and other statements are not published, Joe Bloggs will know about these maneuverings only by chance or if his government chooses to tell him.⁷¹

The extent to which these exceptions are legally binding is unclear, but they reveal an attempt by member states to anticipate and avoid having legal integration undermine valued national policies.

⁷⁰ Protocol 4 and 5 declared that the directive was only binding in the end to be achieved, and Protocol 7 made the end of the directives relatively vague and unenforceable, implying that the goal of the directive was simply to achieve a higher audiovisual capacity in Europe, with each member state working towards the goal within their constitutional capacities to do so. (EC Directive 89/552 on Television Programming)

⁷¹ 1995. Seeing through it. *The Economist*, September 16, 1995:59.

V. Conclusion: Who are the Masters of the Treaty?

The ECJ serves many useful functions for the member states. It checks the Commission and the other EC institutions, fills in the details of incomplete contracts, and along with the Commission monitors compliance with EC law. States continue to want a legal institution to fill these roles, thus eliminating the Court, depriving the court of the resources it needs to do its job, or creating institutional changes which would slow down the legal process is not an appealing option.

To say that member states want a Court to fill these functions is not to say that member states wanted the EC legal system they have today, with national courts enforcing EC law against their own governments. The anti-ECJ Bruges group cites the Doctrines of EC law Supremacy and Direct Effect as two examples where the ECJ had “crossed the dividing line between interpreting and applying the law and actually creating it,” and argued that

[w]hen the Member states signed the Communities Treaties they did not agree to legislation by judicial fiat. They have every reason and entitlement to insist that the Court of Justice...refrains from usurping the role of the Community legislature.⁷²

The Bruges Group’s attack on the ECJ highlights the irony of the member states’ predicament. The Group finds that the ECJ is highly effective—its decisions are rarely flouted or ignored and the Court’s popularity as a forum for the resolution of disputes shows no sign of diminishing.⁷³ National judicial support is the key variable which makes the international rule of law in Europe effective. Yet it is precisely this feature of the EC legal system which has undermined the member state’s ability to control the Court. Once the ECJ had national courts to implement its jurisprudence, the largest political threat against the ECJ—non-compliance—was gone, giving the ECJ more latitude in its decision-making. National court support also changed the default outcome of political non-action. When ECJ decisions were unenforceable, a member state

⁷² Smith, Gavin. 1990. *The European Court of Justice: Judges or Policy Makers?: The Bruges Group Publication*, Suite 102 Whitehall court, Westminster, London SW1A 2EL.

⁷³ They argue:

In the final analysis, the effectiveness of any court is judged by the degree to which litigants seek its rulings and its judgments are respected. The European court of Justice in Luxembourg has without doubt satisfied both prongs of this test, despite a reluctance in the past on the part of certain national courts...to accept its doctrines. Cases in which its decisions have been flouted or ignored are extremely rare, while its popularity as a forum for the resolution of disputes shows no sign of diminishing. (Ibid.)

could ignore an ECJ decision and simply maintain its 'illegal' national policy. But with national courts enforcing ECJ decisions directly, political non-action meant that EC policy rather than national policy would be applied by national courts, and that there could be significant political and financial costs should the government refuse to change its policy. Taking legislative action to reverse unwanted decisions is much harder than dismissing or ignoring decisions, and if legislation requires the assent of other member states, legislating over an ECJ decision might be impossible. Because the ECJ knew that politicians would probably not be able to create enough consensus to reverse activist jurisprudence or to attack the Court for its excesses, it was emboldened to make decisions with more significant material and political impact. In these respects, national judicial support contributed indispensably to the legal and political authority of the European Court, and the political power of the Court.

Politicians' short term time horizons, national judicial support, and the joint decision trap are enduring institutional features of the EC legal and political system. The continued existence of these conditions mean that past doctrinal evolution will not be overturned—the ECJ's bedrock legal principles embedded in the original Treaty of Rome, such as the direct effect of many Treaty articles, the supremacy of European law, the "four freedoms" (free movement of goods, people, capital and labor), equal pay for men and women, and the direct effect of specific EC directives—and that the ECJ will have the capacity and opportunity to be politically activist in the future.

Of course this does not mean that the ECJ faces no constraints. A significant constraint against ECJ activism come from within the legal process itself. Cappelletti has argued that

the most fundamental and, so to speak, "natural" limits [to judicial law-making] are those of a procedural character. If the judicial nature of adjudication is not to be perverted, the judge is bound to procedural passivity, in the sense that he cannot initiate a case on his own motion; he is bound to procedural impartiality, neutrality, and detachment, in the sense that he has to be above the parties... and he is bound to procedural fairness, in the sense that he has to guarantee that all parties have a fair opportunity to be heard.⁷⁴

If the ECJ wants its jurisprudence to be accepted by national courts, it must stick closely to the letter of the law. National courts have shown an increasing willingness to challenge ECJ

⁷⁴ Cappelletti, Mauro. 1989. *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press. Quote from p. 35.

expansions of law, and they have made it clear that the subsidiarity rights of member states must be respected otherwise EC law will not be internally binding.⁷⁵ Member states also have tools to keep the ECJ out of politically sensitive EC policy, to 'inoculate' EC legal texts against unwanted interpretations, to legislate over ECJ decisions, and to threaten the ECJ to take state's rights into account in its jurisprudence. Also, if member states schedule more IGC's in the future and put the ECJ's authority on the agenda, the credibility of the political threat can be extended into the future.⁷⁶

The ability of politicians, public opinion, and national courts to successfully influence the Court into political quiescence will vary across time, depending on the political climate, and across issue areas, depending on the political sensitivities of the issue and the institutional rules for amending the EC law and for national court involvement, factors which make a threat against the ECJ more or less credible. But the institutional basis of the European Court's political power will likely not diminish over time, even if the Court enters periods where it is less activist. As long as the Court has its doctrinal tools and legal cases to adjudicate, and the support of the national judiciaries, it can later invoke these tools to make bold decisions which challenge status quo policies and political understandings.

⁷⁵ Heightened national court vigilance is not, however, a reaction to national government prodding. On the contrary it is a reaction against national governments' willingness to agree to policies at the EC level which undermine national autonomy and violate the internal separation of powers, and against ECJ encroachments on their own interpretive authority.

⁷⁶ See the conclusion of chapter three for more on the constraints faced by the ECJ.

Chapter 7

The Rule of Law in Europe: Implications for Domestic Politics and International Law

The European Court has emerged as a politically influential actor in both EC and national politics. The Court's political power and the increased ability of EC law to influence the policy choices of national governments is a direct result of acceptance of the supremacy of EC law by national judiciaries. Because EC law is supreme to national law, national courts review the compatibility of national law with EC law. Through references to the ECJ, national courts create the opportunity for the ECJ to influence national policy. By enforcing EC law against their own governments, national courts create costs for non-compliance and make it difficult for governments to ignore ECJ jurisprudence. Because member state cannot credibly threaten the ECJ into quiescence, because ECJ decisions are not easily reversible, and because national courts will enforce EC law against their own governments and award penalties for government breaches of EC law, national politicians are constrained by ECJ legal interpretations and forced to abide by ECJ decisions.

Much of this dissertation was focused on explaining why national courts, traditionally part of national systems, agreed to enforce European law against their own governments. The explanation here focuses on how inter-judicial politics influenced legal interpretation and the development of national legal doctrine regarding the relationship of EC law to national law. By making a reference to the European Court, lower courts and some higher courts found that they could circumvent national legal barriers and get legal outcomes they preferred for policy, empowerment or legal reasons, and essentially force these interpretations on other national courts in the system. National court references to the ECJ helped bring EC law and ECJ jurisprudence into national legal debates, pressuring higher courts within the national legal system to change legal precedent to make it accord with ECJ jurisprudence. A single judge sitting anywhere in the national legal hierarchy found that by inviting the ECJ to rule on national policy, she could create an

alternative legal outcome to what would have been allowed under national law and national legal precedent, and essentially force this outcome on other actors in the national political system.

National governments were not very involved in these inter-judicial politics. Governments focused mainly on minimizing the material impact of ECJ jurisprudence, and as long as ECJ jurisprudence was not creating significant problems they were willing to overlook the doctrinal within the legal decisions.¹

Once EC law supremacy became embedded in national legal systems, the ECJ started to apply its doctrine more boldly. Member states opposed to the ECJ's power were unable to reverse the ECJ's doctrinal advances or break the institutional link between national courts and the ECJ because of a division of member state interests. To reverse the transformation of the EC legal system or any ECJ jurisprudence based on the EC Treaty, member states need unanimous agreement. As long even one state strongly prefers the status quo, attempts to change the Treaty will fail. The ECJ knows that it can count on certain member states to protect it from attack which is why political threats against the European Court usually ring hollow.

This conclusion examines the implications of this EC legal system on domestic politics within the European Union (Section I). It will then examine how the preliminary ruling mechanism of the EC contributed to the rule of law in Europe and compare the EC legal system to existent and new international legal systems to gain insight into why these systems may not be as effective as the European system at influencing national policy (Section II).

I. The Transformation of Domestic Politics through the European Legal System

The existence of an EC rule of law has important implications for domestic politics within member states. Because national courts are willing to review the compatibility of national law with EC law, and make a reference to the ECJ, appeals to EC law have become a powerful resource for domestic actors to achieve domestic policy goals. EC law can provide leverage in struggles over national policy and thereby change political outcomes.

¹ The exception to this was in France, where Gaullist members of the National Assembly tried to reverse the *Cour de Cassation's* acceptance of EC law supremacy. See Chapter 5 for more on this point.

Most disputes over EC law are brought by individuals or groups in domestic society which turn to EC law because the EC legal system offers them a new source of leverage to move national policy in their favor.² If domestic actors can successfully argue that a national policy violates European law, national courts will order the suspension of the policy and even award compensation for the violation of European law. A case does not even have to make it to national courts or the ECJ for review for EC law to shift national government or private sector policy. A domestic interest group can increase its negotiating leverage simply by invoking EC law and threatening to bring a case. Calculating that an ECJ decision might be worse than a negotiated settlement, governments and private sector firms may change policy in ways that are more consistent with the interests of the individual or the domestic group invoking EC law, and more consistent with EC law and EC policy.

An especially striking example of how the EC legal mechanism can affect national policy and politics appeared in Britain concerning the issue of gender equality in the workplace. Britain is among the most defensive countries when it comes to national sovereignty, and especially dislikes EU social policy. Yet by appeals to EC law the British Equal Opportunities Commission (EOC) was able to force the Conservative British government to adopt significant changes in British equal treatment policy. Alter and Vargas have shown that by invoking European law and using the preliminary ruling reference system, domestic groups and sympathetic tribunal chairs circumvented national legal barriers and established a series of pro-equality legal precedents which higher British courts were compelled to accept.³ Incorporating EC legal victories into a negotiating strategy, the EOC then forced the Conservative government to lift the cap on awards to women who had been discriminated against, equalize the pension ages of men and women, compensate servicewomen who had been dismissed because of pregnancy, and require some work benefits for part-time

² Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court. *International Organization* 47 (1):41-76. See p. 62.

³ Alter, Karen. 1996. The European Court's Political Power: The Emergence of the European Court as an Influential Political Actor in Europe. *West European Politics* (July). Manuscript p. 9-17. The study is based on Vargas' honors thesis research. Vargas, Jeannette. 1995. Shifting the Balance of Power Between Domestic Groups: The European Court and British Equal Treatment Policy. Dissertation in Honor's Thesis for a Bachelor of Arts degree, Harvard University.

workers. Following the EOC's strategy, British unions also have won legal victories regarding the obligation of newly privatized firms to notify workers before dismissing them, and the obligation of the government to implement EC works council legislation.⁴

When domestic groups use EC law to change national policies, their achievements are hard for national governments to reverse. EC legislation can only be changed at the EC level, and no single country can decide if or how the legislation should be changed. With respect to unequal pension schemes, the Conservative government managed to work with other member states to limit financial liabilities for past violations of EC equality law. But it has been unable to convince other member states to reverse any of the policy changes forced on it by the EOC and the ECJ.

In the case discussed above, appealing to EC law actually shifted the domestic balance of power, allowing weak groups to impose changes in domestic policy on strong political groups and on their national government.⁵ An interesting epilogue to the story is that the Labour Party, which once opposed the EU, now is a strong supporter of the EU. The Labour government lobbied against EC membership out of a fear that it would undermine the economic and political status of workers in Britain. After seeing how EC law became a source of leverage for unions and pro-women groups at the national level, Labour became a strong supporter of EC membership. The Labour party hopes to sign on to the Social Protocol to lock the British government in to social policy changes through EU level legislation. While not the only reason for Labour's change of heart, the supremacy of EC law over national law undoubtedly contributed to a significant change in how this party identifies its interests as far as the European Union is concerned.

The potential reach of EC law is wide, thus there are many areas of national policy where EC law can provide a resource to domestic groups. As Pierson, Leibfried and Scharpf have argued "in principle... few matters are outside of the reach of EU intervention.... There will hardly be any field of public policy for which it will not be possible to demonstrate a plausible connection to the

⁴ For more on EC law based litigation strategies see: Harlow, Carol, and Richard Rawlings. 1992. *Pressure Through Law*. London: Routledge.

⁵ This is the argument of Alter and Vargas (op. cit. 1996).

guarantee of free movement of goods, persons, services and capital—and thus the core objectives of the EU.”⁶

This does not mean that the ECJ *will* intervene in all areas of national policy. The ECJ has positioned itself to be the “Supreme Court” of Europe deciding on the division of EC and state authority, and which national policies are and are not compatible with EC law, but it has discretion in how it uses its office to influence policy. It may be invited by domestic groups to intervene in national policy debates and choose not to in order to avoid conflicts with political bodies or in deference to public opinion. It may also be invited by domestic groups to limit EC authority and protect states rights, and it may choose to support their cause. As U.S. Federal authority was expanded greatly through broad readings of the Interstate Commerce Clause, so too could EC authority be expanded greatly through broad readings of the “four freedoms”: the free movement of goods, labor, capital and services. As US Federal authority is starting to be restricted by the US Supreme Court,⁷ so too could EC authority become more restricted by the ECJ.

How the ECJ will use its position and authority to influence EC and national politics in the future remains to be seen. But we can expect to see the ECJ involved in decisions about national law and policy, and about the separation of EC and national authority.

II. Why the EC Legal System Succeeded in Creating a Rule of Law

The European legal system has managed to overcome many of the limitations of international law and other international legal systems. International legal systems typically suffer from a lack of use, as states prefer to resolve matters through diplomatic channels and power politics. International law also typically lacks a sanction to deter violations, and there is usually no way to coordinate interpretation of the law so that each state can interpret the law to fit its policy objectives. The ECJ overcame these weaknesses by expanding access to individuals so that states

⁶ Pierson, Paul, and Stephan Leibfried. 1995. Multi-Tiered Institutions and the Making of Social Policy. In *European Social Policy: Between Fragmentation and Integration*, edited by P. Pierson and S. Leibfried. Washington D.C.: Brookings. See p. 7. The Scharpf article they are referring to is Scharpf, Fritz. 1994. Community and Autonomy: Multilevel Policy-Making in the European Union. European University Institute. RSC 94/1. See p. 6.

⁷ Berstein, Nina. An Accountability Issue: As States Gain Political Power, a Ruling Seems to Free Them of Some Legal Reins. *New York Times*, April 1, 1996, p. 1 and B9.

could not keep the ECJ out of interpretive disputes, and by harnessing domestic courts to sanction violations of EC law. It was able to do this because of the preliminary ruling mechanism. The preliminary ruling system allowed national courts to stop their proceedings and send a question of interpretation to the ECJ, bringing disputes into the legal realm, helping to coordinate the interpretation of EC law, and creating a sanction for violating the law. This section considers the traditional problems of international legal systems, and how the transformed preliminary ruling mechanism of the EC legal system contributes to overcoming these problems. It then compares the EU legal system to other international organizations to see the extent to which other international legal systems have mechanisms which help to overcome these traditional weaknesses of international legal systems.

The Preliminary Ruling System: A Mechanism to Overcoming the Traditional Problems of International Legal Systems

The transformed preliminary ruling mechanism contributed to the European rule of law by allowing individuals to have access to the international legal forum, giving the ECJ the cases it would have otherwise lacked. It made ECJ decisions enforceable, and it created a domestic cost to violating EC law. Furthermore, by coordinating how national courts interpret and apply EC law, the preliminary ruling mechanism facilitated the development of a transnational convergence in national court interpretation of EC law. To the extent that national courts were enforcing EC rules, national governments across national legal contexts came to be bound by the same rules. The uniformity in how EC law was being interpreted enhancing the sense of reciprocity in the EC legal process, creating a greater willingness of national governments to adhere to EC rules.

Creating Access to Legal Forums: Overcoming the Problem of States Keeping Cases out of the Legal Realm

Courts need cases in order to be able to develop a jurisprudence. In the EC legal system designed by the Treaty of Rome, only member states or the Commission could bring potential violations of EC law to the attention of the ECJ and the ECJ lacked a significant body of cases and legal questions to develop its jurisprudence. Member states did not bring their disputes to the ECJ,

preferring to rely on the political process and bargaining instead. Indeed member states have raised only three infringement suits against other member states since the Community was created. The Commission also did not bring interpretive disputes into the legal realm. Writing on the Commission's use of the EC legal system to enforce European law, Rasmussen noted that

Citizens of the several Member States often in vain, drew the attention of the services of the Commission on flagrant breaches of Community obligations. The implicit or explicit invitations which the Commission was given to commence [infringement] proceedings were too often either rejected or neglected. To observers outside the Commission, the reluctance to file suit yielded an impression of weakness and of imperfect safeguards ensuring it a real independence. This behavior was hardly conducive to a high level of State compliance with Community Law...⁸

Indeed in the first 10 years of the Economic Community, the Commission brought only 27 cases against member states.⁹ The result of this strategy was that the ECJ lacked cases through which it could develop a jurisprudence and national governments continued to interpret the law on their own.

The transformation of the preliminary ruling system expanded access to the ECJ to individuals and domestic groups. By allowing access to individuals and groups, the preliminary ruling procedure allowed cases to reach the European Court which would not have otherwise made it onto the Court's docket. Both the number and types of legal questions which national courts referred were of a fundamentally different nature than the type of cases which states or the Commission brought.¹⁰ Table 7.1 shows the number of references to the ECJ made by national courts. The importance of the preliminary ruling system is especially apparent in the 1960s and 1970s.

⁸ Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers. See p. 238.

⁹ Data from the Service Informatique Juridique of the Court of Justice.

¹⁰ Wyatt has argued that the nature of the preliminary ruling process lends itself to different types of legal questions being raised compared to traditional international legal regimes. Wyatt's main argument was that the preliminary ruling procedure catches violations of EC law before they actually happen, whereas most international legal procedures can address only breaches which have already been committed. Wyatt, Derrick. 1982. *New Legal Order, or Old? European Law Review*: 147-166.

Table 7.1 Cases Brought by States, Commission and National Courts (1960-1994)

	1960-1969	1970-1980	1981-1994	Total 1960-1994
Infringement cases brought to the ECJ by member states	0	2	1	3
Infringement cases brought to the ECJ by Commission ¹¹	27	98	920	1045
Preliminary ruling references from national courts to the ECJ	75	666	2152	2893

Infringement statistics (1960-1993) provided by the Service Informatique Juridique of the Court of Justice. Preliminary ruling statistics and 1994 statistics from the Court's activity report (1992-1994).

National courts also asked the ECJ questions which states would not have asked. Nearly all of the ECJ's landmark rulings, decisions which created new legal principles and doctrines, have been made in cases referred to it by national courts. These cases gave the ECJ the opportunity to develop legal doctrine and to issue definitive interpretations of EC law so that states could not offer their own interpretations of the law to protect national policies.

In most international dispute resolution systems only states have access to the judicial or quasi-judicial bodies, and these bodies lack cases. National governments are often reluctant bring cases to a legal or quasi-legal realm, for fear that they may be stuck with a decision which is worse than what they had before or what they could have negotiated. As Levi has argued:

All states, large and small, rich and poor, strong and weak, prefer the option of settling disputes by their own means...The wish of states to reserve as large an area of uninhibited action as possible applies to the judicial process as well. To them the judicial process is acceptable only under rare circumstances. For either they fear that the process is itself political, or they hope they can achieve more favorable results by using political means for the solution of their disputes.¹²

Because they lack cases, international judicial or quasi-judicial bodies do not have the opportunity to create clear interpretations of the law that could serve as a precedent for future policy-making and negotiations over international law violations. Because there are no clear guidelines about the meaning of clauses in the agreement, states are able to interpret international law to fit their policy

¹¹ Most of the Commission's cases were brought since the 1980s. A significant portion of the cases raised since 1985 can be explained by the completion of the single market. Between 1985 and 1993 69% of Commission infringement cases concerned the non-implementation of common market directives, half of which were violations for not communicating with the Commission whether or not a directive was transcribed into national law. The more authoritative nature of ECJ decisions (especially in light of the ECJ's doctrine on the direct effect of directives) also made using the infringement procedure a more successful strategy and encouraged the Commission to use the infringement procedure more. Today the Commission is much more willing to use the EC legal system in hard bargaining with the member states, and to bring a case to the Court should the bargaining fail. Statistics are compiled by the author from the sixth and the eleventh Annual Report on the Control of the Application of Community Law (Tables 8 and 2.2).

¹² Levi, Werner. 1976. *Law and Politics in the International Society*. Beverly Hills: Sage Publications. See p. 71 and 73.

interests. The transformation of the preliminary ruling system allowed the ECJ to overcome this weakness of international law and develop a jurisprudence which could influence the policy making process and constrain state action.

Creating the Expectation of a Sanction for Violating EC law

Most individuals and governments tempted to violate the law are deterred from doing so because of the threat of a sanction. In the EC legal system designed by the Treaty of Rome, ECJ decisions were purely declaratory and thus breaking EC law or violating an ECJ decision was virtually costless. The fact that ECJ decisions were purely declaratory made bringing an infringement suit against a state a relatively ineffective strategy, further discouraging use of the legal system. The transformation of the EC legal system allowed the ECJ to get around the lack of any coercive tools by harnessing the enforcement power of domestic courts. ECJ decisions are still mostly declaratory, but because national courts enforce ECJ jurisprudence, the political and coercive power of national legal systems can be used for the enforcement of European law. Having the threat of national court enforcement greatly improved the effectiveness of using EC law as a bargaining mechanism vis-à-vis national governments.¹³ By creating the expectation that a case would be brought, that the government would lose a court case, and that such a loss would create undesirable consequences, member states could be encouraged to settle contentious disputes.

According to Henkin, the expectation that violations of the law will lead to “undesirable consequences” is important in fostering a more general respect for the law:

...much law is observed because it is law and because its violation would have undesirable consequences. The effective legal system, it should be clear, is not the one which punishes the most violators, but rather that which has few violations to punish because the law deters potential violators. He who does violate is punished, principally to reaffirm the standard of behavior and to deter others...In international society, too, law is not effective against the Hitlers and it is not needed for that nation which is content with its lot and has few temptations. International law

¹³ Weiler, Joseph. 1994. A Quiet Revolution- The European Court of Justice and its Interlocutors. *Comparative Political Studies* 26 (4):510-534. See p. 519.

aims at nations which are in principal law abiding but which might be tempted to commit a violation if there were not threat of undesirable consequences.¹⁴

Many international legal systems have sanctioning mechanisms for violations of international law. International Court of Justice decisions can be enforced by the UN Security Council through sanctions, freezing of financial assets, boycotts and authorized military action. World Trade Organization and NAFTA panel decisions can be enforced through authorized bilateral retaliation. But these sanctions are not automatically applied when violations of international law are caught, nor can the court or panel arbitrating the dispute order that a sanction be applied. Whether or which sanctioning mechanisms are used depends on political decisions, and in most cases there is not a political consensus to carry through with sanctions. Because the sanctioning mechanisms which exist are rarely used, there is not the expectation that violations of the law will be met with punishment.

Harnessing individuals to bring cases and national courts to enforce ECJ has helped distinguish the EC legal system from other international legal system. As ECJ Justice Mancini has argued:

Without the doctrine of direct effect the enforceability of the basic rights created by the Treaty would have been dependent on the willingness of the Council of Ministers to adopt the necessary implementing regulations or on the willingness of the Council of Ministers to adopt the necessary implementing regulations or on the readiness of the Commission to prosecute Member States under Article 169 of the Treaty (which was of course a toothless remedy in the pre-Maastricht version of the Treaty). Without direct effect, we would have a very different Community today—a more obscure, more remote Community barely distinguishable from so many other international organizations whose existence passes unnoticed by ordinary citizens.¹⁵

¹⁴ Henkin, Louis. 1961. *How Nations Behave*. New Haven: Yale University Press. Cited in Henkin, Louis, Richard Crawford Pugh, Oscar Schachter, and Hans Smit. 1993. *International Law: Cases and Materials*. Third ed, *American Casebook Series*. St. Paul: West Publishing Co. See p. 34.

¹⁵ Mancini, Federico, and David Keeling. 1994. Democracy and the European Court of Justice. *Modern Law Review* 57 (2):175-190. Manuscript p. 19

Coordinating the Interpretation of International Law

“This is a case of nationalism. We are simply interpreting the North American Free Trade Agreement in Spanish.”

Salvador Mikel, a representative of Mexico's ruling party speaking on the government's new policy limiting foreign companies from managing Mexican pension funds

Signing a treaty only begins a process of cooperation. Reciprocity is key to realizing the benefits of international cooperation and in fostering a willingness to sacrifice short term gains for long term benefits. Reciprocity depends on common interpretation of the agreement. Most international treaties leave significant room for the parties to interpret the agreement to suit their interests. Coordinating the interpretation of international law is thus important.

In the EC, this basic problem of coordination is resolved through the preliminary ruling procedure. The preliminary ruling system helps coordinate how EC law is interpreted in the national realm, and creates pressure across national legal systems for a convergence of interpretation of EC law. Within each national legal system, lower courts create pressure on higher courts to accept ECJ jurisprudence. Because references from national courts all end up at the ECJ, the preliminary ruling mechanism causes a transnational convergence in how EC law is interpreted.

In other international systems, coordinating interpretation remains a problem. International legal systems are designed to resolve disputes over how international law is interpreted. But because these systems are under-used, there is usually no way to coordinate how international law is interpreted by each country. Especially if national courts are to play a role promoting an international rule of law, coordination in how international rules are incorporated into national policy will be important.

Some scholars have argued that transnational legal communities can help overcome this coordination problem in Europe and in other contexts. For example, Joseph Weiler has suggested that cross-national “peer pressure” from courts in other countries was a factor leading to a convergence in national court interpretation of EC law, implying that the pressure created by national courts interacting with the ECJ could be substituted by a horizontal pressure from courts in

other countries.¹⁶ Whether or not trans-judicial dialogues can create a convergence in interpretation is not clear.¹⁷ In any case, it is a relatively weak substitute for the coordination which emerges through preliminary ruling references.

International Legal Systems Compared

The EC legal system is the best example of an international legal system which has overcome the traditional weakness of international legal systems: the ability of national governments to keep disputes out of the legal realm resulting in dearth of cases through which judicial bodies can develop a jurisprudence, and a lack of an expectation of a sanction for violating the law. There are other international legal systems which have found ways to address some of these concerns. No system seems to have found ways to overcome all of the weaknesses, which might explain why the European Union has been more successful in engendering respect for the law and for ECJ decisions than other international contexts.

Table 7.2 outlines how different international legal systems have dealt with the three problems described above.

¹⁶ Weiler, Joseph. 1994. A Quiet Revolution- The European Court of Justice and its Interlocutors. *Comparative Political Studies* 26 (4):510-534. See pp. 521-523. Also see Slaughter, Anne-Marie. 1994. A Typology of Transjudicial Communication. *University of Richmond Law Review* 29 (1):99-137.

¹⁷ Weiler offers examples where the decisions of courts in other countries were cited in national legal decisions and examples where the lawyer in the case raised the issue of the international isolation of the national court. In fact, the German case he cites (the *Solange I* decision discussed in Chapter 4) shows that peer pressure *did not* shape national judicial behavior—the BVerfG contradicted the decision of the Italian Constitutional Court. With respect to the French case he cites (the *Nicolo* decision discussed in Chapter 5), the *Conseil d'État* had been internationally isolated for years. There are so many other factors which can explain why the *Conseil d'État* decided in 1989 to reverse itself that it is hard to conclude that trans-judicial peer pressure mattered much at all.

Table 7.2 International Legal Systems Compared

International Treaty	International Legal System	Sanctioning Mechanisms	Access to Legal Bodies	Coordinating Legal Interpretation Across Countries
European Community—Treaty of Rome	ECJ	National court enforcement.	Access to individuals and groups through the preliminary ruling system.	National court use of preliminary ruling mechanism creates pressure for a transnational convergence in interpretation. ECJ coordinates interpretation by national courts.
European Convention on Human Rights	European Court of Human Rights (ECHR)	None	Individuals can bring cases to commission which decides if dispute is sent to ECHR.	The Convention is also invoked in national courts. ECHR can coordinate national legal interpretation of the convention by national courts.
North American Free Trade Association	Arbitral Panels	Authorization of bilateral retaliation.	Only states can call for arbitral panels. Article 1805 requires individual access to impartial review procedures for administrative decisions taken on matters effected by treaty.	Under Article 1805, national courts could be called upon to review compliance with the treaty. Arbitral panels could serve as coordinating mechanism guiding how national courts interpret the agreement. Too early to say if arbitral panels will have enough cases, or if national courts will assimilate the interpretations of these panels.
International Labor Organization	Commission of Inquiries	International Court of Justice decision, but no concrete sanctioning mechanisms	States, and industrial associations (employers and workers) within signatory states.	None
World Trade Organization	Dispute Resolution Bodies	Authorization of bilateral retaliation	States only	None
United Nations Legal System	International Court of Justice	At the discretion of the Security Council	States only	None

The European Convention on Human Rights

The legal system of the European Convention of Human Rights has relatively wide access to the international tribunal, and a means to coordinate interpretation, but no sanctioning mechanism. The European Court of Human Rights (ECHR) can hear cases brought to it by individuals or groups, but ECHR decisions do not carry any sanction. Indeed countries have occasionally indicated that they intended to ignore an ECHR decision because they considered it illegitimate or a violation of national sovereignty. In these cases where the ECHR decision was ignored, there did not seem to be any significant cost for the government involved.

Because access to the European Court on Human Rights (ECHR) is quite wide, there are opportunities for the ECHR to develop a human rights jurisprudence. Often the ECHR hears cases after national courts have already ruled on human rights issues. Constitutional Courts pride themselves on protecting individual rights, and the possibility that a high national court can be contradicted by the ECHR on an issue of human rights works as an incentive for national courts to look to the ECHR jurisprudence for guidance. Thus the ECHR could help coordinate interpretation of the agreement. How important coordination may be in fostering greater compliance is unclear. The Convention strives to improve respect for human rights within national systems, a goal which does not in itself need international cooperation to be furthered.

North American Free Trade Association (NAFTA)

On paper, NAFTA has a sanctioning system, relatively wide access to legal bodies, and a way to coordinate interpretation of the agreement. But it is too early to say how these legal mechanisms will be used. Under the NAFTA agreement states can convene a Arbitral Panels to help resolve disputes over compliance with the agreement.¹⁸ These decisions do not carry a sanction, but the panels can authorize a country to retaliate bi-laterally for a violation of the Treaty. Arbitral Panels have already been used by the U.S. Department of Labor which accused Mexican employers of not allowing workers to unionize. The government in Mexico has also used the procedure, demanding hearings about alleged labor violations by a private sector firm in the US.¹⁹ The decisions of these panels do not carry any sanctions, and at this early stage of the agreement it is unlikely that a country will retaliate for a violation of the agreement. Whether a state would create

¹⁸ Chapter 20 of the NAFTA agreement creates a dispute resolution system through "Arbitral Panels". The system is modeled after that of the WTO.

¹⁹ Goldberg, Carey. U.S. Labor Making Use of Trade Accord It Fiercely Opposed. *New York Times*, February 28, 1996, p. A 11. Mexican Government Officials were challenging the company SPRINT's closing of a division which serviced Spanish speakers, arguing that La Connexion Familiar was closed because it was about to unionize. Union leaders of the Communications Workers of American had been pursuing this issue and had lost the first round of the battle against SPRINT. The article discusses that these groups welcomed the Mexican Government's complaint.

a sanction for a private sector violation of NAFTA is also questionable, thus it is unclear if there can be an expectation of a sanction for a violation of the agreement.

There are also mechanisms for individuals to use national courts to enforce their rights under the NAFTA agreement. Under Chapter 18 of the agreement, each signatory state must allow for judicial or quasi judicial procedures for individuals and parties to challenge the administration of national laws in areas covered by the agreement.²⁰ It is too early to say how national courts and national administrative agencies will respond to Chapter 18 of the Treaty. Whether or not national courts will become involved in enforcing this agreement is unclear. It is also unclear if national courts will look to panel decisions for guidance so that a fairly uniform interpretation of the agreement can emerge.

International Labour Organization (ILO)

The ILO has dispute resolution system, and access to this mechanism extends to employer and labor groups as well as states. But ILO decisions are generally unenforceable, and there is not the expectation that violating the agreement will lead to a sanction. Violations of the ILO Constitution can be brought to the attention of the ILO by other signatory states and national industrial associations of workers and employers. The decision to convene a Commission of Inquiry or to proceed through the various escalating steps of dispute resolution are political decisions made by the Governing Body.²¹ If a country fails to comply with the Commission's decision, the violation can be referred to the International Court of Justice. But it is unclear what sanctions the ICJ could apply.

In the history of the ILO, complaints have been infrequent and all members have accepted the Commission's suggestions.²² But the use of the complaint procedure has been uneven. In 1975 the United States gave notice that it was withdrawing from the organization, giving as a reason for its withdrawal the following arguments: 1) the system of tripartite representation had eroded due to the admission of non-democratic members, 2) the usual procedures for prosecuting

²⁰ Article 1805 of the NAFTA agreement.

²¹ Articles 26-34 of the ILO Constitution.

²² Op. cit. Henkin et al. (1993) p. 1490

member violations of obligations had been bypassed in recent years, as Conferences passed resolutions on member states' actions without prior referral to the appropriate investigating commission, 3) the organization ignored the alleged violations of rights in all but a handful of states, thus expressing only a selective concern for human rights, and 4) the organization had become increasingly politicized and heedless of its goals of promoting social welfare.²³

The United State's charges are revealing of the typical problems of international legal systems discussed above. The United State's reference to the membership of non-democratic states implies that in only some member states were domestic groups truly able to bring disputes to the ILO, so that the Governing Body lacked cases. The lack of cases likely contributed to the US's impression that the organization ignored violations in all but a handful of states. Because the decision to escalate the inquiries were political decisions, the process was also easily politicized, leading to the impression that the ILO had a 'selective concern for human rights' and that the organization was 'heedless in its goal of promoting social welfare.' The politicization of the complaint procedure clearly created an impression of a lack of reciprocity, which undermined the United State's willingness to be bound by ILO standards. Rather than be held to unequal provisions, the United States preferred to withdraw all together from the organization.

World Trade Organization: (WTO)

In World Trade Organization disputes are resolved through Dispute Resolution Bodies. Access to these bodies are restricted to states, and the decisions of the bodies do not carry any sanction. The WTO's dispute resolution mechanism must be instigated by a state. States have shown an increased willingness to use the dispute resolution mechanism, but there have only been 88 decisions by such bodies from 1948 to 1989 (47 of which came in the period of 1980 to

²³ 14 ILM 1582-4 (1975) cited in Henkin et al (Ibid. p. 1490).

1989).²⁴ With few cases, and with cases which pertain only to specific trade issues, the Dispute Settlement Bodies are not well placed to develop a jurisprudence regarding the agreement.

If a country fails to respond to the decision of the Dispute Resolution Body, the country which raised the case can be authorized to respond through bi-lateral retaliation. A dispute must escalate quite far for this threat to be carried out, thus a country can string out an illegal practice for a long time. Only when it looks like the threat might be carried out is there really an incentive to change the national policy under dispute. But except in the most blatant and political of cases, violations of the agreement do not seem to lead to sanctions of "undesirable consequences".

The legal principles in WTO decisions are also not easy for national courts to assimilate. It is questionable how national courts could contribute to respect of this agreement, and if there would be any way to coordinate national court decisions in the event that national courts did start enforcing the agreement.

UN Charter and the International Court of Justice

The International Court of Justice hears cases brought by states, or referred to it by the administrative bodies of the UN agencies (like the ILO discussed above).²⁵ The main problem of the ICJ is that states refused to use the legal system for dispute resolution. In 1974, a UN resolution on the role of the International Court of Justice was passed in which states were encouraged to bring more cases to the ICJ.²⁶ But the problem did not improve. In a speech to the General Assembly in 1985, the then President of the ICJ, Nagendra Singh argued:

...why not go to the root of the matter and recall what Chapter VI of the Charter, which deals with the pacific settlement of disputes, lays to the charge of States in regard to the Court? Article 36 presents it as an axiom that the legal disputes should as a general rule be referred by the parties to

²⁴ Adapted from data presented in Robert E. Hudec *Enforcing International Trade Law*, chapter 11 (note 2), cited in Stone, Alec. 1995. *The New GATT: Dispute Resolution and the Judicialization of the Trade Regime. unpublished manuscript.*

²⁵ Members "allowed" to submit questions of interpretation of international law to the ICJ, but its findings are explicitly not binding. UNCTAD documents Vol 13 pp. 709-710 cited in Singh, Nagendra. 1989. *The Role and Record of the International Court of Justice*. Dordrecht: Martinus Nijhoff publishers. See p. 40.

²⁶ U.N. Resolution of November 12, 1974 discussed in Singh, *ibid.* p. 48-49. Nagendra Singh, argued that the 1974 resolution: "...constitutes an admission that what was essential, if the Court was to play its full part in the modern world, was that the attitude of States to it should change in the ways indicated in the resolution, i.e., by being more ready to accept the Court's jurisdiction and make use of the court, and by the inclusion in treaties of appropriate compromissory clauses conferring jurisdiction on the Court." *Ibid.* p. 67

the International Court of Justice. And do not all States in contention claim to have law on their side? Why then should they not test that claim before the Court and why do they not, 'as a general rule' refer the legal issue to the Court?²⁷

Without more cases, the ICJ will not even have the chance to create a jurisprudence or to develop "a string of good judgments, [where] success will breed success, and to turn to the Court will then become a matter of course."²⁸

There is also a problem of the expectation of a sanction. Enforcing ICJ decisions falls to the discretion of the Security Council. The process is highly politicized, and sanctions are usually only applied for security issues, and even then irregularly. As a result, there is no expectation of a sanction and member states can more or less interpret international law how they want. Indeed even law abiding states have ignored international law.

The European legal system is unique among international legal systems. The key elements of the EC legal system—having judicial bodies actively involved in interpreting international law so that clear rules and interpretations can be developed, having the expectation of sanction for violating international law, and creating pressure for a transnational convergence in legal interpretation—are generalizable outside of the EC context. But whether or not these elements are generalized depends to a large extent on access to legal bodies so that these bodies have cases to resolve, and whether or not the expectation of a "undesirable consequence" for violating the law can be created.

In theory, the factor which has made the EC legal system so successful—national court application of EC law—could be created in other international contexts. But this system was not set up by design and the circumstances under which the preliminary ruling system was transformed and national courts accepted EC law supremacy are quite particular. There is much to suggest that without the existence of the preliminary ruling mechanism, national courts would not have taken on a role enforcing EC law supremacy against their governments, and the interpretation of EC law would have varied from country to country.

²⁷ Speech by Nagendra Singh to the UN General Assembly, October 25, 1985 cited in Singh (ibid.) p. 70.

²⁸ Ibid.

The transformation of the preliminary ruling system, and national judicial acceptance of the supremacy of EC law has greatly facilitated the rule of law in Europe. Writing on the U.S. Constitutional order, Justice Oliver Holmes commented:

I do not think the United States would come to an end if we lost the power to declare an act of Congress void. I do think the Union would be imperiled if we could not declare as to the laws of several states.²⁹

Because EC law supremacy has been accepted, and because national courts send it references, the European Court of Justice has this power which Oliver Holmes considered to be so vital to the United State's legal system. Even if the European Union does not evolve into a federal entity, the European Court of Justice has the opportunity, authority and capacity to delve into matters of national policy to engender respect for European law.

²⁹ Holmes, Oliver. 1920. *Collected Legal Papers*. New York: Harcourt Brace. p. 295-296

Appendix 1

EC Treaty Articles Pertaining to the European Court

Treaty Establishing the European Coal and Steel Community

Article 31

The Court shall ensure that in the interpretation and application of this Treaty, and of the rules laid down for the implementation thereof, the law is observed.

Article 32

The Court of Justice shall consist of thirteen judges.

The Court of Justice shall sit in plenary session. It may, however, form Chambers, each consisting of three or five Judges, either to undertake certain preparatory inquiries or to adjudicate on particular categories of cases in accordance with rules laid down for these purposes.

Whenever the Court of Justice hears cases brought before it by a Member State or by one of the institutions of the Community or, to the extent that the Chambers of the Court do not have the requisite jurisdiction under the Rules of Procedure, has to give preliminary rulings on questions submitted to it pursuant to Article 41, it shall sit in plenary session.

Should the Court of Justice so request, the Council may, acting unanimously, increase the number of Judges and make the necessary adjustment to the second and third paragraphs of this Article and to the second paragraph of Article 32b.

Article 32a

(added by the Convention on Common Institutions Treaties)

The Court of Justice shall be assisted by six Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make in open, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 31.

Should the Court of Justice so request, the Council may, acting unanimously, increase the number of Advocates-General and make the necessary adjustments to the third paragraph of Article 32b.

Article 32b

(added by the Convention on Common Institutions Treaties)

The judges and Advocates-General shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial

offices in their respective countries or who are jurisconsults of recognized competence; they shall be appointed by common accord of the Governments of the Member State for a term of six years.

Every three years there shall be a partial replacement of the Judges. Seven and six Judges should be replaced alternately.

Retiring Judges and Advocates-General shall be eligible for reappointment.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Article 32c

(added by the Convention on Common Institutions Treaties)

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

Article 32d a

(added in the Single European Act, amended in the Treaty on a European Union)

1. A Court of First Instance shall be attached to the Court of Justice with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute, certain classes of action or proceeding defined in accordance with the conditions laid down in paragraph 2. The Court of First Instance shall not be competent to hear and determine actions brought by Member State or by Community institutions or questions referred for a preliminary ruling under Article 177.

2. At the request of the Court of Justice and after consulting the European Parliament and the Commission, the Council, acting unanimously, shall determine the classes of action or proceedings referred to in paragraph 1 and the composition of the Court of First Instance and shall adopt the necessary adjustments and additional provisions to the Statute of the Court of Justice. Unless the Council decides otherwise, the provisions of this Treaty relating to the Court of Justice, in particular the provisions of the Protocol on the Statutes of the Court of Justice, shall apply to this Court.

3. The members of the Court of First Instance shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the judicial offices in their respective countries or who are jurisconsults of recognized competence; they shall be appointed by common accord of the Governments of the Member State for a term of six years. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

4. The Court of First Instance shall establish its rules of procedure in agreement with the Court of Justice. Those rules require the unanimous approval of the Council.

Article 33

The Court shall have jurisdiction in actions brought by a Member State or by the Council to have decisions or recommendations of the High Authority declared void on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The Court may not, however, examine the evaluation of the situation, resulting from economic facts or circumstances, in the

light of which the High Authority took its decisions or made its recommendations save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

Undertakings or the associations referred to in Article 48 may, under the same conditions, institute proceedings against decisions or recommendations concerning them which are individual in character or against general decisions or recommendations which they consider to involve a misuse of powers affecting them.

The proceedings provided for in the first two paragraphs of this Article shall be instituted within one month of the notification or publication, as the case may be, of the decision or recommendation.

Added in the Treaty on a European Union

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the European Parliament for the purpose of protecting its prerogatives.

Article 34

If the Court declares a decision or recommendation void, it shall refer the matter back to the High Authority. The High Authority shall take the necessary steps to comply with the judgment. If direct and special harm is suffered by an undertaking or group of undertakings by reason of a decision or recommendation held by the Court to involve a fault of such a nature as to render the Community liable, the High Authority shall, using the powers conferred upon it by this Treaty, take steps to ensure equitable redress for the harm resulting directly from the decision or recommendation declared void and, where necessary, pay appropriate damages.

If the High Authority fails to take within a reasonable time the necessary steps to comply with the judgment proceedings for damages may be instituted before the Court.

Article 35

Wherever the High Authority is required by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make a recommendation and fails to fulfill this obligation, it shall be for States, the Council, undertakings or associations, as the case may be, to raise the matter with the High Authority.

The same shall apply if the High Authority, where empowered by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make recommendations, abstains from doing so and such abstentions constitute a misuse of powers.

If at the end of two months the High Authority has not taken any decision or made any recommendation, proceedings may be instituted before the Court within one month against the implied decision of refusal which is to be inferred from the silence of the High Authority on the matter.

Article 36

Before imposing a pecuniary sanction or ordering a periodic penalty payment as provided for in this Treaty, the High Authority must give the party concerned the opportunity to submit its comments.

The Court shall have unlimited jurisdiction in appeals against pecuniary sanctions and periodic penalty payments imposed under this Treaty.

In support of its appeal, a party may, under the same conditions as in the first paragraph of Article 33 of this Treaty, contest the legality of the decision or recommendation which that party is alleged not to have observed.

Article 37

If a Member State considers that in a given case action or failure to act on the part of the High Authority is of such a nature as to provide fundamental and persistent disturbances in its economy, it may raise the matter with the High Authority.

The High Authority, after consulting the Council shall, if there are grounds for doing so, recognize the existence of such a situation and decide on the measures to be taken to end it, in accordance with the provisions of this Treaty, while at the same time safeguarding the essential interests of the Community.

When proceedings are instituted in the Court under this Article against such a decision or against an express or implied decisions refusing to recognize the existence of the situation referred to above, it shall be for the Court to determine whether it is well founded.

If the Court declares the decision void, the High Authority shall, within the terms of the judgment of the Court, decide on the measures to be taken for the purposes indicated in the second paragraph of this Article.

Article 38

The Court may, on application by a Member State or the High Authority declare an act of the European Parliament to be void.

Application shall be made within one month of the publication of the act of the European Parliament or the notification of the act of the Council to the Member State or to the High Authority.

The only grounds for such application shall be lack of competence or infringement of an essential procedural requirement.

Article 39

Actions brought before the Court shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

The Court may prescribe any other necessary interim measures.

Article 40

Without prejudice to the first paragraph of Article 34, the Court shall have jurisdiction to order pecuniary reparations from the Community, on application by the injured party, to make good any injury caused in carrying out this Treaty by a wrongful act or omission on the part of the Community in the performance of its function.

The Court shall also have jurisdiction to order the Community to make good any injury caused by a personal wrong by a servant of the Community in the performance of his duties. The personal liability of its servants towards the Community shall be governed by the provisions laid down in their Staff Regulations or the Conditions of Employment applicable to them.

All other disputes between the Community and persons other than its servants to which the provisions of this Treaty or the rules laid down for the implementation thereof do not apply shall be brought before national courts or tribunals.

Article 41

The Court shall have sole jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is in issue in proceedings brought before a national court or tribunal.

Article 42

The Court shall have jurisdiction to give judgments pursuant to any arbitration clause contained in a contract concluded by or on behalf of the community, whether that contract be governed by public or private law.

Article 43

The Court shall have jurisdiction in any other case provided for by a provision supplementing this Treaty.

It may also rule in all cases which relate to the subject matter of this Treaty which jurisdiction is conferred upon it by the law of a Member State.

Article 44

The judgments of the Court shall be enforceable in the territory of Member States under the conditions laid down in Article 92.

Article 45

The Statute of the Court is laid down in a Protocol annexed to this Treaty.

The Council may, acting unanimously at the request of the Court of Justice and after consulting the Commission and the European Parliament, amend the provisions of Title III of the Statute.

Article 92

Decisions of the High Authority which impose a pecuniary obligation shall be enforceable.

Enforcement in the territory of Member States shall be carried out by means of the legal procedure in force in each State after the order for enforcement in the form in use in the State in whose territory the decision to be enforced has been appended to the decision, without other formality than verification of the authenticity of the decision. This formality shall be carried out at the instance of a Minister designated for this purpose by each of the Governments.

Enforcement may be suspended by a decision of the Court.

Treaty Establishing the European Economic Community

Article 164

The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

Article 165

The Court of Justice shall consist of thirteen Judges.

The Court of Justice shall sit in plenary session. It may, however, form Chambers, each consisting of three or five Judges, either to undertake certain preparatory inquiries or to adjudicate on particular categories of cases in accordance with rules laid down for these purposes.

Whenever the Court of Justice hears cases brought before it by a Member State or by one of the institutions of the Community or, to the extent that the Chambers of the Court do not have the requisite jurisdiction under the Rules of Procedure, has to give preliminary rulings on questions submitted to it pursuant to Article 177, it shall sit in plenary session.

Should the Court of Justice so request, the Council may, acting unanimously, increase the number of Judges and make the necessary adjustment to the second and third paragraphs of this Article and to the second paragraph of Article 167.

Article 166

The Court of Justice shall be assisted by six Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make in open, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164.

Should the Court of Justice so request, the Council may, acting unanimously, increase the number of Advocates-General and make the necessary adjustments to the third paragraph of Article 167.

Article 167

The judges and Advocates-General shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence; they shall be appointed by common accord of the Governments of the Member State for a term of six years.

Every three years there shall be a partial replacement of the Judges. Seven and six Judges should be replaced alternately.

Retiring Judges and Advocates-General shall be eligible for reappointment.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Article 168

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

Article 168 a

(added in the Single European Act, amended in the Treaty on a European Union)

1. A Court of First Instance shall be attached to the Court of Justice with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute, certain classes of action or proceeding defined in accordance with the conditions laid down in paragraph 2. The Court of First Instance shall not be competent to hear and determine actions brought by Member State or by Community institutions or questions referred for a preliminary ruling under Article 177.

2. At the request of the Court of Justice and after consulting the European Parliament and the Commission, the Council, acting unanimously, shall determine the classes of action or proceedings referred to in paragraph 1 and the composition of the Court of First Instance and shall adopt the necessary adjustments and additional provisions to the Statute of the Court of Justice. Unless the Council decides otherwise, the provisions of this Treaty relating to the Court of Justice, in particular the provisions of the Protocol on the Statutes of the Court of Justice, shall apply to this Court.

3. The members of the Court of First Instance shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the judicial offices in their respective countries or who are jurisconsults of recognized competence; they shall be appointed by common accord of the Governments of the Member State for a term of six years. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

4. The Court of First Instance shall establish its rules of procedure in agreement with the Court of Justice. Those rules require the unanimous approval of the Council.

Article 169

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 170

A Member State which considers that another Member State has failed to fulfill an obligation under the Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

Article 171

If the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

(added to this article by the Treaty on a European Union)

2) If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinions specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 170.

Article 172

Regulations adopted jointly by the European Parliament and the Council pursuant to the provisions of this Treaty may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations.

Article 173

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the European Council, of acts of the Council, of the Commission, and of the European Central Bank other than recommendations or opinions and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the European Parliament and by the European Central Bank for the purpose of protecting their prerogatives

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 174

If the action is well founded, the Court of Justice shall declare that act concerned to be void.

In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

Article 175

Should the European Parliament, Council or the Commission, in infringement of this Treaty fail to act, the Member State and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a future period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institutions of the Community has failed to address to that person any actor other than a recommendation or an opinion.

The Court of Justice shall have jurisdiction, under the same conditions, in actions or proceedings brought by the European Central Bank in the areas falling within the latter's field of competence and in actions or proceedings brought against the latter.

Article 176

The institution whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 215.

This article shall also apply to the European Central Bank.

Article 177

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the European Central Bank;
- (c) the interpretation of the statutes of the bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any Court or tribunal of a Member State, that Court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a Court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that Court or tribunal shall bring the matter before the Court of Justice.

Article 178

The Court of Justice shall have jurisdiction in disputes relating to the compensation for damages provided for the second paragraph of Article 215.

Article 179

The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment.

Article 180

The Court of Justice shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

a) the fulfillment by Member States of the obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the community by Article 169;

b) measures adopted by the Board of Governors of the Bank. In this connection any Member State, the commission or the Board of Directors of the bank may institute proceedings under the conditions laid down by Article 173;

c) measures adopted by the Board of Directors of the Bank. Proceedings against such measures may be instituted only by Member States or by the commission, under the conditions laid down in Article 173, and solely on the grounds of non-compliance with the procedure provided for in Article 21 (2), (5), (6) and (7) of the Statute of the Bank.

d) the fulfillment by national central banks of obligations under this Treaty and the Statute of the European System of Central Banks. In this connection the powers of the Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 169. If the Court of Justice finds that a national central bank has failed to fulfill its obligations under this Treaty, that bank shall be required to take the necessary measure to comply with the judgment of the Court of Justice.

Article 181

The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law.

Article 182

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the parties.

Article 183

Save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Article 184

Notwithstanding the expiry of the period laid down in the third paragraph of Article 173, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the European Central Bank

is in issue, plead the grounds specified in the first paragraph of Article 173, in order to invoke before the Court of Justice the inapplicability of that regulation.

Article 185

Actions brought before the Court of Justice shall not have suspensory effect.

The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

The Court may prescribe any other necessary interim measures.

Article 186

The Court of Justice may in any cases before it prescribe any necessary interim measures.

Article 187

The judgments of the Court of Justice shall be enforceable under the conditions laid down in Article 192. (see below).

Article 188

The Statutes of the Court of Justice is laid down in a separate Protocol.

The Council may, acting unanimously, at the request of the Court of Justice and after consulting the Commission and the European Parliament, amend the provisions of Title III of the Statute.

The Court of Justice shall adopt its rules of procedure. These shall require the unanimous approval of the Council.

Article 192

Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decisions, by the national authority which the Government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice.

Article 219

Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

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