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Towards a Normative Theory of Interpretation of Community Law

Professor dr jur Hjalte Rasmussen†

Few, if any, of the founding fathers of the European Community ("EC" or "Community") who drafted the Paris and Rome Treaties thought they were participating in constitutional conventions. They were negotiating treaties featuring a limited number of real departures from well-established canons of international law. Over time, however, the Treaties, in particular the Treaty Establishing the European Economic Community ("EEC Treaty"), metamorphosed into constitutional texts. Admittedly, they never acquired that quality in any formal sense but rather as a matter of substance. They increasingly occupy the same function in the Community's legal order as constitutions do in states, federal or otherwise.¹

Although the three communities created by the Paris and Rome Treaties have never been formally fused into one, a single constitutional framework is emerging. Arguing that it has only beffited experts to understand the differences between the three Treaties, the European Parliament has recommended the use of "Community" in the singular. Likewise, the European Court of Justice ("ECJ"), when interpreting the Treaties, has not dealt with them in isolation, but rather as if they were, organically, of one piece: the EC's "basic constitutional charter."²

In a recent judgment, for example, the ECJ declared that, since the two Rome Treaties provide cooperative procedures for preliminary rulings between national and Community level judges (Articles 150 and 177), the silence of the Coal and Steel (Paris) Treaty in that respect should not be taken to mean that it does not

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¹ I, therefore, refer below to the EEC Treaty as the Community's "1958 Constitution," and to the 1986 Single European Act, 1987 OJ L169:1, the first major revision of the Treaties, as the "1986 Amendment."

also warrant preliminary question procedures. The ECJ itself is, accordingly, empowered to address preliminary questions raised under the Coal and Steel Treaty, notwithstanding Article 3 of the Paris Treaty, which stipulates that the institutions of the Community shall act “within the limits of their powers.” Consonantly, the ECJ recently decided that it may hear allegations of infringements against the Euratom Treaty in procedures initiated under the EEC Treaty.

Few, if any, observers will contest that the ECJ played a crucial role in the step-by-step metamorphosis of the three Treaties into a single constitutional framework. The ECJ ignited the process by handing down key rulings like N.V. Algemene Transport-en Expeditie Onderneming van Gend En Loos v Nederlandse Administratie der Belastingen (“van Gend en Loos”), in 1963 and Costa v Ente Nazionale Per L’Energia Elettrica (ENEL) in 1964. Van Gend en Loos held that traditional-looking treaty provisions between states could produce direct effects in the Member States, while Costa held that Community law was the supreme law of the land. Although one can discuss when and how the metamorphosis took place, one cannot point out with confidence when it ended.

Against such a background, this Article raises its main questions about the ECJ: how its role evolved throughout the 1980s and how it should continue to evolve during the 1990s. In particular, this Article is concerned with whether the ECJ, under changing conditions inside and outside of the court, can carry on as an activist pro-Community law- and policymaker, as the court did during the years in which it shaped the Community constitution. I hypothesize that the members of the Bench are rethinking their own and the ECJ’s role in response to the profoundly new societal conditions of the late 1980s and the 1990s.

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3 Case C-221/88, European Coal & Steel Community v Acciaiere e Ferriere Busseni SpA, 1990 ECR I-495.
5 Case C-62/88, Greece v Council, 1990 ECR 1545, 1991:2 CMLR 649. This and the Busseni case have been randomly chosen from many cases illustrating the Court’s free interpretative approach.
Part I of this paper will examine the oft-neglected human factor behind the ECJ’s decisionmaking. During the ECJ’s early years, the judges united around a person, Mr. Robert Lecourt, and around an idea, the goal of an “ever closer union.” When Lecourt left, and when their activism lost its legitimacy, the judges lost their unity, and their case law developed inconsistencies. As a result, a new rallying point is needed to fill this vacuum in the ECJ.

Part II reopens the decade-old discussion concerning the ECJ’s frequent and deep involvement in Community politics. The most-favored rationale for this involvement has been that judicial activism was needed in order to break the impasse into which the political branches had settled. Whatever strength and legitimacy this rationale may have had in the past, it offers little today, since now the political bodies have begun to develop the Community towards European Union.

To respond to the ECJ’s problems outlined above, Part III recommends a new leitmotif for the ECJ: the Rule of Law. In the past, the ECJ has regularly protected the rights of individuals only when such protection served the greater goal of integration. When the rights of individuals, particularly their right to legal certainty and security, threatened to thwart integration, the ECJ denied individual rights. This denial strikes at the core of Western civilization, the idea of a Rule of Law. The judges of the ECJ should regain their lost unity and legitimacy by restoring and preserving the Rule of Law in the European Community.

I. THE LOSS OF JUDICIAL UNITY—THE HUMAN FACTOR

A. The Great Judicial Period

The process of expansion of the ECJ’s stature from being, in essence, an administrative tribunal during the years of the Coal and Steel Community to a constitutional court began as imperceptibly as it ended. Several independent factors acted simultaneously to bring about change. Because not much research has been devoted to isolating these factors and assessing their import, few reliable results are on record. However, one can identify at least one major point of departure in that process: the elevation to judicial eminence on October 6, 1962, of Mr. Robert Lecourt, former Justice Minister under President de Gaulle (although himself not a “Gaullist”). His tenure lasted 15 years, during which he was presi-
dent of the ECJ from 1967-1976, being twice re-elected by his Brethren to that honorable office.\textsuperscript{10}

A group of newly appointed judges, all possessing the highest legal and intellectual qualifications, soon rallied around Lecourt, an inspiring and charismatic team leader. Hindsight demonstrates that many of them seem to have held strong ideas of their own about how to bring about the “ever closer union among the peoples of Europe.”\textsuperscript{11} As history bears witness, they would accomplish union by judicial fiat, if necessary. \textit{Primum inter pares} in this group of judges was Mr. Pierre Pescatore, who sat on the ECJ for almost twenty years, from 1967 until 1985. Pescatore, well-placed to know, once said that in his view the judges had “‘une certaine idée de l’Europe’ of their own.”\textsuperscript{12} In critical situations, this idea, “not arguments based on the legal technicalities of the matter,” was decisive.\textsuperscript{13}

Much of the honor and the responsibility for having transformed the Treaties into a constitution rests with these judges.\textsuperscript{14} Indeed, if they had not initiated a process of intense and frequent pro-Community policy involvement and constitution-making, at times in blatant disrespect of the unambiguous, state-sovereignty-friendly language of several treaty provisions, there would have been no good reason today to ask questions about “The Role of the Court in the European Community.” In any event, that role would most likely have been an essentially different and timid one. If the judges of the “Great Judicial Period”\textsuperscript{15} had not taken advantage of the unique internal and/or external conditions of the 1960s and

\textsuperscript{10} In 1976, Mr. Lecourt stepped down from the court in order to assume new responsibilities in his home state of France. His successor presidents have been Mr. Hans Kutscher (Germany), Mr. Mertens de Wilmars (Belgium), Lord Mackenzie Stuart (United Kingdom), and Mr. Ole Due (Denmark), who began his second term as president on October 6, 1991.

\textsuperscript{11} EEC, Preamble.


\textsuperscript{13} Id.

\textsuperscript{14} Professor Martin Shapiro drew attention to this aspect very early on in \textit{Comparative Law and Comparative Politics}, 53 S Cal L Rev 537, 540 (1980). Unfortunately, European academics’ writings about the ECJ typically ignore the impact of the human factor on the court’s decisionmaking. This factor, however, is far too important to ignore. Admittedly, solid empirical data are difficult to get, and so even this article can account for merely a fragment of its import.

\textsuperscript{15} The “Great Judicial Period” is the phrase which Mr. Grévisse, one of the ECJ’s “French” judges, uses fondly to characterize the years when the spirit of President Lecourt still decisively influenced the inner workings of the ECJ and gave shape to many judicial outcomes.
1970s, decades may have passed before the conditions for judicial activism were again ripe.

B. After the Great Judicial Period

The ideological and intellectual fortifications of the Great Judicial Period have begun to crumble. Signs of decay began to appear during the early 1980s. Unfortunately, to fully substantiate this assertion, one needs access to certain data that are currently inaccessible. For example, the ECJ’s judgments are always without dissenting or concurring opinions. Indeed, such opinions are prohibited by law. Thus, a very important source of insights into the 'Willensbildung' of the ECJ is not available. American constitutional scholars will quickly acknowledge the important loss for EC judicial research that this "closed window" represents.

The European researcher must therefore look elsewhere, including to what members of the Bench have said about this problem in public speeches and in their academic and other publications. Unfortunately, these sources of information shed little light on Willensbildung. The judges’ solemn declaration not to breach the secrecy of their deliberations in judicial conference limits their freedom of expression.

Nevertheless, in his academic writings, the “German” judge, Mr. Uwe Everling, has been unusually open about this problem:

It doesn’t require explanation, that consultations among eleven—or even sixteen—distinct personalities can be difficult and lengthy. This applies in particular to the deliberations of the judgements, which are not limited to the holding, but extend to the reasoning with all of its details. . . . This task is complicated by the differing backgrounds and prior education of the members of the ECJ.

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16 See Statute of the Court of Justice of the European Communities, Arts 32 and 33; ECJ Rules of Procedure, Art 27.

17 By Willensbildung, I mean the discussions between the judges, inside and outside of judicial conference, in search of a solution to the concrete legal problem at hand. This includes coherent and persuasive reasoning in support of the decision as well as the more long-sighted discussions about appropriate judicial policies and laws.

18 Article 2 of the Protocol on the Statute of the Court of Justice of the EEC.

Everling has also cast some doubt on the otherwise generally held belief that the founding fathers agreed on the desirability of an “ever closer union.”20 One need not spend long hours reading the 1958 Constitution’s 248 operative articles to understand that, if the drafters wanted union, they did not invest much political will or capital in bringing it about immediately. The severe political setbacks suffered by the union initiatives of the first half of the 1950s might arguably explain and even justify the prudence of the negotiators assembled at Val Duchesse from 1955 to 1957. Nevertheless, note what Mr. Jean-François Deniau, who was then a member of the French team of negotiators (and who later became a member of the European Commission and of the French government), has to say about the “union” objective:

But the text is still more interesting for the reason that for the first time without doubt a preamble gave way to after discussions. I remember it, it is largely from my pen. Discussed to the end, just before signing (one had forgotten it . . .), each delegation wanted to translate its conception, its interpretation of the treaty such that it became difficult to conclude. And already, the divergences appear.21

In the end, nothing replaces a true consensus on the ends of the Community and its role in the world, a consensus which does not exist, but which one doesn’t seek only in order to not make it appear too distinctly that it doesn’t exist.22

However, even assuming that agreement about the union objective was not fictitious, the judges’ dedication to continue to make up for the political-integrative impasse must have been hurt, since the democratically responsible politicians of the Council were seemingly prepared to extend the stalemate indefinitely. Various attempts at revitalizing the process of integration were made, but

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20 Id at 151.
21 Jean-François Deniau, L’Europe Interdite 65 (Seuil, 1977) (translation by Legal Forum staff) (“Mais le texte est plus intéressant encore en raison du fait que pour la première fois sans doute un préambule donna lieu à d’après négociations. Je m’en souviens, il est très largement de ma plume. Discuté à la fin, juste avant la signature (on l’avait oublié . . .), chaque délégation voulait y traduire sa conception, son interprétation du traité tel qu’il venait d’être difficilement conclu. Et déjà, les divergences apparaissent.”).
22 Id at 149 (translation by Legal Forum staff) (“Enfin rien ne remplace un véritable consensus sur les finalités de la Communauté et son rôle dans le monde, consensus qui n’existe pas, mais qu’on ne recherche pas justement pour ne pas faire apparaître trop nettement qu’il n’existe pas.”).
they conspicuously failed to emphasize any need for a reorien-
tation of the course of Council policymaking, let alone to mandate
the Council to bring about union at high speed.\textsuperscript{23}

Besides this alleged loss of faith, other factors contributed to
an erosion of the ECJ’s decisionmaking process. First, the sheer
growth in the number of judges, from seven in 1973 to thirteen in
1985, undoubtedly made reaching consensus more complicated.
Second, the new judges brought their different “legal cultures” to
the ECJ, with similar effect. Third, rumors persist that the nomi-
nation of new judges who were not all fluent in French, the \textit{lingua
franca} among the judges, rendered the ECJ’s \textit{Willensbildung}
increasingly complicated. Fourth, the age-span between the oldest
and youngest judges sharply increased during the 1980s.

Fifth, the pre-court career backgrounds of the members of the
ECJ throughout the 1980s varied more than was the case during
the “Great Judicial Period.” In particular, several new members
ascended directly to the ECJ from life-long careers in high posts in
the national administrations of Member States.\textsuperscript{24} This group of
judges, moreover, apparently soon became quite influential. Sixth,
the absence of a charismatic president like Robert Lecourt, both
willing and able to lead and inspire his Brethren, may have
counted. Indeed, Mr. Lecourt’s four successors have taken ap-
proaches to the conduct of the presidency quite dissimilar to that
of Mr. Lecourt. Last but not least, lingering doubts about the legit-
imacy of their reach for power to act as a constitutional court may
have weakened the court’s determination to imitate the Great Ju-
dicial Period.

C. Inconsistent Case Law as Evidence of \textit{Willensbildung}
Problems

Inconsistencies do occur within ECJ jurisprudence.\textsuperscript{25} For the
sake of economy, this section will concentrate on inconsistencies
regarding crucial constitutional legal problems. Assuming that eve-

\textsuperscript{23} See Roy Pryce, ed, \textit{The Dynamics of European Union} (Croom Helm and Tepsa,
1987).

\textsuperscript{24} See the ECJ’s \textit{Synopsis of the Work of the Court of Justice of the European Com-
munities}, published at two-year intervals, regarding new members of the ECJ. See also
Hjalte Rasmussen, \textit{On Law and Policy in the European Court of Justice: A Comparative
Study in Judicial Policymaking}, ch 6-7 (Martinus Nijhoff, 1986).

\textsuperscript{25} The risk of inconsistent decisions, deliberate or inadvertent, grows proportionally
with the widespread use of chambers of three or five judges. These chambers are much
smaller than the so-called “full court,” consisting of seven, nine, or eleven judges, instead of
thirteen, the real full court.
rything inside the ECJ was done to ensure the highest degree of consistency in precisely such areas of law, existing inconsistencies are conclusive evidence of doubts haunting the minds of the ECJ's Brethren.

For this Article, I have chosen two of the ECJ's most pivotal reconstructions of the Community's Treaties—the Community law's ability to produce direct effects and its supremacy over the laws of the Member States whenever they happen to conflict. The ECJ set forth the bases of these lines of jurisprudence as early as 1963 and 1964 respectively.

The 1958 Constitution stipulated that regulations were to be immediately applicable in the legal orders of the Member States, and articles of the Treaty such as Articles 85 and 86, were drafted so as to be directly applicable. However, the 1958 Constitution was silent about other occasions for direct effects and certainly did not mention supremacy. In fact, I believe it did not even imply supremacy.

If direct effect was from the outset the noteworthy exception to the rule, the ECJ has made a rule of the exception. The ECJ only rarely finds that an EC provision does not meet the conditions for direct effect: that the provision in dispute is 1) clear and unambiguous; 2) unconditional; and 3) not dependent on further action. Provisions of the Treaties, of international treaties, and

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26 Direct effect means that private parties may invoke relevant provisions of directives or treaties in proceedings before national judges, who then have a duty to enforce the entailing rights. The landmark case is Case 43/75, Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena, 1976 ECR 455, 1976:2 CMLR 98. For a more complete account, see Rasmussen, Summaries (cited in note 6).

27 According to the principle of supremacy, enforcement of Community law must take place even in the face of conflicting national law. The landmark case is Case 106/77, Amministrazione Delle Finanze Dello Stato v Simmenthal SpA, 1978 ECR 629, 1978:3 CMLR 263. For a more complete account, see Rasmussen, Summaries (cited in note 6).

28 EEC, Art 189, ¶ 2.

29 I do not profess to say that the development of the doctrine of direct effects has not been good for the Community. Without it, the Community would have been frozen in the position afforded it by the founding fathers in the mid-1950s.


31 1963 ECR at 13.

of Community decisions all come within the ambit of the ability of Community law to be directly effective. As will be seen below, provisions of EC directives can also be directly effective, despite the fact that Article 189 stipulates that they generate a binding effect only on their addressees, normally Member States.\textsuperscript{34}

1. Marleasing\textsuperscript{35} versus Marshall\textsuperscript{36}—horizontal direct effect of directives by the back door.

The provisions of the 1958 Constitution can be directly effective both vertically and horizontally. That is, they can affect legal relationships both between a citizen and a Member State and between private parties. As an example of the former, the ECJ has ruled that an employee may invoke the Article 119 requirement that the Member States shall issue laws "ensuring equal conditions of remuneration of men and women who perform 'equal work.'"\textsuperscript{37} In contrast, the ECJ has steadfastly denied that directives produce such horizontal direct effects.

The unambiguous language of the ruling in Marshall v Southampton and South-West Hampshire Area Health Authority, dispelled any remaining doubts.\textsuperscript{38} In Marshall, a 62-year-old female hospital employee was dismissed, despite her willingness to work until 65, for the sole reason that she had passed 60, the "retirement age" for female employees. Her employers admitted that they set the retirement age as the age at which social security pensions became payable. The U.K. Social Security Act of 1975 provided that state social security pensions became payable to men from the age of 65 and to women from the age of 60.

Ms. Marshall argued before the U.K. courts that her dismissal was contrary to the U.K. Sex Discrimination Act of 1975, implementing Council Directive 76/207 on equal treatment for men and women regarding access to employment. This U.K. act, however, permitted discrimination on the grounds of sex where it arose out of "provisions in relation to retirement" and so, according to the

\textsuperscript{33} Case 33/70, SpA SACE v Italy, 1970 ECR 1213; Case 9/70, Franz Grad v Finanzamt Traunstein, 1970 ECR 825. For a richer collection of cases on direct effects, see Rasmussen, Summaries (cited in note 6).
\textsuperscript{34} EEC, Art 189, ¶ 3.
\textsuperscript{35} Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentacion SA, 1990 ECR I-4156, 1992:1 CMLR 305.
\textsuperscript{36} Case 152/84, Marshall v Southampton and South-West Hampshire Area Health Authority, 1986 ECR 723, 1986:1 CMLR 688.
\textsuperscript{37} Case 43/75, Defrenne, 1976 ECR 455, 1976:2 CMLR 98. "Equal work" is understood to mean work of equal value.
\textsuperscript{38} Case 152/84, Marshall, 1986 ECR 723.
U.K. courts, Marshall could not rely on the Act. She then sought to rely, instead, on Directive 76/207, which prohibited any discrimination on the grounds of sex with regard to working conditions. Because Marshall's dismissal was clearly contrary to Directive 76/207, the only question that remained was whether she could rely on that directive.

On this point the ECJ ruled that, although Directive 76/207 was vertically directly effective, it was not horizontally directly effective. Indeed, the ECJ declared that, as a general rule, directives could not be horizontally directly effective. The ECJ brushed aside arguments that, by denying the horizontal effect of the directive in question, persons employed by public authorities would be in a considerably better legal position than those working in the private sector.

The tenor of Marshall has been cast in some doubt by the 1990 ruling of a five-judge panel in Marleasing SA v La Comercial Internacional de Alimentacion SA, dealing with the so-called First Company Law Directive. In Marleasing, a limited company incorporated in Spain owed Marleasing some money and transferred its assets to another limited company, La Commercial, specially formed for the purpose of removing the assets from the reach of Marleasing. Marleasing claimed that this transaction was fraudulent and brought an action in the Spanish courts seeking an order that the incorporating document founding La Commercial was void. Marleasing based its argument on articles 1261 and 1275 of the Spanish civil code, which provided that contracts concluded without consideration or for an illegal purpose would have no legal effect. The assets of La Commercial would thereby presumably have reverted to the original company, and Marleasing would have had some prospect of being paid.

La Commercial relied in its defense on article 11 of Directive 68/151 (the "First Company Law Directive"), which lists the grounds on which a company may be declared null. This list did not include lack of consideration. The Directive had not been implemented in Spain, although under the Spanish and Portuguese Act of Accession the relevant deadline had passed. Article 11 of the Directive was, therefore, certainly directly effective, but could La Commercial rely on it even though neither party was an "emana-tion of the state?"

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39 Id at 749.
The Advocate General's conclusions proposed a formal response stating that article 11 could not be invoked against an individual, following Marshall, but that the national judge was bound to interpret national legislation in the light of the wording and objectives of that article. The ECJ restated this doctrine in the body of the judgment and recalled the Member States' duty to cooperate set out in Article 5.

Drawing on the recitals of the Directive, the court pointed out the potentially serious consequences in terms of legal certainty which may flow from a declaration of nullity of a company and concluded that article 11 of the Directive should be interpreted strictly. The ECJ concluded:

Consequently, the answer to the question posed must be that a national court seized with a case falling within Directive 68/151, is bound to interpret its national law in the light of the wording and objectives of that directive, in order to prevent ["en vue d'empêcher"] a limited company being declared null for any reason other than those listed in Article 11.

The phrase in brackets, although a little ambiguous, gives the national judge little room to maneuver: The national judge can find a company null only for the reasons listed in article 11.

According to this reasoning, national judges must interpret their national laws so that they conform to the relevant directive whenever the directive has not been implemented on time or was implemented erroneously. This duty exists even in cases where the national rule stipulates something entirely different than the directive. The result, in Marleasing, is a preliminary ruling which in essence directs the national courts to recognize the horizontal direct effect of article 11 of the First Company Law Directive. In this manner, horizontal effects are introduced, so to say, through the back door.

Some have argued that if the reasoning in Marleasing is inconsistent with the tenor of Marshall, Marleasing might be an extension of the ECJ's von Colson and Kamann v Land Nordrhein-
Westfalen case law from 1984. Von Colson held that national courts must interpret their national laws so as to avoid conflicts with Community law whenever the national provision leaves room for interpretation. I do not think that von Colson can be extended so far as to cover the Marleasing situation, since Marleasing goes much further.

2. Factortame versus CILFIT, or a seemingly unusable interim remedy.

Another set of inconsistencies can be found in the ECJ’s judgments in Ex parte Factortame Ltd., Amministrazione Delle Finanze Dello Stato v Simmenthal, and CILFIT v Ministry of Health. Factortame grew out of a situation in which a number of fishing companies, mainly under Spanish control, incorporated under U.K. laws in order to be able to fly the British flag and thereby have the authorization to fish in British waters, a maneuver called “quota-hopping.” Following criticism from British fishing interests, the British government legislated to prevent the Spanish fishing vessels from exploiting U.K. quotas (hereinafter referred to as the “1988 Act”). Facing the prospect of being forced out of business, the fishing companies asked the ECJ for judicial review of the compatibility of the 1988 Act with Community law.

Since there was no warrant under English law empowering the courts to set aside a statute temporarily while awaiting the ECJ’s ruling on the question of incompatibility, the main legal question in Factortame was whether Community law required such an interim remedy. In other words, if Community law granted the Spanish interests a right to fish in British waters, and if that right was directly effective, were the courts of England under a duty to set aside a parliamentary statute while waiting for an ECJ decision?

Naturally, the case raised more than one politically sensitive issue. Indeed, it raised the question of judicial review of legislation, a theme hitherto considered anathema in view of the fundamental English principle of parliamentary sovereignty. The legal problem was even more sensitive because the question was whether such a statute should be set temporarily aside pending resolution of the question of compatibility between U.K. law and Community law.

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47 Case 283/81, 1982 ECR 3415, 1983:1 CMLR 472.
The ECJ answered that such an interim remedy existed under Community law. The court reasoned that this was a consequence of its earlier rulings by which Community law was given absolute supremacy over national laws when the two conflict, citing its landmark judgment on supremacy, Simmenthal. Indeed, after Simmenthal, no doubt exists that national law, including national constitutional provisions, are automatically inapplicable when contrary to directly effective Community law.

Accordingly, the ECJ felt that any national law or practice that impairs the effectiveness of Community law by withholding from the national courts the power to set aside national legislative provisions is incompatible with the very essence of Community law. The complete effectiveness of Community law, the ECJ continued, can be impaireed just as much when the relief sought is temporary rather than permanent. Consequently, the ECJ ruled that a national court is obliged under Community law to grant interim relief if it would have done so had there been a corresponding warrant under national law.

Having rested the major part of its reasoning on the principle of supremacy, the ECJ added that its interpretation was reinforced by the procedure for preliminary rulings under Article 177. The ECJ maintained that the effectiveness of that system would be impaired if a national court that has stayed proceedings pending the reply from the ECJ was unable to grant interim relief until the ECJ had delivered its judgment based on that reply.

Although this reasoning may be attractive at first glance, it suffers from at least three flaws. First, Simmenthal is about supremacy, a legal principle to apply when Community law and a national law conflict. Factortame, however, at least on the facts before the House of Lords when it referred the case to the ECJ, involved no such conflict. At best, there was the plaintiffs' contention, which the judges may have held prima facie persuasive, about the existence of a potential conflict. Indeed, it was uncertain not only whether the Spanish fishing vessels actually enjoyed a right under EC law to operate in U.K. waters, but also whether that right was directly effective. The ECJ was, therefore, not justified in relying on the principle of supremacy in order to justify its conclusion.

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** Case 106/77, 1978 ECR 629.
** Case C-213/89, Factortame, 1990:3 CMLR at 29-30.
** Id at 30.
Second, the ECJ's major premise suffers from a weakness regarding the desired effectiveness of Community law. The ECJ postulates that Community law must be absolutely effective but does not, for good reason, offer a reference to the ECJ's warrant for that contention. The source of this proposition certainly is not in the Treaty, which sets up a legal system that, in terms of claims to effectiveness, bears few resemblances to the legal systems of the Member States. It is no secret that the judges themselves constitute the source of the absolute effectiveness contention. The claim has given rise to severe problems of compliance in those Member States, particularly the Federal Republic of Germany, Italy, and France, in which the credibility of absolute effectiveness has been made subject to test-decisions by the courts. This Article is not the place to discuss whether Community law should be as effective as the ECJ argues. I only wish to emphasize that the ECJ's claim to effectiveness certainly does not reflect the consensus of the Community.

Third, Factortame is flawed because, for the decision to make any practical sense, it must presume that national judges will regularly be able to find out for themselves what Community law means and whether they face a potential conflict between it and some disputed provision of national law. This presumption, however, flies in the face of CILFIT.

In CILFIT, the ECJ spilled much ink explaining that only in rare cases should national judges feel confident that they were in command of all the insights necessary to decipher the correct meaning of any provision of Community law; including those that at first glance look plain and unambiguous. In fact, the ECJ warned national courts that, before drawing conclusions about the correct interpretation of a piece of Community law, they must be convinced that the matter is equally obvious to the courts of the other Member States, sitting with different language versions in front of them, as well as to the ECJ. Moreover, the ECJ emphasized, national judges must always consider the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.

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52 Id at 325-26.
53 Id at 307-18.
54 For a discussion of these problems, see Ulrich Everling, Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaften 76 (Nomos Verlagsgesellschaft, 1986); Rasmussen, On Law and Policy (cited in note 24).
55 Case 283/81, CILFIT v Ministry of Health, 1982 ECR 3415, 1983:1 CMLR 472.
In particular, the ECJ reminded national courts to bear in mind that Community legislation is drafted in several equally authentic language versions. The interpretation of a provision of Community law will consequently, almost inevitably, involve a comparison of the different language versions. Moreover, even where the nine language versions conform entirely with one another, Community law expresses itself through terminology peculiar to itself. Hence, legal concepts do not necessarily have the same meaning in Community law as they may have in the laws of the Member States. Finally, every provision of Community law must be placed in context and interpreted in the light of the provisions, objectives, and evolution of Community law as a whole.

Of course, if the ECJ in Factortame only intended to declare the law for those exceptional cases in which national judges, after having applied the CILFIT test, still feel confident that they understand the content and implications of the Community legal provision in dispute in the case pending before them, then Factortame may be consistent with CILFIT. Then, however, Factortame would be a judgment of very limited importance. Yet, the ECJ treated the case as one of considerable significance, mustering eleven judges to take part in it. Thus, the judges probably saw Factortame as a ruling of principle, one of great practical importance. In other words, the judges knew exactly what they were doing—creating an inconsistency within their own case law.

This evidence of inconsistencies, in some very crucial areas of legal politics, strongly suggests that groups of judges in the ECJ fundamentally disagree with what their Brethren decide in other cases. Of course, following the steady and enormous growth in the number of cases handled annually by the ECJ throughout most of the last decade, some of the incongruities might also be the result of oversights, embarrassing as they are, of what the ECJ has said previously. But the available evidence about the existence of intellectual, cultural, ideological, and professional difficulties which the members of the court presumably face suggests that lines of jurisprudence will be increasingly at odds with one another.

66 Another aspect of the incongruent language problem is discussed in Part III A 1 of this Article.
67 Both CILFIT and Factortame were decided by panels consisting of eleven judges, yet only two of the judges participating in CILFIT sat on the court that handed down Factortame. CILFIT is analyzed and explained in Hjalte Rasmussen, The European Court's Acte Clair Strategy in C.I.L.F.I.T., 9 European L Rev 242 (1984).
68 The ECJ's vacillation on the Parliament's standing to bring annulment actions under Article 173, discussed below in the text at notes 71-73, suggests the same conclusion.
II. Pro-Integration Judicial Activism

A. Assuming the Power of a Constitutional Court

Neither the Paris nor the Rome Treaties expressly associate the ECJ with anything like a constitutional court. Instead, they give the court a rather heterogeneous, perhaps even confusing, array of specific and fairly detailed competences. The EEC Treaty adds that the ECJ should only act within its limits.\(^6\) The ECJ, however, refused to stay within those limits.

A caveat is necessary: I do not profess that things, competences included, should be frozen in the shape they were given at the outset. The drafters of the Rome Treaties undoubtedly gave the ECJ a greater stature than the Paris Treaty attributed to it. I also do not have problems with assuming that the “ever closer union” declaration of the Preamble was meant to guide the ECJ as well as the other political branches of government. My point is different: even under these assumptions, a great chasm separates the founding fathers’ Treaties from the ECJ’s constitution, regarding the terms of both the ECJ’s own array of competences and most of the other crucial provisions.

The list of enumerated competences under the EEC Treaty begins with Article 169, authorizing the ECJ to hear cases brought by the Commission against Member States in breach of their Community obligations.\(^6\) Article 170 grants the ECJ the power to hear complaints by one Member State against another. Article 173 allows the ECJ to hear actions for annulment of legal acts issued by the Council or the Commission. The first paragraph of Article 173

\(^6\) EEC, Art 4. What follows in this section cannot, for the sake of economy, be but a few highlights of the array of the ECJ’s competences (under the 1958 Constitution). For an account using a comparative approach, see Rasmussen, On Law and Policy (cited in note 24). See also L. Neville Brown, The Court of the European Communities (Sweet and Maxwell, 1989). Any reference list inevitably does injustice to numerous works which are not mentioned. However, the literature is abundant. The two works cited feature extensive bibliographies.

\(^6\) Despite having these competences, Articles 169 and 171 limit the ECJ to declaring that a particular behavior by a State constitutes an infringement of the State’s obligations. Article 171 does not allow the ECJ, in its judgment against a State, to specify the content or nature of the measures that the State must take to bring its house into order.

The Draft Treaty on European Union, signed at Maastricht, adds to Article 171. 31 ILM 247, 292 (1992). In the new Article 171, the Commission will have the competence to assess whether a Member State has executed a judgement against it correctly and, if the answer is no, to specify in a reasoned opinion to the Member State what it believes should be done. If the Member State fails to implement these suggestions, the Commission can bring the case before the ECJ, suggesting either a lump sum or penalty payment. The ECJ will have the power to make the Member State pay these amounts, except in cases brought under Article 170.
A NORMATIVE THEORY

gives standing to the Council, the Commission, and the Member States and establishes jurisdiction over actions brought by these parties.\(^\text{61}\)

While the doors to the courtroom stand wide open to EC institutions and the Member States, the ECJ, as early as 1962,\(^\text{62}\) has narrowly construed Article 173's private-party-standing provision.\(^\text{63}\) This narrow interpretation was followed for almost 25 years in an unbroken line of case law.\(^\text{64}\) "Denial of justice," said some; "compliance with the will of the framers," replied the judges. Whichever is true, this jurisprudence prevented private litigants from contesting the legality of Community acts of general application. Obviously, this narrow standing was comforting for a lawmaking machinery which, even without having to defend itself against allegations about infringements of the constitution, fundamental rights and freedoms, etc., suffered from functional inadequacies and decisional impasses.\(^\text{65}\)

Moreover, in the few cases that reached the ECJ in which private parties could demonstrate that they were directly and individually affected, especially by Commission decisions in the field of competition law, judicial review proved to be an ineffective remedy for most litigants.\(^\text{66}\) In particular, the ECJ showed a remarkable laxity in enforcing Article 190's "giving reasons" requirement.\(^\text{67}\) Legal security ebbed to a point where the 1986 Amendment, setting

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\(^{61}\) Article 173 as amended by the Draft Treaty on European Union will add competence to hear cases for the annulment of acts by the Parliament and Council together and acts by the Parliament and European Central Bank ("ECB") when they may have effects on third persons. The Parliament and ECB will be given limited standing to defend their prerogatives. 31 ILM at 293.


\(^{63}\) For a look at the critical literature from the 1960s and 1970s, see Hjalte Rasmussen, Why is Article 173 Interpreted Against Private Plaintiffs? 5 European L Rev 112 (1980).

\(^{64}\) Joined Cases 250/86 and 11/87, Refinarias de Acucar Reunidas SA v Council and Commission, 1989 ECR 2045. The case law broadened the scope of private standing somewhat in the 1980s. See, for example, Case C-152/88, Sofrimport SARL v Commission, 1990 ECR I-2477, 1990:3 CMLR 80. I think that the old case law will eventually be reformed.

\(^{65}\) Rasmussen, 5 European L Rev 112 (cited in note 63).


\(^{67}\) Martin Shapiro, The Giving Reasons Requirement, 1992 U Chi Legal F 179.
up the Court of First Instance, was necessary in order to enhance legal security, particularly in competition cases.

Plaintiffs claiming illegal inaction on the part of the Council and the Commission may bring cases before the ECJ under Article 175. Its first paragraph gives standing to the Member States, the Council, the Commission, and the European Parliament, opening the ECJ’s doors wide to these institutional litigants. In contrast, the ECJ has construed Article 175’s rules on private standing to match those of Article 173, despite their different wording, again effectively barring private plaintiffs’ access to justice. The Treaty on European Union did not make any important changes in standing under Article 175.

While the ECJ sometimes shows great faithfulness to the framers’ intentions (even implied intentions occasionally), such as in its rulings on private plaintiff standing in Article 173, the court will sometimes find this faithfulness less convenient. For example, when the ECJ was asked to decide whether the European Parliament had standing to bring annulment actions against the Council and the Commission under Article 173, the court proved to be less subservient to either the text or a repeated expression of the founding fathers’ intentions.

The language of this provision clearly shows that the Parliament has no such right of action. Moreover, it is rumored that during the constitutional negotiations leading to the adoption of the 1986 Amendment, some delegations proposed standing for the Parliament. This proposal was rejected by several Member States, and the 1958 Constitution consequently was not amended in that respect. Shortly afterwards, the standing question came up for judicial resolution, and the ECJ vacillated. First, in 1988, in the Comitology case, the ECJ squarely rejected the idea that the Parliament might have standing. However, only one year and eight months later, in the Chernobyl case, the ECJ overruled

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67 Id, Art 11, amending EEC, Art 168A. For a more detailed discussion of the giving reasons requirement and judicial review, see Shapiro, 1992 U Chi Legal F at 179 (cited in note 67).
70 See, for example, Case 246/81, Lord Bethell v Commission, 1982 ECR 2277, 1982:3 CMLR 300.
72 Case C-70/88, Re Radioactive Food: European Parliament v Council (“Chernobyl”), 1990 ECR 2067, 1992:1 CMLR 91. The Member States wrote the tenor of this judgement into the new Article 173, ¶ 3, as amended by the Treaty on European Union. 31 ILM at 293.
By far the most important vehicle for the ECJ’s transformation of the Community’s legal system has been Article 177. Article 177 allows the ECJ to address preliminary questions from national courts regarding the interpretation and invalidity of EC law. Any national judge may pose such questions to the ECJ in a process which the ECJ has defined as one of cooperation between equal partners. Practice is not, however, entirely consistent with theory. The ECJ has removed the power to rule on the validity of Community legal enactments from the national level where Treaty provisions like Article 177 placed it. Moreover, the ECJ’s use by analogy of provisions in Article 174 and 176, regarding its powers under the annulment proceedings, widened the court’s scope of decisional discretion considerably, and generated a good deal of strongly worded protests in academic literature as well as a national judicial refusal to abide by the ECJ’s decision.

While the ECJ played a major role in transforming the Treaties into a directly-effective, liberal constitutional charter, the ECJ managed to take on the role and stature of a constitutional court. As the ECJ widened the scope of its competences, it also expanded its own legitimacy, building on those narrow sources of legitimacy which the founding fathers had originally afforded it. Indeed, even if they had equipped the ECJ with a quasi-monopoly in Article 164 to declare, in the last resort, what the Treaty meant, they certainly did not mandate that the ECJ act as a constitutional umpire. When the ECJ assumed that role and associated its action with an

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73 Case C-70/88, Chernobyl, 1990 ECR 2067.
75 I need not document here that it is the exception rather than the rule when the ECJ constrains its reply to a preliminary question to offering the elements of interpretation of Community law which the national judge needs to resolve the conflict between EC and national law pending before him. Case 27/80, Criminal Proceedings Against Fietje, 1980 ECR 3839, 1981:3 CMLR 722, represents a model of ruling “in theory.”
77 See Henri Labayle, La Cour de justice des Communautés européennes et les effets d’une déclaration d’invalidité, 18 Revue trimestrielle de droit européen 484 (1982). Subsequent national judgments laid the dispute to rest in favor of the ECJ’s solution. The discussion is taken up by Everling, Das Vorabentscheidungsverfahren at 69 (cited in note 54).
intense pro-Community preference, however, new problems of legitimacy emerged.\textsuperscript{78}

B. The Most-Favored Rationale for Activism

The judges have not themselves explained the ECJ's embroilment in pro-Community politics in terms of the roles of the men behind the robes. Judges should not be expected to proclaim in public that \textit{in camera} they act like the Homeric king who received his \textit{themistes} direct from Zeus, or like the Islamic Qadi who makes his decisions out of an esoteric wisdom.\textsuperscript{79} Thus, one can justifiably assume that Mr. Pescatore's unusual openness about the judges' personal philosophy is not merely a slip of tongue but an indication that he knew how important a decisional parameter it was.\textsuperscript{80}

In general, however, judges will try to present an image depicting the administration of justice as determined solely by the motive of obedience to the law in combination with a rational insight into the meaning of the constitution or the will of the constitution-maker.\textsuperscript{81} The European judges are no different. Off the bench in particular, they have explained their involvement in policy as a product of political inaction: soon after the Community's inception, they argue, the Council became trapped in endless negotiations aiming at eliminating often insignificant differences of interests over frequently trivial policy issues. In their search for consensus, the members of the Council lost sight of the commanding nature of the Community's objective—the "ever closer union." The resulting integrative inertia, the judge-commentators argued, created a duty for the ECJ to step in to compensate for the actual or potential harm to the Community's progress towards closer union.\textsuperscript{82}

Legally, the judges relied on Article 4's stipulation\textsuperscript{83} that "[t]he tasks entrusted on the Community shall be carried out" by the political branches of government and the ECJ.\textsuperscript{84} The judge-commentators have emphasized the need to ensure, despite the

\textsuperscript{78} I will return to these problems in Parts II D and II E of this Article.

\textsuperscript{79} Alf Ross, \textit{On Law and Justice} 281 (University of California, 1959).

\textsuperscript{80} See text at notes 12 and 13.

\textsuperscript{81} Ross, \textit{On Law and Justice} at 151 (cited in note 79).

\textsuperscript{82} The literature is abundant. For particularly compelling works by judges, see Robert Lecourt, \textit{L'Europe des juges} (Bruylant, 1976); Pierre Pescatore, \textit{The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities} (A. W. Sijthoff-Leiden, 1974).

\textsuperscript{83} As it stood before the Treaty on European Union.

\textsuperscript{84} EEC, Art 4 (emphasis added).
legislative vacuum, that some body make tangible the promises of rights that the founding fathers had entrusted to the Council to make tangible and real. The judges also believed that they had a duty to prevent the Member States from profiting from either individual or collective breaches of the commitments they had solemnly enshrined in the 1958 Constitution. In sum, the judges have maintained that their duty was to create union as long as the politicians left that task undone.

The judges attached little importance to Article 4's immediately ensuing provision, that "[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty." The judges have never accepted that this provision meant that their task was to do judicial business in accordance with the traditional Western European idea of courts' quintessential function in society. For centuries, the judiciary's mission has been to solve legal disputes, a function inevitably involving a duty to hand down decisions with political consequences. This traditional role, however, is a far cry from using judicial decisions to promote centralization and federalization whenever possible, regardless of "the legal technicalities of the matter."

C. The Explanatory Value of the Most-Favored Rationale for Activism

The core element of the most-favored rationale for activism offered by the leading members of the ECJ is that the Council's failure to promote integration through legislation created a duty for the ECJ to translate that objective into operative law through judicial decisions. Taking a closer look at the explanatory value of that rationale measured against what the ECJ in fact has accomplished reveals ECJ case law which does compensate for the political processes' lack of integrative vigilance. Others lines of jurisprudence, however, do not. Among these, important parts of the direct effect case law and the judge-created principle of uncondi-

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85 Id.
86 Some commentators postulate that the ECJ never went beyond taking decisions with political consequences during the Great Judicial Period. See, for example, my discussion of a key article by F. Dumon in Rasmussen, On Law and Policy at 166-67 (cited in note 24).
87 Pescatore, 8 European L Rev at 157 (cited in note 12).
ional Community supremacy immediately call for attention. Similarly, the ECJ's invention of a fundamental rights and freedoms protection cannot be said to compensate for a political failure to act. The same is true for most of what the ECJ has accomplished in the so-called "double legal basis" field, for the ECJ's dramatic expansion of the Community's external relations powers, and for the many amendments to its own competences for which the ECJ has assumed responsibility.

It is tempting to speculate about how the ECJ would have reacted if the Council had not failed, almost completely, and more or less across all policy sectors, to legislate. Imagine if the Council actually had passed legislation to implement the Treaties' promises

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8 Hundreds of cases might be cited. The most important ones are: Case 43/75, Defrenne v Société Anonyme Belge de Navigation Aérienne (Sabena), 1976 ECR 455, 1976:2 CMLR 98 (on direct, horizontal effect of Article 119); Case 106/77, Amministrazione Delle Finanze Dello Stato v Simmenthal, 1978 ECR 629, 1978:3 CMLR 263. Direct effects and supremacy are discussed in some detail in Part I.

9 The literature is very rich on this topic. Rasmussen, On Law and Policy at ch 12 (cited in note 24) relates the development of the fundamental rights and freedoms law in the hands of the ECJ from its beginnings in 1959-60. Several important cases in recent years have dealt with this problem. See, for example, Joined Cases 46/87 and 227/88, Hoechst AG v Commission, 1989 ECR 2859, 1991:4 CMLR 410 (protection of commercial premises against searches); Case 374/87, Orkem v Commission, 1989 ECR 3283, 1991:4 CMLR 502 (right of defense); Case 222/86, UNECTEF v Heylens, 1987 ECR 4097, 1989:1 CMLR 901 (right to judicial review before national courts). Note also some very aggressive rulings against sex-discrimination on the job market, for example, Case C-188/89, Foster v British Gas, 1990 ECR I-3343, 1990:2 CMLR 833, and Case 109/88, Handels-Og Kontorfunktion Aerernes Forbund i Danmark v Dansk Arbejdsgiverforening ex parte Danfoss, 1989 ECR 3199, 1991:1 CMLR 8.

90 The core of the "double legal basis" discussions has been whether the Council should rely on Articles requiring unanimity as the legal basis for its action in a particular policy area or on provisions authorizing majority voting. The ECJ has opted for the latter option in: Case C-300/89, Commission v Council ("Titanium Dioxide"), 1991 ECR I-2867 (Art 100A (on the internal market) was the correct legal basis and not Art 130S (on environmental protection) essentially for the reason that the latter required unanimity and reduced the role of the Parliament in the legislative process—despite the fact that the Council's enactment was predominantly a measure of environmental protection); Case 275/87, Commission v Council, 1989 ECR 259 (Article 235 (unanimity) only if no other legal basis possible); Case 242/87, Commission v Council, 1989 ECR 1425, 1991:1 CMLR 478 (most of the Erasmus programme fell under Article 128 instead of Article 235); Case 68/86, United Kingdom v Council, 1988 ECR 855, 1988:2 CMLR 543 (Article 43 instead of Article 100 (unanimity)); Case 131/86, United Kingdom v Council, 1988 ECR 905, 1988:2 CMLR 364. For an important discussion of the Council's use of Article 235, see Jean-Louis Dewost, Décisions des Institutions en vue du Développement des Compétences et des Instruments Juridiques, in Roland Bieber and Géorg Ress, eds, The Dynamics of EC-Law 321 (Nomos Verlagsgesellschaft, 1987).

92 For a good up-to-date overview of Court-led developments within this policy sector, see Laurence W. Gormley, ed, Introduction to the Law of the European Communities ch 11 (Graham & Trotman, 1989).

93 Discussed in Part II A.
of more integration, albeit in some minimalist fashion. Would the ECJ have then proceeded to annul that legislation and impose their own vision about what the “ever closer union” should look like? If so, the judges would have assumed responsibility for the ensuing integrative deadlock. Moreover, the ECJ’s activism could hardly have been explained as necessary to compensate for a legislative vacuum.

Similarly, shadows are cast over the “compensation for legislative impasse” rationale: 1) that most but not all of the Council’s duties to legislate might be translated into directly effective legal provisions; 2) that some but not all Treaty provisions have both vertical and horizontal effects; and 3) that directives, until the nebulous Marleasing decision, produce only vertical effects. Many similarities between Treaty provisions and directives exist so as to justify equal legal treatment in this respect. A noteworthy difference is that, if the Council or the Commission would think that the ECJ had wrongly attributed direct horizontal effects to a directive, new legislation might correct the error. While this option is not available for Treaty provisions, this difference does not support the ECJ’s lawmaking on direct effects, which still poses very difficult questions.

Further, a noteworthy number of judgments reach outcomes, in particular in disputes over the compatibility of national laws with Community law, which are obviously at odds with well-established EC jurisprudence. They may be labelled “policy congruence” judgments, considering that their outcomes seem to be dictated by judicial notice that the policy embedded in the national law under constitutional attack is congruent with some EC policy. That is, if the judges are satisfied in the case at hand that an attractive policy congruence exists, they may uphold the constitutional validity of the national law that would otherwise have been struck down as infringing against Community law.

For example, in Case 229/83, Association des Centres Distributeurs Edouard Leclerc v “Au Ble Vert”, 1985 ECR 1, the ECJ declared that the actual outcome of the case on French book pricing was different from what it might have been if the Community had a policy on book pricing. Many other cases are apparently based on similar considerations, although perhaps not explicitly. See, for example, Case 140/79, Chemial Farmaceuti v DAF, 1981 ECR 1, 1981:3 CMLR 350, where crude oil’s scarcity seems to have been decisive for the case’s outcome, at least in principle. The ruling upheld, as consistent with Article 95, an Italian tax scheme which imposed a lower tax on denatured alcohol derived from fruit (abundantly available in Italy) than alcohol derived from crude oil.

Note that it is not my argument that the ECJ should not balance good against bad nationally-pursued policies in this manner. Courts presumably do so in many modern societies.
This case law cannot be justified as a necessary response to legislative impasse, because this solution requires pre-existing Community legislation. Thus, the ECJ is stripped of its most-favored rationale, and its actions to promote more union on its own initiative are revealed for all to see. Moreover, the ECJ has not even been helpful enough to spell out under which conditions it will consider a national policy congruent with a Community one.

Determining what the Community policy is can be difficult itself. Undoubtedly, to require the explicit existence of a policy embedded in a legal act would be to demand too much. Would a Commission proposal to the Council, less formalized but still a structured expression of political will, suffice? What if only a Council resolution exists? Suppose such a resolution has been adopted not by the Council but by the competent national ministers assembled in the Council? For a discussion of resolutions, see Dewost, Décisions des Institutions (cited in note 91).

The ECJ has not, as of yet, given the slightest indication of the types of policies of which it will take judicial notice. Clearly, the ECJ reserves for itself a rather wide margin of discretion. In a few cases, the court has taken notice of a Community policy without judging it necessary to refer to any demonstrable political activity having taken place. Although this approach may compensate for a legislative vacuum in some cases, it is not conducive to high degrees of legal certainty and security.

In most of the above situations there is hardly any other justification for what the ECJ did than that a majority of the judges—or less often, all of them—felt that the legal innovation in question would contribute to an “ever closer union.” Hence, if the preceding discussions do not deprive the most-favored rationale of all its explanatory value, they do inject some important question marks. Yet, additional, more persuasive, rationales have never really been offered. European judicial research should pay more attention in the future to the impact of the human factor on how the ECJ defines its role and decides its cases.

In sum, whether the founding fathers so desired or not, the ECJ involved itself in Community politics by promoting those values to which the elected politicians gave a low priority. The judges...
thus turned the ECJ into an intensely policy-relevant institution. Therefore, any endeavor to portray the ECJ's role in balancing the centripetal against the centrifugal forces of the Community experiment in integration, and in balancing legal security and certainty against the quest for integration, cannot ignore that the ECJ has for many years refused to function as a neutral arbiter. Indeed, while frequently being invited to umpire the competing values of centripetalism, centrifugalism, legal certainty, and security, the members of the ECJ—or at least a rather stable majority among them—committed themselves to serve only one of the opposing values, excepting those instances in which homage could be simultaneously paid to some other fundamental Community interest with the same stroke of the pen. The current question is whether the ECJ should continue its non-neutral role.

D. Questioning the Acceptability of EC Judicial Pro-Community Activism

During the 1970s and 1980s, Community society underwent fundamental changes in ways that now call strongly for a reappraisal of the ECJ's role in EC government. With hindsight, one could conclude that several factors actively contributed to the pervasive substitution of litigation for legislation and constitutional amendment that has taken place in the Community. It is more likely than not that, in this course of events, the members of the ECJ were more than passive bystanders. Rather, several influential members of the ECJ seem to have welcomed this development and helped it come to maturity. Once the cases began to flow in rich streams toward the Palais de Justice, the ECJ began to act more as the unequivocal and indefatigable promoter of centralism, uniformity, and unification for which it is reputed today.

However, what took place in the Palais in Luxemburg did not pass unnoticed by the body politic. The ECJ's pro-Community activism eventually provoked protest, foot-dragging compliance, defiance, and, in extreme instances, outright revolt as well. National courts, governments, parliaments, and even the EC Council, from time to time "took to the streets" in order to remind the judges that, since they command neither the sword nor the purse, the acceptability of judicial outcomes and their smooth translation into legal fact depend on the persuasiveness of the ECJ's rulings.88

88 For a number of reported instances of this kind, see Rasmussen, On Law and Policy at ch 10 (cited in note 24).
One element of such persuasiveness is that rulings should be recognized in general to be typical of judicial business in a Western democratic Rechtstaat. If the ECJ is generally perceived as overstepping the borders circumscribing the EC judicial function, the ECJ’s persuasiveness would decline. With it, judicial authority and legitimacy would crumble and unenforceability would result.99 To be sure, the ECJ has been rather successful in making its case law accepted. Non-compliance and defiance represent the exception, not the rule. Nevertheless, a few pathological cases or catastrophes may ruin an otherwise sound structure completely and swiftly. Many instances of non-compliance, seemingly insignificant when taken individually, together may prove to be as crucial as one or two blatant instances of revolt by slowly eroding judicial authority and legitimacy and building up pressure for court-curbing initiatives.

The legitimacy problem to which judicial policy involvements almost inevitably give rise will be much more familiar to an American audience than to Europeans. An important part of my research during the 1980s grapples with the modern European activism problem, and my book, On Law and Policy in the European Court of Justice,100 deals exclusively with such issues. Some conclusions from this body of work follow.101

The first is that the Treaty Preamble’s “ever closer union” vision was meant to be a guideline both for the EC’s political processes when lawmaking and the EC’s judges in search of solutions to the legal problems facing them. The Preamble was meant to be used sparingly by the judges and not to set up a courtroom government. However, this observation, generally acceptable as it is, reformulates only the crucial “limit to policymaking” question. The question is now about how much weight the judges ought to attribute to the union telos when this, objectively, competes with other legal sources of inspiration (legal texts, contexts, election or referendum results, etc.) for judicial attention.

100 Cited in note 24.
Second, in my book I rejected the possibility of developing a normative theory of interpretation of Community law. This rejection is based on the understanding that, since no consensus exists about what “union” means, a crucially important premise for developing such a theory is lacking. In 1992, a consensus still has not been found. It follows that the ECJ should leave any further identification of the values inherent in “integration” and the nature of “union,” and their transposition into legal requirements and rules, to the political processes, especially when they function as designed. Judicial normativism, both in and out of the courtroom, should consequently be preoccupied with some traditional and, in the European legal cultures, well-established, basics of law, such as safeguarding legal security, fundamental rights of citizens and companies, and legal certainty.

Third, assuming that the legitimacy problem cannot be pertinently raised in relation to individual judgements but only with regard to demonstrable or noticeable judicial trends towards frequent and deep judicial policy involvements, alternative “border locating” tools have to be developed.

Fourth, any semblance of an “I know it when I see illegitimate activism”-test should be rejected outright.\(^{102}\) By making use of a combined legal, sociological, and political science approach to solving the illegitimate activism equation, my book identifies a more objective measuring rod. This new method consists of focussing on recorded negative and positive policy inputs to the ECJ, that is, the positive and negative reactions that the ECJ receives from governments, national courts, or parliaments, legal literature and so forth.\(^{103}\) I assumed that only a careful analysis, in particular of the nature and character of the negative policy inputs, might develop the bases of a relevant, although less than ideally sophisticated, location of the legitimacy borderline test.

The book concludes that too many negative policy inputs were indicative of a seriously declining EC judicial legitimacy. In this respect I regard the book as a highly court-supportive attempt to warn against further declines in the body politic’s confidence in the ECJ as an essentially neutral arbiter. This type of decline might well follow in the wake of a continued, essentially unrestrained judicial pro-Community activism, that sacrificed too many other values at the altar of “integration.”


\(^{103}\) Id at chs 9 and 10.
If the ECJ's legitimacy crumbled under the weight of a societally unacceptable activism, the EC would lose the only institution that, throughout the years of declining Member State faith in the benefits of "building Europe," has steadfastly insisted on strengthening its still frail construction. The Community could not afford to suffer that loss.\textsuperscript{104}

One possible sign of the ECJ's eroding legitimacy, caused by the ECJ's deep and frequent pro-Community policy-involvements, is the number of unexecuted judgments, which increased constantly during most of the 1980s.\textsuperscript{105} The ECJ's awareness of this problem is reflected in the recent history of Community law on the interstate mobility of students.

E. The Student Interstate Mobility Cases

The crucial legal problem in the student mobility cases was whether students fall within the ambit of the 1958 Constitution. Everyone agreed that university studies that may be classified as vocational training fall within Community competences. General educational policy, however, was not meant to be a matter falling under central EC competence. Perhaps the Council could have used Article 235 to vest such a power in the Community, but it did not.

By the mid-1970s, most Member States restricted access to many university studies by introducing \textit{numerus clausus} provisions. France used these provisions for veterinary medicine, among other subjects. In contrast, Belgium did not adopt \textit{numerus clausus} legislation at all. Seeing that the doors of Belgian universities stood wide open, many French students, who were denied enrollment at the facilities of their choice at home, instead went to study at francophone universities in Belgium. As a matter of principle, on the one hand, the Belgian government was in favor of receiving these foreign students. As a matter of fairness, on the other, it required them to pay their way. Therefore, on top of the admission fees that all students had to pay, foreign students had to pay an additional fee, the so-called \textit{minerval}.

The \textit{minerval} did not bring a profit to the university, but covered the costs it incurred by admitting the foreign students. Some


\textsuperscript{105} See the Commission's annual reports to the Parliament.
students from other Member States argued that this fee was discrimination based solely on nationality. Everyone agreed that such discrimination on the ground of nationality would be illegal under Article 7 if studying at a university was an economic activity and for that reason fell within the scope of the 1958 Constitution.\textsuperscript{108}

The Belgian government replied that, since Belgian students or their parents paid taxes, they actually, directly or indirectly, contributed to the funding of overhead costs of universities in a way that the foreign students did not. Therefore, the Belgian government argued, there could be no illegal discrimination, even assuming that university studies were within the ambit of Community law and regulation.

The first of these cases to come before the ECJ turned on whether or not Ms. Gravier, a French student of the art of cartoon-drawing enrolled at a Liège-based academy, was entitled to have her minerval reimbursed.\textsuperscript{107} For the ECJ, it proved to be an easy case, because the State judge who had sent the case up for a preliminary ruling had qualified cartoon-drawing as vocational training. Hence, Article 128 applied, and Ms. Gravier’s student activity fell within the scope of the 1958 Constitution. Article 7 therefore also applied. The ECJ declared that Ms. Gravier had been subject to illegal discrimination on the ground of her nationality.

However, the Gravier ruling gave rise to more complicated legal problems. First, in the process of adapting its legislation to the outcome in Gravier, the Belgian legislature refused to abide by one of the ECJ’s long-standing legal fundamentals, namely, that its judgments have retrospective effects.\textsuperscript{108} Asserting sovereign rights, and blatantly defying the authority of the ECJ’s ruling, the Belgian legislature passed a law that removed the duty to pay the minerval for the future.\textsuperscript{109}

When news about the ECJ’s ruling in Gravier spread in the foreign student community in Belgium, a number of French students of veterinary medicine brought actions to recover their

\textsuperscript{106} Article 7 prohibits any “discrimination on the ground of nationality” within the scope of application of the Treaty.

\textsuperscript{107} Case 293/83, Gravier v City of Liege, 1985 ECR 593, 1985:3 CMLR 1.

\textsuperscript{108} The ECJ’s justification for retrospectivity is not clear. Perhaps the argument is that, since the ECJ merely declares what the meaning of the interpreted provisions has always been, its rulings are not constitutive of new law. The effect of a ruling interpreting a given article must therefore apply from the date of the entering into force of the disputed provision.

\textsuperscript{109} Accounts of these incidents are given in Case 24/86, Blaizot v University of Liege, 1988 ECR 379, 1989:1 CMLR 57.
minervals. In these cases, the Member State judges did not qualify veterinary medicine as vocational training. As the cases were argued, of which the best known is Blaizot v University of Liege,\textsuperscript{110} the ECJ had to face the politically sensitive question of whether university studies in veterinary medicine form part of general education—and thus are not an economic activity—or are just one aspect of vocational training. However the ECJ ruled, it was predictable that its ruling would become important for most other subject matters as well.

Moreover, during argument of the cases, the ECJ realized that enforcing a ruling against the universities with retrospective effects would be a hazardous enterprise. Not only would Belgian universities have had to reimburse truly impressive sums,\textsuperscript{111} but political opposition to the ECJ’s policymaking would have increased.

The ECJ nonetheless found that university studies in veterinary medicine were part of vocational training. Recognizing that this was a rather revolutionary view on the meaning of Articles 7 and 128, however, the ECJ made a tactical retreat, declaring that this ruling, unlike all of the ECJ’s previous case law, applied only prospectively. The reasoning the court offered for this decision was an unusually blunt acknowledgement of one of the inherent weaknesses of the Community’s legal system. The ECJ stated that it was not legitimate to go so far, by issuing a retroactive ruling, as to risk the impartiality of the law and to compromise its future application.\textsuperscript{112} Thus, having to choose between handing down a revolutionary interpretation of Articles 128 and 7 and the principle of retrospectivity, the court sacrificed the latter, acknowledging that a retrospective ruling would be in great danger of never being implemented. Although the judges chose the revolutionary course, it only extended to what Article 128 would mean for the future, not what it had always meant.

In sum, with the help of the Belgian judge, it was possible to claim that cartoon-drawing is vocational training. Without that assistance, it would have been impossible for the ECJ to justify persuasively the view that those who drafted the Treaty had meant that university studies in general were vocational training within


\textsuperscript{111} The precise figure is difficult to determine, but sums close to 600,000 - 700,000 ECUs (approx. $1 billion) have been mentioned.

\textsuperscript{112} Case 24/86, Blaizot, 1988 ECR at 406.
the meaning of Article 128. In substance, studying cartoon-drawing is not radically different from studying veterinary medicine.

In Blaizot, the ECJ acknowledged concern about the acceptability of its judicial decrees to the body politic. The very unusual insight into this concern became evident, however, only after the Belgian parliament's defiance of the ECJ's orders in Gravier. I submit that this defiance was triggered not only because compliance would have been expensive, but, significantly, because the ECJ's construction of Articles 7 and 128 was radically innovative, unpredictable, and, therefore, an easy target of defiance. These cases were judicial creations of great boldness.

The importance of the judicial admission of concern about enforceability, linked as this question is to the general question about the acceptability of ECJ decrees, reaches far beyond Blaizot itself. The ECJ briefly opened a window through which an outside observer might listen to the judges' internal debates about, in this case, the legitimacy of continuing the "Great Judicial Period's" brand of pro-Community activism in the face of the body politic's proven unwillingness to accept all of the court's innovative case law. I view Blaizot as evidence that the protests, foot-dragging compliance, and defiance of the ECJ's countervailing powers made a lasting impression on the judges' perception of the ECJ's future role.113

113 The proposal of the Intergovernmental Conference on Political Union ("IGC") allowing sanctions against non-complying Member States further reveals the size of the non-execution problem. See note 60. Although for many years a pro-ECJ mood held sway over the IGC, the ECJ's credit with many negotiators had reached a low ebb by the early 1990s.

Several draft articles may be evidence of the IGC's rather critical view of the role of the ECJ. See, for example, Article 100C(10) (keeping the ECJ out of the budget-deficit procedures, by declaring that Articles 169 and 170 do not apply); Article 100C, ¶ 4; Article 173, ¶ 3 (where some Member States argued that the IGC should "overrule" the ruling in Case C-70/88, Re Radioactive Food: European Parliament v Council ("Chernobyl"), 1990 ECR 2067, 1992:1 CMLR 91, by denying the right of standing); Articles 126 (on vocational training) and 127 (on education) may also be read as responses to the student mobility case law. Moreover, the ECJ was kept entirely out of foreign policy and police matters in the Treaty on European Union. Finally, on fundamental rights and freedoms, the IGC compromised on the least ambitious expression of the EC's sense of commitment to the European Human Rights Convention ("EHCR"). This compromise was inspired most notably by a British fear that the ECJ might substitute itself for the institutions of the EHCR. Some of these negative policy-inputs are counterbalanced by some new powers which the conference vested in the ECJ (cited in note 60). On the whole, however, the ECJ lost part of the confidence which it enjoyed earlier on the part of the Member States.
F. Judicial Activism in the Face of Revitalized Community Political Processes

As discussed, the judge-commentators’ most-favored rationale for the ECJ’s pro-integrative jurisprudence is that the ECJ had to compensate for the political-integrative impasse by integrating through case law. Even accepting this argument at face value, one must question whether the impasse’s legitimizing effect will dry up once the political processes begin actively pursuing an “ever closer union” through legislation.

Of course, one cannot mechanically conclude that legitimacy must or will come to an end when the impasse does. Recourse to mechanical logic is irrelevant since all impacts will fall on the human flesh behind the robes. My point here is only that, inside as well as outside of the ECJ, pressures are likely to build against a continuation of the ECJ’s old brand of pro-Community activism. Detrimental effects on judicial Willensbildung are likely to go in tandem with the other defortifying factors which I have enumerated in Part I above.

Signs of a reinvigoration of the Community’s political processes are everywhere. First, the political processes managed to accomplish the first genuine revision of the 1958 Constitution when they called for the constitutional convention that led to the adoption of the Single European Act.114

Second, one of the major achievements of the revision was replacing several provisions that hitherto had subjected decision-making to unanimity with provisions authorizing majority-voting. If this itself was not sufficient to persuade the Council to use its voting powers,118 a silent revolution came about a few years later when the members of the Council actually gave up their long-established consensus practices.

Third, a medium-term solution was found in 1988 to the EC’s budgetary and financial problems which had long deadlocked much of the Council’s normal policymaking.

Fourth, under the stewardship of its strong president, Mr. Jacques Delors, the Commission has managed to recapture much of its

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118 Until then, as a rule it had not made use of existing authorizations to legislate by majority-voting. The disuse of majority voting was the very reason why decisionmaking came to an almost complete halt for more than twenty years. The so-called Luxemburg Compromise from February 1966 effectively suspended the majority voting rules that were to enter into force by January 1, 1967 (for example, EEC, Art 43 on the Common Agricultural Policy).
former political initiative and prestige. A measure of the Commission's new importance as a political actor is that, having launched its Internal Market program in 1985, the Commission has successfully managed to bring most of it through the Council at record speed.

Fifth, I should mention the Treaty on European Union, signed in Maastricht. If ratified, Maastricht will fundamentally amend the 1958 Constitution. The successful completion of the Union Treaty should dispel any remaining doubts about whether the Community's political processes are functioning. Even Denmark's vote against ratification on June 2, 1992, surprising as the result may have been, may be evidence that the political processes are working. Finally, the present process of revision, pivotal as it is, is projected to be followed, before the turn of the century, by another constitutional convention with the intent of creating a true federal structure and union.

This reinvigoration of Community politics should be linked with a rethinking of judicial politics. One can safely assume that the judges are keenly aware of this linkage, even if they might still nurture incompatible ideas about its implications for the future role of the Community's judiciary. One can probably also assume that, in the process of rethinking, the judges of the ECJ may be forming factions. Inconsistencies in the ECJ's case law that emerge as a result of the new intellectual and ideological climate are circumstantial evidence of internal differences of opinion about the ECJ's role in the Community.

III. LEGAL CERTAINTY AND THE RULE OF LAW: A NEW LEITMOTIF FOR THE ECJ

A. The Collision of Integration and Legal Certainty

Pro-integration judicial activism should be rejected when union-promotion takes place at the expense of the EC's other fundamental values, including legal certainty and security. This section examines how the judges have translated the noble intention of safeguarding legal security and certainty into actual protection when it clashed with the goals of continued integration.

1. Incongruent language versions of Community legislation.

The ECJ's drive to promote an "ever closer union" has often threatened legal certainty and security for individual citizens and

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116 As seen in Part I C of this Article.
companies. These costs can be seen, first of all, in the ECJ’s resolution of conflicts arising over the occasional existence of incongruent language versions of the EC’s secondary legislation. These incongruities stem almost exclusively from errors made by the Community’s translation department. For the ECJ, these errors threaten integration by preventing the desired uniformity of laws throughout the Member States. Therefore, the ECJ has taken upon itself the task of imposing uniformity, running roughshod over the rights of individuals along the way.

Regina v Bouchereau, from 1977, was the first of these cases. Mr. Bouchereau had served a long prison sentence for drug dealing and other serious offenses and had been released. The court that sentenced him recommended that he be expelled from the U.K. Mr. Bouchereau argued that he no longer represented a genuine danger to public security, and that Community legislation entitled him to stay in England. The various language versions proved to be incongruent on this important point, with almost as many offering him a right to stay as those that did not. The ECJ ruled that, if inconsistencies occurred and one could not point to one dominant semantic edition, it would be for the ECJ to choose among the inconsistent versions, seeking guidance from the context and the objectives of the legislation. In this case, as well as in all the following ones, the ECJ seems to have paid almost exclusive attention to the legislative objective. The Bouchereau court found in effect that the directive at issue aimed at protecting the rights of migrant workers and that this objective had to govern the ECJ’s reconstruction of the content of the disputed enactment. Hence, the ECJ declared that Mr. Bouchereau could rely on the (non-English) versions that offered him the best protection.

A second case, in 1985, concerned the point at which a fish is legally considered “caught” by the fishing vessel bringing it to harbor. The case arose because English fishing vessels cooperated in the Baltic Sea with Polish trawlers. The latter caught the fish in nets in non-Community fishing waters. However, the English fishermen drew the catch aboard their vessels when they came within Community territorial waters. An important question arose whether the fish were “caught” inside or outside of the Commu-

118 Id.
119 Id.
120 Case 100/84, Re Anglo-Polish Fishing: Commission v United Kingdom, 1985 ECR 1169, 1985:2 CMLR 199.
nity, because, according to Community law, imports of fish caught outside of the Community are subject to tax. The English version strongly supported the fishermen's view that the catch took place when the fish were drawn aboard the ship. If that was correct, the Community could not levy the import taxes. Despite the fishermen's interest in legal certainty, the ability to rely on the law in their own language, the ECJ followed Bouchereau and looked to the objective of the Value Added Tax ("VAT") legislation, which was to raise revenue. Accordingly, the ECJ concluded that a fish is caught when it is brought inside the net, which in this case had taken place outside Community territorial seas.\(^{121}\)

A third case involved the prosecution of a German citizen, Mr. Röser, for not complying with a piece of Community legislation.\(^{122}\) Under the German language version of the law, his conduct seemed lawful. The German authorities, however, using argument by analogy, sought to bring the German language version in line with other language versions which better matched the objective of the act. The Commission was aware of the existing incongruence and had proposed that the Council amend its legislation on this point. The Commission considered it to be a violation of general principles of criminal law to punish Mr. Röser under these circumstances. The ECJ, however, did not nurture the same scruples. It construed the German language version so as to make it congruent with the objective of the act and allowed the German courts to sentence Mr. Röser.

Six other cases about exemptions from VAT requirements raised questions regarding incongruent language versions.\(^{123}\) In all six cases, the Member States in question had exempted certain activities from the VAT, loyally applying the versions of the Sixth VAT Directive in their own language. The ECJ first looked for a dominant semantic meaning, but could not find one. As in Bouchereau, the ECJ then considered the objective of the Sixth VAT Directive, which was to bring as many activities as possible under the tax regime. Accordingly, the ECJ ruled that the disputed exemptions were illegal.

\(^{121}\) Case 100/84, Anglo-Polish Fishing, 1985 ECR at 1183.

\(^{122}\) Case 238/84, Criminal Proceedings v Hans Röser, 1986 ECR 795.

The most recent of these cases is *Skattministeriet v Henrik-sen*, from 1989. At issue was whether Mr. Henriksen had to charge VAT when he rented out parking spaces in small, roofed garages. Mr. Henriksen claimed that his activity was covered by a provision in the Sixth VAT Directive, exempting rentals of real property from VAT taxation. The Danish language version was on Mr. Henriksen's side, and a Danish high court of justice ruled consonantly that he should not charge VAT. The Danish Supreme Court decided on appeal to submit a preliminary question to the ECJ. The Court's Advocate General, Professor Francis Jacobs, argued in favor of Mr. Henriksen, saying that for reasons of legal security and certainty the ECJ could not set aside the meaning of the Danish language version, even if including one more activity under the tax regime would best match the objective of the Sixth VAT Directive. If VAT should be charged by Mr. Henriksen in this situation, he argued, the Council should make it clear by amending the Sixth VAT Directive. The ECJ disagreed, ruling that the objective took precedence to the text and that Mr. Henriksen must, therefore, charge VAT.

Taken together, these cases demonstrate that, when the ECJ cannot simultaneously promote integration and protect the individual's interest in legal certainty and security, it will sacrifice the latter. Since this jurisprudence encompasses only nine cases, however, one might argue that "one swallow does not make a summer." Moreover, of the nine cases, one—the *Bouchereau* case—does indeed protect the individual's interest in legal protection, but only while simultaneously promoting integration.

The ECJ's pro-Community obsession in these cases is particularly alarming because the cases touch upon one of the most fundamental guarantees that a society should make tangible for its citizens: the Rule of Law. The Rule of Law seeks to ensure that the citizens can safely rely on the clear and unambiguous language of the laws of the realm. The Röser decision in particular shows a glaring disrespect for the individual's right to legal certainty and security, by allowing the prosecution of Mr. Röser for having done

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125 Id at 2770.  
126 Although the primary motive of the ECJ in these cases was to promote integration by making the laws uniform throughout the Community, a possible secondary motive in seven of the cases might have been to increase Community revenues.  
something that was not, at the time, facially illegal under the German version of the laws in force.

I should note here that the intergovernmental conference preparing the draft Single European Act acknowledged—and attempted to remedy—this imperfection in the ECJ’s safeguards of the Community citizens’ legal certainty. Their solution was to set up a Court of First Instance with particular responsibilities in this field of public policy.\textsuperscript{128} The suggestion that the legal security deficit merited careful attention came to the conference from the ECJ itself.\textsuperscript{129}

2. Fundamental rights and freedoms protection on the Community level.

The ECJ has also sacrificed individual protection for the sake of integration in other lines of jurisprudence. The ECJ has created, from no textual foundation at all in the Rome and Paris Treaties, a fundamental rights and freedoms case law meant to benefit the individual.\textsuperscript{130} Much has been said about the courage and determination that the ECJ demonstrated with the view of safeguarding the individual against the almighty political Community government. It has even introduced that protection against the protests of the European Commission, appearing before the ECJ either as defendant or as an amicus curiae.\textsuperscript{131} However, the ECJ’s many declarations about the protection of the individual have not translated into many decisions actually invalidating laws that violate fundamental rights.\textsuperscript{132}

\textsuperscript{128} See note 68.

\textsuperscript{129} Spyros A. Pappas, The Court of First Instance of the European Communities: History-Organization-Procedure xii (European Institute of Public Administration, 1990).

\textsuperscript{130} Among the landmark judgments in this field, Case 4/73, Nold, Kohlen und Baustoffgrosshandlung v Commission, 1974 ECR 491, 1974:2 CMLR 338, and Case 44/79, Hauer v Land Rheinland-Pfalz, 1979 ECR 3727, 1980:3 CMLR 42, stand out, the latter formulating the ECJ’s stance on this issue in a well-argued and eloquent manner.

\textsuperscript{131} See, for example, Case 29/69, Stauder v City of Ulm, 1969 ECR 419, 1970 CMLR 112.

\textsuperscript{132} The number of cases dealing with fundamental rights and freedoms problems is impressive. More than a hundred may be identified if the principles of proportionality, contradiction/fair hearing, and the protection of citizens’ legitimate expectations are included.

However, of the principles noted above, the ECJ has, for the most part, only used the principle of proportionality to invalidate Community laws of any political importance. For example, in Case 240/78, Atalanta Amsterdam B.V. v Productschap voor Vee en Vlees, 1979 ECR 2137, the ECJ invalidated a provision that required a trader to make a deposit as a guarantee in a particular transaction that would be forfeited for even minor failures of performance. However, in Case 11/70, Internationale Handelgesellschaft mbH v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel, 1970 ECR 1125, 1972 CMLR 255, the ECJ found that the deposit requirement imposed burdens proportional to the Community’s ben-
One could explain the extremely rare cases of annulment if one were to assume that infringements of fundamental rights and freedoms rarely occur in EC lawmaking. The underlying assumption would be that the political branches of the EC are adequately tuned to avoid such infringements completely. However, they hardly are better equipped, in that respect, than governments in most other places. Moreover, the Community's inability to guard against fundamental rights infringements stems in part from the ECJ's own ambiguities and silence. The ECJ has declined to spell out precise criteria regarding the content or quality of the rights to be protected, or the conditions under which the protection applies. They have not defined the protection at either the highest or lowest levels.\textsuperscript{133}

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As for the conditions under which protection applies, a long-standing jurisprudence subjugates actual protection of a fundamental right to the requirement that the disputed legislative provision not serve a Community policy interest which should override the individual’s interest in avoiding an intrusion into his rights. Obviously, it is a matter of much conjecture to say when and if the latter condition is met. That kindred requirements exist under many national laws does not explain away the problematic nature of this condition in Community law, where its concrete bearing may be more difficult to assess, considering the experimental character of the whole Community enterprise.

Moreover, in almost all of those very few cases where the ECJ has actually annulled an act of the Commission or the Council, the court has avoided elevating the rule of protection to the constitutional level. A protection that can be easily set aside by the political majorities of the day is not likely to leave a lasting impression on political decisionmakers.

In sum, there has been more verbal activity in this field than protective action. The ECJ seems to have been interested more in freeing the political processes than in effectively protecting the individual against such infringements.

3. Generally—other case law.

The lack of concern for individuals seen in the language version cases can also be found in several other lines of case law. First, as noted earlier, the ECJ has shown an unusual respect for the founding fathers’ intentions when it has interpreted Article 173 steadfastly against the individual. Under the narrowly defined conditions of access to justice, the citizen claiming actual infringement of his fundamental rights and freedoms is often barred from litigating against the political branches of government.

Second, although some invalidations of Commission or Council enactments are on record, they are quite few considering the impressive mass of actual enactments. I am aware of only one instance in which the ECJ annulled a legal act on the ground that it was ultra vires, and that was an act of the Commission, not the Council. If my argument here survives a more detailed scrutiny

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135 See Case 374/87, Orkem, 1989 ECR 3283.
136 See notes 63-70 and accompanying text.
137 See note 64.
138 The ECJ has struck down minor parts of some Council enactments on the ground that they were ultra vires, but preserved other parts which were of far greater importance.
and analyses which I cannot presently undertake, then the contention, made above, that the ECJ decides the cases brought before it with an unnuanced, pro-Community bias is made more credible. That bias threatens effective fundamental rights and freedoms protection.  

Third, although usually a bold law- and constitution-maker, the ECJ by and large has refrained from formulating Community rights for the benefit of individuals seeking reimbursement of levies or duties illegally collected by the national administrations. Individuals are left to rely on those rights, often ineffective, that the laws of the various Member States offer them. Also, the ECJ has refrained from stipulating rules of preclusion to protect companies charged by the Commission with competition law offenses of old date. But at the same time, the ECJ has found it possible to introduce judicially a rule of preclusion in respect to two-month delays incurred by the Commission when dealing with announcements by the Member States of their intention to spend more on state aids.

It is not tolerable in a Western democratic society that an activist judiciary merits a reputation for regularly sacrificing the in-

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See, for example, Case 242/87, Commission v Council ("Erasmus"), 1989 ECR 1425, 1991:1 CMLR 478. Similarly, when a Council enactment of major importance is under attack because of its dubious constitutional validity, the ECJ frequently finds for the plaintiff on the ground of some less important technical point and, thus, invalidates the act, while finding for the Community interest in respect to the discussed substantive points of law. See Cases 68/86 and 131/86, United Kingdom v Council, 1988 ECR 855, 1988:2 CMLR 543, and 1988 ECR 905, 1988:2 CMLR 364.

Professor Lenaerts also deals with this aspect of the ECJ's jurisprudence in his article in this issue. Koen Lenaerts, Some Thoughts About the Interaction Between Judges and Politicians, 1992 U Chi Legal Forum 93. He seems to prophesy closer scrutiny of Community rulemaking on fundamental rights and other grounds.

See Case 68/79, Hans Just v Danish Ministry for Fiscal Affairs, 1980 ECR 501, 1981:2 CMLR 714. Essentially in line with Hans Just, Case 14/83, von Colson and Kamann v Land Nordrhein-Westfalen, 1984 ECR 1891, 1986:2 CMLR 430, also illustrates well the weak legal basis of the citizens' EC rights in national law and adds a twist as well. In the case, two female physiotherapists sought compensation after having lost a job competition illegally (for employment in a male prison) to less qualified men. German law sanctioned such illegality but only by compelling the employer to compensate for the complainants' economic outlays. These amounted to a few DM for the one, to cover the tram ticket to the interview, and 0 DM for the other, who rode a bike. The ECJ ruled in line with Hans Just but added that national law should provide for a sanction adequate to motivate compliance with Community law.


individual’s interest in legal security when that interest cannot be reconciled with the judges’ pro-Community biases. In the future, the ECJ must make the protection of the individual against Community government its top priority, even at the expense, if reconciliation is impossible, of an “ever closer union.”

My argument is not that the ECJ never protects the interests of the individual. Most of the direct-effect case law, for example, has benefitted private citizens and companies by offering remedies against national governments that breach their solemnly contracted obligations. Instead, I have tried to demonstrate that the ECJ is likely to sacrifice the interests of the individual when the ECJ must choose between protecting the individual and safeguarding the centralization of the Community.

B. The Great Role for the EC Judiciary

The great role for the EC judiciary of the 1990s would be one characterized by judicial self-restraint. The retreat to restraint ought to be, in many respects, to the role of the observer, located at the sidelines of Community (high) politics. The metamorphosis should not be made conditional upon a successful completion of the processes of ratification of the Treaty on European Union. Election results, and not the personal philosophies of appointed judges, should now, for once, define the Community’s “ever closer union” agenda.

My recommendation is founded on the assumption that the ECJ’s retreat to a less integration-oriented role in Community law and constitution-making would be beneficial for the ECJ, the Community at large, the Member States, and third countries. A retreat would be beneficial to the ECJ itself because greater self-restraint would relieve the judicial institution of most of the political, moral, and intellectual burdens associated with the continuous activism that has characterized the ECJ over the past quarter-century. By retreating, the European judges would merely be seen to follow the example set by their Brethren on the U.S. Supreme Court on several occasions from the early nineteenth century to the present day. Periods of intense activism in the United States, like those under Chief Justice Marshall or the anti-New Deal Court, were followed by times of self-restraint (which in turn proved to be merely temporary).

There should be one exception to a new attitude of judicial self-restraint. The EC’s judiciary should embark on an intensified and reinvigorated judicial scrutiny of the legality and/or constitutionality of the laws and other legal decrees, general as well as in-
This definition of a judicial role lies close to the traditional role of courts in Western European societies. The EC’s judiciary, I submit, stands to gain new legitimacy from being seen to align its role with tradition.

A few examples highlight some of the laws that should benefit from the new focus. First, the new approach should provide greater protection, at the highest European levels, for an adequately circumscribed catalogue of Community human and fundamental rights, both substantive and procedural. In particular, the subjugation of the individual’s interest in justice to the Community interest in integration ought to be brought to a quick end. Second, the approach should require that private parties be permitted, as a general rule, to bring actions of annulment against the Community institutions’ general and individual acts under Article 173. Third, the “giving reasons” requirement in Article 190 should be developed into an effective means of reviewing the decisionmaking of the Community’s other branches of government, both in procedural and substantive terms. Finally, the new approach should address the possible invalidation of Community legal enactments which appear in incongruent language versions, on the ground that bringing them all into line by way of a purpose-oriented judicial interpretation infringes upon all Community citizens’ legitimate rights.

Professor Lenaerts has observed in his article that the first small signs that some of these proposed changes are in the making should now be available. Lenaerts, 1992 U Chi Legal F at 122 (cited in note 139). A few judgements suggest a trend, albeit still feeble, of ECJ retreat from its decade-old substantive activism which is used to constrain the Member States’ room for maneuver when lawmaking under their reserved powers. See, for example, Case 145/88, Torphaen Borough Council v B & Q plc, 1989 ECR 3851, 1990:1 CMLR 337; Case C-23/89, Quietlynn Ltd. v Southend Borough Council, 1990 ECR 1-3077, 1990:3 CMLR 55; Joined Cases 60/84 and 61/84, Cinéthèque SA v Fédération Nationale des Cinémas Francais, 1985 ECR 2605, 1986:1 CMLR 365; Joined Cases 46/87 and 227/88, Hoechst AG v Commission, 1989 ECR 2859, 1991:4 CMLR 410; Case 373/87, Orkem v Commission, 1989 ECR 3343, 1991:4 CMLR 502; Case 12/86, Demirel v Stadt Schwabisch Gmund, 1987 ECR 3719, 1989:1 CMLR 421; Case 302/87, European Parliament v Council, 1988 ECR 5615; Case 174/84, Bulk Oil AG v Sun International Ltd, 1986 ECR 559, 1986:2 CMLR 732. Continuation of that trend ought to be highly welcomed and exceptions to it criticized.

To be sure, these signs of restraint are to some extent counterbalanced by sharply activist rulings, perhaps matching the intensity of the Lecourt ECJ. My point is merely that if the revitalized political processes have not as yet had an impact on judicial role-definition (evidenced by the increase in self-restrained judgements) they ought to have.

Compare text at note 134.


For an in-depth discussion of the possibilities of the “giving reasons” requirement as a vehicle for greater judicial review, see Shapiro, 1992 U Chi Legal F at 198-217 (cited in note 67).
expectations that full faith can be had in their own language version.

This new approach should avoid the danger of the ECJ imposing on society some antiquated economic philosophy that, although held by the judges or their majority, does not prevail in society's democratically responsible, political bodies. The Hughes Court's anti-New Deal activism is, in my view, illustrative of the sort of "precedent" to be avoided. Charting a course a safe distance from that Scylla, the new approach should place at the center of judicial attention the genuine enrichment at the Community level of the rights and legitimate expectations of the private citizens and companies. The protection of these values and interests, against the ever-mightier Community government, should become the cornerstone—the leitmotif—of the Community's judiciary for the future. These values represent the sole truly normative elements of any interpretation of Community law.

The Charybdis, perhaps merely theoretical, is the old ECJ pro-integration activism cast in a brand new guise: the protection of the Community citizen's fundamental rights and legitimate expectations by renewed judicial emphasis on process (procedures and participation). Of course, I should expressly disclaim that my recommended change in judicial policy could be taken to warrant judicial embarkation on some variant of process-oriented activism. I should warn that some lines of EC jurisprudence might be classified as process-activism in the making. Any further movement towards process-oriented activism should be discontinued. Indeed, experience shows that process-activism is a particularly apt guise for the promotion of problematic substantive values (here, pro-integration values). Because the emphasis is on process and participation, the substantive values do not surface and are, thus, difficult to confront.

To conclude, I will reemphasize two judicial needs that I have developed at length elsewhere. The first is that the Community's political branches should give the ECJ precisely circumscribed and adequate means of controlling its own docket. This should be done

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148 For a frame of reference for this warning, see Laurence H. Tribe, Constitutional Choices chs 1-3 (Harvard, 1985).

during the revision of the Treaties that is foreseen in the middle-1990s, at the latest. Awaiting that, the ECJ might consider drafting the major outlines of the docket-controlling techniques in its own case law. The second need is for more comprehensive briefing of the socioeconomic facts in the cases before the ECJ. Advocate General Jacobs's quest for more amicus curiae briefs provides one possible way to meet this need.