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# The European Court of Justice and the judicialization of EU governance

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## Abstract

This *Living Reviews* article evaluates the most important strains of social science research on the impact of the European Court of Justice (ECJ) on integration, EU-level policymaking, and national legal orders. Section 2 defines the concepts of *judicialization* and *governance*, and discusses how they are related. As the article demonstrates, the “constitutionalization of the EU,” and its effect on EU governance, is one of the most complex and dramatic examples of judicialization in world history. Section 3 discusses the institutional determinants of judicial authority in the EU in light of delegation theory. The European Court, a Trustee of the Treaty system rather than a simple Agent of the Member States, operates in an unusually broad zone of discretion, a situation the Court has exploited in its efforts to enhance the effectiveness of EU law. Section 4 focuses on the extraordinary impact of the European Court of Justice, and of the legal system it manages, on the overall course of market and political integration. Section 5 provides an overview of the process through which the ECJ’s case law – its *jurisprudence* – influences the decision-making of non-judicial EU organs and officials. Section 6 considers the role of the ECJ and the national courts in monitoring and enforcing Member State compliance with EU law, a task that has provoked a steady *Europeanization* of national law and policymaking.

**Keywords:** European Court of Justice, ECJ, agency theory, court politics, judicial review, integration theory, multi-level governance, intergovernmentalism, neo-functionalism, supremacy

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## 1 Introduction

This *Living Reviews* article concerns the relationship between judicial authority and governance within the EU, as that relationship has evolved over time. In particular, the article focuses on social science that charts the impact of the European Court of Justice (ECJ) and its case law on integration, and on EU-level policy processes and outcomes. One of the striking features of European integration and governance over the past fifty years has been the centrality of the ECJ. At crucial moments, the Court's case law has shaped market integration, the balance of power among the EU's organs of government, the "constitutional" boundaries between international, supranational, and national authority, and literally thousands of policy outcomes great and small. Comparatively, the significance of the ECJ's impact on its legal and political environment rivals that of the world's most powerful national supreme, or constitutional, courts.

Most scholars and students of EU politics will be familiar with these claims. One of the grand, discursive narratives of the study of European integration recounts the gradual "transformation" of a treaty regime through law and courts (Weiler 1991; see also Shapiro 1992). This transformation proceeded with the consolidation of the "constitutional" doctrines of direct effect and supremacy, first announced by the Court in the 1960s. As private litigants, national judges, the EU's governing organs, and national officials worked out the implications of this case law – and related doctrines subsequently developed by the Court – an expansionary, legal system emerged. Several generations of scholars have been preoccupied by this transformation, which some academic lawyers, following Stein (1981), famously characterized as the "constitutionalization" of the regime (also Kumm 2005; Lenaerts 1990; Mancini 1991; Weiler 1999; Timmermans 2003). Constitutionalization significantly enhances the capacity of the ECJ to shape how the other EU organs of governance interact with one another, and to influence the substantive content of the treaties, EU statutes, and other law.

For their part, social scientists have produced more research on the ECJ, and its impact on markets and politics, than on any other court in the world, with the single exception of the United States Supreme Court.<sup>1</sup> This article concentrates on three dimensions of the ECJ's impact. First, blending quantitative and qualitative methods, scholars have conclusively demonstrated that the legal system exerted decisive influence on market and political integration in Europe, pushing the project further and faster than the Member States had been prepared to go on their own. As ultimately constructed, the courts proved to be effective mechanisms for enforcing the property rights of transnational actors, especially those engaged in cross-border trade, and for monitoring Member State compliance with both the Treaty and secondary law (EC statutes). Second, a large body of empirical research, mostly in the form of descriptive case studies, has documented the ECJ's pervasive influence on outcomes in a diverse range of policy domains. Today, no student of EU politics can afford to ignore the role of the judiciary, the impact of which can be crucial. Third, political scientists and academic lawyers have collaborated in research on the *Europeanization* of national law: the impact of EU law, including the ECJ's case law (its *jurisprudence*), on national legal systems. Conceived broadly, these topics overlap a wide range of issues covered by other contributions to the *Living Reviews in European Governance* series, including integration theory, Europeanization, multi-level regulation and governance, and the evolution of the EU's institutional arrangements.

The article proceeds as follows. In Section 2, I define the concepts of *judicialization* and *governance*, and discuss how they are related. The "constitutionalization of the EU," and its effect on EU governance, is one of the most complex and dramatic examples of judicialization. Section 3 considers the institutional determinants of judicial authority in the EU. As we will see, these determinants are not fixed, but rather have evolved as constitutionalization has proceeded, which makes the overall system difficult or impossible to model in any rigorous, formal way. I then

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<sup>1</sup> This research has been the subject of periodic reviews, including Mattli and Slaughter (1998b) and Conant (2007)

review the literature on the relationship between the courts and EU governance, focusing on the three dimensions of impact just noted. Section 4 examines the impact of the European Court of Justice, and of the legal system it manages, on the overall course of integration. In Section 5, I discuss the judicialization of the policy process, focusing on the influence of the ECJ's case law – its *jurisprudence* – on the decision-making of non-judicial actors (e.g., the Commission, the Council of Ministers, the Parliament). Section 6 considers the role of courts in monitoring and enforcing Member State compliance with EU law, and the extent to which these activities have provoked the *Europeanization* of national law and policymaking.

As a contribution to *Living Reviews in European Governance*, this article necessarily emphasizes the contributions of social scientists, and especially those of political scientists. It focuses on important projects – or streams of research – that meet the following criteria. The research must be based on a theory from which testable propositions can be derived, and on which some cumulative social science can, at least in principle, be constructed. There exists a veritable mountain of idiographic case studies on the ECJ and its decisions, on how the legal system operates, on the relationship between the ECJ and national judges, and on the role and impact of adjudicating EU law in specific policy domains. Although many of these studies are informative and well-crafted, they will not be reviewed here in any systematic way. Certain legal scholars have had primordial and enduring significance in this field of research, paving the way for much of the social science that was to come. Legal scholarship that meets the criteria just stated is included and evaluated – as social science. In Sections 3 through 6, I also emphasize the relevant efforts at data collection and analysis that have been undertaken, and discuss the paucity of systematic data collection and analysis in various, important areas of inquiry.

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## 2 Judicialization and governance

In this section, I introduce the concepts of *judicialization* and *governance*, and briefly discuss how they are related, in relatively abstract terms. I note at the outset that most research on the ECJ, and the impact of the EU's legal system on EU governance, is not based on an explicit theory of judicialization.<sup>2</sup> Indeed, some scholars in this area might object to having their work presented under this label. My purpose is not to propagate an overarching theory of judicialization, least of all my own. Rather, I seek to map common ground among scholars engaged in research on EU law and courts, and to link the topics surveyed here with the concerns of other contributions to the *Living Reviews in EU Governance* series. As Kohler-Koch and Rittberger (2006) have well documented, research on EU “governance” commonly takes into account the role of the judiciary.

### 2.1 Judicialization

The most formal theory of *judicialization*, and its relationship to *governance*, has been developed by the present author (Stone Sweet 1999). In its deductive rendering, the theory purports to explain how judicial authority is constructed, focusing on specific causal connections between dyadic contracting (social exchange), third-party dispute resolution (including adjudication), and normative structure (institutions, systems of rules). The “judicialization of dispute resolution” refers to the process through which a third-party dispute resolver (e.g., a judge) emerges in a social system, and then develops authority over the institutions (e.g., the norms, rules, and principles) meant to govern that system. The “judicialization of politics,” concerns how judicial lawmaking – defined as the law produced by a judge through normative interpretation, reason-giving, and the application of legal norms to facts in the course of resolving disputes – influences the strategic behavior of non-judicial agents of governance.

Judicialization is a dynamic process organized by trigger mechanisms and feedback effects. A simplified summary of these dynamics would go as follows. Contracting and other forms of rulemaking (constitutional, regulatory, commercial, and so on) create a social demand for third-party dispute resolution (TDR); to the extent that this demand is supplied, more contracting, or interactions within the rules, will be stimulated. Given certain conditions, a feedback loop will be constructed, connecting two variables: (a) rulemaking, and contracting under rules, and (b) TDR. If the judge gives reasons for her decisions, and if those who contract and use TDR consider these reasons to have some precedential value, then a second (causally related) feedback loop will emerge, linking (c) the lawmaking that issues from TDR with how future legislating, contracting, and disputing takes place. Once forged, these feedback mechanisms will constitute a “virtuous circle” (Stone Sweet 1999: 158–59): a system of governance that places those who would use TDR under the authority of the judge's lawmaking, as that lawmaking evolves.<sup>3</sup>

### 2.2 Governance

Lawmaking, of course, is one core function of any system of governance. I define *governance*, generically, as those social processes – or mechanisms – through which the institutions (rule sys-

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<sup>2</sup> The theme of this article was developed by the executive editors of *Living Reviews in European Governance*. The title is appropriate and welcome, given the mandate to connect research on EU integration and governance to broader concerns of social science.

<sup>3</sup> The model is based on a critical assumption, namely, that *ex ante* acts of delegation are not sufficient to secure the judge's political legitimacy. Fully aware that their legitimacy is partly linked to the perception that they are “neutral” with respect to the litigating parties, judges use two basic techniques to bolster their positions. First, they seek compromise rulings, often splitting the difference between the parties, not least to elicit compliance. Second, they invoke norms and give norm-based reasons for their decisions. Once they do, their political legitimacy will rest in part on the perceived legitimacy of a third interest being brought to bear on the parties – the “social interest” embodied in the norms being applied, and the reasons given.

tems) in place in any social system are adapted, on an ongoing basis, to the needs and purposes of those who live under them.<sup>4</sup> Bodies of legal norms are just one type of institution; and judging, in so far as it entails the on-going adaptation of legal norms to situations, is just one mechanism of governance. A second function of governance is to monitor and enforce compliance with the rule systems in place, as they evolve. Courts, of course, are paradigmatic organs of governance in this second sense. These two functions of governance are inseparable from one another in practice. Indeed, powerful courts spend a great deal of their time and resources monitoring and enforcing compliance with their own prior acts of lawmaking.

The relationship between TDR and governance can be illustrated with reference to simple game theory. In game theory, dyadic instability is taken for granted: divergent preferences within the dyad threaten the building and maintenance of cooperative relationships (society and governance). One underlying purpose of TDR, its social logic, is to sustain cooperation in the face of conflict, making social relationships less brittle, and more robust, as circumstances change. Under orthodox assumptions, games are dyadic, involving two agents interacting under rules that are presumed to be fixed. The judicialization model constitutes a three-party situation (the dyad plus the triadic dispute resolver), in which two analytically separable games are often “nested,” that is, they proceed simultaneously (on nested games, see Tsebelis 1990: 4). The first is a simple “dispute resolution” game in which each party seeks to prevail over the other, before the judge, in the context of a specific legal dispute. The second is a type of “institutional design” game – if the outcome of the first game depends on how the “rules of the game” are interpreted and applied by the judge. After all, the parties may be using the discrete dispute within the rules as a vehicle to promote a change in the rules themselves. In judicialized settings, the analyst cannot assume fixed rules, since changes in the rules of the game occur as an endogenous outcome of dispute resolution game. This point turns out to be crucial to judicial politics in the EU Section 5.2.

Judges would not be significant agents of “governance” if they only “governed” by resolving discrete dyadic disputes. All successful courts labor to provide normative guidance to the greater community, efforts that are codified as case law. Effective judges also seek to make conflict more predictable and amenable to judicial resolution; they do so, in part, through the development of precedent-based, “argumentation frameworks” (Stone Sweet 2004: 32–41). Thus, one can say that judges govern to the extent that they help to generate the institutions that constitute the community, for the benefit of that community, over time.

### 2.3 Courts

Most social scientists will not be interested in courts if judicial decisions have no impact on governance in the political system: the development of the constitution and regulatory regimes, the making of public policy, the securing of property rights and orderly markets, the balance and separation of powers among organs of government, competition among political elites, and so on. Though structured by theory, case studies of the judicialization of dispute resolution and politics tend to be highly descriptive Section 5. Nonetheless, three general conditions are necessary for judicialization to proceed. First, a judge must have a case load. If actors, private and public, conspire not to activate review, judges will accrete no influence over the polity. Second, once activated, judges must resolve these disputes and give defensible reasons for their decisions. If they do, one output of judging will be the production of a case law, a formal record of how the law has been interpreted and applied. Third, those who are governed by the law must accept that legal meanings are (at least partly) constructed through judicial interpretation and lawmaking, and use or refer to relevant case law in their future decision-making. Courts normally do not activate themselves (they rely on actors who expend resources to litigate), and they normally cannot directly control how their decisions are implemented, except through a subsequent round of litigation. In

<sup>4</sup> *Government*, through the Nation-State, is just one species (public and hierarchical) of *governance*.



consequence, judicialization proceeds through complex “dialogues” between courts and litigants, and between courts and other organs of governance. Judicialization is therefore a variable – it varies across systems, and across time and policy domain within any given system – partly as a function of how, and to what extent, these conditions are fulfilled in context.

In addition to the necessary conditions just listed, the relationship between courts and the greater political environment tends to be heavily conditioned by another variable: the rules regulating reversal of judicial decisions. In a classic system of parliamentary sovereignty, the legislature can overturn unwanted judicial decisions by a simple majority vote of parliament. Meaningful dialogue exists, but the legislature will usually have the “last word.” In other systems, some types of decisions, such as constitutional rulings taken by a constitutional court, can only be overturned with great difficulty, or not at all. In the EU, the constitutionalization of the Treaty of Rome was able to proceed, in part, because the decision-rule in place for treaty-revision – the unanimous vote of the Member States – effectively insulates the Court’s constitutional lawmaking from reversal. In such contexts, dialogue exists, but it is the ECJ that typically has the “last word,” not the Member States.

### 3 The institutional foundations of judicial authority in the EU

In this section, I discuss the institutional determinants of judicial power in the EU, from the standpoint of contemporary delegation – or “Principal–Agent” – theory. This bias is justified for three reasons. First, judicial power is a paradigmatic type of delegated authority, to which the Principal–Agent construct, with some reservations to be noted, neatly applies. Second, most of the sophisticated empirical research on the ECJ, and on judicial politics within the EU, makes use of some version of the framework. Simple variants of delegation theory began to appear in EU studies only in the 1990s (with Garrett and Weingast 1993; Pollack 1997, 1998; Stone Sweet and Caporaso 1998), Pollack’s efforts (focusing more on the Commission than the Court) being the most sophisticated. Today, no other framework is used more widely by social scientists engaged in research on the ECJ. I therefore assume familiarity with the basic concepts.<sup>5</sup> Third, through examining the institutional bases of judicial power through the lenses of delegation theory, we can focus analytical attention on variables that underpin the theory of judicialization (discussed in Section 2.3), and casts light on the various ways in which scholars have specified and tested rival theories of integration and judicial politics in the EU.

Although the Principal–Agent framework provides appropriate, off-the-shelf concepts for conceptualizing certain functional logics of delegation to courts and other organs of government, it does not offer, in itself, a fully-specified causal theory.<sup>6</sup> Indeed, the framework has been used in conjunction with what are otherwise rival theories, including versions of “Intergovernmentalism” (Garrett 1992; Moravcsik 1998) and “modified Neo-functionalism” (Sandholtz and Stone Sweet 1998). Other leading scholars who disagree on many fundamentals have profitably used the framework to make diverse points about the nature of supranational authority in the EU, including Alter (2008); Garrett, Kelemen, and Schulz (1998); Kenney (2000); Majone (2005); Mattli and Slaughter (1998a); Pierson (1998); Pollack (2003); Tallberg (2002a); Tridimas and Tridimas (2004). As we will see Section 4.2 some of these disagreements have been subjected to empirical tests.

#### 3.1 Logics of delegation

By definition, *Principals* are those actors who create *Agents*, through a formal act in which the former confers upon the latter some authority to govern, that is, to take authoritative, legally-binding, decisions. The Agent governs to the extent that this authority is exercised in ways that impact upon the distribution of values and resources in the relevant domain of the Agent’s competence. By assumption, the Principals are initially in control, in the strict sense that they have unconstrained discretion to constitute (or not to constitute) the Agent. Since the Principals are willing to pay the costs of delegation – which include expenditures of resources to design a new institution, and to monitor its activities – it is assumed that the Principals expect the benefits of delegation to outweigh costs, over time. Put simply, delegation takes place in so far as it is functional for (i.e., “in the interest of”) Principals. In the EU, the Member States are Principals in the sense that they designed the system at various *ex ante* moments; they are also Principals in an ongoing sense, since they have the capacity to constitute themselves as a collective body for the purposes of revising the treaty law that constitutes the regime.

The most common rationales for delegation are also functional (Thatcher and Stone Sweet 2002). Among other reasons, Principals choose to constitute Agents in order to help them: (1) resolve commitment problems: as when the Agent is expected to work to enhance the credibility

<sup>5</sup> For a critical introduction to delegation theory, as it relates to governance in Europe, see the special issue of *West European Politics* devoted to the topic (Thatcher and Stone Sweet 2003).

<sup>6</sup> To build a testable theory that uses the Principal–Agent construct, scholars typically add materials (concepts, assumptions, and causal mechanisms, for example) derived from other theories of politics.

of promises made either between Principals, or between Principals and their constituents, given underlying collective action problems; (2) overcome information asymmetries in technical areas of governance: wherein the Agent is expected to possess, develop, and employ expertise in the resolution of disputes and the formation of policy in a given domain of governance; (3) enhance the efficiency of rule making: as when Principals expect the Agent to adapt law to situations (e.g., to complete incomplete contracts), while maintaining the authority to update policy in light of the Agent's efforts; (4) avoid taking blame for unpopular policies: as when the Principals command their Agent to maximize specific policy goals that they know may sometimes be unpopular with important societal actors and groups. It should be obvious how these (often overlapping) logics apply to delegation in the EU, especially to the Commission and the Court (see Majone 2005; Pollack 2003; Tallberg 2000, 2002a).

Most EU scholarship in this vein assumes that the Member States established the ECJ in order to help them overcome the various collective action problems associated with market and political integration – or the building of a federal polity. Mattli (1999) and Shapiro (1999, 2006) argued that federal projects do not succeed in the absence of an effective court, operating at the federal level. They further showed that a court that enforces the commitments made by the States will also tend to enhance the autonomy of the federal (or supranational) level of governance, as well as its own political authority over policy at all levels (see also Goldstein 2001; Halberstam 2008; Kelemen 2003, 2004; Majone 2005; Nicolaidis and Shaffer 2005). Others have teased out the logics of specific grants of power to the ECJ, focusing on the Court's capacity to enhance the credibility of Treaty commitments, or to promote the efficiency of policymaking, under competences terms laid down by Articles 258, 259, 263, and 267 TFEU.<sup>7</sup>

### 3.1.1 Jurisdiction

Under Article 258 TFEU (ex-Article 226 TEC),<sup>8</sup> the Commission may initiate “infringement proceedings” – also called “enforcement actions” – against a Member State for non-compliance with EC law; rounds of negotiation with the government then ensue; if these fail, the Commission may refer the matter to the Court for decision. The Commission is under no obligation to bring proceedings; its discretion under Article 258 TFEU is absolute. The Treaty of European Union added a new provision (to what is now Article 260 TFEU<sup>9</sup>) enabling the ECJ to fine Member States for failure to comply with an enforcement ruling. Since 1961, some 3,000 infringement proceedings have been registered by the Court; over the last decade, the Commission filed between 150 and 200

<sup>7</sup> With the entry into force of the Lisbon Treaty, the EU is now governed by two basic laws. The first is the Treaty on the Functioning of the European Union [TFEU], which is the new name for a reorganized and consolidated Treaty of Rome. The second is the Treaty on European Union [TEU] which, compared to the TFEU, is relatively more concerned with institutional architecture and general principles of EU governance. The TFEU changes the numbering system of provisions, even when an Article has not been substantively changed. Throughout this *Living Review*, I use the new numbering system.

<sup>8</sup> Article 258 TFEU (ex-Article 226 EC): “If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.”

<sup>9</sup> Article 260 TFEU (ex-Article 228 TEC):

“1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment, it may impose a lump sum or penalty payment on it. . . .”

such actions each year. The classic scholarly paper on the Article 258 system is Snyder (1993); superb updates are Tallberg (2002b) and Harlow and Rawlings (2006). Until recently, social scientists had not produced much important or systematic research focusing on the politics and impact of Court's Article 258 activity. Important contributions by Tallberg (2002b) and Börzel, Hoffmann, and Panke (Börzel 2003; Börzel, Hofmann, Panke, and Sprungk 2011; Panke 2007, 2009), have partly filled the void (see Section 6.2).

Under Article 263 TFEU (ex-Article 230 TEC),<sup>10</sup> the Court presides over “annulment actions,” litigation seeking to invalidate acts of the EU's governing bodies. Annulment actions come in different forms, implicating two rather different functions of the Court. First, any Member State, the Parliament, the Council of Ministers, and the Commission may bring suits against a lawmaking body for having legislated in ways that violate the Treaty. The most important class of cases coming under this heading are known as “legal basis” disputes, in which the Court – acting, in effect, as a constitutional jurisdiction – determines which procedures must be used to adopt a particular piece of legislation. Article 263 legal basis disputes have been the subject of systematic, high-quality research (Jupille 2004; McCown 2003). Second, the ECJ and the Court of First Instance (founded in 1989, see Van der Woude 1993) act as administrative courts, reviewing the lawfulness of acts taken by the EU's institutions at the behest of individuals and companies. Lawyers (including Craig 2006; Schwarze 2006) and social scientists (especially Shapiro 2002) have charted the steady development of EU administrative law, including the effects of Article 263 actions on the Commission's various rulemaking activities. While this scholarship deserves to be widely read by students of delegated governance, this aspect of Article 263 activity is likely to remain of limited interest to most social scientists, so long as the ECJ maintains the restrictive standing rules it established in the *Plaumann* case (ECJ 1963), which limits “public interest” litigation. Nonetheless, the EU's administrative jurisdiction is severely overloaded. In recent years the EU courts have received more than 500 applications for annulment annually, and the backlog stood at over 1,200 in 2008.

Under Article 267 TFEU (ex-Article 234),<sup>11</sup> national judges send questions – in the form of a *preliminary reference* – to the ECJ in order to obtain a formal interpretation of European law (of the Treaty, secondary legislation, and so on) when that law is material to the resolution of a case at national bar. The ECJ responds in the form of a judgment – called a *preliminary ruling* – which the referring judge is expected to use to resolve the case. The provision was designed to promote the

<sup>10</sup> Article 263 TFEU (ex-Article 230 TEC): “The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. . . .”

<sup>11</sup> Article 267 TFEU (ex-Article 234): The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

consistent application of Community law within national legal orders. With constitutionalization, Article 267 became a kind of central nervous system for the regime, helping to organizing legal, economic, and political integration (Burley and Mattli 1993; Stone Sweet 2004), as well as a series of complex “dialogues” between the ECJ and national courts (Alter 2001; Conant 2002; Kumm 1999, 2005; Nyikos 2003, 2006; Slaughter, Stone Sweet, and Weiler 1998; Weiler 1994). The social science on the Court’s impact through Article 267 is more intensive and systematic than the social science on Articles 258 and 263. The preliminary reference procedure, too, is overloaded. Since 1961, national judges have sent nearly 6,000 preliminary references; in recent years, the Court has received more than 200 references per year, and the average delay between reference and ruling is 18 months.

Finally, under Article 259 TFEU (ex Article 227 TEC),<sup>12</sup> Member States can sue one another for “an alleged infringement of an obligation under the Treaties.” To my knowledge, litigation under this heading has resulted in only three rulings<sup>13</sup> and no scholarship of note.

### 3.1.2 Databases

Stone Sweet and Brunell have compiled comprehensive data sets on litigating EU law under Articles 258, 263, and 267, making them freely available at the website of the Robert Schuman Centre, the European University Institute. The most recent versions, updated through at least 2006, were published on-line in 2008 (Stone Sweet and Brunell 2008), along with accompanying codebooks, statistical analyses, and notes on using the data in various types of research. These data are unavailable outside of the Court (and the Court will not usually provide access to the raw information). The website also provides an introduction to litigating EU law under Articles 258, 263, and 267, with commentary on relevant scholarship (Stone Sweet, Brunell, and Harlow 2008). Since 1996, scholars have used these data in a wide variety of research projects, including doctoral dissertations, books, and articles in economics, law, sociology, and political science.

Several new databases on litigating EC law are likely to come on-line in the next year, notice of which will be included in future versions of this *Living Review*.

## 3.2 Agency and trusteeship

Some scholars invoke the functional logics of delegation theory primarily to “explain” the ECJ’s salience: the Court is powerful because it helps the Member States overcome dilemmas of commitment and collective action (e.g., Garrett 1992; Garrett and Weingast 1993). Others have developed more finely-grained analytics, highlighting the complex details of the Court’s overall grant of authority, which varies across different dimensions of governance (e.g., Pollack 2003: ch. 3; Tallberg 2002a). Generally, the more sophisticated accounts emphasize certain crucial particularities of the Court-as-Agent, and of the States-as-Principals.

The ECJ-as-Agent is well-positioned to control the activities of an extraordinarily wide range of actors, public and private, under EU law. The Principals’ grants of authority to the Court are explicit, as is the case of Articles 258, 263, and 267; and they are also implicit, as when the Principals only imply the discretionary powers that the Court needs to enforce “incomplete”

<sup>12</sup> Article 259 (ex Article 227 TEC): “A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party’s case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.”

<sup>13</sup> *France v. UK*, ECJ 141/78 [1979] ECR 2923; *Belgium v. Spain*, ECJ C-388/95 [2000] ECR I-3123; *Spain v. UK*, ECJ C-145/04 [2006] ECR I-7917.

norms. In this view, the Treaties, and much secondary legislation, are “incomplete contracts” that the Court helps to construct, through interpretation and application, as conditions change (see Farrell and Héritier 2007, Stone Sweet 2004: 24–31). The Member States, or the EU’s legislative organs, can try to limit these implicit grants of discretion, but only by paying the costs of adopting more detailed and precise law.

For most purposes likely to be of interest to readers of this article, the Court is the authoritative interpreter of EU law, not the Member States. The Member States have established the Court not only to provide judicial supervision of the activities of other Agents, such as the Commission, but also to control their own activities under EU law. Put differently, the Principals have engaged the Agent to help them govern themselves, in the face of acute commitment problems associated with market and political integration (Majone 2005; Pollack 2003; Tallberg 2002a). The Principals are not a unified entity; rather, they are represented by a multiple of Governments who will typically exhibit divergent interests on any important policy issue on which the Court takes a position. As Alter (2001: ch. 5) emphasizes, political officials tend to have shorter “time horizons” than do judges, being far more responsive to electoral pressures and public opinion. Further, governments have no means of blocking enforcement actions or preliminary references, or the Court’s ruling. Instead, the Member States have locked themselves into a system of judicial review whose dynamics they cannot easily control, given the decision-rule governing treaty revision (unanimity).

Not surprisingly, some scholars (e.g., Stone Sweet and Caporaso 1998; Majone 2001) began to question the applicability of the standard Principal–Agent framework to judicial politics in the EU, in particular, where EU organs possess authority to monitor Member State compliance with EU law and to punish them for non-compliance. Majone, following Moe (1990), proposed that a model of “Trusteeship” replace that of generic “Agency” for situations in which the Member States have transferred, for all practical purposes, the relevant “political property rights” to the EU’s organs. Under this view, the Commission is a Trustee under Article 258, for example, since the Treaty confers upon it full discretion to bring non-compliance claims against the Member States (which cannot block them from going to the Court). In my view, as applied to the ECJ, the concept of Trusteeship is appropriate in so far as three criteria are met: (a) the Court possesses the authority to review the legality of, and to annul, acts taken by the EU’s organs of governance and by the Member States in domains governed by EU law; (b) the Court’s jurisdiction, with regard to the Member States, is compulsory; and (c) it is difficult, or impossible as a practical matter, for the Member States-as-Principals to “punish” the Court, by restricting its jurisdiction, or reversing its rulings. In this account, the Member States, as High Contracting Parties, made the ECJ a Trustee of the values and principles that inhere in the treaties. Drawing out the metaphor further, when the Court exercises review authority, it discharges a “fiduciary” responsibility in the name of a fictitious entity designated by Article 1 TEU: “the Peoples of Europe.”

Pollack (2003) and Tallberg (2002a) have not embraced the concept of Trusteeship, in effect, treating the Court as a type of Super-Agent. Nonetheless, there appears to be consensus on the key point, namely, that there is a qualitative difference between: (a) an Agent designed to govern third parties in the name of the Principals, and (b) an Agent designed to govern both third parties and the Principals themselves; and (c) an Agent whose rulemaking can easily be reversed by the Principals, and (d) an Agent whose decisions are well insulated from reversal. A Trusteeship situation combines (b) and (d), and can thus be characterized as one of structural judicial supremacy. In a recent paper on international courts as Trustees, including the ECJ, Alter (2008) defines matters differently. An Agent qualifies as a Trustee if it meets three criteria: members are selected for their professional expertise, are given power to take decisions “in light of [their] best judgment or . . . professional criteria,” and they take decisions “on behalf of a beneficiary.” This formulation appears to be incapable of distinguishing most Agents from Trustees, at least under standard Principal–Agent theory. A basic rationale of delegation, emphasized by all delegation theorists, is that Principals establish Agents in order to harness the expertise necessary to govern

in technical domains, including law, and these domains always include third-party beneficiaries and subjects.

### 3.3 The Zone of Discretion

The points made in this section can be formalized in terms of a theoretical zone of discretion – the strategic environment – in which a court operates (for an application to the ECJ, see Stone Sweet 2004: 7–9). This zone is determined by (a) the sum of powers explicitly delegated to a court, and possessed as a result of a court’s own accreted rulemaking, minus (b) the sum of control instruments available for use by non-judicial authorities to shape (constrain) or annul (reverse) outcomes that emerge as the result of the court’s performance of its delegated tasks. The ECJ operates in an unusually permissive strategic environment: in some respects, its zone of discretion is close to unlimited. Mapping a court’s zone of discretion does not tell us what judges will actually do with their powers. What is clear is that the capacity of the Principal(s) to control judicial outcomes is inversely proportional to the size of a court’s zone of discretion. Put differently, it is more likely for the steady judicialization of policymaking to proceed under conditions of Trusteeship, other things equal, than other conditions of simple Agency.

A Trustee court, by definition, possesses the capacity to expand or contract its own zone of discretion, through interpreting the law, and the scope of its own powers. Consider the constitutionalization of the treaty system. The Treaty of Rome originally contained no supremacy clause, and the Member States did not provide for the direct effect of Treaty provisions or directives. The Court, in collaboration with national judges under Article 267, secured direct effect and supremacy; in effect, it rewrote the Treaty. As a result, Article 267 developed into a decentralized mechanism for enforcing EC law; it connected individuals and firms with a stake in European law to the legal system, through national judges; and it generated a steady stream of cases alleging Member State non-compliance which the ECJ used to construct a sophisticated jurisprudence. Moreover, in several important areas, the Court’s case law required, or inspired, the Member States to produce new law (see Section 5). The constitutionalization of the treaty system, which resulted in the deep, structural “transformation” that Weiler (1991) described so well, is itself a form of judicialization. But constitutionalization also laid the foundations for further judicialization, not least, in that it upgraded the legal system’s authority vis-à-vis all other organs of governance. The Member States did not re-contract their relationship with the Court, although they could have done so. Instead they adapted to the constitutionalization, if at times only grudgingly, ratifying the transformation over time.

In summary, the Court, as Trustee, possesses powers to alter the “rules of the game” under which all other organs of governance, including the ECJ and the Member States, are interacting. These powers inhere in any situation of structural judicial supremacy. In the EU, the Court has done so in ways that have changed the terms of its relationship with its Principals, expanding its own zone of discretion. And, in doing so, it has enhanced its own capacities to govern in a wide range of policy domains, which is the topic of the rest of this Living Review.

## 4 The legal system and integration

Most research on EU governance, including that which gives pride of place to law and courts, focuses on the politics of lawmaking, compliance and enforcement in a single policy domain, either episodically or over time (Section 5 and 6). In Section 4.1, I review scholarship that purports to provide a holistic, or macro-institutional, theory of the evolution of the EU's legal system and its impact on European integration, broadly conceived. Although this literature is relatively small, it includes the most cited and influential research produced in the field, some of which ought to be considered obligatory reading for any social scientist working on the EU. Section 4.2 evaluates subsequent efforts to test, or build upon, this work.

### 4.1 Theory, data, methods

“The Transformation of Europe” by Weiler (1991; see also 1981; 1994) is arguably the most influential ever published in the field. It standardized the constitutionalization narrative, providing a subtle presentation of the Court's jurisprudence during the “foundational” period; and it showed how the ECJ's (often conflictual) interactions with national judges subsequently served to allocate authority between the supranational and national legal orders, while enhancing judicial power on both levels (Section 6). Weiler also described, and reflected normatively upon, the steady expansion of the scope of the Community's jurisdiction.<sup>14</sup> For present purposes, the paper's most important contribution was a theory of how constitutionalization had affected the EU's legislative system.<sup>15</sup> The EU, he demonstrated, had become more like a federal state than an international organization, yet the Member States had resisted the move to supranationalism within legislative processes (majority voting in the Council of Ministers to enact EU measures to complete the common market). Weiler drew from this paradox the following hypothesis: “The ‘harder’ the law in terms of its binding effect both on and within States, the less willing States are to give up their prerogative to control the emergence of such law. . . . When the international law is ‘real,’ when it is ‘hard’ in the sense of being binding not only on but also in States, and when there are effective remedies to enforce it, [State control of] decisionmaking suddenly becomes important, indeed crucial” (Weiler 1991: 2426). The Governments of the Member States could accept the legal transformation of the regime, Weiler suggested, only because each retained a veto over important new policy.

If the political viability of constitutionalization rested on a specific equilibrium between a supranational legal system and an intergovernmental legislative system, then the Single Act (signed in February 1986) had “shattered” that equilibrium. Henceforth, every Member State would at times be required to enforce EU statutes that its Government had opposed in the Council of Ministers. A major crossroads had been reached, but Weiler was unsure as to the direction the system would take. In the post-Single Act EU, the constitutional settlement might unravel or, he speculated, the Member States might leave it in place, having been “socialized” by the system enough to value its benefits. Put somewhat differently, to the extent that the legitimacy of constitutionalization rests on a specific equilibrium between a *supranational* legal system and an *intergovernmental* legislative system, then the influence of the legal system on integration processes might be highly constrained, rather than expansive, after 1987.

Garrett's (1992) “International Cooperation and Institutional Choice: The European Community's Internal Market,” rested on different premises. Although he had little use for jurisprudential niceties, Garrett (1992: 556) noted that the EU's legal system was more developed, and “far more constraining,” than the judiciary of any other international organization. He also understood that the courts had been important to market integration in the 1970s; and he suggested

<sup>14</sup> What Pollack (1994) called the “creeping competences” phenomenon.

<sup>15</sup> Although he employed Hirschman's (1970) “exit-voice-loyalty” frame as a heuristic device, Weiler's own theoretical offerings were a product of careful doctrinal analysis and a sophisticated understanding of EU politics.



that the legal system would be a crucial component of the completion of the internal market after the Single Act. But why, Garrett asked, had the Member States permitted the courts to accrue so much power? His response was two-fold. First, the courts comprise commitment devices that European States need to help them overcome the myriad incomplete contracting problems that inhere in building a common market (a version of arguments discussed in Section 3). Second, the ECJ's rulings generally "accord with the interests of powerful States," especially those of "Germany and France" (Garrett 1992: 537; Garrett 1992: 556–69). If it were to be otherwise, these States would punish the Court, and remake the legal system.

Garrett's paper is of interest for two reasons. First, it is an example of theorizing about law and courts from the perspective of "international political economy,"<sup>16</sup> which emerged in the 1980s (with Krasner 1983 and Keohane 1984). Like Moravcsik (1991, 1993), Garrett offers an account of integration that emphasizes the importance of State power, interests, and intergovernmental bargaining, while denying the capacity of the EU's organs to generate outcomes that might conflict with, or induce change in, the preferences of powerful States. Second, the paper generates a testable hypothesis – the Court's case law codifies the preferences of the most powerful Member States – though the author himself made no effort to gather or analyze relevant data. In a follow-up piece, Garrett (1995: 178–79) proposed that the Court pursues two (sometimes contradictory) goals: (a) to curry the favor of powerful states, and (b) to ensure Member State compliance with its decisions. The ECJ, he argued, will sometimes censure "powerful Governments," but only in "unimportant sectors" of the economy, while "accepting protectionist behavior" in more important sectors, since Governments are unlikely to comply with adverse decisions. No predictions are derivable from the theory when it comes to "less powerful Governments," since the Court will at times be concerned with non-compliance (the ECJ defers to the Member State), while other times helping "Northern" governments achieve "trade liberalization" (the ECJ attacks protectionism in small States).

Standing in stark contrast to Garrett is the paper by Burley (Slaughter) and Mattli (1993; see also 1995; 1998a; 1998b), "Europe before the Court: A Political Theory of Legal Integration." The paper's originality lies in how the authors translated the constitutionalization narrative given by Mancini (1991); Stein (1981), and Weiler (1991) into the Neo-functionalism of Haas and his followers, thus melding the concerns of lawyers and social scientists. Most important, they demonstrated that the internal dynamics of EU *law* – of litigation, jurisprudence (precedent-based case law), and doctrinal discourse – were also at the core of the *politics* of European integration, right from the beginning. Burley and Mattli's theory highlighted the various ways in which the courts were responsive to the interests of private actors – such as large producers, traders, and other transnational actors – rather than those of any Member State. The authors also stressed that the legal system had developed as specific feedback loops were constituted, a process that Neo-functionalists call "spillover." Constitutionalization enhanced the effectiveness of EU law, which attracted litigation brought by private actors; more litigation meant more preliminary references which, in turn, generated the context for a nuanced, intra-judicial dialogue between the ECJ and national judges on how best to accommodate, and empower, one another; and, as the domain of EC law, and of the ECJ's jurisprudence expanded, this dialogue intensified, socializing more into the system, encouraging more use. The dynamics embody those of the "virtuous circle" which is at the heart of judicialization. In contrast to Weiler's account, there is no theorized equilibrium: the legal system helps to organize integration which, in turn, shapes how the legal system evolves. Although the authors did not stress the point, the argument from trusteeship – the fact that the ECJ's rulings are largely insulated from reversal bolsters their argument – whereas it undermines Garrett's claims.

Methodologically, Weiler and Burley–Mattli combine doctrinal analysis and theoretically-in-

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<sup>16</sup> In American Political Science, International Political Economy is a sub-field of International Relations; scholarship typically blends insights from literatures on international regimes, regulatory cooperation, and transaction cost economics.

formed descriptions of judicial politics in the EU. Their “data” is, in effect, the Court’s jurisprudence and the best available secondary literature on adjudicating EU law. Garrett derived causal claims from his preferred body of theory, and then illustrated his assertions with anecdotes alleged to fit the theory. None of these papers sought to test their claims in any social scientific sense. In EU studies, Stone Sweet and Brunell (1998a) and Stone Sweet and Caporaso (1998) were the first papers to test hypotheses derived from any theory of integration against comprehensive data collected over the life of the Community. Partly for this reason, the paper has generated a sustained quantitative research project (Section 3.2).

Stone Sweet turned to the EU in order to test a theory of judicialization and governance. The theory models integration as an expansive, self-sustaining process driven by mechanisms of institutionalization (forms of spillover) that also feature prominently in the work of North (1990); March and Olsen (1989), and Haas (especially 1961); it is broadly compatible with Burley–Mattli. Data were collected on the variables identified by the theory, including transnational activity (as measured by intra-EU trade), dispute resolution (Article 267 references), and lawmaking (EU legislative activity). In “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community,” Stone Sweet and Brunell (1998a) blended quantitative and qualitative strategies of testing, but it is the quantitative findings that are relevant here. Using econometric and other statistical methods, the authors demonstrated that, with constitutionalization, transnational economic activity, and the development of the legal system had become causally connected to one another. As important, to the extent that the legal system actually removed national barriers to exchange within the EU (a process known as *negative integration*), it put pressure on Governments to adopt EU market regulations (known as *positive integration*). With the completion of the internal market, the relationship between trade and litigation weakened, whereas the influence of the EU’s developing regulatory structure on litigating EU law was increasing. Although they explicitly invoked elements of Haas’ Neo-functionalism, the authors re-specified “spillover,” not least as the outcome of feedback effects, making the mechanisms more tractable for qualitative research.

In “Constructing Markets and Politics: An Institutionalist Account of European Integration,” Fligstein and Stone Sweet (2002) pushed this project further, developing a macro-sociological, “field-theoretic” theory of integration, blending materials from economic sociology, political economy, and the theory of judicialization. The paper builds on Stone Sweet and Brunell (1998a), in that it models European integration as a series of feedback loops, and makes use of comprehensive data providing relatively direct measures of processes associated with integration. The econometric analysis demonstrated that the activities of market actors, lobbyists, legislators, litigators, and judges had become connected to one another in specific ways (but not all ways). These linkages constituted a self-reinforcing system that has given the EU its fundamentally expansionary character. The analysis also showed that two parameter shifts – whereby important qualitative events generated quantitatively significant transformations in the relationships among variables – had occurred. The first shift began roughly around 1970, the second in the mid-1980s. The EU’s evolving legal system was implicated in both transitions, first, through constitutionalization, and, then, through supervising Member State compliance with EU law, especially with regard to rules governing the common market.

The culmination of this project is the book, *The Judicial Construction of Europe* (Stone Sweet 2004). The book presents qualitative analysis of the Court’s impact on EU governance, as a means of cross-checking quantitative results, to further refine and test hypotheses, and to explore processes and outcomes that can only be understood through detailed case studies, or “process tracing” (see Bennett 2008: ch. 30).

Finally, Kelemen (2006; 2010) has recently completed a broad-gauge project assessing the role of law and courts within the multi-level system of governance that comprises the EU. In his recent book, *Euro-legalism*, Kelemen (2010) explains the emergence of a self-sustaining system

of “adversarial legalism” which, he argues, is today a dominant “mode of governance” within the EU. The seeds of this development were sown with constitutionalization, which generated a rights-based, court-centric system for monitoring and enforcing Member State compliance with EU law. But, Kelemen argues, the system did not fully emerge until after the completion of the Single Market. Simplifying a complex argument, adversarial legalism tends to develop and thrive in multi-level systems of fragmented authority. The EU governs primarily through law, procedures for further lawmaking, and the judicial monitoring of compliance with this law, which results in the massive delegation of power to lawyers and judges, and thus in legalistic forms of governance (Héritier 2001; Shapiro 2002; Stone Sweet, Fligstein, and Sandholtz 2001a). With the Single Act, Kelemen shows, the EU steadily “deregulated” at the national level through a process of “juridical reregulation” at the EU level. “Time and time again,” Kelemen summarizes (2010: ch. 7), “across a wide range of policy areas, EU lawmakers enact[ed] detailed, transparent, judicially enforceable rules – often framed as ‘rights’ – and they back[ed] these with a combination of public enforcement and enhanced opportunities for private enforcement litigation by individuals, interest groups and firms.” In consequence, EU lawmaking (i.e., market regulation) and litigating began to develop symbiotically, that is, their evolution became causally connected, in powerful feedback loops. The claim is impressively supported with quantitative analyses of pertinent data, as well as with qualitative cases studies of the judicialization of three policy domains: securities regulation, anti-trust, and the rights of disabled persons. The book’s thesis is of enormous potential importance. If Kelemen is right, then the systematic judicialization of EU governance is inevitable.

## 4.2 Testing

Weiler’s (1991) theory of supranational-intergovernmental equilibrium has not been tested in any rigorous way. It is implicitly rejected by Burley and Mattli (1993) and others (Stone Sweet 2004; Cichowski 2004, 2007) who view integration as a self-sustaining process that has steadily enhanced judicial authority and supranationalism (as a mode of governance) *vis-à-vis* the authority of the Member States and intergovernmentalism (as a mode of governance).<sup>17</sup> In any case, by the end of 1992, the legislative work necessary to complete the internal market had largely been concluded. However well-founded were Weiler’s fears in theory, the juridical foundations of supranationalism and federalism constructed by the courts did not, in fact, disintegrate. Rather, intergovernmentalism, as a mode of legislative decision-making, steadily declined, while supranational authority (e.g., majority voting and the powers of the Parliament) was upgraded. The Member States did not roll-back the legal system, nor did the ECJ abandon its constitutional commitments and stage a retreat. Instead, as Kelemen (2006; 2010) has shown, with the completion of the internal market, the EU became even more rule-oriented, legalistic, procedurally complex, and adversarial (in an American sense), all factors that bolstered the centrality of the courts. The EU’s legislative organs themselves chose to reinforce these features, notably, by delegating to the courts the charge of monitoring and enforcing EU market regulations, as they emerged.

Some scholars have also taken from Weiler (1991) a more general proposition: the Court becomes the leading policymaking organ when the EU’s legislative processes are paralyzed.<sup>18</sup> The claim can be assessed by a simple method: the analyst searches for periods of legislative paralysis, and then checks to see if the Court, in fact, stepped in to fill the void. In addition to invalidating any version of the proposition that would allow for no exceptions, the method can help us to identify necessary conditions for the proposition to hold, as well as to refine the theory with reference to how important variables interact. Alter, an adept at using this method in her research

<sup>17</sup> It is important to distinguish between intergovernmentalism as a mode of governance (which one finds in all federal polities), and Intergovernmentalism as theory of, or framework for explaining, integration.

<sup>18</sup> I am skeptical that this general claim can be derived from Weiler, given that his causal propositions rest on a specific institutional context, at the least, unanimity decisions rules for adopting new legislation (the *de facto* outcome of the Luxembourg Compromise), and the operational effectiveness of direct effect and supremacy.

on courts, has subjected the proposition to just such an evaluation (Alter and Steinberg 2007; Alter 2009: ch. 3). Citing Weiler (1981), Alter states (2009: 5): “A common view is that the ECJ is most expansionist when the political process is blocked.” She then assesses the Court’s impact on the functioning of the European Coal and Steel Community (ECSC) in the 1950s and 1960s. Although the ECJ processed some important ECSC cases, she argues that it did little more than control the legality of the High Authority’s activities in relatively conventional ways. The Court went no further, and the polity did not take off as the EC had, because none of the key actors involved – Governments, firms, unions – desired or seriously pursued an integrated market in the area. Alter’s analysis conflicts with that of Pennera (1995) and others who find in the case law of the 1950s the foundations for the Court’s constitutional jurisprudence of the 1960s and beyond. Although Alter does not address these alternative views, her broader point echoes a central lesson of research on judicialization. Courts do not activate themselves; rather, judges respond to litigation, which demands resources and organization. Even a Court that engages in creative, “expansionist” lawmaking cannot, in itself, judicialize policymaking. The important non-judicial policy actors must learn to accept the authority of the Court – a complex socialization *process* of dialogue and accommodation – and adapt their decision-making, at least in part, to the Court’s case law. The point will be taken up again below (Section 5 and Section 6).

In 1993, Burley and Mattli were virtually the only scholars active in EU studies who explicitly referred to themselves as Neo-functionalists.<sup>19</sup> In the decade that followed, Neo-functionalism was updated and revived (Sandholtz and Stone Sweet 1998; Stone Sweet, Sandholtz, and Fligstein 2001b). This is not the place to assess “modified Neo-functionalism,” which is covered by other contributors to this *Living Reviews* series. Here, I will make only three points. First, the research demonstrated that law and courts were at the heart of European integration and supranational governance, as both were institutionalized over time. Second, the theory had certain affinities with Haas’ Neo-functionalism, at least at a relatively high level of abstraction. Third, the theory made predictions that were at odds with the Intergovernmentalism of Garrett (1992) and Moravcsik (1998), and it tested these predictions against data. The research built a case for the claim that intergovernmental bargaining was embedded in larger processes associated with integration, rather than strictly fixing limits to these processes. It also showed that the Commission and the Court routinely generated important policy outcomes – “unintended consequences” from the point of view of Intergovernmentalist theory – that conflicted with the clearly revealed preferences of powerful Member State Governments.

These larger theoretical issues connect to debates taking place under the rubric of delegation theory (Section 3). Simplifying, the Principal–Agent relationship between the Member States and Court has been modeled in opposing ways. A first type is broadly congruent with Intergovernmentalist integration theory: the ECJ is conceptualized as a relatively servile Agent of the most powerful Member States (Garrett 1992, 1995; Carrubba, Gabel, and Hankla 2008). The Court does so, primarily, out of fear of being punished and, sometimes, due to worries about non-compliance. A second type (Pollack 2003; Stone Sweet 2004; Tallberg 2002a; Jupille 2004), assumes that the Court, as a Trustee or Super-Agent, will be able to promote pro-integrative policies when enforcing the Treaty and interpreting secondary legislation. As Tallberg (2000: 848) puts it, the ECJ can easily “exploit diverging Member State positions for the purpose of implementing a [pro-integrative] agenda it knows governments cannot undo or punish,” given the zone of discretion in which the Court operates. This second type of model tends to support theories of integration (including, but not exclusive to, variants of Neo-functionalism) that expect the Court to generate policy outcomes that would not have been adopted by the Member States, given existing decision-rules.

The models make different predictions, which have been tested using a method first developed by Stein (1981), in his seminal paper on the constitutionalization of the Treaty of Rome. The analyst

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<sup>19</sup> The paper that re-launched research on European integration after its decline in the 1970s, Sandholtz and Zysman (1989), presented an updated version of Haas’ most important ideas.

examines the relationship between arguments made in *amicus* briefs submitted to the Court – called “observations” – and the disposition of its final ruling. Observations, which can be filed by Member State Governments and by the Commission, advise the ECJ on how it should decide the legal questions that comprise the case at hand; they therefore embody revealed preferences in a legalistic form. Stein examined all of the early foundational (or “constitutional”) cases, and found that *no* Member States filed an observation in support of any of these rulings, while each opposed what the Court would do in at least one of the rulings analyzed. Consider *Van Gend en Loos* (1963),<sup>20</sup> perhaps the most important ruling the Court has rendered. In that case, the briefing parties battled over the direct effect of a Treaty provision. Belgium, Germany, and the Netherlands (of six members at this time) argued that the Treaty was not directly effective, indeed, they had expressly chosen *not* to provide for direct effect when they made the Treaty. Prompted by the Dutch judge of reference, and urged on by the Commission, the Court found that the Treaty was directly effective,<sup>21</sup> implying the Treaty’s supremacy, and the plaintiff won. In subsequent cases, the Court developed its supremacy doctrine, and the doctrine of direct effect was extended to cover directives.<sup>22</sup> Stein’s main finding – that constitutionalization moved forward despite Member State opposition – applies to many important decisions the Court would render in the decades to come, a crucial fact that scholars such as Garrett (1992, 1995) and Carrubba *et al.* (2008) simply ignore.

Scholars have updated Stein’s method and applied it systematically to all cases decided in three different domains: the free movement of goods (Stone Sweet 2004: ch. 3; also Kilroy 1996); social provisions, including sex equality (Cichowski 2004, 2007; Stone Sweet 2004: ch. 4); and environmental protection (Cichowski 1998, 2007; Stone Sweet 2004: ch. 5). The free movement of goods research was designed to test Garrett’s (1992; 1995) theory, since he had focused his remarks exclusively on that domain. The evidence strongly refute Garrett’s claims: the larger States were litigated against – and lost – more often than smaller States, and Germany lost more consistently than virtually any other State. The underlying logic is basic political economy, and it is basic to Neo-functionalism: traders, litigants, the Commission, and the Court have a greater interest in opening up larger markets, relative to smaller ones, if they are to build a common market (see Stone Sweet 2004: 129–32). It was also found that the observations of Member States were largely ineffectual, while the Commission’s observations had a 90% success rate. Results are remarkably similar for outcomes of Article 267 litigation in the domains of social policy and environmental protection.<sup>23</sup>

Pressing further, Cichowski (2007: chs. 3, 4) examined the observations filed in all Article 267 cases that resulted in a preliminary ruling in the domains of social policy and environmental protection, for the period 1976–2003. Among other propositions, she tested whether the Court deferred more to Governments in cases of relatively high political and economic salience, compared to cases of lower salience (a hypothesis proposed by Garrett *et al.* 1998). Salience was operationalized as the number of Governments filing observations that urge the Court to uphold a national practice under EU law; the higher the number, the greater the salience. In sex equality and environmental protection cases, the data show, the ECJ did not defer more to Member States as salience increased and, often enough, the opposite was true. The findings “bring into question the assertion that the ECJ is more likely to withhold adverse rulings, the higher the domestic costs associated with such a ruling” (Cichowski 2007: 88). Nyikos (2003) also analyzed every preliminary ruling rendered in three legal domains: free movement of goods, free movement of workers, and sex discrimination. Among other important contributions (see Section 6.1), she found that, although Member States

<sup>20</sup> *Van Gend en Loos*, ECJ 26/62 [1963] ECR 1.

<sup>21</sup> Technically, the Court found that the specific provision being litigated, ex-Article 12 EEC, was directly effective. In later cases, the ruling was generalized and expanded.

<sup>22</sup> For a summary of this case law, see Stone Sweet (2004: 64–71)

<sup>23</sup> The Commission’s rate of success in Article 226 actions against Member States was found to be 90% for the free movement of goods area, 97% for the social policy domain, and 88% in the field of environmental protection, and the rate of success does not vary in statistically significant ways across Member States (Stone Sweet 2004).

were parties in 86% of the cases that generated preliminary references, their *amicus* observations were largely ineffectual in influencing the decision-making of either the ECJ or national judges.

Finally, Stone Sweet and Brunell (1998a) and Fligstein and Stone Sweet (2002) have spawned a number of on-going projects. Two economists, Pitarkis and Tridimas (2003) subjected one of the findings – the operation of the EC’s legal system stimulates intra-EC trade – to a further set of statistical tests, using updated measures. They concluded (365) that “the establishment of an EU-wide legal order and a system of dispute resolution with the ECJ at the top, leads to deeper economic integration expressed as a larger share of intra-EC trade in economic activity.”<sup>24</sup> Tridimas continues to develop and test a “political economy” theory of the legal system (Tridimas 2004; Tridimas and Tridimas 2004), one that has close affinities to Mattli (1999) and Stone Sweet (2004). Carrubba and Lacey (2005) have also subjected Stone Sweet and Brunell (1998a) to a series of tests, focusing on national variation in Article 267 references. Their analysis strongly supported the “argument that transnational actors are using the preliminary ruling process to expand transnational economic activity.” They also found that public opinion produced a “non-trivial” effect on Article 267 references. Last, lying beyond the scope of this article, Fligstein and Stone Sweet (2002) has become a source of quantitative measures of European integration (Beckfield 2006), and for theory on the structure of the “global polity” (Beckfield 2010).

### 4.3 Theoretical issues and controversies

In the 1990s, a literature emerged that sought both to account for the evolution of the EU’s legal system, as a whole, and for its relationship to EU governance and integration, over time. There would seem to be few such projects underway today, with the major exception being Kelemen’s (2010).

From the standpoint of integration theory, this literature has produced clear results. Most strikingly, “Intergovernmentalism,” as a body of causal propositions purporting to explain the impact of the Court on European integration and governance, has failed every serious empirical test (see also Section 5.2). I have yet to find a single exception.<sup>25</sup> Approaches possessing affinities with Neo-functionalism, as modified in the 1990s, have thrived. In my view, this result flows from a kind of meta-theoretical congruence. Haas (e.g., 1961), a pioneer of “institutionalist” analysis, combined materials from (what we would now call) “rational choice” and “sociological-constructivist” perspectives, which allowed him to identify certain generic dynamics of how new systems of governance institutionalize as rule systems. These dynamics turn out to be basic to all sophisticated accounts of how courts succeed in becoming important political actors.<sup>26</sup>

<sup>24</sup> Curiously, Pitarkis and Tridimas (2003) state that their analysis does not provide support for Neo-functional integration theory, although Haas (e.g., (1961) explicitly states that his theory is concerned with how new EC institutions will stimulate more cross-border exchange, thereby raising the costs of intergovernmental stalemate. In any case, the theoretical underpinnings of the generic proposition – that complex social exchange depends heavily on rules, property rights, and contract enforcement – is central to the approach of North (1990); Pitarkis and Tridimas (2003); Fligstein and Stone Sweet (2002), and others.

<sup>25</sup> Carrubba *et al.* (2008) claim that the decision-making of the European Court of Justice (ECJ) has been systematically constrained by the threat of override on the part of Member States, acting collectively, and the threat of non-compliance on the part of any single Member State government. They further purport to have found strong evidence in favor of Intergovernmentalist positions. In an analysis of the authors’ own data, undertaken in preparation of this *Living Review*, Stone Sweet and Brunell (2010) demonstrate that the evidence strongly refutes each of Carrubba, Gabel, and Hankla’s claims.

<sup>26</sup> I am not claiming that all important scholars in the field embrace a variant of Neo-functionalism. Alter (2009: ch. 1), for example, denies that she is a Neo-functionalist, claiming that the theory was falsified in the 1970s. Since she chooses not to engage the imposing literature that revived and applied the theory in the 1990s, it is difficult to evaluate her theoretical position. Alter also rejects the concept of spillover, preferring the phrase, “virtuous circle,” to describe what appear to be similar dynamics at the core of Neo-functional approaches, including Burley and Mattli (1993). The “virtuous circle” is exactly the phrase used to describe the overall judicialization dynamic (Stone Sweet 1999), and certain processes of spillover in the EU (Stone Sweet and Brunell 1998a). In any event, the formulation and testing of specific arguments relevant to European integration and EU governance is what should

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## 5 The judicialization of the policy process

This section evaluates scholarship that has contributed to our understanding of judicialized governance in the EU. All important research on judicialized governance, in any polity, addresses four basic questions. First, who activates the legal system, and for what purposes? Second, what interests or values are judges pursuing when they adjudicate disputes? Third, what law-making techniques do judges use to influence subsequent patterns of litigation, and the future decision-making of non-judicial actors in the policy process at the EU level? And, fourth, how do non-judicial officials (governments, legislators, administrators) respond to judicial lawmaking that imposes constraints on their decision-making? These questions can be reformulated as a series of variables (or sub-processes) that determine the judicialization process. These questions can also be reformulated as a series of variables (or sub-processes) that drive the overall process. As will be shown, judicialization is a type of spillover: it proceeds only to the extent that specific feedback loops – connecting judicial lawmaking to policy processes and back again – institutionalize as stable practices.

It is important to stress that there is no “best practice” method of charting the impact of law and courts on EU governance. Different scholars will prioritize some variables and processes more than others, but all successful studies of judicialization provide insight into how the overall process works. Although diverse methods are used, most of these can be characterized as variants of “process tracing” (George and Bennett 2005: ch. 10; Bennett 2008: ch. 30) dynamic case studies that are structured by explicit hypotheses. Some research is geared toward building or refining theory, while other projects are designed to test hypotheses, or adjudicate between rival theories. In my view, the finest scholarship supplements qualitative methods with quantitative analysis for testing purposes. Finally, all research on judicialization in the EU makes a place for legal materials and, in particular, the Court’s case law, as an important contingent, or mediating, variable that helps to generate outcomes. Nonetheless, one finds wide variance in how scholars conceptualize and make use of these legal materials. In Section 5.1, I discuss how some selected scholars have addressed the questions just listed, and how they understand the ways in which these variables and processes interact with one another to produce meaningful judicialization. Section 5.2 assesses this research from the point of view of integration theory, and hypothesis testing. Section 5.3 is devoted to issues deserving of further research.

### 5.1 Mechanisms and processes

Research on judicialization typically blends rational choice and sociological-constructivist approaches to institutional change. On the one hand, the analyst will stipulate what rationalists call “micro-foundations”: those interest-based, logics of action assumed to motivate the relevant actors. On the other hand, she will consider the extent to which legal norms and argumentation impact upon actors’ decision-making. Where there is judicialization, there will also be top-down, “macro-foundations” of behavior to be assessed. Ongoing judicialization connects agency, normative reasoning, argumentation, and socialization: non-judicial actors participate in the construction of judicial authority, but they are also affected by judicial authority, as it evolves, in complex and multi-dimensional ways. Most accounts of judicialization show (a) how self-interested behavior leads to normative innovation, through litigation and judicial lawmaking, but also (b) how changes in rule systems affect the strategies and interests of those who litigate and make policy (feedback).

We now turn to the first basic question: why do actors, public and private, litigate EU law? The analyst of a specific case has reason to focus on the actions of specific people. The tenacity of the labor lawyer, Elaine Vogel-Polsky, for example, is crucial to the process through which the ECJ

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matter, not the presumed rivalry between two or more “isms,” or labels.

recognized the direct effect of Article 157 TFEU (ex-Article 141 TEC), in *Defrenne II* (1976),<sup>27</sup> which proclaims “equal pay for equal work” between the sexes (Cichowski 2004; Mazey 1988). But the story does not stop there. The Court’s ruling generated a steady stream of cases which, as Cichowski (2007; see also Hoskyns 1996) shows, catalyzed the development of a European social movement for women’s rights. Once institutionalized as a significant NGO presence in Brussels, the movement helped workers and trade unions, at the national level, generate new litigation (spillover). Feedback loops such as these sustain the judicialization process.

There are three basic motivations behind litigation that matters most to the evolution of EU law. First, in the negative integration area, transnational actors litigate in the hopes of removing national barriers to their activities. As discussed, transnational commercial activity, litigating free movement of goods provisions in the national courts, the Court’s jurisprudence, and the evolution of the EU’s market rules became connected to one another, through well-defined and understood feedback loops (Section 4.1). Second, individuals and groups not directly engaged in cross-border exchange (e.g., those seeking to enhance women’s rights) activate the courts in order to change national rules and practices in their favor, with reference to EU law. It is one of the basic driving forces of legal integration that those who lose in domestic politics have sought to Europeanize policy, to change national rules and practices in their favor, through court actions. Litigating EU law in national courts does not guarantee success. Indeed, the best empirical research has consistently shown that how state structures and social interests are organized, and the resources potential litigants command, can be crucial to outcomes (Alter and Vargas 2000; Cichowski 2007; Conant 2002; Panke 2009; Slepcevic 2009). Third, EU organs seeking to promote integration, like the Commission and the Parliament may turn to the ECJ (under Article 263) to undermine Member State claims of national regulatory autonomy, or the Council of Minister’s control of the policy process. And the reverse is true, as when a Member State or the Council of Ministers brings a suit to preserve national prerogatives. The analyst then examines a specific line of cases to see how the ECJ responded to these efforts, with what impact on EU policymaking and subsequent litigation activity (Jupille 2004; McCown 2003, discussed in Section 5.2). Kelemen’s (2006; 2010) project comprises the most important research in this area (see Section 4).

A second set of issues concerns the motivations of the courts. Here I will focus only on the ECJ (Section 6 discusses the national courts). The analyst states, as a general expectation, what values or corporate interests the ECJ is expected to pursue. There is, today, broad consensus on the following three assumptions about the Court. First, the ECJ will use its powers to promote integration (values that inhere in the treaties). Second, the Court has an interest in maximizing the coherence of its case law, not least, to build the political legitimacy for its lawmaking role. Third, the Court worries about the compliance of national judges, EU organs, and the Member States with its decisions, and will develop techniques to enhance compliance. The most sophisticated empirical research on the Court has shown these assumptions to be generally warranted. To the extent that the Court actually behaves in light of these expectations, of course, judicialization is likely to proceed.

Typically, once motivations like these are stipulated, the analyst proceeds to draw out their theoretical consequences, or to test their empirical validity. Such assumptions operate, in effect, as a short cut to other stages of the process. Unfortunately, there is no scholarly literature of note that directly examined the attitudes and preferences of judges and other officers that have served on the Court. Remarkably, one also finds no serious research on the judicial appointment process, or on the backgrounds of judges. Inattention probably is due to the fact that the ECJ does not publish its votes, and does not allow for dissenting opinions, thus making it virtually impossible to assess the influence of appointments on outcomes. One way to proceed, despite this limitation, would be to develop a testable politico-strategic theory of legal interpretation and precedent formation. Innovative legal scholarship on the politics of the Court’s interpretive strategies exists

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<sup>27</sup> *Defrenne II*, ECJ 43/75 [1976] ECR 455.



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(Bengoetxea 1993, 2003; Della Cananea 2003; Itzcovich 2009; Wiklund 1997, 2003), but few social scientists engage this work. Stone Sweet (2004) developed a theory that conceptualizes precedents as “argumentation frameworks” which the Court is expected to build for several overlapping purposes: to reduce the “noise” of chaotic environments, to help lawyers build litigation markets, to enhance compliance, and to socialize non-judicial officials into a politics that precedent-based discourse creates, thus legitimizing the Court’s own lawmaking capacities. McCown and Stone Sweet then compiled a comprehensive database on the ECJ’s citation practices, which they used to test hypotheses about how argumentation frameworks have evolved, with what effects on EU governance (McCown 2004; Stone Sweet 2004).

Arguably, the most important research directly assessing the strategic nature of the Court’s jurisprudence is Maduro’s (1998), *We, the Court: The European Court of Justice and the European Economic Constitution*. Among other things, Maduro examined every case decided after the Court’s famous *Cassis de Dijon* ruling, wherein the ECJ balanced trading rights under Article 34 TFEU (ex-Article 28 TEC) against derogations allowed to Member States under Article 36 TFEU (ex-Article 30 TEC) and the Court’s case law (Poiars Maduro 1998: 72–78). He found that the judges engage, systematically, in what he called “majoritarian activism.” Maduro found no exception to the following rule: when the national measure under review is more unlike, than like, those equivalent measures in place in a majority of Member States, the ECJ strikes it down as a violation of Article 34. (In the early 1980s, the Court began to ask the Commission to provide such information on a regular basis.) The Court typically upholds national measures in situations in which no dominant type of regulation exists, although there are important exceptions. Through majoritarian activism, the Court was able to pursue a “judicial harmonization” process, which steadily put pressure on the EU organs to re-regulate at the EU level (Van Empel 1992; Berlin 1992). The Court would have little to fear in the way of reprisals, since it was, in effect, acting in the interest of a majority of the Member States.

The third question relates to the capacity of the Court, through its rulings, to alter the underlying “rules of the game” that govern policymaking in any given field (Section 2.2). We have already discussed this point with reference to constitutionalization (Section 3.3); and a host of scholars, not primarily interested in law and courts, have identified mechanisms of institutional change that rely on litigation and judicial lawmaking (Héritier 2001, 2007; Pierson 1998; Sandholtz 1996). Three types of decisions virtually always provoke expansive judicialization in that they create situations in which the EU legislative bodies are virtually required to adapt to the Court’s case law. First, when the Court chooses to apply Treaty law to policy areas that were formerly assumed to be in the domain of national, not supranational, governance, it empowers the Commission and the courts, while undermining the authority of national officials. Important examples include the ECJ’s decisions to subject the domains of telecommunications (Sandholtz 1998; Schmidt 1998; Thatcher 2004) and air transport (O’Reilly and Stone Sweet 1998) to EU competition rules (under which the Commission is a Trustee of the Treaty in the terms of Section 3). Second, the ECJ may interpret EU statutes as if certain provisions express values of a higher, “constitutional” status. In doing so, the Court carves out substantive legal positions, or guiding principles for lawmaking, that lie outside the EC legislator’s direct control. A third robust form of judicialization is triggered when the Court holds that specific policy dispositions are required by Treaty law. These techniques typically lead to the “constitutionalization” of policy (e.g., Stone Sweet 2004: ch. 4; see also Héritier 2007; Kohler-Koch and Rittberger 2006 Rittberger and Schimmelfennig 2006). The dynamics of “majoritarian activism” identified by Maduro are often present in each of these three situations, while the Court’s Trustee status makes these types of decisions “sticky” – difficult to reverse – except through subsequent rounds of adjudication.

The sex equality domain provides a well-documented illustration (Cichowski 2004; Ellis 1998; Kenney 1995). Most spectacularly, the ECJ enacted, through interpreting Article 157 and the 1976 Equal Treatment Directive, the core of several proposed directives (e.g., pregnancy and oc-

cupational pensions) that had stalled in the Council of Ministers under the vetoes of France and the UK. In Curtin's (1990) telling phrase, the Court had "scalped the legislator." In other areas (e.g., burden of proof and indirect discrimination), ECJ rulings all but required the production of new directives by the EU's legislative organs, empowering the Commission in the process. In this domain, at least, constitutional rulemaking fundamentally altered the intergovernmental modes of governance in place.

The fourth stage of the process, which focuses attention on the impact of the Court's case law on subsequent policymaking, has already been sufficiently covered (as spillover, or feedback). Rather than rehearse the findings of (literally) hundreds of research projects, a few summary points deserve emphasis. A judicialized policy process is one that takes place in the light of the Court's case law and in the shadow of future litigation. Judicialization is an empirically observable outcome, indeed, it is registered *only* when the EU's legislative organs, or the Member States in treaty revision processes, take decisions that, in effect, *implement* the Court's case law (adapting their own lawmaking to that of the Court's). Officials may also seek to block or limit the effects of the Court's jurisprudence, of course. But these efforts will be countered by actors who wish to expand the Court's influence. These politics – "dialogues" between judges and legislators – are at the core of *all* studies of judicialization. Further, the extent of the judicialization of EU governance varies, across policy areas and across time, which raises formidable problems of measurement and assessment. Two analysts, observing exactly the same politics and outcomes, might come to a very different evaluation of the Court's impact. One analyst might consider to be significant *every* policy outcome that can be shown to be the result of the Court's participation in the policy process (this is my view). Another, focusing on how actors within the legislative process worked to dilute the Court's influence, might reject the characterization that the process was "judicialized" at all, since the "political" actors organized resistance. In either case, legislative resistance to judicial influence should be the expected state of affairs, not the exception. That is, judicialization is an inherently political process, and thus never frictionless. To make matters even more complex, the influence of judges typically accrues over time. The analyst measuring judicialization through observation of one policy episode will always miss these dynamics.

In any event, the more judicialized any policy domain, the more we can expect that individuals, firms, interest groups, national judges, and EU organs, such as the Commission (Kelemen 2006; Börzel 2003; Schmidt 2000, 2010) or the Parliament (Dehousse 1998: ch. 4; McCown 2003), will supervise closely the policy process, and to leverage the Court's jurisprudence for their own purposes. The Member States, and the EU's legislative organs, can expect litigation if they choose to ignore rulings that are pertinent to their lawmaking, or to limit the scope of such rulings too much. It bears repeating (Section 2.3 and Section 3), in this regard, that neither the Member States nor the EU's organs can block litigation under Article 258, 263, or 267, and they have limited means of reversing the rulings that are produced.

## 5.2 Theoretical issues and controversies

Research on judicialization is directly implicated in scholarly debates about the nature of the integration process and the evolution of EU governance. The most systematic studies have invalidated those theories that support some version of the claim that the EU's organizations, like the Court and the Commission, do not produce "unintended consequences" from the perspective of those who designed and maintain the system: the Governments of the Member States. Among the better-known examples are the theories of Tsebelis and Garrett (2001) and Moravcsik (1998: 482–90), the latter going so far as to claim that supranational organizations have *never* generated outcomes that "alter the terms under which governments negotiate new bargains." Both invoke logics of delegation, but they incorrectly model supranational authority in the EU, thereby missing the dynamics of Trusteeship. Instead, the EU's organizations are conceptualized as relatively simple agents of

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Member States, at any (and every) point in time. Second, neither theory makes room for a class of important outcomes that turns to the heart of judicialization and spillover in the EU, namely, that the “rules of the game” governing EU politics are routinely altered by play within those same rules (e.g., through judicial lawmaking). Both treat such outcomes – which are routinely generated by the legal system – as theoretical impossibilities. In any case, I am unaware of any important empirical research on the EU’s legal system that has found support for hypotheses derived from Tsebelis and Garrett and Moravcsik. These theories have also been the subject of critique that focuses on their construction, as theory, from within the “rationalist” paradigm (Farrell and Héritier 2003; Pollack 2003). It is important to stress that this debate is not a meta-theoretical one (i.e., between incommensurate paradigms); rather it concerns how causal propositions are to be derived from theoretical assumptions about the nature of supranational authority.

The adjudication of “legal basis” disputes under Article 263 would comprise a best test of the claims of Tsebelis–Garrett and Moravcsik, since such disputes authoritatively determine the content of the “rules of the game” governing the production of EU law. If the Governments, acting in the Council of Ministers, *fail* to maintain intergovernmental modes of governance (e.g., unanimity voting) in those areas in which they prefer such modes, and *fail* to limit the extension of supranational modes of governance (e.g., majoritarian voting) to those domains in which they prefer supranationalism, then these theories are invalidated. The judicial politics of such disputes have, in fact, been the subject of high-quality, systematic research. Jupille (2000, 2004), examining every legal basis dispute brought to the Court after the Single Act entered into force (July 1987), found no support for Tsebelis–Garrett, in particular. Instead, his analyses of the data “strongly disconfirm” them (2000: 14) the Court “appears dedicated throughout the period to the extension of ‘integration,’ defined as majoritarian decisionmaking in the Council, and the attendant increase in legislative output.” Margaret McCown (2004) who also analyzed outcomes in every legal basis dispute, confirmed Jupille’s findings. In addition, she found that the Court, in the course of adjudicating these disputes, had produced an intricate, precedent-based doctrinal framework to which Governments gradually adapted. In her related study of what happens when the European Parliament “litigates for constitutional change,” McCown (2003) shows that Member States Governments, on their own and through the Council of Ministers, were not able to block the production of a “highly politicized” and “pro-integrative” jurisprudence that has reconfigured the legislative process in ways that have undermined intergovernmental control.

The more EU governance is judicialized, the more the legal system will produce new “rules of the game” that will be institutionalized as governance arrangements. A related issue concerns the nature of the “spillover” process. I have noted that the theory of judicialization and Neo-functional theory intersect at certain crucial points. For present purposes, what is important is that both theories conceptualize a dynamic process (judicialization/regional integration) that is propelled forward only to the extent that certain mechanisms of institutionalization – feedback effects – operate in particular ways. Governments as actors, and intergovernmental modes of governance, are conceived as crucial at key moments. Indeed, in my view, spillover can be said to occur *only* when Member State Governments formally agree to new extensions of supranational authority that can be shown to have already emerged through the prior exercise of supranational authority. It occurs only to the extent that Member State Governments explicitly ratify, or otherwise adapt to, the Court’s jurisprudence. In this basic sense, judicialization registers spillover. A large body of empirical research takes up this point explicitly (e.g., Dehousse 1998; Sandholtz 1998; O’Reilly and Stone Sweet 1998; Sbragia 1998), tracing the process through which Governments came to accept constitutional and legislative outcomes that they had rejected prior to important ECJ rulings.

The social science reviewed in this article has conclusively demonstrated that judicialized governance is an institutional fact of EU politics. We also know a great deal about how the judicialization process works and, theoretically, how the process might be blocked. But there has been

little or no research on the extent to which the depth and pace of judicialization varies across EU policy domains. In some domains, there was little evidence of judicialization for many decades, road transport being an example, not least because the ECJ did not move aggressively to break down national control of trucking. Other areas, too, have moved more slowly than a modern Neo-functionalism might expect, as would be the case of freedom to provide services (see Schmidt 2009). The study of negative cases, and comparative analysis of a mixture of positive and negative cases, would help us to refine the theory in the context of the EU. A related issue concerns how we assess the impact of legal outcomes on the wider polity. Cichowski (2007) has shown that, in the domains of environmental protection and sex discrimination, litigating EU law and the development of social movements evolved in tandem. Yet “mainstreaming gender” (Pollack and Hafner-Burton 2000; Hafner-Burton and Pollack 2009; Mazey 1988), or the “greening” of Europe (Kelemen 2001; Slepcevic 2009; Temmink 2000), may be stifled, not least since countervailing values and interests are also on the political agenda. The Court can work to influence agenda and decision-making, but it does not control them.

### 5.3 Future research

There is a great deal of research to be done on all stages of the judicialization process. With respect to litigation in the national courts, there is not a single serious article that surveys (let alone evaluates the importance of) national standing rules, though comparative analysis of the evolution of national rules governing class action suits, which are gradually liberalizing, has recently appeared (Hodges 2008). By definition, these rules are critical to determining who has access to the courts (see Slepcevic 2009). Surprisingly, there also exists no social science on the legal services<sup>28</sup> of the European Commission, Parliament, or Council of Ministers, although lawyers in these bureaus help to determine how the EU’s legislative organs respond to the ECJ’s rulings, or of advocates for Member State Governments, who participate in filing observations. Our knowledge of the reciprocal impact of large law firms and legal integration is also virtually non-existent, though Wigger’s recent work on the evolution of the competition law bar is a notable exception (Wigger 2008; Wigger and Nölke 2007). Kelemen (2006; also Kelemen and Sibbitt 2004) has claimed that adversarial legalism has come to Europe partly as a result of the “Americanization” of the law firm, an issue that deserves much more empirical attention. As far as I am aware, there has been no systematic data collection relevant to how law firms have adapted to European market and legal integration. Finally, given the Court’s centrality to EU governance, it must be that Member State Governments have become more vigilant over time on the question of whom they appoint to the Court. Yet no one has examined this question with any seriousness.

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<sup>28</sup> There has recently emerged a potentially important literature on the background, activity, and impact of pro-integration legal elites on the development EU constitutionalism (Vachez 2008a,b; Cohen 2007, 2008).

## 6 Monitoring and enforcing Member State compliance with EU law

This section focuses on the legal system's capacity to monitor and enforce Member State compliance with EU law. Article 258 exposes national officials and national law to the supervision of the ECJ, in the form of infringement proceedings brought by the Commission against the Member States. With the consolidation of supremacy, direct effect, state liability, and related constitutional doctrines, Article 267 evolved as a separate system for enforcing compliance. The mechanism is activated by national judges, usually at the behest of private litigants who are seeking to vindicate rights or entitlements under EU law. Both procedures open a window onto national law and practices, through which the ECJ may reach to develop its case law and expand the scope of judicial review. It should be obvious that the more effective the courts are at performing their monitoring and enforcement functions, the more likely they are to become, in Panke's (2007) apt phrase, "agents of Europeanization." Yet, as with judicialization processes more generally, the ECJ must rely on the self-interest of other actors, such as the Commission, private litigants, and national judges, to generate caseload and to supervise compliance (Conant 2002).

### 6.1 The ECJ and the national courts (Article 267 TFEU)

The big bang of European legal integration is the Court's pronouncement of supremacy and direct effect in the 1960s. Legal integration steadily proceeded thereafter, as each of the high courts in the EU gradually accepted supremacy and its consequences, albeit on their own doctrinal terms (Slaughter *et al.* 1998). At the same time, the constitutionalization process has been full of friction, not least because the ECJ does not sit as a Supreme Court at the apex of a unified system. Systemic coherence and effectiveness have depended on how the ECJ and the national courts have negotiated their relationship with one another. Some of the most important achievements of legal integration – such as the progressive construction of a charter of rights for the EU – are rooted in deep, as yet unresolved doctrinal conflicts between the ECJ and national courts. This "jurisprudence of constitutional conflict" (Kumm 2005) is ongoing, indeed, it seems to have no endpoint.

Simplifying a sophisticated, often technical, debate, scholars have sought to explain both inter-judicial cooperation and conflict. The puzzle – why cooperation? – received the most early attention. In most national jurisdictions, supremacy would require judges to abandon certain deeply-entrenched, constitutive principles, such as the prohibition against judicial review of legislation; and direct effect would mean setting aside traditional rules governing standing and remedies, and to evolve new ones. Because embracing these doctrines would entail significant, structural adaptation on the part of national judiciaries, inter-judicial cooperation could not be presumed to follow automatically from the ECJ's doctrines.

Weiler's solution to the puzzle – the "judicial empowerment" thesis – remains dominant. Weiler (1991, 1994) argued that (a) the ECJ's constitutional jurisprudence and (b) the incentive structures in place for most national judges pushed in the same pro-integrative direction. Most important, national judges could acquire, many for the first time, the power to control the legality of state acts previously beyond their reach, such as statutes. Article 267 not only legitimized what would become a complicit relationship between the ECJ and the national courts, it also afforded both judicial levels a good deal of protection from potential political fallout. The European Court responds to preliminary questions, as the Treaty requires, but the ECJ does not apply EC law within the national legal order; the national courts provide the ECJ with case load, but only implement the Court's preliminary rulings, as the Treaty requires. Thus, at critical moments, each court can claim to be responding to the requirements of the law, and the demands of the other court, thereby obscuring their own political role and empowerment. Once national judges (especially lower court judges) understood that they were advantaged by participating in the construction of EC law, the

delicate mixture of the active and the passive in this new legal system flowed naturally, gluing the two levels together. Burley and Mattli (1993) extended the argument and added empirical content.

While agreeing that some (but not all) national courts could empower themselves by partnering with the ECJ, Stone Sweet and Brunell (1998b) proposed a more mundane explanation: judges who handle relatively more litigation in which EC law is material will be more active consumers of EC law, and more active producers of preliminary rulings, than judges who are asked to resolve such disputes less frequently. This formulation assumes that national judges seek to maximize their own efficiency, within the protective shelter of Article 267, and in partnership with the ECJ. As the percentage of cases involving EC law rises, so do judicial incentives to master the tools that are most appropriate for the job, and those tools have been supplied by the ECJ. Judges that need these tools less will be slower or more reticent to master them, and have less reason to be concerned with the overall effectiveness of EC law. The approach helps us to explain some of the temporal variation we find across Member States, and within autonomous court systems within States. It has been well documented, for example, that across the EC private law jurisdictions typically accepted supremacy more quickly and with fewer reservations than did, say, administrative law courts, and they produced far more references; further, constitutional courts actively resisted, pushing back (Slaughter *et al.* 1998). As integration proceeded, as the scope of EC law gradually expanded into more areas, so did the willingness of national judges to make use of it.

Those who focused on inter-judicial cooperation took inter-judicial friction for granted as the *expected* state of affairs. The trick, then, was to explain why the legal system had nonetheless taken off. It was obvious that legal integration was largely determined by how such tensions had, or had not been, resolved. It was also clear to all scholars in the field that the interests of any national judge could also cut in non-integrative ways. The judicial empowerment thesis could not be expected to apply to at least three situations. First, national constitutional courts would not be empowered by helping the ECJ build a “constitutionalized” legal order, and they would have good reasons to resist developments that might subsume the national order, or weaken national rights protection. Second, to the extent that the ECJ’s evolving jurisprudence would undermine a national court’s own case law, autonomy, or close relations with other national governmental bodies, judges might at times choose to ignore, or limit the application of, the Court’s rulings. Further, the development of EU law would, in effect, expand the “menu of policy choices”<sup>29</sup> available to litigants and judges, and judges might exploit this development creatively; the judges might be empowered, but they could not always be expected to use their powers in pro-integrative directions. Because Weiler and Burley–Mattli were interested in explaining legal integration, they did not emphasize these alternatives, but they were aware of them.

The first relatively systematic, comparative study of these politics, *The European Court and the National Courts* (Slaughter *et al.* 1998), focused on inter-judicial dialogue (primarily in the form doctrinal cooperation and conflict) as a medium of legal integration. The most important research in this vein is Alter’s (2001) *Establishing the Supremacy of European Law*. Alter gives a convincing, if eclectic, mix of responses to the key questions, why national courts accepted supremacy, and why national Governments adapted to legal integration. Most important, she traces in impressive detail how French and German judges, sitting on different courts, reacted to the ECJ’s supremacy moves, paying full attention to the subtleties of both cooperation and conflict as legal integration progressed. The book shows that there are multiple, continuously evolving, factors that shape how national judges choose to use or ignore EC law (see also Chalmers 2000 for analysis of the UK). It is unfortunate that comparable research has not been undertaken on all national systems, although a series of papers on the courts of new members is beginning to appear (Bobek 2008; Lazowski

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<sup>29</sup> In most EU systems today (documented in Keller and Stone Sweet 2008), the provisions of the European Convention on Human Rights are also directly effective and take precedent over statutes and EU law. Thus, the menu of options available to national judges in disputes involving EU law is even more cornucopian than described here.

2010).

The other indispensable book in this area, Conant's (2002) *Justice Contained*, makes some of these same points, while expanding the scope of the analysis to include how all national officials respond to the ECJ's lawmaking in three domains: telecommunications, air transport, and electricity. Conant demonstrates just how difficult it is for ECJ rulings – even those that had been successful in meaningfully judicializing governance at the EU level – to gain traction in national systems. The support of interlocutors will always be crucial (section 4). The Court's allies must compete for influence with those seeking to maintain the *status quo*, and, as she shows, the political and structural forces favoring inertia often prevail. A basic lesson of Conant's book (and of research on judicialization more generally) bears repeating: the Court's case law may change legal norms, policy frames, and incentive structures for actors, but its jurisprudence is *never* self-implementing at the national level.

### 6.1.1 The Article 267 system: compliance and enforcement issues

Some social scientists address the topic of how constitutionalization has proceeded, whereas others explore the politics of national compliance with the ECJ's rulings, taking the Article 267 system as given. Both kinds of projects involve qualitative, empirical research that combines legal-doctrinal analysis and case studies of (often messy) judicial politics. There is broad, scholarly consensus on the view that the ECJ and the national courts are strategic actors who interact with one another in complex, multi-dimensional ways, within political environments that will often be hostile to judicial lawmaking. The ECJ's output – its case law and rulemaking – is only one of the factors that matters. The best empirical work has shown that the effectiveness, or influence, of EC law on national law and politics varies widely, as a function of myriad factors operating with different effects, at different places and times. When observed in this way, the Europeanization of national law and courts will always look “patchwork” and “fragmented,” not least because quasi-federal governance must be, in Conant's (2002) terms, “negotiated” between judges, organized interests, and elected officials. These same points apply to the implementation of federal law in other federal polities, such as Canada and the United States. Comparing the politics of supremacy in her book, *Constituting Federal Sovereignty*, Goldstein (2001) found that national judges in Europe accommodated the supremacy of EC law (in the absence of a supremacy clause) faster and with less conflict than State judges accepted federal supremacy in the United States system.

In any event, there is no denying that the effectiveness of the decentralized system of monitoring and enforcement of EU law, under Article 267, has been steadily upgraded since the big bang of the 1960s (Appendix 1). A Member State Government that fails, willfully or by omission, to make available to individuals rights under the treaties, or that fails to properly transpose directives into national law, invites litigation in the national courts. Further, national judges today possess all of the authority necessary to provide effective remedies (Dougan 2004; Ward 2000), alone and in conjunction with the ECJ.

By any measure, the constitutionalization of the treaty system – the process through which national judiciaries came to accept the ECJ's doctrines of direct effect, supremacy, the principle of state liability, and so on – provides the most profound, and best understood, example of the Europeanization of state structures that we have in EU studies. The process radically enhanced judicial authority within national systems, positioning national judges to become important policymakers at both the EU and national levels. It has mainly been through interactions under Article 267 that EU governance has been judicialized Section 5; and constitutionalization created the conditions for the kind of research on the impact of the courts on national law and policy that has been undertaken by social scientists. These outcomes were not pre-ordained by the Treaty, or by decisions taken by the Member States; they comprise, instead, a prime example of the kind of

“unintended consequences” that Tsebelis and Garrett (2001) and Moravcsik (1998)<sup>30</sup> portray as impossible Section 5.3.

There has been virtually no quantitative research in the area of national compliance with ECJ rulings, with the exception of Nyikos’ (2003; 2006) seminal work on inter-judicial dialogue within the Article 267 procedure. Nyikos (2003) analyzed all references in three legal domains – free movement of goods, free movement of workers, and sex discrimination – and traced their various effects on latter stages of the process. She found that national judges regularly signal (in 38% of cases) to the ECJ the answer they hope to obtain; such signaling has risen over time, and is highest among judges who use the procedure repeatedly. The ECJ sometimes redefines (in 33% of cases) the issue, through restating the referring judge’s question. In a majority of instances in which national judges signal the desired response, the ECJ provides it. Nyikos also examined judicial compliance with the ECJ’s preliminary rulings. Strikingly, she found overall compliance to be nearly perfect. In less than 3% of cases did the national court (a) seek to evade a preliminary ruling through resending the reference differently phrased, or (b) refuse to apply the ruling (only two cases).

Although we have comprehensive data on Article 267 reference activity Section 3.1.2, and these data have organized a great deal of qualitative research, no one has collected systematic data on the litigation of EU law in the national courts. Scholars who have looked at samples of such litigation have found that, in the vast majority of such cases, judges do not send references (Conant 2002: 81–83, 209–10). Because of the paucity of data, some crucial questions are impossible to answer with any certainty, including whether national judges are faithfully applying EU law and the ECJ’s jurisprudence, when they resolve cases *in the absence of a reference*. Stone Sweet (2004: ch. 3) examined every national decision reported by courts in three Member States (France, Netherlands, UK), in order to determine whether national judges were applying the framework the ECJ developed in its *Dassonville* (1974)<sup>31</sup> and *Cassis de Dijon* (1979)<sup>32</sup> rulings, before the Court changed that framework in its *Keck* (1993) ruling. Most judges did not, a fact that the Court would have noticed. To take another example, the ECJ introduced into EU law the concept of indirect sex discrimination in 1981 (*Jenkins*),<sup>33</sup> which was previously unknown in Europe outside the UK. A decade later, Prechal and Vegter (1992) surveyed how national judges applied the Court’s step-by-step framework for adjudicating indirect discrimination cases. They found, as one would expect, significant variation across court systems. Only in Germany, Ireland, the Netherlands, and the UK did judges explicitly make use of each step of the framework, though how they did differed in ways that would bias outcomes significantly. In the majority of Member States, fewer than six decisions in the area had been reported in ten years, suggesting that the Court’s case law took some time to take hold among national lawyers and judges. Though studies like these are suggestive, the field desperately needs more systematic data collection and empirical research on what national judges do when EU law is pleaded in cases before them.

There is gradually emerging an impressive body of knowledge on the judicial politics of non-compliance with EU law at the national level. In their research, Börzel (2002) and Panke (2007, 2009) focus on the deep, structural problems of compliance that can result when new EU directives “fit” poorly with existing national law and practices. Such situations pose challenges for national officials, not least, because compliance will require overcoming vested interests that favor the status quo, including the attachment of State officials to established, hence more legitimate, ways of doing things. Panke’s (2009) study of how Germany and the UK adapted to EU initiatives in the fields of social policy and taxation is exemplary in its design and method. The research is an

<sup>30</sup> Moravcsik (1995) admitted that his version of Intergovernmentalism could not explain constitutionalization or its effects downstream. He then treats the Court, constitutionalization, and the legal system as anomalies that somehow do not weaken his theory.

<sup>31</sup> *Dassonville*, ECJ 8/74 [1974] ECR 837.

<sup>32</sup> *Cassis de Dijon*, ECJ 120/78 [1979] ECR 649.

<sup>33</sup> *Jenkins*, ECJ 96/80 [1981] ECR 911.



important contribution to the literature on the Europeanization, and judicialization, of national governance. Panke argues that the impact of ECJ rulings on the relative power and influence of domestic actors varies across States and across policy domains, partly as a function of the “fit” variable, that is, how much adaptation is necessary for compliance to be achieved. She finds that, even in these politically “sensitive” areas, where “sovereignty concerns” might be considered to be a barrier, compliance was eventually achieved, but through different mechanisms. In domains in which relatively less adaptation was required, “shaming” and the threat of further legal action are often enough. Where there is poor fit, and where these first-order means have failed, actors pushing for compliance must “reframe” the issues, and re-engage national officials, in a new political effort to achieve their goals. Although she does not cite Conant (2002), Panke’s findings deserve to be considered alongside that work.

In a comparable study of note,<sup>34</sup> Slepcevic (2009) presents a theory of enforcement of EU law in the national courts, which he then applies to explain variation in the implementation of the Natura 2000 Directives in three Member States: France, Germany and the Netherlands. Slepcevic argues that for public interest litigation in the national courts to succeed, four conditions must be met. Litigators must be well organized and resourced; they must have standing and access to the courts; they have to persuade judges to faithfully interpret and apply EU law in conflicts with national law and practice; and non-judicial authorities have to change national law and practice when the courts tell them to do so. Each condition is a necessary condition, and a cumulative stage in the overall process, for effective enforcement. Slepcevic found that legal action to enforce the Natura 2000 Directives produced “only limited effects in France and Germany,” whereas it was successful in the Netherlands, “in spite of the absence of [the Directives’] transposition into national law.”

## 6.2 The ECJ and infringement proceedings (Article 258 TFEU)

As mentioned above Section 3.1.1, scholars have paid much more attention to Article 267 than they have to Article 258. While the courts were actively, spectacularly, building the legal system under Article 267, the Commission adopted a passive posture with regard to its authority to bring enforcement actions, sometimes to the point of legal negligence.<sup>35</sup> Beginning in the late 1970s, the Commission began to use that authority more aggressively, in the service of its own legislative agenda, not least, to consolidate jurisprudence produced by the Court under Article 267 (see Alter and Meunier-Aitsahalia 1994; Stone Sweet 2004: ch. 3). After the Single Act (1986), the Commission’s use of Article 258 exploded into prominence, as Börzel (2001) and Tallberg (2002b) have documented.

Tallberg (2002b) provides the most succinct account of Member State non-compliance with EC law with regard to the Article 258 system. He identifies two basic categories of non-compliance: (a) failure to transpose directives properly or on time; and (b) failure to properly apply the substantive terms of the directive once transposed. Both types of non-compliance are common, and each may generate litigation under Article 258 and 267. Tallberg then considers two sources of non-compliance. The first can be expressed as a hypothesis (627): “the greater the legal and behavioral adjustment required to conform to a rule [or practice], the less inclined . . . Member States [will be] to comply.” The variable is defined by the relationship between *fit* and the *cost of adaptation*: the more any new EU directive already “fits” current legal and administrative arrangements and practices, the less costly it will be for the Member State to implement it. The second variable is a Member States “capacity” to implement secondary legislation. The more

<sup>34</sup> The articles by Panke (2009) and Slepcevic (2009) are superb examples of a “structured-focused comparison” (George and Bennett 2005: ch. 4) of compliance politics, and judicialization, at the national level.

<sup>35</sup> In the 1970s, the ECJ strongly criticized the Commission for failing to bring Article 226 proceedings on several occasions (e.g., *Defrenne II*, ECJ 43/75 [1976] ECR 455).

complex and inefficient are the legislative procedures for transposition, the more likely we will find non-compliance (especially delays in transposition). At the application stage, the higher the “quality” of regulatory staff, or the less “deficient” are administrative capacities, the less likely we are to see non-compliance.

Because Tallberg’s theory highlights system-level variables, it loses power at the sub-system level, and cannot explain variation across policy domains within a Member State. Börzel (e.g. 2002) and Panke (2007, 2009) have elaborated a framework that contains some of Tallberg’s elements, but they also pay more attention to how other relevant factors (state structures, party competition, interest group politics, and so on) vary. We should not expect to find the same compliance dynamics across policy domains, either cross-nationally or in a single Member State, and this expectation should be built into research design. Panke (2009) does so admirably. Unfortunately, none of these approaches pays any sustained attention to the role or capacities of national courts in the overall compliance process. Tallberg (2002b: 621) notices the problem but notes that the absence of quantitative data makes the Article 267 preliminary reference mechanism for ensuring compliance too difficult to measure.

### 6.2.1 The Article 258 system: compliance and enforcement issues

Börzel (2001) and Tallberg (2002b) have produced the most important social science on enforcement actions, describing the Article 258 process with reference to comprehensive data, which they present and analyze at each important stage of the proceedings. Both find that the system works more effectively than others have claimed, or than one might expect from the point of view of many theories of international politics. Börzel (2001) takes pains to debunk the notion that there exists a “compliance deficit” in the EU. Analysis of the data over the 1990–99 period shows, rather, that non-compliance has been “rather modest and . . . stable over time,” a non-trivial finding given that “opportunities” and pressures for non-compliance steadily increased during this period, as the corpus of EU secondary legislation expanded under the Single Act regime.

In a recent, yet unpublished paper, Börzel, Hofmann, and Panke (2009), provide a useful overview of how the system has worked. Of the more than 5,000 proceedings brought against the Member States by the Commission during the 1978–99 period, most were settled before being referred to the ECJ. The Commission ended up referring to the Court only one-third of all cases ( $n = 1,646$ ), leading to a final ECJ judgment in slightly less than half ( $n = 808$ ). The fact that the ECJ finds against the Member States in 95% of all cases puts strong pressure on defendant States to settle (that is, to comply), in advance of a decision. In “about 100” cases, the Commission was forced to bring a second action after Member States refused to comply with the ECJ’s ruling. Börzel, Hofman, and Panke also identify the Member States (among the EU-12) with the best records (Denmark, Ireland, Netherlands, Luxembourg, and the UK), as well as the worst non-compliers (Belgium, France, Greece, and Italy). In another stage of the project, Börzel *et al.* (2011) tested various alternative hypotheses that would explain variation in rates of non-compliance. They found, among other results, that relatively less powerful States with high capacities (e.g., to properly transpose and apply EU directives) tend to “violate European law less frequently,” whereas more powerful States with “more constrained capacities” have greater compliance problems. In effect, legislative and administrative inefficiencies generate higher rates of non-compliance (confirming Tallberg 2002a, while greater power translates into less sensitivity to the costs (material, reputational, and ideational) associated with non-compliance. Though suggestive, the findings are marred by the fact that the analysis ignores national judges as important actors, although the arguments from “capacity” and “fit” would apply as well to judges as to any other national officials.

Although they do not focus on the Article 258 system, Falkner and Treib (2008) have shown that in four Central and East European Member States, transposition rates have improved over

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time, while application of EU law by regulators often lags. Among other factors, Falkner and Treib emphasize the fact that the courts lack resources and are overloaded, and that judges and lawyers are not well-enough acquainted with EU law to make up for weaknesses in administrative capacity. Research in the line of Tallberg (2002b) and of Börzel and her collaborators, would be enormously improved if it would take into account the national courts. Helping to close gaps in compliance is, after all, one of the major functions of national judiciaries.

### 6.3 Controversies and future research

The complexities of multi-level governance are fully revealed in studies of the impact of the ECJ on law and politics at the national level. Some scholars have sought to trace and assess the Court's impact at both the supranational and national levels, but these are typically limited to specific policy domains and States. Fine examples include Haverland (2003); Kelemen (2010); Kenney (1995); Slepcevic (2009), and a great deal of sophisticated legal scholarship (e.g., Jarvis 1998; Micklitz 2005; Snyder 2000; Ward 2000). Most projects relevant to this survey either prioritize explaining the evolution of judicialized governance at the EU level (project A), or the impact of judicialized EU governance on national politics (project B).

In the jargon of the social sciences, project A and project B are defined by different dependent variables, as well as theories and methods, that organize the research. Explaining the judicialization of supranational governance in a particular domain makes no claim per se about the extent to which national officials, including judges, comply with EU law, or how any Europeanization process will proceed. Some may well disagree with this point. Conant (2002), for example, strongly criticizes scholarship in the field for having overstated the ECJ's role and authority, pointing to obstacles to national compliance, and low levels of Europeanization, as the main evidence. In my view, she is inappropriately judging one research project (A) by the findings of another (B). Conant would be right if she could refute the following hypothesis: the more judicialized any domain of EU governance, compared to domains of EU governance that are less judicialized, the more likely it is that the importance of lawyers and courts will be enhanced in relevant *national* policy processes, and the more likely it is that the ECJ's case law will influence the latter. The hypothesis cannot be dismissed by the type of arguments marshaled by Conant. The recent research by Kelemen (2006, 2010) underscores this point. As a multi-level mode of governance, "adversarial legalism" cannot be contained, sealed off from national regimes, but instead gradually infects and changes how national law and courts work. And as Slepcevic (2009) and Panke (2009) show, interest groups can judicialize a policy process and still not get what they want.

One of the great virtues of Conant's (2002) book is that she engages existing social science theories of judicial compliance, and contributes to their refinement. Unfortunately, most comparable research rarely does as much, nor does it relate findings on implementation and Europeanization, as Conant admirably does, in light of the more general literature on those topics in the EU. Clearly, scholars working on the legal system could benefit from engaging the most sophisticated social science in these areas (e.g., Falkner, Treib, and Holzleithner 2008; Héritier 2001; Featherstone and Radaelli 2003), some of which does an excellent job at incorporating national courts into their analysis (Falkner and Treib 2008).

Last, although immensely important social science has been produced, our understanding of many aspects of legal integration remains piecemeal at best. As mentioned, no one has compiled a significant data set on the litigation of EU law in the national courts, and thus we have only a very incomplete understanding of the ways in which national judges make use of EU law in performing their day-to-day tasks. A research project that focused on how judges dispose of cases in the absence of a reference, for example, could tell us a great deal about the extent and scope of Europeanization when it comes to the courts. Further, the relationship between adjudication under Article 258 and 267, which one has every reason to think would be important, has never

been the subject of serious analysis. I could go on. Without belaboring the point, the field remains a fertile ground for new scholars and new approaches.

## 7 Conclusion

Over the past twenty years, lawyers and social scientists have produced an impressive body of scholarship on the relationship between the judicial authority and governance in the EU. This literature has shown us that the impact of law and courts on European integration, on EU politics and policymaking, and on the operation of national systems of lawmaking and judging has been deep, pervasive, and increasing. It has also generated a rich theoretical debate about how best to explain the judicialization of the EU which, in turn, has stimulated data collection, quantitative analysis designed to test hypotheses, and sophisticated qualitative methods that blend perspectives of concern for judicial and political process and decision-making. I cannot stress enough how difficult it is to produce good research on the topic covered by this *Living Review*. The best scholarship requires an inter-disciplinary perspective, familiarity with comparative methods, an understanding of politics at both the EU and national levels, a knowledge of how multiple legal systems work, language proficiency (since most national court decisions are not translated), and more time and resources than most of us have. This *Living Review* has also emphasized that much important empirical work remains to be done. Looking forward, the momentous structural changes that have taken place, from enlargement to the Lisbon Treaty, pose new and daunting challenges for scholars.

The entry of force of the Lisbon Treaty, on December 1, 2009, has made important changes to the EU constitutional architecture. The new Treaty further strengthens the supranational features of the system: qualified majority voting and co-decision are now the presumptively “normal” procedures for legislating, and the Parliament’s powers have increased in other ways. The European Council, that most intergovernmental of institutions, is now a proper subject of EU law, rather than an external appendage to it. The Member States did not shrink the Court’s zone of discretion: the Court’s Trustee status is fully intact. The Member States tinkered with the rules governing treaty revision, but the unanimity requirement remains in place for all important amendments. Further, they extended the Court’s “normal” jurisdiction to matters that formerly constituted the “third pillar”; and, on the road to Lisbon, they declared their acceptance of the Court’s supremacy case law, for the first time.<sup>36</sup> The EU’s administrative law system also appears ripe for expansion: the new Treaty now authorizes legislative delegation of considerable rulemaking authority to the Commission, which will inevitably generate a great deal of administrative review under Article 263.

The change with the greatest potential to shape the future evolution of the system is the promulgation of the Charter of Rights. Lawyers and judges will be more comfortable working with a codified text than with the rights the Court incorporated into the Treaty, under pressure from national courts, as unwritten general principles.<sup>37</sup> They will generate more rights-oriented litigation and preliminary references, and they will plead and decide cases differently. The ECJ, for its part, will be able to find rights issues implied in most any case it looks for them. Thus, there is every reason to expect that rights preoccupations will gradually infuse the exercise of *all* of the Court’s competences, much like it does that of other national constitutional courts in Europe. If so, the dynamics of adversarial legalism depicted by Kelemen (2010) will be strengthened. The Court also now finds itself firmly locked into an inter-judicial structure – the triangle of national courts, the European Court of Human Rights, and the ECJ – which will generate its own, multi-dimensional, rights politics. These politics will force the ECJ to review the legality of EU acts much more robustly than it has to this point in time. National judges, through preliminary references that invoke the Charter, will routinely ask the Court to do so, as a pre-condition for enforcing EU law. Further, the Lisbon Treaty commits the EU to accede to the European Convention on Human

<sup>36</sup> Declaration 17 – “Concerning Primacy.” *Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon*, signed 13 December 2007, on-line at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0335:0359:EN:PDF>. (Last checked on 7 February 2010.)

<sup>37</sup> On the incorporation process and its effects, see generally Craig and de Búrca (2008: ch. 11) and Alston, Bustelo, and Heenan (1999).

Rights (ECHR).<sup>38</sup> With accession, the position of the Strasbourg Court, as a *de facto* organ of EU governance, will be radically enhanced, since EU law, including the ECJ's case law, will be exposed to the direct supervision of the ECHR's Court. Thus, one expects the ECJ to find itself under increasing pressure from below (the national courts) and above (the European Court of Human Rights), and these pressures will lead it to intrude ever more deeply into EU level policymaking. More judicialization of EU governance will therefore be the result.

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<sup>38</sup> Accession is currently blocked by Russia's failure to ratify Protocol 14 ECHR.

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