The ECJ's Contribution to Europe's Democracy Deficit

Aaron Xavier Fellmeth

Over the last half-decade the European Union's democracy deficit has become a topic of serious concern among scholars, politicians, the press, and the public. Commentaries inevitably focus on the Commission, the Council, or Parliament. This paper addresses the heretofore ignored question of how the European Court of Justice affects democracy in Europe. It argues that the Court's impact has been great on the extension of its own jurisdiction, on the jurisdiction of the European government, on the balance of power between member state governments and the European government, and on the distribution of power between appointed prime ministers and elected parliamentarians in the member states. The Court has repeatedly used procedurally undemocratic and extralegal methods, thereby significantly threatening the representativeness and responsiveness of public policy in Europe. The article advocates judicial restraint and a more open, accountable, and representative European Union.

The author is a J.D. candidate at The Yale Law School and a Master of Arts candidate at the Department of International Relations, Yale University.

Introduction

The democracy deficit of the Commission, Parliament, and Council of Ministers of the European Union (EU) has been widely debated.[1] Scholars and European citizens alike have often pointed out that the only directly elected body, the Parliament, suffers from a notable lack of power (Boyce 1993; Wallace and Smith 1995, 152–54; Volcansek 1992, 110). For example, while the Parliament—supposedly the most democratic EU institution—gained power from the consultation procedures of the Maastricht Treaty, it remains unable to propose or pass legislation. Criticism has also been directed inter alia at the Commission, which seems responsible to nobody in particular (Boyce 1993, 458);[2] at the secrecy and high degree of removal of the Council from European voters (Boyce 1993, 458, 470); at the Council's veto provision, which can be seen as inherently antidemocratic insofar as it allows a minority to block majority legislation (Weiler 1991, 2467); at the relative lack of openness in the EU's proceedings (Leonard 1994, 4–5); and at the slow pace of progress on the EU's goal of subsidiarity (Bermann 1994, 340–41).[3] However, the role of the European Court of Justice (ECJ) in Europe's democracy deficit has been largely ignored.

One commentator has observed that "[e]xpansion of EC legislation increasingly subordinates the courts and the citizens of the member states to legal norms originating outside national legislation. [The EC's] various legal systems are not determined democratically. The people are 'sovereign' in the national state and the 'subjects' of the EC" (Lepsius 1992, 63). This democracy deficit is a serious problem for the EU member states and their citizens. "Democracy" as used in this article refers to the institutionalized accountability and responsiveness of policy makers to the citizens of the polity (Dahl 1971, 1–2), whether expressed through referenda, elected representation, or some other means. Expansion of the EU's powers absent democratizing amendments to the foundational treaties damages the cause of democracy in Europe. The ECJ has been a primary contributor to just such an expansion of the EU's powers. The ECJ as a threat to democracy therefore merits much closer examination than it has heretofore received.

This paper analyzes two related ways in which the unelected ECJ infringes upon European democracy. The first is the ECJ's ongoing expansion of its own judicial review powers. Some civil law countries of Europe, like France, have a strong tradition of legislative supremacy that

seems to argue against judicial review. Even in a country with a weaker tradition of legislative supremacy, such as the United States, endless debate has focused on whether judicial review is constitutionally mandated (or even allowed) and whether such review is advisable. Because there are major differences in the structure, function, and mandate of the U.S. Supreme Court as compared to the ECJ, it is striking that no similar debate has occurred over the advisability of judicial review in the EU. This is surprising a fortiori because judicial review appears to conflict with the judicial philosophies of several of the EU member states.

Second, the ECJ contributes to the EU's democracy deficit through judicial lawmaking and its influence on the separation of powers. Judicial lawmaking can redistribute policy making power from the more democratically responsive member state governments to the less democratically responsive institutions of the EU, and from the more responsive to the less responsive organs of the member state governments. Judicial review and judicial lawmaking are both potentially countermajoritarian. While judges no doubt must sometimes make law (at the very least, between the parties before the court), the question of where to draw the line has implications for the principle of separation of powers. Historical, political, and philosophical differences between the U.S. federal government and the several European governments suggest that the lawmaking function of the ECJ should be more restrained than that of the courts of the United States.

The article first discusses the problems of democratic representation inherent in the concept of judicial lawmaking and how these problems relate to the ECJ in the context of the Maastricht Treaty. It then examines the ECJ's actual behavior through case studies, and demonstrates the Court's departure from its original mandate as expressed by the Treaty of Rome and the Maastricht Treaty. Finally, it analyzes the evidence and concludes that the ECJ threatens the cause of European democracy.

Judicial Review, Separation of Powers, and the ECJ's Mandate

The ECJ has increasingly exercised powers like those of the U.S. Supreme Court and unlike those mandated by the founding treaties of the EU. Yet there are many features of the civil law systems of the largest EU member states, including France, Germany, Italy, and Spain, that differ from the U.S. common law system. Even the British common law system differs significantly from the American in many important areas. Because the

United States and most member states of the EU differ so greatly in their approaches to judicial review and separation of powers, it is ill advised for the ECJ to exercise these powers.

The Problem of Judicial Review

In the United States, the separation of powers doctrine is part of a system of checks and balances in which an independent judiciary guarantees the rights of the individual from the potential tyranny of the majority. As the sphere of court lawmaking has expanded through a slow but persistent process of bootstrapping, concerns about the resultant "countermajoritarian quandaries" have grown among academics and occasionally politicians. Yet rarely has the idea of judicial rule making aroused any serious concerns about elite oppression. While courts sometimes have used their powers to this end,[4] they also have used them in ardent protection of individual rights against the wishes of the majority (*Roe v. Wade* 410 U.S. 113 [1973]; *Brown v. Board of Education* 347 U.S. 483 [1954]). The founders of the United States government were more concerned with tyranny by the executive or legislative branches than with tyranny by judges.

In marked contrast, legislative supremacy is the rule for European civil law systems. This principle is generally thought to preclude judicial review of legislative decisions, and to preclude judicial lawmaking as well. The separation of powers in civil law systems thus has very different implications for the role of the courts. In Belgium and France, matters of executive or legislative overreaching are handled by a *Conseil d'État*, not by the regular courts. Germany, Italy, and Austria provide for judicial review, but only through a separate system of administrative courts. This is a relatively new invention, having only been instituted after World War II. The English for a long time denied altogether that judicial review occurs in England.

Yet judicial review is an important topic in American legal history, to understate the case. Every U.S.-trained law student must confront *Marbury v. Madison* (5 U.S. [1. Cranch] 137 [1803]). *Marbury v. Madison* was the U.S. Supreme Court's first attempt to justify judicial review of executive and legislative decisions and actions. In *Marbury*, the plaintiff asked the Supreme Court to review the constitutionality of an act of President Jefferson. While Chief Justice Marshall's majority opinion denied the plaintiff a right to a judicial remedy in the particular case before it, it held that the Supreme Court did have the power to review presidential actions that violate a specific duty assigned by law. Marshall's reasoning

was spare: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule" (*Marbury v. Madison* 5 U.S. [1 Cranch] 137 [1803], 177). Since "[t]he judicial power of the United States is extended to all cases arising under the constitution" (*Marbury v. Madison* 5 U.S. [1 Cranch] 137 [1803], 178) and the Constitution is the supreme law of the land, the courts have a duty to review the constitutionality of the legal acts of the other branches of government.

Marbury v. Madison is the foundation of judicial review in the United States. The question of whether the Supreme Court actually possesses or should possess the authority that Marshall attributed to it has been the subject of extensive debate (Bickel 1962; Burt 1992; Commager 1958; Dahl 1957). An independent court may be largely immune to the influence of popular prejudices and is to that extent better qualified than the executive or legislative branch to assert the inviolability of constitutional rights or duties (Burt 1992, 29).[5] While neither the U.S. Supreme Court nor the ECJ is popularly elected, they nevertheless may be considered potential pillars of democracy in preserving the rights inherent to a well functioning democracy.[6] But this is only true so long as the judiciary remains independent and reactive, rather than political and proactive. The doctrine of judicial restraint has a long and illustrious history. Alexander Hamilton wrote, in *The Federalist* No. 78, that the judiciary is the "least dangerous to the political rights of the constitution" because, among other reasons, it "can take no active resolution whatever" (Hamilton et al. 1988, 393–94). Similarly James B. Thayer argued in 1893 in *The Harvard Law Review* that, while the judiciary has power to nullify legislation violating the Constitution "beyond a reasonable doubt," courts "must not, even negatively, undertake to legislate" (Thayer 1893, 148–52).

The line between the proactive and reactive styles of judicial decision making is fuzzy but vital. There is no obvious answer, for example, to the question of how much authority courts must afford the other branches' interpretations of the Constitution. Yet if an independent judiciary inserts countermajoritarian principles into a state's political life beyond those necessary to the enforcement of its constitutional mandate, the judiciary infringes upon the "sovereign" right of the people to control their destiny within the confines of their state's constitution.[7]

Such an arrogation of authority could damage democracy a great deal. This is particularly true in a nonconstitutional nonstate like the European Union,[8] where almost all the authority of the governing body is derived

indirectly from the citizens. While neither of the most powerful players in the EU (the Council of Ministers and the Commission) is a model democratic institution, the ECJ is undoubtedly the least democratically accountable of all the EU's governing bodies. For the ECJ to gravely overreach its authority could be catastrophic for the legitimacy of the European regime, particularly (but not only) if it asserted its activism contrary to public opinion.

The ECJ's Mandate

The EC and EU treaties, unlike the U.S. Constitution, impart to the highest court the duty to "ensure that in the interpretation and application of this Treaty the law is observed" (Treaty of Rome 1957, art. 164).[9] Article 173 of the Maastricht Treaty states:

> The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB . . . and of acts of the European Parliament intended to produce legal effects vis-a-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of power.

Thus the ECJ has an explicit mandate for judicial review. Once the ECJ finds an action against any of the EU organs mentioned in Article 173 to be well founded, the ECJ "shall declare the act concerned to be void" except in the case of regulations (Maastricht Treaty 1992, art. 174). This is a very broad grant of power, particularly considering the principle of legislative supremacy that reigns in most influential European states. Not only does the Maastricht Treaty grant the Court extensive powers of judicial review, it *requires* the Court to nullify the acts described in Article 173, with no apparent discretion to administer less drastic remedies.

Yet despite the seemingly broad power that the Treaty of Rome imparts to the Court, it also requires that each governing body—including the ECJ—"act within the limits of the powers conferred upon it by this Treaty" (Treaty of Rome 1957, art. 4(1)). This clause implicitly forbids any form of judicial activism not specifically prescribed by the Treaty. Thus, while

the ECJ's interpretation of law appears to be supreme within the EU, the ECJ would seem, at least in theory, to be limited to a strict interpretation of the Treaty. Joseph Weiler has interpreted the judicial review function in precisely that light, arguing that it was intended mainly to protect the rights of member states against Community overreaching rather than to protect the rights of individuals (1986, 1111).

Article 171 of the Treaty of Rome requires member states to comply with the rulings of the ECJ with no right of appeal, and (as amended by the Maastricht Treaty) also gives the ECJ power to penalize states for noncompliance (Maastricht Treaty 1992, art. 171(1), (2)). Indeed, the Maastricht Treaty even gives the Council the right to grant the ECJ "unlimited jurisdiction" with regard to such penalties (Maastricht Treaty 1992, art. 172).[10] Article 171 would thus give an activist ECJ a broad power to annul the democratically legislated wishes of any member state of the EU. This potentially puts the ECJ directly at odds with the democratic governance processes of the member states. Whenever the ECJ's interpretation of an undemocratic European law conflicts with a member state's democratically-enacted law, the ECJ's interpretation of the foundational treaties requires European law to prevail automatically.

This potential for abuse by the EU would be especially worrisome if member states did not have a de facto veto on the ECJ's excessive judicial activism. Member states themselves are responsible for executing EU law, and history has proven that when the ECJ goes too far, member states may decide to exercise that leverage. The fact remains, however, that member states almost invariably obey the Court's rulings, even when those rulings are contrary to the states' perceived (at least short term) interests. This means that although the ECJ's potential for abuse must be subtle, it is not merely theoretical. The Court's power to overrule democratically legislated measures is real, and must be confronted.

Trends of Democracy in the European Union and the ECJ

The ECJ's judicial activism in expanding the powers of the EU has been extensive. First, the ECJ has raised EU law to a higher level than the municipal or even constitutional law of member states. Second, the ECJ has interpreted EU law to preclude unilateral legislation by member states in any area of overlapping competence with the EU, except under very narrow circumstances. Moreover, the ECJ has persistently ballooned the

sphere of EU competence through its leniency on the Council and Commission in their use of extraordinary powers (Treaty of Rome 1957, art. 235); its invention of whole areas of jurisprudence uncontemplated by the foundational treaties (e.g., human rights); its attempt to virtually replace the legal systems of member states within EU areas of competence (i.e. the doctrines of exclusivity and direct effect); and its numerous but subtle ways of broadly interpreting the EU's and its own jurisdiction (Treaty of Rome, art. 177). These all point to a particularly self-serving brand of judicial activism on the part of the Court.

The Supreme Court of Europe?

For the ECJ to assert successfully the supremacy of European law, the courts and governments of the member states must defer to its rulings. Courts of the member states are not immune to feeling that, by claiming to preempt national law and even national constitutions, the ECJ threatens the "sovereignty" of the state. The concept of such a "supreme court," whose decisions override the decisions of the highest courts of any sovereign member state, is unique. The Court's power seems especially threatening considering the recognized democracy deficit of the institution whose law the Court interprets. Getting member states to comply with the Court's rulings (or those of the Commission and Council, for that matter) has not always been easy, although ultimately the Court has been almost uniformly successful.

The ECJ itself—not the Maastricht or Rome Treaties—declared the supremacy of EC law over the constitutional law of any member state in 1964, in *Costa v. Enel.* Most member states of the EU accept that European law trumps national law and even national constitutions,[11] and a few European parliamentarians have (unsuccessfully) proposed a constitutional regime in Europe with the ECJ as the supreme constitutional court. Nevertheless, member states' courts have sometimes refused to implement ECJ decisions, thereby, in effect, denying the absolute supremacy of the ECJ. The French *Conseil d'État* has occasionally refused to follow an ECJ decision, and the Italian *Corte Suprema* initially put EU law and Italian law on the same plane (Petriccione 1986, 321). Eventually, the *Corte Suprema* admitted European supremacy *within its sphere of competence* as determined by the national authorities; however, given that the ECJ rules on its own jurisdiction (a practice called *kompetenz-kompetenz* or *compétence de la compétence*), a potential conflict between national and

ECJ interpretations of the limits of the ECJ's jurisdiction remained. The ECJ predictably opposed the *Corte Suprema*'s attempt to limit its power in any measure (*Amministrazione delle Finanze dello Stato v. Simmenthal, S.p.A.* 1978). Eventually, the *Corte Suprema* bowed to the ECJ even on this condition (Petriccione 1986, 322–23).

Germany's constitutional court, the *Bundesverfassungsgericht*, has in the past refused to recognize the supremacy of EU law and the ECJ (Garrett 1995, 174; *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittle* 1974). The Bundesverfassungsgericht initially reasoned that first, because the organs of the EC were not democratic, and second, because the EC lacked protection for "human rights," no transfer of powers from Germany to the EC could deprive German citizens of their constitutional protections (*Solange I* 1974; Wincott 1994, 258–59). For the ECJ to maintain its supremacy over the German constitutional court, it had to develop a jurisprudence protecting human rights (Wincott 1994, 256; Volcansek 1992, 115–16). As a result, the ECJ pragmatically developed a body of case law that had, by 1987, convinced the German constitutional court that European law did in fact adequately protect human rights (Wincott 1994, 262–63).[12]

Judicial Overreaching in the ECJ

Rare (or nonexistent) is the scholar who argues that the ECJ is *not* guilty of overreaching its authority; indeed, they commonly acknowledge its activism (Volcansek 1992, 109). As Weiler has pointed out, "[i]n its entire history there is not one case . . . where the Court struck down a Council or Commission measure on grounds of Community *lack of competence*" (1991, 2447). There is little disagreement that many ECJ decisions are motivated by a desire to enhance the Court's reputation and authority by extending the ambit of European law (Garrett 1995, 180–81). Even Helmut Kohl, the europhilic Chancellor of Germany, accused the ECJ of overreaching its authority in 1992, claiming it "does not only exert competencies in legal matters, but goes far further. We have an example of something that was not wanted from the beginning" (Mattli and Slaughter 1995, 189). Several years earlier, French Prime Minister Michel Debré was quoted as having stated: "J'accuse la Cour de Justice de mégalomanie maladive" (Mancini 1989, 595).[13] This section outlines several important areas in which the ECJ has overreached the authority granted to it by the

EU's foundational treaties. The question at issue is whether the ECJ is in fact guilty of unwarranted judicial activism.

Fundamental Human Rights

Neither the member states nor any organ of the EU has conferred a mandate on the ECJ that would allow the Court to strike down legislation enacted by the other organs of the EU for what it deems to be violations of fundamental human rights (Weiler 1986, 1105). Indeed, the Treaty of Rome did not directly mention anything like "fundamental human rights."[14] Yet since 1969 the Court has held that such rights are "enshrined in the general principles of Community law and protected by the Court," (*Stauder v. Ulm* 1969) and that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice" (*Internationale Handelsgesellschaft* 1970). In *Internationale Handelsgesellschaft*, the Court relied on laws common to most European states. In essence, the ECJ claimed to have derived the principles of fundamental human rights from the common constitutional traditions of the member states—an approach that would presumably preclude it from extending human rights protection to areas where member states' constitutions significantly conflict. The Court also relied in part on the European Convention for the Protection of Human Rights and Fundamental Freedoms (*Solange II* 1987), which, even if it had been signed by all the member states, was not European law in the same way that a statute enacted by all 50 U.S. states does not become federal law. In effect, the Court used sources of customary international law as if it were the International Court of Justice rather than a European federal court.

The Court, for pragmatic reasons, went well beyond interpreting existing law in this area. To increase its power over the Bundesverfassungsgericht, which had denied the ECJ's supremacy over German constitutional law, the ECJ essentially created a new EU jurisprudence of human rights out of thin air. Fortunately, the ECJ's rules do not seem at variance with those of the member states. If those rules did differ, however, the ECJ would have been unilaterally and undemocratically imposing its will on the member states in an act that could reasonably be described as dictatorial. Furthermore, the pragmatic provenance of this new body of law may be related to the ECJ's occasional reluctance to actually invoke "fundamental human rights" in subsequent, apparently appropriate cases.

Three undemocratic aspects of the Court's lack of respect for procedure take this example of overreaching beyond the academic. First, it sets a disturbing precedent. The ECJ must not become comfortable with the idea that it can engage in the wholesale creation of laws absent a democratically-conferred mandate. Second, the Court's motivation was clearly pragmatic. The Court was not necessarily concerned with protecting human rights so much as with solidifying its hegemony over the Bundesverfassungsgericht. Finally, whatever the substantive merits of the fundamental human rights jurisprudence, democracy must be understood as a procedural system. An institution that protects freedom and property through dictatorial means is not a democratic one, even if it reaches the same results. By the definition employed in this article, democracy requires institutionalized accountability to the citizens. Any system that creates policy without accounting for citizen preferences is undemocratic regardless of the merits of the substantive policy it promulgates.

U.K. Sea Fisheries

The ECJ is normally more subtle in its attempts to expand the applicability of EU law and its own authority to interpret that law. For example, in the 1981 *U.K. Sea Fisheries* case (*Commission v. United Kingdom* 1981), the Commission brought the United Kingdom before the ECJ on charges that it had failed to fulfill its duty to refrain from promulgating environmental legislation without EC approval. The Council had adopted a regulation that provided for the Council to determine within six years certain conditions for environmentally friendly fishing. The Council failed to reach such an agreement, and instead agreed to interim measures for the next six months that allowed member states to catch up to a certain amount of fish determined by the Commission. The United Kingdom, taking advantage of the fact that the Council had failed to reach any agreement, adopted its own measures over Commission objections. The Commission brought its case before the ECJ, claiming that once the Council and Commission had decided to legislate on a matter of EC competence, member states could no longer adopt unilateral measures, even if such measures did not conflict with any measures adopted by the EC organs. The United Kingdom argued that member states "have an inherent power and right to take conservation measures, except in so far as they have limited that right by treaty." The main question at issue was: whose power should fill a vacuum in an area of law in which the member

states and the EC have overlapping competence? The ECJ ruled, in very strong language, that EC law filled in the lacuna. Once subject matter comes within EC competence, the Court held, member states irretrievably lose their ability to act unilaterally (*Commission v. United Kingdom* 1981, op. part paras. 18, 20).

This very broad interpretation of the EC's (and by extension, the ECJ's) powers—in contravention to commonly recognized principles of treaty interpretation in international law—exemplifies the doctrine of exclusivity, which the Court has persistently advanced since *U.K. Sea Fisheries.* Nowhere does the Treaty of Rome require that member states lose their competence in any field that overlaps with EC competence. Although the ECJ's reasoning in the *U.K. Sea Fisheries* decision may not be completely unfounded, it is at least questionable that, where the allocation of power was uncertain, the ECJ should have presumed to expand the powers of the undemocratic EC to override democratic legislation of the member states without any clear Treaty of Rome mandate to do so. Building on *U.K. Sea Fisheries*, the Court has gone beyond the principle of supremacy of EU law and has upheld the doctrine of exclusivity of EU law in other areas of EU competence.[15] Entire fields of legislation are preempted by the EU such that, if the EU fails to act (as it did in *U.K. Sea Fisheries*), national legislatures are effectively paralyzed unless given EU approval.

The Court's Article 177 Jurisdiction

The Court has also attempted, with some consistency, to expand its own Article 177 jurisdiction.[16] Article 177 of the Treaty of Rome provides the Court with jurisdiction when a question of EU law arises before "any court or tribunal of a Member State." In addition, Article 177 requires courts "against whose decisions there is no judicial remedy" that are confronted with questions of EU law to refer the legal question to the ECJ. In *C. Broekmeulen v. Huisarts Registratie Commissie* (1982), a Netherlands doctor with a Belgian diploma was denied registration by a private society whose approval was necessary to practice in the Netherlands. The question arose of whether the private society's Registration Committee constituted a "court or tribunal" for the purposes of Article 177. The Netherlands government thought not, noting that an adverse decision could be appealed to a Netherlands court (*C. Broekmeulen v. Huisarts Registratie Commissie* 1982, paras. 11, 15), but the ECJ nevertheless accepted jurisdiction on grounds of expediency: "it is imperative, in order

to ensure the proper functioning of Community law, that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings" (*C. Broekmeulen v. Huisarts Registratie Commissie* 1982, para. 16).

The Court's interpretation of its own jurisdiction in this case is expansive indeed. The Netherlands government is presumably most knowledgeable about whether the Registration Committee is one of its courts or tribunals. Moreover, a strict interpretation of the Treaty of Rome would probably favor the Netherlands government's argument. Yet the Court did not hesitate to impose a pragmatic solution despite its apparent lack of jurisdiction. This ruling was one of a pattern. As Anthony Arnull has pointed out, "[t]he term 'court or tribunal' has been construed broadly by the Court and it embraces any organ of a Member State which performs a judicial function, regardless of its classification under national law" (1993, 130)—a point well illustrated by the *C. Broekmeulen* case.

Direct Effect

Perhaps the most stunning example of the Court's expansion of EU powers is its creation of the doctrine of direct effect. The doctrine of direct effect posits that courts of the member states must directly enforce EU law that is clear and precise enough to require no implementing legislation on the part of the member states. Without delving too deeply into a complex and much discussed subject (Arnull 1986; Curtin 1990), it is sufficient to note that the foundational treaties nowhere confer "direct effect" upon themselves. A straightforward reading of those treaties—which are founded upon a principle of interstate cooperation—seems to indicate that European law was meant to be incorporated into the law of each state, and that each state was to implement that law itself.

Article 11 of both the Rome and Maastricht treaties states that "Member States shall take all appropriate measures to enable Governments to carry out, within the periods of time laid down, the obligations with regard to customs duties which devolve upon them pursuant to this Treaty." This quite clearly represents a mandate for state implementation of Community directives—and by implication, a denial of any direct effect for the treaties. Of course, such an arrangement might amount to letting the fox guard the chicken coop, but it is intuitively sensible. It is, after all, highly questionable that most member states would have agreed to a system wherein EU directives were to apply within their territory in the absence of implement-

ing legislation. Article 11 was included in the treaties for the very purpose of insuring that each member state maintained control over the implementation of EU policy in its own territory, except where the member states had explicitly undertaken to give the EU regulatory competence.

Nevertheless, the ECJ interpreted the Treaty of Rome to confer direct effect in the case of *N.V. Algemene Transport en Expedite Onderneming van Gend & Loos v. Nederlanse Administratie der Belastingen* (1963). *Van Gend & Loos* concerned the importation of West German ureaformaldahyde into the Netherlands in 1960. A dispute about the proper tariff classification of the product under EC law led the importer, Van Gend & Loos, to lodge a complaint against the government of the Netherlands for violation of the Treaty of Rome. Van Gend & Loos argued that, by reclassifying ureaformaldahyde into a heading with a higher tariff, the Netherlands had violated Article 12, which prohibited member states from introducing new tariffs or increasing old ones. The Dutch Tariefcommissie referred two questions to the ECJ, only one of which is relevant here:

> Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect . . . (*Van Gend & Loos* 1963, 3).

In other words, if an individual (or company) claims that a member state violated his or her rights under European law, must courts of that state apply European law directly? Or must the individual wait until the Commission or another member state brings the case before the ECJ?

Naturally, the answer to this question determined in large part the relevance of European law for individuals. If European law were found to apply only to states, then individuals would have no effective remedies, and thus no effective rights, under European law. That dynamic, however, represents a practical consideration, not a question of interpretation of the Treaty of Rome. Both the Netherlands and the German governments argued vigorously that the ECJ had no jurisdiction because *Van Gend & Loos* concerned the application of the Treaty of Rome to a specific factual case rather than the interpretation of European law. Van Gend & Loos countered that Article 12, because it imposes only a negative obligation (not to increase duties), does not require national legislation and so must be applied directly. The Commission chimed in with a remarkably expansive and expandable pragmatic (but not particularly legal) argument:

> [A]n analysis of the legal structure of the Treaty and of the legal system which it establishes shows on the one hand that Member States did not only intend to undertake mutual commitments but to establish a system of Community law, and on the other hand that they did not wish to withdraw the application of this law from the ordinary jurisdiction of the national courts of law.
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> However, the Community law must be effectively and uniformly applied throughout the whole of the Community.
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> The result is first that the effect of Community law on the internal law of Member States cannot be determined by this internal law but only by Community law, further that the national courts are bound to apply directly the rules of Community law and finally that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later (*Van Gend & Loos* 1963, 7).

Although the Advocate General wrote a well-considered opinion concluding that Article 12 had no direct effect, the Court thought otherwise. It held that "the EEC Treaty . . . is more than an agreement which merely creates mutual obligations between the contracting states" (*Van Gend & Loos*, op. part para. 10). Van Gend & Loos had argued only that Article 12, which requires member states to refrain from introducing new tariffs, had direct effect—but the Court's holding went much farther. Moreover, it seems unlikely that such a sweeping constitutional interpretation was the intent of the majority of the member states. Such a remarkable expansion of the EU's (and hence, the Court's) powers has caused considerable controversy in legal and political circles.

After *Van Gend & Loos*, the Court nevertheless continued to augment the direct effect doctrine to include other articles of the treaties and even directives.[17] The Court itself has admitted that "[e]*ven before there was the idea of citizenship of the Union*, the Court had inferred from the Treaties the concept of a new legal order applying to individuals and had in many cases ensured that those individuals could exercise effectively the rights conferred on them" (Report of the Court of Justice 1995, emphasis added). In *Watson and Belmann* (1975), for example, the Court held that "Articles 48 to 66 of the Treaty and the measures adopted by the Community in application thereof implement a fundamental principle of the Treaty, confer on persons whom they concern individual rights which the

national courts must protect and take precedence over any national rule which might conflict with them" (*Watson and Belmann* 1975, op. part para. 1). The Court's pragmatic decisions are clearly beyond the scope of the terms of the Treaty of Rome and, like many ECJ decisions, run contrary to established rules of treaty interpretation under international law. While the Court's desire to extend the protections of European law to individuals is commendable, it simply had no mandate to extend its power in this way.

Other Cases

Examples of ECJ judicial activism could be multiplied ad infinitum, but a few additional decisions suffice to illustrate the Court's tendency to decide cases in a manner that extends the jurisdiction of the EU and its own authority within that jurisdiction. Is it important to note that the attempts by EU organs to extend their jurisdiction rarely go unopposed by member states, as the *U.K. Sea Fisheries* case illustrates.[18] But even if member states always acquiesced to EU overreaching, such overreaching would still damage the cause of democracy.

The Court has expanded its jurisdiction in a most subtle manner by giving itself the rather unEuropean power of stare decisis. Stare decisis is the common law—not civil law, for strictly speaking civil law has no such rule—principle that a legal issue decided by a court must not be relitigated. This rule has two functions. First, it conserves judicial resources, and second, it prevents the court from contradicting itself. The first case in which the Court gave itself the power of stare decisis was *Srl CILFIT v. Ministry of Health* (1983). In *CILFIT* the Court ruled that the Article 177 duty of member state courts to refer questions of EU law to the ECJ did not apply where "the correct application of Community law is so obvious as to leave no scope for any reasonable doubt" (*CILFIT* 1983, op. part paras. 16, 21). A requirement to refer such questions to the Court might "deprive the [Article 177] obligation of its purpose and thus empty it of its substance" (*CILFIT* 1983, op. part para. 13). In other words, the Court asserted that its rulings could make a legal issue clear beyond a "reasonable doubt;" those rulings thus had the effect of stare decisis despite the general civil law principle that courts do not make law.

Furthermore, the Court has used its power under Article 235 to expand EU jurisdiction to a virtually limitless degree. According to Article 235,

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of

> the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures (Treaty of Rome 1957).

The already very expansive words of this provision have been interpreted broadly by the Court[19] so as to open up "practically any realm of state activity to the Community, provided the governments of the Member States found accord among themselves" (Weiler 1991, 2450). Article 235 was plainly intended for exceptional circumstances (Usher 1988, 30), but the organs of the EU have used it for such mundane measures as adding to the list of food products subject to the EEC Agricultural Policy in an annex to the Treaty of Rome (Weiler 1991, 2444–45). This expansive use of Article 235 allows the Council and Commission to avoid amending the foundational treaties and thereby to avoid having to consult national parliaments. Democracy in Europe can only suffer from such unjustified evasions of democratic accountability (Weiler 1991, 2452).

The Verdict: Does the ECJ Damage Democracy?

The foregoing examination of ECJ rulings is not intended to provide a complete listing of the Court's overreaching, but is meant to make it clear that, despite the Court's prudent-but-occasional admission of either its lack of jurisdiction or the preeminence of national law over European law, the jurisprudence of the Court may be characterized as excessively activist. Scholars commonly acknowledge the Court's activism, but, as Mary Volcansek has noted, "[w]hat is truly remarkable . . . is the almost total lack of criticism and virtual sycophantic praise of the Court's action" (1992, 109). The time has come to ask how this activism affects European democracy.

The Vienna Convention on the Law of Treaties, which codified well established rules of customary international law when it entered into effect in January 1980, provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" (art. 31(1)). Moreover, a traditional rule of international law has been to interpret treaties in such a way as to minimize their infringement of the sovereignty of states (Weiler 1991, 2416). The ECJ, insofar as it is constrained to adjudicate in accordance with international law, must respect these rules

when interpreting the EU treaties from whence it derives its own authority. Yet the Court has extended its powers or the powers of the EU beyond what seems permissible by the "ordinary meaning" of the words of the foundational treaties in a multitude of cases. Thus, it is correct that

> [t]he combined effect of constitutionalization and the evolution of the system of remedies results . . . in the removal from the Community legal order of the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility wit hits concomitant principles of reciprocity and countermeasures (Weiler 1991, 2422).

The ECJ's activism has largely transformed the EU from a consociation under international law to a "constitutionalized" union (*Parti écologiste "Les Verts" v. European Parliament* 1986, 1365; Stein 1981, 1). But by what mandate has this transformation occurred? The subtlety and counter-majoritarianism of the ECJ's activism merits rethinking the powers of the ECJ and the political nature of the EU.

Assuming that the European Union, as a government, is less democratic than most of its member states, then any extension of European power at the expense of the autonomy of the member states would appear prima facie antidemocratic. The lack of accountability—democratic or otherwise—inherent in the European Court of Justice is another reason for one to be concerned about the Court's overreaching. Thus, the first way in which the ECJ has contributed to Europe's democracy deficit is through its unauthorized transfer of powers from the member states to the less democratic EU.

Yet the democracy deficit to which the ECJ contributes consists of more than solely the transfer of power from member state governments to a nondemocratic supranational authority. The ECJ's rulings also transfer power from the legislative branch in the member states to the executive and judicial branches. While that result follows in part from the structure of the treaties (Weiler 1991, 2430), the Court has enhanced the power of the executive branches beyond what the treaties contemplated through its activism in extending the ambit of the treaties and its own jurisdiction. The treaties offer no authority for the court's expansion of EU powers in *U.K. Sea Fisheries* or *Van Gend & Loos*, nor for the court's extension of its own jurisdiction in *C. Broekmeulen* or *CILFIT*. A significant difference exists between a democratic vote that transfers power to the executive branch

and judicial lawmaking that has the same effect (Weiler 1991, 2470). Thus, the second way the ECJ has contributed to Europe's democracy deficit is by transferring power from the more democratic legislative branches of the member states to their less democratic executive branches.

Article 4, Section 1 of the Treaty of Rome plainly limits the ECJ's activism to the admittedly broad powers it prescribes. That provision has become somewhat of an American 10th Amendment for the Treaty of Rome, honored more in its breach than its observance. But its inclusion in the Treaty was deliberate. The member states could afford to limit the ECJ's activism in this way because there is no danger of any real dictatorship in the EU. In contrast, the judicial check on legislative and executive powers in the United States insures against arbitrary powermongering by any branch that chooses to disregard its constitutional duties. There was never any such fear in the EU (at least, no such rational fear) because no legislature can exercise a dictatorship without control over some form of executive—and the de facto "executive" of the EU is none other than the member states themselves. The Council will undoubtedly continue to uphold its duties under the Maastricht Treaty and refrain from exercising dictatorship; if the Council overstepped the limits of its authority too egregiously, member states would refuse to enforce its directives. Only a very limited judicial review is therefore necessary.

As one observer remarked with some understatement, it must be questioned whether the Court may invent rights and remedies as it has sometimes done. "The Court of Justice is not under democratic control. . . . [therefore], there ought to be limits to judicial activism" (Wincott 1994, 257). The "fundamental human rights" example is a case in point. If the member states or the citizens of the EU had desired to create such a legal regime, they could well have done so. Josef Weiler has asserted that the Court's "fundamental human rights" rulings *alleviate* the democracy deficit by putting a check on the EU's powers, and actually "curtail[ing] the freedom of action of the Community" (1991, 2438). This argument only has merit if the Council or Commission were in any real danger of violating fundamental human rights—an eventuality that seems very doubtful, in part because member states exercise a de facto veto on Council and Commission policy as the executive branch of the Union. In any case, the question is not whether the Court's substantive ruling advanced human rights or democracy or anything else. The question is whether the ECJ had jurisdiction to do so, and clearly it did not. In other words, the Court's substantive ruling was laudable, but it lacked the

proper procedure that is at the essence of democracy. Indeed, democracy is little else than a political procedure that guarantees few substantive ends other than those necessary to the proper functioning of democracy itself. By creating a "law" of fundamental human rights without the democratically mandated competence to do so, the Court set a precedent (which it quickly followed) for exceeding its own jurisdiction.

As Thomas Jefferson has pointed out, even the judiciary's "honest error must be arrested, where its toleration leads to public ruin" (quoted in Commager 1958, 34). Because all of the member states recognized the same human rights that the ECJ's new law protected, no substantive harm was done to any democratic legislation in this instance.[20] Yet the ECJ clearly had no right to create such a law, and insofar as the ECJ is unaccountable to the citizens of the EU, its creation of a new legal regime was undemocratic. Ends cannot be assumed to justify means in a democracy. Commentators, unfortunately, sometimes act as if ends do justify means. Even so outspoken a critic of ECJ activism as Hjalte Rasmussen (1986, 8) has argued that judicial activism may qualify as a "social good" if judges are responsive to public opinion. But does occasional voluntary responsiveness to public opinion, even if a "social good," qualify as democracy? Does not a stable democracy require *institutionalized* responsiveness to the majority? Moreover, does not democracy entail public debate and, most importantly, public accountability? These vital procedural considerations must figure into the calculus. A dictatorship guaranteeing free speech for the time being is not granting democracy to its subjects—it is granting a temporary and reversible public freedom. Democracy is not just public freedom; it is majority rule and certain *enshrined* and *institutionalized* public freedoms that make majority rule sustainable and desirable. Though strong majoritarian judicial activism may produce some quantity of social good, it may not be worth the long-term cost of the ECJ's usurpation of European democracy.

Conclusion

Given the lack of democracy, legitimacy, and accountability in the European Union, the ECJ's activism has been excessive and has further widened the EU's democracy deficit. Of all the organs of the European Union, only the ECJ openly claims that the Treaty of Rome created a constitutional regime. If the EU is a constitutional regime, that fact is largely due to the ECJ's activism. Yet constitutionalism can be pointless,

and even potentially dangerous, in a nondemocratic regime. There is something profane about constitutionalizing what Weiler has aptly called a "*gouvernement des juges* . . . designed to control a *gouvernement des fonctionnaires*" (1986, 1117). This activism seems particularly invasive and unjustified considering the conservative purposes of judicial review in the foundational treaties.

Often, europhilic scholars—and there are many who admit it freely, including Weiler (1986, 1109) and this author—laud the Court's independence and European spirit, often forgetting that the Court expands the powers of a Union that, however efficient and politically advantageous, lacks the popular support of almost half the European population. Worse, scholars have heretofore failed to recognize the link between the ECJ's overreaching and the EU's democratic deficit. Their misunderstanding stems from overlooking the importance of procedure to democracy. Democracy is a procedural political system that results in certain substantive ends (such as freedom of speech and association, or the right to vote). Scholars have let their enthusiasm for the laudable substantive ends advanced by the ECJ blind them to the Court's less worthy procedural means.

Did the Maastricht Treaty improve the representativeness and accountability of the European Community? A little. But it certainly did not compensate for the damage done to democracy by an unrepresentative and almost completely unaccountable Court shifting power from the member states' legislatures to the member states' executives; from the member states' governments to the Commission; and from the member states' courts to the ECJ over the course of 35 years. It is possible that the ECJ has promoted democracy by promising to ensure the protection (at the EU level) of fundamental human rights. But that does not justify the means by which it created those rights. When the ECJ created its human rights doctrine, member states were not ignoring human rights violations. Nor does the Court's promise to protect human rights excuse its almost relentless overreaching. The ECJ is guilty of damaging European democracy with good intentions. Unfortunately, there is no reason to believe that it will reverse the direction of its decisions any time soon. The best that European citizens can hope for is that the EU itself will become more accountable, open, and responsive, and that the governments of the member states or the other organs of the EU will be less hesitant to restrain the Court in the future.

The 1996 Intergovernmental Conference (IGC) will undoubtedly prove relevant to the prospects for greater democracy in the European Union. The purpose of the Conference is to plan the future of the EU, with the particular intent of revising the foundational treaties. Its agenda, outlined by the report of an eighteen-member Reflection Group (1995), suggests that democracy in the EU will be a subject of discussion this fall.

While the Reflection Group's report is predictably vague, it clearly indicates a desire to promote greater European democracy, or at least the appearance of democracy. For example, the report repeatedly expresses concern with improved transparency. Transparency is certainly a sine qua non of democracy; citizens can hardly make informed decisions and demands without access to information about the EU's inner workings. At the same time, however, the report refers to democracy mostly for rhetorical impact, and it offers no serious agenda on how to improve the Union's responsiveness. It suggests that the Conference should make the Union "closer to the citizens," but closeness is not enough. The critical question is whether the EU's centralized government, comprised of the Commission, Council, and Parliament, will be adequately responsive. The proposals that the report does offer, such as increased national parliamentary participation in EU decision making, are promising but underdeveloped.

Similarly, the report's terse treatment of the ECJ evidences the Reflection Group's lack of awareness of, or concern with, the ECJ's overreaching. Rather than proposing to relegate the Court to a reactive role or to limit the Court to the jurisdiction explicitly assigned to it, the Reflection Group vaguely advises strengthening the ECJ's role in the EU. This position merely echoes what the Court advocates in its own submission to the IGC (Report of the Court of Justice, 1995). The Court's report urges the strengthening of its power over individuals and over acts of other EU organs. Only one of the Reflection Group's members cautioned that the consequences of the ECJ's increased power and jurisdiction could be "disproportionate in their effect."

The agenda of the 1996 IGC gives cause for cautious optimism that the Conference will result in increased transparency in the EU. On the other hand, it offers no reason to believe that responsiveness will improve significantly, or that the powers that the ECJ has arrogated to itself and to the EU generally will be curtailed. By ignoring this problem, the governments of the member states pass up a rare opportunity to reverse an expansion of the EU's democracy deficit.

Notes

[1]Formerly the European Community (EC). This paper will refer to the EU and EC interchangeably, depending on the time frame in question.

[2]Technically, the Council and Parliament may exercise some influence over the Commission, as the Council may change the number of Commissioners by unanimous vote (Maastricht Treaty 1992, art. 157) and the Parliament retains a right to disapprove the Commission as a body when it is first nominated (Maastricht Treaty 1992, art. 158(2)). In reality, particularly considering their restrictions (unanimity, disapproval *as a body*, etc.) and the rarity of their actual exercise, these powers amount to very little. On the other hand, as if to make a point about the real power member states exercise over the Commissioners, British Prime Minister Margaret Thatcher had a habit of referring to the British appointees as "our Commissioners" (Taylor 1991, 118).

[3]Scott et al. (1994, 47, 55–57) argue that subsidiarity can promote democracy by improving the accountability of policy makers to citizens.

[4]For example, consider *Adair v. United States* (208 U.S. 161 [1908]), one of a series of post-*Lochner* (*Lochner v. New York*, 198 U.S. 45 [1905]) cases denying Congress the right to regulate interstate commerce. In *Adair*, the Supreme Court overturned a law promulgated by Congress that made it "a crime against the United States to unjustly discriminate against an employee of an interstate carrier because of his being a member of a labor organization" (169). Henry Steele Commager compiled a laundry list of the Court's countermajoritarian meddling in chapter two of *Majority Rule and Minority Rights* (1958).

[5]While the Court has many times defied popular sentiment, there is reason to question whether the Court is in fact countermajoritarian. One ambitious social science study has found that, based upon comparisons of public attitudes and Supreme Court rulings, "the modern Court has been an essentially majoritarian institution" (Marshall 1989, 129). A more recent study supported this conclusion, though it found that the relationship was more subtle and reciprocal (Mishler and Sheehan 1993, 96). If correct, these assessments may contradict the assertion that the Supreme Court is independent, but they do support the argument that the Court is not significantly countermajoritarian. On the other hand, the Mishler and Sheehan study did find that the Court had become significantly less responsive to public opinion since the election of Ronald Reagan in 1992. "The decisions of the Court during the Reagan years were significantly countermajoritarian" (Mishler and Sheehan 1993, 97).

[6]In other words, a governmental body devoted to upholding the principles of the Constitution insures that the "rules of the game" remain democratic (Holmes 1993).

[7]The argument made here may be considered an assumption of this article. The question of whether judicial activism damages democracy merits a much more nuanced and complete treatment than it can be given here. One point worth noting, though, is that judicial activism would not necessarily damage democracy so long as judges kept to interpreting statutes, and their activism were directed at giving those statutes maximum effect insofar as they expressed the legislative or popular will. The problem with this approach, however, is that one may question the ability of judges to discern what such will actually may be, if indeed it even exists (Radin 1930, 870; Schacter 1995, 107; Shepsle 1992; Zeppos 1992, 1087).

[8]While the EU certainly has elements approximating constitutional statehood, its members have denied it official status as such. The Treaty of Rome (as amended at Maastricht) remains a treaty, not a constitution, and the European Union remains a union, not a state, even if it is a "union among the peoples of Europe" (Treaty of Rome 1957, pmbl.) rather than a union among the states.

[9]That duty belongs to the President under the U.S. Constitution, which requires that the President "take care that the laws shall be faithfully executed . . ." (U.S. Constitution, art. 2, sec. 3).

[10]The Treaty of Rome also requires the institutions of the EU to obey the Court's rulings but, in contrast to the treatment of recalcitrant member states, does not provide for penalties for their failure to act (Maastricht Treaty 1992, art. 176).

[11]For example, Articles 65 through 67 of the Netherlands constitution, read together, give supremacy to EU law over national legislation where they conflict. Article 28(1) of the Greek constitution states that "intemational conventions . . . shall be an integral part of domestic Greek law and shall prevail over any contrary provisions of the law." The Italian constitutional court held in favor of European supremacy in *Frontini v. Ministero delle Finanze* (1974).

[12]However there is reason to doubt the sincerity of the ECJ's commitment to those "rights," as it has occasionally failed to uphold them in seemingly appropriate cases (Volcansek 1992, 116).

[13]"I accuse the Court of Justice of Maladivian megalomania" (author's translation). The tiny Maldive Islands, a full member of the United Nations, pretend to form a microstate.

[14]However, the Commission did implicitly encourage the ECJ to protect human rights through its case law in statements made in the official journal (Wincott 1994, 260).

[15]The Court has sometimes made exceptions when the member state's legislation fulfilled a strict set of requirements. In *Commission v. Federal Republic of Germany* (1987), for example, the Court held that, in the absence of common rules relating to the marketing of products within the Community sphere of competence, national laws restricting the free movement of goods "must be accepted" if the rules are proportional, impartial, and necessary to an important purpose.

[16]This is not to say that the Court has uniformly attempted to expand its own jurisdiction. There are many cases in which the Court has declined jurisdiction; for example, see *Criminal Proceedings Against Regis Unterweger* (1986).

[17]For example, see the cases of *Delkvist v. Anklagemyndigheden* (1979) (applying to directives); *Defrenne v. Societ~Anonyme Belge de Navigation Aierenne Sabena* (1976) (applying to art. 119); *B.N.O. Walrave v. Association Union Cycliste Internationale* (1975) (applying to several articles in combination); and *Van Duyn v. Home Office* (1974) (applying to directives).

[18]To take a more recent example, six member states have recently opposed the EU Transport Commissioner's attempt to coopt the entire field of European civil aviation and use of airports, which would essentially take negotiating power out of the hands of each state (U.S./E.U. Relations 1995, 1, 12).

[19]For a full analysis of the Court's use of Article 235, see Weiler (1991, 2442–50).

[20]Nor did the ECJ's judicial activism accomplish anything meaningful in the field of human rights. Since the member states are ultimately responsible for the execution of the EU law, and since the member states themselves adhered to a convention protecting the "fundamental human rights" recreated by the Court, the ECJ merely reaffirmed the member states' duty to uphold those rights.

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