
Who Are the “Masters of the Treaty”? European Governments and the European Court of Justice

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Few contest that the European Court of Justice (ECJ) is an unusually influential international court.¹ The Court can declare illegal European Union (EU) laws and national laws that violate the Treaty of Rome in areas traditionally considered to be purely the prerogative of national governments, including social policy, gender equality, industrial relations, and competition policy, and its decisions are respected. Nevertheless, there is significant disagreement about the extent of the Court’s political autonomy from member states and the extent to which it can decide cases against their interests.

Legal and neofunctionalist scholars have asserted that the ECJ has significant autonomy by virtue of the separation of law and politics and the inherent legitimacy of courts as legal actors, and that it can use this autonomy to rule against the interests of member states.² Such an analysis implies that virtually any court, international or national, can decide against a government’s interests because it is a legal body.³ Neorealist analysts have argued that member states have sufficient control over the Court so that it lacks the autonomy to decide against the interests of powerful member states.⁴ This implies that the ECJ, as an international court, is particularly dependent on national governments and must bend to their interests.

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1. This article discusses the European Court of Justice, the supreme court of the European Union located in Luxembourg. The European Union was known as the European Community during most of the period discussed in this article.

The law of the European Union was and usually is still considered European Community (EC) law. I will refer to the European Union and its legal system by its current title, but retain the reference to its law as EC law.

2. See Weiler 1991; and Burley and Mattli 1993.

3. This generalization follows from the logic of the argument, with an important caveat that this argument applies to liberal democracies where the rule of law is a political reality. If domestic courts in general lack political authority, an international court is also likely to lack political authority; Burley 1993.

4. Garrett and Weingast 1993.

Both accounts contain significant elements of truth. The legal nature of ECJ decisions affords the Court some protection against political attacks, but member states have significant tools to influence it. Neither theory, however, can explain why the Court, which was once politically weak and did not stray far from the interests of the European governments, now has significant political authority and boldly rules against their interests. The nature of the ECJ as a court has not changed, nor have the tools the member states have to influence judicial politics. This article is an attempt to move beyond the categories of legalism, neofunctionalism, and neorealism, drawing on theories from comparative politics literature to explain the nature of ECJ–member state relations.

Member states intended to create a court that could not significantly compromise national sovereignty or national interest, but the ECJ changed the EU legal system, fundamentally undermining member state control over the Court. A significant part of the “transformation” of the EU legal system has been explained by legal scholars who have shown how the Court turned the “preliminary ruling system” of the EU from a mechanism to allow individuals to challenge *EC law* in national courts into a mechanism to allow individuals to challenge *national law* in national courts.⁵ But important questions remain. How could the Court expand the EU legal system so far from the desire of the member states and beyond their control? Once the ECJ had transformed the EU 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 EU legal system or the bold application of EC law by the ECJ, what does this mean about the ability of national governments to control legal integration in the future?

Through an investigation of how the ECJ escaped member state control, I develop a general argument about ECJ–member state relations. The argument has three components. First, I argue that judges and politicians have fundamentally different time horizons, which translates into different preferences for judges and politicians regarding the outcome of individual cases. By playing off the shorter time horizons of politicians, the ECJ developed legal doctrine and thus constructed the institutional building blocks of its own power and authority without provoking a political response.

Second, I argue that the transformation of the European legal system by the ECJ limited the possible responses of national governments to its decisions within the domestic political realm. In the early years of the EU legal system, national politicians turned to extralegal means to circumvent unwanted decisions; they asserted the illegitimacy of the decisions in a battle for political legitimacy at home, instructed national administrations to ignore ECJ jurisprudence, or interpreted away any difference between EC law and national policy. The threat that national governments might turn to these extralegal means, disobeying an ECJ decision, helped contain ECJ activism. With national courts enforcing ECJ jurisprudence against their own governments, however, many of these extralegal avenues no longer worked. Because of

5. See Rasmussen 1986; and Weiler 1991.

national judicial support for ECJ jurisprudence, national governments were forced to frame their response in terms that could persuade a legal audience, and thus they became constrained by the legal rules of the game.

Third, national court enforcement of ECJ jurisprudence also changed the types of policy responses available to national governments at the EU level. Member states traditionally relied on their veto power to ensure that EU policy did not go against strongly held interests. The ECJ, however, interpreted existing EC laws in ways that member states had not intended and in ways that compromised strongly held interests and beliefs. As member states began to object to ECJ jurisprudence, they found it difficult to change EU legislation to reverse court decisions or to attack the jurisdiction and authority of the ECJ. Because there was no consensus among states to attack the authority of the ECJ, member states lacked a credible threat that could cow the Court into quiescence. Instead, the institutional rules combined with the lack of political consensus gave the ECJ significant room to maneuver.

In the first section I identify the functional roles the ECJ was designed to serve in the process of European integration and show how the Court's transformation of the preliminary ruling process went beyond what member states had intended, significantly compromising national sovereignty. In the second section I explain how the ECJ was able to transform the EU legal system during a period when the system was inherently weak, developing the time horizons argument and the argument about how national court enforcement of ECJ jurisprudence changed the policy options of national governments at the national level. In the third section I explain why member states were not able to reform the EU legal system once it was clear that the Court was going beyond the narrow functional interests of the member states, developing the third argument about the changes within the EU political process. In the conclusion I develop a series of hypotheses about the institutional constraints on ECJ autonomy and discuss the generalizability of the EU legal experience to other international contexts.

The ECJ as the Agent of Member States

Before looking at how the ECJ escaped member state control, I first consider the role the ECJ was created to play in the EU political system. Geoffrey Garrett and Barry 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 EU political process and politically constrained by the member states. The principal-agent framework is useful in identifying the interests of national governments in having an EU legal system at all. But the emphasis of Garrett and Weingast on the Court's role in enforcing contracts and dispute resolution is historically misleading. It attributes to the ECJ certain roles that rightfully belong to the European Commission, and it misses the main role the member states wanted the ECJ to play in the EU political system: keeping the Commission from exceeding its authority. Why is Garrett and

Weingast's historical inaccuracy important? It overlooks entirely the role of the courts in a democratic system of government where courts provide checks and balances against abuse of executive authority and thus overlooks a whole area for judicial influence in the political process. And, importantly for this article, focusing on enforcing contracts and dispute resolution misrepresents the interests of the member states in the EU legal system and misrepresents the role the preliminary ruling system was intended to play in the EU legal process, thereby giving the impression that the preliminary ruling system existed to help enforce EC law. This impression is wrong, and it leads one to overlook the importance and the meaning of the transformation of the preliminary ruling system, missing the essence of the Court's political power.

The ECJ was created to fill three limited roles for the member states: ensuring that the Commission and the Council of Ministers did not exceed their authority, filling in vague aspects of EC laws through dispute resolution, and deciding on charges of noncompliance raised by the Commission or by member states. None of these roles required national courts to funnel individual challenges to national policy to the ECJ or to enforce EC law against their governments. Indeed, negotiators envisioned a limited role for national courts in the EU legal system.

The ECJ was created as part of the European Coal and Steel Community in order to protect member states and firms by ensuring that the supranational high authority did not exceed its authority.⁶ When the EU was founded, the Court's mandate was changed, but its primary function remained to keep the Commission and the Council in check. Indeed, most of the Treaty of Rome's articles regarding the Court'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 ECJ, and the preliminary ruling system (Article 177 §2) allowed individuals to raise challenges to EU policy in national courts.⁷ The most significant expansion of the Court's authority by national governments since the Treaty of Rome has also been in this area. The creation of a Tribunal of First Instance, which was long opposed because it was seen as a steppingstone to a federal system of courts, was finally accepted so that the ECJ could better review the Commission's decisions in the area of competition policy.

A second role of the Court is dispute resolution when EC laws are vague (or, in the language of Garrett and Weingast, filling in incomplete contracts). In the EU, 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 EU regulations and directives they

6. The ECJ was modeled after the French Conseil d'État, which controls government abuses of authority. 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 exceeded their authority under the law, they can challenge the government action in front of the Conseil. For more on the history of the ECJ, see Kari 1979, chap. III; Rasmussen 1986, 201–12; and Robertson 1966, 150–80.

7. Articles 173–176, 177 §2, 178–179, 181, and 183–184 of the Treaty of Rome pertain to the checking function of the ECJ.

administer. The ECJ 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.⁸ The ECJ resolves the disagreement by interpreting the disputed EC legal clause and thus by filling in the contract through its legal decision. The preliminary ruling procedure (Article 177 §1 and 3) allowed individuals to challenge in national courts EC law interpretations of the Commission or of national administrations (for example, an individual could challenge the government's administration of EU agricultural subsidies.) Article 177 challenges were to pertain only to questions of European law, not to the interpretation of national law or to the compatibility of national law with EC law.

The ECJ was not designed to monitor infringements of EU agreements (in Garrett and Weingast's terms, monitoring defection), which has always been the Commission's responsibility.⁹ In the Coal and Steel Community, the Commission monitored compliance with ECSC policies on its own, and the ECJ was an appellate body hearing challenges to Commission decisions. Under the Treaty of Rome, the ECJ 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 preliminary ruling cases.¹¹

8. Articles 183 and 177 §1 and 3 of the Treaty of Rome pertain to the filing in incomplete contracting role of the ECJ.

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 states 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, 3 November 1992), a commissioner in the 1960s and 1970s (Paris, 9 June 1994), and a director of the Commission's legal services in the 1960s who also negotiated the treaty for France (Paris, 7 July 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 1953-57, 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.

The Transformation of the Preliminary Ruling Procedure into an Enforcement Mechanism

Member states continue to want the ECJ to keep EU bodies in check, fill in contracts, and mediate oversight, which is why they have expanded the resources of the ECJ with respect to these narrow functional roles.¹² But none of these roles requires or implies 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 Court'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 Court's doctrine of direct effect declared that EC law created legally enforceable rights for individuals, allowing individuals to draw on EC law directly in national courts 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.¹³ 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 national law with EU law in preliminary ruling cases. Indeed, the ECJ usually 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 it intentionally encourages national courts to use the preliminary ruling mechanism (Article 177) to do this job for it, by indicating in its decision whether or not certain types of national law would be in compliance with EC law and encouraging the national court to set aside incompatible national policies. ECJ Justice Federico 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 na-

12. As already mentioned, in 1986 the Treaty of Rome was amended to allow for the creation of a Court of First Instance to allow the ECJ to examine in more detail competition policy decisions of the Commission. In 1989 the role of the ECJ in checking the Commission and the Council was expanded by allowing Parliament to also challenge Commission and Council acts. Also in 1989 the Commission was given the authority to request a lump sum penalty from states that had willfully violated EC law and ignored an ECJ decision.

13. For more on the doctrines of direct effect and EU law supremacy, see Weiler 1991; Mancini 1989; and Stein 1981.

tional 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.¹⁴

Having national courts monitor Treaty of Rome compliance and enforce EC law was not part of the original design of the EU legal system. The transformation of the preliminary ruling system significantly undermined the member states' ability to control the ECJ.¹⁵ It allowed individuals to raise cases in national courts that were then referred to the ECJ, undermining national governments' ability to control which cases made it to the ECJ. Individuals raised cases involving issues that member states considered to be the exclusive domain of national policy, such as the availability of educational grants to nonnationals, 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 also made the treaty's common market provisions enforceable despite the lack of implementing legislation, so that EC law created constraints member states had not agreed to. Finally, the transformed preliminary ruling system made ECJ decisions enforceable, undermining the ability of member states to ignore unwanted ECJ decisions.¹⁶

One might think that member states would welcome any innovation that strengthened the monitoring and enforcement mechanisms of the EU legal system, but national governments were not willing to trade encroachments in national sovereignty for ensuring treaty compliance. Negotiators of the Treaty of Rome had actually weakened its enforcement mechanisms 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 European institutions.¹⁷ 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 a new power that could only be applied to EC law simply to ensure better treaty compliance, especially because in some countries it would mean that the EU 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 their interests better to have made ECJ decisions enforceable by attaching financial sanctions to ECJ decisions (as was done in 1989) to have made transfer payments from the EU contingent on compliance with common market rules, or to have given the Commis-

14. Mancini 1989, 606. The ECJ has been known to go beyond this trick and on occasion to tell the national court exactly what to do. In 1994 Mancini acknowledged that the ECJ "enters the heart of the conflict . . . but it takes the precaution of rendering it abstract, that is to say it presents it as a conflict between Community law and a hypothetical national provision having the nature of the provision at issue before the national court." The fiction is necessary to avoid the charge that the ECJ is exceeding its authority. Mancini 1994, 184–85.

15. Alter 1996a.

16. Alter 1996a.

17. 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.

sion more monitoring resources.¹⁸ This would have given member states the benefits of a court that could coerce compliance, and they would not have had to risk having the ECJ delve so far into issues of national policy and national sovereignty.

Most evidence indicates that politicians did not support the transformation of the EU 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 EU legal doctrine at both the national and the EU level occurred at the same time that member states were scaling back the supranational pretensions of the Treaty of Rome and reasserting national prerogatives.¹⁹ When the issue of the national courts enforcing EC law first emerged in front of the ECJ, representatives of member states argued strongly against any interpretation that would allow national courts to evaluate the compatibility of EC law with national law.²⁰ In the 1970s, while politicians were blocking attempts to create a common market, the doctrine of EC law supremacy was making significant advances within national legal systems. With politicians actively rejecting supranationalism, one can hardly argue that they actually supported an institutional transformation that greatly empowered a supranational EU institution at the expense of national sovereignty.

The preliminary ruling system (Article 177), the direct effect, and the supremacy of EC law continue to be polemic. The 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.²¹ Numerous battles have ensued 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 ECJ. For the Brussels convention, member states restricted the right of reference of national courts to a narrow list of high courts²²—courts that are known to be reticent to refer cases to the ECJ.²³ In the late 1970s negotiations over intergovernmental conventions to deal with fraud against the EU and crimes committed by EU 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 little national sovereignty was at stake. Nevertheless, France refused to extend Article 177 authority for the ECJ at all, and the Benelux countries refused to ratify the agreements without an Article 177 role for the ECJ.²⁴ This conflict over extending preliminary ruling jurisdiction played itself out again regarding the 1992

18. 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.

19. Weiler 1981.

20. Stein 1981.

21. 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, 17 February 1994 (Bonn).

22. Protocol regarding the interpretation of the Brussels Convention of 27 September 1968, adopted 3 June 1971.

23. Alter 1996a.

24. Based on interviews with French, German, and Dutch negotiators for these agreements: 27 October 1995 (Brussels), 30 October 1995 (Paris), and 2 November 1995 (Bonn).

Cannes conventions on Europol, the Customs Information System, and the resurrected conventions regarding fraud in the EU.²⁵ And it was an issue again in negotiations for the Treaty of Amsterdam where national governments could not agree on the desirability of preliminary ruling powers for the ECJ in Justice and Home Affairs.

Transforming the preliminary ruling system was not necessary for the ECJ to serve the member states' limited functional interests, and it brought a loss of national sovereignty that the Council would not have agreed to then and still would not agree to today. 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.²⁶

Member states controlled the legislative process and could legislate over unwanted ECJ decisions or change the role or mandate of the ECJ. They could also manipulate the appointments process and threaten the professional future of activist judges.²⁷ How could the ECJ construct such a fundamental transformation of the EU legal system against the will of member states?

Escaping Member State Control

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.²⁸

Principal-agent theory tells us that agents have interests that 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.²⁹ The ECJ preferred the transformed preliminary ruling system for the same reason that member states did

25. This time Britain has refused to extend Article 177 authority, and Germany, Italy, and the Benelux parliaments have refused to ratify the agreement 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.

26. Garrett and Weingast 1993, 200–201.

27. Ibid.

28. From “More Powerful Than Intended,” *Financial Times*, 22 August 1974.

29. See Garrett and Weingast 1993; Pollack 1995; and Moravcsik 1995. See also Burley and Mattli 1993; and Pierson 1996.

not want it: it decreased the Court's dependence on member states and the Commission to raise infringement cases by allowing individuals to raise challenges to national law, and it decreased the Court's need to craft decisions to elicit voluntary compliance by making ECJ decisions enforceable.³⁰ In other words, it enhanced the power of the ECJ. This inherent difference of interests explains *why* the ECJ would want to expand its authority, but not *how* it was able to expand its authority. If 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 that 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 that would be legally acceptable both to the ECJ and to national courts.

Different Time Horizons of Courts and Politicians

Legalist and neofunctionalist scholars have argued that politicians were simply not paying attention to what the ECJ was doing, or that they were compelled into acquiescence by the apolitical legal language or by their reverence of legal authority.³¹ A different explanation is that politicians and judges have different time horizons, a difference that 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 and expanding 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.³² Member states were most concerned with protecting national interests in the process of integration, while avoiding serious conflicts that could derail the common market effort. As far as the Court's decisions were concerned, member states wanted to avoid decisions that could upset public policies or create a significant material impact (be it political or financial).³³ The strategy of relying on "fire alarms" to be set off by ECJ decisions before politicians actually act has advantages. Politicians do not have to expend political energy fighting every court decision that could potentially create

30. See Burley and Mattli 1993; and Alter 1996a.

31. Joseph Weiler implied that being a supreme court, the ECJ had an inherent legitimacy that was difficult to politically contest; Weiler 1991, 2428. Burley and Mattli argued that it was the nonpolitical veneer of judicial decisions that 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; Burley and Mattli 1993, 72–73.

32. Pierson 1996, 135–36.

33. Rasmussen also observed that states' short-term interests influenced their participation in EU legal proceedings. States tended to participate in cases in which their own national laws were at stake, not paying attention to other countries' cases; Rasmussen 1986, 287.

political problems in the future, and they can take credit and win public support for addressing the public and political concerns raised by adverse ECJ decisions.³⁴ But such an approach leads to a focus that prioritizes the material impact of legal decisions over the long-term effects of ECJ doctrine. The short-term focus of politicians explains why they often fail to act decisively when doctrine that is counter to their long-term interest is first established.

The ECJ 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, the ECJ 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.³⁵ Given that the privatization was legal, what was there for politicians to protest, not comply with, or overturn? Trevor 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.³⁶

The Commission was an accomplice in the efforts of the ECJ 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 worked to help the ECJ develop its doctrine. The Commission selected infringement cases to bring that were important in terms of building doctrine, especially doctrine that national courts could apply, and avoided cases that would have undermined the integration process by arousing political passions.³⁷ By making sure that ECJ decisions did not compromise short-term political interests, the judges and the Commission could build a legal edifice without serious political challenges.

Indeed, the early jurisprudence of the ECJ shows clear signs of caution. Although bold in doctrinal rhetoric, the ECJ made sure that the political impact was minimal in terms of both financial consequences and political consequences. Clarence Mann commented on the early jurisprudence of the ECJ in politically contentious cases,

34. 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 and Schwartz 1987.

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

36. Hartley 1988, 78–79.

37. A former commissioner called the Commission's strategy “informal complicity.” Interview with the former director of the Commission's Legal Services, 7 July 1994 (Paris), and with a former commissioner, 9 June 1994 (Paris).

saying that “by narrowly restricting the scope of its reasoning, [the ECJ] manages to avoid almost every question in issue.”³⁸ Stuart Scheingold observed that, in Article 173 cases, “the ECJ used procedural rules to avoid decisions of substance.”³⁹ A French legal advisor at the Secretariat General de Coordination Interministeriel 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.⁴⁰

Politicians may have been myopic in their focus on material consequences, but this does not mean that they did not realize that their long-term interest in protecting national sovereignty might be compromised by the doctrinal developments. The Court’s *Van Gend* and *Costa* decisions were filled with rhetoric to make politicians uneasy, and lawyers from member states had argued strongly against the interpretations the ECJ eventually endorsed.⁴¹ Indeed, some politicians were clearly unsettled by the legal precedents the ECJ 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 1968.⁴² But other member states were unwilling to renegotiate the Treaty of Rome, especially at a French request, so the political threat to the ECJ was not credible.

In the 1960s the risk of the ECJ running amok was still fairly low given the inherent weakness of the EU 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 ECJ began applying the doctrine in unacceptable ways, politicians lacked a compelling interest in mobilizing an attack on the Court’s authority. In

38. Mann 1972, 413.

39. Scheingold 1971, 21.

40. Based on an interview in Paris, 31 October 1995.

41. 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.

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 acts incompatible with the concept of the Community cannot prevail.

It does not take a legal expert to recognize the potential threat to national sovereignty inherent in this rhetoric. *Van Gend en Loos v. Nederlandse Administratie Belastingen*, ECJ. 26/62 (1963) ECR 1, p. 12. *Costa v. Ente Nazionale per L’Energia Elettrica (ENEL)*, ECJ Case 6/64 (1964) ECR 583.

42. Debré mentioned this in the discussion of the Foyer-Debré’s Propositions de Loi, cited in Rasmussen 1986, 351.

retrospect political nonaction seems quite shortsighted. But predicting what would happen in light of the Court's declarations was difficult, and the strategy of holding off an attack on the ECJ was not stupid. EC law supremacy was at that time only a *potential* problem. Member states thought that controlling the legislative process would be enough to ensure that no objectionable laws were passed.⁴³ In any event, the problem was for another elected official to face.

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 it to escape member state oversight. What were marginal legal decisions from a political perspective, were revolutionary decisions from a legal perspective. They created standing for individuals to draw on EC law and a role for national courts enforcing EC law supremacy against national governments. Once national courts became involved in the application of EC law, it was harder for politicians to appeal to extralegal means to avoid complying with EC law. 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 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. Indeed, national courts have refused political attempts to circumvent ECJ jurisprudence by passing new laws at the national level, applying the supreme EC law instead. National courts created both financial and political costs for ignoring ECJ decisions.

I have explained elsewhere why national courts took on a role enforcing EC law against their own governments.⁴⁴ What is important is that because of national court support of ECJ jurisprudence, extralegal means to avoid ECJ decisions were harder to use, forcing governments to find legally defensible solutions to their EU legal problems. In the EU legal arena, however, member states were at an inherent disadvantage vis-à-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

43. See Moravcsik 1995; and Weiler 1981.

44. Alter 1996a. For more on the motivations of national courts in the EU legal process, see Alter 1997; Golub 1996; Mattli and Slaughter 1998; and Weiler 1994.

are meant to live by their statements. The legal arena imposes different rules of discourse.⁴⁵

The turnover tax struggle of 1966 offers a clear example of how the ECJ could rely on governments' 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 Court'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 German customs officials and tax courts to ignore the ECJ decision in question.⁴⁶ The decree would have worked if it were not for the national courts that refused to be told by the government that they could not apply a legally valid ECJ decision. Lower tax courts insisted on examining case-by-case whether or not a given German turnover tax was discriminatory. With national courts refusing to follow this decree, with lawyers publishing articles about the government's attempts to intimidate plaintiffs and order national courts to ignore a valid EC legal judgment,⁴⁷ with legal cases clogging the tax branch and creating the possibility that nearly all German turnover taxes might be illegal, and with members of the Bundestag questioning a Ministry of Finance official on how the decree was compatible with the principles of a *Rechtsstaat*⁴⁸—a state ruled by law—the German government turned to its lawyers to find a solution to the problem.

The lawyers for the Ministry of Economics 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 did not have legal standing to challenge German turnover taxes in national courts.⁴⁹ 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 Court's decision. But the strategy implicitly left the Court's precedence established in the *Lütticke* case intact. Article 95 remained directly effective, and, even more importantly, member states became obliged to remove national laws that created tariff and nontariff 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) was gone. But the precedent came back to haunt the German government and other member states in subsequent cases.

Because of national court support, politicians were forced to play by the legal rules of the game, where precedence (legal doctrine) matters, and any position must be

45. Weiler 1994, 519. Burley and Mattli make a similar point; Burley and Mattli 1993.

46. 7 July 1966 (IIIB.4-V8534-1/66), republished in *der Betrieb* (1966), 1160.

47. See Meier 1967a; Stöcker 1967; and Wendt 1967a,b.

48. See Meier 1967b; and Meier 1994.

49. See Meier 1994; and Everling 1967.

justified in legal terms in a way that is credible within the legal community.⁵⁰ Most importantly, in the legal sphere judges—not politicians—are in the power position of deciding what to do.

The doctrinal precedents stuck into the Court's benign legal decisions were in fact formidable institutional building blocks that would be applied in the future to more polemic cases. 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. Indeed, once the important legal precedents of direct effect and supremacy of EC law were established, judges were loath *not* to apply them or to reverse them fearing that frequent reversals would undermine the appearance of judicial neutrality, which is the basis for parties accepting the legitimacy of their decisions.⁵¹ If legal arguments cannot persuade either the national court or the ECJ, in the end politicians can do little 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. The only choice left for politicians is to rewrite the EU legislation itself.

The legal rules of the game limited political responses to ECJ jurisprudence, but national governments still had significant means to influence the EU legal process. Member states could influence the interpretation of the law through legally persuasive arguments, mobilization of public opinion, or political threats. They could rewrite the contested legislation and even rewrite the mandate of the ECJ, limiting access to it and cutting back its jurisdictional authority without violating the legal rules of the game. The next section considers why member states have not exercised these options.

Could Member States Regain Control? Why Did Member States Accept Unwanted ECJ Jurisprudence?

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. . . . 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.⁵²

Some scholars have argued that the fact that member states did not reverse the direct effect and supremacy declarations of the ECJ shows that the Court had not deviated significantly from member state interests. The strongest argument of the strongest proponent of this view, Garrett, comes down to a tautology. He argues that, “If member governments have neither changed nor evaded the European legal system,

50. See Weiler 1994; and Mattli and Slaughter 1995.

51. Shapiro has argued that judges search for legitimacy by applying legal principles across cases; Shapiro 1981, chap. 1.

52. Lord Denning, judicial branch of the House of Lords, in Denning 1990.

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.⁵³ 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,⁵⁴ that national leaders disagreed with the Court's activist jurisprudence but were institutionally unable to reverse it.⁵⁵

Institutional Constraints: The Joint-Decision Trap

EC law based on regulations or directives can be rewritten by a simple statute that, depending on the nature of the statute, requires unanimity or qualified majority consent. A few of the Court's interpretations have been rewritten in light of their decisions, though surprisingly few. This is because ECJ decisions usually affect member states differently, so there is not a 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 decision of the ECJ 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 relegislate. Such actions can reverse the substance of the decisions, allowing the specific policies affected by the Court's interpretation to remain unchanged. But they do not affect the Court's legal doctrine or the EU legal system as an institution. Nor do they undermine the doctrines that 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 EU treaty would require a treaty amendment, a threshold that is even harder to reach under the policymaking rules of the EU.

In order to change the treaty, member states need unanimous agreement plus ratification of the changes by all national parliaments. Obtaining 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."⁵⁶ According to

53. Garrett 1995. 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; Rasmussen 1986, 291.

54. As mentioned earlier, EU authority expanded at a time when member states were contesting the Court's supranational powers, making it unlikely that they would support a significant aggrandizement of the Court's authority at the cost of national sovereignty. Lawyers for the national governments argued strongly against the Court's eventual interpretations on the grounds that they would compromise national sovereignty. Evidence indicates that De Gaulle protested the growing powers of the ECJ and tried to organize an attack on it. See Weiler 1981; and Stein 1981.

55. This finding is consistent with Brian Marks, who shows how legislators may be hamstrung to reverse a legal decision. Marks argues that "inaction is neither a sufficient nor necessary condition for acceptability [of a legal decision] 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." Marks 1989, 6.

56. Scharpf 1988.

Scharpf, a joint-decision trap emerges when (1) the decision making of the central government (the Council 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 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 nonagreement 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.⁵⁷

States can block the attribution of new powers to the ECJ until their concerns are met. But the joint-decision trap makes reversing the Court’s key doctrinal advances virtually impossible. Small states have an interest in a strong EU 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 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 from the outset wanted a “United States of Europe,” and considered a more federal-looking EU legal system a step in the right direction. Although sometimes critical of the ECJ, the German government is also a supporter of a European *Rechtstaat*. Germany and the Benelux countries tend to block attempts to weaken ECJ authority, and they try to extend its authority as the EU expands into new legal areas whenever the political possibility exists. Britain and France, on the other hand, block attempts to expand EU legal authority.

The need to call an Intergovernmental 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 agenda of the IGC, making member states hesitant to call for an IGC lest the agenda get out of control.

57. *Ibid.*, 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:

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.*⁵⁸

Certainly, courts have political limits, some area of "acceptable latitude," beyond which they 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.⁵⁹ They compare the institutional authority of the ECJ to that of the U.S. 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.⁶⁰

The difficulty of changing the Court's mandate given the requirement of unanimity and given the lack of political consensus implies that the Court's room for maneuver may be, in some respects, even greater than that of the U.S. Supreme Court or other constitutional courts. Changing the authority of the ECJ requires a treaty amendment, not a simple statute. Securing an agreement on a treaty amendment from all member states could be even harder than convincing a national parliament to agree on a statute amending jurisdictional authority, especially if the parliament were dominated by one party. Because of the decision-making rules of the EU, the political threat to alter the Court's role is usually not credible. The ECJ can safely calculate that political controversy will not translate into an attack on its institutional standing,

58. Garrett and Weingast 1993, 200–201 (emphasis in original).

59. Garrett has made this argument more clearly elsewhere; see Garrett 1992, 1995.

60. Garrett and Weingast 1993, 201.

thus it will not need to reconcile its behavior with a country's political preferences. For these reasons, Mark Pollack calls amending the treaty the "nuclear option—exceedingly effective, but difficult to use—and is therefore a relatively ineffective and noncredible means of member state control."⁶¹

The joint-decision trap also affects the ability of member states to control the ECJ through the appointment process. The relevant EU institutional feature is that decision making takes place in the subunit 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, such a strategy is extremely unlikely to succeed. Each state has its own selection criteria for EU justices, and high-level political appointments are governed by a variety of political considerations, including party affiliation and political connections. A judge's opinion on EU legal matters is seldom 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.⁶² The individual threat to the judge's professional future may also be more hypothetical than real. Because ECJ decisions are issued unanimously, knowing if a given justice is ignoring its state's wishes is impossible. And 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 many do, they are virtually guaranteed that a job will be awaiting them on their return.

Garrett and Weingast raise another potential political tool of control over the ECJ—the threat of noncompliance—arguing that the ECJ must fear that a failure to implement its jurisprudence will undermine its legitimacy and thus its influence in the political process.⁶³ Although courts do not like flagrant flaunting of their authority, as Walter Mattli and Anne-Marie Slaughter have argued, it could hurt a court's legitimacy even more to disregard legal precedent and bend to political pressure than to make a legally sound decision that politicians will contest or ignore.⁶⁴ Indeed, in most legal systems a significant level of noncompliance remains: think of the many states in the United States where unconstitutional law and policy exist despite U.S. Supreme Court rulings. Does this mean that the U.S. Supreme Court curbs its jurisprudence to avoid noncompliance? It is hard to sustain the argument that in most cases or even in the most political of cases the fear of noncompliance shapes the jurisprudence of the ECJ.

The key to member states' ability 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 influencing judicial decisions. That being said, the ECJ is more

61. Pollack 1997, 118–19.

62. I have explored this issue in interviews with the Italian, Greek, Dutch, Belgian, French, German, British, and Irish judges at the ECJ and with legal scholars and government officials in France, Germany, and the United Kingdom. The criteria for ECJ judicial selection varied across countries but included factors such as party affiliation, ethnicity, legal background, ability to speak French, familiarity with EC law, and domestic party politics. Only in France and Germany could appointments designed to limit judicial activism be identified.

63. Garrett and Weingast 1993, 200. See also Garrett, Kelemen, and Schulz 1996, 9.

64. Mattli and Slaughter 1995.

interested in shaping future behavior than exacting revenge for past digressions, especially if the past digression was not intentional (which is usually the case). Neither politicians, nor the public, nor the ECJ has an interest in a judicial decision that would cripple a government bureaucracy by filling it with thousands of claims, bankrupt a public pensions system, or force a significant redistribution of gross national 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 ECJ. Rather, it is a sign that the ECJ shares a commitment to serving the public interest.

*Overcoming the Joint-Decision Trap? The 1996–97 IGC
and the Treaty of Amsterdam*

I have argued that decision-making rules significantly undermine the ability of national governments to control the ECJ. Although reforming existing policies is made difficult by the joint-decision trap, this does 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, such as threatening exit or holding hostage something that other member states want. Thus intensely held interests by one state can lead to hard bargaining and reform of entrenched policies if the state will subjugate other issues to a single goal.

British Euro-skeptics had a very intense interest in weakening the powers of EU institutions, especially the ECJ. In the Maastricht Treaty negotiations the British demanded the scheduling of an intergovernmental conference to discuss the roles and powers of EU institutions, and the British made it part of their list of demands that the Court's powers be addressed. Euro-skeptics wanted to make the ECJ directly accountable to political bodies and leaked to the press a proposal to allow a political body to veto or delay the effect of ECJ decisions.⁶⁵ They forced the British government to put into the negotiating process of the IGC a series of proposals to make the ECJ more politically accountable and to limit the cost of its decisions. British officials hoped to elicit German support for their proposals. There had been rumors about a potential German proposal to limit preliminary ruling reference rights to high courts. And Chancellor Helmut Kohl had become increasingly critical of the ECJ. The British challenge to the ECJ was the most serious to date because it went beyond rhetoric to articulate and specify an anti-ECJ policy.

In interviews during the fall of 1995, while meetings of the planning group for the 1996 IGC were being held, Dutch, German, and French legal advisors and members of the Council's legal services all agreed that the mandate of the ECJ, as it stood in the Treaty of Rome, was not up for renegotiation.⁶⁶ Because the other member states were unwilling to renegotiate the *aquis communautaire*, the British put forward pro-

65. Brown 1995.

66. Based on interviews in the British Foreign and Commonwealth Office (10 November 1995), the Tribunal of First Instance (2 November 1995), and the German Economics Ministry (correspondence from 6 January 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, Mr. Clever, in the Bundesministerium für Arbeit und Sozialordnung; Brown 1995; and Clever 1995.

posals to the IGC planning group that did not directly attack the authority or autonomy of the ECJ or attempt to dismantle the preliminary ruling procedure or the supremacy of EC law. The British suggested creating an ECJ appeals procedure that would give the Court a second chance to reflect on its decisions in light of political displeasure, but according to the proposal it would still ultimately be the ECJ that executed the appeal! The British also suggested a treaty amendment to limit liability damages *in cases where the member state acted in good faith*, as well as an amendment that explicitly allowed the Court to limit the retrospective effect of its judgments. Nothing in the current text of the Treaty of Rome 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. Nevertheless, the British hoped 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 that other member states might accept stripped most of the political force from the British government's proposals.

The British proposals were rejected entirely by the other member states. The existing jurisdiction of the ECJ for common market issues was not altered in the new Treaty of Amsterdam, thus the British threats never materialized. But in the new areas of jurisdiction given to the Court, the ECJ was significantly restricted. In the Maastricht Treaty, the ECJ had been excluded from the new areas of EU authority: the Common Foreign and Security Policy, and Justice and Home Affairs (so-called pillars 2 and 3, respectively). This exclusion showed that member states had learned from the past, and that they were unwilling to allow the ECJ to meddle in these important policy areas. As usual, the small states were especially unhappy that the ECJ was excluded from Justice and Home Affairs. In the Treaty of Amsterdam, formally concluded in October 1997, the small states managed to have aspects of Justice and Home Affairs transferred into the realm of the ECJ, but in a restricted way. For issues of asylum law, migration policy, border controls, and the Schengen Agreement, the preliminary ruling system was extended only to the courts of last instance, which are less likely to send controversial issues of national policy to the ECJ. Officially, the explanation for excluding lower courts from sending references is that states were worried about a flood of asylum appeals to the ECJ, but EU officials admit that behind this official stance is a fear of ECJ activism on lower court references. The ECJ was also explicitly denied jurisdiction over domestic issues concerning internal order and security, including assessments of the proportionality of state security actions (Article K.5 and K.7 §5). For issues of policing and judicial cooperation (that is, fighting terrorism and drug trafficking), each government is allowed to choose if its courts will be able to make preliminary ruling references; thus national governments can keep the ECJ out of domestic issues by denying the right of reference to national courts (Article K.6 §2). More easily overlooked is the provision stating that policies adopted under the EU framework with respect to Article K will not create direct effects, that is, individual rights that can be claimed in national courts (Article K.6 §2). Thus no individual or group will be able to draw on these EU

rules to challenge national policy. This restriction will make it possible for individuals to challenge the EU agreements themselves but not national implementation of the agreements.

This outcome accords exactly with the expectations of the joint-decision trap. For existent ECJ jurisprudence and for areas of the Court's established jurisdiction, the ECJ remained virtually immune from political sanction. But in areas of new legislation and new authority for the ECJ, member states were able to block changes that they feared would undermine their sovereignty.

The ECJ has survived the most serious attack on its authority in its history. The ECJ may have retreated in some of its jurisprudence, but it has still shown a willingness to make bold decisions even at the height of the political threats against it.⁶⁷ The ECJ knew that the British government was angry over the cost of ECJ decisions, yet in March 1996, while the IGC was still underway, the ECJ ordered the British government to pay Spanish fishermen a fine for violating European law. It also ordered the German government—the British government's desired ally—to compensate a French brewery prevented from exporting to Germany.⁶⁸ Even under the most concrete and direct political attacks to date, the ECJ continued its doctrine building—and in an area of significant concern to the attacking member states. This experience shows yet again that the ECJ continues to have the institutional and political capacity and the will to make decisions that go against member state interests.

Conclusion: A New Framework for Understanding ECJ–Member State Interactions

In this article I have offered an account of how ECJ–member state relations are embedded in and constrained by institutions. I have argued that these institutional links, both at the national and supranational levels, directly shape the maneuverability of the ECJ so that its decisions do not have to be simple reflections of national interests. The account is self-consciously historical, focusing on understanding the evolution of the EU legal system over time as a window into how the present system operates.⁶⁹ Only when one considers that the current EU legal system was not intended to function as it does can we understand why member states that have an interest in maximizing national sovereignty have ended up with a legal system that greatly compromises national sovereignty. To say that this outcome was unintended is not to say that it happened by chance. The ECJ was very conscious in its strategy,

67. In an article entitled "Language, Culture, and Politics in the Life of the European Court of Justice," Justice Mancini of the ECJ argued that there had been a "retreat from activism," citing three reasons for this retreat: (1) the change in public opinion signaled by the debates of the Maastricht Treaty, which identified the ECJ as one of the chief EU 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 IGC; Mancini 1995, 12.

68. Rice, Harding, and Hargreaves 1996.

69. A similar general account of this nature has been developed by Pierson 1996. I am indebted to Pierson for helping crystallize many of the ideas with which I have been working.

as were the member states. But their different time horizons combined with a national judicial dynamic that propelled legal integration forward created a situation that national governments had not agreed to and, collectively, would not agree to today. Only by knowing this evolution of the Court's political power can we understand why these same countries are still very reluctant to extend the jurisdictional authority of the ECJ even in very limited areas, such as the Cannes conventions for Europol and a common customs information system. Because we know the history of the European legal system, we can understand why European states, committed to a rule of law and benefiting from increased compliance with EU law, are also reluctant to agree to replicate the successful EU legal system in other international contexts or even in other areas of European integration.

The arguments advanced in this article are built on many important insights from the early literature on the ECJ. Like the neofunctionalist and legalist literature, this article stresses the important difference between the legal and the political rules of the game. Like the neorealist literature, it examines the ECJ as an agent of the member states and identifies important political constraints created by the control of the decision-making process by member states. This article goes beyond these accounts, however, offering a different and even competing conception of the interests of the ECJ and member states and of the relationship between the ECJ and the member states. By moving beyond international relations approaches, I hope to widen the variables considered in evaluating EU–member state relations and contribute to the growing debate on how domestic politics influences European integration, and vice versa.

Many of the arguments raised in this article can be stated as more general hypotheses about ECJ–member state relations and about national government–judicial relations. If these hypotheses hold, there are also significant reasons to question how generalizable the experience of the ECJ is to other international legal contexts.

Different Time Horizons for Different Political Actors

One of the reasons why the ECJ could develop legal doctrine that went against the long-term interests of the member states is that politicians focused on the short-term material and political impact of the decisions rather than the long-term doctrinal implications of the decisions. Member states *understood* that the legal precedent established might create political costs in the future, and thus they were not fooled by seemingly apolitical legalese or by the technical nature of law. But national governments were willing to trade off potential long-term costs so long as they could escape the political and financial costs of judicial decisions in the present. From this experience, one could hypothesize that legislators are more likely to act against judicial activism when it creates significant financial and political consequences and less likely to act against judicial activism that does not upset current policy.⁷⁰ In other words, the doctrinal significance matters less to national governments than the impact of decisions. If, however, the doctrine itself created a political impact by mobi-

70. For similar arguments, see Alter 1996a; and Garrett, Kelemen, and Schulz 1996.

lizing groups, as many U.S. Supreme Court decisions do, the doctrine alone might be enough to upset member states.

This time horizons argument comes from rational choice and historical institutional analysis and is, of course, generalizable beyond the ECJ or EU case.⁷¹

Importance of National Judicial Support

National judicial support was critical in limiting the ability of national governments to simply ignore unwanted legal decisions from the international ECJ. In other words, where the inherent legitimacy of the ECJ or the compelling nature of the legal argumentation did not convince member states to accept ECJ decisions, national court legitimacy forced the government to find legally acceptable solutions to accommodate the jurisprudence of the ECJ.⁷² This implies that in areas where national courts cannot be invoked, either because EC law does not create direct effects or the ECJ does not have jurisdictional authority to be seized by national courts, politicians would more likely ignore unwanted ECJ decisions or adopt extralegal means to mitigate the effects of ECJ decisions. Consequently, the ECJ would be more careful to take member state interests into account. The critical role of national courts as enforcers of ECJ decisions also implies that in countries where national courts are less legitimate, less vigilant, and a rule of law ideology is not a significant domestic political factor, politicians would be more likely to use extralegal means to circumvent ECJ jurisprudence.⁷³

The EU experience highlights the importance of having domestic interlocutors to make adherence to international institutions politically constraining at home. One could hypothesize that international norms will most influence national politics when they are drawn on or pulled into the domestic political realm by domestic actors.⁷⁴

Creating a Credible Threat

If courts should start deciding against national interests, what can national governments do? In the European Union, where governments cannot selectively opt out of the European legal system, the only solution available to member states is to rewrite EU legislation or renegotiate the jurisdictional authority of the ECJ. For the many reasons discussed, doing this is not so easy. This is not to say that states can never overcome the institutional constraints. Germany and the Netherlands are pivotal countries in the coalition protecting the ECJ. If these countries turned, and all other countries agreed to go along, a credible threat could be mustered. One could hypothesize that when political support for the ECJ is waning in the key states blocking jurisdictional change, we can expect the ECJ to moderate its jurisprudence to avoid the emergence of a consensus to attack its prerogatives. But when a clear blocking con-

71. Pierson 1996.

72. This argument is supported in survey research on ECJ legitimacy by Caldeira and Gibson; Caldeira and Gibson 1995.

73. This hypothesis follows from Slaughter 1995.

74. Alter and Vargas 1997.

tingent exists, the ECJ can be expected to decide against the interests of powerful member states.

In international contexts where states can opt out of legal mechanisms or keep disputes from even getting to an international body, it will be easier for governments to credibly threaten international tribunals to moderate their jurisprudence. Whether these threats will be enough to cow the tribunal into quiescence is another story. As mentioned earlier, in some circumstances the legitimacy of a legal body could be hurt more by caving in to political pressure than by making a legally sound decision that the court knows politicians will ignore.⁷⁵

The ECJ: A Model for Other International Legal Systems?

The ECJ began as a fairly weak international tribunal, suffering from many of the problems faced by international courts. It lacked cases to adjudicate. No enforcement mechanism was in place, so ECJ decisions were easy to ignore. The neutrality of the ECJ and its reputation for high-quality decisions and sound legal reasoning was not enough to make member states use the legal mechanism to resolve disputes or to force member states to adhere to decisions that went against important interests. The ECJ has changed the weak foundations of the EU legal system, with the help of national judiciaries. If the ECJ, by building legal doctrine, created a base of political leverage for itself, could other international legal bodies not do the same?

If national courts are the main reason why European governments adhere to ECJ decisions in cases that go against national interests, one must question how generalizable the EU experience is to other international contexts. In the EU the preliminary ruling mechanism serves as a direct link coordinating interpretation of national courts with the ECJ. As I have argued elsewhere, the preliminary ruling system also serves a political function, pressuring national high courts to bring their jurisprudence into agreement with the ECJ.⁷⁶ In most other international judicial or quasi-judicial systems, there is no direct link between the international court and national courts, making it much more difficult to coordinate legal interpretation across boundaries. Although it is always possible that national courts could look to jurisprudence generated from international bodies and thus enhance the enforceability of international law, without the preliminary ruling mechanism one must wonder if independent-minded national judges with different legal traditions and much legal hubris will turn for guidance to international bodies whose jurisprudence goes against strong political interests.

Given that unintended consequences almost always accrue when institutions are created, it should not surprise us if politicians wake up at some other time to find their sovereignty constrained in unintended ways in other international contexts. At the same time, it could be that member states are now wise to the benefits and costs of the EU legal system, and that they will not make such a mistake in the future. Although great strides have been made in the development of international dispute resolution

75. Mattli and Slaughter 1995.

76. Alter 1996b.

mechanisms, none of the new systems includes a preliminary ruling mechanism. These systems still have significant political controls for the member states that allow them to avoid the costs of an international judicial decision that greatly compromises national interests. Whether the success of the EU legal system is a prototype for other international legal systems is still open for debate.

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