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

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

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

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

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

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

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

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

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

even these actions where member governments have failed to implement a directive correctly or in a timely fashion.[46]

Without tracking the intricacies of direct effect jurisprudence any further, it suffices to note that at every turn the Court harped on the benefits of its judgments for individual citizens of the community. In *Van Duyn,* for instance, the Court observed: "A decision to this effect (granting direct effect to community directives) would undoubtedly strengthen the legal protection of individual citizens in the national courts."[47] Conversely, of course, individuals are the best means of holding member states to their obligations. "Where Community authorities have, by directive, imposed on Member states the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law."[48]

The net result of all these cases is that individuals (and their lawyers) who can point to a provision in the community treaties or secondary legislation that supports a particular activity they wish to undertake – from equal pay for equal work to a lifting of customs levies – can invoke community law and urge a national court to certify the question of whether and how community law should be applied to the ECJ. When litigants did not appear to perceive the boon that had been granted them, moreover, the Court set about educating them in the use of the Article 177 procedure.[49] The Court thus constructed a classically utilitarian mechanism and put it to work in the service of community goals. Citizens who are net losers from integrative decisions by the council or the commission cannot sue to have those actions declared ultra vires. But citizens who stand to gain have a constant incentive to push their governments to live up to paper

[46] See Case 152/84, *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching), Common Market Law Review,* vol. 1, 1986, p. 688; and Case 152/84, *ECR,* 1986, p. 737. On the relationship between *Marshall* and *Marleasing,* see Hjalte Rasmussen, "The Role of the Court in the European Community: Towards a Normative Theory of Interpretation of Community Law," *University of Chicago Legal Forum.*

[47] *Van Duyn,* p. 1342.

[48] *Ibid.,* p. 1348. For a discussion of more recent cases in which the Court explicitly has carved out individual rights in the enforcement of community directives, see Deirdre Curtin, "Directives: The Effectiveness of Judicial Protection of Individual Rights," *Common Market Law Review,* vol. 27, 1990, pp. 709–39.

[49] Mancini describes this process in great detail; see G. Federico Mancini, "The Making of a Constitution for Europe," *Common Market Law Review, vol.* 26, 1989, pp. 605–6. See also Pierre Pescatore, *The Law of Integration*, (Leyden : Sijthoss, 1974), p. 99; and Rasmussen, *On law and Policy in the European Court of Justice,* p. 247.

commitments.[50] As Haas argued in 1964, a successful international organization can achieve "growth through planning . . . only on the basis of stimulating groups and governments in the environment to submit new demands calling for organizational action."[51]

Courting the national courts

The entire process of increasing the use of the Article 177 procedure was an exercise in convincing national judges of the desirability of using the ECJ. Through seminars, dinners, regular invitations to Luxembourg, and visits around the community, the ECJ judges put a human face on the institutional links they sought to build.[52] Many of the Court's Article 177 opinions reenforced the same message. It was a message that included a number of components designed to appeal to the self-interest primarily of the lower national courts. It succeeded ultimately in transforming the European legal system into a split system, in which these lower courts began to recognize two separate and distinct authorities above them: their own national supreme courts, on questions of national law, and the ECJ, on questions of European law. Judge Mancini explains quite candidly that the ECJ needed the "cooperation and goodwill of the state courts."[53]

Shapiro expresses surprise at the willingness of lower national courts to invoke Article 177 against the interests of their own national supreme courts, noting that lower court judges "must attend to their career prospects within hierarchically organized national judicial systems."[54]

[50] More prosaically, but no less effectively for the construction of a community legal system, the Article 177 procedure offers "clever lawyers and taticians . . . the possibility of using Community law to mount challenges to traditional local economic restrictions in a way which may keep open a window of trading opportunity whilst the legal process grinds away." In a word, delay. See L. Gormley, "Recent Case Law on the Free Movement of Goods: Some Hot Potatoes," *Common Market Law Review,* vol. 27, 1990, pp. 825–57.

[51] Haas, *Beyond the Nation-State,* p. 128.

[52] Rasmussen describes a "generous information campaign," as a result of which a steadily increasing number of national judges traveled to the *Palais de Justice,* at the ECJ's expense, for conferences about the court and the nature of the Article 177 procedure. See Rasmussen, *On Law and Policy in the European Court of Justice,* p. 247.

[53] Mancini, "The Making of a Constitution for Europe," p. 605. In this regard, Mary Volcansek offers an interesting discussion of the various "follow-up mechanisms" the ECJ employed to further an ongoing partnership with the national courts, including positive feedback whenever possible and gradual accommodation of the desire occasionally to interpret community law for themselves. See Volcansek, *Judicial Politics in Europe,* pp. 264–66.

[54] Martin Shapiro, "The European Court of Justice," in Alberta M. Sbragia, ed., *Europolitics: Institutions and Policymaking in the New European Community* (Washington, D.C.: Brookings Institution, 1991), p. 127.

Weiler offers several explanations, beginning with the legitimacy of ECJ decisions conferred by the national prestige of individual judges and the precise reasoning of the opinions themselves. He ultimately concludes, however, that the "legally driven constitutional revolution" in the EC is "a narrative of plain and simple judicial empowerment."[55] And further, that "the E.C. system gave judges at the lowest level powers that had been reserved to the highest court in the land." For many, "to have de facto judicial review of legislation . . . would be heady stuff."[56]

Perhaps the best evidence for this "narrative of empowerment" comes from the ECJ itself. Many of the opinions are carefully crafted appeals to judicial ego. In *Van Gend & Loos* itself the Belgian and Dutch governments had argued that the question of the application of the Treaty of Rome over Dutch or Belgian law was solely a question for the Belgian and Dutch national courts. The ECJ responded by announcing, in effect, that the entire case was a matter solely between the national courts and the ECJ, to be resolved without interference from the national governments. When the Belgian government objected that the question of European law referred by the national court could have no bearing on the outcome of the proceedings, the ECJ piously responded that it was not its business to review the "considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions."[57] In this and subsequent direct effect cases the ECJ continually suggested that the direct effect of community law should depend on judicial interpretation rather than legislative action.[58]

Finally, in holding that a national court's first loyalty must be to the ECJ on all questions of community law,[59] the Court was able simultaneously to appeal to national courts *in their role* as protectors of individual

[55] Joseph Weiler, "The Transformation of Europe," *Yale Law Journal* 100 (June 1991), p. 2426.

[56] Ibid. Anecdotal evidence also suggests that lower national courts who refer questions to the ECJ save themselves the work of deciding the case themselves and simultaneously protect against the chance of reversal.

[57] *Van Gend & Loos,* p. 22.

[58] See, e.g., *Lütticke,* p. 10, where the ECJ announced that the direct effect of the treaty article in question depends solely on a finding by the national court; see also Case 33/76 *Rewe-Zentralfinanz Gesellschaft and Rewe-Zentral AG v. Landwirtschaftskammer fur das Saarland, ECR,* 1989, p. 1998; and Case 45/76 *Comet BV v. Produktschap voor Siergewassen, ECR,* 1976, pp. 2052–53.

[59] Case 106/77, *Amministrazione delle Finanze dello Stato v. Sirnmenthal S.p. A.* [1978] *ECR* 629.

rights – a very effective dual strategy.[60] Such argumentation simultaneously strengthens the force of the Court's message to national courts by portraying the construction of the European legal system as simply a continuation of the traditional role of European courts and, indeed, liberal courts everywhere: the protection of individual rights against the state. At the same time, as discussed above, the Court strengthens its own claim to perform that role, building a constituency beyond the Brussels bureaucracy.

Reciprocal Empowerment

This utilitarian depiction of the integration process must include the ECJ itself. It is obvious that any measures that succeed in raising the visibility, effectiveness, and scope of EC law also enhance the prestige and power of the Court and its members, both judges and advocates general. In addition, however, by presenting itself as the champion of individual rights and the protector of the prerogatives of lower national courts, the ECJ also burnishes its own image and gives its defenders weapons with which to rebut charges of antidemocratic activism. Rasmussen points out that the encouragement to use Article 177 procedure meant that the Court visibly sided with "the little guy," the underdog against state bureaucracies, "the 'people' against the 'power-elite'."[61] Strikingly enough, this is a characterization with which Judge Koenrad Lenaerts essentially concurs.[62]

The empowerment of the ECJ with respect to the national courts is more subtle. While offering lower national courts a "heady" taste of power, the ECJ simultaneously strengthens its own legal legitimacy by making it appear that its own authority flows from the national courts. It is the national courts, after all, who have sought its guidance; and it is the national courts who will ultimately *decide* the case, in the sense of issuing an actual ruling on the facts. The ECJ only "interprets" the relevant provision of community law, and leaves it for the national court to apply it to the facts of the case. In practice, of course, the ECJ frequently offers a virtual template for the subsequent lower court decision.[63] But, the all-important fiction is preserved.

[60] *Ibid.,* p. 643.

[61] Rasmussen, *On Law and Policy in the European Court of Justice,* p. 245.

[62] See Koenrad Lenaerts, "The Role of the Court of Justice in the European Community: Some Thoughts About the Interaction Between Judges and Politicians," *University of Chicago Legal Forum.*

[63] For a number of specific examples, see Ulrich Everling, "The Court of Justice as a Decisionmaking Authority," *Michigan Law Review* 82 (April/May 1984), pp. 1299–1301.

Finally, the empowerment of the ECJ simultaneously empowers all those who make their living by analyzing and critiquing its decisions. Here community law professors and their many assistants join with members of the community bar to form a communitywide network of individuals with a strong stake in bolstering the Court's prestige. On the most basic level, the growing importance of community law translates into a growing demand for professors to teach it and hence, funding for chaired professorships.[64] The holders of these chairs are likely, in turn, to aspire to become judges and advocates general themselves, just as many current judges and advocates general are likely to return to the professoriate when their terms expire. This is a neofunctionalist interest group par excellence.

Process

As discussed above, the neofunctionalist description of the actual process of integration focused on three major features: functional spillover, political spillover, and upgrading of common interests. All three dynamics are clearly present in the building of the EC legal system.

Functional spillover: the logic of law

Functional spillover presupposes the existence of an agreed objective and simply posits that the jurisdiction of the authorities charged with implementing that objective will expand as necessary to address whatever obstacles stand in the way. This expansion will continue as long as those authorities do not collide with equally powerful countervailing interests. Alternatively, of course, one objective might conflict with another objective. Such limits define the parameters within which this "functionalist" logic can work.

In the construction of a community legal system, such limits were initially very few, and the functional logic was very strong. Judge Pierre Pescatore has attributed the ECJ's success in creating a coherent and authoritative body of community law to the Court's ability – flowing from the structure and content of the Treaty of Rome – to use "constructive methods of interpretation."[65] One of the more important of those

[64] The "Jean Monnet Action," a program of the European Commission, has recently created fifty-seven new full-time teaching posts in community law as part of a massive program to create new courses in European integration.

[65] Pescatore, *The Law of Integration,* pp. 89–90.

methods is the "systematic method," drawing on "the various systematic elements on which Community law is based: general scheme of the legislation, structure of the institutions, arrangement of powers . . . , general concepts and guiding ideals of the Treaties. Here is a complete 'architecture,' coherent and well thought out, *the lines of which, once firmly drawn, require to be extended.*"[66] Interpretation according to the systematic method means filling in areas of the legal structure that logically follow from the parts of the structure already built.

A well-known set of examples confirms the power of this functional logic as applied by the ECJ. After *Van Gend & Loos,* the next major "constitutional" case handed down was *Costa v. Enel,* which established the supremacy of community law over national law. In plain terms, *Costa* asserted that where a treaty term conflicted with a subsequent national statute, the treaty must prevail. Predictably, Judge Federico Mancini justifies this decision by reference to the ruin argument.[67] He argues further, however, that the supremacy clause "was not only an indispensable development, it was also a logical development."[68] Students of federalism have long recognized that the clash of interests between state and federal authorities can be mediated in several ways: either (1) by allowing state authorities to implement federal directives at the time and in the manner they desire, or (2) by allowing both state and federal authorities to legislate directly, which entails formulating guidelines to establish a hierarchy between the two. On this basis, Mancini (and Eric Stein before him) points out that *because* the Court had "enormously extended the Community power to deal directly with the public" in *Van Gend & Loos,* it now became logically necessary to insist that community law must prevail over member state law in cases of conflict.[69] In short, the "full impact of direct effect" can only be realized "in combination with" the supremacy clause.[70]

The evolution of community law also has manifested the substantive broadening typical of functional spillover. EC law is today no longer as dominantly economic in character as in the 1960s.[71] It has spilled

[66] Ibid., p. 87, emphasis added.
[67] Mancini, "The Making of a Constitution for Europe," p. 600.
[68] Ibid.
[69] Ibid., p. 601.
[70] This is the way Joseph Weiler describes the supremacy cases, again tacitly emphasizing a necessary logical progression. See Weiler, "The Transformation of Europe," p. 2414.
[71] Neil Nugent, *The Government and Politics of the European Community* (Durham, N.C.: Duke University Press, 1989), p. 151.

over into a variety of domains dealing with issues such as health and safety at work, entitlements to social welfare benefits, mutual recognition of educational and professional qualification, and, most recently, even political participation rights.[72] Two notable examples are equal treatment with respect to social benefits of workers, a field developed almost entirely as a result of Court decisions,[73] and the general system of community trademark law – again formed entirely by the Court's case law.[74] In both areas the Court gradually extended its reach by grounding each new decision on the necessity of securing the common market.

Political spillover: "transnational incrementalism"

The neofunctionalists argued that integration was an adaptive process of gradually shifting expectations, changing loyalties, and evolving values.[75] In trying to explain why member states responded positively to the Court's legal innovations, Joseph Weiler writes: "it is clear that a measure of transnational incrementalism developed. Once some of the highest courts of a few Member States endorsed the new constitutional construct, their counterparts in other Member States heard more arguments that those courts should do the same, and it became more difficult for national courts to resist the trend with any modicum of credibility."[76]

Beyond the Court's specific machinations, however, law operates as law by shifting expectations. The minute a rule is established as "law," individuals are entitled to rely upon the assumption that social, economic, or political behavior will be conducted in accordance with that rule. The creation and application of law is inherently a process of shifting expectations. A major function of a legal rule is to provide a clear and certain standard around which expectations can crystallize.

[72] See "Council Directive on Voting Rights for Community Nationals in Local Elections in Their Member States of Residence," *Official Journal,* 1988, C 256/4, and Amended Proposal, *Official Journal,* 1989, C 290/4.

[73] For further reading, see Paul Leleux, "The Role of the European Court of Justice in Protecting Individual Rights in the Context of Free Movement of Persons and Services," in Eric Stein and Terrence Sandalow, eds., *Courts and Free Markets,* vol. 2 (Oxford: Clarendon Press, 1982), pp. 363–427.

[74] Henry Schermers, "The Role of the European Court of Justice in the Free Movement of Goods," in Eric Stein and Terrence Sandalow, eds., *Courts and Free Markets,* vol. 1, pp. 222–71.

[75] See Haas, "International Integration," p. 366; and Haas, *The Uniting of Europe,* p. 12.

[76] Weiler, "*The Transformation of Europe,*" p. 2425.

As long as those actors to which the Court's decisions are directed – member state governments, national courts, and individuals – accept one decision as a statement of the existing law and proceed to make arguments in the next case from that benchmark, they are shifting their expectations. This is precisely the process that court watchers, even potentially skeptical ones, have identified. Hjalte Rasmussen demonstrates that even governments overtly hostile to the Court's authority do not seek to ask the Court to overturn a previous ruling but rather accept that ruling as a statement of the law and use it as a point of departure for making arguments in subsequent cases. After reviewing an extensive sample of briefs submitted to the Court by member governments, Rasmussen was unable to find even one instance in which a member state suggested that a prior precedent be overruled.[77]

This finding is particularly striking given that states do often strongly object to a proposed interpretation or application of a particular legislative term in its briefs and arguments *prior* to a particular decision.[78] ***

Upgrading common interests

For the neofunctionalists, upgrading common interests referred to a "swapping mechanism" dependent on the services of an "institutionalized autonomous mediator." The Court is less a mediator than an arbiter and has no means per se of "swapping" concessions. What it does do, however, is continually to justify its decisions in light of the common interests of the members as enshrined in both specific and general objectives of the original Rome treaty. The modus operandi here is the "teleological method of interpretation," by which the court has been able to rationalize everything from direct effect to the preemption of member state negotiating power in external affairs in every case in which the treaty grants internal competence to community authorities.[79] All are reasoned not on the basis of specific provisions in the treaty or community secondary legislation but on the accomplishment of the most elementary community goals set forth in the Preamble to the treaty.

According to Judge Pescatore, the concepts employed in the teleological method include "concepts such as the customs union, equality of

[77] Rasmussen, *On Law and Policy in the European Court of Justice*, pp. 275–81.

[78] As is now widely recognized, Belgium, Germany, and the Netherlands all filed briefs strongly objecting to the notion of direct effect in *Van Gend & Loos*. None subsequently suggested revisiting that decision.

[79] Case 22/70, *Commission of the European Communities v. Council of the European Communities, ECR*, 1971, p. 363.

treatment and non-discrimination, freedom of movement, mutual assistance and solidarity, economic interpenetration and finally economic and legal unity as the supreme objective."[80] He goes on to cite two examples from early cases concerning the free movement of goods and the customs union. He points out that "formulas" such as describing the customs union as one of the "foundations of the Community," the role of which is "essential for the implementation of the Community project . . . have been repeated and developed in very varied circumstances since this first judgment."[81]

Rhetorically, these formulas constantly shift the analysis to a more general level on which it is possible to assert common interests – the same common interests that led member states into the community process in the first place. French sheepfarmers might fight to the death with British sheepfarmers, but the majority of the population in both nations have a common interest in "the free movement of goods." "Upgrading the common interest," in judicial parlance, is a process of reasserting long-term interest, at least as nominally perceived at the founding and enshrined in sonorous phrases, over short-term interest. In the process, of course, to the extent it succeeds in using this method to strengthen and enhance community authority, the Court does certainly also succeed in upgrading its own powers.

Context: the (apparent) separation of law and politics

The effectiveness of law in the integration process – as Haas predicted for economics – depends on the perception that it is a domain distinct and apart from politics. Shapiro has argued, for instance, that the Court, aided and abetted by its commentators, has derived enormous advantage from denying the existence of policy discretion and instead hewing to the fiction, bolstered by the style and retroactivity of its judgments. An absolute division between law and politics, as between economics and politics, is ultimately impossible. Nevertheless, just as Haas stressed that overt political concerns are less *directly* engaged in economic integration, requiring some time for specific economic decisions to acquire political significance, so, too, can legal decision making function in a relative political vacuum. Although the political impact of judicial decisions will

[80] Pescatore, *The Law of Integration*, p. 88.
[81] *Ibid.*, p. 89.

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

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

Maintaining the Fiction

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

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

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

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