

**Who are the “Masters of the Treaty”?:
European Governments and the European Court of Justice**

By Karen J. Alter
(Forthcoming in *International Organization*)
Department of Government
Smith College
Northampton MA 01063
413-585-3544
FAX 413-585-3389
e-mail: kalter@sophia.smith.edu

Abstract: To what extent can the European Court of Justice (ECJ), an international court, make decisions which go against the interests of EC member states? Neo-functional accounts imply that because it is a legal body the ECJ has vast political autonomy from the member states, while neo-realist accounts imply that because member states can sanction the ECJ, the Court has no significant political autonomy. Both of these approaches overlook that the ECJ was once politically weak, and that the Court's current autonomy reflects significant unintended changes in the European and national legal systems. In explaining how the European Court escaped member state control, this article develops a general explanation of European Court autonomy, focusing on how differing time horizons of political and judicial actors, political support for the Court within the national judiciaries, and decision-making rules at the supra-national level limit the member states' ability to control the European Court.

This article is based on a chapter in a dissertation on “The Making of a Rule of Law in Europe: The European Court and the National Judiciaries” (MIT, 1996) Research for this article was funded by the Program for the Study of Germany and Europe at the Center for European Studies, Harvard University. The author would like to thank Suzanne Berger, Brian Hanson, Ken Oye, Mark Pollack, and Anne-Marie Slaughter for their helpful comments on earlier versions of this article.

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

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

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

Member states intended to create a European Court which could not significantly compromise national sovereignty or national interest, but the European Court changed the EC legal system fundamentally undermining member state control over the Court. A significant part of the "transformation" of the EC legal system has been explained by legal scholars who have shown how the European Court turned the EC's

¹ This article discusses the European Court of Justice, the supreme court of the European Union located in Luxembourg. The analysis is not meant to apply to the European Court of Human Rights in Strasbourg or the International Court of Justice in the Hague.

² Weiler 1991. Burley and Mattli 1993.

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

⁴ (Garrett and Weingast 1993)

“preliminary ruling system” from a mechanisms to allow individuals to challenge *EC law* in national courts into a mechanism to allow individuals to challenge *national law* in national courts.⁵ But important questions remain. How could the European Court expand the EC legal system so far from the desire of the member states and beyond their control? Once the ECJ had transformed the EC legal system, why did member states not reassert control and return the system to the one they had designed and intended? If member states failed to control the transformation of the EC legal system or the ECJ’s bold application of EC law, what does this mean about the ability of member states to control legal integration in the future?

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

Second, I argue that the legal doctrine developed by the Court limited the possible responses of national governments to ECJ decisions within the domestic political realm. In the early years of the EC legal system, national politicians turned to extra-legal means to circumvent unwanted decisions; they asserted the illegitimacy of the decisions in a battle for political legitimacy at home; instructed national administrations to ignore ECJ jurisprudence; or interpreted away any difference between EC law and national policy. The threat that national governments might turn to these extra-legal means, disobeying an ECJ decision, helped contain ECJ activism. With national courts enforcing ECJ jurisprudence against their own governments, however, many of these extra-legal avenues no longer worked. *Because of national judicial support for ECJ jurisprudence*, national governments were forced to frame their response in terms which could persuade a legal audience, and thus they became constrained by the legal rules of the game.

Third, national court enforcement of ECJ jurisprudence also changed the types of policy-responses available to national governments at the EC level. Member states traditionally relied on their veto power to ensure that EC policy did not go against strongly held interests. The ECJ, however, interpreted existent EC laws in ways that member states had not intended and in ways which compromised strongly held interests and beliefs. As member states began to object to ECJ jurisprudence, they found it very difficult to change EU legislation to reverse court decisions, or to attack the jurisdiction and authority of the Court. Because there was no consensus among states to attack the ECJ’s authority, member

⁵ (Rasmussen 1986; Weiler 1991)

states lacked a credible threat which could cow the Court into quiescence. Instead the institutional rules combined with the lack of political consensus gave the Court significant room for maneuver.

Section I of this article identifies the functional roles the Court was designed to serve in the process of European integration, and shows how the Court's transformation of the preliminary ruling process went beyond what member states had intended, significantly compromising national sovereignty. Section II explains how the ECJ was able to transform the EC legal system during a period when the EC legal system was inherently so weak, developing the time horizons argument and the argument about how national court enforcement of ECJ jurisprudence changed the policy options of national governments at the national level. Section III explains why member states were not able to reform the EC legal system once it was clear that the Court was going beyond the narrow functional interests of the member states, developing the third argument about the changes within the EU political process. The conclusion develops a series of hypotheses about the institutional constraints on ECJ autonomy and discusses the generalizability of the EC legal experience to other international contexts.

I. The European Court as the Agent of the Member States

Before we can look at how the ECJ escaped member state control, we must first consider the role the ECJ was created to play in the EC political system. Garrett and Weingast use principal-agent analysis to explain how the ECJ is an agent of the member states, serving important yet limited functional roles in the EC political process and politically constrained by the member states. The principal-agent framework is useful in identifying the interests of national governments in having an EC legal system at all. But the emphasis of Garrett and Weingast on the Court's role in enforcing contracts and dispute resolution is historically misleading. It attributes to the ECJ certain roles which rightfully belong to the Commission, and it misses the main role the member states wanted the ECJ to play in the EC political system: keeping the Commission from exceeding its authority. Why is Garrett and Weingast's historical inaccuracy important? It overlooks entirely the role of the courts in a democratic system of government where courts provide checks and balances against abuse of executive authority, and thus overlooks a whole area for judicial influence in the political process. And importantly for this article, focusing on enforcing contracts and dispute resolution misrepresents the interests of the member states in the EC legal system and misrepresents the role the preliminary ruling system was intended to play in the EC legal process, thereby giving the impression that the preliminary ruling system existed to help enforce EC law. This impression is wrong and it leads one to overlook the importance and the

meaning of the transformation of the preliminary ruling system, missing the essence of the ECJ's political power.

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

The Court of Justice was created as part of the European Coal and Steel Community in order to protect member states and firms by ensuring that the supra-national high authority did not exceed its authority.⁶ When the Economic Community was founded, the Court's mandate was changed but its primary function remained to keep the Commission and the Council in check by ensuring that they did not exceed their authority. Indeed most of the Treaty articles regarding the ECJ's mandate deal with this "checking" role (see Appendix 1), and access to the ECJ is the widest for this function: individuals can bring challenges to Commission and Council acts directly to the Court, and the preliminary ruling system (Article 177 §2) allowed individuals to raise challenges to EC policy in national courts. The most significant expansion of the Court's authority by national governments since the Treaty of Rome has also been in this area. The creation of a Tribunal of First Instance, which was long opposed because it was seen as a stepping stone to a federal system of courts, was finally accepted so that the Court could better review the Commission's decisions in the area of competition policy.

A second role of the court is dispute resolution when EC laws are vague (or in the language of Garrett and Weingast, filling in incomplete contracts). In the EC, the Commission is primarily responsible for filling in contracts in areas delegated to it (competition law, agricultural markets, and much of the internal market) and national administrations fill in the principles in EC regulations and directives they administer. The Court may be seized in the event of a disagreement between member states or firms on the one hand, and the Commission or national governments on the other, about how the Treaty or other provisions of EC law should be interpreted. The Court resolves the disagreement by interpreting the disputed EC legal clause, thus by filling in the contract through its legal decision. The preliminary ruling procedure (Article 177 § 1 & 3) allowed individuals to challenge in national courts EC law interpretations of the Commission or of national administrations (for

⁶ The ECJ was modeled after the French *Conseil d'État* which controls government abuses of authority. In France individuals can bring charges against the government to the *Conseil d'État*. They cannot challenge the validity of a national law, but if they think that the law was implemented incorrectly, or that a government official exceeded its authority under the law, they can challenge the government action in front of the *Conseil*. For more on the history of the ECJ see: (Kari 1979: Chapter III; Rasmussen 1986: 201-212; Robertson 1966: 150-180)

example, an individual could challenge the government's administration of EC agricultural subsidies.) Article 177 challenges were only to pertain to questions of European law, not to the interpretation of national law or to the compatibility of national law with EC law.

The Court was not designed to monitor infringements of EC agreements (in Garrett and Weingast's terms monitoring defection), which has always been the Commission's responsibility.⁷ In the Coal and Steel Community, the Commission monitored compliance with EC policies on its own, and the Court was an appellate body hearing challenges to Commission decisions. Under the Treaty of Rome, the Court was designed to play a co-role in the enforcement process. The Commission was still the primary monitor, but the ECJ mediated Commission charges and member state defenses regarding alleged Treaty breaches. The ECJ was to play this role, however, only if diplomatic efforts to secure compliance failed. The preliminary ruling system was *not* designed to be a "decentralized" mechanism to facilitate more monitoring of member state compliance with the Treaty.⁸ Indeed the ECJ clearly lacks the authority to review the compatibility of national law with EC law in Article 177 cases.⁹

The Transformation of the Preliminary Ruling Procedure into an Enforcement Mechanism

Member states continue to want the ECJ to keep EU bodies in check, fill in contracts and mediate oversight, which is why they have expanded the ECJ's resources with respect to these narrow functional roles.¹⁰ But none of these roles require or imply that EC law is supreme

⁷ The Commission's first task, as enumerated in Article 155 EEC, is "to ensure that the provisions of [the] Treaty and the measures taken by the institutions pursuant thereto are applied."

⁸ Negotiators of the Treaty confirm that member state intended only the Commission or member state to raise infringement charges, through Article 169 EEC and Article 170 EEC infringement cases. Based on interviews with the Luxembourg negotiator of the Treaty of Rome (Luxembourg, November 3, 1992), a Commissioner in the 1960s and 1970s (Paris, June 9, 1994), and a director of the Commission's legal services in the 1960s who also negotiated the Treaty for France (Paris, July 7, 1994). National ratification debates for the Treaty of Rome also reveal that member states believed that only the Commission or other member states could raise infringement charges. (Document 5266, annex to the verbal procedures of 26 March 1957 of the debates of the French National Assembly, prepared by the Commission of the Foreign Ministry; "Entwurf eines Gesetzes zu den Verträgen vom 25 März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft" Anlage C; Report of representative Dr. Mommer from the Bundestag debates of Friday 5 July 1957, p. 13391; Atti Parlamentari, Senato della Repubblica; Legislatura II 1953-1957, disegni di legge e relazioni- document, N. 2107-A, and Camera dei deputati document N. 2814 seduta del 26 marzo 1957.)

⁹ The preliminary ruling system is designed to allow questions of the interpretation of EC law to be sent to the ECJ. The original idea was that if a national court was having difficulty interpreting an EC regulation, it could ask the ECJ what the regulation meant. It was not designed to allow individuals to challenge national laws in national courts, or to have national courts ask if national law is compatible with EC law.

¹⁰ As already mentioned, in 1986 the Treaty of Rome was amended to allow for the creation of a Court of First Instance to allow the ECJ to examine in more detail competition policy decisions of the Commission. In 1989 the role of the Court in checking the Commission and the Council was expanded by allowing Parliament to also challenge Commission and Council acts. Also in 1989 the Commission was given the authority to request a lump sum penalty from states which had willfully violated EC law and ignored an ECJ decision.

to national law, that individuals should help monitor member state compliance with EC law through cases raised in national courts, or that national courts should enforce EC law instead of national law and national policy. These aspects of the ECJ's jurisdiction were not part of the Treaty of Rome, rather they were created by the ECJ which transformed the preliminary ruling system from a mechanism to allow individuals to question *EC law* into a mechanism to allow individuals to question *national law*.

The Court's Doctrine of Direct Effect declared that EC law created legally enforceable rights for individuals, allowing individuals to draw on EC law directly in national courts to challenge national law and policy. The Doctrine of EC Law Supremacy made it the responsibility of national courts to ensure that EC law was applied over conflicting national laws.¹¹ In using the direct effect and supremacy of EC law as its legal crutches, the ECJ does not itself exceed its authority by reviewing the compatibility of national law with EC law in preliminary ruling cases. Indeed the ECJ usually tells national courts that it cannot consider the compatibility of national laws with EC law, but can only clarify the meaning of EC law. But it intentionally encourages national courts to use Article 177 to do this job for it, by indicating in its decision whether or not certain types of national law would be in compliance with EC law and encouraging the national court to set aside incompatible national policies. ECJ Justice Mancini candidly acknowledged the Court's complicity in this jurisdictional transgression:

It bears repeating that under Article 177 national judges can only request the Court of Justice to interpret a Community measure. The Court never told them they were entitled to overstep that bound: in fact, whenever they did so—for example, whenever they asked if national rule A is in violation of Community Regulation B or Directive C—, the Court answered that its only power is to explain what B or C actually mean. But having paid this lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the court usually went on to indicate to what extent a certain type of national legislation can be regarded as compatible with that measure. The national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child's play.¹²

Having national courts monitor Treaty compliance and enforce EC law was not part of the original design of the EC legal system. The transformation of the preliminary ruling system significantly undermined the member states' ability to control the Court.¹³ It allowed individuals to raise cases in national courts which were then referred to the ECJ, undermining national government's ability to control which cases made it

¹¹ For more on the doctrines of direct effect and EC law supremacy see Weiler (op. cit. 1991) and (Mancini 1989; Stein 1981)

¹² Ibid. Mancini, 1989: 606. The ECJ has been known to go beyond this trick and on occasion to tell the national court exactly what to do. But the Court maintains this fiction in response to those who claim it has overstepped its jurisdictional authority.

¹³ (Alter 1996a)

to the ECJ. Individuals raised cases involving issues which member states considered to be the exclusive domain of national policy—such as the availability of educational grants to non-nationals, the publication by Irish student groups of a how-to guide to get an abortion in Britain, and the dismissal of employees by recently privatized firms. The extension of direct effects to EC Treaty articles also made the Treaty's common market provisions enforceable despite the lack of implementing legislation, so that EC law created constraints member state had not agreed to. Finally, the transformed preliminary ruling system made ECJ decisions enforceable, undermining the ability of member states to ignore unwanted ECJ decisions.

One might think that member states would welcome any innovation which strengthened the monitoring and enforcement mechanisms of the EC legal system, but national governments were not willing to trade encroachments in national sovereignty for ensuring Treaty compliance. Negotiators of the Treaty had actually weakened the enforcement mechanisms of the Treaty of Rome compared to what they were in the European Coal and Steel Community (ECSC) Treaty in order to protect national sovereignty, stripping the sanctioning power from European institutions.¹⁴ In most of the original member states, ordinary courts lacked the authority to invalidate national law for any reason. It is unlikely that politicians would give national courts a new power which could only be applied to EC law simply to ensure better Treaty compliance, especially because in some countries it would mean that the EC Treaty would be better protected from political transgression than the national constitution. Indeed, if monitoring defection were such a high priority for member states, it might have served their interests better to have made ECJ decisions enforceable by attaching financial sanctions to ECJ decisions (as was done in 1992),¹⁵ or have made transfer payments from the EC contingent on compliance with common market rules, or to have given the Commission more monitoring resources. This would have given member states the benefits of a court which could coerce compliance and they would not have had to risk having the European Court delve so far into issues of national policy and national sovereignty.

Indeed most evidence indicates that politicians did not support the transformation of the EC legal system, and that legal integration proceeded despite the intention and desire of national politicians. As Joseph Weiler has pointed out, the largest advances in EC legal doctrine at both the national and the EC level occurred at the same time that member states were scaling back the supra-national pretensions of the Treaty of Rome, and re-asserting national prerogatives.¹⁶ Indeed when

¹⁴ In the Coal and Steel Community, the Commission and the ECJ could issue fines and extract payments by withholding transfer payments. In the Treaty of Rome, ECJ decisions were purely declaratory.

¹⁵ Frustrated that certain member states (especially Italy and Greece) repeatedly violate EC law and ignore ECJ decisions, in 1989 member states returned to the ECJ some of the sanctioning power it had in the ECSC Treaty granting it authority order lump sum payments.

¹⁶ Op. cit. Weiler (1981)

the issue of the national courts enforcing EC law first emerged in front of the ECJ, representatives of the member states argued strongly against any interpretation which would allow national courts to evaluate the compatibility of EC law with national law.¹⁷ In the 1970s, while politicians were blocking attempts to create a common market, the ECJ's doctrine of EC law supremacy was making significant advances within national legal systems. With politicians actively rejecting supra-nationalism, it is hard to argue that they actually supported an institutional transformation which greatly empowered a supra-national EC institution at the expense of national sovereignty.

The preliminary ruling (Article 177) system, the direct effect and the supremacy of EC law continue to be polemic. The European Council has refused attempts to formally enshrine the supremacy of EC law in a Treaty revision, or to formally give national courts a role in enforcing EC law supremacy.¹⁸ There have also been numerous battles over extending the preliminary ruling process to "intergovernmental" agreements. It took nearly three years after the signing of the 1968 Brussels convention on the mutual recognition of national court decisions for member states to reach a compromise regarding preliminary ruling authority for the Court. For the Brussels convention, member states restricted the right of reference of national courts to a narrow list of high courts¹⁹—courts which have been notoriously reticent to refer cases to the European Court.²⁰ In the late 1970s negotiations over inter-governmental conventions to deal with fraud against the EC and crimes committed by EC employees broke down altogether over the issue of an Article 177 role for the ECJ. The terms of the conventions had been agreed to, and there was little national sovereignty at stake. But France refused to extend Article 177 authority for the ECJ at all, while the Benelux countries refused to ratify the agreements without an Article 177 role for the ECJ.²¹ This conflict over extending preliminary ruling jurisdiction is playing itself out again regarding the 1992 Cannes conventions on Europol, the Customs Information System and the resurrected conventions regarding fraud in the EC.²²

Transforming the preliminary ruling system was not necessary for the Court to serve the member states' limited functional interests, and it brought a loss of national sovereignty that the European Council would

¹⁷ (Stein 1981)

¹⁸ Based on an interview with a member of the German negotiating team who put forward the proposal at the Maastricht negotiations for the Treaty on a European Union, February 17, 1994 (Bonn).

¹⁹ Protocol regarding the interpretation of the Brussels Convention of September 27, 1968, adopted June 3, 1971.

²⁰ (Alter 1996a)

²¹ Based on interviews with French, German and Dutch negotiators for these agreements: October 27, 1995 (Brussels), October 30, 1995 (Paris), and November 2, 1995 (Bonn).

²² This time Britain has refused to extend Article 177 authority and Germany, Italy and the Benelux parliaments have refused to ratify the agreement without Article 177 authority for the ECJ. According to sources within the Legal Services of the Council, France and perhaps Spain are hiding behind the British position, laying low so that the British take the political heat for a position they too support.

not have agreed to then, and still would not agree to today. The Doctrines of Direct Effect and EC law Supremacy fundamentally altered the role of national courts in the national legal system, turning them into enforcers of international law against their own governments, and allowed national political questions in areas only tangentially related to the Common Market to be decided by a foreign court.

Member states had significant political oversight mechanisms to control the ECJ. As Garrett and Weingast have pointed out:

Embedding a legal system in a broader political structure places direct constraints on the discretion of a court, even one with as much constitutional independence as the United States Supreme Court. This conclusion holds even if the constitution makes no explicit provisions for altering a court's role. The reason is that political actors have a range of avenues through which they may alter or limit the role of courts. Sometimes such changes require amendment of the constitution, but usually the appropriate alterations may be accomplished more directly through statute, as by alteration of the court's jurisdiction in a way that makes it clear that continued undesired behavior will result in more radical changes...²³

Member states controlled the legislative process and could legislate over unwanted ECJ decisions or change the role or mandate of the Court. They could also manipulate the appointments process and threaten the professional future of activist judges.²⁴ How could the ECJ construct such a fundamental transformation of the EC legal system against the will of the member states?

II. Escaping Member State Control

Although the Court likes to pose modestly as "the guardian of the Treaties" it is in fact an uncontrolled authority generating law directly applicable in Common Market member states and applying not only to EEC enterprises but also to those established outside the Community, as long as they have business interests within it...

From "More powerful than intended," Financial Times article, August 22, 1974

Principal agent theory tells us that agents have interests that are inherently different than principals; principals want to control the agent, but the agent wants as much authority and autonomy from the principals as possible.²⁵ The ECJ preferred the transformed preliminary ruling system for the same reason that member states did not want it: it decreased the Court's dependence on member states and the Commission to raise infringement cases by allowing individuals to raise challenges to national law, and decreased the Court's need to craft

²³ Op. cit. Garrett and Weingast 1993, p. 200-201.

²⁴ Ibid. p. 200-201.

²⁵ Op. cit. Garrett and Weingast (1993), Pollack (1995) and Moravcsik (1995). (Burley and Mattli 1993; Pierson 1996)

decisions to elicit voluntary compliance by making ECJ decisions enforceable.²⁶ In other words, it enhanced the ECJ's power. This inherent difference of interests explains *why* the Court would want to expand its authority, but not *how* it was able to expand its authority. If member states had political oversight controls, how could the agent escape the principals' control?

The answer lies in the different time horizons of politicians and judges, and the lack of a credible political threat which was a direct result of the transformation of the preliminary ruling system. With national courts enforcing EC law against their governments, politicians could not simply ignore unwanted ECJ decisions. They were forced to respond to the issues raised by the ECJ in a way which would be legally acceptable to both the ECJ and national courts.

Different Time Horizons of Courts and Politicians

Legalist and neo-functionalist scholarship has argued that politicians were simply not paying attention to what the Court was doing, or that they were compelled into acquiescence by the apolitical legal language or by their reverence of legal authority.²⁷ A different explanation is that politicians and judges have different time horizons, a difference which manifests itself in terms of differing interests for politicians and judges in each court decision. Because of these different time horizons, the ECJ was able to be doctrinally activist, building legal doctrine based on unconventional legal interpretations and expanding its own authority, without provoking a political response.

Politicians have shorter time horizons because they must deliver the goods to the electorate in order to stay in office. The focus on staying in office makes politicians discount the long term effects of their actions, or in this case inaction.²⁸ Member states were most concerned with protecting national interests in the process of integration, while avoiding serious conflicts which could derail the common market effort. As far as the European Court decisions concerned, member states wanted to avoid decisions which could upset public policies or create a significant material impact (be it political or financial).²⁹ The strategy of relying on "fire-alarms" to be set off by ECJ decisions before politicians actually act has advantages. Politicians do not have to expend political energy

²⁶ Ibid. Burley and Mattli. (Alter 1996a)

²⁷ Joseph Weiler implied that being a supreme court, the ECJ had an inherent legitimacy which it was difficult to politically contest. (Weiler 1991) See p. 2428. Burley and Mattli argued that it was the non-political veneer of judicial decisions which made them hard for politicians to contest. They acknowledge that this veneer is more myth than reality, but the judicial use of nominally neutral legal principles 'masks' the politics of judicial decisions, gives judges legitimacy, and 'shields' judges from political criticism. Op. cit. Burley and Mattli p. 72-73.

²⁸ Op. cit. Pierson 135-136.

²⁹ Rasmussen also observed state's short term interests influenced their participation in EC legal proceedings. States tended to participate in cases in which the its own national law was at stake, not paying attention to other country's cases. (Rasmussen 1986: 287)

fighting every court decision that could potentially create political problems in the future, and they can take credit and win public support for addressing the public and political concerns raised by adverse Court decisions.³⁰ But such an approach leads to a focus which prioritizes the material impact of legal decisions over the long term effects of EC doctrine. The short term focus of politicians is the main reason that politicians often fail to act decisively when doctrine which is counter to their long term interest is first established.

The Court took advantage of this political fixation on the material consequences of cases to construct legal precedent without arousing political concern. Following a well known judicial practice, it expanded its jurisdictional authority by establishing legal principles, but not applying the principles to the cases at hand. For example, the ECJ declared the supremacy of EC law in the *Costa* case but it found that the Italian law privatizing the electric company did not violate EC law.³¹ Given that the privatization was legal, what was there for politicians to protest, not comply with or overturn? Hartley noted that the ECJ repeatedly used this practice:

A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.³²

The Commission was an accomplice in the ECJ's efforts to build doctrinal precedent without arousing political concerns. In an interview, the original director of the Commission's legal services argued that legal means—with or without sanctions—would not have worked to enforce the Treaty if there was no political will to proceed with integration. He argued that the Commission adopted the "less worse" solution of compromising on principles, but working to help the ECJ develop its doctrine. The Commission selected infringement cases to bring which were important in terms of building doctrine, especially doctrine which national courts could apply, and avoided cases which would have undermined the integration process by arousing political passions.³³ By making sure that Court decisions did not compromise short term political interests, the judges and the Commission could build a legal edifice without serious political challenges.

³⁰ In their work on the U.S. Congress, McCubbins and Schwartz develop the notion of "fire alarms" as a form of political oversight and identify the many benefits for politicians of such an approach. (McCubbins and Schwartz 1987).

³¹ *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ . Case 6/64 (1964) ECR 583.

³² (Hartley, 1988: 78-79)

³³ A former Commissioner called the Commission's strategy "informal complicity." Interview with the former director of the Commission's Legal Services (July 7, 1994, Paris) and with a former Commissioner (June 9, 1994, Paris).

Indeed the ECJ's early jurisprudence shows clear signs of caution. While bold in doctrinal rhetoric, the ECJ made sure that the political impact was minimal both in terms of financial consequences and political consequences. Mann commented on the ECJ's early jurisprudence in politically contentious cases saying that "by narrowly restricting the scope of its reasoning, [the ECJ] manages to avoid almost every question in issue."³⁴ Scheingold observed that in Article 173 cases, "the ECJ used procedural rules to avoid decisions of substance."³⁵ A French legal advisor at the *Secretariat General de Coordination Interministeriel des Affaires Européen* argued that the ECJ did not matter until the 1980s because the decisions were principles without any reality. Since there was not much EC law to enforce in the 1960s and 1970s, and since national courts did not accept that they should implement European law over national law, ECJ jurisprudence was simply marginal.³⁶

Politicians may have been myopic in their focus on material consequences, but this does not mean that they did not realize that their long term their interest in protecting national sovereignty might be compromised by the doctrinal developments. The Court's *Van Gend* and *Costa* decisions were filled with rhetoric to make politicians uneasy,³⁷ and lawyers from the member states had argued strongly against the interpretations the ECJ eventually endorsed. Indeed some politicians were clearly unsettled by the legal precedents the Court was establishing in the 1960s. According to former Prime Minister Michel Debré, General de Gaulle *did* ask for revisions of the Court's power and competences in 1968.³⁸ But other member states were unwilling to re-negotiate the Treaty of Rome, especially at a French request, so the political threat to the Court was not credible.

³⁴ (Mann 1972: 413)

³⁵ (Scheingold 1971: 21)

³⁶ Based on an interview in Paris, October 31, 1995.

³⁷The *Van Gend* decision declared that

the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

And the *Costa* decision added that

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which subsequent unilateral act incompatible with the concept of the Community cannot prevail.

It does not take a legal expert to recognize the potential threat to national sovereignty inherent in this rhetoric. *Van Gend en Loos v. Nederlandse Administratie Belastingen* ECJ . 26/62 (1963) ECR 1: p. 12. Op. cit. *Costa v. Enel*.

³⁸ Debré mentioned this in the discussion of the Foyer- Debré's Propositions de Loi, cited in Rasmussen (op. cit. 1986 p. 351)

In the 1960s the risk of the ECJ running amok was still fairly low given the inherent weakness of the EC legal system. Most national legal systems did not allow for international law supremacy over subsequent national law (indeed the Italian Constitutional Court and the French *Conseil d'État* rejected a role enforcing EC law supremacy in the 1960s) and there were relatively few national court references to the ECJ. Until the time arrived that the doctrine was being applied in unacceptable ways, there was no compelling interest for politicians to mobilize to attack the ECJ's authority. In retrospect political non-action seems quite short-sighted. But it was very hard to predict what would happen in light of the Court's declarations, and the strategy of holding off an attack on the Court was not stupid. EC law supremacy was at that time only a *potential* problem. Member states also thought that controlling the legislative process would be enough to ensure that no objectionable laws were passed.³⁹ In any event, it would be a problem for another elected official to face.

The Transformation of the Preliminary Ruling Procedure

By limiting the material impact of its decisions, the ECJ could minimize political focus on the Court and build doctrine without provoking a political response, creating the opportunity for the ECJ to escape member state oversight. What were marginal legal decisions from a political perspective, were revolutionary decisions from a legal perspective. They created standing for individuals to draw on EC law and a role for national courts enforcing EC law supremacy against national governments. Once national courts became involved in the application of EC law, the ability of politicians to appeal to extra-legal means to avoid complying with EC law was diminished. Instead, politicians had to follow the legal rules of the game.

Through the doctrines of Direct Effect and EC law supremacy, the ECJ harnessed what became an independent base of political leverage for itself—the national judiciaries. With national courts sending cases to the ECJ and applying ECJ jurisprudence, interpretive disputes were not so easily kept out of the legal realm. National courts would not let politicians ignore or cast aside as invalid unwanted decisions. Nor could politicians veto ECJ decisions through a national political vote because EC law was supreme to national law. Indeed national courts have refused political attempts to circumvent ECJ jurisprudence by passing new laws at the national level, applying the supreme EC law instead. National courts created both financial and political costs for ignoring ECJ decisions.

³⁹ (Moravcsik 1995; Weiler 1981)

Elsewhere it has been explained why national courts took on a role enforcing EC law against their own governments.⁴⁰ What is important is that because of national court support of ECJ jurisprudence, extra-legal means to avoid ECJ decisions were harder to use, forcing governments to find legally defensible solutions to their EC legal problems. In the EC legal arena, however, member states were at an inherent disadvantage vis-à-vis the ECJ. As Joseph Weiler has argued:

by the fact of their own national courts making a preliminary reference to the ECJ, governments are forced to juridify their argument and shift to the judicial arena in which the ECJ is preeminent (so long as it can carry with it the national judiciary)...when governments are pulled into court and required to explain, justify, and defend their decision, they are in a forum where diplomatic license is far more restricted, where good faith is a presumptive principle and where states are meant to live by their statements. The legal arena imposes different rules of discourse.⁴¹

The turnover tax struggle of 1966 offers a clear example of how the ECJ could rely on government's fixations with the short term impact of its decisions to diffuse political protests. It also shows how national judicial support shifted the types of responses available to governments to the advantage of the ECJ. When the ECJ's 1966 *Lütticke* decision created hundreds of thousands of refund claims for "illegally" collected German turnover equalization taxes, the German Finance Ministry issued a statement saying: "We hold the decision of the European Court as invalid. It conflicts with the well reasoned arguments of the Federal Government, and with the opinion of the affected member states of the EC", and it instructed German customs officials and tax courts to ignore the ECJ decision in question.⁴² The decree would have worked if it were not for the national courts which refused to be told by the government that they could not apply a legally valid ECJ decision. Lower tax courts insisted on examining on a case by case basis whether or not a given German turnover tax was discriminatory. With national courts refusing to follow this decree, with lawyers publishing articles about the government's attempts to intimidate plaintiffs and order national courts to ignore a valid EC legal judgment,⁴³ with legal cases clogging the tax branch and creating the possibility that nearly all German turnover taxes might be illegal, and with members of the Bundestag questioning a Ministry of Finance official on how the decree was compatible with the principles of a *Rechtstaat*⁴⁴—a state ruled by law—the German government turned to its lawyers to find a solution to the problem.

The Ministry of Economics' lawyers constructed a test case strategy, suggesting that the wrong legal question had been asked in the

⁴⁰ (Alter 1996a) For more on the motivations of national courts in the EC legal process see: (Alter 1997; Golub 1996; Slaughter and Mattli 1996; Weiler 1994)

⁴¹ (Weiler 1994: 519) Burley and Mattli make a similar point op. cit. 1994.

⁴² July 7, 1966 (IIIB.4-V8534- 1/66), republished in *der Betrieb* (1966) p. 1160.

⁴³ (Meier 1967a; Stöcker 1967; Wendt 1967a; Wendt 1967b)

⁴⁴ (Meier 1967b; Meier 1994)

1966 case, that really Article 97 EEC was the relevant EC legal text not Article 95 EEC, and that Article 97 did not create direct effects so that individuals did not have legal standing to challenge German turnover taxes in national courts.⁴⁵ The ECJ accepted the legal argument and all of the plaintiffs lost legal standing, thus the government won in its efforts to minimize the material impact of the ECJ's decision. But the strategy implicitly left the ECJ's precedence established in the *Lütticke* case intact. Article 95 remained directly effective, and even more important member states became obliged to remove national laws which created tariff and non-tariff barriers to trade even though no new EC level policies had been adopted to replace the national policies. The government was quieted because its problem (the numerous pending cases) were gone. But the precedence came back to haunt the Federal government and other member states in subsequent cases.

Because of national court support politicians were forced to play by the legal rules of the game,⁴⁶ where precedence (legal doctrine) matters, and any position must be justified in legal terms in a way which is credible within the legal community.⁴⁷ Most importantly in the legal sphere judges—not politicians—are in the power position of deciding what to do.

The doctrinal precedents stuck into the ECJ's benign legal decisions were in fact formidable institutional building blocks which would be applied in the future to more polemic case. Once national courts had accepted EC law supremacy, they became supporters and advocates of the ECJ in the national legal realm, using their judicial position to limit the types of responses politicians could use to avoid unwanted ECJ decisions. Indeed once the important legal precedent of the direct effect and supremacy of EC law were established, judges were loath to *not* apply it or to reverse it fearing that frequent reversals would undermine the appearance of judicial neutrality, which is the basis for parties accepting the legitimacy of their decisions.⁴⁸ If legal arguments cannot persuade either the national court or the ECJ, in the end there is little that politicians can do to influence the legal outcome. The ECJ is after all the highest authority on the meaning of EC law and national courts will defer to the ECJ for this reason. At this point, the only choice left for politicians is to rewrite the EC legislation itself.

The legal rules of the game limited political responses to ECJ jurisprudence, but there was still significant room for government manipulation of the EC legal process. Member states could influence the interpretation of the law through legally persuasive arguments, the mobilization of public opinion or political threats. They could re-write the

⁴⁵ Ibid. Meier (1994); (Everling 1967)

⁴⁶ Op. cit. Weiler, 1994.

⁴⁷ (Slaughter and Mattli 1995)

⁴⁸ Shapiro has argued that judges search for legitimacy by applying legal principles across cases. (Shapiro 1981: Chapter 1)

contested legislation without violating the legal rules of the game and even re-write the Court's mandate, limiting access to the Court and cutting back the jurisdictional authority of the Court. The next section considers why member states have not exercised these options.

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

Our sovereignty has been taken away by the European Court of Justice. It has made many decisions impinging on our statute law and says that we are to obey its decisions instead of our own statute law...Our courts must no longer enforce our national laws. They must enforce Community law...No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses—to the dismay of all.

Lord Denning, of the judicial branch of the House of Lords⁴⁹

Some scholars have argued that the fact that member states did not reverse the ECJ's Direct Effect and Supremacy declarations shows that the Court had not deviated significantly from member state interests. The strongest argument of the strongest proponent of this view, Geoffrey Garrett, comes down to a tautology. Garrett argues: 'If member governments have neither changed nor evaded the European legal system, then from a 'rational government' perspective, it must be the case that the existing legal order furthers the interests of national governments,' and thus reflects the interests of national governments.⁵⁰ But the failure to act against judicial activism cannot be assumed to mean political support for the transformation of the preliminary ruling system. It is equally plausible, and more consistent with the evidence,⁵¹ that national leaders disagreed with the ECJ's activist jurisprudence but were institutionally unable to reverse it.

Brian Marks has used game theory to show how judicial outcomes could be irreversible even when a majority of legislators disagreed with the legal decision. Because legislators may be hamstrung to reverse a legal decision, Marks argued that "inaction is neither a sufficient nor necessary condition for acceptability by a majority of legislators. Nor can we conclude that the absence of legislative reaction implies that the

⁴⁹ (Denning 1990)

⁵⁰ (Garrett 1995) Rasmussen also implies that states "tacitly welcomed" ECJ expansions through the in-court behavior of their council, and by their willingness to accept ECJ legal interpretations. *Op. cit.* Rasmussen (1986) p. 291.

⁵¹ As mentioned earlier, EC authority expanded at a time when member states were contesting the ECJ's supra-national powers, making it unlikely that they would support a significant aggrandizement of the ECJ's authority at the cost of national sovereignty. Lawyers for the national governments argued strongly against the ECJ's eventual interpretations on the grounds that they would compromise national sovereignty. There is also evidence that De Gaulle protested the ECJ's growing powers and tried to organize an attack on the ECJ. See note 38 for more.

court's policy choice leads to a "better" policy in the view of the legislature."⁵² Marks' model was based on a bi-cameral and uni-cameral legislative system. But his basic insight that institutional rules can thwart politicians from responding to judicially imposed policy changes is generalizable to the EC context.

Institutional Constraints: The Joint Decision Trap

EC law based on regulations or directives can be re-written by a simple statute which, depending on the nature of the statute, requires unanimity or qualified majority consent. A few of the ECJ's interpretations have been re-written in light of ECJ decisions, although surprisingly few. This is because ECJ decisions usually affect member states differently, so there is not a coalition of support to change the disputed legislation. Also, it takes political capital to mobilize the Commission and other states to legislate over a decision. If a member state can accommodate the ECJ's decision on its own, by interpreting it narrowly or by buying off the people the decision effects, such an approach is easier than mobilizing other member states to re-legislate. Such actions can reverse substance of the decisions, allowing the specific policies effected by the ECJ's interpretation to remain unchanged. But they do not effect the EC legal system as an institution. They do not undermine the doctrines which form the foundation of ECJ authority: the Supremacy or the Direct Effect of EC law, or the "four freedoms" (the free movement of goods, capital, labor and services). Reversing these core institutional foundations or any ECJ decision based on the EC Treaty would require a Treaty amendment, a threshold which is even harder to reach under the EC's policy-making rules.

In order to change the Treaty, member states need unanimous agreement plus ratification of the changes by all national parliaments. Getting unanimous agreement about a new policy is hard enough. But creating a unanimous consensus to change an existing policy is even more difficult. Fritz Scharpf calls the difficulty of changing entrenched policies in the EU context the "Joint Decision Trap."⁵³ According to Scharpf, a "joint decision trap" emerges when 1) the decision-making of the central government (the Council of Ministers in the case of the EU) is directly dependent on the agreement of constituent parts (the member states); 2) when the agreement of the constituent parts must be unanimous or nearly unanimous; and 3) when the default outcome of no agreement is that the status quo policy continues. The default outcome is the critical factor hindering changes in existing polices. As Scharpf notes:

What public choice theorists have generally neglected...is the importance of the 'default condition' or 'reversion rule'...The implications of unanimity

⁵² (Marks 1989: 6)

⁵³ (Scharpf 1988)

(or of any other decision rule) are crucially dependent upon what will be the case if agreement is not achieved. The implicit assumption is usually that in the absence of a decision there will be no collective rule at all, and that individuals will remain free to pursue their own goals with their own means. Unfortunately, these benign assumptions are applicable to joint decision systems only at the formative stage of the 'constitutional contract', when the system is first established. Here, indeed, agreement is unlikely unless each of the parties involved expects joint solutions to be more advantageous than the status quo of separate decisions...The 'default condition' changes, however, when we move from single-shot decisions to an ongoing joint-decision system in which the exit option is foreclosed. Now non-agreement is likely to assure the *continuation* of existing common policies, rather than reversion to the 'zero base' of individual action. In a dynamic environment...when circumstances change, existing policies are likely to become sub-optimal even by their own original criteria. Under the unanimity rule, however, they cannot be abolished or changed as long as they are still preferred by even a single member.⁵⁴

The joint decision trap makes reversing the ECJ's key doctrinal advances all but impossible. Small states have an interest in a strong EC legal system. In front of the ECJ political power is equalized and within the ECJ small states have disproportionate voice since each judge has one vote and decisions are taken by simple majority. The Benelux states are unlikely to agree to anything which they perceive will weaken the legal system's foundations and thus compromise their own interests. The small states are not alone in their defense of the ECJ. The Germans from the outset wanted a "United States of Europe," and considered a more federal looking EC legal system a step in the right direction. They also are supporters of a European *Rechtstaat*. Germany and the Benelux countries tend to block attempts to weaken ECJ authority and they try to extend the ECJ's authority as the Community expands into new legal areas whenever the political possibility exists. Britain and France, on the other hand, block attempts to expand EC legal authority.

The need to call an Inter-Governmental Conferences (IGC) to amend the treaty is an additional institutional impediment to member state attacks on the ECJ. Any member state can add an item to the IGC's agenda, making member states hesitant to call for an IGC lest the agenda get out of control.

The reality of the joint decision trap fundamentally changes the assumptions of Garrett and Weingast regarding member states' ability to control the ECJ through political oversight mechanisms. Recall Garrett and Weingast's argument that:

Embedding a legal system in a broader political structure places direct constraints on the discretion of a court, even one with as much constitutional independence as the United States Supreme Court. This conclusion holds even if the constitution makes no explicit provisions for altering a court's role. The reason is that political actors have a range of avenues through which they may alter or limit the role of courts. Sometimes such changes require amendment of the constitution, but usually the appropriate alterations may be accomplished more directly

⁵⁴ Ibid. 257.

through statute, as by alteration of the court's jurisdiction in a way that makes it clear that continued undesired behavior will result in more radical changes...*the possibility of such a reaction drives a court that wishes to preserve its independence and legitimacy to remain in the area of acceptable latitude.*⁵⁵

There are certainly some political limits to what a court can do, some area of "acceptable latitude" beyond which courts cannot stray. Indeed *all* political actors are ultimately constrained to stay within an "acceptable latitude." But Garrett and Weingast imply that the political latitude of the ECJ is very limited, so limited that the ECJ has to base its individual decisions directly on the economic and political interests of the dominant member states.⁵⁶ They compare the institutional authority of the ECJ to that of the US Supreme Court to highlight what they see as the inherent political vulnerability of the ECJ and of ECJ justices, arguing:

The autonomy of the ECJ is clearly less entrenched than that of the Supreme Court of the United States. Its position is not explicitly supported by a constitution. One of the thirteen judges is selected by each of the twelve member states, and their terms are renewable every six years. Many are likely to seek government employment in their home countries after they leave the ECJ. Moreover, there is no guarantee that the trend to ever greater European integration—legal or otherwise—will continue. At any moment, the opposition of a few states will be enough to derail the whole process.⁵⁷

But the difficulty of changing the Court's mandate given the requirement of unanimity and given the lack of political consensus implies that the European Court's room for maneuver may, in some respects, be even greater than that of the U.S. Supreme Court or other constitutional courts. Changing the ECJ's authority requires a Treaty amendment, not a simple statute. It could be even harder to get all member states to agree on a Treaty amendment than to get a national parliament to agree on a statute amending jurisdictional authority, especially if the parliament were dominated by one party. Because of the joint-decision trap, the political threat to alter the European Court's role is usually not credible. The ECJ can safely calculate that political controversy will not translate to an attack on its institutional standing, thus it will not need to alter its behavior in light with a country's political preferences. For these reasons, Mark Pollack calls amending the treaty the "nuclear option—exceedingly effective, but difficult to use—and is therefore a relatively ineffective and non-credible means of member state control."⁵⁸

The joint-decision trap also affects the ability of member states to control the ECJ through the appointment process. The relevant EC institutional feature is that decision-making takes place in the sub-unit of the member state. Using appointments to influence judicial positions

⁵⁵ Op. cit. Garrett and Weingast 1993, p. 200-201. Emphasis in the original.

⁵⁶ Garrett has made this argument more clearly elsewhere: (Garrett 1992; Garrett 1995)

⁵⁷ Op. cit. Garrett and Weingast (1993). p. 201.

⁵⁸ Op. cit. Pollack p. 40.

is never a sure thing, but without a concerted appointment strategy on the part of a majority of member states, it is extremely unlikely to succeed. Each state has its own selection criteria, and high political appointments such as appointments to the ECJ, national Constitutional Courts or national administration positions, are governed by a variety of political considerations, including party affiliation and political connections. A judge's opinion on EC legal matters is seldom the determining factor and only a few member states have even attempted to use a judge's views regarding European integration as a factor in the selection process.⁵⁹ The individual threat to the judge's professional future may also be more hypothetical than real. In most European member states, the judiciary is a civil bureaucracy and judges have all the job protection of civil servants. If an ECJ judicial appointee came from the judiciary (or academia), which many do, they are virtually guaranteed that a job will be awaiting them upon their return. Because ECJ decisions are issued unanimously, it is also impossible to know if a given justice is ignoring its state's wishes.

Garrett and Weingast raise another potential political tool of control over the Court—the threat of non-compliance—arguing that the Court must fear that a failure to implement its jurisprudence will undermine the Court's legitimacy and thus a court's role in the political process.⁶⁰ While courts do not like flagrant flaunting of their authority, as Slaughter and Mattli have argued it could hurt a court's legitimacy even more to disregard legal precedent and bend to political pressure than to make a legally sound decision which politicians will contest or ignore.⁶¹ Indeed in most legal systems there remains a significant level of non-compliance: think of the many states in the U.S. where unconstitutional law and policy exists despite U.S. Supreme Court rulings. Clear examples of non-compliance exist, but does this mean that the U.S. Supreme Court curbs its jurisprudence to avoid non-compliance? It is hard to sustain that in most cases or even in the most political of cases the fear of non-compliance shapes the ECJ's jurisprudence.

The key to politicians being able to cow the ECJ into political subservience is the credibility of their threat. If a political threat is not credible, politicians can protest all they want without influencing judicial decisions. That being said, the ECJ is more interested in shaping future behavior than exacting revenge for past digressions, especially if the past digression was not intentional (which is usually the case). It is in no one's interest—not politicians, not the public, and not the ECJ—for a

⁵⁹ In the fall of 1992, I interviewed the Italian, Greek, Dutch, Belgium, French, German, British and Irish judges at the ECJ about how appointments to the European Court were made both in their country and in other countries. The criteria varied across countries but included factors such as party affiliation, ethnicity, legal background, ability to speak French, familiarity with EC law, and immediate political factors. Only in France and Germany could appointments designed to limit judicial activism be identified.

⁶⁰ Op. cit. Garrett and Weingast 1993, p. 200. Also (Garrett, Kelemen, and Schulz 1996: Manuscript p. 9)

⁶¹ (Slaughter and Mattli 1995)

judicial decision to cripple a government bureaucracy by filling it with thousands of claims, to bankrupt a public pensions system, or to force a significant re-distribution of national Gross Domestic Product to pay back a group of citizens for past wrongs. That the ECJ takes these political considerations into account is not a sign of politicians dominating the Court. Rather it is a sign that the ECJ shares a commitment to serving the public interest.

Overcoming the Joint-Decision Trap? The 1996 IGC

I have argued that the joint decision trap significantly undermines the ability of national governments to control the ECJ. While joint decision trap makes it difficult to reform existent policies, it does not mean that policies can never be reformed. Scharpf argues that the joint-decision trap can be overcome in a given policy debate if a member state adopts a confrontational bargaining style, threatening exit or holding hostage something which other member states really want. In the Maastricht Treaty negotiations the British demanded the scheduling of an inter-governmental conference to discuss the roles and powers of EC institutions and the British have made it part of their list of demands that the Court's powers be addressed.

In interviews during the fall of 1995, while meetings of the planning group for the 1996 Intergovernmental Conference (IGC) were being held, Dutch, German and French legal advisors and members of the Council's legal services all agreed that the Court's mandate, as it stood in the Treaty of Rome, was not up for re-negotiation.⁶² The refusal to negotiate about the *acquis communautaire* likely has a few origins. A French advisor voiced the fear that once one opens the discussion about the institutional mandates and rules of the EC, all kinds of unwanted issues could be raised. Small states especially could anticipate that any new bargain regarding the ECJ would be far less favorable to their interests than the current system, which is why they are working to keep the ECJ off the political agenda. Also the UK is the force behind attempts to reform the ECJ. Because of its history of opposing the more integrationist aspects of the EC, the British have little credibility to lead the charge to re-organize the European Court's mandate. If the French, German and Dutch governments persist in their refusal to negotiate about the Treaty of Rome provisions regarding the Court, there will be no significant reforms of the EC legal system.

⁶² Based on interviews in the British Foreign and Commonwealth Office (November 10, 1995), the Tribunal of First Instance (November 2, 1995) and the German Economics Ministry (correspondence from January 6, 1996). The desire to "clip the Court's wings" was also announced in an article in the Financial Times and in an academic article written by a civil servant in the Bundesministerium für Arbeit und Sozialordnung, Mr. Clever. (Brown 1995; Clever 1995)

At first some in Britain suggested allowing a political body to veto or delay the effect of ECJ decisions.⁶³ Knowing the other member states reluctance to re-negotiation the *aquis communautaire*, the British have put forward proposals to the IGC planning group which do not directly attack the ECJ's authority or autonomy directly, or attempt to dismantle the preliminary ruling procedure or the supremacy of EC law. The British have suggested creating an ECJ appeals procedure which would give the ECJ a second chance to reflect on its decision in light of political displeasure, but according to the proposal it would still ultimately be the ECJ which executed the appeal! The British have also suggested a treaty amendment to limit liability damages *in cases where the member state acted in good faith*, as well as an amendment which explicitly allows the Court to limit the retrospective effect of the its judgments. Nothing in the current text of the Treaty denies the authority of the ECJ to limit the liability of member states if they have acted in good faith, or to limit the retrospective effect of its decisions. But the British hope that having these texts in the Treaty would encourage the ECJ to use them, and open the possibility that governments could appeal ECJ findings using good faith and retrospective effects arguments. Being forced to put its ideas in legally acceptable terms which other member states might accept stripped most of the political force from the British government's proposals.

At press time, the outcome of the IGC, especially given the new Labour government is uncertain. But there is much to suggest that the ECJ will gets through this IGC with its jurisdiction intact, and that it will continue to be a bold and activist court. If it does, it will have survived the most serious attack on its authority in its history. The ECJ has clearly heard the unhappiness of the British and has perceived a weakening of support within one of its key defenders: Germany. In an article on the "Language, Culture and Politics in the Life of the European Court of Justice", ECJ Justice Mancini cited three reasons for what he called the ECJ's "retreat from activism"; 1) the change in public opinion signaled by the debates of the Maastricht Treaty which identified the ECJ as one of the chief EC villains; 2) two protocols in the Maastricht Treaty designed to circumvent potential ECJ decisions regarding awarding retrospective benefits for pension discrimination and German house ownership in Denmark; and 3) recent criticism from Germany—one of the Court's historic allies—especially in light of the IGC.⁶⁴

The Court has retreated in some of its jurisprudence, but it has still shown a willingness to make bold decisions despite the political threats. The ECJ knows that the British government is angry over the cost of ECJ decisions, yet in March of 1996 the Court ordered the British government to pay Spanish fishermen a fine for violating European law. It also ordered the German government—the British Government's presumed ally—to compensate a French brewery prevented from exporting

⁶³ Ibid. Brown, 1995.

⁶⁴ (Mancini 1995: manuscript p. 12)

to Germany.⁶⁵ Thus we can expect the ECJ to continue to have the institutional and political capacity; and the will to make decisions which go against member state interests.

IV. Conclusion: A New Framework for Understanding ECJ-Member State Interactions

This article offered an account of how ECJ-Member State relations are embedded in and constrained by institutions arguing that these institutional links both at the national and supra-national levels directly shape the room for maneuver of the ECJ so that ECJ decisions do not have to be simple reflections of national interests. The account is self-consciously historical, focusing on understanding evolution of the EC legal system over time as a window into the present operation of the system.⁶⁶ Only when one considers that the current EC legal system was not intended to function as it does, can we understand why member states which have an interest in maximizing national sovereignty have ended up with a legal system that greatly compromises national sovereignty. To say that this outcome was unintended is not to say that it happened by chance. The ECJ was very conscious in its strategy, as were the member states. But their different time horizons combined with a national judicial dynamic which propelled legal integration forward⁶⁷ created a situation which national governments had not agreed to and as a collective would not agree to today. Only by knowing this evolution of European Court's political power can we understand these same countries are still very reluctant to extend the ECJ's jurisdictional authority even in very limited areas such as the Cannes conventions for Europol and a common Customs Information System. Because we know the history of the European legal system, we can understand why European states, committed to a rule of law and benefiting from increased compliance with EC law, are also reluctant to agree to replicate the successful EC legal system in other international contexts or even in other areas of European integration.

The arguments advanced in this article built upon many important insights from the early literature on the European Court of Justice. Like the neo-functional and legalist literature, it stresses the important difference between the legal rules of the game and the political rules of the game. Like the neo-realist literature, it examines the Court as an agent of the member states, and identifies important political constraints created by the member states control of the decision-making process. But this article goes beyond these accounts, offering a different and even competing conception of the interests of the ECJ and member states, and

⁶⁵ (Rice, Harding, and Hargreaves 1996)

⁶⁶ A similar general account of this nature has been developed by (Pierson 1996). I'm indebted to Pierson for helping crystallize many of the ideas with which I had been working.

⁶⁷ (Alter 1996a)

of the relationship between the European Court and the member states. By moving the beyond international relations approaches, I hope to widen the variables considered in evaluating EC-member state relations and contribute to the growing debate on how domestic politics influences European integration, and visa versa.⁶⁸

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

Different Time Horizons for Different Political Actors

One of the reasons why the ECJ could develop legal doctrine which went against the long term interests of the member states is that politicians focused on the short-term material and political impact of the decisions rather than the long term doctrinal implications of the decisions. Member states *understood* that the legal precedent established might create political costs in the future, thus they were not fooled by seemingly apolitical legalese or by the technical nature of law. But national governments were willing to trade off the potential long term costs so long as they could escape the political and financial costs of judicial decisions in the present. From this experience, one could hypothesize that legislators are more likely to act against judicial activism when it creates significant financial and political consequences, and less likely to act against judicial activism that does not upset current policy.⁶⁹ In other words, the doctrinal significance matters less to politicians than the impact of decisions. If, however, the doctrine itself created a political impact by mobilizing groups, as many US Supreme Court decisions do, then the doctrine alone might be enough to upset politicians.

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

Importance of National Judicial Support

National judicial support was critical in limiting the ability of governments to simply ignore unwanted legal decisions from the international ECJ. In other words, it was not the inherent legitimacy of the ECJ or the compelling nature of the legal argumentation which compelled governments to accept ECJ decisions, it was national court legitimacy which forced the government to find legally acceptable

⁶⁸ See: (Alter 1996a; Garrett, Kelemen, and Schulz 1996; Hix 1994; Pierson 1996); (Alter and Vargas 1996)

⁶⁹ (Alter 1996a; Garrett, Kelemen, and Schulz 1996; Hix 1994; Pierson 1996) make a similar argument.

solutions to accommodate the ECJ's jurisprudence.⁷⁰ This would imply that in areas where national courts can not be invoked, either because EC law does not create direct effects or the ECJ does not have jurisdictional authority to be seized by national courts, politicians will be more likely ignore unwanted ECJ decisions or adopt extra-legal means to mitigate the effects of ECJ decisions, and consequently the Court will be more careful to take member state interests into account. The critical role of national courts as enforcers of ECJ decisions also implies that in countries where national courts are less legitimate, less vigilant and a rule of law ideology is not a significant domestic political factor, politicians will be more likely to use extra-legal means to circumvent ECJ jurisprudence.⁷¹

The EC experience highlights the importance of having domestic interlocutors to make adherence to international institutions politically constraining at home. One could hypothesize that international norms will most influence national politics when there are domestic actors drawing on or pulling in international norms into the domestic political realm.⁷²

Creating a credible threat

If courts should start deciding against national interests, what can national governments then do? In the European Union, where governments can not selectively opt-out of the European legal system, the only solution available to member states is to rewrite EC legislation or re-negotiate the jurisdictional authority of the Court of Justice. For the many reasons discussed, this is not so easy to do. This is not to say that states can never overcome the joint-decision trap. Germany and the Netherlands are pivotal countries in the coalition protecting the ECJ. If these countries turned, and all other countries agreed to go alone, a credible threat could be mustered. One could hypothesize that when political support for the Court is waning in states blocking jurisdictional change, we can expect the Court to moderate its jurisprudence to avoid the emergence of a consensus to attack the Court's prerogatives. But when a strong blocking contingent exists, the Court can be expected to decide against the interests of powerful member states.

In international contexts where states can opt out of legal mechanisms, or keep disputes from even getting to an international body, it will be easier for governments to credibly threaten international tribunals to moderate their jurisprudence. Whether these threats will be enough to cow the tribunal into quiescence is another story. As mentioned earlier, in some circumstances it would hurt the legitimacy of

⁷⁰ This argument is supported in survey research on ECJ legitimacy by Caldeira and Gibson. See: (Caldeira and Gibson 1995)

⁷¹ This hypothesis follows from (Slaughter 1995)

⁷² (Alter and Vargas 1996)

a legal body more to cave to political pressure than it would to make a legally sound decision which the court knows politicians will ignore.⁷³

The ECJ: A model for other international legal systems?

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

If national courts are the main reason why European governments adhere to ECJ decisions in cases which go against national interests, then one must question how generalizable the EC experience is to other international contexts. In the EC, the preliminary ruling mechanism serves as a direct link coordinating interpretation of national courts with the European Court. As I have argued elsewhere, the preliminary ruling system also serves a political function, pressuring national high courts to bring their jurisprudence into agreement with the European Court of Justice.⁷⁴ In most other international judicial or quasi-judicial systems, there is no direct link between the international court and national courts making it much more difficult to coordinate legal interpretation across boundaries. While it is always possible that national courts could look to jurisprudence generated from international bodies, and thus enhance the enforceability of international law, without the preliminary ruling mechanism, one must really wonder if independent minded national judges with different legal traditions and much legal hubris will turn for guidance to international bodies whose jurisprudence goes against strong political interests.

Given that there are almost always unintended consequences when institutions are created, it should not surprise us if politicians wake up at some other time to find their sovereignty constrained in unintended ways in other international contexts. At the same time, it could be that member states are now wise to the benefits and costs of the EC legal system system, and that they will not make such a mistake in the future. While great strides have been made in the development of international dispute resolution mechanisms, none of the new systems include a preliminary ruling mechanism, and these systems still have significant political controls for the member states to avoid having an international judicial decisions which greatly compromises national interests. Whether

⁷³ Op. cit. Slaughter and Mattli, 1995.

⁷⁴ (Alter 1996b)

the success of the EC legal system is model or proto-type for other international legal systems is still open for debate.

Appendix 1: The European Court's Mandate⁷⁵

Article 164: The European Court shall ensure that in the interpretation and application of this Treaty the law is observed.		
Checking the Commission and the Council	Filling In Contracts-Dispute Resolution	Monitoring Defection
<p>Articles 173, 174, 183 & 184: The Court can hear actions pertaining infringement of the Treaty or any rule of law relating to its application or misuse of power. Member states, the Council, the Commission or individuals can bring suits challenging the legality of EC acts. The Court can declare void acts which it finds illegal. Disputes where the Community is a party are not per se excluded from national court authority, except where jurisdiction is conferred on the ECJ by the Treaty.</p> <p>Articles 175 & 176: Should the Council or the Commission fail to act, Member states and other EC institutions can bring an action to the ECJ to establish an infringement of duty. The ECJ's decision is binding on the EC institution.</p> <p>Articles 178, 179 & 181: The Court can hear disputes regarding contractual liabilities between the EC and private bodies, and disputes between the Community and its employees.</p> <p>Article 177 (§ 2): The Court can hear preliminary ruling references regarding the validity of acts of EC institutions.</p> <p><i>1989- amendment of Article 173-</i> The Parliament is given authority to challenge Commission and Council acts, and its own legally binding acts can now be challenged.</p> <p><i>1986 amendment Article 168a-</i> A Tribunal of First Instance can be created. The Tribunal was created in 1989, increasing the Court's resources to examine in detail Commission decisions regarding competition law, anti-dumping and subsidy policy and unburdening the ECJ from personnel and Coal and Steel cases.</p>	<p>Article 182: The Court can hear disputes between member states regarding the substance of the Treaty if both parties agree.</p> <p>Article 177 (§ 1 & 3): The Court can hear preliminary ruling references regarding the interpretation of the Treaty and statutes of the Council ("where those statutes so provide").</p>	<p>Article 169: The Commission can raise infringement suits against the member states.</p> <p>Article 170: Member states can raise infringement suits against other member states, but they must first bring alleged infringements before the Commission.</p> <p>Article 171: ECJ decisions are binding on member states. Member states must do whatever necessary to comply with ECJ decisions.</p> <p>Article 180: The Court can hear disputes about member state compliance with the statutes of the European Investment Bank.</p> <p><i>1989- amendment of Article 171 revised-</i> The Commission can request a lump sum or penalty to be paid by a member state which fails to comply with an ECJ decision.</p>

⁷⁵ This table paraphrases Treaty of Rome articles pertaining to the ECJ. Not included on this table: Articles 165-168 and Article 188 which concern the composition of the Court, including judges, advocate generals, a registrar and its rules of procedure. Articles 185-188 lay out the legal effect of ECJ decisions.

Bibliography

- Alter, Karen. 1996a. The European Court's Political Power. *West European Politics* 19 (3):458-87.
- Alter, Karen. 1996b. The Making of a Rule of Law: The European Court and the National Judiciaries. Dissertation in Political Science, Massachusetts Institute of Technology.
- Alter, Karen, and Jeannette Vargas. 1996. Shifting the Domestic Balance of Power in Europe: European Law and UK Social Policy. Paper presented at Tenth Annual Conference of Europeanists March 14-16, 1996.
- Alter, Karen J. 1997. Why, Where and When National Courts Enforce European Law Against their Governments. Paper presented at Domestic Policy and International Law, at Saint Helena, CA June 4-8, 1997.
- Brown, Kevin. Government to demand curb on European Court. *Financial Times*, February 2, 1995, p. 9.
- Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court. *International Organization* 47 (1):41-76.
- Burley, Anne-Marie Slaughter. 1993. International Law and International Relations Theory: A Dual Agenda. *The American Journal of International Law* 87:205-39.
- Caldeira, Gregory, and James Gibson. 1995. The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support. *American Political Science Review* 89 (2):356-76.
- Clever, Peter. 1995. EuGH-Rechtsprechung im Sozialbereich- Kritik, aber auch hoffnungsvolle Zuversicht. *Zeitschrift für Sozialhilfe und Sozialgesetzbuch* (1):1-14.
- Denning, Lord. 1990. Introduction to article "The European Court of Justice: Judges or Policy Makers?": The Bruge Group Publication, Suite 102 Whitehall Court, Westminster, London SW1A 2EL.
- Everling, Ulrich. 1967. Sprachliche Mißverständnisse beim Urteil des Gerichtshofes der Europäischen Gemeinschaften zur Umsatzausgleichsteuer. *Außenwirtschaftsdiensts des Betriebs-Beraters* 5 (15 Mai):182-4.
- Garrett, Geoffrey. 1992. The European Community's Internal Market. *International Organization* 46 (2):533-60.
- Garrett, Geoffrey. 1995. The Politics of Legal Integration in the European Union. *International Organization* 49 (1):171-81.
- Garrett, Geoffrey, Daniel Kelemen, and Heiner Schulz. 1996. *The European Court of Justice: Master or Servant? Legal Politics in the European Union*.
- Garrett, Geoffrey, and Barry Weingast. 1993. Ideas, Interests and Institutions: Constructing the EC's Internal Market. In *Ideas and Foreign Policy*, edited by Judith Goldstein and Robert Keohane. Ithaca: Cornell University Press.

- Golub, Jonathan. 1996. The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice. *West European Politics* 2.
- Hix, Simon. 1994. The Study of the European Community: The Challenge to Comparative Politics. *Western European Politics* 17 (1):1-30.
- Hartley, Trevor. 1994. *The Foundations of European Community Law*. Third ed. Oxford: Clarendon Press.
- Kari, Jutsamo. 1979. *The Role of Preliminary Rulings in the European Community*, *Dissertationes Humanarum Litterarum* 16. Helsinki: Suomalainen Tiedeakatemia.
- Mancini, Federico. 1989. The Making of a Constitution for Europe. *Common Market Law Review* XXIV:595-614.
- Mancini, Federico. 1995. Language, Culture and Politics in the Life of the European Court of Justice.
- Mann, C.J. 1972. *The Function of Judicial Decision in European Economic Integration*. The Hague: Martinus Nijhoff Press.
- Marks, Brian A. 1989. A model of Judicial Influence on Congressional Policy Making: *Grove City College v. Bell* (1984). Dissertation in Political Science, University of Washington.
- McCubbins, Mathew, and Thomas Schwartz. 1987. Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms. In *Congress: Structure and Policy*, edited by Matthew McCubbins and Terry Sullivan. Cambridge: Cambridge University Press.
- Meier, Gert. 1967a. Aktuelle Fragen zur Umsatzausgleichsteuer. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 3 (15 March 1967):97-101.
- Meier, Gert. 1967b. Zur Aussetzung der Einsprüche gegen Umsatzausgleichsteuerbescheide. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 2 (15 February, 1967):75-7.
- Meier, Gert. 1994. Der Streit um die Umsatzausgleichsteuer aus integrationspolitischer Sicht. *Recht der Internationalen Wirtschaft* 3/94.
- Moravcsik, Andrew. 1995. Liberal Intergovernmentalism and Integration: A Rejoinder. *Journal of Common Market Studies* 33 (4):611-28.
- Pierson, Paul. 1996. The Path to European Integration: A Historical Institutional Perspective. *Comparative Political Studies* 29 (2):123-63.
- Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers.
- Rice, Robert, James Harding, and Deborah Hargreaves. EU states ordered to pay for breaches of European law. *Financial Times*, March 6, 1996, p. 12.
- Robertson, A.H. 1966. *European Institutions—Cooperation: Integration: Unification*. Second ed. New York: Frederick A. Praeger.

- Scharpf, Fritz. 1988. The Joint-Decision Trap: Lessons from German Federalism and European Integration. *Public Administration* 66 (Autumn):239-78.
- Scheingold, Stuart. 1971. The Law in Political Integration: The Evolution and Integrative Implications of Regional Legal Processes in the European Community: Harvard University Center for International Affairs, Cambridge Massachusetts.
- Shapiro, Martin. 1981. *Courts: A comparative political analysis*. Chicago: University of Chicago Press.
- Slaughter, Anne-Marie. 1995. International Law in a World of Liberal States. *European Journal of International Law* (6).
- Slaughter, Anne-Marie, and Walter Mattli. 1995. Law and politics in the European Union: a reply to Garrett. *International Organization* 49 (1):183-90.
- Slaughter, Anne-Marie, and Walter Mattli. 1996. Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts. *unpublished manuscript*.
- Stein, Eric. 1981. Lawyers, Judges and the Making of a Transnational Constitution. *American Journal of International Law* 75 (1).
- Stöcker, Hans A. 1967. Einzelklagebefugnis und EWG-Kommissionsentscheidung: Alternative oder kumulierter Rechtsschutz in Umsatzausgleichsteuersachen. *Der Betrieb* (40):1690-2.
- Weiler, Joseph. 1981. The Community System: The Dual Character of Supranationalism. *Yearbook of European Law* 1:257-306.
- Weiler, Joseph. 1991. The Transformation of Europe. *Yale Law Journal* 100:2403-83.
- Weiler, Joseph. 1994. A Quiet Revolution- The European Court of Justice and its Interlocutors. *Comparative Political Studies* 26 (4):510-34.
- Wendt, Peter. 1967a. Kein Rechtsschutz im Umsatzausgleichsteuer-Sachen? *Der Betrieb* (Nr. 48):2047-8.
- Wendt, Peter. 1967b. Ungeklärte Fragen im Streit um die Unumsatzausgleichsteuer. *Außenwirtschaftsdienst des Betriebs-Beraters* Heft 9 (September):348-54.
- Word count: 14,238 with footnotes & bibliography*