

Calling the Tune or Following the Lead: The European Court of Justice in European Policy Making

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I. INTRODUCTION

There has been an ongoing debate about whether and to what extent the European Court of Justice (ECJ) influences European Community¹ policy making. Some scholars argue that the ECJ is simply the agent of national governments and therefore has no independent impact on Community policy making; others maintain that it is an autonomous actor whose decisions influence policy outcomes. The dispute over the ECJ reflects a larger debate concerning the level of judicial independence that supranational courts can maintain from national governments. This question is relevant not only for understanding the political importance of the European court, but also for assessing the potential impact of other supranational dispute resolution mechanisms (such as the WTO and NAFTA panels). In this Article I evaluate the ECJ's policy impact

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1. The term Community will be used to describe the European integration project over time.

using a structural equilibrium model of European Community decision making. The model demonstrates two things. First, because the ECJ's voting rules differ from those of the Council of Ministers,² the Court is able to make policy decisions that are more integrationist than those the Council would adopt. Second, because the Council is then unable to reverse the Court's decisions, those decisions constitute stable policy outcomes. The Court is therefore able to independently determine Community policy.

The influence of supranational institutions upon policy making is the source of debate between neofunctional and intergovernmental theories of supranational decision making. Intergovernmental theories stress the role of national governments in the supranational process. Since no national government can be forced to adopt a policy which it does not approve, decision making is restrained to the lowest common denominator.³ Neofunctional theories emphasize the importance of supranational institutions and "spillover" or "policy feedback" effects. Neofunctional theories quite rightly point out that decision making is not constrained to the lowest common denominator, and the policies often are enacted at the supranational level and adopted at the national level over the stated objections of national governments.⁴ Neofunctional theories rely on the ability of institutions to solve collective action problems and lower transaction costs as an explanation for the existence and development of supranational institutions.

Both theories also speak directly to the ECJ and describe the function of the Court in terms of their larger theory on European decision making. Intergovernmental accounts describe the Court as highly constrained by the interests of national governments, while neofunctional theories perceive the Court as autonomous from national governments' influence or control. These two theories at the outset appear to be diametrically opposed: Either the Court is an autonomous judicial institution, or it is the servant of powerful

2. The Council of Ministers is the Community's main legislative body. *See generally* J. WERTS, *THE EUROPEAN COUNCIL* (1992).

3. *See* Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995); Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 INT'L ORG. 533 (1992); Andrew Moravcsik, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community*, 45 INT'L ORG. 19 (1991).

4. Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993); Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Union*, 92 AM. POL. SCI. REV. 63 (1998); Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 INT'L ORG. 183 (1995).

member governments' interests. I present a model of European judicial interaction that brings some of the core insights of these two theories together. By examining the Court's interaction with other supranational institutions, this model illustrates that the Court is an institution that possesses policy discretion within a certain range. The result is policies that are above the lowest common denominator, but the model does not rely on assumptions of lower transaction costs or collective action problems to explain the institution's development. The Court can be understood as an institution that has a certain level of discretion defined by its relationship with other supranational level and national level institutions.

A structure-induced equilibrium model of this kind, when applied to the ECJ, can illustrate the impact the Court can have in the policy making process. Far from being a weak institution with a minimal capacity to control policy, the model argues that even given restrictive voting rules in the Council, the Court has significant powers to set integrationist policies that transfer decision-making authority in an issue area from the national to the supranational level. Without assuming unitary conceptions of appropriate policies on the part of the Court's justices, the structural equilibrium model delineates the means by which the ECJ can successfully modify Community policy away from the lowest common denominator. The Court is not an entirely autonomous actor, however: The difficulty of adjusting the Court's competence allows the ECJ a wide discretion, but the voting rules of the Council establish parameters for the ECJ's decisions. The ECJ is additionally vulnerable in the longer term to powerful member governments during intergovernmental treaty revisions. Understanding the Court's development requires examining the treaty revisions and the periods of Community governance between treaty revisions.

This model makes two main findings. First, the Court is able to produce equilibrium outcomes that would not be achieved in the absence of the Court. When given the opportunity to review policies, the Court has the capability to adopt integrationist policies that cannot be altered in the Council and yet are beyond what the Council itself would be able to adopt. By offering private actors a new channel to pursue Community policies, the Court affects the pace and pattern of integration. The Court, however, has constraints on its possible decisions that are defined by the voting rules of the EU legislative process and the willingness of national courts to cooperate with the ECJ. While the national governments cannot alter the ECJ's decisions once they are made, national governments can alter and have altered

the competence of the Court during the treaty revisions. Second, the model indicates that lowering the restrictions on voting in the Council does not unambiguously lead to more integrationist policies. While the initial policy adopted by the Council may be more supranational under qualified majority voting than under unanimous voting, the end policy may not be any more integrationist than what the Court would have adopted given unanimous voting in the Council.

The first Part presents the model of European decision making. Using a spatial model of Council and Court policy positions based on the voting rules in each organization, the model predicts that the Court will be able to raise the level of integration in Community policy. The second Part presents an illustration of the model in the development of Community law through a description of the development of mutual recognition standards within the internal market. In the third Part, the implications of the model in terms of the current literature are discussed.

II. DECISION MAKING WITHIN THE EUROPEAN COMMUNITY

The European Court of Justice has been the dispute resolution mechanism for the European Union since the Coal and Steel Community Treaty in 1952. The Court is a permanent organization with the competence to interpret the treaties and legislation. The regime is rule based, meaning that the consent of the member states involved in the dispute is not necessary for the resolution of the dispute, as compared with arbitration or mediation which can require consent in each case. Additionally, the rulings of the court are binding in future cases, which gives the ECJ the ability to make supranational law, not just rulings specific to the dispute. The decisions of the ECJ are made by majority vote, and neither dissenting opinions nor the vote count are published. Consequently, national governments do not know how their national justices or other justices have voted.

The model begins with the choice of a policy position by the legislative body, the Council of Ministers. During the course of European integration the Council has functioned under different voting rules. Both unanimous and qualified majority voting rules are used in the models. The model then explores likely judicial outcomes given the voting rules of the ECJ. The model indicates that during the normal course of community governance the Court will be able to set more integrationist policies than the Council is able to adopt. Since the ECJ can establish policies that are structural equilibrium positions

within the Council, these policies will be durable under the Council's voting rules. Since the ECJ's decision can incorporate a higher level of integration than the Council policy, private actors whose preferences are closer to the Court's position may pursue policy outcomes through the Court. The model also includes the role of national courts in supplying the ECJ with cases and incorporating European law into national law. The finding is that the ECJ has a range of policy options that will be equilibrium positions for the Council and national courts.

A. *The Supranational Level*

1. Unanimity Voting

Policies are considered by the Council of Ministers out of a policy set A that contains policies with differing degrees of integration (Figure 1). Under unanimity voting rules, the adoption of policy X will be determined by the least integrationist member. The least integrationist member's ideal point (X_C) is the dominant policy since that member would veto any policy that was more integrationist than it preferred. X_C is the only point where no one will veto the policy, and all members to the left of X_C still prefer the less integrationist policy over no policy (X_{SQ}). Any policy to the right of X_C will be rejected because all members could be made better off by adopting X_C .⁵ The result is a policy at X_C .

See Appendix. Figure 1

If a government's implementation of the policy is challenged by another government or private actors within states, the European Court of Justice has the opportunity to review national law and set the supranational policy. In a review similar to Constitutional review, the ECJ can review the policy for consistency with the treaties (requiring more or less action) as well as reviewing the implementation of the policy. The ECJ is composed of one justice from each member state. For the moment, I will assume that justices vote on the policy in a manner that mirrors the position of their national representative in the

5. The Commission is not explicitly included in the formation of policy since agenda setting powers are not effective because the Council can amend any proposal. If amendment is possible, the dominant policy will remain X_C as the least integrationist member will veto any proposal made by the Commission that is to the left of X_C . While the Commission does have some gate keeping powers in that it can keep issues off of the agenda, the value to the Commission of keeping decision making at the national level is low. See KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* (1997).

Council (National Position Model). The ECJ functions under majority voting rules so the outcome is the median judicial vote (X_J).

The policy at X_J is at the same position or is more integrationist than the one produced in the Council and is stable.⁶ In the next move, the Council has the ability to review the issue again. The Council cannot directly overrule the specific decision of the ECJ, but it can adopt policies that counteract the ECJ's policy decision. There is no voting coalition, however, that will be able to defeat X_J . Any attempt to alter the policy to the right, closer to the original policy X_C , will be vetoed by all members that prefer policies to the left of X_J . Any attempt to move the policy to the left of X_J will prompt vetoes by members to its right. Therefore, given the institutional structure of the Community, X_J will defeat all other possible alternative proposals on this issue. X_J is thus a structure-induced equilibrium.⁷ As a result, given unanimity voting rules in the Council, the ECJ will be able to impose a more integrationist policy than the Council would select on its own even given the Council's response to judicial action.

It is possible, however, that the justices may not base their decisions on the positions of their national representatives. The justices may be interested not only in their national positions but also in enhancing their jurisdiction and the authority of the Court (Judicial Preference Model). More integrationist policies tend to promote federal decision making, which increases the organizational competence of the Court. Accordingly, the ECJ's median voter may be to the left of the Council's median position. Under this model, the Court would have the discretion to choose a policy that is between the ideal points of the most integrationist member X_L and the least integrationist member X_C . Any of the policy positions within this range would be structure-induced equilibria since movements from the judicial decisions would be vetoed by at least one Council member. Consequently, the justices would have the discretion to set policies that would be more integrationist (or less integrationist) than the median Council position. Any decision to the left of X_L or the right of X_C would be altered by the Council to X_L or X_C respectively.

Understanding the impact of the ECJ on policy making implies a theory for understanding who will challenge community and national

6. It is possible for X_J to be at the same position as X_C using the National Position Model. If a majority of the national representatives' positions is located at or to the right of X_C , then the median justice would also be at X_C . The ECJ should not, however, make decisions that are less integrationist than the X_C .

7. See generally John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992).

policies through legal channels (Figure 2). Because the Court can move outcomes away from the Council's position, some actors have an incentive to challenge policies. X_I represents the position at which an actor (private or public) is indifferent between X_C and the anticipated position of the ECJ $X_{J(A)}$. Anyone to the left of X_I has an incentive to challenge the Council's policy through the Court. $X_{J(A)}$ would be a stable policy position and would be closer to the actor's preferences than X_C .

See Appendix. Figure 2

2. Qualified Majority Voting

A very similar game is played under qualified majority voting, but the ECJ possesses less discretion in the policy making process. The dominant policy in Council voting will be the position of the minimum blocking coalition at X_{C^*} (Figure 3). The position of X_{C^*} will vary depending on the member governments that compose the coalition. The position of the coalition will be the ideal point of the most integrationist blocking coalition member X_{C^*} . Short of this member's ideal point, the less integrationist member governments to the right will not possess the necessary votes to block the proposal. The most integrationist member government recognizes this and will refuse to use its votes to veto the proposal unless the coalition adopts X_{C^*} . The other coalition members will agree to X_{C^*} rather than accept a more integrationist proposal.

See Appendix. Figure 3

The range of judicial discretion is from the ideal point of the least integrationist blocking coalition X_{C^*} to the most integrationist policy that retains a winning coalition X_{L^*} . If the Court has the opportunity to review the policy, any policy within the X_{C^*} to X_{L^*} range will be an equilibrium position. Any attempt to alter the ECJ's decision will be vetoed by some coalition within the Council. The win set, the possible range of structure-induced equilibria, for the Court is narrower under qualified majority voting. While the Council is able to arrive at more integrationist policies, the ability of the ECJ to interpret community law further to the left of X_{L^*} is curtailed. If the Court issues decisions to the left of X_{L^*} or the right of X_{C^*} , the Council will pass legislation that counteracts the decision to X_{L^*} or X_{C^*} respectively.

The justices on the ECJ are aware that their policy making ability is more limited with the qualified majority rule. Consequently, the

justices should be attempting to make decisions that fall within their win set. If the Court makes a decision that is outside the win set, the policy will be altered to one of the two range boundaries X_{L^*} or X_{C^*} . In this situation, the justices do not receive any greater benefit for deciding outside of the range and incur the cost of having their decision rejected by the Council. Given this knowledge, the justices could be expected to make their decisions conform to the win set.

As the ability of the Council to make more integrationist policy decisions increases, the range of actors who would wish to challenge the policy narrows (Figure 4). Other things being equal, the placement of the indifference point for the challenger X_{I^*} is further to the left since X_{C^*} is further to the left. Actors who fall between X_I and X_{I^*} would have challenged the policy through the Court under unanimity voting but will not do so under qualified majority voting. This does not, however, indicate a decrease in the number of challenges the ECJ receives. Anyone to the left of X_{L^*} would still be motivated to challenge the policy legally. For the ECJ to have the opportunity to review the policy, the Court need only receive one request to review the law. Hence the number of cases that the ECJ reviews should not be significantly affected by a move to qualified majority voting. The number of cases that the Court considers should be related to number of policy issues covered by the supranational regime rather than to changes in the Council's voting rules.

See Appendix. Figure 4

B. The Domestic Level Game

Discussion thus far of the structural equilibrium model begs the question: Why do national governments abide by the rulings of the ECJ if those rulings are more integrationist than the national executive's preference? To some extent this would be a concern for any type of non-unanimity voting rules, but it is particularly notable for supranational courts where the national executive does not have a direct role in the decision making process. There have certainly been many historical examples of national executives disregarding the decisions of supranational courts that were not consistent with the national executive's preferences.

National executives are not able to dismiss or ignore ECJ rulings as easily as they might disregard rulings of other supranational courts, because the rulings of the ECJ are not left to the national executive to accept or reject. Instead, the ECJ's rulings are generally incorporated

into the judicial decisions of national courts.⁸ Ignoring the decisions of national courts imposes a significantly higher cost to the national executive than not applying a decision by a supranational court.⁹ National courts also possess different preferences for cooperating with the ECJ than national executives possess. Alter (1996) and Volcansek (1986) note that cooperating with the ECJ strengthens the institutional power of domestic judiciaries as well as providing incentives for individual justices to cooperate.¹⁰

While national courts have proven generally willing to cooperate with the ECJ, there is a threshold past which some national courts will refuse to implement ECJ policy. Since national courts are hardly unitary actors, the threshold varies according to the specific court. The national courts with lower thresholds for accepting ECJ policy have been high national courts (generally constitutional courts or high administrative courts) whose jurisdiction is most threatened by ECJ expansion. The degree of integration that the national courts are willing to accept in ECJ rulings varies with the national court's concern over jurisdiction in an issue area.

In effect, the ECJ is engaged in a two level game between national courts and the Council of Ministers. The ECJ has a range of discretion in making policy that will be stable within the Council, but the decisions must also be acceptable to national courts (Figure 5). On the first level, the ECJ is working supranationally, interacting with the Council. Under qualified majority voting, the ECJ will have the discretion to set policy between X_{L*} and X_{C*} , as illustrated previously. On the second level, the ECJ is interacting with national courts. The ECJ will only be able to make decisions that fall below the national court's acceptance threshold X_{NC} . As long as the ECJ's decision is to the right of X_{NC} , the national courts will incorporate the ECJ's interpretation of law into their decisions and the policy will be a structure induced equilibrium. If the ECJ's decision falls to the left of the national courts' threshold, the national courts will not accept the rulings and will replace the ECJ's ruling with some policy at or to the right of X_{NC} . The result is that the win set of policy positions for the

8. See generally STEPHEN WEATHERILL, *LAW AND INTEGRATION IN THE EUROPEAN UNION* (1995); Gerhard Bebr, *Direct and Indirect Judicial Control of Community Acts in Practice: The Relation Between Articles 173 and 177 of the EEC Treaty*, 82 MICH. L. REV. 1229 (1984).

9. See Karen Alter, *The European Court's Political Power*, 19 W. EUR. POL. 458 (1996); Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397 (1994).

10. For a much more complete explanation of why national courts cooperate with the ECJ and how their cooperation varies, see Alter, *supra* note 8, at 458-87; see also MARY VOLCANSEK, *JUDICIAL POLITICS IN EUROPE* (1986).

ECJ is the overlap between the judicial discretion in the Council and the range of policies below the national court threshold.

See Appendix. Figure 5

The ECJ's interaction with national courts is more complex than with the Council, since the ECJ is dealing with many political actors instead of one political body. While the Council regularly convenes and has procedural rules for adopting countermeasures, the national courts do not have the opportunity to agree upon some common threshold. In addition, in any one policy decision, the ECJ only needs to be below the policy threshold of the specific court from which the ruling was requested. Yet ECJ decisions become part of the *acquis communautaire* which affects all national courts.¹¹ A situation can then occur where the national court (X_1) that forwarded the request is willing to accept the ECJ's ruling (X_{ECJ}), but the decision will be beyond the threshold for another national court (X_2) (Figure 6). This decision would not be an equilibrium point, since in later judicial action concerning this issue, national court X_2 will not incorporate the ECJ's ruling into the national court's decision.

See Appendix. Figure 6

To eliminate this situation where two different rules are simultaneously in effect, high national courts attempt to communicate their threshold positions to the ECJ. Consequently, national courts will express their concern to the supranational court when ECJ rulings are approaching their threshold positions. For example, the German Constitutional Court has expressed its concern over the ECJ's rulings on human rights issues.¹² The German court has communicated that it might be unwilling to use the community law as interpreted by the ECJ in this area. This has led to a type of judicial negotiation, in which the ECJ has attempted to ascertain where the German court's threshold position is and to move its rulings below that threshold.

In this structural equilibrium model, it is possible for the ECJ to have an empty win set. If the threshold of a national court X_{NC} were to the right of the minimum Council coalition X_{C^*} (with qualified majority voting rules) or the least integrationist Council member X_C (with unanimity voting rules), the ECJ would be unable to achieve any equilibrium decision (Figure 7). An empty win set has not so far

11. See J.H.H. Weiler, *The Reformation of European Constitutionalism*, 35 J. COMMON MKT. STUD. (1997).

12. See WEATHERILL, *supra* note 8.

been a serious concern for the ECJ, however, since national courts' thresholds for accepting ECJ decisions have been high.

See Appendix. Figure 7

III. TREATY REVISION

What does not fit neatly into the spatial model is the possibility that the member governments will alter the competence of the ECJ by revising the Community's treaties. The model is based upon an evaluation of the current institutional rules of the Court and does not include an explanation of why one specific institutional structure was chosen over alternatives. During intergovernmental conferences, however, member governments can change the parameters of the Court, the procedural rules of the Court, and the areas in which the Court has jurisdiction.

Changing the treaty to restrict the ECJ's competence is a difficult undertaking since treaty revisions always require unanimity. However, the nature of the treaty revisions, where multiple issues including institutional rules are negotiated in one compromise agreement, can make it possible for less integrationist member governments to place constraints on the ECJ during treaty changes. In treaty revisions, the competence of the ECJ becomes another issue over which bargaining can occur. Instead of being a post hoc enforcement mechanism for whatever policy compromise is reached, the competence and the procedural rules of the ECJ are endogenous to the agreement. Member governments can consider changes in the ECJ's competence together with other policy areas to be negotiated. Less integrationist member governments do not need to achieve unanimity on the issue of the ECJ's competence or parameters alone, but as a part of a package of policy compromises. Consequently, in a multidimensional bargaining arena, some member governments may be willing to compromise on the scope or competence of the Court to gain concessions in other areas. Since member governments have the ability to change the rules of the game, the continued ability of the Court to successfully alter policy is not assured.

The competence of the Court was prevented from expanding in the Maastricht Treaty: While increasing the authority of the Court in the internal market, the treaty limited the ECJ's competence to review decisions in the foreign policy and security pillar and the justice and home affairs pillar. This limitation of the Court, in two of the three pillars of the European Union, was a definite restriction upon it. As

the Community had been expanding in issues of social policy and justice before the Maastricht Treaty, the Court had been able to make rules that influenced the Community policies on these issues. The limitation upon reviewing decisions now classified as falling outside the market pillar, imposed a real constraint upon the Court's competence. Because the ECJ is not responsive to member states' demands in the immediate term, constraints upon the Court were a requisite for increasing the scope of the integration project. Notably, the ECJ retained its competence within the internal market and received the authority to fine member state governments found not to be in compliance with Treaty obligations. Since the ECJ provides positive outcomes to member governments not composing the lowest common denominator of the Council, these governments are unlikely to sacrifice significant sections of the ECJ's authority.

In exploring the evolution and the future role of the ECJ, it is important to examine the powers of the Court in setting policy in the normal operation of community governance and to examine the preferences of the national government, with respect to the Court, at treaty revisions. Focusing on only one aspect of this relationship overemphasizes the importance of the one supranational organization over the other. The Council and the Court can place constraints upon one another.

IV. ILLUSTRATING THE MODEL

The jurisdiction of the ECJ has expanded since its inception in the Treaty of Rome. Some scholars have attributed the development of the ECJ to its ability to lower transaction costs.¹³ Other neofunctional scholars have attributed the development to the nature of the legal sphere together with the interests of individual actors in greater integration.¹⁴ The structural equilibrium model indicates that development of the ECJ is due to the ECJ's ability to alter community policy which suits the interests of certain private or governmental actors.

The ECJ underwent its greatest expansion (the so-called constitutionalization of Europe) from 1958 to 1973 when the Council was generally voting under unanimity voting rules.¹⁵ Under the structural equilibrium model, anyone with an interest in achieving a policy to the left of X_1 should have an interest in challenging the

13. Sweet & Brunell, *supra* note 4.

14. Burley & Mattli, *supra* note 4.

15. See J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 240 (1991).

policy through legal channels. The ECJ could produce outcomes that offered greater utility to liberalizing interests. In addition, the ECJ's decisions were acceptable, and even (as an aggregate) preferable to the outcomes that could be achieved through Council voting. The policy outcomes that the ECJ could achieve for private and public interests promoted the use of the Court and gave the Court the supply of cases necessary to expand its competence. The judicial outcomes were at least as acceptable to the Council as X_C so the Council did not restrict the expansion of the Court. Under this model, the general acquiescence of the Council in the rulings of the ECJ is not a result of the nature of the legal sphere or lower transaction costs. The acquiescence of the Council is a result of the ECJ's decisions falling within a set of veto-proof policies.

This model can also be used in explaining Weiler's observation that the early period of European integration presents a paradox in the high level of legal integration occurring concurrently with the Council's movement towards less supranationalism in the form of unanimity voting rules.¹⁶ This model indicates that the Council's movement towards a more intergovernmental style of decision making may have directly contributed to the high level of legal integration by giving the ECJ greater discretion in establishing the community's legal principles. Similar to slamming on the brakes on an icy road, attempts to abruptly stop the integration process through unanimity voting by the French government resulted in a greater loss of control of part of the policy making apparatus. By moving from qualified majority voting to unanimity voting, the range of equilibrium decisions that the ECJ could make expanded from X_{L^*} and X_{C^*} to X_L and X_C (Figure 8).

See Appendix. Figure 8

The model indicates that during the normal course of community governance the Court will be able to set more integrationist policies than the Council is able to adopt. Since the ECJ can establish policies that are structural equilibrium positions within the Council, these policies will be durable under the current voting rules. Hence we would expect to see the Court making decisions that are more integrationist than the Council is able to adopt, and to see these policies be durable. This type of activity should occur with market oriented rules and with social policy rules.

16. Weiler, *supra* note 11.

A. Mutual Recognition

One of the Court's best known decisions is the *Cassis de Dijon* case, in which the ECJ established the principle of mutual recognition for the free movement of goods.¹⁷ The ruling dramatically changed the Community's policy on determining the validity of national regulation of goods and pushed the internal market project forward. The lowering of barriers to trade within the Community is an explicit element, if not the core, of the 1957 Treaty. Art. 12 eliminates customs duties, and Art. 95 prohibits discriminatory taxing systems. Yet, the key to much of the internal market project is established in Art. 30 which states that "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."¹⁸ The principle in Art. 30 is not without qualifications, however, which are expressed in Art. 36's statement permitting "restrictions on the imports, exports, or goods in transit justified on grounds of public morality, public policy, or public security; . . ."¹⁹ The conflicting principles expressed in Art. 30 and 36 left the status of national regulations as barriers to trade ambiguous.

The negative integration mandate in Art. 30 is not unconditional. Since national regulations could be justified under the Treaty, the position of the Council and Commission was to harmonize policies at the supranational level. By establishing new regulations for the Community, national standards could be maintained and restrictions on trade would decrease.²⁰ The obstacle to harmonization was the legislative process. Working under unanimity voting rules, the process of building a consensus on Community regulations was slow, and often unsuccessful. In addition, regulations were considered by narrow issue areas which required large numbers of directives to be proposed and debated.²¹ The Council's inability to re-regulate at the supranational level maintained the ambiguous status of national regulations as barriers to trade. Without harmonization, the de facto Community policy was a continuation of national standards until such

17. Case 120/78, *Reue-Zentrebe A.g. v. Bundesmonopolverwaltung für Branntuiein*, 1979 E.C.R. 649, [1979] 3 C.M.L.R. 494 (1979).

18. See *supra* note 7, at 226.

19. See *supra* note 7, at 227.

20. See Ferejohn & Weingast, *supra* note 7.

21. Karen Alter & Sophie Meunier-Aitsahalia, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, 26 COMP. POL. STUD. 535 (1994). Alter and Meunier-Aitsahalia (1994) note that between 1962 and 1984 only 159 were adopted for an average of seven per year.

time as Community regulations replaced them. The lowest common denominator policy was maintenance of national regulations.

Private actors engaged in exporting goods that faced regulatory restrictions in other member states had an incentive to challenge national regulations left in place by the absence of Community regulations. The first challenge concerned the ability of *Dassonville*, a Belgian importer of Scotch whisky, to import his goods, which had been certified by the French government, into Belgium without obtaining the required certificate of origin from Scotland.²² In *Dassonville*, the Court determined that all regulations having the effect of hindering trade were contrary to the principle espoused in Art. 30.²³ The *Dassonville* decision called into question the ability of member states to maintain national regulations, and eventually laid the foundation for the *Cassis de Dijon* decision.

In 1979, a French firm challenged a German regulation prohibiting the importation of the *Cassis de Dijon* liqueur. The German government claimed that public health standards were threatened by importing the liqueur because the alcohol content was too low. The Court rejected the German position and ruled that goods produced legally in one member state must be accepted in all member states. The Court continued to allow justifications for some national regulations, but mutual recognition became the dominant Community policy.

While mutual recognition might have established a lowest common denominator in product standards, the policy was not the lowest common denominator in the Council. The German, French, and Italian governments were strongly opposed to the policy changes. As relatively high product standard states, these governments recognized that mutual recognition would lead to lower product standards and disadvantage their goods competitively.²⁴ The resistance of these governments to the *Cassis* decision was insufficient, however, to reject the Court's policy. The mutual recognition policy would give low regulation states competitive advantages and provide states with smaller national markets greater access to all of the Community's consumers. Without unanimity in the Council, the Court could effectively shift the Community's policy from a continuation of each state's regulations in the absence of harmonization to the mutual recognition of product standards. Mutual

22. Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, [1974] 2 C.M.L.R. 436 (1974).

23. *See id.*

24. *See Ferejohn & Weingast, supra note 7.*

recognition became the new equilibrium in the Community's internal market policy, since it was incapable of being defeated by alternative policies under Council voting rules. The same Council rules that had retarded the harmonization process also prevented reluctant Council members from rejecting the Court's ruling.

B. Implications

1. The Court is able to produce equilibrium outcomes that the Council would not be able to achieve.

The institutional rules of the European Community allow the ECJ to adopt policy positions that are above the lowest common denominator level. The ECJ has some autonomy from the most reluctant Council member and will exercise that discretion when making policies. The relationship between interested individuals and firms, national courts, and the ECJ is mutually reinforcing. Groups that could benefit from the Court's discretion supply the Court with cases. These cases then give the Court the opportunity to improve its own position. The model also implies that current neofunctional and intergovernmental theories about the Court lead to a view of the ECJ either as an autonomous or a highly constrained actor. The dichotomous choice is misleading and obscures the nature of the Court's discretion in shaping Community policy.

While the neofunctional approach is able to explain the interaction among national courts, litigants, and the ECJ, it fails to explain the several aspects of the ECJ's development. Neofunctional approaches first overstate the degree of autonomy that the Court possesses. Feedback and spillover may constrain the Court in its decision making. The Court has a set of parameters within which its rulings must fall. As Ferejohn and Weingast point out, "If we can say nothing else with certainty, we can say that there is no "last word" in politics.²⁵ No person or individual ever gets to say what the law is finally;" Other institutions can reply to the decisions of the Court. If the other institutions do not reply, it is probably because that policy is a structure-induced equilibrium rather than an acknowledgment of the ECJ's ability to give the final word on an issue.

Neofunctional accounts also take for granted the institutional rules that the ECJ was granted in the Treaty of Rome. The access to national courts, the competence to interpret the treaty, and even the

25. *See id.* at 263.

status of the ECJ as a permanent and single court for the Community should not be viewed as natural components of any regional trading regime dispute resolution mechanism. The subsequent development of the ECJ has been a result of the structure of the Court as established in the Treaties. Most of the ECJ's path-breaking cases have come as a result of Art. 177, the preliminary reference procedure which was incorporated in the competence of the ECJ from the beginning and has not been incorporated into any other supranational dispute resolution mechanisms. The WTO dispute resolution mechanism and the NAFTA panels have not been vested with the same institutional rules at their introduction. Consequently, their developmental paths will have significantly different trajectories. Neofunctional approaches overlook the fact that the trajectory of the ECJ has only been possible because of the competence granted to the Court by national governments. Without these rules, the ECJ might have developed as a response to demand for dispute resolution services as trade increased or judicial interaction increased, but certainly not to the extent that it currently has.

Where intergovernmental accounts include the politics of integration and conflict of actors' interests, the approach's focus on national executives leads to misleading predictions about the ECJ. The ECJ is constrained and can be limited by powerful national governments, but this does not imply that the Court acts in the interests of powerful member state governments. First, policy is not constrained to the lowest common denominator. The Court has been able to change policies above the Council's adopted level of integration successfully on issues of positive and negative integration.

Second, members of national executives, who make up the Council of Ministers, are not the only relevant national governmental bodies in the policy process. Specifically, and very importantly to the ECJ, national courts have their own place in national governance. National courts' utility functions are not identical to the utility functions of the national executives. Consequently, the ECJ can interpret European law and have it accepted by national courts that will not necessarily match the preferences of the national executives in the Council of Ministers. If the national governments had the option of individually accepting or rejecting ECJ decisions, then the intergovernmental understanding of the ECJ might be more viable.

2. The level of integration not a direct function of the restrictiveness of the Council of Ministers' voting rules.

European integration has been perceived by traditional literature as related to the level of majority voting in the Council of Ministers. Restated, the closer Council voting came to majority rule (or the less lowest common denominator decision making the Council produced), the more supranational policies the community would produce, and the deeper integration would become. This model perceives integration differently. Changes in the Council that lead to more majority voting do not necessarily lead to more supranational policies on the whole. Restrictive voting in the Council actually grants the ECJ a broader discretion to move policies up from the lowest common denominator. The same restrictive Council voting rules that make more supranational policies difficult to achieve initially make the decisions of the ECJ difficult to change. The result is a structure-induced equilibrium that is more supranational than what the Council produces. Subsequent changes in the voting rules of the Council therefore do not necessarily lead to more supranational policies. The policies that the Council is able to initially adopt are more supranational, but the discretion of the ECJ is narrowed. Consequently, the ability of the ECJ to "ratchet" policies upward may be limited. Changes to qualified majority voting rules in the Council do not necessarily mean that policies will be less supranational, but the changes do not unambiguously lead to more supranational policies either.

The difference between this model and other integration literature is the incorporation of other institutions into the policy-making process. Assuming that the Council, as representative of national governments, is dominant in the policy-making process leads to the conclusion that the level of policy will be based on the voting rules in the Council. Hence less restrictive voting rules would lead to more supranational policies. Incorporating the Court into the policy-making landscape alters the impact of voting rule changes. By including another institution with the capacity to set community policies, the policy positions of the Community become less dependent on the initial actions taken by the Council. Hence, changes in the voting rules of the Council may have an indeterminate effect on the level of European integration.

Changes in the voting rules of the Council also do not necessarily lead to changes in the past decisions of the ECJ. The model does not indicate that the adoption of qualified majority voting

in the Single European Act should have been followed by a spree of Council decisions that would “overturn” pre-SEA rulings of the Court. The Council as an aggregate and the Court are not in opposition to one another. The policies set by the Council under unanimity rules are one form of extreme outcomes. Those policies reflect the preferences of the government on the extreme of the Council policy continuum. The decisions of the ECJ on the other hand are much more likely to be closer to the median position of the Council. Hence the policies of the ECJ are probably more appealing to the Council as a whole than the policies that the Council itself can adopt. In other words, the policy positions of the ECJ are closer to the median voter on the Council than the policy positions that the Council is able to adopt given its voting rules. Consequently, the Council, considered aggregately, and the Court are mutually supporting. As a result, changes in the voting rules of the Council should not make the Council attempt to rewrite the policies that the Court had previously enacted. The Court is not producing extreme outcomes that differ radically from the preferences of the Council as a whole.

C. Conclusions on the European Case

One cannot view the Court outside of its proper institutional context. The Court is only understandable when considered together with the larger institutional structure of the Community. The Court is neither highly constrained nor highly autonomous. The model presented here suggests that the truth lies somewhere in the middle. The Court has policy discretion within some parameters defined by its interactions with other supranational and national institutions. The case is the strongest for the neofunctional and intergovernmental theories in the arena in which each theory focuses. Neofunctionalism explains most accurately the ECJ’s activity in the time between treaty revision since the power of national governments to restrict the Court is limited during the normal Community decision making process. Intergovernmentalism most accurately explains treaty revisions since national executives are able to exert the most influence on policy and institutional rules in that arena.

The structural equilibrium model indicates that the success of the ECJ is a function of the voting rules of the supranational executive body and cooperation with national courts. The discretion of the ECJ in establishing policy positions is directly related to the strictness of the Council’s voting rules. Under simple majority rules, the Court

would have discretion only when the preferences of the member governments have altered since the adoption of the policy and the Court is aware of the shift. The Court also is interacting with national courts and is dependent on their continued cooperation. The ECJ is indirectly dependent on the independence of the judiciary to the extent that national courts do not have preference functions identical to that of the national executives. This relationship continues to evolve and may be changing as the ECJ further develops its jurisdiction. Greater resistance by national courts to expansive ECJ rulings could also limit the discretion of the Court.

Rather than serving as a substitute for more legalist or constructivist conceptions of the role of the Court in the Community's policy making process, the model attempts to provide a more systematic framework for analyzing the Court's policy making capabilities. The model is not inherently inconsistent with other approaches. The advantage of this approach is that the structural equilibrium model permits an analysis of the influence of many actors, private and public, national and supranational, under one framework. The model highlights the constraints each actor confronts in the policy process and thus can aid in explaining instances of action and inaction by judicial and legislative bodies.

The model also illustrates that the potential impact of supranational dispute resolution mechanisms is a function of the position of the mechanism within the larger institutional structure and the domestic systems. The development of the ECJ is not only a result of the its own procedural rules, but also the competence of those organizations with which the Court interacts. Hence attempting to create a supranational court that will behave as the ECJ will probably be unsuccessful without similar supporting supranational legislative organs and national judicial systems as well. Instead of being a prototype for supranational courts, the ECJ may be unique to its institutional environment.

APPENDIX. TABLE OF FIGURES

Figure 1: Range of Judicial Discretion under Unanimity Voting

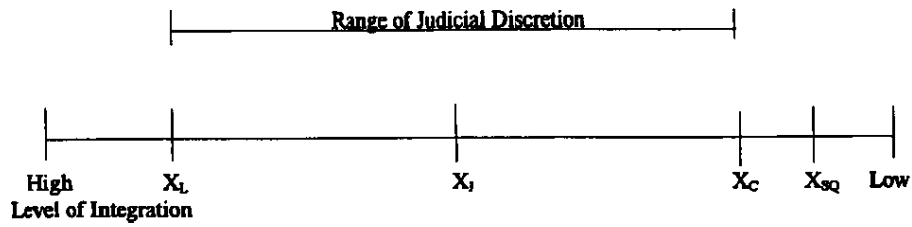


Figure 2: Incentive to Challenge under Unanimity Voting

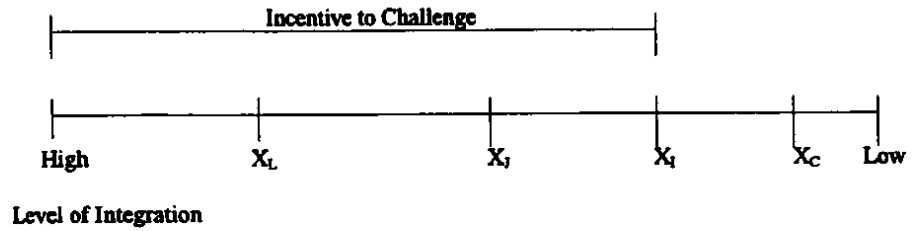


Figure 3: Range of Judicial Discretion under Qualified Majority Voting

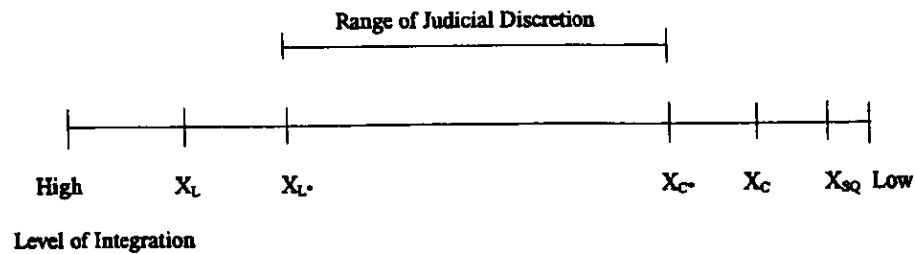


Figure 4: Incentive to Challenge under Qualified Majority Voting

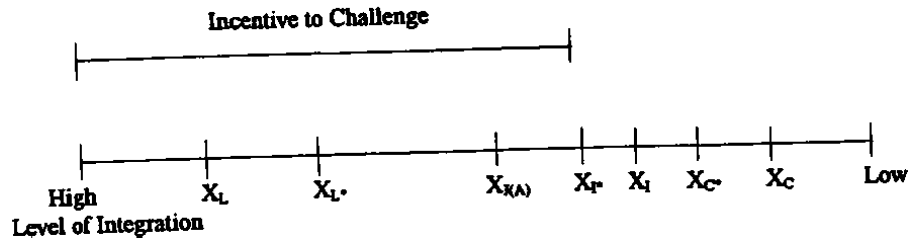


Figure 5: Domestic Level Game

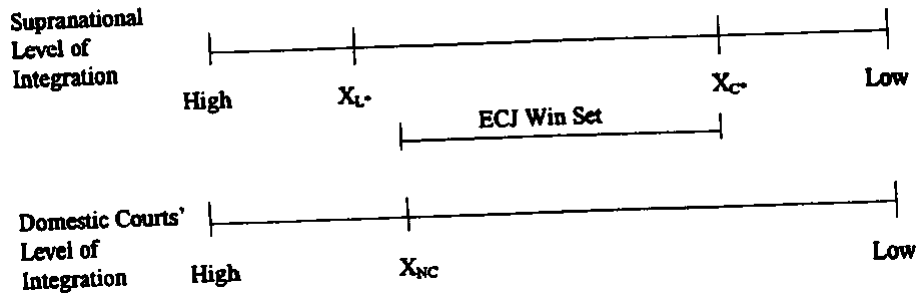


Figure 6: National Court Interaction

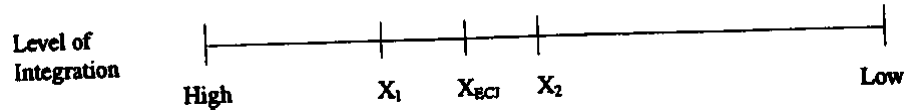


Figure 7: The Elimination of the Win Set

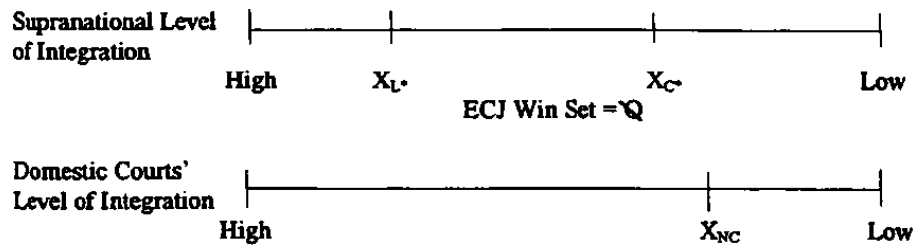


Figure 8: Changes in the Level of Judicial Discretion

