International Law and International Relations

Edited by Beth A. Simmons and Richard H. Steinberg

CAMBRIDGE www.cambridge.org/9780521861861

and decided in the language and logic of law. Further, although we make the case here for the strength of neofunctionalism as a framework for explaining *legal* integration – an area in which the technicality of the Court's operation is reinforced by the apparent technicality of the issues it addresses – the principle of law as a medium that both masks and to a certain extent alters political conflicts portends a role for the Court in the wider processes of economic and even political integration.

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

The first part of this article [focuses the inquiry on the more specific question of explaining legal integration and offers a brief review of the principal elements of neofunctionalist theory. The second part details the ways in which the process of legal integration as engineered by the Court fits the neofunctionalist model.] *** The final part returns to the larger question of the relationship between the ECJ and the member states and reflects on some of the broader theoretical implications of our findings.

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A RETURN TO NEOFUNCTIONALISM

An account of the impact of the Court in terms that political scientists will find as credible as lawyers must offer a political explanation of the role of the Court from the ground up. It should thus begin by developing a political theory of how the Court integrated its own domain, rather than beginning with legal integration as a fait accompli and asking about the interrelationship between legal and political integration. The process of legal integration did not come about through the "power of the law," as

the legalists implicitly assume and often explicitly insist on. Individual actors – judges, lawyers, litigants – were involved, with specific identities, motives, and objectives. They interacted in a specific context and through specific processes. Only a genuine political account of how they achieved their objectives in the process of legal integration will provide the basis for a systematic account of the interaction of that process with the political processes of the EC.

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

Neofunctionalism in historical perspective: a theory of political integration

The logic of political integration was first systematically analyzed and elaborated by Ernst Haas in his pioneering study *The Uniting of Europe*.[6] This work and a collection of later contributions[7] share a common theoretical framework called neofunctionalism. Neofunctionalism is concerned with explaining "how and why nation-states cease to be wholly sovereign, how and why they voluntarily mingle, merge, and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts between themselves."[8] More precisely, neofunctionalism describes a process "whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities towards a new and larger center, whose institutions possess or demand jurisdiction over the pre-existing national states."[9]

As a theory of European integration, neofunctionalism was dependent on a set of highly contingent preconditions: a unique constellation of

[6] See Haas, *The Uniting of Europe*.

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

[8] Haas, "The Study of Regional Integration," p. 610.

[9] Haas, "International Integration," p. 366. See also, Haas, *The Uniting of Europe*, p. 12.

exogenous historical, international, and domestic variables. For present purposes, however, the principal contribution of neofunctionalist theory is its identification of the functional categories likely to be receptive to integration and its description of the actual mechanics of overcoming national barriers within a particular functional category *after the integration process has been launched.*

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

The actors: circumventing the state

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

The Commission of the European Communities, for example, has the "power of initiative."[10] To have its proposals accepted by the Council of Ministers, the commission forges behind-the-scene working alliances with pressure groups. As its policymaking role grows, interest groups coalesce across national boundaries in their pursuit of communitywide interests, thus adding to the integrative momentum. Note that these groups need not be convinced "integrationists." The very existence of the community alters their situation and forces them to adjust.[11]

What role is there for governments? According to neofunctionalism, government's role is "creatively responsive."[12] As holders of the ultimate political power, governments may accept, sidestep, ignore, or sabotage the decisions of federal authorities. Yet, given their heterogeneity of interests in certain issue-areas, unilateral evasion or recalcitrance may prove unprofitable if it sets a precedent for other governments.[13] Thus governments may either choose to or feel constrained to yield to the pressures of converging supra- and subnational interests.

[10] Stuart A. Scheingold and Leon N. Lindberg, *Europe's Would-be Polity* (Englewood Cliffs, N.J.: Prentice-Hall, 1970), p. 92.
[11] Ibid., p. 78.
[12] We borrow this expression from Reginald Harrison, *Europe in Question: Theories of Regional International Integration* (London: Allen and Unwin, 1974), p. 80.
[13] Haas, *The Uniting of Europe,* p. xiv.

The motives: instrumental self-interest

One of the important contributions of neofunctionalism is the introduction of an unambiguously utilitarian concept of interest politics that stands in sharp contrast to the notions of unselfishness or common goods that pervades functionalist writing.[14] Assumptions of good will, harmony of interests, or dedication to the common good need not be postulated to account for integration. Ruthless egoism does the trick by itself.[15] As Haas puts it, "*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 this course appears profitable.*"[16] The supranational actors are likewise not immune to utilitarian thinking. They seek unremittingly to expand the mandate of their own institutions to have a more influential say in community affairs.

The process: incremental expansion

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

Functional spillover * is based on the assumption that the different sectors of a modern industrial economy are highly interdependent and that any integrative action in one sector creates a situation in which the original goal can be assured only by taking further actions in related sectors, which in turn create a further condition and a need for more action, and so forth.[17] This process is described by Haas: "Sector

[14] Haas, *Beyond the Nation-State,* p. 34.

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

[16] Haas, *The Uniting of Europe,* p. xiv, emphasis added.

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

integration . . . begets its own impetus toward extension to the entire economy even in the absence of specific group demands."[18]

Political spillover describes the process of adaptive behavior, that is, the incremental shifting of expectations, the changing of values, and the coalescing at the supranational level of national interest groups and political parties in response to sectoral integration. It is crucial to note that neofunctionalism does not postulate an automatically cumulative integrative process. Again, in Haas's words, "The spillover process, though rooted in the structures and motives of the post-capitalist welfare state, is far from automatic,"[19] and "Functional contexts tend to be autonomous; lessons learned in one organization are not generally and automatically applied in others, or even by the same group in a later phase of its life."[20] In other words, neofunctionalism identifies certain linkage mechanisms but makes no assumptions as to the inevitability of actor response to functional linkages.

Upgrading common interests is the third element in the neofunctionalist description of the dynamics of integration. It occurs when the member states experience significant difficulties in arriving at a common policy while acknowledging the necessity of reaching some common stand to safeguard other aspects of interdependence among them. One way of overcoming such deadlock is by swapping concessions in related fields. In practice, the upgrading of the parties' common interests relies on the services of an institutionalized autonomous mediator.[21] This institutionalized swapping mechanism induces participants to refrain from vetoing proposals and invites them to seek compromises, which in turn bolster the power base of the central institutions.

The context: nominally apolitical

The context in which successful integration operates is economic, social, and technical.[22] Here Haas seems to accept a key assumption of the predecessor to his theory, functionalism, which posits that functional cooperation must begin on the relatively low-key economic and social

[18] Haas, *The Uniting of Europe,* p. 297.
[19] Haas, "Technocracy, Pluralism, and the New Europe," p. 165.
[20] Haas, *Beyond the Nation-State,* p. 48.
[21] "The European executives [are] able to construct patterns of mutual concessions from various policy contexts and in so doing usually manage to upgrade [their] own powers at the expense of the member governments." Haas, "Technocracy, Pluralism, and the New Europe," p. 152.
[22] Ibid.

planes. In David Mitrany's words, "Any political scheme would start a disputation, any working arrangement would raise a hope and make for confidence and patience."[23] However, economic and social problems are ultimately inseparable from political problems. Haas thus replaced the dichotomous relationship between economics and politics in functionalism by a continuous one: "The supranational style stresses the indirect penetration of the political by way of the economic because *the 'purely' economic decisions always acquire political significance in the minds of the participants.*"[24] "Technical" or "noncontroversial" areas of cooperation, however, might be so trivial as to remain outside the domain of human expectations and actions vital for integration.[25] The area must therefore be economically important and endowed with a high degree of "functional specificity."[26]

A NEOFUNCTIONALIST JURISPRUDENCE

The advent of the first major EC crisis in 1965, initiated by De Gaulle's adamant refusal to proceed with certain aspects of integration he deemed contrary to French interests, triggered a crescendo of criticism against neofunctionalism. The theory, it was claimed, had exaggerated both the expansive effect of increments within the economic sphere and the "gradual politicization" effect of spillover.[27] Critics further castigated neofunctionalists for failing to appreciate the enduring importance of nationalism, the autonomy of the political sector, and the interaction between the international environment and the integrating region.[28]

Neofunctionalists accepted most of the criticism and engaged in an agonizing reassessment of their theory. The coup de grace, however, was Haas's publication of *The Obsolescence of Regional Integration Theory,*

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

[24] Haas, "Technocracy, Pluralism, and the New Europe," p. 152, emphasis added.

[25] Haas, "International Integration," p. 102.

[26] Ibid., p. 372.

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

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

in which he concluded that researchers should look beyond regional integration to focus on wider issues of international interdependence.[29]

With the benefit of greater hindsight, however, we believe that neofunctionalism has much to recommend it as a theory of regional integration. Although it recognizes that external shocks may disrupt the integration process,[30] it boasts enduring relevance as a description of the integrative process *within a sector.* The sector we apply it to here is the legal integration of the European Community.

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

Actors: a specialized national and supranational community

On the supranational level, the principal actors are the thirteen ECJ judges, the commission legal staff, and the six advocates-general, official members of the Court assigned the task of presenting an impartial opinion on the law in each case. Judges and advocates general are drawn from universities, national judiciaries, distinguished members of the community bar, and national government officials.[31] Judges take an oath to decide cases independently of national loyalties and are freed from accountability to their home governments by two important facets of the Court's decision-making process: secrecy of deliberation and the absence of dissenting opinions.

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

[30] Haas and Schmitter, "Economic and Differential Patterns of Political Integration," p. 710.

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

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

Almost as an afterthought, Article 177 authorizes the Court to issue "preliminary rulings" on any question involving the interpretation of community law arising in the national courts. Lower national courts can refer such questions to the ECJ at their discretion; national courts of last resort are required to request the ECJ's assistance. In practice, the Article 177 procedure has provided a framework for links between the Court and subnational actors – private litigants, their lawyers, and lower national courts.[32] From its earliest days, the ECJ waged a campaign to enhance the use of Article 177 as a vehicle enabling private individuals to challenge national legislation as incompatible with community law. The number of Article 177 cases on the Court's docket grew steadily through the 1970s, from a low of 9 in 1968 to a high of 119 in 1978 and averaging over 90 per year from 1979 to 1982.[33] This campaign has successfully transferred a large portion of the business of interpreting and applying community law away from the immediate province of member states.[34]

As an additional result of these efforts, the community bar is now flourishing. Groups of private practitioners receive regular invitations to visit the Court and attend educational seminars. They get further encouragement and support from private associations such as the International Federation for European Law, which has branches in the member states that include both academics and private practitioners.

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

[33] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice : A Comparative study in Judicial Policymaking* (Dortrecht: M. Nijhoff, 1986), p. 245.

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

Smaller practitioners' groups connected with national bar associations also abound.[35] The proliferation of community lawyers laid the foundation for the development of a specialized and highly interdependent community above and below the level of member state governments. The best testimony on the nature of the ties binding that community comes from a leading EC legal academic and editor of the *Common Market Law Review,* Henry Schermers. In a recent tribute to a former legal advisor to the commission for his role in "building bridges between [the Commission], the Community Court and the practitioners," Schermers wrote,

> Much of the credit for the Community legal order rightly goes to the Court of Justice of the European Communities, but the Court will be the first to recognize that they do not deserve all the credit. Without the loyal support of the national judiciaries, preliminary questions would not have been asked nor preliminary rulings followed. And the national judiciaries themselves would not have entered into Community law had not national advocates pleaded it before them. For the establishment and growth of the Community legal order it was essential for the whole legal profession to become acquainted with the new system and its requirements. Company lawyers, solicitors and advocates had to be made aware of the opportunities offered to them by the Community legal system.[36]

In this tribute, Schermers points to another important set of subnational actors: community law professors. These academics divide their time between participation as private consultants on cases before the court and extensive commentary on the Court's decisions. In addition to book-length treatises, they edit and contribute articles to a growing number of specialized journals devoted exclusively to EC law.[37] As leading figures in their own national legal and political communities, they play a critical role in bolstering the legitimacy of the Court.

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

The glue that binds this community of supra- and subnational actors is self-interest. In the passage quoted above, Schermers speaks of making

[35] See Brown and Jacobs, *The Court of Justice of the European Communities,* pp. 180–181.

[36] Henry Schermers, "Special Foreword," *Common Market Law Review,* no. 27, 1990, pp. 637–38.

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

private practitioners aware of the "opportunities" offered to them by the community legal system. The Court largely created those opportunities, providing personal incentives for individual litigants, their lawyers, and lower national courts to participate in the construction of the community legal system. In the process, it enhanced its own power and the professional interests of all parties participating directly or indirectly in its business.

Giving individual litigants a personal stake in community law

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

The Court began by prohibiting individuals from seeking to annul legal acts issued by the Council of Ministers or the EC Commission for exceeding their powers under the Treaty of Rome. As noted above, Article 173 of the treaty appears to allow the council, the commission, the member states, and private parties to seek such an injunction. In 1962, however, the Court held that individuals could not bring such actions except in the narrowest of circumstances.[38] A year later the Court handed down its landmark decision in *Van Gend & Loos,* allowing a private Dutch importer to invoke the common market provisions of the treaty directly against the Dutch government's attempt to impose customs duties on specified imports.[39] *Van Gend* announced a new world. Over the explicit objections of three of the member states, the Court proclaimed:

> the Community constitutes a *new legal order* . . . for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and *the subjects of which comprise not only Member States but also their nationals.* Independently of the legislation of the Member States, Community law *therefore*

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

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

not only imposes obligations on individuals but it also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[40]

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

The subsequent evolution of the direct effect doctrine reflects the steady expansion of its scope. Eric Stein offers the best account,[41] charting the extension of the doctrine from a "negative" treaty obligation to a "positive" obligation[42]; from the "vertical" enforcement of a treaty obligation against a member state government to the "horizontal" enforcement of such an obligation against another individual[43]; from the application only to treaty law to the much broader application to secondary community legislation, such as council directives and decisions.[44] After vociferous protest from national courts,[45] the Court did balk temporarily at granting horizontal effect to community directives – allowing individuals to enforce obligations explicitly imposed by council directives on member states against other individuals – but has subsequently permitted

[40] Ibid., p. 12, emphasis added.

[41] See Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law* 75 (January 1981), pp. 1–27.

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

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

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

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