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ultimately be felt, they will be more acceptable initially due to their independent nonpolitical justification.

The importance of undertaking integration in a nominally nonpolitical sphere is confirmed by the underlying issues and interests at stake in the nascent debate about judicial activism in the community. As periodic struggles over the proper balance between judicial activism and judicial restraint in the United States have demonstrated, assertions about the preservation of the legitimacy and authority necessary to uphold the rule of law generally have a particular substantive vision of the law in mind.[82] In the community context, the response to Rasmussen's charge of judicial activism reveals that the substantive stakes concern the prospects for the Court's self-professed task, integration. In heeding widespread advice to maintain a careful balance between applying community law and articulating and defending community ideals, the Court is really preserving its ability to camouflage controversial political decisions in "technical" legal garb.

Maintaining the Fiction

The European legal community appears to understand the importance of preserving the Court's image as a nonpolitical institution all too well. The dominant theme in scholarship on the Court in the 1970s and 1980s was reassurance that the Court was carrying out its delicate balancing act with considerable success.[83] Rasmussen describes a widespread refusal among community lawyers and legal academics to criticize the Court on paper. The consensus seems to be that overt recognition of the Court's political agenda beyond the bounds of what "the law" might fairly be said to permit will damage the Court's effectiveness.[84] Commenting on the same phenomenon, Shapiro has observed that the European legal community

[82] See, for example, Martin Shapiro, "The Constitution and Economic Rights," in M. Judd Harmon, ed., *Essays on the Constitution of the United States* (Port Washington, N.Y.: Kennikat Press, 1978), pp. 74–98.

[83] See F. Dumon, "La jurisprudence de la Cour de Justice. Examen critique des methodes d'interpretation" (The jurisprudence of the ECJ. Critical study of methods of interpretation) (Luxembourg: Office for Official Publications of the European Communities, 1976), pp. 51–53; A.W. Green, *Political Integration by Jurisprudence* (Leiden: Sijthoff, 1969), pp. 26–33 and 498; Clarence Mann, *The Function of Judicial Decision in European Economic Integration* (The Hague: Martinus Nihjoff, 1972), pp. 508–15; Scheingold, *The Rule of Law in European Integration,* pp. 263–85; and Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," passim.

[84] For a discussion of "the oral tradition" of criticism that European scholars refuse publicly to acknowledge, see Rasmussen, *On Law and Policy in the European Court of Justice,* pp. 147–48 and 152–54.

understands its collective writings on the Court as a political act designed to bolster the Court. By denying the existence of judicial activism and thus removing a major potential locus of opposition to the Court, they promote an institution whose pro-community values accord with their own internalized values.[85]

The Court itself has cooperated in burnishing this nonpolitical image. Pescatore set the tone in 1974, contending that the first reason for the "relative success of Community case law" is "the wide definition of the task of the Court as custodian of law."[86] And certainly the Court has carefully crafted its opinions to present the results in terms of the inexorable logic of the law. To cite a classic example, in the *Van Gend & Loos* decision, in which the Court single-handedly transformed the Treaty of Rome from an essentially nonenforceable international treaty to a domestic charter with direct and enforceable effects, it cast its analysis in the following framework: "To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme, and the wording of those provisions."[87]

Judge Mancini recently has continued this tradition in his description of the Court's success in winning over national judges. Referring to the ECJ's "courteously didactic" method, Mancini ultimately attributes the rise of the Article 177 procedure to the "cleverness" of his colleagues not in devising political strategies but in fashioning the law in such a way that its autonomous power and ineluctable logic would be clear to the benighted national judges. He seems astonishingly candid, observing, with an insider's wink: "The national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child's play."[88] In fact, however, his "revelations" amount to a story about the power of law, thus continuing the Court's proud tradition of insisting on the legal-political divide.

Mancini also has joined with other judges, most notably Ulrich Everling, in public penance to reassure concerned onlookers that the Court was very aware of the need for prudence. By the early 1980s, responding to simmering criticism, Judge Everling published several articles announcing that much of the foundational work in establishing

[85] Martin Shapiro, "Comparative Law and Comparative Politics," *Southern California Law Review* 53 (January 1980), p. 542.
[86] Pescatore, *The Law of Integration,* p. 89.
[87] *Van Gend & Loos.*
[88] Mancini, "The Making of a Constitution," p. 606.

the Treaty of Rome as a community constitution was done and that the Court could now afford to take a lower political profile. In 1989 Judge Mancini applauded the work of the Court to date but noted that the political relaunching of the community embodied in the SEA and the progress of the 1992 initiative toward a genuine common market would now permit the Court essentially to confine its activities to the more purely legal sphere.[89]

Transforming the political into the legal

Court watchers have long understood that the ECJ uses the EC Commission as a political bellwether. In any given case, the ECJ looks to the commission's position as an indicator of political acceptability to the member states of a particular result or a line of reasoning.[90] From the Court's own perspective, however, the chief advantage of following the commission is the "advantage of objectivity," resulting from the commission's supranational perspective.[91] In neofunctionalist terms, the Court's reliance on what Pescatore characterizes as "well-founded information and balanced legal evaluations," as "source material for the Court's decisions" allows it to cast itself as nonpolitical by contrasting the neutrality and objectivity of its decision-making processes with the partisan political agendas of the parties before it.

Relatively less attention has been paid to the role of the commission in depoliticizing potentially inflammatory disputes among the member states. Judge Pierre Pescatore credits the procedure set forth in Article 169 (whereby the *commission* initiates an action against a member state for a declaration of default on a community legal obligation) with defusing the potential fireworks of an Article 170 proceeding, in which one state would bring such a charge directly against another.[92] By allowing default proceedings to be initiated by "an institution representative of the whole, and hence objective both by its status and by its task," this device "permits the Member States more easily to accept this process of control over their Community behavior and the censure which may arise for them from the judgments of the Court."[93] Against this

[89] Ibid., pp. 612–14.

[90] The classic study documenting this proposition is Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," p. 25. Out of ten landmark cases, Stein found only two in which the Court had diverged from the Commission.

[91] Pescatore, *The Law of Integration,* p. 80.

[92] Ibid., pp. 80–82.

[93] Ibid., p. 82.

backdrop, it is of signal importance that the Court itself actively and successfully encouraged the increased use of the Article 169 procedure.[94]

This perspective reveals yet another dimension of the Court's encouragement of the Article 177 procedure. The increased use of Article 177 shifted the vanguard of community law enforcement (and creation) to cases involving primarily *private* parties. It thus further removed the Court from the overtly political sphere of direct conflicts between member states, or even between the commission and member states. The political implications of private legal disputes, while potentially very important, often require a lawyer's eye to discern. Following Haas's description of economic integration, Article 177 cases offer a paradigm for the "indirect" penetration of the political by way of the legal.

Law as a mask

The above discussion of context reveals that the neofunctionalist domain is a domain theoretically governed by a distinct set of nonpolitical objectives, such as "the rule of law" or "economic growth and efficiency," and by a distinctive methodology and logic. These characteristics operate to define a purportedly "neutral" zone in which it is possible to reach outcomes that would be impossible to achieve in the political arena. Neofunctionalists also insisted, however, that this neutral zone would not be completely divorced from politics. On the contrary, "economic" – or, in our case, "legal" – decisions inevitably would acquire political significance. This gradual interpenetration was the mechanism by which economic integration might ultimately lead to political integration.

The key to understanding this process is that even an economic decision that has acquired political significance is not the same as a "purely" political decision and cannot be attacked as such. It retains an independent "nonpolitical" rationale, which must be met by a counterargument on its own terms. Within this domain, then, contending political interests must do battle by proxy. The chances of victory are affected by the strength of that proxy measured by independent nonpolitical criteria.

From this perspective, law functions both as mask and shield. It hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere. In specifying this dual relationship between law and politics, we also uncover a striking paradox. Law can only perform this dual political function to the extent it is accepted as law. A "legal" decision that is transparently "political," in

[94] See Rasmussen, *On Law and Policy in the European Court of Justice*, pp. 238–40.

the sense that it departs too far from the principles and methods of the law, will invite direct political attack. It will thus fail both as mask and shield. Conversely, a court seeking to advance its own political agenda must accept the independent constraints of legal reasoning, even when such constraints require it to reach a result that is far narrower than the one it might deem politically optimal.

In short, a court's political legitimacy, and hence its ability to advance its own political agenda, rests on its legal legitimacy. This premise is hardly news to domestic lawyers. It has informed an entire school of thought about the U.S. Supreme Court.[95] It also accords with the perception of ECJ judges of how to enhance their own effectiveness, as witnessed not only by their insistence on their strict adherence to the goals of the Treaty of Rome but also by their vehement reaction to charges of activism. Mancini again: "If what makes a judge 'good' is his awareness of the constraints on judicial decision-making and the knowledge that rulings must be convincing in order to evoke obedience, the Luxembourg judges of the 1960s and 1970s were obviously *very* good."[96]

What is new about the neofunctionalist approach is that it demonstrates the ways in which the preservation of judicial legitimacy shields an entire domain of integrationist processes, hence permitting the accretion of power and the pursuit of individual interests by specified actors within a dynamic of expansion. Moreover, the effectiveness of "law as a mask" extends well beyond the ECJ's efforts to construct a community legal system. To the extent that judges of the European Court do in fact remain within the plausible boundaries of existing law, they achieve a similar level of effectiveness in the broader spheres of economic, social, and political integration.

[CONCLUSION]

* * *

In his most recent article, Weiler depicts much of the "systemic evolution of Europe" as the result of the self-created and internally sustained power of law. Shapiro made a similar point in the article in which he first threw down the gauntlet to community legal scholars to take account of the larger

[95] The most notable proponents of this approach to American judicial politics were Justice Felix Frankfurter and his intellectual protégé Alexander Bickel. See Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970).

[96] Mancini, "The Making of a Constitution for Europe," p. 605, emphasis original.

political context in which the Court was acting. He concluded that the legalist analysis might ultimately be the more "politically sophisticated one" on the ground that "legal realities are realities too."[97] Rasmussen would agree, although he fears that legal realities are likely to be overborne by political realities as a result of a loss of judicial legitimacy. This position might be described as the "sophisticated legalist" position – one that recognizes the existence of countervailing political forces but that nevertheless accords a role for the autonomous power of law.[98]

The neofunctionalist approach integrates that insight with a carefully specified theory of the individual incentives and choices facing the servants of law and a description of the processes whereby they advance their own agenda within a sheltered domain. Thus, although we agree with Weiler's conclusion, we go far beyond his general claim that the power of law within the community emanates from the "deep-seated legitimacy that derives from the mythical neutrality and religious-like authority with which we invest our supreme courts."[99] The power flows from a network of strongly motivated individuals acting above and below the state. To enhance and preserve that power, they must preserve and earn anew the presumed legitimacy of law by remaining roughly faithful to its canons.

In conclusion, neofunctionalism offers a genuine political theory of an important dimension of European integration. It is a theory that should be equally comprehensible and plausible to lawyers and political scientists, even if European judges and legal scholars resist it for reasons the theory itself explains. Previously, those who would argue for the force of the law had to forsake "political" explanations, or at least explanations satisfactory to political scientists. Conversely, most of those seeking to construct a social scientific account of the role of the Court typically have eschewed "fuzzy" arguments based on the power of law. We advance a theory of the interaction of law and politics that draws on both disciplines, explaining the role of law in European integration as a product of rational motivation and choice. Lawyers seeking to offer causal explanations, as well as political scientists trying to explain legal phenomena, should be equally satisfied.

[97] Shapiro, "Comparative Law and Comparative Politics," pp. 540–42.

[98] It should be noted here that Volcansek has integrated similar arguments into a more comprehensive political theory about the impact of ECJ judgments on national courts, arguing for the importance of "legitimacy and efficacy" as one of four factors determining the nature of that impact. See Volcansek, *Judicial Politics in Europe*, pp. 267–70.

[99] Weiler, "The Transformation of Europe," p. 2428.

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The European Court of Justice, National Governments, and Legal Integration in the European Union

Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz

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The growth of European law has been central to the broader process of European integration. The accretion of power by the European Court of Justice (ECJ) is arguably the clearest manifestation of the transfer of sovereignty from nation-states to a supranational institution *** in modern international politics ***. The ECJ is more similar to the U.S. Supreme Court than to the International Court of Justice or the dispute panels of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO). The Court interprets European Union (EU) treaties as if they represent a de facto constitution for Europe and exercises judicial review over laws and practices within member states. The ECJ is thus in the business of declaring extant national laws and the behavior of national governments "EU-unconstitutional." Even more significantly from the standpoint of conventional international relations, member governments often abide by such decisions.

There are two perspectives on the evolution and operation of Europe's remarkable legal system. The legal autonomy approach argues that the ECJ has been able to push forward its European integration agenda against

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the interests of some member states.[1] According to this view, national governments paid insufficient attention to the Court's behavior during the 1960s and 1970s when the Court developed a powerful set of legal doctrines and co-opted the support of domestic courts for them. By the time member governments finally realized that the ECJ was a powerful actor in the 1980s, reining in the Court's power had become very difficult.

In contrast the political power approach argues [that governments from EU member states] have not been *** victims of European legal integration ***.[2] From this perspective the member governments have given the ECJ autonomy to increase the effectiveness of the incomplete contracts the governments have signed with each other (that is, the EU treaty base). In turn the judges of the ECJ realize that their power is ultimately contingent on the acquiescence of member states and hence are reticent to make decisions of which governments disapprove.

Notwithstanding rhetorical characterizations of the ECJ either as "master" or as "servant," proponents of each view agree on one common assumption: the ECJ is a strategic actor that is sensitive to the preferences of EU member governments. ***

[We follow suit] by presenting a game theoretic analysis of the strategic environment affecting interactions between the Court and national governments in the EU. This yields three empirically testable hypotheses. *** First, the greater the clarity of ECJ case law precedent, the lesser the likelihood that the Court will tailor its decisions to the anticipated reactions of member governments. Second, the greater the domestic costs of an ECJ ruling to a litigant member government, the lesser the likelihood that the government will abide by an ECJ decision that adversely affects its interests (and hence, *** the lesser the likelihood that the Court will make such "adverse" decisions).

Our third hypothesis brings in the reactions of governments other than the litigant in a particular case. Governments that are subject to adverse decisions can engage in unilateral noncompliance. However, they can also press for the passage of new *** EU legislation *** or even revision of the EU treaty base ***. Noncompliance may reduce the costs of an adverse decision, but it is less likely to constrain the future

[1] See *** Burley and Mattli 1993; *** Slaughter, Stone, and Weiler 1997; Stein 1981; and Weiler 1991.

[2] See Cooter and Drexl 1994; Garrett 1992; Garrett 1995a; and Garrett and Weingast 1993.

behavior of the ECJ than is secondary legislation. Treaty revisions are clearly even more constraining on the Court. But legislation and treaty revisions demand more coordination on the part of member governments. [We thus hypothesize] that the greater the activism of the ECJ and the larger the number of member governments adversely affected by it, the greater the likelihood that responses by litigant governments will move from individual noncompliance to coordinated retaliation. Conversely, of course, the specter of coordinated responses will make the ECJ more reticent to make adverse decisions.[3]

It should be clear from these hypotheses that the ECJ may face conflicting incentives. [In order to maintain its legitimacy, the Court will seek to avoid making decisions that it anticipates governments will defy.] In order to maintain its status as an independent arbiter, however, the Court must *** minimize the appearance of succumbing to political pressures from interested parties. Avoiding member government defiance may call for one decision; maintaining legal consistency may demand a very different one. In making its rulings, the ECJ must weigh the consequences of both courses of action. [It] is in those cases where the Court is cross-pressured that conflict with governments is likely to break out.

*** Until now the protagonists in the legal politics debate have sought to support their own arguments with selective citation of illustrative cases. We strive to do better. ***

* * *

Our case selection strategy seeks to capture the analytic benefits of focusing on adverse ECJ decisions that prove ex post to be controversial (that is, eliciting government responses), but to do so while minimizing the costs of [this inherent] selection bias. We have chosen to analyze broad streams of controversial ECJ case law where the Court repeatedly confronts similar legal principles but in different contexts. This allows us to test *** our three hypotheses by holding the legal principles constant ***.

We focus on three lines of cases ***. The first involves bans on agricultural imports, where ECJ decisions stood on the front line in the battle between the conflicting trade liberalization and agricultural protection agendas of the EU. The second set of cases involves the application of principles of equal treatment of the sexes to occupational pensions – one of the most controversial areas of ECJ activism in recent years because of

[3] These two statements may seem mutually inconsistent, but they are not in the context of iterated games and incomplete information.

its enormous financial implications. Finally, we analyze Court decisions pertaining to state liability for the violation of EU law. These last cases arguably represent the Court's most important constitutional decisions since the early 1970s concerning the relationship between EU law and national sovereignty.

Empirical analysis of these lines of cases lends broad-based support to each of our three hypotheses. ***

The article is divided into three sections. In the first section we present our game theoretic understanding of the strategic interactions between the ECJ and member governments. In the second section we outline our three hypotheses regarding the impact of ECJ precedent, domestic conditions, and EU coalitions on the behavior of litigant governments and the Court. In the third section we examine the empirical utility of our arguments against lines of cases concerning trade liberalization, equal treatment of the sexes, and state liability.

THE LEGAL POLITICS GAME IN THE EUROPEAN UNION

Asserting that ECJ decision making is strategic is no longer controversial ***.[4] The Court's preferences regarding how EU law should be interpreted often differ from those of member state governments ***.

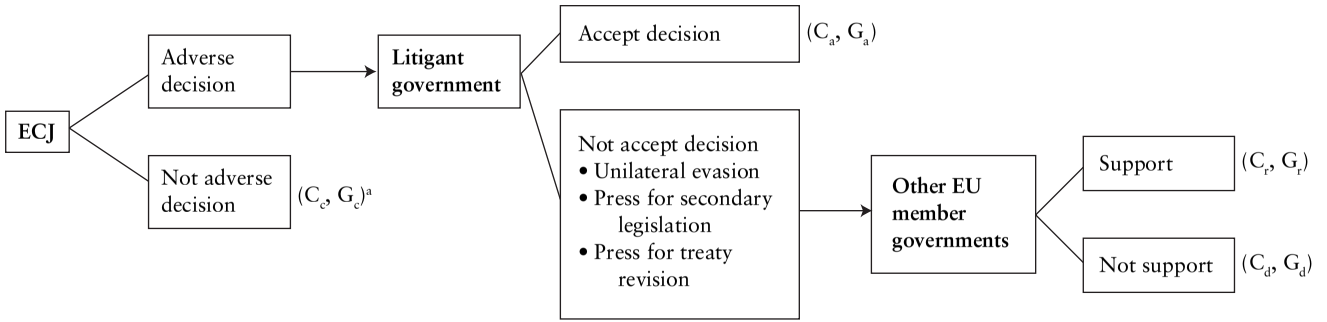
*** We analyze the ECJ–litigant government interaction as a repeated noncooperative *** game *** in which actors discount the future at a reasonable rate (see Figure 19.1). * [The] ECJ moves first by ruling on the legality of an existing national law or practice with respect to European law (embodied in EU treaties, directives, regulations, and decisions made pursuant to the treaties or previous Court decisions).[5] If the Court decides that the national law or practice is consistent with EU law, the status quo is not disturbed ("conciliation" between the ECJ and the relevant government results in payoffs of C_c and G_c, respectively).[6]

If, however, the ECJ rules against an extant national law or practice, the adversely affected member government must choose whether to abide by the ruling. Acceptance entails changing national practices or laws to conform with the decision or compensating the party that has suffered

[4] See Burley and Mattli 1993; Mattli & Slaughter 1995; and Weiler 1991.

[5] In practice, of course, numerous steps take place prior to the Court's decision (including previous plays of the government–ECJ game). Perhaps the most important of these that we do not analyze is the referral of cases to the ECJ by national courts – the *preliminary judgments* procedure of Article 177 of the Treaty of Rome. ***

[6] For definition of terms, see Figure 19.1.



[a]Items in parentheses are payoffs:
C = ECJ
G = Member government involved in case
a = Affected government acquiesces in adverse decision
c = ECJ conciliates with government
d = Adversely affected government unilaterally defies ECJ
r = Member governments collectively restrain ECJ

FIGURE 19.1. *The legal politics game*