The Inside Threat: European Integration
and the European Court of Justice

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Abstract

The European Court of Justice (ECJ) has long been recognized as a major engine behind the European integration project for its role in passing judgments expanding the powers and scope of the European Community, while member states have consistently reacted negatively to judgments limiting their sovereignty or granting the Community new powers. It is this interplay between the Court and member state interests that cause the ECJ to pose a threat to the future of integration. Using a combined framework of neofunctionalism and rational choice new institutionalism, six landmark cases and the events surrounding them are studied, revealing the motivations behind the Court’s and member states’ actions. From the analysis of these cases is created a set of criteria which can be used to predict when the ECJ will make an activist decision broadening the powers of the Community at the expense of the member states as well as when, and how, member states will respond negatively.
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I. Establishing the Issue

The roots of European integration are nebulous. The continent, or at least parts of it, has been integrated in one form or another several times throughout the centuries. Despite this long history, the European Community (EC) and integration project as they exist today are not the product of any previous attempts at integration, such as the Roman Empire of Caesar or the Holy Roman Empire of Charlemagne, but rather of the most disintegrative event in European history: World War II. After the devastation and horror of the war years, and the climate of nationalism which preceded them, many hoped for a new model of political cooperation in Europe. Recognizing the threat of unchecked nationalism, and reasoning that closer cooperation decreased the likelihood of conflict between European countries, while also strengthening their position vis-à-vis the USA and USSR, the European Coal and Steel Community (ECSC) was created in 1951 and served as the first step in the process of establishing a supranational authority over Europe. From this limited beginning, integration has grown to include a European Union (EU) of twenty five nations, a common currency in most, European citizenship, and potential for a European defense force. However, as Garrett and Weingast argued in 1993, “there is no guarantee that the trend to ever greater European integration – legal or otherwise – will continue. At any moment, the opposition of a few states will be enough to derail the whole process.”

The above quote is the starting point of this thesis. If continued European integration is not guaranteed then what will cause that trend to reverse? What could

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possibly cause any of the member states to reevaluate their decision to participate in the EC and actually leave it? Solving this question is vital to any understanding of the Community and its future and cannot be ignored by either those in favor of integration or opposed to it, if they hope to succeed in their endeavors. In reality, there is not one simple answer to the above questions; with the various reasons member states have for joining, the varied influence and power the Community has in different areas, and the multiple interest groups lobbying their governments, no one European action or policy can be identified as the cause of disintegration. Rather, a number of things could potentially lead to this reversal. The aim of this thesis is to demonstrate how one actor, the Court of Justice of the European Communities (ECJ or Court), as a major force behind integration may serve as one of these causes and be the catalyst which derails the entire Community project. The hypothesis is that the Court will pass a judgment so expansionist and contrary to member state interests that the ensuing backlash will be fatal to integration as it exists today.

The ECJ first took form as the court of the ECSC. It was created in the “classical, continental European, Montesquieu’an” style, meant to serve as a third power between the member states and ECSC.\(^4\) As such, the Court was not expected to actively engage itself in the political process. Even when the Court went from being the ECSC’s court to the EC’s court it still had a very limited mandate. Article 164, now Article 220, which established the Court’s authority, gave it only one task: “ensure that in the interpretation and application of the Treaty the law is observed.”\(^5\) As the Community’s court, the

\(^5\) European Community Treaty, 1957.  
ECJ’s fundamental task was to promote trade and economic prosperity through the rule of law, as this was seen as more effective than diplomacy and more appropriate than warfare.\textsuperscript{6} Despite this limited mandate, it is widely accepted that the Court has engaged in blatantly political decision making that has increased the power of the Court and the Community and limited the sovereignty of the member states. This is something to which the European judges sitting in the “fairytale land Duchy of Luxembourg” readily admit.\textsuperscript{7}

Before the Court can be seen as a potential threat to European integration its motivations for making activist decisions must be identified, as well as the motivations member states have for following or fighting ECJ decisions. This is a theoretical exercise that must explain what the Court and member states want, how they can be expected to pursue their interests, and how they can be expected to react to the actions of the other. In order to accomplish this, this thesis will combine the explanatory powers of neofunctionalism and rational choice new institutionalism.

II. Literature Review

When it comes to the European Court of Justice there is no shortage of literature. From books to academic articles, the literature abounds with those who champion the Court, those who lambaste its behavior and those who have ideas for its reform, with the categories often overlapping. The same can be said of the literature surrounding the theories used in this thesis, neofunctionalism and rational choice new institutionalism. The literature used to research and develop this thesis can be broadly categorized in one


\textsuperscript{7} Volcansek & Stack, p. 49.
of three areas: general literature about the Community or Court, literature dealing with neofunctionalism, and that dealing with rational choice new institutionalism.

Paul Craig and Grainne de Burca’s works EU Law: Text, Cases, and Materials and The Evolution of EU Law fall into the first category. These works, both extensive in their scope and research, cover everything from the beginnings of the ECSC to the events of the EU at time of publication. Serving essentially as thorough historical records of all stages of Community law, covering the Court’s, the member states’ and the Community institutions’ actions, these works lack a major ideological bias or argument either for or against an activist ECJ. In fact, the only time the authors address theoretical interpretation of the Community and Court is when they attempt to provide a brief history of theoretical development. Any of the number of other textbooks regarding the ECJ or EC, such as the Deards and Hargreaves text quoted extensively throughout this thesis, serve as valuable resources when one is simply trying to gain a basic understanding of the Community, its laws and its history.

One of the most valuable texts on the history of ECJ activity in particular is Hjalte Rasmussen’s 1986 work On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking. A doctoral dissertation, On Law and Policy is a critical look at the activist role the Court played in expanding Community competences through the mid-1980’s. Rasmussen takes the position that the Court has seriously transgressed the boundaries of its legitimate authority, a position well supported with a thorough analysis of the Court’s case history and comparison with the activist nature of the US Supreme Court. Not an opponent of the Court’s existence, merely its activism, Rasmussen offers his own suggestions for reforming Court behavior to bring it
more in line with the Treaty’s aims. While a bit dated, this work established Rasmussen as a critical authority on the Court.

The two most important texts addressing neofunctionalism were Ernst Haas’s *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957* and Charles Pentland’s *International Theory and European Integration*. No review of neofunctionalism is complete without *The Uniting of Europe*, the first work to develop the theory. Written in response to the perceived shortcomings of functionalism in explaining the pace of European integration, the work serves as a foundation for all subsequent neofunctionalist thought. It was here that political community was defined in terms of integration, the motivations behind integration were identified, and the revolutionary concept of spillover first took shape. Unlike Haas’s work, Pentland’s *International Theory* is not a book specifically about neofunctionalism. Rather, it is a study of four theoretical approaches to European integration: pluralism, functionalism, neofunctionalism and federalism. The major contribution of this piece is that it brings the works of various neofunctional scholars together, contextualizing them vis-à-vis both each other and other integration theories. Pentland’s book, therefore, serves as a textbook-like introduction to neofunctionalism and provides a useful foundation of understanding.

The authorities on new institutionalism as a broad theory are March and Olsen, whose body of work on the subject since *The New Institutionalism: Organizational Factors in Political Life* in 1984 has been extensive. *The New Institutionalism* was the genesis of new institutionalism as a theory, and the authors’ works have covered everything from the impact of institutions on other actors to the process of institutional
change. Junko Kato builds on the work of March and Olsen in “Institutions and Rationality in Politics – Three Varieties of Neo-Institutionalists” from the British Journal of Political Science. In it, Kato clearly defines the three major schools of new institutionalism: historical, rational choice and sociological. This work addresses the many similarities the three have, which often cause them to be confused and interchanged, but focuses primarily on their differences. It therefore serves as a useful guide in determining which form of new institutionalism is most appropriate for a given analytical task. Demonstrating the actual use of new institutionalism is Marlene Wind’s Sovereignty and European integration: towards a post-Hobbessian order. While not a book about theory, Wind covers both rational choice and sociological new institutionalism in her look at the effects of the EU on member state sovereignty. The work is a useful example of how rational choice new institutionalism can be operationalized.

As can be seen in the list of works cited, this is a very brief review of the relevant literature; the works addressed above were simply referenced most extensively. The works cited section of this thesis does not even reflect the sheer volume of material available regarding the European Court of Justice or either theory.

III. Theory

A. Definitions and Introduction to Theory

A purely empirical understanding of the ECJ’s role in expanding Community competence is impossible “since the representation of empirical facts is always based on particular concerns, and assumptions.” 8 No amount of Treaty articles or Court opinions would provide insight into the expansive and threatening nature of the ECJ without a

theory or theories to motivate an analysis of why certain decisions were made by the
Court and how they affect the interests of member states.

The purpose of this thesis is, at its core, the study of integration, the integration of
the states of Europe into a new institution, the EC. Unfortunately, both integration and
institution lack clear, universally accepted meanings, with different theories, and different
theorists within theories, operationalizing different definitions. As this thesis is first and
foremost about integration, it will be addressed first. The founder of neofunctionalism,
Ernst B. Haas, defined integration as the process “whereby political actors in several,
distinct national settings are persuaded to shift their loyalties, expectations and political
activities toward a new centre, whose institutions process or demand jurisdiction over the
pre-existing national state.”9 Others use a more limited definition of integration, one that
focuses solely on the political and ignores the social. Lindberg defines integration as
“gradual buildup over time of collective decision making authority.”10 While some of the
specifics of the definition of integration change, one important aspect does not: it is
viewed not as an end or a stage, but a process.11 Rather than being seen in a state of
existing or not, integration is seen in degrees of more or less. For the purposes of this
thesis, use of the term integration will reflect the more limited version provided by
Lindberg.

Like integration, institution lacks a universally agreed upon definition, with much
of the disagreement occurring between the different schools of new institutionalist

9 Wiener & Diez, p. 2.
E Haas, The Uniting of Europe: Political, Social, and Economic Forces 1950-1957, Stanford University
10 M Dolan, ‘The Study of Regional Integration: A Quantitative Analysis of the Neo-Functionalist and
11 Haas, pp. xxxii, 100.
thought. In rational choice new institutionalism, however, there are essentially two definitions. One is of the type put forward by March and Olsen, who define institutions as a “relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations.”\(^{12}\) This type of definition focuses on the rules and procedures that govern interaction between actors and leads to many things being considered institutions, from a country’s legislative body to the unwritten rules of sportsmanship that help regulate athletes’ behavior toward one another. The other definition employed by practitioners of rational choice new institutionalism is much more specific: institutions are formal, legalistic entities that impose obligations on actors.\(^{13}\) The two definitions are not mutually exclusive; in fact, the second one builds off the first in that a formal, legal entity has its origins in the commonly accepted rules and norms of interaction. The second, more specific definition, however, is more useful for the purposes of this thesis, given its focus on the tangible entities of the ECJ, EC, and member states, and will be the one employed.

The special circumstances surrounding the expansion of EC powers through decisions of the ECJ cannot be adequately explained by any one of the traditional theories of international relations that focus solely on the nation state, economic forces, or the classes. Given that this thesis focuses on the process of integration, the ECJ, and member states, the use of both integration and institutional theory provides the most explanatory power. Integration theory is particularly useful because of its “reflection on intensifying political cooperation in Europe and the development of common political institutions.”\(^{14}\)


\(^{14}\) Wiener & Diez, p. 3.
While there are a number of different integration theories, from functionalism to liberal intergovernmentalism, neofunctionalism will provide the integrationist theoretical framework for this thesis. The reason for this is threefold. First, it is the theory most capable of explaining the mechanical process through which the ECJ expands its and the Community’s power while at the same time explaining the process of member state response. Second, neofunctionalism goes a long way in explaining the motivations of the relevant actors, not just the process through which they pursue their interests. Finally, neofunctionalism has the reputation of being a theory unable to explain any aspect of integration beyond a single-minded progression towards federalism, a theory that does not explain what causes integration and is unable to account for how integration can fail. Neofunctionalism does not deserve this reputation, as will be demonstrated by its usage in this thesis.

Institutional theory will complement neofunctionalism because of the special attention it pays to the interactions of formal institutions and their creators. Rational choice new institutionalism, a theory that is often tied to the functional schools, including neofunctionalism by theoretical scholars, will be the institutionalism used throughout this thesis.¹⁵ The power of rational choice new institutionalism is in its definition of institutions and actor interest. Where neofunctionalism provides insight into how the ECJ expands its authority, rational choice new institutionalism explains why. The economic rationality of interest creation and pursuit in rational choice new institutionalism, together with neofunctionalism, will allow a thorough examination of

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the ECJ’s role in European aggrandizement and the effects of this on member state behavior.

One of the greatest strengths of employing neofunctionalism jointly with rational choice new institutionalism is that both recognize the relevance of actors at several levels. Unlike realism, which focuses on the state, or liberalism, with its focus on the international organization as an actor, neofunctionalism and rational choice new institutionalism recognize the importance of actors at the supranational, national and sub-national levels. There is a role for supranational organizations such as the ECJ, the individual nation states and sub-state elite interest groups in the project of integration, with each actor playing an important role that cannot be ignored.\(^{16}\)

It is important to provide the definition for actors used throughout this thesis in order to understand exactly who or what is being dealt with at a particular moment. The EC does not technically represent the entire integration project. It is only one of three “Communities” and is distinctly separate from the EU, which is what most people now think about when they think of European integration. However, for the purposes of this thesis, it will be used to refer to all Communities and permutations of European integration, unless otherwise stated.\(^{17}\) This technique is borrowed from Volcansek and Stack and is used simply for the sake of convenience and continuity. Member state is a term that requires definition as well, since different authors assign different aspects of the state apparatus to the member state level and leave others to the elite interest group level. For the purposes of this thesis, member state refers to all branches and organs of a

\(^{16}\) Haas, pp. 4-5.

government: executive, legislative, judicial, and all administrative bodies supporting the functioning of the various branches. In contrast, elite driven interest groups are explicitly non-government groups within the member state, typically expressing themselves as voting demographics and political lobbies.

B. Neofunctionalism

With its roots in the European integration project of the 1950’s, neofunctionalism began as a “sympathetic critique” of the functionalist theory. Functionalism was one of the earlier theories to be termed an integration theory and holds that cooperation in technical areas leads to greater cooperation in general. This cooperation, while leading to a federal outcome for some, typically remains at the intergovernmental level, and does not develop into a supranational entity. For functionalists there exists a dichotomous relationship between the economic and political, with no connection existing between the two. Neofunctionalism developed as a result of a fairly rapid period of integration during the 1950’s, when it became evident the economic-political divide in functionalism was not representative of the realities of integration. It was argued that actual events were outpacing the ability of existing functionalist theory to provide explanation when Haas published *The Uniting of Europe* in 1958, the work where neofunctionalism first took form.

Since Professor Haas’ seminal work, neofunctionalism has been reworked, come in and out of vogue, criticized as inadequate and praised for its explanatory powers. Neofunctionalism faced its first major challenge during the integration slowdown of the

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19 Pentland, pp. 64-100.
21 Pentland, p. 106.
1970’s.\textsuperscript{22} It was during this period that many of the theory’s weaknesses were exposed, theorists attempted to rework it to make it appropriate, and it generally fell out of favor. One reason for neofunctionalism’s fall from favor was its history of being misunderstood and caricatured.\textsuperscript{23} It was applied in such a way that the theory was only capable of explaining one outcome of European integration: the eventual creation of a super state. This is not a weakness of the theory itself, but rather a misapplication by scholars advocating a particular outcome and using neofunctionalism to justify their views. Neofunctionalism has also suffered from limited application in that its practitioners have historically overlooked the role of the ECJ and law in European integration.\textsuperscript{24} While there is a theory of legal integration, it does not have the tools to explain the potential for destruction of European integration by the Court. Neofunctionalism, however, is able to adequately address the special role the ECJ has played over the decades, including the threat it poses. With the resurgence in European integration that occurred with the Single European Act (SEA) in 1986, neofunctionalism regained some popularity as a method of explaining integration and remains a valuable tool in explaining the expansive nature of ECJ decisions.\textsuperscript{25} My goal in utilizing neofunctionalist theory is to provide a thorough understanding of the Court’s role in integration, while demonstrating that it does not suffer from the shortcomings many of its critics have pointed out.

As mentioned before, a crucial point in the neofunctionalist argument is that actors, whether supranational organizations such as the ECJ or sub-national elites, act not

\textsuperscript{22} M O’Neill, \textit{The Politics of European Integration: A Reader}, Routledge, New York, 1996, p. 44. \\
\textsuperscript{23} Wiener & Diez, p. 1. \\
\textsuperscript{24} Wiener & Diez, p. 56. \\
\textsuperscript{25} O’Neill, p. 5.
in pursuit of an ideal or the greater good, but self-interest.\textsuperscript{26} From a neofunctionalist perspective, expansive or limiting actions taken by the Court or member states are the result of selfish pursuits, not of a benevolent adherence to an ideal. It is here one of the strongest critiques of neofunctionalism occurs, for it traditionally fails to identify what that self-interest is. This need not be the case, however. It can be assumed that self-interest is survival. Of the person, group, institution or state it does not matter, the root desire is the same. Since power is equated with greater chance of survival, and survival on one’s own terms, it therefore follows that self-interest is power. It is here political theories diverge, with realists defining power as military strength and neoliberals defining it in economic terms. As a theory of integration, neofunctionalism defines power in relation to that process. Thus, power is defined as greater control over the process of integration, control which will be pursued by the Court and member states alike. For the ECJ this means expanding its jurisdiction and judicial control while also strengthening the central power of the Community. For member states this means pursuing the economic benefits the Community was designed for while also retaining their sovereignty and unique identity. Given the varied nature of sub-national elite interest groups, it is impossible to say specifically how they would each define power, but it would relate directly to the type of interest group and what it stood to gain or lose from integration.

The result of this self-interested action, and neofunctionalism’s great contribution to the study of integration, is spillover, which Dolan defines as the increase in decisional output in EU institutions because of their original power and duties.\textsuperscript{27} This is the key insight of neofunctionalism into the process of integration. At the center of this

\textsuperscript{26} Matlary, p. 189.
Pentland, p. 100.
\textsuperscript{27} Dolan, p. 295
understanding is the idea that “members of an integration scheme…expand the scope of commitment” in order to more effectively pursue their interests in the integrative process. The key to spillover is effectiveness. It is the argument that institutions will expand their power into areas where they previously had none because it is necessary to more effectively carry out the duties with which they were originally tasked. Because different areas of the economy do not exist in isolation, spillover will occur when, in pursuit of free trade for example, formal tariff barriers are removed and there becomes a need to address non-tariff barriers. The outcome of this is “to upgrade the common interests and in the process delegate more authority to the center.” This process is neither purely technical nor benignly motivated, but is the result of self-interested action. The Court acts as an agent promoting spillover by engaging in judicial policymaking, defined by Rasmussen as a “court’s contribution to creating, conserving or changing public policies, or existing priorities among them, in areas of public policy which are subject to some sort of governmental regulation by binding rules of law.”

Contrary to what some theorists have previously said, or how they have applied neofunctionalism, spillover is by no means automatic or smooth. For starters, spillover presupposes the existence of an agreed objective. Without agreement on a common goal there can be no agreement on expanding powers, and no spillover. This notion holds true whether one is dealing with separate member states agreeing, through the Council, to expand Community powers, or with individual judges on the Court deciding a case.

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28 Pentland, p. 118.
30 Dolan. p. 286
31 Pentland, pp. 108, 111.
32 Rasmussen, p. 4.
33 Burley & Mattli, p. 65.
Additionally, spillover can occur in fits, facing starts, stops and even set backs.\textsuperscript{34} There are a number of reasons spillover may not occur evenly. Member states are constantly reevaluating their commitment to the integration scheme, comparing the results they expect with what they actually experience, and they will only agree to allow more spillover and integration if they deem their interests are being met or will in the future be met through that process. According to Matlary, this situation should even offer the possibility of “upgrading,” the potential for further pursuit of self-interest.\textsuperscript{35} If a member state determines the integration scheme to be beneficial, no change needs to be made to the arrangement.\textsuperscript{36} However, if the scheme is determined not to be serving the member states’ needs then a change will be pursued, and this can be either the expansion of power or the roll-back of integration.\textsuperscript{37} The latter is known as spillback.

Spillback is a term defined by Lindberg and Schiengold and can be seen as the opposite of spillover. The basic premise is that member states, or other actors in an integration scheme, constantly evaluate their relationship to the scheme as a whole. If they determine that what they are receiving from that relationship is not best serving their self-interest they will attempt to redefine their relationship to the integration process. This can include attempts to roll back integration, or even full withdrawal as a participant.\textsuperscript{38} In terms of Court behavior, spillback will occur when the Court has pushed spillover too far. Member states comply with Court decisions because of what Varian describes as the “second best arrangement.”\textsuperscript{39} According to Varian, the most favorable

\begin{footnotes}
\item[34] Pentland, p. 119.
\item[35] Matlary, p. 201.
\item[36] Wiener & Diez, p. 63.
\item[37] Wiener & Diez, p. 57.
\item[38] Pentland, p. 119.
\end{footnotes}
strategy for any member state is unilateral non-compliance while all other member states are fully compliant. This provides the member state with all the benefits and none of the restrictions of Community membership. However, this is not a feasible option since once one member state refuses to comply the others will likely follow suit, what Rasmussen terms the “spreading affect.” The member states will then exercise the second best option, that of compliance, in the hopes that others will do the same. This can only motivate member states so far, however. When determining where its interests lie, a member state is more likely to choose non-compliance if it deems the restrictions it faces as more excessive than what it receives from reciprocal restrictions on its fellow member states. At this point spillback occurs. This limits the ability of the Court to make expansive judgments, if it wishes to avoid particularly harsh spillback from the “countervailing powers.”

When addressing the process of integration, neofunctionalism makes four assumptions about the member states: integration occurs between formally independent entities; the nation state serves as the model for integration; integration is a two way process between the member states and supranational organizations; and new political loyalties may arise without threatening the primacy of the nation state. The first assumption, that integration occurs between formally independent entities, is critical in explaining the relevance of member states to the process of integration in neofunctionalism. By holding that it is between the states that integration occurs, and not

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40 Rasmussen, p. 343.
42 Rasmussen, p. 17.
43 Burley & Mattli, p. 52.
Pentland, pp. 114, 195.
Haas, pp. xxxii, 14.
between smaller groups within states, the individual member state maintains its importance. An important distinction to be made here is who integration occurs between and who motivates integration. While neofunctionalism holds that integration occurs between states, it also recognizes that smaller, sub-national elite groups are a major driving force in the process itself. Thus, while domestic labor organizations (to cite an example only) may push for integration, the integration is between member state labor markets and laws, not between the various domestic labor lobbies. The second assumption provides much of the analytical structure with which neofunctionalists approach integration. Because the nation state is used as a model, the end result of the process of integration, assuming continued forward movement, is a gradual shift from the diplomatic to the domestic.\textsuperscript{44} This assumption, taken alone, is responsible for much of the misunderstanding and misapplication surrounding neofunctionalism that it is a goal of this thesis to remedy. The third assumption is critical to understanding the integration process after it has begun and proceeded for some time. By two-way process, Haas meant that both the supranational bodies and nation states influence the other’s understanding of their interests and the integration process itself. As the process progresses it is assumed that the values and goals of both sides will undergo changes.\textsuperscript{45} For example, the more integrated a state becomes the more costly it becomes to exit the integration scheme and the more value it sees in remaining a member, thus redefining its goals. The fourth assumption regarding member states, that new political loyalties may not supplant national loyalty, is the basis for the idea of spillback. While there may be new loyalties, they will exist simultaneously, and it becomes a question of which one is

\textsuperscript{44} Pentland, p. 194.
\textsuperscript{45} Haas, p. 13.
supreme over the other. Given the continued primacy of the state in self-identification, the national identity will almost always be superior, creating the potential for spillback.

Neofunctionalism is not without its critics, from intergovernmentalists to legal integrationists, who point out a number of potential shortcomings. I, however, hope to demonstrate that these shortcomings are either mischaracterizations of the neofunctionalist model or are not relevant for the purposes of this thesis. The first major criticism of neofunctionalism is that it is a very normative theory that, because of the desire for a highly integrated Europe typical of its practitioners, can only explain a continuous forward movement towards a European super state. Some authors have reinforced this perception by seeing integration as a way to wither away at the state, with the only possible outcome being a large, federal Europe.\(^\text{46}\) This is one problem that helped lead to neofunctionalism’s near death in the 1970’s. However, with the application of spillback, this critique is made moot, since it provides for more than simply one alternative. I intend to show that neofunctionalism can be used just as easily and effectively to explain the potential end of the EC, for any theory of integration “should potentially be a theory of disintegration,” aiding in explaining both why countries choose to enter power limiting arrangements and why they choose to exit them.\(^\text{47}\)

A second criticism of neofunctionalism is that it attributes too much autonomy to the supranational organizations and their ability to determine the integrative scheme.\(^\text{48}\) This is largely the result of a lack of clarity in the role of the state in neofunctionalism’s previous


\(^{47}\) Wiener & Diez, p. 47.

application and a misunderstanding of neofunctionalism itself.\textsuperscript{49} However, as Pentland says, the role of the central institution in defining the terms of the final agreement is crucial, but it does not need to go so far as to mean the trumping of the nation state.\textsuperscript{50}

Related to this is the critique that, in its focus on the Commission, neofunctionalism has historically overlooked the role of other institutions, such as the ECJ, in European integration. “By concentrating so exclusively on interdependencies rooted in production and exchange and, hence, on the role of European interest politics, neofunctionalists tended to discount the significance of decisions taken and precedents set by the ECJ.”\textsuperscript{51}

A final criticism of neofunctionalism is that it fails to describe under which circumstances integration begins.\textsuperscript{52} This shortcoming, while perhaps being valid, does not affect the relevance or effectiveness of neofunctionalism for the purposes of my thesis, for, as will be demonstrated below, rational choice new institutionalism fills this explanatory gap.

C. Rational Choice New Institutionalism

The origins of rational choice new institutionalism are more fluid than those of neofunctionalism. Institutionalism has its roots in the study of the American federal administration and developed out of the highly behaviorist atmosphere of the 1950’s and 1960’s.\textsuperscript{53} While institutionalism had developed during the ‘60’s and ‘70’s, new institutionalism is a more recent phenomenon, one that arose to explain and interpret the

\textsuperscript{49} Burley & Mattli, p. 54.  
O’Neill, p. 37.  
\textsuperscript{50} Pentland, p. 119.  
\textsuperscript{51} Wiener & Diez, p. 56.  
accelerated process of European institutionalization in the 1980’s. March and Olsen popularized new institutionalism with the publication of their work in the 1980’s, bringing it into the mainstream and making it one of the leading theoretical frameworks for the study of European political and economic integration. Part of this rise in popularity is due to the perceived inability of existing theories to explain the effect institutions have on particular policy outcomes by shaping the political behavior of actors, influencing the formation of their preferences and the pursuit of their interests. Rational choice new institutionalism is one of three major schools of new institutionalist thought, the other two being historical and sociological, and represents the triumph of economic rationality in political science.

The fundamental premise of rational choice new institutionalism is that self-interested actors act purposively to maximize their benefits, and in order to do this institutions are created which will affect the actor’s pursuit of maximum benefits. The question rational choice new institutionalism developed in response to is why, when faced with limited resources, do actors choose to create institutions, and how do they choose to do so? However, before it can be understood why actors create institutions to achieve their goals, it needs to be understood what constitutes an actor and what defines an actor’s behavior. In rational choice new institutionalism, an actor is any unitary,

54 Chryssochoou, p. 112.
56 Chryssochoou, p. 114.
59 Wind, p. 39.
human interest driven entity. This can be the individual of economic rationality or an institution such as the ECJ or a member state. All actors in the scheme, whether individuals or an institution, pursue their self-interest only after “extensive rational calculation.” This calculation is multi-faceted. The first concern of the actor is its preferences, with the intended goals considered against the potential outcomes. While the cosmetics of the goal may change the essence of it never does. Power is always pursued as a result of the desire for survival. Thus, the ECJ wants more authority over an EC of expanded competence, while the member states want a minimalist but functional Community that protects their sovereignty while increasing their welfare. The second concern of an actor is a consideration of how others are expected to act. Given that the actions of others can help or harm the pursuit of self-interest by the first actor, a calculation of what another is likely to do will affect the decision of any rational actor. For example, the second best arrangement described by Varian would no longer be a desired outcome if the other actors in the scheme cannot be expected to comply as well. The final concern is what kind of limitations have been placed on the actor(s) by an institution. The idea that institutions, as agents created with a functional goal in mind, can in turn influence their creators independently is one of new institutionalism’s key contributions to the study of political science. While created to help in the pursuit of self-interest, institutions are capable of enough autonomous behavior to wield influence in their own right. Considering these three factors (self-interest, probable behavior of other actors, and the influence of institutions) the actor is able to make a reasoned assumption

59 Kato, p. 554.  
60 Wind, p. 34.  
of the costs and benefits of different behavior, what is termed the logic of consequentiality by March and Olsen. Where the difference between the two is greatest is where the action is expected to take place.

There is debate in rational choice new institutionalism surrounding preference formation. On one side are those who believe that preferences are given, fixed and exogenous to the system. On the other are those who view them as fluid and shaped by interaction. This thesis will rely on a blending of the two. I suggest that there is one preference exogenous and fixed, the pursuit of power. All subsequent preferences, while based on the first, are subject to change based on circumstances. Whether it is military, financial, moral, or another form, it is assumed that actors seek power. That is the preference shared by all, and in that sense it is exogenous to interaction. What changes are what I call superficial preferences, those preferences that are created in order to pursue power. Superficial preferences are formed only after a careful calculus has been performed considering the costs and benefits of certain actions, the potential actions of others, and experience from previous interaction. Superficial preferences can be the desire for more or fewer trade restrictions, centralized or decentralized executive authority, and so forth. One factor influencing those preferences is institutions themselves. Once an institution is created, it not only enables the pursuit of preferences but shapes and limits those preferences. How an institution enables that pursuit is best addressed later, but how they shape those preferences can be addressed immediately. By

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64 Harty, p. 52.
ordering events, available choices and information, institutions force actors to reevaluate their goals under new circumstances in a process called Bayesian updating, what Haas referred to as the two-way process. They both enable and constrain the pursuit of interests, and while the end goal always remains the same, the preferences of how to achieve it will change.

One of neofunctionalism’s major shortfalls is its inability to explain the origin of institutions, and as this thesis is concerned with what circumstances will lead member states to limit or destroy the ECJ or European integration project it must be understood why they would create such institutions in the first place. Part of what makes rational choice new institutionalism such a complementary theory to neofunctionalism is that one of its major contributions fills in where neofunctionalism failed and explains how and why institutions are created. For rational choice new institutionalism scholars, institutions are seen as a solution to the collective action dilemma of politics. The foundation of institutions can be found in rational choice new institutionalism’s understanding of individual behavior, which, as previously stated, is about the rational pursuit of self-interest. If every actor is selfishly pursuing its own good, with the only limits being what it is capable of and willing to do, then no one actor will manage to maximize its gain. In such a free-for-all, transaction costs are very high, outcomes are uncertain, and no actor is able to fully pursue its preferences. By structuring exchange between actors through rules, norms and established avenues of contact, institutions are able to lower the costs of interaction, increase the certainty of outcome and limit the

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67 Hall & Taylor, p. 945.
opportunity for one-sided pursuit of interest. The EC was created by member states who saw the costs of not cooperating through a formal institution as prohibitively high, and it is in the wake of this atmosphere that the ECJ has exercised the power it was given and the power it has claimed.

One of the hallmarks of institutions is that, having been created out of a functional need, they can often lead to unintended consequences for the creators. The occurrence of unintended consequences is partly due to the theoretical requirement of extensive rational calculation. In the perfect “laboratory settings” of discourse theorists use to establish and develop the theory, the requirement for extensive and rational calculation was not faced with the realities of time and information constraints. Due to the limitations of time and information that exist in reality, the kind of thorough calculation the theorists envisage does not occur. Rather, the calculation is not perfect, which leads to what one scholar refers to as “intended rationality:” using the time and information available when the action is taken as if all information and unlimited time had been available. Thus, while the action may not be rational if looked at with the benefit of hindsight and extensive information, it was certainly intended to be rational at the time, making it, for all intents and purposes, rational in reality. Because the calculations are not perfect, the creators of the institution begin to lose control over the outcome of institutional actions and they become less certain. Another cause of unintended consequences is action taken for the short-term. Because politicians often have a timeline that extends no further than

68 Wind, p. 29.
69 Wind, p. 34
70 Kato, p. 576.
their next election, the action they take is generally geared towards the near future.\footnote{Wind, p. 130.} As circumstances change so will preferences, as will the action taken by those who created the institutions. The effects of these short-term actions often become “institutionalized” while the preferences that led to them do not, increasing the likelihood of the institution producing consequences that were not expected. The most important factor, however, for the existence of unintended consequences is the relatively autonomous nature of institutions once created.\footnote{M Aspinwall & G Schneider, ‘Institutional research on the European Union: mapping the field’, p. 5.} It is impossible to foresee or effectively control the actions of an institution that is able to function relatively autonomously, which creates the potential for that institution to take action or make decisions that run contrary to the original aims and intentions of the actors that created it.

Understanding institutional change is critical to any argument regarding change of the ECJ and EC, as this thesis intends to make. Much like the process of integration, institutions are not static; nor is the process of institutionalization automatic or irreversible.\footnote{March and Olsen, \textit{Elaborating the ‘New Institutionalism’}, p. 7.} This is evident in the formal and informal changes that have occurred in the ECJ over the years, such as changes to its authority and creation of a Court of First Instance (CFI). As rational choice new institutionalism holds that institutions are created for the functional purpose of maximizing benefit, only those that continue to serve this purpose will survive.\footnote{March and Olsen, \textit{Elaborating the ‘New Institutionalism’}, p. 8.} The creators of an institution, whether member states, individuals, or other institutions, retain the ultimate authority, despite institutional autonomy, in that they can change their allegiance to the institution, even going so far as

\footnote{\textit{Wind}, p. 35.}
to destroy it.\textsuperscript{75} This is, however, made difficult by several factors. First, it may not always be simple for an actor to change or destroy an institution; there are things mitigating in its favor. An institution can structure interaction in such a way, or even make itself such an important actor in its own right, as to remove any potential benefit from “malfeasance.”\textsuperscript{76} Second, given the autonomous nature of institutions and their ability to actually shape, not just constrain, the preferences of those that created it, they may actually see a change in their role vis-à-vis the actors. When this happens, and the institution has become something other than intended, either because it or the actor’s preferences have changed, is when an institution is ready for change. The difficulty lies in identifying when an institution no longer serves the purpose for which it was created. In addition to requiring the above, institutional change relies on one more circumstance: opportunity. When the changes already discussed lead to a negative shift in the cost-benefit calculation then the need for change already exists, all that is needed is an opportunity for the actors to institute that change. This opportunity can come in many forms. When dealing with member states looking to change the ECJ or EC, that opportunity can come from either international or domestic politics, with the opportunity being an upcoming intergovernmental conference (IGC) to discuss Treaty reform, strong calls from the voting public of a country, or support across several member states for change.\textsuperscript{77}

The use of rational choice new institutionalism also has its shortcomings, but again, these should prove relatively minor or irrelevant for the purposes of this thesis.

\textsuperscript{75} Martin, p. 1.
\textsuperscript{77} Harty, p. 64.
One critique often leveled against rational choice new institutionalism is that it requires actors to possess a clear, consistent hierarchy of preferences which, it is argued, they do not. This criticism is only accurate if one looks at superficial preferences as inherent, which they are not. Beyond survival, all other preferences are simply value judgments, based on the circumstances, on how to best ensure survival, and as such, they change with those circumstances. A second critique of rational choice new institutionalism is that its assumption of rationality is too strict to apply in real-life situations. This is a fair critique in the sense that, as already discussed, pure rationality as it exists in the theoretical discourse is impossible due to constraints of time and information in the real world. However, to say this reduces the effectiveness of rationality is to assume that intended rationality is fundamentally different than perfect rationality in the actions they precipitate. Given that an actor utilizes available information, whether it is imperfect or not, to decide on a course of action in pursuit of self-interest is enough to justify the use of rational choice new institutionalism, even if the conditions created by the theorists do not in reality exist. A natural follow up critique to the previous two is that of rationalism’s clear failure to explain all human behavior, which proves troublesome since humans are the rational beings that make institutions adhere to rationalist rules. Behavior such as sacrificing of life or well-being for the benefit of another is completely irrational in the sense of pursuing self-interest defined at its most basic as survival, and rational theory simply cannot explain this phenomenon. However, this critique can be disregarded for this thesis because there has yet to be an example of a state or other institution that has sacrificed itself purely for the good of another. A final critique of

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78 Kato, p. 570.
79 Kato, p. 573.
rational choice new institutionalism is that its methodology “has mainly been deductive, formal and universalist. It has tended not to examine individual cases” and thus lacks “empiricism.”\footnote{M Aspinwall & G Schneider, ‘Institutional research on the European Union: mapping the field’, p. 15.} Just as with some of the shortcomings of neofunctionalism, this is not a problem with the theory itself but rather with its practitioners and will be directly remedied by the application of rational choice new institutionalism to six specific decisions of the ECJ.

D. Operationalization

This thesis operationalizes neofunctionalism and rational choice new institutionalism in two parts. The first section of this thesis establishes an historical trend of activist Court action followed by anti-Court and Community responses from member states that viewed the decisions to be contrary to their interest (except in one instance when the decision was welcomed by the member states). In establishing this trend, the neofunctional assumptions of integration as a political process and politics as the pursuit of self-interest will be utilized in conjunction with the rational choice new institutionalism assumption that self-interest is pursued in a rational manner. Looking at the text of the decisions and contextualizing them with documents from member states and other EC institutions, this thesis will show that the Court has rationally pursued an integrationist course in order to expand its and the Community’s power, and will likely continue to do so. Rather than occurring naturally as a way for the Court to more effectively carry out its duties, the Court has co-opted the notion of spillover as a tool in order to expand its own jurisdiction and push the integration scheme forward. This thesis argues the Court has continued to expand EC competence, such as deciding the Commission can force member states to levy criminal penalties, by justifying its
decisions with established community needs. Spillover is an appropriate analytical tool for this type of politically motivated integration because it is itself explained by politicization. In looking towards a trend of anti-Court and Community responses by member states to ECJ decisions, the theories will be operationalized in the same manner, only spillback will replace spillover. The member states are pursuing their self-interest in the integration project and when the ECJ makes decisions deemed contrary to those interests they will take action meant to correct that problem. However, because of the nature of principal-institution interaction – Haas’s previously described two way process and rational choice new institutionalism’s Baysian updating – the member states evaluate their response in the context of the EC and ECJ. This will likely lead to action not necessarily deemed “rational” by those who see the EC as purely an interstate bargain.

For the second section of this thesis the explanatory purpose shifts to that of showing the Court as a threat to continued and sustained European integration as it exists today. As will be shown in Section V of this thesis, the ECJ has been a major promoter and engine of European integration; while pursuing a more expansive agenda at some times versus others, the general trend has always been towards an “ever greater Union.” This thesis argues that it is this very nature of the Court that makes it such a threat to sustainable European integration within the terms member states set out in the various treaties. Several aspects of neofunctionalism will be drawn upon to develop this argument: its recognition of nation state interest as important, its argument regarding the legitimacy of a court and its decisions, and the notion of spillback. Rational choice new institutionalism can also be used to help demonstrate the tenuous existence of European

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81 Dolan, p. 286.
82 European Community Treaty, 1957
integration if the ECJ continues on the path it has been on because, even though it helps redefine member state interests and is relatively autonomous, member states are, in the end, dominant and possess the power to stop, change or destroy the ECJ and European integration. Neofunctionalism is an appropriate theory because it does not dismiss the importance of the member states, who, in fact, continue to play a key role in integration by evaluating and setting the terms of the scheme, while rational choice new institutionalism is appropriate because it injects the purposefulness and rationality that are at the heart of this thesis. Both theories agree a court’s decisions are only legitimate as long as it is able to compel parties to it to comply and an international tribunal, such as the ECJ, must rely on the perceived interest of the member states and the willingness of national courts to uphold its decisions. As Karen Alter says, “to put it bluntly, the ECJ can say whatever it wants, the real question is why anyone should heed it.” Using neofunctionalism and rational choice new institutionalism, this thesis argues that member states may not choose to heed it much longer. As long as EU member states continue to pursue individual interests, states will be wary of an ever increasing EU power sphere. The ECJ was created to oversee an international organization governed by international law, but if it continues to increase its ability to decide the domestic laws of the EC member states with decisions that states view as contrary to their self-interest it stands to reason that the states will eventually react and slow or stop the integration process. As the gap increases between ECJ and popular values, more dissent will occur.

84 Pentland, pp. 54, 57.
87 Rasmussen, p. 301.
IV. Methodology

The substance of this thesis will be broken into two sections. The first section will review a selection of Court decisions and the ensuing member state responses using the combined theoretical framework, the goal being to establish the motivations behind the Court’s and member states’ behavior. The second section will build upon the first and develop a set of specific criteria under which the Court can be expected to make an activist decision and the member states can be expected to respond negatively. These criteria will then be used to predict when the Court will make an expansive decision in the future and how the member states can be expected to respond.

Having developed the appropriate theoretical framework, the first challenge is to create a representative list of cases that demonstrates the Court’s activism and also prompted direct response from the member states. This will be done through a comprehensive review of the literature surrounding the Court’s history, drawing on cases that are mentioned by several authors as important. This list will be augmented by a review of more recent case law that may meet the criteria above but has not as yet made it into academic literature with any regularity. After identifying the cases, each will then be contextualized in the political atmosphere in which it was decided by looking at the recent history of Court decisions, member state actions and attitudes towards the Court, and the general status of integration at that point. Having placed the decision, it will then be analyzed, along with the responses of member states, with neofunctionalism and rational choice new institutionalism.

This methodology is not perfect. The sheer number of cases requires a limited review, which may in turn prejudice the results. Since no study of the ECJ can avoid this
problem, however, this shortcoming will make little difference. More important is the
difficulty in defining judicial activism. As a subjective valuation, defining a particularly
“activist” decision will be impossible to do in a completely neutral manner. This
problem is mitigated by using cases cited by the majority of ECJ authors as expansive
and activist. Through these cases I will be able to develop a list of criteria with which to
judge more recent decisions for activism. A second shortcoming of this approach is the
incremental nature of judicial policymaking. Because the Court typically develops a
policy over the course of several decisions, it may prove difficult to identify spillback in
response to a particular decision.

Having looked at the historical trend I will then be able to use those findings to
establish a case for the threatening nature of the Court. Using the understanding of the
circumstances and each actor’s motivations, I will develop a set of criteria which can be
used to predict both Court action and member state response. Applying these criteria,
this thesis will attempt to demonstrate the threat the Court poses to future integration on
the terms which it has historically progressed. The major shortcoming of this
methodology is that trends are not always accurate predictors of future developments,
largely because we possess imperfect knowledge. In fact, as the quote from the opening
paragraph suggests, trends can easily change. A trend may also appear to have existed
for one reason when it existed for an entirely separate one, which could lead to inaccurate
predictions about the future.

88 Rasmussen, p. 73.
89 Craig & de Burca, The Evolution of EU Law, p. 324.
V. A Selective History and Analysis

A. Van Gend en Loos

One of the most famous, and arguably most important, decisions by the ECJ has been to give the Treaty direct effect. The doctrine, which “can be provisionally defined as the capacity of a norm of Community law to be applied in domestic court proceedings,” was established in the Court’s first groundbreaking judgment, Van Gend en Loos, and has since been developed through subsequent cases into the 1990’s. Direct effect has become such a bulwark of the EC legal system that it is inseparable from any study of the Community’s structure and is taught to students as a defining characteristic.

Direct effect was not enshrined in the original Treaty of Rome establishing the Community, nor had it been discussed politically as an option by any of the original six member states. It is, rather, purely the creation of the European Court of Justice. On 5 February 1963 the Court rendered its judgment in Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration (Van Gend en Loos). In this seminal case, Van Gend en Loos, a Dutch importer, challenged the eight percent import duty as contrary to Article 12 of the EEC Treaty. The real issue was less the legality of an eight percent duty as opposed to three percent, which was the prior rate, but whether or not a Dutch company could be permitted to rely on Article 12 in national court proceedings.90 What was at stake for the member states and Community was no less than establishing the real nature of the Treaty. Was it traditional international law that relied on states party to the agreement for effect based on their monist or dualist systems, or was it a new body of law, sui generis,

granting its own rights and privileges to individuals? The Court was given the opportunity to answer this question on a literal or a goal-oriented interpretation of the Treaty.\footnote{Craig & de Burca, \textit{The Evolution of EU Law}, p. 12.}

The political environment in the Community in the period leading up to the Court’s decision cannot be defined as necessarily hostile to such a bold judgment. The Community was still quite young, the Court had yet to make a major decision, and there was little reason to believe \textit{Van Gend en Loos} would become important.\footnote{R Dehousse, \textit{The European Court of Justice: The Politics of Judicial Integration}, St. Martin’s Press, New York, 1998, p. 38.} In fact, member states appeared to be pleased with the state of the EC, as evidenced by the failure of the Fouchet Proposal, which would have unambiguously removed any supranational aspect to the Community.\footnote{K Alter, \textit{Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe}, OUP, Oxford, 2001, p. 183.} Community commentators had remained largely silent on the issue of direct effect since it was agreed by the member states that the Treaty relied on national constitutions for its effect.\footnote{D McKay, \textit{Push to Union: Understanding the European Federal Bargain}, Clarendon Press, Oxford, 1996, p. 52.} The Italian Consiglio di Stato had, in 1958, given the Treaty direct effect, but this was in-line with the member states’ understanding of such a decision being within the national prerogative.\footnote{Craig & de Burca, \textit{The Evolution of EU Law}, p. 178.} As the national politicians understood it, there was nothing to suggest the Treaty was any different than other international treaties or that the ECJ would be inclined to declare it so. Furthermore, the member states had recently outlined the reduced powers of the ECJ in the Treaty and had no reason to believe these reduced powers were not understood. Once the issue had been raised before the Court, however, it received official opposition from a full half of the
Community, with Germany, Belgium, and Holland arguing before the Court that the
effect of the Treaty was a matter left entirely to the national constitutions. This
opposition, however, provided little evidence of a potential backlash against the Court if
it declared the Treaty to have direct effect.

The decision of the Court in *Van Gend en Loos* was revolutionary in its
application of international law. The Court decided that not only did the Treaty confer
rights on the individual, but “these rights arise not only where they are expressly granted
by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly
defined way.” 96 According to the judgment, the Treaty does more than create “mutual
obligations between contracting states” but creates a “new legal order” in which member
states have “limited their sovereign rights.” 97 Equally important, as will be seen later, is
the Court’s decision to let the Dutch Tarifcommissie decide the facts of the case
regarding the legality of the import duty.

Response to *Van Gend en Loos* was mixed throughout the six-nation Community,
with different responses coming from different actors. The Court’s decision, however,
was largely accepted, with no member state government protesting or refusing to comply.
This is not to say *Van Gend en Loos* was not challenged, most of those challenges
originating in Germany. In 1967, the Bundesfinanzhof, reacting to another ECJ decision,
*Lütticke*, argued that direct effect was “in essence of a political nature” and thus invalid
as a judicial decision. 98 Before that, in 1964, the French Conseil d’Etat began a tradition

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96 Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration*

97 Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration*


of not referring cases to the ECJ because it did not agree with the “interpretive leadership” demonstrated by the Van Gend en Loos decision. As late as 1978 the Conseil d’Etat, in Cohn-Bendit, challenged the ECJ’s assertion that it alone had the authority to determine direct effect. Despite these instances of protest, the Court’s decision was, arguably, “readily accepted” throughout the Community and the principle that the Treaty can have direct effect has never been challenged.

What motivated this behavior on behalf of the Court and member states? What led the Court to abandon the text of the Treaty and make a teleological decision while the member states watched as they were told they had limited their sovereignty? It is here neofunctionalism and rational choice new institutionalism become useful tools. Beginning with the Court, from a combined theoretical perspective it is assumed the ECJ’s decisions will tend towards expanding its and the Community’s powers through rational, purposive behavior, often claiming the necessity or efficacy of the expansion to better carry out its explicitly prescribed duties. At first glance, Van Gend en Loos appears to reinforce this idea. The “political action as self-interest expressed” hypothesis that is at the center of the combined theories can be clearly seen in nearly all aspects of the Court’s decision. By creating a new legal order granting direct effect and declaring itself the court of last instance for that order, the ECJ accomplished two tasks: it strengthened the body of EC law and expanded its constituency. A stronger body of EC law makes the EC itself more powerful, increasing the likelihood of its law being used or called into question in court proceedings. This increased incidence of EC law in court means the ECJ is more likely to receive preliminary references or direct challenges from

99 Rasmussen, p. 310.
100 Craig & de Burca, The Evolution of EU Law, p. 196.
any of the actors with authority to do so, which in turn provides it with more opportunity to further develop and expand its and the Community’s jurisdiction and powers. With this one simple decision the ECJ was essentially able to exponentially expand its capability to direct the integration project. The same result is achieved by expanding its constituency. With more actors able to use Community law in judicial proceedings the Court managed to increase the likelihood of Community law being used, with the same resulting benefits as described above.

The major contribution of neofunctionalism to the integration debate was its introduction of spillover, the process of expanding competencies in order to carry out already assigned tasks. This thesis’ contribution to the theory is to assign agency to spillover by incorporating the rational behavior model of rational choice new institutionalism. Where most literature remains silent on what actually sparks spillover, this thesis argues the teleological and goal oriented actions of integration friendly actors is a major cause of the process. The Court’s preference, as an institution of the EC, is to increase its power over the integration project, which will allow it to promote integration on its own terms, in turn giving it further power. Starting with this assumption, it is to be expected that the Court make expansive decisions that do not necessarily rely solely on the text of the Treaty. A look at the language of the Court’s judgment and the effects of Van Gend en Loos support this hypothesis. The Court begins its judgment by stating “it is necessary to consider the spirit, the general scheme and the wording of [the Treaty].”

By ranking the actual text of the Treaty last and the spirit, which the judges are largely free to determine for themselves, first, the Court was ensuring for itself a broad mandate

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102 Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration
for interpretation, and laying the groundwork for ever wider Community competences, based on the spirit of the Community’s founding. There was nothing in the facts of the case or the Treaty to suggest the Court make this decision; rather, it had a choice between a letter-of-the-law and goal-oriented interpretation, and it chose the latter.\textsuperscript{103}

After de-emphasizing the importance of the Treaty’s language, the ECJ was able to declare the creation of “a new legal order of international law” in which the member states limited their sovereignty.\textsuperscript{104} There was no precedence for establishing the Treaty as a new form of international law, distinct from the traditional inter-state treaty where direct effect comes from the contracting state’s constitution.\textsuperscript{105} The most analogous example would be the military tribunals set up after World War II to try individuals for acts made criminal by international treaties.\textsuperscript{106} The comparison is difficult to make, however, between rules meant to prevent genocide and rules meant to promote economic cooperation, and the tribunals fail to serve as precedent for the Court’s ruling. The establishment of EC law as a new legal order went a long ways towards increasing the strength of the Community, for it explicitly transferred certain aspects of sovereignty from the member states to the Community itself. This was not a power-sharing or cooperative agreement, but rather a permanent transfer of sovereignty to a new actor. Not only did this declaration strengthen the Community itself, it allowed the Court to declare itself ultimate judge whenever a question of the Treaty was involved. While still

\textsuperscript{103} Rasmussen, p. 12.
\textsuperscript{104} Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration
\textsuperscript{105} D Beach, Between Law and Politics: The Relationship Between the European Court of Justice and EU Member States, DJØF Publishing, Copenhagen, 2001, p. 35.
reliant on national courts for preliminary references, the ECJ essentially declared itself master of the Treaty, over the intentions and will of the EC members.

It is when the Court comes to the question of the facts of the case that neofunctionalism’s critics would tend to point out its failings. Given the traditional neofunctionalist approach of seeing integration as an unstoppable, constantly forward-moving process, it is difficult to understand why the Court, having already made a bold judgment would not take the extra step of deciding the case itself. Again, this is where rational choice plays a role. Assuming self-interest as the motivating factor behind the Court’s decision, it becomes clear that not only is it in the ECJ’s interest to limit the powers of the member states in relation to itself and the Community, but it is also in its interest to keep the member states involved and moderately pleased with its results. The success of any court, particularly a supranational one such as the ECJ, is dependent on the willingness of its constituents to go along with its decisions, which is in turn dependant on their perception of the court and its decisions as legitimate.107 Additionally, the Court is reliant on member state courts for much of its case load, which, as explained above, plays a role in the Court’s ability to determine its power and the process of integration. It follows, therefore, that the Court can only afford to push so hard at any one time for its integrationist goals, otherwise it runs the risk of losing its legitimacy and destroying itself or the integration process. Deciding the actual facts of Van Gend en Loos, rather than just the application of the Treaty, would have been such a flagrant intrusion into the right of nation states to exercise judicial sovereignty as to gravely threaten the infant Court; a Court that had actually seen member states reduce its

107 Deards and Hargreaves, pp. 283-5.
powers between the ECSC and EC treaties.\textsuperscript{108} The Court was able to secure more than just its continued existence by not deciding the facts of the case; it also allowed it to put the doctrine of direct effect into Community case law without drawing a direct challenge from member states. This was achieved in two ways. First, because the facts of \textit{Van Gend en Loos} were left to the Tarifcommissie to decide, there was no real ruling for the member states to challenge. Second, by inserting direct effect into a judgment that was essentially favorable to the member states, the ECJ reduced the likelihood of excessive scrutiny from member state governments and academics, especially in the atmosphere of relative ECJ neglect that existed throughout the 1960’s. These techniques ensured that direct effect was not immediately challenged, allowing the Court to point to judicial precedent for further justification when it was used again in the future.

Using the combined theoretical approach, it is assumed that, like the Court, member states will pursue their selfish interests through rational political action. One of the problems with using neofunctionalism alone is that it fails to account for when member states would allow integration to occur at the expense of their sovereign powers. By combining neofunctionalism with rational choice new institutionalism, the power calculus that inherently accompanies any self-interested action by a member state is included in the analysis. This calculation is little more than the weighing of the costs and benefits of various courses of action. As this thesis argues, where a state sees the positive effects of integration as outweighing the negative it will allow it to go forward, and if there are multiple choices before it, it will choose the one with the greatest positive gain. Despite isolated instances of national court defiance, there were no examples of official

government resistance anywhere in the community. The question then becomes: why did the ECJ’s decision not tip the power calculus done by member states away from the Community and back towards nationalism? There are a number of possible answers to that question, all of which support the combined theoretical model.

There is a case to be made that the member states of the Community did not fully appreciate the repercussions of the *Van Gend en Loos* decision. There was a lack of focus on the ECJ and its judgments, fostered in part by the focus on attempts to fully implement the Treaty of Rome, despite de Gaulle’s reticence, and by the belief that the Court’s powers were clearly defined and direct effect was safe in the national constitutions. This lack of focus prevented careful consideration of the potential repercussions of the Court’s decision in the future, keeping the member states from fully appreciating its affect on their sovereignty. As there was lack of understanding, little to no threat was observed. With no threat observed, there was little reason to respond.

The combined theories also hold that a member state would acquiesce in *Van Gend en Loos* as long as there came an increase in prosperity with the loss in sovereignty.109 Again, this is an assumption supported by the actual events. Although three member states opposed the Court in the proceedings, and the Advocate General echoed their worries, there was not a pervasive or overwhelming opposition by any means.110 As an institution created to solve the collective action dilemma and increase the gains wrought by member states, there was an interest in seeing a strong set of EC rules. Specific to *Van Gend en Loos*, allowing individuals recourse for national governments failing to fulfill their Community duties helps ensure the compliance of all

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member states and thus the effects of the Community itself.\footnote{111} With increased effectiveness comes more of what the Community was established to accomplish: economic gain. It can, therefore, be seen as in the state’s economic interest to allow the Treaty direct effect.

An ever-present, if rarely spoken, motivation for creation of the EC was to protect Europe from a resurgent and remilitarized Germany, with the thinking being that by tying Germany’s economy into that of the rest of Europe war was much less likely.\footnote{112} This early in the Community’s life, and less than a generation after the end of WWII, the idea of sacrificing a limited degree of sovereignty to the Community in exchange for keeping Germany too close to fight would have played a role in the calculations of any national politician deciding whether or not to oppose\textit{ Van Gend en Loos}. 

Since the combined theoretical model places importance on the role of national courts as part of the member states in the integration process, it is necessary to understand their actions from a theoretical standpoint. Although not widespread, there were instances of national court defiance, which can be attributed to protection of interest. These instances are examples of spillback, where an actor has deemed the integration process to be detrimental to its interests and challenges it. In dualist systems, such as Germany, the question of direct effect was one largely in the purview of national courts. Thus, any ECJ ruling that automatically grants direct effect and makes the ECJ its sole judge robs the national courts of an area of authority they once had. Such an attack on authority, with no positive returns, motivated the courts to oppose the ECJ’s decision. The fact that not all courts opposed\textit{ Van Gend en Loos} can be attributed to any number of

\footnote{111} Craig & de Burca, \textit{The Evolution of EU Law}, p. 195. \footnote{112} Deards & Hargreaves, p. 9.
factors, from some courts not having their jurisdiction affected in any way, to other courts, in Italy for example, having already agreed to the principles put forward in the decision.

B. Francovich

*Van Gend en Loos* was not the only ECJ decision to deal with direct effect, nor was it the only expansive one. There have been a number of cases throughout the years expanding direct effect, *Van Duyn* being one of the most famous, for it gave direct effect to Directives and sparked open defiance from both the Conseil d’Etat and Bundesfinanzhof. Another case, *Francovich*, introduced such an unexpected doctrine and sparked so much response by the member states that it will receive special attention here.

Case 9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (*Francovich*), was actually the combination of two cases, 6/90 and 9/90, which asked the exact same question of the Court. Both cases involved employees owed wages who argued the Italian government should pay those wages based on Directive 80/987. The direct effect of Directives was a long established precedent, beginning with *Van Duyn* in 1974 and being extended even further as recently as *Costanzo* in 1989. What was really at stake in this case was not the direct effectiveness of Directive 80/987, but rather whether a member state could be held financially liable for losses resulting from its non-implementation of the Directive.

The political environment preceding *Francovich* was, overall, fairly positive. The Community had begun to emerge from the integration doldrums of the 1970’s, with the

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Single European Act there was renewed commitment to fulfilling the original Treaty of Rome and it appeared that Europe was once again pro-integration.\textsuperscript{114} Throughout the 1980’s, popular opinion of membership had steadily risen, the Community’s finance problems had been temporarily solved and the Spanish and Portuguese had joined.\textsuperscript{115} There had been instances of hostility towards the ECJ, particularly by national courts and certain leaders, but the Community had continued to expand and no pan-Europe hostility existed. That being said, the environment was by no means as welcoming as it had been before \textit{Van Gend en Loos}. Under the leadership of Margaret Thatcher, the United Kingdom, which had joined the Community in 1973, was not very amenable to an activist ECJ. In 1990, a year before the \textit{Francovich} ruling, Lord Denning, former Master of the Rolls, said

\begin{quote}
Our sovereignty has been taken away be the European Court of Justice. It has made decisions impinging on our statute of law and says that we are to obey its decisions instead of our own statute law...No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all.\textsuperscript{116}
\end{quote}

Additionally, the Court had faced an increasing amount of dissent among national courts and member state governments, with the increased awareness of member state governments of its decisions.\textsuperscript{117} The period of member state neglect of the ECJ, and the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{114} McKay, p. 71.
\item\textsuperscript{117} As quoted in Wind, p. 104.
\item\textsuperscript{117} Dehousse, p. 135.
\end{enumerate}
\end{footnotesize}
Community in general, had ended. In the end, however, the ECJ had been enjoying a period of relative support, so the situation was not overly dangerous for the Court. All of this would change on 19 November 1991.

In its decision, the ECJ once again left the text of the Treaty and said that the issue of state liability “must be considered in the light of the general system of the Treaty and its fundamental principles.” Based on the system and principles, the ECJ found that the principle whereby a State must be liable for loss and damage caused to individuals as a result of the breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty. A further basis for the obligation of member states to make good such loss and damage is to be found in Article 5 of the Treaty, under which the member states are required to take all appropriate measures…

Thus did the ECJ justify extending the doctrine of direct effect into member state liability, through the encompassing language of Article 5 and an argued inherent nature in the Treaty.

Although no attempts were made to counteract *Francovich* through secondary legislation, the member state response represents one of the harshest rebukes of ECJ jurisprudence, in marked contrast to the *Van Gend en Loos* judgment. Germany, in its submission for *Brasserie* (Joined cases C-46, 48/93), stated, in direct opposition to *Francovich* “The German Government considers that it was not the intention of the Community legislature to establish any general liability on the part of member states for

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118 Beach, p. 74.
119 Case 9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic
infringement of Community law,” while the UK, with the support of Germany and Italy, opposed the Dines case largely because of Francovich.\textsuperscript{121} These expressions of unhappiness, while powerful in that they occurred in legal cases and could potentially receive legal remedy, were minor compared to what would come. The UK government issued a proposal at the 1996 IGC that would alter the Treaty in a way limiting the strength of a Court it called “exasperating” and directly reduce the applicability of Francovich.\textsuperscript{122} The proposal was to limit when a member state must pay damages for non-implementation, give the Council authority to nullify an ECJ decision when it did not agree, and to adopt a clause in the Treaty requiring the Court to uphold subsidiarity. While the British proposal did not succeed, partly because of the attack it made on judicial independence, it is significant that at least one member state was willing to take the strongest action possible against the ECJ.

Most illuminating about the Court’s decision are paragraphs thirty-five and six, quoted above. The Court’s claim that financial responsibility is “inherent” in the Treaty fits neatly into the combined theoretical model. A decision on these grounds was an example of the Court purposively expanding its power into a new area, imposition of financial obligations, based on the power it had in another, ensuring proper enforcement of the Treaty. By justifying financial liability with an inherent obligation found in the Treaty, the Court achieved two things. It greatly expanded the potential for expansive decisions in the future because it can base future judgments on other, as yet undefined, inherent obligations. Also, it established the Court as judge of what is inherent in the Treaty, a power which once secured for itself further strengthens the Court’s position in

\textsuperscript{121} Beach, p. 101.
\textsuperscript{122} ‘Major Setback’, \textit{The Economist}, 11 June 1994, p. 52.

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defining the scope and process of integration. The argument that financial liability is inherent in the Treaty is little more than the Court saying financial liability exists because it should exist. By declaring the authority to make this decision the Court expanded its power into what was previously solely the purview of member state governments negotiating legislation or Treaties to define the character of the Community.

The broad use of Article 5’s language was also to be expected. Since the Court’s preference is power, and it can only achieve or maintain this with the tacit support of its constituents, the member states and their courts, it must maintain a degree of legitimacy. With this requirement, it is unlikely a legal body appealing to societies with a strong regard for the rule of law would be able to get away with a decision negatively affecting member states that is based entirely on an unwritten and newly defined inherent obligation. Article 5 was the textual legal justification that was meant to protect the Court from accusations of an improper judgment. Article 5 was, however, included in a way that belies its secondary importance to the Court. Included in the judgment as a secondary, almost passing rationale, meant to provide support to the primary, inherent obligation rationale, the ECJ demonstrated, as it had in *Van Gend en Loos*, its willingness to rely on a purposive, teleological approach to interpretation over the actual text of the Treaty.

There was an added benefit to the Court in making member states financially liable for non-implementation: it decreased the chances of future malfeasance on their part. Member states are particularly sensitive to financial penalties, particularly when as potentially far reaching as *Francovich* declared, as is evidenced by the fact that the power to impose pecuniary fines was removed from the Court when the Treaty of Rome was
drafted and was not reinserted until after *Francovich*. By setting financial penalties for failure to implement directives, not only did the Court strengthen the Community by reducing the benefit of not abiding by its rules, but it set the stage to strengthen itself, for it was only a small step from financial penalties for non-implementation to penalties for non-compliance.

The reaction of the member states to the *Francovich* ruling stands in marked contrast to the *Van Gend en Loos* ruling, and yet the combined theoretical framework remains just as relevant a tool for its analysis. *Francovich* took a doctrine that was never fully accepted throughout the Community (in none of the many subsequent treaties was direct effect included), even if it was never seriously challenged, and assigned it financial penalties.123 Furthermore, unlike *Van Gend en Loos*, this decision could not go unnoticed by the member states because of its potential for immediate financial repercussions, particularly in the UK, where the *Factortame* case made the consequences of *Francovich* immediately apparent. While this decision was not necessarily any more of a stretch in reason than previous decisions, it was particularly offensive to the member states for two reasons: it assigned them a financial obligation they had never considered, from the origins of the Community through the many Treaty revisions, and it represented a Court declaring a power that had been specifically removed from it. Such a decision raises the stakes of Community membership tremendously. By increasing the cost of non-compliance the Court increases the likelihood of EC law efficacy, not only strengthening the Community and its current body of law, but providing a stronger structure for the creation of future law.

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Francovich is a prime example of the unintended consequences that accompany the autonomous behavior of institutions, and the strength of the member state response is commensurate with the negative affects they saw in the decision. Francovich elicited such vehement opposition because it was viewed by many member states as a clear usurpation by the ECJ of its power. The response demonstrates sophisticated rationality not seen in previous instances, a fact which may be attributed to the more than thirty years of interaction member states had with the Court and in the Community. While Francovich did not attack sovereignty in the same way as Van Gend en Loos, it did impose new obligations on member states while at the same time limiting their ability to determine their future in the EC. The British proposal at the ’96 IGC and the various legal challenges attempted to limit the power of the Court and the impact of Francovich, respectively, in the most legitimate and authoritative manner. Both strategies, if successful, would have effectively restored the power balance as it existed before the judgment while also maintaining the integrity and respect for law the EC is founded on, as well as ensuring the Community, and Court, continue to exist as institutions helping solve the collective action dilemma.

C. Costa v ENEL

Direct effect was not the only legal doctrine developed by the ECJ early in the Community’s existence that would draw a response from the member states. Another fundamental aspect of EC law, one taught side-by-side with direct effect, is the doctrine of supremacy, the “capacity of a norm of Community law to overrule inconsistent norms of national law in domestic court proceedings.”124 Receiving no mention in the Treaty or discussions about the Community, supremacy was created through the same judicial

124 Craig & de Burca, The Evolution of EU Law, p. 177.
legislation process as direct effect. The first case, in a series of cases, that established the supremacy of Community law over national law was C-6/64, Flaminio Costa v E.N.E.L. (Costa), decided on 15 July 1964. The issue in this case was Flaminio Costa’s refusal to pay an approximately \$1 bill to the nationalized Italian power company E.N.E.L. since, he argued, the nationalization law of 6 December 1962 was contrary to Article 177 of the Treaty. The real issue was whether member states could continue to practice *lex posterior derogat priori*, more recent law trumps conflicting previous law. At stake was no less than the legislative sovereignty of member states.

With only eighteen months separating the two decisions, the political environment in which the Court heard and ruled on *Costa* was little different than that which existed when it ruled on *Van Gend en Loos*. As with *Van Gend en Loos*, the Court was relatively ignored Community wide, and the full repercussions of *Van Gend en Loos* had yet to be felt so it had sparked little mistrust.\(^{125}\) One major difference is that unlike direct effect, which member states largely left alone because they assumed it was already addressed by their national constitutions, supremacy had been addressed by the national courts and member state governments. Holland and Luxembourg had already accepted the supremacy of Community law over domestic law.\(^{126}\) In France and Italy, on the other hand, supremacy had been rejected by the governments. French courts were forced to deal with the issue of supremacy in the late ‘50’s, when they were trying to decide if a treaty concluded with Spain in 1862 took precedence over later French law. The courts were told by the Foreign Ministry that they were not entitled to set aside national law in

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\(^{125}\) Craig & de Burca, *The Evolution of EU Law*, p. 178.  
the face of international law, despite the latter’s supposed supremacy.\textsuperscript{127} Additionally, the Italian government had argued in court that national judges were not entitled to rely on Article 177 of the Treaty over domestic law.\textsuperscript{128} Thus, the environment in which the ECJ was about to announce its decision was much like before \textit{Van Gend en Loos}, with the major difference being that one third of the Community had already addressed and rejected the very doctrine it was about to pronounce.

The Court’s decision was more than a simple response to the question put to it, and established or reinforced several expansive notions. Expanding on its declaration that member states had limited their sovereignty with accession to the Treaty, the Court declared that sovereignty limitation to be permanent. Following from this “permanent limitation of their sovereign rights” the Court reasoned that supremacy of EC law existed over subsequent national legislation for two reasons. First, it ruled the Treaty’s “special and original nature” meant that it, automatically, could not be overruled by national law. Second, appealing to the effectiveness of the Community, it warned that Community law would lose all “purpose if the member states could renounce their obligations by means of an ordinary law.” In addition to declaring the existence of supremacy, the \textit{Costa} decision was remarkable for the Court’s justification of its jurisdiction to even hear the case. In response to a jurisdictional challenge by the Italian government, the ECJ declared the “power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty.” In essence, the Court ruled that when the framing of a reference did not address an issue the Court

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was entitled to hear it could “extract” an issue from the reference which would grant it jurisdiction. It was also in this decision that the ECJ, for the first time, did not refer to itself as an international court.\textsuperscript{129} On the facts, as in \textit{Van Gend en Loos}, the Court chose not to make a decision contrary to member state interests and ruled the Italian nationalization scheme legal, thus Costa’s bill legal.

From countries that had already accepted the idea of EC law supremacy there was no negative response to \textit{Costa}. However, the decision was not taken as well in other countries. France, where the Foreign Ministry had previously rejected the ability of national judges to set aside national law in the face of international law, saw its president, Charles de Gaulle, call for Treaty revision limiting the power of the ECJ.\textsuperscript{130} Of the three high courts in France, supremacy was accepted first by the Cour de Cassation, but not until six years had passed since \textit{Costa}, while the Conseil Constitutionnel declared supremacy unconstitutional in 1976. By the 1980’s, however, both the Conseil d’Etat and Conseil Constitutionnel came to accept the doctrine of EC law supremacy.\textsuperscript{131} Germany’s was the first constitutional court in the Community to accept the doctrine of supremacy, but even it was slow to do so, waiting until 1971, while the tax court in Rhineland-Palatine compared this expansion of Community power through legal interpretation to the Nazi regime.\textsuperscript{132} Even though the UK did not join the Community until after the Costa decision was rendered, it expressed its refusal to accept supremacy in October 2005 when, in a House of Commons report on the European Constitution, it

\begin{itemize}
\item \textsuperscript{129} Wind, p. 145
\item \textsuperscript{130} Alter, \textit{Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe}, p. 187.
\item \textsuperscript{131} Alter, \textit{Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe}, p. 126-30, 147.
\item \textsuperscript{132} Alter, \textit{Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe}, pp. 22, 64.
\end{itemize}

The Court’s actions in deciding Costa are exactly what are to be expected of a supranational tribunal from the combined theoretical perspective. Beginning with the extension of sovereignty limitation to permanent status, the expansive logic was precisely the type of rationally pursued spillover described above. By permanently limiting member state sovereignty the Court established a permanent transfer of that sovereignty to the Community and its institutions. With Costa, the ECJ was discreetly limiting the ability of member states to retaliate against negative decisions and take back lost sovereignty in the future. If the member states had permanently transferred some of their powers to the Community then they would have little ground to challenge when those powers were exercised at the Community level. By establishing in law that the transfer of sovereignty was permanent, the Court removed the question of sovereignty transfer from the political debate, where it could easily fall victim to shifting political preferences, and placed it in the legal realm, where the member states were much less likely to challenge it. Basing supremacy on the “new legal order” carried with it the same advantages as the declaration of direct effect’s existence for that very reason. With a new legal order, more credence is given to the Court’s claim of sole legal responsibility for that order. As sole legal guardian in a law based Community of ever increasing jurisdiction and importance, the ECJ is able to ensure itself a highly important and influential role in the future of Community development, a definite departure from its original role under the Treaty of Rome as an international tribunal.
What is most notable about the Court’s declaration that supremacy existed is the grounds for its justification. As the previous paragraph showed, it was clearly in the ECJ’s interest to establish the supremacy of EC law because of the power it granted to the Court. But again, as in Van Gend en Loos, the Court was forced to rely on the “spirit of the Treaty.” The Court’s position in this case is arguably stronger, given the general lack of negative response to Van Gend en Loos when the Court declared it had the power to base judgments on the spirit of the Treaty. Supremacy was also justified on the grounds of effectiveness, in language very similar to that of Haas describing spillover in The Uniting of Europe. The language is so similar because the Costa decision could serve as a generic description: because the Treaty requires reciprocity it does not follow that national legislation can trump Community law, therefore Community law must be superior.

The Court’s declaration that it could extrapolate the “right” question for interpretation from a “wrong” one was the ultimate bold expansion of its jurisdiction. This decision shows the true nature of the ECJ as a rational actor seeking to maximize its power. If the Court were merely a tool of the member states looking to protect their interests there would have been no need to extrapolate a “right” question from a “wrong” one. Such a move grants the Court tremendous interpretive leeway in future cases as well, for it can continue to find questions hidden in references that will allow it to further its powers. By establishing this precedent in a case that is unlikely to be challenged again, since the Court found in favor of the Italian government, the ECJ is able to reduce the chances of its newly declared power being contested. By the time a member state is

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134 C-6/64, Flaminio Costa v E.N.E.L.
actually able to challenge the principle legally, the ECJ will have case-law with which to justify itself.

The member state response to Costa can be broken into two categories: national court and political response, each of which can be analyzed on their own. When looking at national court defiance, it is notable that those most opposed to the notion of supremacy were constitutional courts. With self-interest being the motive for action, it follows that when a court with the traditional ability to decide the applicability of two conflicting laws loses that power it will protest. The real challenge is actually to explain why the BVerfGE and other supreme courts eventually accepted supremacy, even if not for a number of years. Again, however, this was purely a move of self-interest. Courts, having no power of purse and relying on legal legitimacy for authority, value highly the rule of law, particularly in Western countries such as those in the EC. Continued defiance of the ECJ on an issue the political leaders were clearly going to accept, having had the opportunity to take responsive measures had they wanted, would threaten the rule of law, the Community, and the very basis on which constitutional courts claimed authority in their domestic jurisdictions. It came to be seen as more prudent to accept supremacy than to continue in defiance.

Turning towards de Gaulle’s call for restricting the authority of the ECJ, it would be easy to write this off as the words of a famously nationalistic leader playing to nationalist sympathies. de Gaulle’s comment cannot be dismissed out of hand, however, if for no other reason than he was the president of one of the EC’s major economic and political leaders. As ultimately responsible for protecting French sovereignty, something the French, and de Gaulle in particular, were still rather sensitive about, the harsh
reaction is to be expected. It is the leaders of the other member states that are the anomaly. The Benelux countries clearly stood more to gain from the existence of a strong body of EC law equally applicable throughout the Community. It afforded them all the economic benefits of easy trade with France and Germany while protecting them from bullying by the overwhelming economic power of the two. In Germany and Italy, countries that had recently dealt with hyper-nationalistic fascist regimes, the political leaders had to be very careful when dealing with issues of nationalism. Thus, the political leaders of most member states deemed it more beneficial to go along with the doctrine of supremacy. It was not because integration was proceeding out of their control but because the alternative at that time was viewed as no better.

The refusal of the British, who did not join the Community until nearly a decade after Costa, to accept the decision’s basic premise is remarkable, but not unexpected behavior from one of the most Eurosceptic member states. Unlike in other member states, the British system is not founded on a written constitution. As a result, Parliament is the ultimate source of sovereignty, its acts not subject to judicial review. Costa’s establishment of European law supremacy, even though ostensibly accepted by the British with accession, is an unacceptable challenge to the British legal order and sovereignty. As a result, the UK has practiced what essentially amounts to a non-compliance form of spillback: refusing to accept the validity of a judgment.

D. Internationale Handelsgesellschaft

Like direct effect, supremacy of Community law was not a doctrine developed in only one case. Another major development was in C-11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel
(Internationale Handelsgesellschaft). At issue in this case was the distribution of free import deposits which were to be paid back if not used, a scheme the German government claimed violated Germany’s Basic Law. The real issue was whether or not supremacy of EC law over national legislation extended to member state constitutions. At stake was the ultimate expression of member state sovereignty, the sanctity of the constitution.

The political environment leading into the Court’s Internationale Handelsgesellschaft decision was no longer as welcoming or tolerant of bold, policy-making decisions by the ECJ. The Court had faced resistance, albeit very limited, to its creation of direct effect, while its original enunciation of supremacy sparked comparisons to Nazi Germany and had yet to be accepted by any constitutional court that had not accepted supremacy prior to entering into the Treaty. Given the fact that the first attempt to change the Court’s jurisdiction, and a great deal of its early experience with non-compliance, came as a direct result of the case Internationale Handelsgesellschaft would build on, the environment was not particularly conducive to widespread acceptance of an activist decision.

Beyond just the change in attitude toward the Court and its ability to make activist decisions limiting the power of member states was the general mood in the Community as a whole. The Community was still trying do deal with the crisis de Gaulle finally created in 1965 when he instituted the empty chair policy, and the subsequent Luxembourg Compromise.135 As a result of this crisis, the legislative initiative of the Community came to a halt and saw even less progress than in the years surrounding Van

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Gend en Loos and Costa. The Community had been able to make very little progress after 1965, and the general belief about what it could accomplish had gone down.\textsuperscript{136}

In its decision the Court returned to a theme that comes up in most, if not all, of its expansive decisions: effectiveness. The ECJ argued that recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law...Therefore the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.\textsuperscript{137}

However, while denying the claim of the German Verwaltungsgericht that Community law could not overrule a national constitution, the ECJ declared that fundamental rights, what the Germans felt were not being protected, were in fact a fundamental principle of the Community and thus would not be infringed by any of the Community institutions, including the ECJ.\textsuperscript{138}

The response from member states to this decision was far from accepting. It appeared the ECJ had struck a nerve across the Community, for Internationale Handelsgesellschaft was met with a level of resistance unknown to the ECJ at the time.

In Germany, the Frankfurt court which submitted the reference refused to accept the

\textsuperscript{137}C-11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel
\textsuperscript{138}C-11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel
ECJ’s decision on the grounds that it was political and thus invalid.\(^{139}\) In 1974 the BVerfGE declared that it alone had the authority to determine the constitutionality of law within Germany by arguing that member state constitutions provided the EC with its privileged status, and were therefore superior to its law.\(^{140}\) The Italian constitutional court made a similar ruling when it declared that questions regarding EC and national law were entirely within its jurisdiction.\(^{141}\) Just as France was the first place a political leader called for revision of the Treaty to limit the authority of the ECJ, France was also the first where national legislation actually passed that nullified a decision by the Court. In the National Assembly the Aurillac Amendment was passed, part of a judicial reform bill that made enforcement of EC law supremacy illegal by national courts.\(^{142}\) While the measure never made it into national law due to lack of Senate approval, the displeasure with the ECJ within certain ranks of the French government was made known. Former Prime Minister Michel Debre “called for a constitutional revision and a revision of the Treaty of Rome to make it clear that national judges should not apply European law supremacy” at Le Comite pour l’independance et l’unite de la France, a conference that he organized in response to Internationale Handelsgesellschaft.\(^{143}\) There was also judicial response in France, where the Conseil Constitutionnel, in an attack not only on Internationale Handelsgesellschaft, but also on Van Gend en Loos and Costa, denied the special nature


\(^{140}\) BVerfGE 37, 271; 2 CMLR 540, 1974, Solange I


\(^{142}\) Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, pp. 152, 156.

of the EC Treaty. Special nature lacking, it declared, meant that it would review the constitutionality of EC and national law in France, not the ECJ.\textsuperscript{144}

Just as in the \textit{Costa} case, \textit{Internationale Handelsgesellschaft} was not even fully accepted by member states that would join the Community much later. If one looks at the parliamentary debates from the Swedish Riksdag in the years prior to accession it becomes clear that the precedent set by \textit{Internationale Handelsgesellschaft} and \textit{Costa} was of major concern. The Swedish government’s official line on the matter was that the national constitution remained supreme because the ECJ only had powers and validity when member states allowed it, a stance similar to that of most other member states.\textsuperscript{145}

Despite the brashness demonstrated by the ECJ in \textit{Internationale Handelsgesellschaft}, the motivations and reasoning of the Court are the same as in its previous decisions. Using the same logic it did to create supremacy, the Court strengthened its position vis-à-vis the member states even more by denying them their last recourse against the EC and Court. With no body of law higher in the domestic sphere than a constitution, and with the constitution now declared subordinate to EC law, the ECJ positioned itself as the single most powerful and authoritative judicial body in the entire Community. While the Court did not rule against the member states in the cases addressed above, \textit{Internationale Handelsgesellschaft} found against the German government and denied the protection of fundamental rights. However, even this was a move meant to protect the Court’s interests, what Rasmussen terms “activism by

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\textsuperscript{145} For examples of this debate, see \textit{Motion 2005/06:K269, Konstitutionella frågor av Göran Lenmarker m.fl. and Kammarens Protokoll, Riksdagens snabbprotokoll, Protokoll 1993/94:100, Måndagen den 2 maj, kl. 12 – 15.26}, Sveriges Riksdag, 2005.
\end{flushright}
passivism;" and while it did not promote spillover it did prevent the Community from being crippled by an overwhelming number of fundamental rights challenges. The Community still being relatively young and unsure in its existence, had the Court guaranteed the protection of fundamental rights then a number of cases could be raised all over the Community challenging certain measures. Such a widespread pattern of challenges would have severely threatened the future existence of the Community.

Turning to the reactions from member state national courts, a clear case of spillback is seen to occur. The constitutional courts, those most directly affected by the ruling, were also those to openly defy the judgment of the ECJ. National constitutional courts are, like the ECJ, institutions that make rational decisions in pursuit of power. It was not possible for the ECJ to attack the interests and jurisdiction of the national constitutional courts any more and, unlike with Costa before it, the national courts saw no advantage in accepting this decision. To this day, Internationale Handelsgesellschaft has not been accepted by national constitutional courts and has, in fact, been challenged in a series of more recent cases.

The behavior of the National Assembly in France is also a textbook case for spillback. The reasoning is largely the same as the courts’: an overwhelming attack on national sovereignty was recognized, without there being a due return. However, there exists an extra level to the National Assembly’s action. By announcing that EC law trumped even the constitution of member states, the ECJ attempted to remove the last layer of legislative independence in the Community. If the constitution could never trump the Treaty then it made no matter how the National Assembly, or any other

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146 Rasmussen, p. 416.
147 Rasmussen, p. 404.
legislative body, amended it; the Treaty would remain supreme. The real question is why the events in the National Assembly were not repeated in other member states, or even embraced by the French Senate. The reason for this is the perception that in a society ruled by law, political responses to judicial decisions are seen as highly dangerous. They threaten the integrity of the judicial process and decrease the sense of rule of law.\footnote{Alter, \textit{Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe}, pp. 193-4.} By leaving the dissent to the national courts, who could do so through interpretation of law, the political leaders saw the opportunity to achieve the goal of protecting member state sovereignty against an activist ECJ without the side effect of delegitimizing the Community’s legal structure. By defeating judge with judge the future legal integrity of the Community was protected.

E. \textit{Les Verts}

The Court did not just make decisions expanding its power at the expense of the member states, it has also turned its attention to other Community institutions. One case that serves as a particularly good example of this is C-294/83, \textit{Parti ecologiste “Les Verts” v European Parliament (Les Verts)} decided on 23 April 1986. At issue in \textit{Les Verts} was the European Parliament’s (EP) distribution of money to political parties for campaign expenditures, which Les Verts maintained was illegal because it prejudiced incumbent parties. The real issue was the freedom of the EP to create and manage its own budget as the Treaty empowered it to do. At stake in this decision was the separation of powers, as they were, within the Community, for the ECJ was explicitly denied the authority to review acts of the EP according to Article 177, under which this case was brought.
The environment in which *Les Verts* was decided was not as amenable to an activist court as that in which *Francovich* would be decided only five years later, for not all the Community-positive trends had taken place. Non-compliance throughout the Community had been on the rise in the years leading up to the decision in *Les Verts*, after the member states had the opportunity to see a series of ECJ judgments taking sovereign powers they had always assumed they would keep.¹⁴⁹ In addition to the rising incidence of non-compliance, there was also political dissatisfaction with the Court, Giscard d'Estaing calling for something to be done about its “illegal” actions.¹⁵⁰ The 1980’s was also a time of renewed integrative energy, as Europe emerged from the rather unmotivated ‘70’s, which had, in turn, promoted more Court activism.¹⁵¹ Not only had the SEA been signed, but the Community had recently expanded to include Spain and Portugal on 1 January 1986, taking its total membership to twelve. Despite the pro-integration mood across Europe, in none of the accession treaties negotiated at each expansion or the SEA were the doctrines of direct effect and supremacy addressed.¹⁵² While the member states were generally positive about integration, and were not willing to amend the Treaty to change the Court’s jurisdiction or the effect of its decisions, it is evident they were not willing to officially accept them either. Keeping the direct effect and supremacy out of the Treaties ensured either could more easily be changed.

Before it could make a judgment regarding the legality of the EP’s budget allocations to EP candidate parties, the ECJ had to determine whether it had jurisdiction

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¹⁴⁹ Beach, p. 97.
¹⁵⁰ Rasmussen, p. 254.
¹⁵¹ Rasmussen, p. 61.
to hear the case. Given the explicit nature of the Treaty in denying the Court that jurisdiction, it came as a surprise when the Court declared

An interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and its scheme...It must therefore be concluded that an action for annulment may lie against measures adopted by the European Parliament...\textsuperscript{153}

In an ironic statement, the Court declared the necessity to review the legality of EP measures in order to keep it from exceeding the limits the Treaty assigns.\textsuperscript{154} Another striking aspect of the Court’s decision was its declaration, for the first time, that the Treaty constituted a constitutional charter.\textsuperscript{155} \textit{Les Verts} was, as Ian Ward stated, impossible to understand as “anything more than extreme judicial activism.”\textsuperscript{156}

Unlike the previous cases of an activist ECJ dealt with in this thesis, the response to \textit{Les Verts} was largely positive. No member state government or national court came out in opposition to the Court’s declaration that the Treaty formed a constitutional charter or its clear flaunting of the Treaty’s text. In fact, in reviewing the coverage of \textit{Les Verts} in the member state media it becomes clear that in the limited coverage the decision did receive it was viewed not as an unwarranted expansion of Court jurisdiction but as a blow to the EP.\textsuperscript{157}

\textsuperscript{153} C-294/83, Parti ecologiste “Les Verts” v European Parliament
\textsuperscript{154} C-294/83, Parti ecologiste “Les Verts” v European Parliament
\textsuperscript{155} C-294/83, Parti ecologiste “Les Verts” v European Parliament
\textsuperscript{156} I Ward, \textit{A Critical Introduction to European Law}, 2\textsuperscript{nd} ed. LexisNexis, Edinburgh, 2003, p. 95.
\textsuperscript{157} For an example see ‘Court Says Euro-MPs Acted Illegally’, \textit{The Times}, 24 April 1986, p.10.
The actions of the Court in *Les Verts* were particularly bold, even for the ECJ, given that it interpreted an article of the Treaty contrary to the express language of that article. This is the first instance dealt with in this thesis where the Court strengthened itself in relation to the Community itself (although, it should be noted the EP supported the ECJ’s review of its actions). While increasing the risk of challenge to the EP, the Court was simultaneously achieving two things. On one hand, by increasing the likelihood of challenges brought against the EP the Court was increasing its chance to rule on more cases in which to make expansionist decisions. On the other hand, the Court was also able to establish itself as an authority over every major institution of the European Community. The Big Three of the Council, Commission and Parliament were now all subject to ECJ jurisdiction.

In citing the risk of the EP overstepping its bounds as justification for assuming jurisdiction over it, the Court played its trump card of effectiveness once again. The Community needs to function effectively, it cannot do so if the EP is able to act outside its power without the chance for recourse, therefore the Court’s ability to review EP actions exists. Because it should. The benefits for the Court are the same as before. It strengthens its position immediately, and its potential to do more in the future, through the judgment.

When it declared the Treaty existed as a constitutional charter, the Court was going beyond its previous statements when it said the Treaty created a new legal order, *sui generis*. In doing so the Court established the Treaty as something akin to a national constitution, a document typically revered as sacred in the nationalist sense and not to be altered or derogated from except in the most extreme circumstances. This not only
strengthens the position of the ECJ as a legitimate constitutional court, it reinforces its sole jurisdiction as the judge of anything relating to the Treaty. In addition, it is an attempt to discourage member states from attempting to limit its authority by playing on their respect of law, especially constitutions.

The most striking aspect of *Les Verts* was not the Court’s audacity but the lack of opposition, indeed the open support, from member states. That the decision had little to do with the member states and did not directly harm them cannot explain their acquiescence, for, as seen with the *Van Gend en Loos* and *Costa* decisions, at least parts of the member state community have reacted negatively when the Court slipped an activist precedent into an otherwise benign decision. In fact, the Court was especially bold in its *Les Verts* decision, establishing the Treaty as a constitutional charter and making the EP subject to its Article 177 review powers in what amounted to the Court saying the Treaty was wrong not to include it. So why did the member states, if the combined theoretical model is to hold true, not make any attempt to reign in the Court and limit, at least in part, the scope of *Les Verts*? The answer to this question is quite simple: there was no reason to feel threatened by the decision. As guardians of their interest, the member states have been sensitive to expansive ECJ decisions since *Costa* and saw in *Les Verts* a beneficial judgment. As the Court noted in its decision, prior to *Les Verts* there would have been no recourse against the EP had it passed illegal or especially harmful legislation. Thus, while *Les Verts* did nothing to make the member states more powerful, and the willingness of the Court to decide a case contrary to the explicit language of the Treaty could indeed be worrying, the member states saw in the
decision more benefit than harm, which the combined theoretical framework established as the conditions under which no negative action will be taken.

F. *Commission v Council 03*

A recent case demonstrating the ECJ’s willingness to step boldly beyond what the member states expect of it was C-176/03, *Commission of the European Union v Council of Europe (Commission v Council 03)*, decided on 13 September 2005. In *Commission v Council 03* the Commission sought annulment of Council Framework Decision 2003/80/JHA regarding the imposition of criminal penalties for egregious violations of environmental law. The Commission argued the Council’s Framework Decision prejudiced the EC Treaty, which no action taken under the EU is allowed to do, and that its own, similar proposal from 2000 was the more appropriate method for addressing environmental crime. At stake was the sovereignty of both the criminal law and judicial systems of the member states, for the question was one of who could force member states to implement criminal sanctions, the intergovernmental and member state-protectionist Council or the supranational and integrationist European Commission.

European integration had suffered a major setback in the months prior to the *Commission v Council 03* decision, with the rejection of the European Constitution by French and Dutch voters (the latter being a surprise to Europe-watchers), with expected rejections of the Constitution, had a referendum been held, in the UK, Denmark and Sweden.158 There had been a tremendous amount of debate leading up to the Constitutional referendum, over its granting the Commission and ECJ sole control over

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defining subsidiarity, over its abolition of the three pillars, and many other aspects.\textsuperscript{159} The mood going into the referendum, and carrying over through the Court’s decision, was that the EU had “come to be viewed as a growing threat.”\textsuperscript{160} And while the member states were receptive to both strong Community environmental measures, as evidenced by the near universal compliance with implementing Community environmental law, and criminal sanctions for violators, as evidenced by the Council’s Framework Decision at issue, they had made their stance on transferring criminal law out of their hands clear on a number of occasions.\textsuperscript{161} The UK issued a White Paper in 2003 to such effect, the Council had, without fail, removed the criminal sanction section of Commission proposals so they could be dealt with through Framework Decisions, and eleven member states officially supported the Council before the ECJ.\textsuperscript{162} The 1990’s, although positive for overall integration – with the introduction of the Euro, expansion, and the creation of the EU – were not particularly positive for the ECJ. There was the harsh reaction to \textit{Francovich}, and the lasting legacy of the 1996 IGC. It was here the Court had its powers clearly defined with the aim of preventing further activist decisions, and suffered a Treaty revision aimed specifically at one of its judgments, the \textit{Barber Protocol}.\textsuperscript{163} Furthermore,

\textsuperscript{159} For examples of this debate see House of Commons European Scrutiny Committee, \textit{Aspects of the EU’s Constitutional Treaty, Fourteenth Report of Session 2004-05}, vol. 1, Parliament of the United Kingdom, 2005, House of Commons European Scrutiny Committee, \textit{Aspects of the EU’s Constitutional Treaty, Fourteenth Report of Session 2004-05}, vol. 2, Parliament of the United Kingdom, 2005, \textit{Aspects of the EU’s Constitutional Treaty: the Government’s Response to the Fourteenth Report from the Committee, Session 2004-05 and Motion 2005/06:K269}. Although the last two were published after \textit{Commission v Council 03}, the debate was going on before.
\textsuperscript{161} \textit{Final Report: Criminal Penalties in EU Member States’ Environmental Law}, Maastricht European Institute for Transnational Research, Maastricht, 2002.
\textsuperscript{162} House of Commons European Scrutiny Committee, \textit{Aspects of the EU’s Constitutional Treaty, Fourteenth Report of Session 2004-05}, vol. 2.
\textsuperscript{163} Craig & de Burca, \textit{The Evolution of EU Law}, p. 329
there had been growing nationalist sentiment throughout Europe, as can be seen in the right-wing electoral victories in France, Austria and Denmark.

In its decision, the Court first acknowledged that it is, because of the three pillars system of the EU, typically excluded from judgments pertaining to criminal law. In paragraph 47 of its judgment it states “As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence.”\(^{164}\) That being said, the Court went on to say “However, the last-mentioned finding does not prevent the Community legislature...from taking measures which relate to the criminal law of member states which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”\(^{165}\) As the Court accepted the idea of the Community creating criminal law, it accepted the legitimacy of the Commission’s original proposal for a Directive and declared the Council Framework Decision to be in conflict with the more appropriate Commission proposal, and to be annulled. In so doing, the Court granted the Commission authority to force member states to levy criminal penalties against major environmental violators, giving the Community, for the first time in its history, the independent power to create criminal law.

While it is still too early to see the full magnitude of member state responses to \textit{Commission v Council 03}, the member states, particularly in the days immediately following the decision, made their dismay well known. The British government called the judgment “inappropriate,” arguing that the EC should not be used to harmonize criminal sanctions.\(^{166}\) The shadow foreign minister, Liam Fox, said “the UK is bit by bit

\(^{164}\) C-176/03, \textit{Commission of the European Union v Council of Europe}

\(^{165}\) C-176/03, \textit{Commission of the European Union v Council of Europe}

losing control of its ability to make [its] own laws” and the House of Commons expressed its “grave concern.” In Sweden, the Riksdag declared that it believed the case to be wrongly decided, with Vänsterpartiet calling for an end to the Court’s legislative behavior. Community wide, diplomats have called the decision “dynamite” and the Justice and Home Affairs ministers from every country have expressed solidarity on two issues directly relating to Commission v Council 03: neither criminal law nor the rules of criminal procedure fall within the Community’s competence, and the Community must leave it to the member states to choose the criminal penalties to apply. It has yet to be seen if action is taken against the Court in the next round of Treaty negotiations, or whether any member state will comply with the Commission telling them to impose criminal sanctions, but it is clear this decision went well beyond what any member state was willing to accept. And unlike previous decisions considered in this thesis, which received little media attention in the days immediately following, Commission v Council 03 has been vilified by the mainstream press in some member states, with the Times of London running the alarmist front page headline “Europe wins the power to jail British citizens.”

This was a particularly bold judgment by the Court, reminiscent of its Internationale Handelsgesellschaft and Francovich decisions. The judicial courage, or brashness, depending on one’s view of the Court, is evident not only in the context of the


\[169\] Motion 2005/06:U339, Det europeiska samarbetets framtid av Lars Ohly m.fl., Sveriges Riksdag.


Draft, Background, Justice and Home Affairs Council, Brussels, 21 February 2006, p. 3.

decision but in the timing as well, coming at a very uncertain and arguably low time for the Community. As a rational actor seeking to expand the powers of itself and the Community as a whole, the Court accomplished a number of things in the *Commission v Council 03* decision. First and foremost, it established case law precedent for Community-level control over criminal law, its caveat about the usually domestic nature of criminal law notwithstanding. Second, it did so from the relative safety of a decision regarding environmental violations. Member states had previously made clear the importance they attached to protecting the environment, and even recognized the need to address it at the Community level. By declaring criminal law authority for the Community in this area the Court could hope to minimize the negative member state response to such a declaration. Most important for the expansion of Community powers, however, is not what this decision granted immediately, but what it could lead to in the future. If it becomes accepted that the Community has a role to play in environmental criminal law it is a short leap to declare its authority in other areas of criminal law as well. The Court again relies on its standard “effectiveness” justification to give legitimacy to its decision and increase its likelihood of acceptance. In order to more effectively carry out its duty of protecting the environment, the Court reasons the Community should also have some sort of sanction to ensure compliance with its laws. This, again, provides the Court with much expansive leeway in future decisions. If it has legal precedent for imposing penalties in one area of criminal law it will likely be easier to expand those powers to other areas. As the ability to control criminal law is one of the true hallmarks of sovereignty, *Commission v Council 03* can be seen as a move by the
ECJ to give the EC one more aspect of state-like sovereignty, much as it did when it declared the Treaty a constitution.

Although it is still too soon to know the full extent of member state response to *Commission v Council 03*, the limited action that has been taken, along with the strong rhetoric, is to be expected from member states hoping to protect their sovereignty and control over the European integration project. Not only have national governments across the Community expressed their misgivings about, or refusal to comply with, the judgment, the Justice and Home Affairs ministers have unanimously opposed the decision. The reasons for this are many. As discussed above, the right to control criminal law is a jealously guarded aspect of member state sovereignty, one the Treaty makes clear no member state ever intended to give up. The ECJ attempting to transfer some of this authority to the Commission represented not only a powerful attack on the sovereignty of member states but on their control of integration as well. If the Community has the power to attach criminal penalties to its integration mandates then it becomes that much more powerful of an actor at the expense of member states.

G. Cases not Reviewed

As the title of Section V makes clear, the preceding was an analysis of selected cases. Since its inception, the ECJ has heard 13,180 cases, and rendered a decision in the majority of them.\textsuperscript{171} It would be impossible to even list all the cases here, given the size restrictions of this thesis, let alone provide an analysis. Such a minor sampling of the Court’s cases – 4.5 ten-thousandths of a percent, to be exact – means that many important cases received no attention at all. Examples include *Barber, Defrenne* and *Cassis*, to name a few, each of which is discussed thoroughly and often by Court scholars. There

\textsuperscript{171} As of 20 May 2006.
were a number of reasons for not including these other major cases and choosing the six that I did: amount of information and understanding about a case available when I chose which to write about, confidence in my ability to provide a thorough and competent analysis, general interest in the subject matter of the case and its impact on integration, and an attempt to provide at least one example from every decade of the Court’s existence.

In addition to the numerous influential decisions that received no attention in this thesis were the thousands of mundane judgments that were not integrationist and had no real impact on European integration. None of these decisions were included in this thesis because they are irrelevant to this argument, either in support or opposition.

Of importance to note is that no cases showing the Court reversing integration, as opposed to promoting it, are offered up as potential counter arguments to this thesis. The reason for this is simple, I came across none in my research. This is not to say they do not exist and could be used in a rebuttal to this argument, but in my research I found only two kinds of cases, those that maintained the status quo and those that promoted integration.

VI. Analysis and Conclusion

A. Developing Criteria for Court and Member State Action

As can be seen from the preceding cases, the ECJ has consistently departed from the text of the Treaty to render judgments on teleological grounds so that it could strengthen itself and the Community as a whole. These decisions have come at times of both support for and opposition to the Community project, and have prompted reactions ranging from firm opposition to widespread acceptance. The challenge now, if this thesis
is to produce a compelling argument for how the Court can threaten European integration, is to identify under what circumstances it chooses to make activist decisions and what circumstances prompt different types of member state response. While all the cases dealt with in this thesis are examples of an activist and expansive Court, there are thousands of instances of an ECJ showing restraint and maintaining the power of member states. A comparison of the selected cases will identify the similarities common to all, which will allow for the creation of a set of criteria that can be applied in future cases to predict the level of ECJ activism. Similarly, despite the varying degrees of member state response in the cases dealt with here, their similarities and differences will provide for the creation of a set of criteria that can be used to predict their likely response.

In predicting what effect ECJ judgments will have on the future of European integration, two sets of criteria are needed, one which can be used to measure likelihood of ECJ action and another to measure type and likelihood of member state response. These criteria are necessary because, while the Court and member states are always pursuing their self-interest, as rational actors this does not translate into every Court decision wildly expanding the Community’s competence or the member states always drastically limiting the ECJ’s jurisdiction in response. Rather, these decisions are made rationally upon consideration of several criteria, criteria which the preceding theoretical case analysis aids in identifying. The use of neofunctionalism and rational choice new institutionalism together in the combined theoretical framework for analysis of the historical record of the ECJ creates a comprehensive understanding of the motivations behind actions taken by the ECJ and member states as regards European integration.
Knowing these motivations and how they have manifested themselves in reality makes
for the possibility of predicting how the Court and member states may act in the future.

Turning first to the Court of Justice, the criteria fall into one of two general
categories, environmental and case related. The environmental circumstances under
which a decision is made can include any number of things: potential for member state
support, general attitude towards the ECJ and EC, degree of legislative gridlock in the
Community, speed with which integration is moving forward, and so on. From a purely
theoretical standpoint it would appear that potential for member state support for a
particular judgment would play a large role in the actions of the Court. As previously
stated, a court is reliant on the compliance of its constituents for legitimacy, and
compliance is at least partly due to amenability. The more amenable a particular decision
to a member state, the more likely that member state is to support not only the decision
but the Court’s authority to make such a decision. As a rational actor seeking to maintain
and increase its legitimacy and power, it follows that the more likely at least one member
state is to support the Court the more likely it is to make an expansive decision. The
reasons for this being it reduces the likelihood of secondary legislation being passed
limiting the Court’s impact or authority, makes Treaty revision because of the decision a
near impossibility, and lends credibility to the judgment. If one looks at the historical
record, this criterion seems to apply in reality. In most instances of egregious expansion
by the Court there has been support from somewhere. Van Gend en Loos saw support
from Italy, Costa from Holland and Luxembourg, and Les Verts had every expectation of
receiving wide support. Even in cases where there was no overt support, such as
Commission v Council 03, the lack of universal opposition always existed, and that lack
of opposition seems to have provided the protection the Court needed. Thus, after
comparing the theoretical assumption to the historical record, the first criterion for
activist Court action can be determined: there cannot be evidence of universal opposition
to the expansionist decision.

Another preliminary assumption of the combined theoretical model is that the
overall mood towards the EC in general and the ECJ in particular will play a role in the
Court’s decisions. The reason for this is again the rational actor assumption; it does not
seem rational that the Court would push an integrationist decision in an environment not
very keen on integration or its institutions due to a seemingly increased risk of non-
compliance or retaliatory action. However, the historical record belies this assumption.
In fact, when there is great legislative gridlock or tremendous slowdown in integration,
suggesting disenchantment with the EC, the Court has made some of its most expansive
decisions. Two of the Court’s most controversial decisions, *Internationale Handelsge
Handelsge Handelsgeellschaft* and *Commission v Council 03*, came at times of great uncertainty in
the Community and very little support for further integration. It therefore appears that
despite the theoretical assumption that the general mood towards integration should
matter, the reality is that this is not an issue considered by the Court. One possible
explanation for this follows from the criterion identified above; if there is support from at
least one member state then the Court is more generally protected, even in an otherwise
hostile atmosphere. When it comes to the environment in which the Court renders a
judgment the only criterion of importance for the Court is whether or not there is the
potential for universal opposition to its decision.
Garnering support from at least one member state is not the only criterion that appears to play a role in determining when the Court makes an expansive decision; there are a number of criteria related to the case to be decided. Based solely on the combined theoretical model, case related considerations should include strength of precedent, degree of departure from the Treaty, and the impact of the decision on the effectiveness of the Community. In the highly legalistic Western European society, and to a lesser extent the more recent Eastern European additions, legal precedent accomplishes two things. First, and most importantly, it adds a great deal of legitimacy to a decision. With some sort of legal precedent on which to rely, a Court’s decision is more likely to be viewed as based on law and not ideology, thus likely to prompt fewer negative responses. A second major advantage to having precedent to rely on is it most likely means the member states have already seen the effects of the decision in another area or to a lesser extent. This may damper the initial shock of an activist decision, increasing the likelihood of the Court’s decision being accepted. Looking at the selected cases, the Court, in its most expansive decisions, did have precedent to rely on. *Francovich* had *Van Gend en Loos*, *Internationale Handelsgesellschaft* had *Costa*, *Les Verts* drew its precedence from the Court’s ability to render judgment on all other Community institutions with the capability of creating legally binding legislation, and *Commission v Council 03* drew on the expressed desire of all member states to protect the environment through more than mere national legislation. It is true that in *Van Gend en Loos* and *Costa* the Court had no precedent to rely on, but given that these decisions came so early in its history, when the case law was not highly developed, this was to be expected. Throughout all the later cases, the strength of precedent varied, but there was always a
precedent of some kind. Strength of precedent appears to be another area where the theoretical assumption and historical record match.

Another criterion the combined theoretical model suggests the Court consider is the amount of departure it must make from the text of the Treaty in order to render an activist judgment. The further away from the text the Court must go in order to make its decision the greater the risk of member states perceiving it as making illegitimate, ideological decisions. Such an impression would increase the likelihood of noncompliance or retaliatory measures being taken. In reality, however this does not seem to pose a major problem for the Court. Not only has the Court shown its willingness to stretch the Treaty language, it has repeatedly listed the actual text as the least important of its considerations when making a decision, after the spirit and general scheme. Furthermore, it made decisions in absolute opposition to the Treaty (*Les Verts*) and declared itself competent to find the “correct” question in references that it was technically not allowed to hear (*Costa*). Thus, while there is certainly a role for the Treaty’s text in the legal reasoning of the judges, the amount of departure from the Treaty does not appear to be a criterion of importance for the ECJ when making decisions.

Given the Court’s active use of spillover to further its goals, the effectiveness of a power or doctrine declared by the Court is of great importance. Effectiveness is the justification behind spillover, which serves as an efficient, gradualist way for the Court to expand its powers. A look at the historical record supports this. Direct effect was needed so that member states could not prevent uniformity of Community law through non-implementation; supremacy was needed because the Community would mean little if national legislation could overrule its laws; review of the European Parliament was
needed to ensure the rule of law; Community enforcement of criminal law is needed to protect the environment, which is a cross-border problem. The ability to couch the decision in terms of “effectiveness” is inseparable from activist Court decisions.

There are a number of criteria that can be applied to the member states as well, but whereas the Court’s criteria were to judge when it would make an expansive judgment, all but one of the member state’s criteria are to judge the severity of response. The first criterion, used to determine whether action needs to be taken against the judgment or not, is that the decision must be viewed as contrary to member state interests. This seems obvious to the point of being a platitude, but the finesse in determining preferences makes it a more complicated calculus than first look suggests. Having created the EC and ECJ in the rational pursuit of interest, member states must always consider the benefits of the expansive judgment versus the costs of fighting it. The potential costs are many, from jeopardizing an entire system which the state finds beneficial to threatening its position vis-à-vis other member states. This makes it easy to see why certain decisions were received as they were. *Van Gend en Loos* was largely accepted because it was assumed it really did not change much in reality, *Les Verts* provided protection the member states had previously been lacking, *Francovich* carried with it tremendous potential financial costs and *Commission v Council 03* went into criminal law, one of a member state’s most protected competences. Once a decision has been determined to be more negative than positive the member states will respond. This is where criteria are needed to measure the strength of member state response, from political blustering at one end to Treaty revision at the other.
After determining that a Court decision is contrary to its interests, a member state must determine to what extent the decision affects it. Being actors that rationally pursue their interests, it would seem that the more a decision affects those interests the more negative the response. The historical record bears this assumption out, with two instances when the response was particularly strong: when it affects the constitutional order and when it carries with it potential financial liability. Both *Internationale Handelsgesellschaft* and *Commission v Council 03* directly affected the constitutional order of member states, the former seeing tremendous resistance and the latter, while still too recent to have seen the full reaction, showing all the signs of steadfast opposition throughout the Community. *Francovich* received the most opposition of any case dealt with in this thesis, and it carried with it financial penalties for the member states, as did *Barber*, a case which, although not analyzed in this thesis, is famous for prompting successful Treaty revision. The type of action taken by the member states also appears to be similar to the type of attack it faced. Attacks on the constitutional order are primarily dealt with through the national courts, particularly constitutional courts, refusing to follow the ECJ’s lead. A number of constitutional courts refused to accept *Costa* or *Internationale Handelsgesellschaft*, and it does not look likely that many will accept *Commission v Council 03*. While member states cannot respond in kind to decisions establishing their financial liability (refusal to pay other Community obligations would affect the effectiveness of accepted parts of the Community), the impact is met in kind with attempts at Treaty revision. It is thus clear that the impact of the decision plays a large role in determining the ferocity of the member state response.
Just as one of the Court’s criteria is that at least one member state must support, or at least not oppose, its decision, it would seem that a member state is more likely to attempt strong action if there is support from other member states. This increases the chance of effectively pushing legislation or Treaty revision through, decreases the need for largely ineffective noncompliance, and makes it unlikely the member state will lose diplomatic capital. As rational actors, this would seem to be the most beneficial route for member states. However, the historical record shows this need not be the case. While opposition to a decision has always existed in more than one member state, the amount of opposition and proposed response has differed. Furthermore, there appears to be no correlation between the amount of Community disapproval and member state action; they act in view of their own interests. Thus, the amount of support it can get from other member states does not appear to be a criterion used by member states when deciding the scale of their response.

For the Court, or any of its decisions, to play a role in a member state’s calculus regarding whether or not to respond, sufficient attention must be paid to it for the member state to get enough information to consider. Given the requirements of extensive knowledge in rational decision making, without information about the Court it is unlikely to play a role in the member state’s calculus when deciding what to pursue and how to proceed in the integration project. One can see in the historical record the varying severity of response depending on the amount of attention paid, with almost no attention and no response to *Van Gend en Loos* and extensive attention and response to *Francovich*. This criterion is essentially a given condition now that the ECJ has a history
of expansive judgments, with at least certain segments of the member state watching the
ECJ closely at all times.

Member states, like any rational actor, will take the path of least resistance
whenever possible. In terms of responding to judgments by the ECJ, this means
opportunity. Opportunity can be a number of things: subsequent cases, either before the
ECJ where a member state can make its dissent known or before a national court where
preliminary reference can be denied and/or a decision rendered in absolute opposition to
the Court, an upcoming IGC or budget negotiations, or even an upcoming national
election where a politician can play to populist sentiment and fight the ECJ. Looking at
the cases presented in this thesis, the strongest response to ECJ decisions have occurred
when the opportunity arose in subsequent court proceedings or if there was an IGC in the
near future, Francovich being perhaps the best example. Opportunity for action is thus
an important criterion for member states when determining how they will respond.

B. Looking Toward the Future

The central aim of this thesis was to show how the Court of Justice can threaten
the future of European integration. To do this, the true nature of the Court and the
response this receives from the member states was demonstrated through a review of
select cases and their aftermath. This was followed with the identification of criteria that
appeared to determine when the Court made an expansive judgment and the strength of
member state response. What remains is to determine how this can affect the future. The
historical record makes it clear that when given the opportunity the Court will depart
from the text of the Treaty and make a teleological judgment furthering its integrationist
goals. This thesis argues that one of these decisions may prove so unpalatable to the
member states and the spillback reaction will be so strong that integration ceases to move forward. The question is, what type of decision and circumstances can potentially lead to such an outcome, especially if nothing like this has happened yet? Here the criteria established above become useful.

The first thing to identify is what type of case poses the greatest threat. There is very little question that the Court will, when given the opportunity, make an expansive judgment. The first criterion, that at least one member state not openly oppose the decision, is easier now than ever for the Court to secure given the size of the Community. Not only does the Community now have several times over the number of original members, its members also represent a cultural, historical and political diversity unforeseen in the original Community. Under these circumstances, the potential for one or more member states to oppose a decision accepted by the others is increased tremendously. In terms of precedent, the Court has such an extensive body of case law to rely on, and has proven so resourceful in its past decisions, that identifying some sort of precedent, even a very tenuous one, shall not be a problem. For evidence of this resourcefulness, just turn to the *Commission v Council* decision, where the “precedent” was the expressed desire of the member states to protect the environment, despite the fact they had also expressed the desire to keep criminal law a matter of national prerogative. The final criterion, effectiveness, should pose no threat to the Court in the future either, because it has proven itself resourceful in tying many legal questions to the very effectiveness of the Community.

Given that an expansive judgment is nearly a foregone conclusion, the real issue is the type of response it will draw from the member states. The first requirement is that
it be contrary to the perceived interests of the member state and there is little reason to believe a decision like this will not occur. In fact, the current state of the Community and attitudes toward integration suggests that much will be seen as contrary to member state interest, limiting the Court’s leeway and increasing the likelihood of a clash. The second criterion, that the Court and its judgments are a significant enough priority to warrant attention, is essentially in a permanent state of being met after the years of decisions limiting member state sovereignty. Nor is a third criterion, opportunity, in short supply. Continuing attempts at expansion and the need to deal with the failure of the Constitutional Treaty mean the opportunity for Treaty revision is ample, while the continuing need to negotiate the budget every few years and the never ending flow of cases provide further opportunity for member state action. The only truly variable criterion that will determine the extent of member state response, and thus the degree to which the current project of integration is altered, is the impact of the future decision on the member state’s sovereignty; the greater the impact the greater the response, and a strong enough impact will cause a major, integration stopping response. If one looks just at the cases selected for this thesis, the pattern is of greater and greater impact, followed by stronger and stronger response. If this pattern continues, it is not unwarranted to expect a future decision to go beyond even harmonizing criminal law. It thus becomes a question of when, not if, the Court will push too hard.

This thesis should not be understood as predicting the collapse of the EC and the end of structured cooperation on the continent under the weight of an ECJ decision. However, like all other political entities, the EC is neither a given nor static. The nature of the Community will continually shift as its influence and the needs of the member
states change. To date, this change has generally been towards greater integration, with certain instances and trends moving in the opposite direction. Rather than predicting the end of the EC because of the Court, this thesis merely argues that because the Court has proven such a potent and consistent force for integration, it possesses immense potential to threaten the very integration it promotes as circumstances around it change.
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