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Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953–1975) (2009)

It is well established that the European Court of Justice transformed the original European Community legal system through the creation of revolutionary legal doctrines turning the Treaty of Rome into a constitution for Europe, and that this transformation created the bases for the ECJ's expanded political role in European politics (See Chapter 5). This paper challenges previous accounts of this early period of European legal integration, situating individual entrepreneurs and far-reaching ECJ decisions into the social context of the times—namely the organized and activist Euro-law associations. The activities of Euro-law associations are known among European law scholars, though seldom written about.¹ Ignoring the role of legal associations served a purpose. Especially while the ECJ was seeking to establish its authority, revealing the extensive coordination that gave rise to the ECJ's early legal successes can imply conspiracy potentially undermining the effort to portray support for an active European court as spontaneously spreading. But given that the ECJ is often seen as a model to follow (or avoid), it is important to understand how the ECJ orchestrated its legal revolution. Thus we must add back in the role of Euro-law associations.

Section I of this chapter documents the activities of Euro-law associations, formally constituted member organizations that planned activities related to European law. Section II explains how the activities of Euro-law associations contributed to European legal integration, invoking Bourdieu's framework of the politics of legal fields (Bourdieu 1987). Both Bourdieusian and neo-functionalism stress how the promoters of European legal integration drew on law's capital—they justified their cases and the ECJ's rulings using legal argumentation so as to envelop their political agenda in law's putative neutrality and accepted authority (Burley and Mattli 1993; Weiler 1991). But neo-functionalism offers an essentially liberal story in which integration

¹ Hjalte Rasmussen already in 1986 discussed the cozy relationship between the ECJ and legal scholars (Rasmussen 1986: 265–7).

succeeds by playing to the self-interest of individuals. Walter Mattli paraphrased Haas idea:

The ‘good Europeans’ are not the main creators of the . . . community. The process of community formation is dominated by nationally constituted groups with specific interests and aims, willing and able to adjust their aspirations by turning to supranational means when the course appears profitable . . . the groups driving the process of integration are rational maximizers of their narrow self interest; they hail from the world of business, politics and science and their actions or beliefs need not be infused with pan-regional ideology or commitment. Deeper integration is the intended as well as unintended consequence of their self-serving actions. (Mattli 2005: 330–1)

The liberal narrative suggests that merely transplanting European style legal institutions will spur legal integration because at least some set of self-interested actors will benefit from legal integration and be likely to exploit the opportunities international litigation offers (Stone Sweet 1999).

The Bourdieusian approach of examining politics within legal fields considers jurists to be self-interested in that lawyers, judges, and legal scholars are jockeying to advance the position of law so as to increase their own power and influence. It is not, however, a liberal vision in that actors are not atomized ‘rational maximizers of their narrow self-interest’. Instead, Bourdieusian approaches investigate the social backgrounds of and connections between legal actors, assuming that larger group interests guide the political behavior of individuals and expecting the ‘capital’ of actors—e.g. their power bases—to be key to whether or not they achieve their objectives. Because politics in the legal field is characterized by contestation—clashing interests and objectives, which generate actions and counter-reactions—political outcomes are constructed, contingent on the balance of interests and power among actors, and thereby subject to change when the balance changes.

Part II shows how Euro-law associations coordinated the actions of individuals to propel legal integration in a constitutional direction, identifying four contributions of Euro-law associations. The community that Euro-law associations fostered coordinated and encouraged individual actions. The success of Euro-law associations, however, was in large part a result of the political capital of association members. Inspired by the meetings, members of associations used their offices to help the European legal integration project—lawyers found test cases; judges promoted European arguments before national courts and referred cases to the ECJ; professors wrote supportive arguments, planned conferences and imparted ECJ doctrine to the next generation of academics and practitioners. The core members of the jurist movement were more ideologically driven than self-interested, inspired by the larger historical idea of overcoming war and enmity via European integration. In their view, a Europe united under a rule of law provided ‘the most reliable and durable way to establish a harmonious political union’ where the preponderance of larger European powers could be managed

(Madsen and Vauchez 2005: 19). This larger agenda, rather than narrow self-interest, unified members and spurred them to action.

Part III imagines legal integration absent the support of an organized jurist movement by examining the ECJ's clone, the Andean Community Tribunal of Justice (ATJ). In 1984 Andean countries created the ATJ, modeled explicitly on the ECJ. The ATJ is now the third most active international court in existence, having issued over 1,200 rulings to date. Yet outside of the issue of intellectual property law, an island of effective international adjudication that I explore in another co-authored paper (Helfer, Alter, and Guerzovich 2008), the Andean Tribunal has not transformed national legal systems or Andean politics. Indeed the ATJ and its doctrine are largely unknown. This brief section explores how the absence of a jurist advocacy movement combined with the weakness of national legal fields impedes the ATJ from developing bold legal doctrines and limits Andean law from penetrating national systems.

Part IV concludes by considering what the European experience suggests more broadly about the importance of jurist advocacy movements for transnational law. The European and Andean cases together suggest that jurist advocacy movements need to do more than disseminate information about legal best practices. They also suggest that neither the prospect of advancing narrow self-interests nor of collective functional gains provide enough of an incentive if individuals are to act iconoclastically. Legal movements need a combination of ideology and affiliation with political power to succeed.

I. Founding National Euro-law Associations and the *Fédération Internationale de Droit Européen (FIDE)*—1952–1975

The founding of the European Community in 1958 provided an impetus to organize pro-integration lawyers into national associations dedicated to the study and promotion of European Community law. Euro-law associations, including the *Wissenschaftliche Gesellschaft für Europarecht*, *Association Belge pour le Droit Européen*, *Association Française des Juristes Européens*, *Associazione Italiani dei Giuristi Europei*, *Association Luxembourgeois des Juristes Européens*, *Nederlandse Vereniging voor Europees Recht*, formed in each European Community member state in the 1950s up through 1961. According to the founders, the nearly simultaneous emergence was not directly coordinated, but it was a natural outgrowth of practices within national legal communities where diplomat-juriconsults in the 1940s and 1950s had been actively involved in national and international political and legal developments (Madsen and Vauchez 2005). Indeed the *Mouvement Européen* had always seen law as an integral part of European integration.²

² The *Mouvement Européen*, a group of activists seeking European integration, had in 1952 established a *Comité des Juristes*. In the 1950s a separate *Comité des Juristes*, a transnational group

Euro-law associations served as gathering grounds for jurists (lawyers, legal scholars, and governmental actors with legal backgrounds) interested in the European integration project. Euro-law associations included politically connected and well-placed individuals. For example, the *Association Française des Juristes Européens* (AJE) was founded in 1953, by ‘gentlemen-politicians of law’ including Pierre-Henri Teitigen and Maurice Roland (Sacriste and Vauchez 2007: 91). Teitigen was, among other things, a government minister in the immediate post-war period, and a deputy and then head of the centrist French Mouvement Républicain Populaire (MRP), which captured a quarter of the French vote in the immediate post-war period. He was part of the French delegation to the Comité des Juristes, and rapporteur for the Committee on Legal and Administrative Questions in the negotiations for the Council of Europe (Madsen 2007: 141). Roland was a high magistrate at the Cour de Cassation. The German association the *Wissenschaftliche Gesellschaft für Europarecht* (WGE) was founded in 1961 by academics including Hans-Peter Ipsen, Gert Nicolaison, and Ernst Steindorff. Ipsen, a lifelong academic, was the intellectual father of European law in Germany. The leadership included Reimer Schmidt (an academic and early author on European legal issues), lawyers Bodo Börner and C. F. Ophüls (the latter was an advisor to Konrad Adenauer and Walter Hallstein, and he had participated in negotiations regarding the Treaty of Rome), and Walter Roemer from the Federal Ministry of Justice (Ipsen 1990: 335).³ Employees of European institutions (the Court of Justice, the Commission, and its Legal Secretariat) were implicit and at times explicit members of national Euro-law associations. For example, Walter Hallstein (President of the European Commission), Otto Riese (a Former German Supreme Court judge and ECJ judge from 1959 to 1964) were members of the WGE (Davies 2007: 54) Many ties held this emerging European legal field together—members had been active in the resistance, worked together in national government ministries, participated in the construction of the legal order for the Council of Europe, and participated in drafting the United Nations Charter, the Council of Europe, and the European Coal and Steel Community. A common commitment to the larger objective of European integration, under a rule of law, provided an ideological cohesion to the group (Madsen and Vauchez 2005: 17–23).

Forming an organization dedicated to a particular legal topic (e.g. European Community law) was hardly novel. According to Hans-Jürgen Rabe, an early member of the WGE and later its secretary, in Europe it is quite

of lawyers (scholars, practitioners, and government officials), was charged with helping to write and advise negotiation of a European constitution based in law, protected by legal institutions (Friedrich 1954: xxvi). Members of these early committees later joined or helped found national Euro-law associations.

³ Antoine Vauchez and Antonin Cohen have been documenting the political background of Europe’s early legal pioneers. See their work in the bibliography, and check for ongoing publications for more information.

common to establish associations when there is a new area of law.⁴ Indeed the WGE was founded as a working group of the pre-existing *Gesellschaft für Rechtsvergleichung*. Associations helped lawyers learn about legal developments so that they could better advise their clients, and they helped judges learn about legal developments within other parts of the judiciary. It is also quite normal for practitioners to have seminars on new areas of law, to write briefs for legal journals, and to be consumers of journals that published rulings and notes regarding developing law. Thus in some respects the activities undertaken by Euro-law associations were within the normal range for the European legal profession.

But Euro-law associations had a specific political objective of promoting the larger European project of integration (which included the human rights work of the Council of Europe). The new Euro-law associations actively sought to wrest the topic of European law from specialists in coal and steel law and from international law experts whose traditional doctrines about the relationship between national and international rules were too limited given the aspirations of association leaders (Davies 2007: 50–69). These larger objectives of associations were explicit. The French AJE's stated goal was to 'help those outside of the organization understand the necessity of creating Europe and to identify the role jurists can and must play in the creation of a United Europe.'⁵ ECJ judges also spoke clearly about the role of judges in building European legal integration (Donner 1968; Lecourt 1964; Mancini 1989; Pescatore 1983). The common objectives united the members into a largely homogenous 'policy community' all working in the same direction (Schepel and Wesseling 1997). One participant summarized the environment as follows:

in Europe around 1950 the idea of European unification was capable of evoking almost religious enthusiasm among young lawyers. We believed in the United State of Europe. Hardly anybody had any doubts about the possibility of achieving this aim within a few years. The reality turned out to be very different indeed.

Yet, in spite of this state of affairs, the vast majority of West German teachers of 'European Law' remained faithful to this ideal of their youth and passed on this ideology to their assistants, who now hold their chairs of 'European Law'. (Seidl-Hohenveldern 1984: 282–3).

Euro-law associations were immediately successful in organizational terms. The WGE reached 200 to 300 members by the early 1960s, with a core membership of 30–40 practitioners including academics, in-house lawyers for large corporations, members of European and national governmental institutions, and interested professionals. According to the WGE's Secretary Hans-Jürgen Rabe, within this 'core group' there was intense contact with the eight German lawyers of the

⁴ Interview with Dr Hans-Jürgen Rabe, Secretary of the *Wissenschaftliche Gesellschaft für Europarecht*, Brussels, 11 January 1994.

⁵ Reprinted in a 1994 publication about the Association Française des Juristes Européens. On file with the author.

Commission's legal services.⁶ In 1963 the AJE had 70 active members, including an Avocat Général of the ECJ and the Secretary of the European Commission on Human Rights (Maurice Lagrange), 34 lawyers, 11 French judges, five members of the Conseil d'État, eight professors of law, the president of the Tribunal de commerce de la Seine, and a variety of well-known individuals from government and the private sector (Vauchez 2007b: note 22).⁷ The meetings of the Belgium association also regularly drew 50 participants.⁸

With financial support from the European Commission, organizations were able to host a number of conferences. The WGE, with its scholarly focus, put its energy into planning conferences where issues of European law were debated, and in writing analyses of the law. According to the AJE's President Dr Lise Funck-Bretano, the French association was more distant from academics because 'academics were involved in the teaching in Universities, not in the development of law'. Thus the AJE organized smaller meetings, lunches, and seminars for national lawyers and judges, sometimes meeting within national courts and often bringing in high officials from the European legal system.⁹ The European Commission also helped develop the European legal field by establishing the Fédération Internationale de Droit Européen (FIDE), an umbrella organization connecting national associations. FIDE sponsored conferences every two years in the 1960s, providing a means for pro-integration lawyers from different countries (including the United Kingdom) to get to know each other and to coordinate activities.

Hans Peter Ipsen identified 41 scholarly meetings of the WGE, FIDE, and a number of institutes from 1961 to 1973 (Ipsen 1972). This number does not include the smaller meetings, like those organized by the ATJ, which created a discussion-forum for practioners regarding specific legal topics. Meetings were well attended. According to Hans-Jürgen Rabe, at least throughout the early 1970s everyone who was anyone in European law attended WGE's conferences in Bad Em. Ipsen notes that the 1963 FIDE meeting in the Hague had over 200 participants, including 20 WGE members (Ipsen 1964: 339). H. V. Brinkmann

⁶ Interview with Hans-Jürgen Rabe, the Secretary of the WGE, 11 January 1994, Brussels. By 1990 the WGE made up 45% of its parent organization the *Gesellschaft für Rechtsvergleichung*, with 516 members, 60 per cent of whom were practioners and 40 per cent scholars. See Ipsen (1990).

⁷ By the 1990s, the head of the Association said it had 300 members, and that between 100 and 250 turned out for its events. Interview with Dr Lise Funck-Brentano, President of the Association des Juristes Européens, 26 May 1994, Paris.

⁸ Interview with Michel Gaudet, Director of the Legal Services of the European Commission, 7 July 1994, Brussels.

⁹ Interview with Dr Lise Funck-Brentano, President of the Association des Juristes Européens. This distance between practioners and the teaching of European law may be why politicians—Pierre-Henri Teitigen and Walter Hallstein (Former President of the European Commission)—created a separate organization for academics. Teitigen founded the Commission pour l'Etude des Communautés Européennes (1964) and Walter Hallstein the German Arbeitskreis für Europarecht, both academic associations that worked to integrate European law studies into legal education. Interview with Gerard Nafylan, Treasurer of the Commission (CEDEC), 16 May 1994, Paris.

notes that a conference at the Gustav-Stresemann Institute in 1965 had 40 judges, public attorneys, and clerks (Brinkmann 1965).

Euro-law associations were fonts for briefs about European legal developments. For example, within a little more than a year of the ECJ's seminal *Van Gend en Loos* decision, scholars published at least 13 notes in national legal publications discussing the ruling, many if not most of which were written by Euro-law association members.¹⁰ That there were so many legal venues to report in (13 is just the tip of the iceberg) is already a sign of the existing legal infrastructures European law associations could use to their advantage. Association members also wrote reference books about European law that interested lawyers could consult to learn about the European legal system. Members of the WGE started a quarterly series in the most widely read legal journal, the *Neue Juristischen Wochenzeitschrift*, to inform the German bar about European legal developments.¹¹ They addressed the German Juristentag to inform its members about European law.¹² On occasion, WGE members telephoned judges who issued rulings counter to European law, explaining to them what they should have done. According to Rabe, this was a gentler approach than writing critical commentaries, but they also wrote critical commentaries.¹³

Members of the European Commission's Legal Services helped in these efforts. Michel Gaudet, Director of the Commission's Legal Service from 1958–70, explained that the Legal Services tried to meet with as many lawyers as possible to convince them to use European law. The goal, according to Gaudet, was to get people used to referencing European law and European institutions as part of the normal legal debate.¹⁴ The Commission also sent representatives and developed materials for training meetings on specific legal subject areas, and ECJ Justices

¹⁰ *Recueil Sirey* (1963) 29–33 (by Jean Robert, lawyer at the Cour de Paris), *Diritto Internazionale* (1963) No. 3 Part I, 247–8 (by Italo Telchini, legal counsel to the High Authority), *Giustizia Civile* (1963) No. 6 Parte Prima, 1225–31 (by Mario Berri); *Giurisprudenza Italiana* (1963) Disp. 4a, Parte IV (by Paolo Gori, attaché to ECJ); *Common Market Law Review* (1963) Vol. 1, 88–92 (by Samkalden); *Der Betrieb* (1963) No. 20, 683–5 (by Andreas Hammann, lawyer); *Juris-Classeur Périodique*, *La Semaine Juridique* (1963) No. 19 II Jurisprudence No. 13177 (by Fernand-Charles Jeantet, an active private business lawyer, identified at the time as a judge at the Cour d'Appel de Paris); *Le Barreau de France* (1963) No. 147–8, juin–juillet, 25–6 (also by Jeantet); *Rivista di diritto processuale* (1963) No. 4, 651–7 (by Alessandro Migliazza, professor), *Journal des Tribunaux* (1963) No. 4397, 190–2 (by Fr. Rigaux), *Revue générale de droit international public* (1963) No. 2, 421–2 (by Ch. R), *Il Foro Padano* (1963) No. 3 Parte Quinta, 33–42 (by Nicola Catalone, former legal advisor to ECSC, ECJ judge 1958–61) *The International and Comparative Law Quarterly* (1963) Vol. 12, 1411–16 (by Norman Marsh).

¹¹ The first article explains the intent. See Ophüls (1963). Ipsen also discusses the series in his 25th year retrospective in the journal *Europarecht* (Ipsen 1990).

¹² Ipsen spoke to the Juristentag group in 1964. The 1966 meeting had a section focused on European law. After that, European law was not an explicit theme, though it was frequently in the background of discussions. Only in 1992 was there again an explicit focus on the European legal system. See *Verhandlungen des Neunundfünfzigsten Deutschen Juristentages* (1992).

¹³ Interview with Hans-Jürgen Rabe. See citations to legal criticisms in Alter (2001: 80–98).

¹⁴ Interview with Michel Gaudet, Director of the Legal Services of the European Commission, 7 July 1994, Brussels.

and Commission Directors attended meetings, visited national judges, and penned introductions to important works concerning European law, lending the prestige of their office to fledgling publications and to association activities.

With seed money from the Commission, associations founded European law journals including: *Rivista di diritto europeo* (1961), *Cahiers de droit européen* (1965), *Revue trimestrielle de droit Européen* (1965), *Europarecht* (1966) (Gaudet 1963; Ipsen 1990). The stated goals of these journals was to provide a venue for discussion of European legal issues (including Human Rights law), and to keep practitioners abreast of European legal developments. FIDE helped to found the *Common Market Law Review* (1964)—a joint venture of the British Institute of International and Comparative Law and Europa Institute in Leyden. Like its national counterparts, the *Common Market Law Review* had a trans-European editorial board, drawn from national associations and European officials.¹⁵ But it was written in English so as to facilitate Great Britain's accession to the European Community.

Academic association members founded institutes at a number of universities and trained doctoral students who later became active members of associations (indeed Hans-Jürgen Rabe, the long time secretary of the WGE, wrote his thesis under Hans Peter Ipsen). The European Commission helped by providing grants for doctoral students, funding the publication of dissertations, giving subsidies to professors who taught seminars in European law, and funding University meetings where scholars could exchange research and teaching insights. The Commission also financed institutes for European studies, then built associations of institutes, and general associations for the study of the European Community, subsidizing meetings, newsletters, and events held by these groups. It created documentation centers that brought resources and prestige to the universities that were repositories of European documents, and it provided resources so European officials could spend time in national universities.¹⁶ With these and other policies, the Commission helped ensure that nationally based universities had faculty members focused on European issues.

In addition to participating in the activities of associations, European officials undertook their own public relations. Members of European institutions were active writers on European legal issues. Harm Schepel and Rein Weisseling found that 32 per cent of the 1,181 articles published in the *Common Market Law Review*, *Europarecht*, and *Cahiers de Droit Européen* from their founding through 1995 came from people who worked for European institutions—the Commission, the ECJ, and the Tribunal of First Instance—a level of involvement in scholarship

¹⁵ Ernst Steindorff, co-founder of WGE, was on the board, as was Nicola Catalano, a former legal advisor for the Coal and Steel Community, and an ECJ judge from 1958 to 1961. Other members included Lord Diplock, H. Drion, W.L. Haardt, G. Van Hecke, Andrew Martin, Jonkheer F. van Panhuys, Jean Robert, and Wilberforce L.J.

¹⁶ Interview with Jaqueline Lastenouse, Director of Academic Affairs, the European Commission, 11 July 1994, Brussels.

that significantly exceeds the norm for public actor participation in legal debates (Schepel and Wesseling 1997: 172–3). With its docket fairly empty in the 1960s, the ECJ used its time to cultivate support within national legal communities. It welcomed every reference from national courts, working with national judges to refine the formulation and substance of questions they sent. Justices regularly participated in scholarly conferences and workshops on European law, and they organized *stages* where their national colleagues could visit the ECJ, to be wined and dined. The ECJ took its show on the road, holding sessions in national capitals to generate news coverage and expose their workings to national audiences. In a somewhat unusual practice, European judges also wrote articles, speeches, and op-eds promoting the idea of lawyers helping to build integration through law (e.g. Donner 1968; Lecourt 1964, 1965; Mancini 1989).

While association members shared a general affinity for the project of European integration, members came from a variety of backgrounds (Vauchez 2007a) and were free thinkers who often disagreed about the means of promoting integration and about specific legal questions. Emil Noel stressed that the Commission encouraged free thinking. Academics and lawyers could not be controlled or indoctrinated, thus it was best to encourage open debate. Ultimately, Noel argued, the influence of European law would come from the persuasiveness of legal arguments, thus European officials were best off developing sound legal opinions.¹⁷

Written together, these efforts look extensive. But European Community law remained an esoteric topic in the 1960s, and the advocates of European law knew they were fighting an uphill battle. The ECJ's doctrines of the Supremacy and Direct Effect ran counter to established international and national legal doctrines (Donner 1968). Especially if one considers that many early ECJ cases only existed because association members sought out ways to facilitate European legal integration, there were relatively few national court references to the ECJ in the 1960s (75 references from 1960–69). And there were newly issued high court rulings in Italy (1964), France (1964, 1968), and Germany (1967) that directly contradicted the ECJ's doctrine of the day.¹⁸

¹⁷ Interview with Emil Noel, longtime member of the European Commission, 9 June 1994, Paris. According to one website, Noel was employee number 32 of the European Commission, and the right hand man of Walter Hallstein. <<http://www.nyulawglobal.org/events/emilenoellecture/EmileNoel.htm>>.

¹⁸ *Costa v. Enel and Soc. Edisonvolta*, Italian Constitutional Court Decision 14 of 7 March 1964, [1964] CMLR 425, [1964] I Il Foro It. 87 I 465; *Re Tax on Malt Barley* (Case III 77/63) FG Rhineland-Palatinate decision of 14 November 1963, [1963] EuR 10 130, [1964] 10 CMLR 130. BVerfG decision of 5 July 1967, BVerfG 2 BvR 29/63, [1967] 2 EuR 351, [1967] 27 CMLR 302; *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, [1964] Recueil Lebon 344 ; [1964] 5 RDP 1019. 1991; *SA des Etablissements Petitjean et autres*, Conseil d'État decision of 10 February 1967, [1967] Recueil Lebon 63, [1967] AJDA 267, [1967] RTDE 681; *Semoules decision 'Syndicat General de Fabricants de Semoules de France*, Conseil d'État

Indeed the 1960s the ECJ resembled the mouse that roared.¹⁹ It was a small and rather powerless supranational court, asserting doctrines with constitutional aspirations that challenged entrenched legal practices so as wrest power away from powerful state actors. Associations worked to magnify the mouse's actions, and to seize the topic of European law from the leading international law minds of the day who seemed quite willing to keep European law quite limited in its reach.²⁰ Their objective was epic, and the resources Euro-law organizations had at their disposal were modest in comparison to the larger budgets funding universities and other political and economic projects in European countries. But compared to jurist movements in other contexts, European actors were well resourced. The immediate organizational success of Euro-law associations in planning events, turning out participants and influencing the legal press—made possible in no small part by funds from the Commission—suggests that there was a constituency of activists eager and able to support the European project. It also suggests that Europe of the 1960s had fairly vibrant national legal fields populated by lawyers and scholars with both the means and practice of participating in transnational legal debates and publishing articles that debated and disseminated legal developments. In many developing country contexts it is hard to imagine that newly established member-organizations could have such a broad and quick presence.

II. The Impact of Euro-Law Advocacy Movements on European Legal Integration

How were Euro-law associations helpful to the larger process of legal integration? The neo-functionalist notion of legal integration is that lawyers, judges, and professors are working on their own or as independent interest groups, promoting their narrow self-interest. In Anne-Marie Burley and Walter Mattli's account of European legal integration, the political system was rigged as a 'one way ratchet.' Since plaintiffs could only ask the ECJ for help enforcing EC rules and the ECJ could only empower itself by obliging such requests, the supranational pursuit of self-interest led ineluctably to the development and penetration into national

decision of 1 March 1968, [1968] Recueil Lebon 149, [1970] CMLR 395. These cases are briefly discussed in Alter (1996: 461–6).

¹⁹ *The Mouse that Roared* is a 1955 book by Leonard Wibberley that was made into a film in 1958. In the book and film, the fictional Duchy of Grand Fenwick wages war on the United States expecting to lose in the hopes that the United States will then help it rebuild its economy. Instead, through a series of strange events and coincidences, it captures a nuclear weapon and the great super power capitulates to the tiny country.

²⁰ Eyal Benvenisti aptly summarizes the reasons why international lawyers have maintained a deferential approach of leaving international law to political actors to interpret (Benvenisti 2008: 245–7).

systems of the European law (Burley and Mattli 1993: 60–5), or in Stone Sweet’s terminology, the judicial construction of the rules of international governance (Stone Sweet 1999). Certainly Euro-law associations contained self-interested members, and hoped to mobilize and inspire more self-interested non-ideological actors. But the core association leaders were not themselves such actors, and their goal was not simply to help European rules penetrate national orders. Rather, Euro-law activists wanted to achieve what they had failed to win politically, creating a constitution for Europe (Cohen 2007).

This section shows how Euro-law associations helped define the larger legal field of contestation, making possible the ECJ’s constitutionalizing doctrines by creating test cases to facilitate the development of far-reaching European legal doctrine, by acting as the ECJ’s and Commission’s kitchen cabinet, by spurring individuals to bold action, and by creating an impression of a momentum favoring the ECJ’s doctrinal creations. The implication of the argument is that Euro-law associations critically defined what European legal integration became. The counter-factual claim is that without the activities of Euro-law associations, a far more limited type of legal integration would have existed in Europe of the 1960s. Thus I am challenging the notion that there is an automaticity in the international legal process, a sort of invisible hand that channels internationally oriented self-interested litigant and judicial behavior in the political direction of ambitiously expanding the reach and scope of international rules.

1. Creating test cases for the ECJ to use to develop far-reaching legal doctrine

The majority of cases referred to the ECJ in the 1960s concerned the complicated formula for calculating social security benefits for migrant workers and the classification of customs categories. These cases represented how the European legal system was designed to work—national courts would refer to the ECJ technical questions about European Community rules that arose as litigants raised suits involving European law. But these spontaneous cases were not per se helpful in building the ECJ’s authority as an important legal and political actor. The references asking far-reaching questions, and thus provoking rulings of doctrinal significance, took orchestration by association members.

The ECJ’s constitutionalizing process began with two early rulings, *Van Gend en Loos* (1962) and *Costa v. Enel* (1964), which established the direct effect and supremacy of European law (see Chapter 5). Euro-law associations were key in constituting these rulings. The Dutch legal system offered the most hospitable environment for European law because the 1953 Dutch constitution allowed for the supremacy of international law.²¹ Moreover, in Dutch law international rules

²¹ Fifteen of the first 18 preliminary references to the ECJ came from Dutch courts (Vauchez 2008: note 25).

that are self-executing can be applied by domestic courts (Claes and De Witte 1998: 173–6). In November 1961, the Dutch Euro-law association established a working group to identify which provisions of the Treaty of Rome might be seen as self-executing, which under Dutch law would mean that they would be directly applicable by domestic courts and supreme to conflicting Dutch rules. L. F. D. Ter Keile, a young Dutch lawyer and member of the Dutch Euro-law association, fashioned the test case *Van Gend en Loos* where the Dutch judges queried the ECJ as to whether the European provision in question could create direct effects (Vauchez 2008: 9). The case concerned the reclassification of a customs duty which, according to L. F. D. Ter Keile, had the effect of raising the existing tariff in contravention of the Treaty of Rome. A similar fact pattern would appear twenty years later in the Andean context. The *Van Gend en Loos* reference, which came from a tariff commission, was significant for a few reasons. There was a clear and well-established answer to the legal question at hand—given that the European Treaty provision in question was not addressed to individuals, it should not create direct effects (Claes and De Witte 1998: 176). Referring the question to the ECJ could help legal activists procure a different answer than what a more conservative Dutch judge might on their own give. The reference also suggested that the ECJ had the authority to speak to the effect of European law within national systems, thus providing the ECJ an opportunity to assert a reach for European law that would apply beyond the Netherlands. The ECJ's *Van Gend en Loos* ruling is famous for asserting that some European Treaty articles generate direct effects which individuals can invoke in front of national judges.²²

For the Dutch system, if European law created direct effects, it was *ipso facto* supreme to conflicting domestic rules. But in other European legal systems, legal primacy went to the last law passed, which meant that even if European law created direct effects, it could be supplanted by national rules passed later in time. The ECJ's *Costa v. Enel* decision spoke to the supremacy of European law over subsequently enacted national laws.²³ The lawyers behind the *Costa v. Enel* case were not pro-integration activists, rather they created the case to challenge what they saw as excessive government intervention in the Italian economy (Vauchez 2008: 17). The lawyers had raised the suit in a small claims court, using a \$3 electricity bill as the legal basis to challenge the nationalization of the Italian energy industry. The small claims court also referred the case to the Italian Constitutional Court that ruled first, finding that the case raised no question related to European integration. Nonetheless the ECJ went on to find

²² Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Belastingen* [1963] ECR 1, [1963] CMLR 105.

²³ It is not clear if the lawyers—Flaminio Costa and Giangaleazzo Stendari—were members of Euro-law associations, though they did write about European legal issues (Vauchez 2008: 17).

that European law is supreme to national law, but that the nationalization of the Italian energy industry did not violate European law.²⁴

The ECJ decision in fact upheld the validity of the Italian law in question, and given the Italian Constitutional Court's prior ruling, it was moot in any event. It was the pro-integration advocates that made the *Costa* ruling legally significant. From within their offices as EC officials, Euro-law association members situated the *Costa* reference into the context of a handful of recent adverse national court rulings, suggesting a dangerous trend of national courts finding limitations to the effect of European law within national systems. Framed in this way, the need to assert EC law supremacy seemed more pressing. European judges and Euro-law associations then followed up the ECJ's *Costa v. Enel* pronouncements with writings and speeches that both advertised the legal rulings and manufactured the far-reaching implications of the decisions. According to Vauchez, participants were engaged in a sort of ventriloquism. Before the ruling academics and practitioners spoke about what European law should mean. Then ECJ judges pronounced in the rulings what European law did mean, though they did so with ambiguity. Then the very same set of actors summarized what the ECJ had said, offering less ambiguous interpretations of the ruling, and thereby manufacturing a meaning and import to the decisions they themselves had helped author (Vauchez 2008b).

There were a number of other test cases constructed through association meetings and then trumpeted for their importance. The ECJ's *Cassis de Dijon* ruling, which is the focus of Chapter 7, was a test case constructed following an association meeting where a member of the Commission leaked to a German lawyer that it had settled a case involving the French liqueur *Anisette*. Euro-law association member Gert Meier, the in-house counsel for Rewe Zentrale, simply changed the type of liqueur to Cassis de Dijon, and brought his own test case.²⁵ As Chapter 7 shows, the Commission's reaction to the ECJ ruling, more than the decision itself, triggered legal and political contestation, the end result of which was arguably a retrenchment of the ECJ doctrine of mutual recognition, broadly interpreted. Still, the ECJ's interlocutors had achieved a huge victory. They had transformed a legal decision that applied only to alcohol imported into Germany into a widely known legal doctrine of general significance, and helped to surmount a political impasse by forcing member states to actively alter the ECJ's mutual recognition doctrine through passing their own legislation on the topic.

²⁴ *Costa v. Enel and Soc. Edisonvolta*, Italian Constitutional Court Decision 14 of 7 March 1964, [1964] CMLR 425, [1964] I II Foro It. 87 I 465.

²⁵ In total Meier brought at least 12 cases that were ultimately referred to the ECJ. Meier estimated that national judges referred only 10% of the cases where he argued that European law was relevant. But, where Meier's goal was to have a case referred to the ECJ, Meier estimated that he succeeded 90% of the time because he would bring the case to sympathetic judges. Sometimes judges even asked Meier to find cases to address issues. These types of requests, he noted, usually were made at FIDE, WGE, and Gesellschaft für Lebensmittel conferences. Interview with Gert Meier, the in-house lawyer for Rewe Zentrale, 26 April 1993, Cologne.

European officials also influenced legal integration by shedding their official positions and assuming the role of a private actor. While a member of the European Commission, Elaine Vogel-Polsky published an article suggesting the provision of the Treaty of Rome guaranteeing equal pay for men and women could create direct effects, and thus provide a basis to challenge national practices that discriminated on the basis of gender (Vogel-Polsky 1967). Vogel-Polsky helped write the EC's Equal Treatment Directive. As a private lawyer, she later found the plaintiff Defrenne (who gave Vogel-Polsky her case but did not participate beyond) and constructed the test case against Sabena airlines which established the direct effect of Article 119 (Harlow and Rawlings 1992: 283).²⁶

Such activism does not always work in the ECJ's favor. Bourdieu's concept of a legal field involves contestation—actors react to each other with the actions and counter-actions propelling political developments. But legal strategies can also be counter-reactions to political activism. The WGE co-founder Bodo Börner actually supported the German Constitutional Court's *Solange I* ruling that asserted that the German Constitutional Court could find European law invalid in Germany if it conflicted with German Basic Law. Börner felt that ignoring German concerns regarding a lack of basic rights protections in European law would be counterproductive and even dangerous for European integration (Seidl-Hohenveldern 1984: 283). Later still, when political developments were proceeding uncomfortably fast, four members of the European Parliament from the German Green Party and a member of the European Commission became litigants opposing the constitutionality of the Treaty of Maastricht, which led to the German Constitutional Court's decision that again asserted limits to the reach of European law inside of Germany (Alter, 2001: 94–117).²⁷ Most recently, the German Constitutional Court actually rejected the constitutionality of an EU arrest warrant, though it did so on narrow grounds suggesting that the greater problem was implementation of the EU Directive, not the Directive itself.²⁸ Such contestation, inherent in the politics of legal fields, ensures that European legal integration is not the 'one-way ratchet' neo-functional theory expects.

2. Associations served as the ECJ's and the Legal Secretariat's kitchen cabinet

The American term 'kitchen cabinet' refers to President Andrew Jackson's practice of circumventing his real cabinet (the one approved by the Senate) to instead plan policy with like-minded friends. National governments are arguably the ECJ's

²⁶ *Defrenne v. Sabena* [1976] ICR 547; *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena* [1978] ECR 1365, ECJ.

²⁷ *Brunner and Others v. The European Union Treaty, 'Maastricht decision'*, 2 BvR 2134/92 and 2 BvR 2159/92 of 11 January 1994 [1994] 1 EuR 95, [1994] CMLR ???.

²⁸ *Europäischer Haftbefehl*, 113 BVerfGE 273 (2005), reprinted in 32 *Europäische Grundrechtezeitschrift* (EuGRZ) 387–408 (2005).

statutory cabinet, since they write the laws the ECJ is interpreting. Euro-law associations were the ECJ's kitchen cabinet, providing a means for European officials to test out ideas and seek informal advice, which was especially important given that in the 1960s national political leaders were challenging the supranational aspects of European integration.

It is hard to underestimate the benefit to the ECJ of having such a discussion forum. In the 1960s the ECJ had a handful of judges who were ardent European federalists, but they were also pragmatic about the obstacles they faced (Mancini and Keeling 1995: 403). The European legal system by design provides ECJ judges with legal advice. The ECJ has a system of *Advocats Généraux* who offer legal interpretations for the ECJ to consider. In addition, the Commission's legal secretariat usually weighs in during legal proceedings. These insider suggestions, which are publicly available before the ECJ itself rules, serve as a sort of trail balloon where the ECJ can gauge support for different legal arguments. Association members and events provide the audience, keeping track of legal developments and providing real time feedback (Rasmussen 1986: 265–6). Associations helped ECJ judges gauge how far they could push their federalist agenda.

Hans-Jürgen Rabe, secretary and early member of the WGE, recalled a conference in Vienna, shortly after the ECJ's *Van Gend en Loos* decision where conversation kept returning to the *Van Gend* ruling.²⁹ Even though the *Avocat Général* in the *Van Gend* case had pointed out that a finding that European law created direct effects implied that European law was also supreme to national law, Rabe recalls that the ECJ's president André Donner vigorously denied that the *Van Gend* ruling spoke to the supremacy of European law. Rabe interpreted Donner's denial as an effort by the ECJ to tread carefully. Inspired by the exchange, the WGE's leadership put the issue of supremacy on the agenda for its next meeting, held on 10 July 1964 in Bensheim. The date proved highly fortuitous. On 24 June 1964, just two and a half weeks before the WGE's conference, the ECJ's *Avocat Général* Maurice Lagrange (an AJE member) made his oral argument on the *Costa* case. Lagrange had argued that national judges should find ways within their constitutions to give effect to European law, or national governments should change constitutions to facilitate legal integration. At the 10 July meeting, Ipsen critiqued Lagrange's widely shared perspective, urging instead that ECJ judges should find that the Treaty of Rome itself implied European law supremacy. The advantage of this interpretation was that the Treaty of Rome was already part of national law. Also, basing EC law supremacy on the Treaty ensured that the origin of the supremacy doctrine was uniform and independent from national constitutional limitations (Ipsen 1964). Rabe notes that three European judges were at the meeting 'listening with red ears,' wanting to know if the leading academics

²⁹ *Van Gend en Loos* was issued 5 February 1963. The dates correspond to a meeting held in Vienna from 18–21 September 1963 organized by Würdinger and Wohlfarth.

of EC law would accept Ipsen's argument. Five days later, the ECJ issued its famous *Costa* ruling, going beyond Lagrange's argument to base the supremacy of European law in the Treaty of Rome.³⁰

With a friendly set of critics willing to engage doctrinal ideas, in an oral context where there are no written records and where opinions can be gauged in real time, the ECJ gets important insight into the reception its rulings may receive within national systems. In the case of the supremacy debate, the ECJ learned that there was support for a bolder legal assertion of the supremacy of European Community law over national law. European officials kept track of these debates. The ECJ had employees who compiled dossiers on national legal decisions and who culled national legal journals for articles on these decisions and on ECJ decisions. The conversation in Bensheim was deemed of great enough importance to be reported to the President of the EC Commission, Walter Hallstein, via a memo that summarized the debate and noted most people in the audience had sided with Ipsen's perspective (Davies 2007: 65).

3. Associations created community, which inspired and emboldened members

The two previous points—that association members fashioned test cases and advised the ECJ on doctrinal issues—suggests a third contribution of Euro-law associations. Associations provided community, which helped inspire individuals to bold action. Association meetings were places that the Commission leaked to lawyers the legal issues that it had chosen not to pursue through infringement proceedings (which led to the *Cassis de Dijon* case discussed above). They were places where lawyers could identify friendly national judges, and where lawyers and judges could learn about the types of cases the ECJ would welcome. The discussion earlier about the 1964 WGE Bensheim conference shows how the interactions of like-minded supporters egged on each member, encouraging the ECJ to make the bolder legal claim that the Treaty of Rome itself suggested the supremacy of European law. This community was important because the steps needed to develop the supremacy of European law were larger than any one actor. The ECJ needed cases so it could issue rulings; its ruling had to be well received within legal communities; and follow up efforts were needed to create a reality that reflected legal doctrine. Associations fostered a sense that the different components of the process would work in tandem, which helped individual actors to play their part in the larger scheme. When the ECJ rewarded litigants, and scholars then praised the ECJ for its rulings, there was confirmation that bold actions lead to good results. Such

³⁰ Interview with Dr Hans Jürgen Rabe, Secretary of the WGE, Brussels. For more on this conference, see Vauchez (2008a): manuscript 15–16; (Davies 2007: 61–9).

positive reinforcement helps activists be entrepreneurial by suggesting that bold ideas are not merely crazy ideas.

4. Creating the perception of momentum in favor of European legal integration

European law was more frequently ignored than followed in the 1960s and 1970s (see Chapter 5). National judges unaffiliated to Euro-law movements were reluctant to refer cases to the ECJ, there were national high court rulings that seemed to contradict ECJ doctrine,³¹ and the common market objectives of a free movement of goods, services, capital, and people remained a distant dream. Euro-law movements sought to change the legal perception regarding European integration while the political will and thus the political reality of European integration lagged. Already mentioned are the numerous legal briefs heralding the importance of the ECJ's *Van Gend* and *Costa* rulings, which helped manufacture the sense that the rulings were of great constitutional importance. Euro-law associations also manufactured the national court decisions that created the sense that the ECJ's doctrines were spreading within national legal systems. The French Cour de Cassation's *Cafés Jacques Vabre* is an example; it would not have become important were it not for Euro-law supporters using their offices to aide European legal integration.

The *Cafés Jacques Vabre* ruling was important because France's two other high courts had established a record of opposing ECJ authority and European law supremacy. In the 1964 *Shelle-Berre* and 1967 *Petitjean* cases, Commissaire du Gouvernement Questiaux (who played the equivalent role of the ECJ's Avocat Général) urged the Conseil d'État to assert that it could interpret even rather unclear European law on its own—which the Conseil d'État implicitly did by not referring the cases to the ECJ (Alter 2001: 137–40).³² In 1968 the Conseil d'État issued its *Semoules* ruling, which refused to consider whether European law was supreme to the French law in question, suggesting that the Constitutional Council was responsible for enforcing the French constitutional provision that granted supremacy to international rules.³³ Then, in 1975 the French Conseil constitutionnel found that it lacked the authority to consider whether or not

³¹ See note 56.

³² *Société des pétroles Shell-Berre et autres, Sociétés 'Les Garages de France', Société Esso-Standard, Société Mobile Oil française, Société française des pétroles B.P.*, Conseil d'État decision of 19 June 1964, [1964] Recueil Lebon 344. [1964] 5 RDP 1019; *S.A. des Etablissements Petitjean et autres*, Conseil d'État decision of 10 February 1967, [1967] Recueil Lebon 63, [1967] AJDA 267, [1967] RTDE 681.

³³ *Syndicat Général de Fabricants de Semoules de France*, Conseil d'État decision of 1 March 1968, [1968] Recueil Lebon 149, [1970] CMLR 395.

French laws conflicted with international rules, so that it appeared as if no French courts were obliged to enforce the supremacy of European law.³⁴

Adolphe Touffait, the former chef de cabinet of Pierre-Henri Teitigen (see note 47), was an active member of AJE, and ultimately a judge on the ECJ from 1976–82. He used his offices to imply that there was movement in the prevailing French position, which by all appearances opposed both ECJ authority and the ECJ's Supremacy doctrine. As President of the 'ordinary' Cour d'Appel de Paris, Touffait sent references to the ECJ. Indeed between 1965 and 1969 nearly half of the references by French courts (three out of seven) to the ECJ came from the Cour d'Appel in Paris.³⁵ These were not important cases, but at least they signified that some French courts recognized the ECJ's authority. By the time the *Cafés Jacques Vabre* case reached the Cour de Cassation (France's highest ordinary court), Touffait had been promoted to the position of Procureur Général of the Cour de Cassation (the equivalent of the administrative system's Commissaire du Gouvernement and the ECJ's Avocat Général) where he used his office to great effect.

In the *Cafés Jacques Vabre* case, the coffee-maker had refused to pay a tax arguing that the tax in question violated EC law. If the coffee-maker wanted to challenge the legality of the tax, the coffee-maker would have had to go to the Conseil d'État, which, given its *Semoules* doctrine, would have meant that he would have lost the case. But because Café Jacques Vabre was being pursued by the tax authority for non-payment, and because the tax law in question had been issued subsequent in time to the Treaty of Rome, the case became one of the rare 'ordinary' cases raising the question of European law supremacy. The first instance court had sided with the coffee-maker suggesting the supremacy of European law but basing the legal decision on other inaccuracies in the government's calculations of the tax. The appeals court had also sided with the coffee-maker, but suggested that the issue at stake was a French regulation, not a law, thus it ducked the question of whether European law could be supreme to French law.³⁶ If the Cour de Cassation had taken either of these routes, the legal outcome would have been the same but the ruling would not be famous.

Procureur Général Touffait avoided any obfuscation, framing the case in historic terms. He suggested that the French Conseil d'État's *Semoules* ruling was made in the context of an exceptional situation (the independence of France's former colony, Algeria), and thus not of general significance. He offered a questionable interpretation of the French Constitutional Council's 1975 ruling,

³⁴ Conseil constitutionnel decision 74–54 of 15 January 1975, [1975] Recueil des Décisions du Conseil constitutionnel 19. [1975] Dalloz-Jurisprudence 529.

³⁵ 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 (interview with Marie-France Buffet-Tchakaloff, 6 June 1994, Paris).

³⁶ *Administration des Douanes v. Société Cafés Jacques Vabre and J. Weigel et Compagnie Sarl*, Tribunal d'instance decision of 8 January 1971 [1976] 1 CMLR 43. *Administration des Douanes v. Société Cafés Jacques Vabre and J. Weigel et Compagnie Sarl*, Cour d'appel decision of 7 July 1973 [1975] 2 CMLR 22.

suggesting that that the ruling implied that reviewing the compatibility of French law with EC law was merely ‘applying’ the constitution, not conducting judicial review of national laws which only the Constitutional Council could do. Touffait summarized the state of European law doctrine in other member states and argued that the French court should base the supremacy of European law on the Treaty of Rome, not the French constitution. He finished his argument saying ‘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.’³⁷

References to the ECJ and supportive national court decisions were trumpeted by European officials and legal scholars as signs that the European Court’s doctrine was beginning to take hold. Really, what was happening was that activists were finding opportunities, doing what they could to make the rulings seem important and portentous. Euro-law scholars were then heralding pro-EC law national rulings as indications of new thinking in national systems. The *Cafés Jacques Vabre* case was trumpeted by Euro-law scholars as actively supporting the ECJ’s supremacy doctrine. The Cour de Cassation ruling itself actually says very little—it is not what students or scholars focus on. Rather, for many years Touffait’s argument has been used in European law case books as an exemplar of a national court applying European law supremacy.

A similar story could be told about the famous Belgium *Le Ski* decision which asserted for Belgian judges a role enforcing the supremacy of European law. This decision was famous in no small part because of the arguments of Ganschoff Van de Meersh, a member of the Belgian Euro-law association, who played the analogous role Adolpe Touffait had played in the *Cafés Jacques Vabre* case.³⁸

The overall effect was intimidating. German judge Helmut Friedl was not a member of the WGE. As a tax judge, Friedl believed he was obliged to refer to the ECJ questions that concerned European tax directives. Friedl estimated that he referred at least 40 cases to the ECJ over his years at the Finanzgericht München, yet he still believed that there was little legal basis supporting the supremacy of European law. Friedl said that the supremacy doctrine crept up on national judges who did not pay much attention to the ECJ’s rulings or the pro-Europe doctrinal debates. Friedl was aware of the ECJ’s *Costa* decision, but he emphasized that the ECJ had said that the ruling applied *as far as European law was concerned*. But by 1970 there was a ‘governing opinion’ in the literature supporting EC law supremacy. Judges, he said, avoided the criticism that would come with contradicting the governing opinion by sidestepping the issue, which was easy to do since few

³⁷ *Administration des Douanes v. Société Cafés Jacques Vabre and J. Weigel et Compagnie Sarl*, Cour de Cassation decision of 24 May 1975, [1975] 2 CMLR 343. Quote at p. 367.

³⁸ *État Belge v. S.A. ‘Fromagerie Franco-Suisse Le Ski’*, decision of the Cour de Cassation, 1ere Chambre, 1971. *Journal des Tribunaux* 460 2. CCH CMLR 8141. See ‘Conflicts between Treaties and Subsequently Enacted Statutes in Belgium: État Belge v. S.A. ‘Fromagerie Franco-Suisse Le Ski’ 1973.

cases involved an issue of European law supremacy. Friedl also observed that after 1968 there was not nearly as much literature challenging the supremacy doctrine, surmising that authors were avoiding being labeled ‘anti-European.’³⁹

ECJ judges and early European legal integration scholars explained the success of the ECJ’s doctrine by focusing on the persuasive authority of ECJ decisions (Mancini 1989: 605–6; Weiler 1991: 2428). But it was not the ideas of the ECJ that made the difference. The legal interpretations propounded by the ECJ, and stridently supported through publications penned by association members, did not gain much traction within national legal communities. Numerous national judges and unaffiliated legal scholars told me that they discounted the opinions of pro-Europe lawyers and scholars, seeing them as more ideological than legal. And in fact national high courts have not accepted the argument that the Treaty of Rome requires the supremacy of European law—not even France’s Cour de Cassation (Alter 2001: 149 note 50). Instead, they have found ways within national systems to accommodate European law supremacy, without ceding the supremacy of their own constitutions or their own judicial authority (Alter 2001).

The key to Euro-law associations’ success was the social and political capital of its members. Antoine Vauchez, Antonin Cohen, Guillaume Sacriste, and Mikael Rask Madsen document the many ways in which the legal pioneers of Europe had political capital. They served in government ministries and high courts and were members of political dynasties and thus close relatives of ministers and high officials. They were professors who chaired dissertation committees and thus had sway over the prospects of young academics. They served as lawyers to industries, which allowed them to find test cases (Madsen and Vauchez 2005; Sacriste and Vauchez 2007; Vauchez 2007a, 2008). They switched offices, rotating their roles—one day being a lawyer, another a commentator, and another a judge or legal advisor—to magnify their actions so as to appear greater in number and effect than they actually were. The cumulative result of their actions as participants—lawyers, judges, scholars, and government officials—was the monopolization and ultimately the construction of what European law meant. How their constructions were then diffused across national systems is a different question that I take up elsewhere (see chapter 5).

III. Imagining Legal Integration without Jurist Associations—The Case of the Andean Tribunal of Justice⁴⁰

If a tree falls in the forest, does anyone know? Absent Euro-law associations, would ECJ decisions have been trees that fell largely without notice? Would the

³⁹ Interview with Dr Helmut Friedl, former Judge at Finanzgericht München, Clerk at the Bundesfinanzhof from 1967–72, 22 February 1994, Füssen.

⁴⁰ This section is based on research conducted in collaboration with Laurence Helfer and Maria Florencia Guerzovich.

ECJ have even issued its bold rulings without the clear signals that they would be welcomed? A brief comparison with the Andean Tribunal of Justice—the ECJ’s clone—reveals how a lack of an advocacy movement inhibits supranational doctrinal development.

The Andean Community Tribunal of Justice (ATJ) was created in 1984, 15 years after the creation of the Andean Pact. The ATJ was explicitly modeled on the ECJ, including among other similarities an infringement process and a preliminary ruling mechanism (Keener 1987: 49). Andean legal integration was in some ways advantaged in that all member states shared a common language and the ATJ had the model of the ECJ to emulate. But the ATJ has lacked cases raising significant constitutional legal issues. With the notable exception of the issue of Andean intellectual property rules (Helfer, Alter, and Guertzovich 2008), Andean law has been slow to penetrate national legal systems, and the ATJ has itself been timid about asserting its authority and about providing purposive teleological interpretations of Andean rules (Saldias 2007).

The ATJ initially lacked cases. In the 1980s member states refused to authorize the Andean legal secretariat to proceed with cases, even the type of technical non-controversial cases the European Commission raised in the 1960s.⁴¹ Luis E. Pochet tried to overcome this blockage, bringing to the ATJ an infringement suit on behalf of Reynolds Aluminum. The case greatly resembled the *Van Gend en Loos* suit where the litigant invoked an article of the Treaty of Rome prohibiting member states from raising tariffs against each other to challenge the Dutch customs administration’s reclassification of product. Article 41 of the Andean Treaty called for the progressive elimination of internal tariffs, and thus it arguably prohibited raising any tariffs. Pochet argued that a Colombian regulation 75/86 had the effect of increasing the tariff, which in his view violated Article 41 of the Cartagena agreement. In November of 1987 the ATJ rejected the suit because private actors were not authorized to raise infringement suits.⁴²

Shortly afterwards, the ATJ received its first preliminary ruling reference. The reference came from a case brought by Germán Cavelier, who had served as Secretary General of the Ministry of Foreign Affairs in 1968 and 1969

⁴¹ Based on an interview with Alfonso Vidales Olviedo, legal council for the Andean Junta from 1970–83 and 1986–91, 22 June 2007, Lima, Peru. The original Andean Tribunal Treaty only allowed the Junta to pursue infringements that were identified by member states. The Court Treaty was revised in 1996 through the Cochabamba Protocol. From 1996 on, private actors could bring to the Secretariat charges that states were infringing Andean rules. Private actors were also authorized to bring infringements directly to the ATJ. The Secretariat started bringing infringement suits on its own, arguing that if it did not raise the suit, the private actor would raise it on their own. The original Andean Tribunal Treaty is published in 18 *Int’l Legal Materials* 1203, 1979. The Cochabamba Protocol, signed on May 28, 1996, substituted the original Andean Tribunal Treaty with a revised text. The revised Treaty Creating the Court of Justice of the Andean Community is available at: <http://www.comunidadandina.org/INGLES/normativa/ande_tric2.htm> (visited 1/8/08).

⁴² 1-AI-87.

when the Andean Pact was negotiated.⁴³ Dr Cavelier was an internationalist, writing his doctoral thesis on international law, followed by numerous treatises on international law. According to lawyers in the law firm Cavelier established, Cavelier believed in integration of the countries as a way to strengthen law, though he himself was not involved in legal negotiations regarding the Andean Pact.⁴⁴ Cavelier challenged a Colombian administrative decision denying Volvo's application for a trademark, taking the bold step of asking for a preliminary reference. Cavelier did not simply make a legal argument; he talked with former judges who personally lobbied Colombian Council of State judges to change their position regarding referring cases to the ATJ. This case became the first national court reference to the ATJ.⁴⁵

The ATJ used case 1-IP-87 to explain the preliminary ruling process. Invoking terminology that was nearly identical to the ECJ's it asserted that Andean rules create direct effects and are supreme to national rules. Its decision 2-IP-88 explicitly embraced the ECJ's *Costa* and *Simmenthal* jurisprudence. Neither ruling turned on these assertions, perhaps because they were framed in terms of the legally authorized self-interest of litigants, rather than intentionally constructed to frame a broad legal issue. (The narrower framing may have also been needed to convince the Colombian Council of State to refer the case.) Rather, the ATJ took the opportunity of having a reference to instruct Andean courts on the legal system, using the ECJ's language to insist that the relevant national agencies were required to refer cases and enforce Andean rules. The ATJ followed with numerous other decisions where it reasserted these principles within the ruling—though none of the cases actually turned on constitutional issues related to the ATJ's pronouncements.

Pochet's case—which had been rejected as an infringement suit—later reappeared as a preliminary ruling reference brought on behalf of Reynolds Aluminum Santodomingo and Sociedad Aluminio Nacional. Article 41 of the Andean Treaty called for the progressive elimination of internal tariffs and thus it arguably prohibited raising any tariffs. The Colombian government urged the Andean Tribunal to focus on Article 55, which allowed for a list of exceptions. The plaintiff stressed that even though the Andean treaty allowed temporary exceptions, this did not mean that governments could raise tariffs in the meantime. The ATJ, however, sided with the Colombian government finding that Andean governments could

⁴³ The five founding members of the Andean Pact were Bolivia, Chile, Colombia, Ecuador, and Peru. Venezuela joined the group as a sixth member in 1973. Chile withdrew from the Andean Pact in 1976. These countries committed to integrating their markets. The Andean Pact's legal and institutional architecture mirrored that of the EC. But the substantive policies of the two regions were quite different. Whereas the European integration project focused on liberalizing trade and creating a common market, the Andean Pact's *raison d'être* was import substitution—promoting regional development as an alternative to purchasing goods and technologies from foreign firms.

⁴⁴ Interview with German Marin and Emilio Ferraro, Cavelier Abogados, 11 September 2007, Bogota Colombia.

⁴⁵ Case 1-IP-87.

in essence do as they wanted regarding goods included on the list of exceptions. Moreover, it left to national courts the task of determining which goods were part of the list of exceptions! (Saldias 2007: 11–12).

Pochet and Cavalier were legal entrepreneurs, though they did not appear to be following a constructed plan nor is there any evidence that they were working as part of a larger group of actors.⁴⁶ The ATJ was relatively bold in asserting the supremacy and direct effect of European law, but its 1-IP-90 decision avoided a chance to issue a *Van Gend en Loos*-like ruling.

All of these rulings fell into almost complete silence. The Andean Tribunal did not set up a system to disseminate its rulings. Indeed even highly motivated individuals would have found it hard to access an ATJ decision in the 1980s and 1990s.⁴⁷ One can find a few articles on the Andean legal system, which appear far later in time, are mostly penned by lawyers with degrees in Europe or the United States, and/or are published in Europe or the United States.⁴⁸

This different context changes how the actors perceive and play their roles. Gallo Pico Mantilla was President of the ATJ when the ATJ's first ruling asserting the supremacy of Andean rules was issued (1987), and he served on the ATJ until 1993. A gentleman-politician lawyer who was once Secretary of the Minister of Industry and Ambassador to Venezuela, and later as a judge at Ecuador's Supreme Court (1997–2004), Mantilla sought to emulate the European legal integration strategy. Mantilla was committed to Andean integration as an end in itself, having been a participant in negotiations involving Andean integration and in the negotiations that led to the founding of the Andean Tribunal.⁴⁹ As President of the ATJ, Mantilla probably penned the 1-IP-87 ruling, and he helped convince the first Ecuadorian courts to start making reference to the ATJ.⁵⁰ Later, Mantilla joined the Ecuadorian Supreme Court that in 1999 issued a ruling ordering an Ecuadorian court to refer the case in question to the ATJ, as it was required to do

⁴⁶ Members of Cavalier's law firm were not aware of any movement or group that Cavalier might have been connected to. In their view, he was a true entrepreneur: German Marin and Emilio Ferraro, Cavalier Abogados, 11 September 2007, Bogota, Colombia.

⁴⁷ An Andean Tribunal judge recounted a meeting he had with a student who wanted to write a thesis on the Andean legal system. The student was stuck on the doorsteps of the Andean Tribunal, having been refused access to review the Court's decisions. The judge provided access to his copies, and presumably the student wrote his thesis. Interview with Uguarte del Pino, 22 June 2007, Lima, Peru. Web access became available around 2004.

⁴⁸ There are writings in Spanish that mainly summarize aspects of Andean law or ATJ decisions. Far harder to find are analyses that consider the doctrinal implications of legal rulings, or their contribution to legal integration. A few exceptions to the trend include: Baquero-Herrera 2004; Rodriguez Lemmo 2002; Saldias 2007; Tremolada 2006.

⁴⁹ While in the Economics ministry, Mantilla participated in a working group regarding the Andean Pact. Mantilla later held various positions in the Ecuadorian government, including as the Secretary of the Minister of Industry and Ambassador to Venezuela. Mantilla was an early advocate of creating a court for the Andean Pact.

⁵⁰ The big turning point in terms of Ecuadorian courts sending references to the ATJ came after Gallo Pico's time. Proctor and Gamble brought an infringement suit against the Ecuador Supreme Court for failing to refer a tax dispute to the Andean Tribunal (ATJ ruling 24-AN-99). After that case, the number of references from Ecuadorian courts rose significantly.

under Andean law.⁵¹ Mantilla was an integration activist, who like Pochet and Cavalier used his offices to aid Andean legal integration. But he had few other interlocutors to work with.

Juan Vincente Ugarte del Pino, the Peruvian judge on the Andean court from 1990–1995, is more typical of appointments to the ATJ. Ugarte del Pino did not put his energy into the Andean integration system; for example he did not work to educate the Peruvian judiciary on their responsibility to refer cases to the ATJ, nor did he write treatises on the Andean system for Peruvian lawyers and judges. To some extent, his lack of energy is understandable. Ugarte del Pino recounted the basic struggles he faced as a judge on the Andean Tribunal—since the Ecuadorian government did not supply a building, judges had to spend time finding a building to work in. Andean judges lacked a staff or a system of *Avocat Général* to help them analyze legal issues or draft decisions, and early on the Andean court spent time dealing with labor disputes from employees whose contracts were never fulfilled because promised resources were not supplied by Andean governments. The picture one gets is of a judge lacking the basic means to do his job.⁵² Time has overcome these logistical difficulties, but still the ATJ has very limited resources and ATJ judges remain relatively inactive legal diplomats.

There do not appear to be as many outlets for legal articles. ATJ judges and members of the legal secretariat have written chapters for books commemorating each other's years on the court. Some have written treatises on Andean law, but legal writings are primarily technocratic, including mostly replication of relevant legal texts and descriptions of legal procedures. The writing of Andean judges, Mantilla included (Mantilla 1992), is in sharp contrast to the speeches and writings of European Court judges (Donner 1968; Lecourt 1964; Mancini 1989; Pescatore 1983).

There is a University of the Andes, located in Bolivia, which presumably focuses on Andean integration. Andean officials have also taught courses on Andean integration at local universities, but they have not created a burgeoning field of integration studies populated by their students. Andean officials have also served as lawyers bringing cases involving Andean law.⁵³ There is also a regional association, the *Comisión Andina de Juristas*. This association is over 25 years old, but only recently has it started to work to help the Andean legal integration process. Its involvement has been limited: it was contracted by the Andean Community to help create a website to help distribute Andean Tribunal Rulings, and to work with Peruvian and Bolivian legal systems so that they might start referring cases

⁵¹ Claim No. 13–99; Res. No. 468–99, *Recurso de Casacion*, Third Civil and Commercial Law Courtroom of the Supreme Court of Ecuador, 5 October 1999.

⁵² Interview with Ugarte del Pino, 22 June 2007, Lima, Peru.

⁵³ A former member of the legal division of the General Secretariat (Alfonso Vidales Olviedo) served as the lawyer for the Peruvian generic pharmaceutical industry in the suit against a Peruvian decree regarding second use patents. Marcel Tagareife Torres has been a norm entrepreneur with respect to legal cases involving agro-chemicals.

to the ATJ. According to the lead association member involved in the projects, Andean integration had not been part of the *Comisión* area of focus because the Andean Pact and Andean Community were seen as economic projects, distant from the organization's core objectives of promoting human rights, democracy, and respect for international law more generally.⁵⁴ The absence of interlocutors has starved the ATJ of legal advice that could have been useful. Also, without an active debate about ATJ rulings, the Andean legal system remains largely unknown within larger national legal and political systems.

The lack of a larger movement perhaps contributes to making the ATJ less bold than its European counterpart. The ATJ's 1-IP-87 preliminary ruling decision was written in bold terms, but the ATJ has hesitated to innovate through legal doctrine or to encourage more entrepreneurial legal behavior by lawyers and national judges. I already mentioned how ATJ decision 1-IP-90 avoided issuing a *Van Gend en Loos*-type interpretation. The ATJ's ruling of 2-IP-90 refused to follow the ECJ in asserting a doctrine of implied powers—ruling instead that where Andean rules are not clear or complete, legal and political authority resides at the national level. In 3-IP-93, the Reynolds company had dropped out but the Sociedad Aluminio Nacional tried again to get the ATJ to issue a more purposive ruling regarding the Colombian regulation in question, but for the third time the ATJ refused to find that the Andean Treaty created inherent limits on what governments could do (Saldias 2007: 13–14).⁵⁵ When in 1999 the Peruvian intellectual property agency *INDECOPI* asked the ATJ to consider a legal question sent by itself, the ATJ refused because *INDECOPI* was not part of the Peruvian judiciary.⁵⁶ In refusing this case, the ATJ shut off an avenue for requests involving Peru—and indeed it took until 2005 for Peruvian courts to start regularly sending references to the ATJ.⁵⁷ In Decision 87-IP-2002 the Andean Tribunal excluded from its jurisdiction practices that, even though restrictive, do not create external effects involving other member states.

Many elements keep Andean judges from more assertively developing and expanding their authority. One could claim that the ATJ's greater restraint in its legal interpretations reflects the intent of member states as revealed in the Court

⁵⁴ The association is a regional offshoot of International Commission of Jurists. For many years, the association had institutional funding to allow it to pursue its own projects. Beginning around the year 2000 it was contracted by the Andean Community for a handful of projects. Phone Interview with Salvador Herencia Carrasco, Comisión Andina de Juristas, Asesor jurídico, 20 May 2008.

⁵⁵ The other two opportunities were those raised by Pochet, discussed above.

⁵⁶ Interview with Teresa Mera Gomez who worked in the INDECOPI trademark office from 1993–2005, Member of INDECOPI Tribunal (2006 to present) 21 June 2007, Lima, Peru.

⁵⁷ Ugarte del Pino explained the reasoning for the ATJ's decision. Dictators had a history of politicizing the judicial function by locating judicial review in executive agencies. For Ugarte del Pino, rejecting INDECOPI's request to send references, and perhaps also interpreting the ATJ's mandate narrowly, helped insure the independence of the judiciary. The decision was reasonable, but not one that the ECJ would have taken. Interview with Ugarte del Pino.

Treaty⁵⁸ and the many Andean rules that have loopholes that make them hard to legally enforce (Helfer, Alter, and Guertzovich 2008). Also, national judiciaries in the Andean context have historically been politically weak, often afraid to assert their independence or challenge political authority (Dezalay and Garth 2002: 222–7; Merryman and Pérez-Perdomo 2007: 36–7; O'Donnell 1998). These legal attributes, however, probably do not fully explain the ATJ's reticence. In Europe as well state negotiators did not intend the ECJ to transform the preliminary ruling system as it did. Moreover, it is easy to forget that European founding states were all civil law countries with limited traditions of judicial review, formally committed to the principle that judicial rulings apply only to the case at hand and that the last law passed reigns supreme. In other words, just like the ATJ, the ECJ needed to break out of the legal tradition of its time in order to succeed, and it needed to do so without the blessing of national governments.

My point is not that there are no jurist movements in the Andean context, or that Andean lawyers in general lack political capital. In Latin America lawyers with prestige are associated with the leading families within a country, which tend to hold positions of power in both business and government (Dezalay and Garth 2002: 198–203). And one can find signs of emerging legal fields in Latin America to support the free market and human rights agenda (Dezalay and Garth 2006; Lutz and Sikkink 2000; Sieder, Schjolden, and Angell 2005; Sikkink 2003, 2005). The Andean Tribunal's problem is that lawyers with prestige have not embraced Andean integration. Rather the political context of Andean integration, more than formal legal and political constraints, creates a reality where Andean legal integration lacks the support of an activist, politically well connected jurist movement. For more see Alter and Helfer (2009).

The exception is that Andean lawyers have coalesced behind Andean intellectual property rules, a puzzle I explore elsewhere. Over 90 per cent of the Andean Tribunal's docket (1,163 of 1,260 Andean rulings) concerns Andean IP rules (Helfer, Alter, and Guertzovich 2008). Said differently, there are fewer than 100 Andean legal rulings regarding issues other than intellectual property, suggesting little grass roots or upper level political demand to enforce the Andean Community's common market rules. While there was also little demand in Europe of the 1960s for a common market, Euro-law advocacy movements entered the legal breach for the ideological reasons noted above.

⁵⁸ The Andean Tribunal's statute was written with 20–20 European hindsight, and negotiators took pains to circumscribe the preliminary ruling mechanism's role. Andean Tribunal Treaty, Article 30 defines a division of labor where the ATJ is not supposed to consider the facts of the case in rendering preliminary rulings. This provision was revised in the Cochabamba Protocol. States added a suggestion that the ATJ can refer to the facts of the case 'when essential for the requested interpretation'. Still the ATJ has avoided delving into specifics in the case, and thus it has avoided making decisions with clear implications for the merits of the case. See note 79 for citations of Andean legal texts.

IV. Does Transnational Law Need Advocacy Movements and Transnational Legal Fields to Flourish?

To investigate the role of advocacy movements is to question the forces driving international legal integration, meaning the spread and penetration of international rules within national polities. It is well established that advocacy movements use litigation domestically and internationally to promote their causes (Cichowski 2007; Harlow and Rawlings 1992), and that cause lawyers actively promote political agendas (Halliday, Karpik, and Feeley 2007; Sarat and Scheingold 2001). It is also well established that national advocacy movements can latch onto international rules to great effect (Keck and Sikkink 1998; Risse, Ropp, and Sikkink 1999). This article's contribution is to think about how uniting like-minded actors together in a coordinated fashion—in this case via Euro-law associations—facilitates the entrepreneurship of legal actors.

One way to think about the role of advocacy movements is to contrast the dynamic of having coordination by an ideologically cohesive politically well-placed set of actors with other forces for the global spread of rules. One oft-credited source of the global spread of common international rules is information. The theoretical suggestion is that ignorance keeps individuals and collectivities from adopting best practices, in which case knowledge is all that is needed to create a global convergence around common rules and standards. Certainly there is a much greater awareness about the benefits of using international rules to promote political agendas in 2008 than there was in 1960. The Internet also makes it easier for lawyers to publish their views, and if they choose, to blog about legal issues. There is also an emerging trend of high court judges meeting each other, providing opportunities to share their solutions to the problems that judges face (Slaughter 2000, 2004). Thus we can see that the opportunities to exchange information have grown over time, which might suggest that we no longer need the type of coordination Euro-law associations provided in the 1960s. The analysis in this article, however, suggests that Euro-law associations did not simply share information, they built communities of like-minded actors. The contrast to the Andean case also suggests that the new information technologies are an insufficient substitute for the sort of community building that Euro-law associations provided.

There is also growing recognition that international coordination increasingly occurs via trans-governmental networks which bring together national administrators and judges who are engaged in similar policy enterprises (Sikkink and Walling 2006; Slaughter 2004; Turner 2005). The theoretical suggestion in this literature is that functional imperatives (e.g. the need to build relationships with their counterparts in other countries and coordinate internationally to achieve domestic goals like fighting money-laundering or terrorism) generate

the emergence of transnational networks. The analysis offered here suggests that including actors with political capital is very important for the process of legal integration, which is why trans-governmental networks are important. But the functional imperative to work together is probably not a sufficient basis for cooperation, something Ernst Haas and the early proponents of neo-functional theory long ago recognized (Haas 1975) and that experience of the Andean Tribunal of Justice reinforces. Euro-law associations were far more than trans-governmental networks are likely to ever be. They included governmental actors, but they also reached beyond these actors. They brought together ideologically cohesive groups united by a political agenda—integration via a constitutional legal structure.

Others have recognized the role of ideology in unifying movements. Margaret Keck and Kathryn Sikkink adopt the term advocacy movement to indicate that a commitment to a common agenda provides the critical glue unifying members. They also suggest that certain issues are inherently more amenable to being influenced by transnational advocacy networks, because certain issues have a greater ability to connect with and resonate within political actors who are not part of the advocacy movement (Keck and Sikkink 1998; Risse, Ropp, and Sikkink 1999). The scholarship on epistemic communities is similar in that it recognizes that group cohesion is furthered by the existence of shared beliefs about cause-and-effect relationships, and that it is the shared epistemes that provide epistemic communities with cohesion and ultimately with power (Haas 1992). This analysis concurs in that it suggests that self-interest alone provides too narrow a basis to sustain collective action aimed at ambitious and fundamental objectives. The ideology of unifying Europe so as to create peace helped unite the core membership of Euro-law associations. By contrast, the Andean Pact's import substitution ideology, and the Andean Community's liberal economic ideology have failed to mobilize a group of jurists to aid the Andean integration project.

The Bourdieusian approach adds in an examination of the social backgrounds of actors and thus an investigation of power. Investigating the backgrounds and connections among actors reveals how in Europe, jurist advocacy movements connected a well-placed set of actors personally, ideologically, and strategically. The contrast with the Andean integration process also suggests the importance of a larger movement of jurists in generating international judicial activism. Notwithstanding the similar structure of the legal system, and even though the Andean Pact also had legal provisions that were supposedly would automatically lead to the reduction of internal barriers to trade (Avery and Cochraine 1973; Vargas-Hidalgo 1979), neither the desires of some ideologically motivated actors, knowledge of what had occurred in Europe, or the behaviors of a small number of self-interested actors, have managed to spread Andean legal integration much beyond the issue of intellectual property law. While the ATJ is the third most active international court, it is neither an activist court nor a legal actor capable of surmounting the political obstacles hindering Andean integration.

Euro-law associations are not unique in the history of international law, or domestic law for that matter. In the United States, the judicial turn to constitutional originalism reflects the active efforts of jurists to found a conservative Federalist Society (<<http://www.fed-soc.org/>>) which has penetrated academia, the bar, and the judiciary. Internationally, Yves Dezalay, Bryant Garth, and others have noted how groups of lawyers have influenced international economic and human rights legal developments in Latin America and beyond (Dezalay and Garth 2002, 2006; Halliday, Karpik, and Feeley 2007; Sikkink 2005). There are also emerging movements of lawyers—in Europe and beyond—that are formally or informally working to promote the development of international criminal law (Hagan and Levi 2005). The question remains, however: What are the keys to such movements being successful?

This study suggests that there must be a mixture of ideology and power fueling legal integration. International law is most likely to inspire dogged activism when it is seen as linked to a project that is significantly larger than the substance of the cases being litigated, and thus when actors are motivated by more than narrow self interest. Moreover, transnational jurist movements need to include powerful actors, and/or be allied with the agendas of powerful actors, if they are to succeed. This study suggests that one can build an international court in other contexts, but without the larger ideological motivation, and without a community of legal activists with political and social capital, even the most entrepreneurial legal activists are unlikely to be able to replicate the type of legal revolution that occurred in Europe in the 1960s.