THE EUROPEAN COURT OF JUSTICE: LEGAL INTERPRETATION AND THE DYNAMICS OF EUROPEAN INTEGRATION

Alejandro Pizarroso Ceruti[*]

Abstract

This Note attempts to explain the constitutionalization of European law by the Court of Justice. It argues that this development responds to the particular stance to legal construction adopted by the Court, which I call "integrative cumulative approach." The approach places equal importance upon the textual and dynamic reading of legal provisions, allowing the Court to perform an integrative interpretation of European law. This Note also contends that, to explain this phenomenon, both extra-legal and legal variables must be considered. The main approaches to European integration — intergovernmentalism and neofunctionalism— disregard the role of European law in this process and the integrative dilemma that its interpreter faces. This Note thus assesses the "what," "how," and "why" of the constitutionalization of the European Union. It first describes the process, both from a doctrinal (direct effect and primacy) and institutional (preliminary reference) perspective. It then assesses the Court's methods of interpretation, discussing its integrative cumulative approach. And finally, it tries to explain the reasons behind it, focusing on the role that legal variables played in the constitutionalization.

A parallel finding is the quasi-unanimous approval that the Court's approach has been met with in Europe—which stands in contrast with the contentious debate over the Supreme Court's construction methods in the United States. The conclusion also suggests that the basis for the Court's interpretive approach has eroded since the 1990s, calling perhaps for a more moderate stance towards interpretation, notably in cases that do not pose integrative issues.

* This Note is based on a paper presented at the Columbia Law School fall 2017 Seminar in Legal Interpretation. I am grateful to Professor Greenawalt and my fellow students for their comments on the original paper. I would also like to thank Professor Dehousse and Professor Weiler (and in general the Total Law team), whose teachings at Sciences Po (Paris) have greatly shaped my views on E.U. law and politics.

1. INTRODUCTION

When deciding cases, the European Court of Justice (the "E.C.J.") often faces a dilemma. Its decisions transcend the facts of the case in a very specific way. The Court can either further integration or halt the process.[1] Arguably, few courts in the world confront this issue.

Scholars unanimously agree that the E.C.J. has played a central role in European integration. In fact, it has created a true constitutional order, whose nature, if not federal, is at least supranational.[2] The main features of this system are nowhere to be found in the Treaties. The objective of this Note is to offer a brief overview of the methods of construction of European Union ("E.U.") law in connection with this process of constitutionalization, an issue that has traditionally attracted little attention.[3] As I will show, the E.C.J. favors an approach to legal interpretation (which I call an "integrative cumulative approach") that allows it to perform an overall teleological or meta-teleological reading of E.U. law to further European integration. I argue that, to explain what the Court did, regard must be had to the role of E.U. law, as well as its integrative nature. This Note focuses mainly on the initial period of integration, but in my conclusion, I also suggest that the time may have come for the Court to take a more moderate stance to legal interpretation.

This Note proceeds as follows. First, it examines the constitutionalization process of the E.U. legal order carried out by the Court. Secondly, it overviews the different methods of interpretation of E.U. law used by the E.C.J., discussing the overall approach taken by the Court. Thirdly, I will discuss the explanative power of law in

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[1] ANNA BREDIMAS, METHODS OF INTERPRETATION AND COMMUNITY LAW xvi–xvii (1978).

[2] *See, e.g.*, Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG., 41, 41–42:

Even the self-professed legion of skeptics about the [E.U.] has had to recognize that if the community remains something well short of a federal state, it also has become something far more than an international organization of independent sovereigns.

An unsung hero of this unexpected twist in the plot appears to be the European Court of Justice . . . By their own account, now confirmed by both scholars and politicians, the thirteen judges quietly working in Luxembourg managed to transform the Treaty of Rome . . . into a constitution. (citation omitted).

[3] JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE 1 (1993) ("This is a very interesting area of study which has heretofore attracted relatively little attention from legal theorists and [E.U.] law-scholars."). The topic, however, has received more attention in the past few decades.

this process. And, to conclude, I make some suggestions regarding the current role of the Court.

2. THE CONSTITUTIONALIZATION OF THE EUROPEAN UNION

The E.C.J. has played a crucial role in European integration, and especially in the constitutionalization of E.U. law.[4] In its most basic sense, this process can be equated to the creation of those stable laws and principles that govern the organization.[5] Hix and Høyland, noting that "the EU constitution lies less in the founding treaties than in the gradual constitutionalization of the EU legal system,"[6] stress several aspects of the Court's case law in this respect.[7] I will focus only on the principles that govern the relationship between the E.U. legal system, on the one hand, and the legal systems of the Members States, on the other. From this perspective, the emphasis is not so much on how a particular case is decided, but rather on the broader, structural ramifications of the Court's rulings for the relationship between E.U. and national law.

While other aspects of the E.C.J.'s constitutional case law, such as the protection of human rights, are of paramount significance,[8] it can be argued that the principles that govern such relationship are taxonomically prior to the others. Without these principles, one can hardly see how any other relevant doctrine could have developed. The constitutionalization of the E.U., in fact, is primarily a process of creating individual rights out of treaties that were intended to apply only to states.[9] As former Advocate General Fennelly has noted, the Court has not "acted merely as an engine for European integration. It sees itself as concerned with establishing a Community of law, and the Treaties as guaranteeing rights to individuals extending beyond their merely economic objectives."[10] Only through this process of "juridification" could other (again, very relevant) features of the E.U. constitution materialize.[11]

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[4] *See* Burley & Mattli, *supra* note 2.

[5] *Constitution*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the term "Constitution" and showing that it is analogous to the functions that the ECJ has adopted).

[6] SIMON HIX & BJØRN HØYLAND, THE POLITICAL SYSTEM OF THE EUROPEAN UNION 83 (3d ed. 2011).

[7] *Id.* at 83–89.

[8] For a brief overview of the case law in the fields of free movement, human rights, criminal law and "social Europe," see GERARD CONWAY, THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE 40–51 (2012). Hix and Høyland also assess economic constitutionalism, external and internal coercion, and *Kompetenz-Kompetenz* conflicts. Hix & Høyland, *supra* note 6, at 86–89.

[9] Burley & Mattli, *supra* note 2, at 60.

[10] Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 676 (1997).

[11] *Cf.* Harm Schepel, *Reconstructing Constitutionalization: Law and Politics in the European Court of Justice*, 20 OXFORD J. LEGAL STUD. 457, 465 (2000) (reviewing RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION (1998) and HJALTE RASMUSSEN, THE EUROPEAN COURT OF JUSTICE (1998)) ("Ultimately, the measure of the Court's 'political' role is not its success in imposing particular policies through law, but the extent to which the Court has succeeded in 'juridiyfing' the [E.U.]'s processes of social decision-making."). This phenomenon is also known in the United States. *See* Michelle Egan, *Toward a New History in European Law: New Wine in Old Bottles?*, 28 AM. U. INT'L L. REV. 1223, 1244 (2013):

> Of particular interest . . . are the varied sources of ideas and pressures for change, both internal and external, to the judicial and legal system. In both the European and American case, we see that law can be innovative with major changes fostering 'rights consciousness' that can generate substantial litigation for addressing economic discrimination, social protection, and democracy promotion.

Seminal accounts of the Court's performance stress its early political engagement.[12] But change was to arrive only in the mid-1960s, with the principles of direct effect and primacy, through which the Court effected a "quiet revolution."[13] Both principles are examined in turn. Along with these, I will briefly refer to the role of the preliminary reference procedure in the process of constitutionalization of E.U. law. These doctrines profoundly altered the nature of this simple consultation procedure. Rather than focusing on several decisions, I will only analyze a few landmark cases, which will allow me to offer a more detailed analysis.[14]

2.1 Direct Effect: Van Gend en Loos

The Court crossed the Rubicon in 1963, when it laid down the direct effect doctrine in *Van Gend en Loos*.[15] International treaties are binding instruments. However, the constitutional rules of the signatories usually determine the effect that international treaties must have in their domestic legal systems. *Van Gend en Loos* raised the issue of whether this was to be the case with respect to the original E.U. Treaties. Van Gend en Loos, a Dutch company, challenged a national decision to raise custom duties to imported goods, even though article 12 of the Treaty of Rome prohibited their increase.[16] The Dutch court put the question to the E.C.J., asking whether the provision in article 12 was to be directly applicable in the national legal system, that is, "if nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect."[17]

Predictably, this possibility was fiercely opposed by the Dutch, Belgian and German governments.[18] But the Advocate General's opinion was also firmly contrary

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[12] 1 D.G. VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 370–404 (1965). Valentine notes, however, that the Court formally rejected being a political actor. The E.C.J. is "a Court concerned with interpreting and enforcing a particular system of law: it is, therefore, first, no part of its duty to comment upon the nature of the law or to critise it." *Id.* at 388.

[13] Andreas Grimmel, *'This is not Life as it is Lived Here': The Court of Justice of the EU and the Myth of Judicial Activism in the Foundational Period of Integration Through Law*, 7 EUR. J. LEGAL STUD. 61, 69 (2014).

[14] For a more comprehensive review of the foundational decisions by the E.C.J., see Eric Stein, *Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L., 1 (1981). The author, after selecting "among more than a thousand cases a small sampling of major opinions in which 'constitutional law was made,'" *id.* at 3, concludes that the Court took an integrative approach to E.U. law, *id.* at 24–27, so that the latter "has progressively acquired the status of quasi-federal law in terms of its impact on individual citizens," *id.* at 24. Some claim that this article is the "definitive account of the 'constitutionalization' of the treaty." Burley & Mattli, *supra* note 2, at 42 n.3.

[15] Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case C-26/62, EU:C:1963:1. For the explanation of this case, I follow the line of reasoning in RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION 37–41 (1998).

[16] "Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial transactions with each other." Treaty Establishing the European Economic Community, art. 12, Mar. 25, 1957 [hereinafter EC Treaty].

[17] *Van Gend en Loos*, EU:C:1963:1, at 11.

[18] Stein, however, finds this resistance surprising, as lack of direct effect would have halted the integration process and turned the community into little more than a regional trade agreement. Stein, *supra* note 14, at 27. However, he notes that "it may be too much to expect a national lawyer-bureaucrat, however enlightened, to preside with any degree of enthusiasm over a steady erosion of national power and his own vested career interests." *Id.*

to it.[19] It was submitted that, with regard to the intention of the drafters, an examination of the actual wording of the provision was sufficient to establish that article 12 placed an obligation only on the Member States, who were free to decide how they intended to fulfill it. On its face, this was a convincing argument. Both the wording of a provision and the intention of the parties are normally taken into consideration in international law.[20]

In an unexpected move, however, the Court rejected this reasoning. The E.C.J. said that "[t]o ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions."[21] Noting that the objective of the Treaty of Rome was to create a common market, it argued that the Treaty was more than an agreement creating mutual obligations between the contracting parties. This was confirmed by the preamble, which made express references to the people and to the several representative and legal mechanisms created by the Treaty. The Court stated that:

> [T]he [E.U.] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals . . . . [E.U.] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[22]

The Court therefore noted that article 12 created a "clear and unconditional prohibition," which was suitable, by its nature, to "produce direct effect in the legal relationship between Member States and their subjects."[23]

This was a singularly remarkable holding, bound to revolutionize E.U. law.[24] As Weiler argues, *Van Gend en Loos* breaches two basic presumptions of international law —the presumption that international legal obligations are addressed to the states, and the presumption that states have the autonomy to decide how to fulfill those obligations, which implies that they may determine the internal effects of international obligations, and that non-compliance may only be asserted declaratively, typically in the context of inter-state claims.[25] Direct effect therefore made E.U. law the "law of

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[19] Opinion of Advocate General Roemer, Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case C-26/62, EU:C:1962:42.

[20] *See, e.g.*, Dehousse, *supra* note 15, at 38. *See also* Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of the Treaties].

[21] *Van Gend en Loos*, EU:C:1963:1, at 12.

[22] *Id.*

[23] *Id.* at 13.

[24] The doctrine of direct effect was subsequently extended to secondary E.U. law provisions that, being clear and unconditional, confer rights upon individuals, and notably to provisions in *regulations*, Leonensio v. Minstero dell' Agricoltura e Foreste, Case-93/71, EU:C:1972:39; *decisions*, Grad v. Finanzamt Traunstein, Case C-9/70, EU:C:1970:78; and *directives* (at least vertically), Van Duyn v. Home Office, Case C-41/44, EU:C:1974:133.

[25] Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2413–14 (1991). The relevant part of the opinion should thus be read as follows: "the [E.U.] constitutes a new legal order . . . the subjects of which comprise . . . also [the Member States'] nationals . . . [to which E.U.] law not only imposes obligations . . . but is also intended to confer . . . rights (emphasis omitted)." Burley & Mattli, *supra* note 2, at 60 (citing *Van Gend en Loos*).

the land" in the Member States,[26] irrespective of what their domestic rules had to say on the effects of international treaties. This was the first step towards the constitutionalization of the E.U.

2.2 Primacy: Costa

Direct effect was quickly supplemented by primacy, sometimes referred to as supremacy, in *Costa*.[27] The doctrine of direct effect could not guarantee the effective application of E.U. law. This was especially true of countries with a dualist system, which requires the translation of international law into national law for the former to have domestic binding effects. But even in monist countries that did not require such translation, E.U. law could only enjoy the same authority as national law. According to the *lex posterior* principle, then, any subsequent national provision conflicting with E.U. law could take precedence over it. The Treaty of Rome provided that Member States had to take "all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty."[28] Member States were bound by E.U. law, but it was unclear how this commitment had to be honored, and the role the national courts had to play in honoring it.[29]

Costa raised precisely this question. Mr. Costa, an Italian citizen who owned shares in an electricity company, tried to question its nationalization by challenging his electricity bill. He argued that the nationalization of the electricity sector in Italy was contrary to E.U. law. The *giudice conciliatore* of Milan (a sort of justice of the peace) raised the question to the E.C.J. The Italian government reacted harshly. It submitted that the request was "absolutely inadmissible," inasmuch as the *giudice conciliatore* was obligated to apply the statutory provisions that mandated the nationalization of the electricity sector; those legal provisions could not be put into question through a preliminary reference procedure.[30]

Despite Italy's arguments, the Court did not back down. Given the silence of the Treaty, the E.C.J. turned to its spirit. After reaffirming *Van Gend en Loos*, Judge Lecourt wrote that:

> The integration into the laws of each Member State of provisions which derive from the [E.U.], and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The

[26] Weiler, *supra* note 25, at 2413. For a comparison of the direct effect doctrine of the E.C.J. and the doctrine laid down by the Permanent Court of International Justice in 1928, see Stein, *supra* note 14, at 9–10. He concludes that while the international court created a presumption against direct effect, the E.C.J. created a presumption in favor of it. *See id.* Spiermann, however, denies the ground-breaking nature of the Court's direct effect doctrine, at least from an international law perspective. *See generally* Ole Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10 EUR. J. INT'L L. 763 (1999).

[27] Costa v. E.N.E.L., Case C-6/64, EU:C:1964:66. The explanation of this case also follows the one offered in Dehousse, *supra* note 15, at 41–46.

[28] EC Treaty, art. 5.

[29] Dehousse, *supra* note 15, at 41.

[30] *Costa*, EU:C:1964:66, at 593.

> executive force of [E.U.] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty . . . .[31]

The E.C.J. then proposed a new reading of European integration, based on a permanent transference of competences which was clearly incompatible with the classical vision of state sovereignty as indivisible.[32] The Court noted that:

> The transfer by the States from their domestic legal system to the [E.U.] legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the [E.U.] cannot prevail.[33]

The Court was even more explicit about this proposition in subsequent cases. Thus, in *Simmenthal*,[34] it clarified a question that *Costa* did not address, namely whether a national judge could set aside an internal provision that conflicted with E.U. law. Disregarding Montesquieu's view of the role of the judge as *la bouche de la loi*, the Court effectively inaugurated judicial review of national legislation in Continental Europe, therefore granting powers to national judges that they did not enjoy under their legal systems.[35] The Court ruled that:

> [A] national court which is called upon, within the limits of its jurisdiction, to apply provisions of [E.U.] law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means [as mandated in systems of centralized constitutional review].[36]

Costa, and subsequently *Simmenthal*, thus go one step further than *Van Gend en Loos*. The *Costa* court is willing to say that the E.U. legal system is not only a "new legal order," but rather "an integral part of the legal systems of the Member States"[37] or, to put it differently, a "new legal order of national law."[38] An uncompromising monist constitution was thus imposed on all the Members States. This feature constitutionalizes E.U. law, as the latter definitively becomes, in Weiler's felicitous

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[31] *Id.* at 593–94.

[32] Dehousse, *supra* note 15, at 42.

[33] *Costa*, EU:C:1964:66, at 594.

[34] Amministrazione delle finanze dello Stato v. Simmenthal S.p.A., Case C-106/77, EU:C:1978:49, ¶ 17.

[35] Dehousse, *supra* note 15, at 45.

[36] *Simmenthal*, EU:C:1978:49, ¶ 24. In *Mareleasing v. Comercial Internacional de Alimentación*, Case C-106/89, EU:C:1990:395, ¶ 8, the E.C.J. also ruled that national law had to be interpreted and applied in accordance with E.U. law, thus creating the so-called "indirect effect" of E.U. provisions.

[37] *Costa*, EU:C:1964:66, at 597.

[38] Spiermann, *supra* note 26, at 775. More orthodox accounts of this evolution, such as ARACELI MANGAS MARTÍN & DIEGO J. LIÑÁN NOGUERAS, INSTITUCIONES Y DERECHO DE LA UNIÓN EUROPEA 385 (7th ed. 2005), usually note that the E.U. is an autonomous legal system, distinct both from the international and the national legal systems.

phrase, the "'Higher Law' of the Land" in the Member States.[39] It should come as no surprise that two decades later, the Court itself adopted a constitutional argot by referring to the Treaty of Rome as a "constitutional charter."[40]

In merely two years, therefore, a Copernican revolution took place in the E.U. The enforcement of E.U. provisions went from depending on the action of the Member States to being directly enforceable before national courts, irrespectively of whether those provisions were in conflict with (previous or subsequent) national law.[41] I now turn to the role of those courts.

2.3 Preliminary Reference Procedure

Direct effect and primacy effectively constitutionalized E.U. law. But only on paper. Whether these doctrines would in fact result in the constitutionalization of Europe did not depend solely on the Court. The E.C.J. needed national judges and judiciaries to accept its doctrines and decisions —but this was not guaranteed. In the words of Dehousse:

> The absence of a clear legal basis in the treaty on which to rest this construction could have proved to be a source of weakness. The [E.U.] being deprived of any coercive power, the effectiveness of [E.U.] law is largely dependent on the dialogue between the ECJ and domestic courts. Thus, supremacy could only be effective if it was accepted by the national courts.[42]

The E.C.J. proved to be very successful (also) in this endeavor; the Court, one could argue, "took over" national courts. Professor Sarmiento rightly argues that the creation of a European judicial power was one of the most significant revolutions carried out by the Court.[43] Yet, while the E.C.J.'s interest in laying down the principles of direct effect and primacy may seem clear, it is uncertain why national courts accepted these doctrines, which amounted to a legal revolution for many of them.[44] The rise of this E.U.-wide judiciary is best explained through the role of the preliminary reference procedure. More specifically, through the opportunity that this mechanism granted lower national courts in conjunction with the doctrines of direct

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[39] Weiler, *supra* note 25, at 2415. Hix and Høyland are perhaps less poetic, but they also note that direct effect and primacy are "classical doctrines in federal legal systems." Hix & Høyland, *supra* note 6, at 83.

[40] Les Verts v. Parliament, Case C-294/83, EU:C:1986:166, ¶ 23. Spiermann disagrees with the use of this term, as:

> [I]t is not always justified to associate the term [constitution] with its meaning in national law of the superior, legal source of a sovereign entity. Indeed, the European Court has always linked the expression 'the constitutional charter' to 'the rule of law', suggesting that the meaning of the former is restricted to the application of the latter. This is a decent analogy taken from national public law, though not quite a revolution.

Spiermann, *supra* note 26, at 788–89 (footnotes omitted).

[41] Burley & Mattli, *supra* note 2, at 42.

[42] Dehousse, *supra* note 15, at 43. *Cf.* DESMOND DINAN, EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION 119 (2004) ("National governments may have thought that the two principles were unenforceable without the support of national courts, which would surely be more responsive to national opinion and more attached to national legal prerogatives. If so, member states misjudged the situation.").

[43] DANIEL SARMIENTO, PODER JUDICIAL E INTEGRACIÓN EUROPEA 39 (2004).

[44] KAREN ALTER, THE EUROPEAN COURT'S POLITICAL POWER. SELECTED ESSAYS 95 (2010).

effect and primacy, which transformed the nature of the preliminary reference procedure.

From the perspective of ensuring a uniform interpretation of E.U. law, the so-called "cooperation" between the Court and the national judges is crucial. To understand this relationship, we must bear in mind that the national judge is often the first judge called to apply E.U. law to a given case. The fact, however, that national judges from many different countries, operating in as many different legal systems, must apply E.U. law raises uniformity issues, and thus the question of the correct application of E.U. law across Europe. The Treaties created the preliminary reference procedure precisely from this perspective. Through this procedure, the national judge may (or must, in the case of courts of last instance) request the Court to rule on the correct interpretation or the validity of a E.U. provision when such a ruling is necessary to decide a case before it.[45]

Most likely, the drafters of the Treaty did not anticipate the importance of this procedure.[46] It was meant to be a simple and relatively harmless consultation mechanism between judges, one where the Court would never apply E.U. law to a domestic case.[47] The procedure, however, turned out to be the "jewel in the Crown" of the Court's jurisdiction.[48] Indeed, direct effect and primacy radically transformed its basic consultative nature. If E.U. law was in fact the higher law of the land in a Member State (as implied by those two principles), then any decision on the correct interpretation of its provisions was not merely an intellectual exercise, framed within a speculative debate between judges. Quite the contrary. Under these two doctrines, the consultation procedure effectively became a way to determine the compatibility of national rules with E.U. law.[49] Yet again, then, the Court's decisions transformed a seemingly innocuous mechanism.

But why would national judges refer questions to the Court? What were their incentives to initiate this procedure? Alter has ably described how the E.C.J., through the preliminary reference procedure, "enlisted" the national lower courts against the national high courts' initial resistance to direct effect and primacy. These doctrines

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[45] *See* GIUSEPPE TESAURO, DIRITTO DELL'UNIONE EUROPEA 309–10 (6th ed. 2010).

[46] In PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 442 (5th ed. 2011), it is noted that "Article 267 TFEU, which contains the preliminary ruling procedure, is one of the most interesting provisions of the Treaty. There would have been few, at the inception of the Treaty, who would have guessed its importance in shaping EU law, and the relationship between the national and EU legal systems (footnote omitted)."

[47] *Cf.* Anne Boerger-de Smedt, *Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome*, 21 CONTEMP. EUR. HIST. 339, 352:

Directly inspired by the Italian constitutional system, this mechanism was first proposed and put on paper by Catalano. The jurists crafted Article 177 with great care over a period of two months. Two key elements of Catalano's initial proposal were left out of the final provision: the stipulation that the ECJ's rulings would be 'binding' on national courts and the fact that the Court could also render preliminary rulings concerning the *application* of the treaty (footnote omitted).

[48] Craig & De Búrca, *supra* note 46, at 442.

[49] *Cf.* Tesauro, *supra* note 45, at 313:

The second purpose of the preliminary ruling procedure is therefore to verify the compatibility of a national statute or administrative decision or praxis with E.U. law. The mechanism is complex. It is true that the national ruling that decides on the validity of the national provision follows from the interpretation of E.U. law rendered by the Court. In fact, however, by the end of procedure, which is based on a cooperation between the national judge and the E.C.J., the compatibility of a national rule with E.U. law has been examined.

were a threat to high national courts, but lower courts greatly benefitted from making referrals to the E.C.J.[50] The preliminary reference mechanism empowered lower courts. It allowed them to "circumvent restrictive jurisprudence of higher courts,"[51] magnify the influence of their decisions, and lower the risk of their being reversed by a higher court.[52] This competition between high and lower courts eventually reached a tipping point when it was clear that high courts had failed in their efforts to stop the course of E.U. law. These high courts then attempted to reposition themselves and regain some control through their decisions.[53] By this time, though, national judges had become veritable E.U. judges under the doctrines of direct effect and primacy, whose validity was not to be challenged in the future.

Through the preliminary reference procedure, therefore, structural changes introduced in the E.U. legal system were accompanied by institutional changes in the relation between the European and national judicial systems. In the words of Pescatore, preliminary references established a "relation [between European and national judges] that is much more than a simple consultation, a relation at the level of competences and powers."[54] The constitutionalization of the E.U. legal system was thus completed.

3. THE INTEPRETATION OF EUROPEAN UNION LAW

Having examined the constitutionalization of the E.U. legal system, this section overviews the methods of interpretation that underlie this process. As the "software of the Courts,"[55] the importance of interpretation methods for understanding what the E.C.J. did and why cannot be sufficiently stressed. It is clear from this analysis that the Court has favored a dynamic cumulative approach to legal construction, that is, a non-hierarchical approach to legal interpretation that has enabled it to perform a teleological or meta-teleological reading of E.U. law, with the purpose of furthering European integration.

The Treaties are somewhat ambiguous as to how E.U. law should be interpreted. They state that the E.C.J. "shall ensure that in the interpretation and application of the Treaties the law is observed."[56] This provision, however, is open to multiple readings, especially since the term "law" is equivocal. It seems nevertheless reasonable to suggest that the Treaties do not derogate from the ideal of judicial neutrality.[57] In

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[50] Alter, *supra* note 44, at 99–100.

[51] *Id.* at 100.

[52] *Id.*

[53] *Id.* at 104.

[54] PIERRE PESCATORE, LE DROIT DE L'INTEGRATION 83 (1972), *reprinted in* COLLECTION DROIT DE L'UNION EUROPÉENNE (Fabrice Picod ed., 2005) (translation).

[55] Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUD. 137, 138 (2008).

[56] Consolidated Version of the Treaty on European Union, art. 19, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

[57] *Cf.* Henri de Waele, *The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment*, 6 HANSE L. REV. 3, 10 (2010):

Indeed, Article 19 TEU does provide for a broad mandate . . . . Thence, perhaps everything the Court says ought to be accepted as inherently just, and virtually immune to criticism. But, on this view, this article would amount to a 'blank cheque'-provision. It could, at the same time, very well be seen as a neutral

practice, though, the Court has greatly departed from this paradigm.[58] Although the interpretive criteria of the E.C.J. are those generally deployed across advanced legal systems,[59] the Court has certainly capitalized on the possibilities offered by the Treaties.[60]

The E.C.J. has never issued an articulate doctrine on the interpretation of E.U. law. It came close to it in *C.I.L.F.I.T.*,[61] where it instructed national courts on how to interpret E.U. law. However, clarifying (or not) the indications in *C.I.L.F.I.T.* may be, a more elaborate classification of the Court's interpretive criteria is possible. What follows is a brief overview of the methods of construction of the E.C.J. In my analysis, I rely on both Bredimas[62] and Bengoetxea's[63] classifications. The approach is purely descriptive, as opposed to normative. I merely seek to explain how the Court decides its cases. However, the last part of this section encapsulates my analysis of the interpretive methods of the Court.

3.1 The Court's Methods of Interpretation

3.1.1 The Textual Method

Textual interpretation turns on the language of a provision, on the usual and plain meaning of its words, to determine what it conveys. From this perspective, the main task of the interpreter is to read a provision and discern its ordinary meaning. The method "is based on the presumption that the intention of the parties has been reliably expressed in the text and found its formulation in the latin maxim . . . '*in claris non fit interpretatio*.' . . . ."[64] Textualism normally relies on lexical semantics, grammar and logical methods of interpretation, which comprise canons of interpretation, to infer a meaning; and it can be made to include systemic and contextual techniques of construction.[65] Textualism is usually associated with legal certainty.[66]

Although to my knowledge there are no empirical studies on the issue, the Court usually looks at the text of a provision when it interprets E.U. law. Legal interpretation turns largely on textual meaning,[67] and the Court does not derogate from this understanding. In a decision issued in 1961, the E.C.J. clearly advocated for a textual

competence clause, confirming the institutional existence of the Court, and attributing it a general, but not unlimited power.

[58] Dehousse, *supra* note 15, at 72.

[59] GUNNAR BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU 7 (2012).

[60] Dehousse, *supra* note 15, at 73.

[61] C.I.L.F.I.T. v. Ministero della Sanità, Case C-283/81, EU:C:1982:335.

[62] *See generally* Bredimas, *supra* note 1, at 13–32.

[63] *See generally* Bengoetxea, *supra* note 3, at 233–62.

[64] Bredimas, *supra* note 1, at 15 (footnotes omitted).

[65] *Id.* at 15–17. Bredimas includes the systemic and contextual method under this heading, as it is an objective method of construction. Other scholars, such as Bengoetxea, do not follow this classification, presumably because systemic interpretation looks at elements that are, strictly speaking, outside the text of the provision. *See* Bengoetxea, *supra* note 3, at 240–42. I follow Bredimas in this case.

[66] Koen Lenaerts & José A. Gutiérrez-Fons, *To Say What the Law of the E.U. Is: Methods of Interpretation and the European Court of Justice*, 20 COLUM. J. EUR. L. 3, 8 (2014).

[67] KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 35 (1999).

approach.[68] And this approach reverberates in more recent judgments, where textualism has been linked to legal certainty,[69] and where the plain meaning of a provision was made to prevail over its purpose.[70]

But the E.C.J. is hardly a textualist court. It is true that in some fields, such as horizontal direct effect of directives,[71] criminal law,[72] the technical field of common custom tariffs,[73] or (to an extent) E.U. citizenship,[74] textual interpretation is prevalent.[75] However, these textual decisions are difficult to reconcile with other opinions where the Court strongly limits textual interpretation.[76] Indeed, the E.C.J. "does not . . . accord the same (defeasible) primacy to linguistic arguments as other

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[68] Simon v. Court of Justice, Case C-15/60, EU:C:196:11, at 125 ("In the absence of working documents clearly expressing the intention of the draftsmen of a provision, the Court can base itself only on the scope of the wording as it is and give it a meaning based on a literal and logical interpretation.").

[69] United Kingdom v. Comm'n, Case C-209/96, EU:C:1998:448, ¶ 35 ("The first point to be borne in mind here is the need to ensure legal certainty . . . . The Commission thus cannot choose . . . an interpretation which departs from and is not dictated by the normal meaning of the words used" (citation omitted)).

[70] Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j., Case C-134/08, EU:C:2009:229, ¶ 16 ("[T]he preamble to a [E.U.] act has no binding legal force and cannot be validly relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording" (citation omitted)).

[71] Lenaerts & Gutiérrez-Fons, *supra* note 66, at 8–9; ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 608 (2nd ed. 2006). It may not be a very good example. The textual argument made by the Court in these cases could be used to deny the vertical direct effect of directives that the E.C.J. upholds.

[72] Lenaerts & Gutiérrez-Fons, *supra* note 66, at 9. *But see* Criminal proceedings against Gérard Roudolff, Case C-803/79, EU:C:1980:166 (where the Court, in a criminal case, did not use textual interpretation).

[73] Albertina Albors Llorens, *The European Court of Justice, More than a Teleological Court*, 2 CAMBRIDGE Y.B. EUR. LEGAL STUD. 373, 398 (1990–2000) ("The case law on Common Customs Tariff classification . . . clearly supported the view that where the Court has received sufficient guidance from the relevant texts and where adequate aids to interpretation are available, it will have very limited recourse to teleology.").

[74] *See* SUVI SANKARI, EUROPEAN COURT OF JUSTICE LEGAL REASONING IN CONTEXT (2013), ch. 4. Sankari argues that the Court has been systemic (a method of construction that can be linked to textualism) in its interpretation of E.U. citizenship provisions.

[75] Beck has systematized the main legal and non-legal steadying factors affecting the Court's interpretation, and concludes that "[s]ome factors, like the political or budgetary sensitivity of an issue to Member States, make a *communautaire* reading less likely, whilst others, like the political fashionability of a cause complained against a Member State, commonly make an integrative approach more probable," Beck, *supra* note 59, at 9. This is perhaps his most prominent contribution to this field. Joxerramon Bengoetxea, *Text and Telos in the European Court of Justice: Four Recent Takes on the Legal Reasoning of the ECJ*. 11 EUR. CONST. L. REV. 184, 191 (2015) (book review).

[76] *See* Beck, *supra* note 59, at 282; *Roudolff*, *supra* note 72, at ¶ 7:

From a linguistic point of view the question is whether the words 'emballés séparément' [packaged separately] refer to 'morceaux désossés' [boned or boneless cuts] or whether they refer on the contrary to the exception made for 'les joues, les abats, le flanchet et le jarret' [the chaps, the offals, the thin flanks and the shin]. Although in the different versions there are grammatical indications, particularly the punctuation, which seem to support the former interpretation, the text when read as a whole remains ambiguous. The function of the words in question must therefore be examined in the light of the intention and purpose of the regulations in question (footnote omitted).

See also Staatssecretaris van Financiën v. H.K. Trade Dev. Council, Case C-89/81, EU:C:1982:121, ¶ 5:

Consideration of those two articles, a literal analysis of which is not *prima facie* an appropriate way to resolve the issue as to whether or not an organization which habitually provides services free of charge may be regarded as a taxable person, indicates that it would be advisable to identify the relevant features of the common system of value added tax in the light of its purpose.

high courts."[77] There are even instances where the purpose of a provision has prevailed over its wording.[78] And it is fair to say that, although text is not disregarded, the Court seems reluctant to base its reasoning on a merely textual basis.[79] Textualism is inherently limited in the E.U. for at least two reasons.

In the case of the E.U., textual interpretation raises the issue of multilingualism. The provisions of the Treaties in each of the official languages of the E.U. are treated as equally authentic.[80] E.U. legislation has also established a principle of linguistic equality that affects all the actions of European institutions.[81] The Court also recognized its importance in *C.I.L.F.I.T.*[82] The Court usually seeks to construe provisions in a way consistent with all or almost all the language versions of a text.[83] Having to look at 24 different versions of the same rule restricts a strong textual approach.[84] Potentially, multilingualism could operate in the opposite direction, as multiple, equally authentic provisions could be used to resolve the plain meaning ambiguities within one text, especially if the Court were to stick to the interpretation that had the most support across all of the versions. The Court, however, does not normally operate in this way. Rather, the multiple language provisions allow it, if need be, to extract a more general rule than it probably would if it had to interpret just one language version of the text.[85] As different linguistic versions of the same rule present

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[77] Beck, *supra* note 59, at 281 (footnote omitted).

[78] *E.g.*, Franz Grad v. Finanzamt Traunstein, Case 9/70, EU:C:1970:78, ¶¶ 12–13:

It is true that a literal interpretation of the second paragraph of Article 4 of the Decision might lead to the view that this provision refers to the date on which the Member State concerned has brought the common system into force in its own territory.

However, such an interpretation would not correspond to the aim of the directives in question. The aim of the directives is to ensure that the system of value-added tax is applied throughout the Common Market from a certain date onwards. As long as this date has not yet been reached the Member States retain their freedom of action in this respect.

[79] *Cf.* Bredimas, *supra* note 1, at 70 (arguing that purposivism usually supplements a textual reading).

[80] TEU, art. 55.

[81] Council Regulation 1/1985/EEC, Determining the Languages to be Used by the European Economic Community, 1958 O.J. (L 17) 385.

[82] *C.I.L.F.I.T.*, EU:C:1982:335, ¶ 18.

[83] The E.C.J. insists on linguistic equality. In *The Queen v. Comm'rs of Customs and Excise, ex parte E.M.U. Tabac SARL*, Case C-296/95, EU:C:1998:152, ¶ 34, where there were discrepancies between the language versions of the provision to be applied, the plaintiffs argued that that the Danish and Greek version had to be "disregarded, on the ground that, at the time when the Directive was adopted, those two Member States represented in total only 5% of the population of the 12 Member States and their languages are not easily understood by the nationals of the other Member States." The Court noted that:

[T]o discount two language versions . . . would run counter to the Court's settled case-law to the effect that the need for a uniform interpretation of [E.U.] regulations makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages . . . . [A]ll the language versions must, in principle, be recognised as having the same weight and thus cannot vary according to the size of the population of the Member States using the language in question.

Id. at ¶ 36.

[84] *E.g.*, Arnull, *supra* note 71, at 609–11.

[85] In *Mij PPW Internationaal NV v. Hoofdproduktschap voor Akkerbouwprodukten*, Case C-61/72, E.U.:C:1973:28, ¶ 14, the Court noted that "[n]o argument can be drawn either from any linguistic divergences between the various language versions, or from the multiplicity of the verbs used in one or other of those versions, as the meaning of the provisions in question must be determined with respect to their objective."

"[d]ivergences in nuance, emphasis, and even substantive meaning,"[86] this is understandable.[87] Additionally, multilingualism impairs communication between the judges, making it easier for them to agree on a common objective rather than on the text of a provision.

Another limit to textualism in the E.U. flows from the diverse background against which E.U. law has developed. Legal concepts in the E.U. can generally be traced back to the legal concepts of the Member States, but those concepts differ (sometimes greatly) across countries. This has given the Court yet another reason to depart from the plain meaning rule, relying instead on a "special" meaning rule, which is linked to the so-called "notions of E.U. law," referred to in *C.I.L.F.I.T.*[88] When it comes to these notions, that encompass key legal concepts, the Court cannot accept discrepancies among Member States. Concepts like "worker,"[89] "court or tribunal,"[90] or (in the field of antitrust) "undertaking"[91] have therefore been given a specific E.U. interpretation.

Textualism may be made to encompass a contextual systemic interpretation of the law.[92] If the meaning of a provision is unclear from its text, the E.C.J. often reads the words in their context (both in a narrow and broad sense) to determine what they mean.[93] As seen in the previous section, the Court often relies on this construction technique. Even in "cases where the Court adhere[s] to a literal construction, it [is] anxious to have recourse to a whole series of arguments in order to establish that the solution arrived at was the result of a coherent system wanted by the Treaty and integrated in a logical way in its provisions."[94]

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[86] Fennelly, *supra* note 10, at 660–61. The author offers a very interesting example in relation to the word "task," which is how the Treaties refer to the interpretive role of the Court. The author compares this term to its French counterpart: "*mission*," concluding that "a convincing distinction cannot be made between '*mission*' in the English sense and the teleological method, as applied by the Court." *Id.* at 662–63.

[87] *But cf.* Conway, *supra* note 8, at 277 ("Ordinary meaning may be complicated by problems of translation in the EU, but these should be understood as just that: problems of translation to be resolved on the basis of evidence, not as conceptually recasting the enterprise of legal reasoning or as a pretext for judicial law-making."). Multilingualism sometimes presents an opportunity for the Court to engage in teleology, at times (over)emphasizing the uncertainty derived from linguistic divergence in order to resort to purpose. Fennelly, *supra* note 10, at 664.

[88] *C.I.L.F.I.T.*, *supra* note 61, at ¶ 19–20.

[89] *E.g.*, Lawrie-Blum v. Land Baden-Württemberg, Case C-66/85, EU:C:1986:284, ¶ 16 ("Since freedom of movement for workers constitutes one of the fundamental principles of the [E.U.], the term 'worker' in Article 48 may not be interpreted differently according to the law of each Member State but has [an E.U.] meaning.").

[90] *E.g.*, Dorsch Consult Ingenieursgesellschaft v. Bundesbaugesellschaft Berlin GmbH, Case C-54/96, EU:C:1997:413, ¶ 23:

In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by [E.U.] law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent" (citations omitted).

[91] *E.g.*, Pavlov, Case C-180/98, EU:C:2000:428, ¶ 74 ("The Court has consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed" (citations omitted).).

[92] *See* Greenawalt, *supra* note 67.

[93] Bredimas, *supra* note 1, at 43.

[94] Bengoetxea, *supra* note 3, at 241. The link between this method of interpretation and dynamic interpretation, stressed by some scholars, *e.g.*, *id.* at 250 (naming them "teleo-systemic criteria"), may explain why the E.C.J. is willing to perform a systemic reading of E.U. law.

3.1.2 The Subjective Method

The subjective method of construction is generally linked to the search for the intention of the drafters of the provision. Bredimas quotes Judge Lauterpacht in explaining the rationale behind this construction method: "[t]o say that the intention is irrelevant and what matters is plain words is to divest the task of interpretation of its scientific character. Words are an expression of will. That will is not the will of the judge. He cannot substitute the intentions."[95] Despite the boldness of this assertion, legislative intent is perhaps one of the most complex and perplexing issues in legal interpretation.[96] In the field of international law, this construction method usually implies considering the preparatory works of the treaties.[97]

The E.C.J. has been traditionally reluctant to use this interpretive technique, notably in regard to the Treaties.[98] This reluctance is linked to the secret nature of the *travaux préparatoires* that led to the Treaty of Rome.[99] Recently, however, as the preparatory works of the amendments to the Treaties have become increasingly available, the E.C.J. has been willing to give more weight to them. As explained by Advocate General Kokott:

> [T]he practice of using conventions to prepare Treaty amendments, like the practice of publishing the mandates of intergovernmental conferences, has led to a fundamental change in this area. The greater transparency in the preparations for Treaty amendments opens up new possibilities for interpreting the Treaties which should be utilized as supplementary means of interpretation . . . .[100]

In the case of secondary E.U. legislation, the Court has also been cautious in relying on legislative history, which is now widely available, and is prepared much as in the United States, where it has acquired a central role in the interpretation of legal provisions.[101] Even though legislative history is sometimes considered,[102] the Court generally distrusts legislative intent. Many scholars in the E.U. believe that the drafting history of European legislation should not be given much value, mainly because of the difficulties involved in determining the intentions of the legislator or the ossifying effect that reliance on those intentions may have.[103]

In the case of the E.U., this reluctance can also respond, in my opinion, to the fact that the search for a legislative intent may reveal disputes between Member States

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[95] Bredimas, *supra* note 1, at 17.

[96] Greenawalt, *supra* note 67, at 91 ("Few subjects about legislative interpretation are as puzzling as the concept of legislative intent.").

[97] Vienna Convention on the Law of Treaties, art. 32.

[98] Bengoetxea does not even include this method in his classification. *See* Bengoextea, *supra* note 3.

[99] *See* Arnull, *supra* note 71, at 614.

[100] Opinion of Advocate General Kokott, Inuit Tapiriit Kanatami v. Parliament and Council, Case C-583/11 P, EU:C:2013:21, ¶ 32 (footnote omitted).

[101] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 31 (1997):

Resort to legislative history has become so common [in the United States] that lawyerly wags have popularized a humorous quip inverting the oft-recited (and oft-ignored) rule as to when its use is appropriate: 'One should consult the text of the statute,' the joke goes, 'only when the legislative history is ambiguous.' Alas, that is no longer funny. Reality has overtaken parody.

[102] Fennelly, *supra* note 10, at 666.

[103] Lenaerts & Gutiérrez-Fons, *supra* note 66, at 21–22.

over the drafting of a provision. The legislative procedure of the E.U. leaves room for national perspectives to arise in the drafting of rules. Often, the interests of some countries prevail over those of others. To revive already settled conflicts when interpreting a legislative provision may not be a good idea, especially if European integration is considered desirable. This phenomenon may also explain why the Court, and (almost) no scholar, defends an original intent approach to E.U. law.[104]

3.1.3 The Dynamic Method

The above criteria may be contrasted, as Bengoetxea suggests, with a dynamic method of legal construction.[105] While the former offers a static picture of the law, the latter allows it to evolve over time, according to the context in which a rule is applied.[106] This method, in fact, "recognizes that the purpose may be independent of both the text and the intention."[107] Its origins, at least at an international level, are usually connected with the rise of international organizations.[108] The dynamic method of interpretation includes teleological, functional, and consequentialist arguments;[109] some scholars suggest that it also encompasses a comparative method of construction.[110] At the extremes, dynamic interpretation may not be far from judicial activism,[111] particularly when it seeks to ascertain the "emergent purpose" of a rule,[112] or where the *telos* of the latter is defined at a high level of generality.[113]

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[104] *But cf.*, Conway, *supra* note 8, at 26 ("To briefly outline the normative theory advocated in this work, it contrasts interpretation with law-making and relates legitimate interpretation to a close textual analysis of the most relevant specific laws (in priority over more general provisions) and an effort to retrieve original intention."). Original meaning, despite its prevalence in American constitutional interpretation, is also relatively unknown in the E.U. This, I believe, may be because Treaties' provisions, unlike the provisions of the Constitution of the United States, are fairly recent, so that their meaning may still be presumed to be the same as when they were drafted. *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012) ("Properly understood, originalism . . . . applies mostly to older documents that continue in effect: Those are the ones whose operative terms are most likely to have undergone semantic shift."). In the few cases where the meaning of a concept has evolved since the 1960s, as in the case of gender equality, which is enshrined in the Treaties, the Court has been willing to perform a progressive interpretation of the relevant provisions, more in line with a "living constitution" conception than with an original meaning approach. On how the interpretation of the concept of gender equality has evolved in E.U. law, see Tesauro, *supra* note 45, at 121–29. On sexual and gender discrimination, see Kenneth A. Armstrong, *Legal Integration: Theorizing the Legal Dimension of European Integration*, J. COMMON MKT. STUD., June 1998, at 155, 164–66. This "progressive" interpretation should come as no surprise if one reads *C.I.L.F.I.T.* The decision refers to the "state of evolution" as one of the factors to take into consideration when interpreting a provision. *C.I.L.F.I.T.*, *supra* note 61, at ¶ 20. As noted by Gaja, "the E.C.J. mentioned the need to refer to the 'state of evolution' of [E.U.] law when interpreting a legal rule. The use of dynamic criteria implies that Treaty provisions and, likewise, acts adopted by [E.U.] institutions may acquire a meaning other than that originally intended." Giorgio Gaja, *Beyond the Reasons Stated in Judgments*, 92 MICH. L. REV. 1966, 1975 (1993) (reviewing JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE (1993)).

[105] Bengoetxea, *supra* note 3, at 251–52. This characterization resembles that of Judge Pescatore, who already in 1972 talked about "constructive" interpretive criteria. Pescatore, *supra* note 54, at 79.

[106] Bengoetxea, *supra* note 3, at 252.

[107] Bredimas, *supra* note 1, at 20.

[108] *Id.* at 19.

[109] Bengoetxea, *supra* note 3, at 251–52.

[110] Arnull, *supra* note 71, at 617–18.

[111] Lenaerts & Gutiérrez-Fons, *supra* note 66, at 34–37.

[112] Bredimas, *supra* note 1, at 20.

[113] *Cf.* Scalia & Garner, *supra* note 104, at 343 (citation omitted):

Teleology is probably the Court's preferred method of dynamic interpretation. In its most traditional sense, a teleological or purposive construction of the law emphasizes "the function, utility, aim and purpose which the [provision] has to fulfil."[114] In the case of the Court, however, teleology means more than a particular reading of E.U. provisions. In fact:

> It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules. . . . It is not simply the telos of the rules to be interpreted that matters but also the telos of the legal context in which those rules exist. We can talk therefore of both a teleological and a meta-teleological reasoning in the Court.[115]

This meta-teleological approach can be linked, again, to the need of ensuring legal uniformity across Europe, as it gives "[E.U.] provisions the coherence of a complete system of law [allowing the Court] to create a 'European teleology,' which protects EU law against the dangers of dissolution within the various national legal orders."[116]

For the Court, dynamic interpretation also means "effective" interpretation. The Court recurrently stresses the importance of the so-called *effet utile* of E.U. provisions,[117] which calls for a construction that ensures the effectiveness of the asserted purposes of a provision. Once the aim of a rule, as opposed to its textual meaning, has been established, the focus shifts to determining whether the aim is preserved in a given case. Additionally, the dynamic approach allows the Court to consider the consequences of a given construction,[118] and even to engage in a comparative analysis of the laws of the Member States.[119]

There is no doubt: the dynamic method plays a major role in the decisions of the Court. Even if the E.C.J. has relied on all classical methods of interpretation and has not yielded exclusively to any one of them,[120] the E.C.J. often favors a dynamic reading of E.U. law,[121] which is indeed "emblematic" of the Court's approach.[122] The

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The mere statement of the spirit-over-letter concept gives reason to doubt its validity. No one has ever set forth any principles for perceiving an at-large spirit that overcomes the letter. The concept is, in practice, a bald assertion of an unspecified and hence undoubted judicial power to ignore what the law says, leading to 'completely unforeseeable and unreasonable results.

See also infra note 133.

[114] Bredimas, *supra* note 1, at 20.

[115] Maduro, *supra* note 55, at 140 (footnote omitted). Sankari also mentions the meta-teleological nature of the Court's approach. Sankari, *supra* note 74, at 67.

[116] Loïc Azoulai & Renaud Dehousse, *The European Court of Justice and the Legal Dynamics of European Integration*, *in* THE OXFORD HANDBOOK OF THE EUROPEAN UNION 350, 354 (Erik Jones et al. eds., 2012).

[117] Lenaerts & Gutiérrez-Fons, *supra* note 66, at 17–23, 32; Bredimas, *supra* note 1, at 20, 77–80.

[118] Lenaerts & Gutiérrez Fons, *supra* note 66, at 32.

[119] Maduro, *supra* note 55, at 140 ("In the face of such potential challenges and of largely 'incomplete' legal texts it was only natural for the Court to 'appeal' to national legal orders."); Arnull, *supra* note 71, at 617–18. For a full overview on the importance of comparative law in the case law of the E.C.J., see generally Lenaerts & Gutiérrez-Fons, *supra* note 66, at 44–49.

[120] Maduro, *supra* note 55. *See also* Arnull, *supra* note 71, at 607 ("However, the teological approach is only one of a range of methods employed by the Court to resolve questions of interpretation.").

[121] Practically all commentators agree on this issue. *See, e.g.*, Arnull, *supra* note 71, at 621 (agreeing that the E.C.J. often favors a dynamic interpretation of E.U. law).

[122] Sankari, *supra* note 74.

Court does not normally give purpose precedence over the ordinary meaning of a provision,[123] but dynamic considerations always play an important role in its interpretation of E.U. law.

Many scholars link the dynamic approach with the open-ended nature of E.U. provisions. The Treaty of Rome, and for that matter all the subsequent treaties, are in fact framework treaties, which "do not pretend to govern in an absolute manner all eventualities,"[124] and make constant reference to fluid legal concepts that allow the interpreter to exercise substantial discretion.

Some commentators go even further and suggest that the Court is obligated to deliver integrative decisions, which require a dynamic construction of E.U. law.[125] On this view, the Treaties enshrine certain objectives, including the "closer union" objective, that require the Court to engage in dynamic interpretation.[126] The Court therefore cannot act as a neutral arbiter, like national courts, because its task is to achieve the Treaties' aims.[127] From a separation-of-powers perspective, Beck notes that "[t]he linguistic and norm uncertainty of the EU treaty structure means that Member States effectively delegated crucial choices regarding the future course and depth of European integration to the judicature."[128]

The tendency to favor a dynamic reading is not restricted to original cases, such as *Van Gen den Loos* or *Costa*. It extends to more recent ones. *Pringle* provides a good example.[129] Amid the Euro Crisis, the countries that had adopted the Euro agreed to create a mechanism to mobilize funding and deliver support, under strict conditionality, to those that were experiencing severe financial difficulties. The mechanism, however, was facially contrary to the "no bail-out" clause in the Treaties. The issue reached the Court through a preliminary reference. The E.C.J., considering (perhaps surprisingly) that the clause was unclear, turned to its objective. It then decided that the financing mechanism was consistent with the Treaties so long as it was conditional, since the no bail-out clause aimed to ensure that the Member States followed a sound budgetary policy, by guaranteeing that they remained subject to the logic of the market when they took on debt.[130]

This decision is one of the most extreme examples of the Court's teleological method. *Pringle* is one of those cases where *telos* does not merely assist the interpreter in their task, but prevails over the ordinary meaning of the provision.[131] Predictably,

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[123] Bredimas, *supra* note 1, at 70. But some examples can be found. *See Franz Grad*, *supra* note 78.

[124] Bredimas, *supra* note 1, at 70.

[125] *Cf.* De Waele, *supra* note 57, at 11 ("An evergreen opinion in European legal doctrine . . . contends that the Court is in fact legally obligated to steer a pro-integration course, and required to always deliver judgments that strengthen and expand the [E.U.] legal order.").

[126] The same may be said about secondary law, as "EU legislation is drafted to give effect to the integrationist objectives of the Treaties." Beck, *supra* note 59, at 319. On the "closer union" objective, see generally *id.* at 319–22.

[127] Fennelly, *supra* note 10, at 672.

[128] Beck, *supra* note 59, at 7.

[129] Pringle v. Government of Ireland and Others, Case C-370/12, E.U.:C:2012:756.

[130] *Pringle*, E.U.:C:2012:756, ¶¶ 129–47.

[131] On this distinction, see Greenawalt, *supra* note 67, at 67.

the judgment sparked an intense debate. Most commentators welcomed it,[132] but others passionately raised their voice against it.[133] Whereas the decision could be defended from the perspective of the extreme situation in which the Euro Crisis had placed the E.U., close to disintegration, it remains true that some of its passages are highly controversial.

3.2 An Integrative Cumulative Approach

The Court's methods of interpretation invite some reflections. What exactly is particular about the Court's stance? If, as we have seen, the Court relies on well-established methods of construction and, despite favoring dynamic interpretation, does not yield exclusively to any one of them, what makes it stand out? Is it merely a preference towards a dynamic teleological reading of E.U. provisions? I believe that the defining feature of the Court is its integrative cumulative approach —that is, a non-hierarchical approach to legal interpretation that allows it to perform an overall teleological or meta-teleological reading of E.U. law, in order to further integration.

While some early commentators already pointed in this direction,[134] I agree with Beck when he says that the Court deploys a cumulative or fused approach to legal reasoning.[135] This approach can be linked to the three-stage method developed by MacCormick and Summers, according to which "[l]inguistic arguments give way to or are complemented by systemic or purposive arguments only if they are inconclusive and/or in the face of strong countervailing reasons."[136] In the case of the Court, though, this approach loses its hierarchical nature, and all the main interpretive techniques are

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[132] *E.g.*, Paul Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20 MAASTRICHT J. EUR. & COMP. L. 3 (2013); Gunnar Beck, *The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the Pringle Case*, 20 MAASTRICHT J. EUR. & COMP. L. 635 (2013) (responding to and reviewing Craig's article).

[133] See Gunnar Beck, *The Court of Justice, Legal Reasoning, and the Pringle Case – Law as a Continuation of Politics by Other Means*, 39 EUR. L. REV. 234 (2014), who, despite being otherwise in accord with the Court's construction of E.U. law, argues that "this case illustrates, as well as carries to extremes, general features of its distinctive flexible approach to legal reasoning," *id.* at 234, in the sense that "the Court exploits the vagueness and norm uncertainty in its general approach to the maximum, probably to a point where legal reasoning no longer imposes any constraints on judicial law-making. At this point, the legal becomes the political," *id.* at 234-35, that is "law no longer appears to constrain political choices," *id.* at 236. According to Beck, *Pringle* evidences that:

> [I]f a court construes a legal rule, and its methodological approach does not limit it to either the purposes stated in the legislation or in its Recitals or its preparatory works, it is then at liberty to choose between several purposive considerations and therefore between alternative interpretations that will lead to very different decisions.

Id. at 238. The issue is the level of generality at which teleology can act. In a subsequent article, Professor Craig notes that there are three types of cases where the conjunction of text and purpose can occur, according to the level of generality, one of them being the overall treaty objective, with respect to which he claims that "there is nothing illegitimate in courts adverting to a general background purpose or object when interpreting a constitution or treaty, nor is there anything illegitimate in their construing particular constitutional or treaty provisions so as to attain that purpose." Paul Craig, *Pringle and the Nature of Legal Reasoning*, 21 MAASTRICHT J. EUR. & COMP. L. 205, 212 (2014).

[134] *E.g.*, Bengoetxea, *supra* note 3, at 233 ("The main idea expressed therein was that even if the wording used seems to be clear, it is still necessary to refer to the spirit, general scheme, and context of the provision; a fortiori if the wording is unclear. Thus the literal meaning of a provision gives way to the arguments from the general scheme and context of application." (citation omitted)).

[135] Beck, *supra* note 59, at 283.

[136] *Id.* at 279.

considered together, in a cumulative or fused manner. The Court, indeed, does not grant textual arguments the same defeasible primacy as other high courts.[137] The prevalent approach is therefore the one in *Merck*.[138] When the E.C.J. interprets a provision of E.U. law, it "considers the wording of the provision, in the legal context and general scheme in which it occurs . . . in the light of its purposes and objectives, including the system and objectives of the EU Treaties."[139] For the Court, therefore, the text is relevant, but not preeminent.

It is this approach that, in my opinion, makes the E.C.J. stand out. And it is precisely this approach that allows the Court to harmonize all interpretive techniques under a dynamic reading of E.U. provision, and more specifically under a meta-teleological construction of E.U. law as a whole, in rendering its decisions.[140] The *telos* of the norms is always considered, irrespectively of whether the language of the provision is clear or not. And its effectiveness is subsequently attained by the *effet utile* doctrine. The Court therefore does not yield exclusively to textualism *in order* to impregnate all of its legal interpretation with an European teleology.

This European teleology, furthermore, points in a consistent direction. In using a dynamic cumulative approach, the Court favors integration over other possible objectives. This is not banal. The E.C.J. does promote, in its case law, a specific goal: integrating Europe. This feature enables it to adopt an *in dubio pro communitate* stance.[141] In case of doubt, the Court ceases to be a neutral court, and furthers integration. In sum, the E.C.J.'s approach is both cumulative (because text is not preeminent and is always read in conjunction with purpose) and integrative (because this allows the Court to promote integration) —an integrative cumulative approach. Only thanks to this approach was the Court able to achieve the constitutionalization of the E.U. legal order referred to above. And, it is this integrative stance that, in my view, allows Azoulai and Dehousse to classify the dynamic method not as a mere construction criterion, but rather as one of the "main techniques" of the Court to constitutionalize the E.U.[142]

As striking as this approach may seem, especially for common law lawyers, it is a *fait accompli*. In its endeavor, the Court was able to "enlist" not only national courts, but also legal scholars and Member States. With few exceptions,[143] commentators

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[137] *See id.* at 281.

[138] *See* Merck Hauptzollamt Hamburg-Jonas, Case C-292/82, EU:C:1983:335, ¶ 12 ("However, as the Court has emphasized in previous decisions, in interpreting a provision of [E.U.] law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part.").

[139] Beck, *supra* note 59, at 283 (footnote omitted).

[140] This approach is apparent in many cases, even very recent ones, such as Banque postale v. E.C.B., Case T-733/16, EU:T:2018:477, ¶¶ 42–58, where, in order to assess whether deference should be accorded to an agency decision, the textual reading of the applicable provision, whose meaning was clear, was supplemented by other methods of interpretation, all leading to the same conclusion, as if the ordinary meaning of the provisions in question were insufficient. While this Note refers to the E.C.J., most of the conclusions drawn here may be extended to the rest of E.U. courts, although it would be interesting to further investigate this question.

[141] Beck, *supra* note 59, at 14 ("*Communautaire* means that the Court adopts an *in dubio pro communitate* interpretation which represents the Court's institutional default position.").

[142] *See* Azoulai & Dehousse, *supra* note 116, at 353.

[143] *See generally* HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986).

either contextualize the E.C.J. decisions[144] or quite simply agree with its approach,[145] and little debate exists over legal interpretation, unlike in the United States.[146] The Court has also secured the approval of the Member States,[147] as shown by the fact that they have consistently expanded the jurisdiction of the E.C.J. over time.[148] Patience, however, may not be infinite. A growing number of scholars are criticizing the Court.[149] And some Member States seem to be increasingly dissatisfied —it should come as no surprise that many supporters of Brexit have fiercely criticized the role of the Court.[150]

Regardless, we still need to address an additional question. Why did the Court act in this manner? How can we explain the process of constitutionalization and the integrative cumulative approach that made it possible? Although there is no definitive answer to this question, in the next section I offer my assessment of the matter.

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[144] *See, e.g.*, Albors Llorens, *supra* note 73, at 374 ("[A] comparatively small number of decisions from across the Court's vast case law has been chosen to [support the claim that the Court is an activist court]. But to be fair to the Court, its judgments need to be taken within a temporal and substantive context, rather than in isolation." (citations omitted)). *See generally* Sankari, *supra* note 74 (arguing that the Court's construction of E.U. law is not as purposive if studied in context). Stressing only the "moderate" cases may be of little help, as "one may draw an analogy with a physician who, in alternation, heals and kills patients: the latter action does not become any more acceptable or soothing because of the former." De Waele, *supra* note 57, at 14.

[145] Therefore, most of the authors I have cited agree with the Court's approach. *See, e.g.*, Lenaerts & Gutiérrez-Fons, *supra* note 66, at 34–37; Arnull, *supra* note 71, at 620–621; Maduro, *supra* note 55. Two sets of reasons may explain this stance. The fact that European integration has often been presented as a remedy to war may illustrate why scholars tend to be lenient towards the E.C.J.'s interpretive approach. Without it, the E.U. would probably not have survived. Those who consider European integration a desirable aim are therefore reluctant to criticize the Court. Additionally, the constitutionalization of the E.U. also empowered the European bar, which is comprised of many professors and lawyers, that have a vested interest in the "juridification" of the community. This last reason is discussed in Burley & Mattli, *supra* note 2, at 59–60.

[146] In the United States, the counter-majoritarian fear is stronger as judicial review was largely created by the Supreme Court and, unlike in the E.U., is not enshrined in the Constitution. Maduro, *supra* note 55, at 8, n.13 (version with footnotes).

[147] This may be because, as intergovernmentalists argue, the actions of the Court have generally been consistent with the interests of the Member States, at least from a commercial and industrial perspective. *See* discussion *infra* Section 4.1. Additionally, the Court may have allowed countries to circumvent the political debate and present the results of integration as a judicial *fait accompli*. *See* Burley & Mattli, *supra* note 2, at 72.

[148] *Cf.* Fennelly, *supra* note 10, at 670 ("It is, however, reasonable to interpret the unanimous Member State acceptance of the deepening and broadening of the original objectives as giving some form of implicit approval to prior Court interpretations of declarations of narrower scope.").

[149] *See, e.g.*, de Waele, *supra* note 57. He argues that multilingualism does not justify a purposive approach, *id.* at 10, and that the Court is not obligated by the Treaties to deliver integrative decisions, *id.* at 11. Finally, he believes that the lack of legislative override can be attributed to the difficulties in amending the Treaties and in anticipating whether a decision will result in long-term losses or gains, *id.* at 16–17. *See also* Conway, *supra* note 8, at 26 ("In many . . . cases, doctrines and new rules have emerged of general application that far transcend their immediate facts and so that can make these cases analogous to legal provisions of a legislative character, in violation of an understanding of the relative distinctness of the legislative and judicial functions.").

[150] *See generally* Annabelle Dickson & Quentin Ariès, *9 Reasons Why (Some) Brits Hate Europe's Highest Court*, POLITICO EUROPE (Jul. 26, 2017, 4:00 AM), https://www.politico.eu/article/brexit-ecj-european-court-of-justice-9-reasons-why-some-brits-hate-europes-highest-court/.

4. A LAW OF INTEGRATION

Having discussed the constitutionalization of E.U. law, as well as the approach to legal interpretation adopted by the Court to effectuate it, I will now briefly examine the reasons behind this process. It is always difficult to trace causal relationships in these fields, but I will argue that, even if extra-legal variables must be taken into consideration, the role of law, and especially the very nature of E.U. law, as well as the dilemma its interpreter faces, cannot be disregarded.

However tempting *ideational* theories of European integration might be,[151] it would be naïve to submit that *interests* did not play a substantive role in the process of integration, given what is at stake. After all, the E.C.J. judges and advocates general are appointed directly by the Member States in a somewhat opaque fashion,[152] the Court itself has institutional interests, and so do other actors, like Member States, big corporations, and social players. Following this suggestion, scholars have tried to specify the conditions that govern the Court's integrative logic.

An examination of the main theories behind this process follows. After assessing these theories, I will make my argument.

4.1 Classical Views on Legal Integration

The first explanations of European legal integration were *legal-formalist*.[153] From the legal-formalist perspective, the Court is a neutral actor displaying no specific interest in integration, and the constitutionalization process appears as the logical extension of the Treaties.[154] According to this view, national courts were also anxious to welcome the doctrines of direct effect and primacy.[155] However, perhaps because proximity makes "big pictures" harder to see, or because lawyers can be sometimes myopic,[156] legal approaches to this phenomenon seem insufficient to explain European legal integration. As Shapiro pointed out a few decades ago, strict legalists do "constitutional law without politics."[157] The E.U. is presented as "a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology."[158] While legalists are right to point out the integrative logic of E.U. law, it is difficult to claim that the developments of E.U. law brought about by

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[151] *See* Craig Parsons, *Domestic Interests, Ideas and Integration: Lessons from the French Case*, 38 J. COMMON MKT. STUD. 45, 50–52 (2000).

[152] On the appointment of judges and advocates-general, see the Treaty on the Functioning of the European Union, arts. 253–55, Oct. 26, 2012, 2012 OJ (C 326) 1. But the appointment is less politicized than in the United States. *Government by Judges? The European Court of Justice Emerges Blinking into the Limelight*, THE ECONOMIST (Jan. 15, 2004), https://www.economist.com/europe/2004/01/15/government-by-judges (citing former President Skouris).

[153] For a brief overview of the evolution of the scholarship on this field, see Alter, *supra* note 44, at 36–37.

[154] Hix & Høyland, *supra* note 6, at 95–96.

[155] *Id.*

[156] *See* Dehousse, *supra* note 15, at 81.

[157] Martin Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537, 538 (1980).

[158] *Id.*

the Court were pure extensions of the Treaties.[159] Besides, only a sort of objective interest —the interest of law— is taken into consideration.[160]

More recently, political scientists have entered the debate. These scholars explain the role of the Court in E.U. integration from the viewpoint of one of the two main theories of European integration: intergovernmentalism or neofunctionalism.[161]

Drawing from realism in international relations, *intergovernmentalism*[162] contends that the constitutionalization of the E.U. is a calculated strategy by the Member States.[163] On this view, national governments are the main actors in the integration process and the Court cannot force upon them a pace of integration that does not suit their interests.[164] Had the Member States been opposed to this development, they would have either not complied with the Court's decisions or simply overridden them through legislation.[165] Garrett further develops this theory. Member States, he argues, have an interest in delegating authority to the E.C.J. as a way to monitor compliance with E.U. law.[166] However, the question is whether the Court "implement[s] the collective internal market preferences of [E.U.] members,"[167] defined in terms of domestic industrial interests.[168] Garrett contends that this is the case, as E.C.J. decisions are aligned with the interests of France and Germany.[169] From this perspective, then, the Court would have furthered European integration because that was what the Member States (and notably France and Germany) desired, or else they would have stopped it from doing so. This theory, however, is not without its issues. For one, it is not well supported empirically.[170] Besides, it assumes perfect

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[159] Hix & Høyland, *supra* note 6, at 96.

[160] *See id.*

[161] Neorationalist approaches, such as the one presented in Geoffrey Garrett, *International Cooperation and Institutional Choice*, 46 INT'L ORG. 533 (1992), can be included in the intergovernmental approach. So do Hix & Høyland, *supra* note 6, at 97.

[162] *See generally* SABINE SAURUGGER, THÉORIES ET CONCEPTS DE L'INTÉGRATION EUROPÉENNE 93–129 (2009).

[163] Hix & Høyland, *supra* note 6, at 97.

[164] Burley & Mattli, *supra* note 2, at 48.

[165] Clifford J. Carrubba et al., *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 435, 437–39 (2008).

[166] Burley & Mattli, *supra* note 2, at 50.

[167] Garrett, *supra* note 161, at 558.

[168] Hix & Høyland, *supra* note 6, at 97. *See, e.g.*, Dehousse, *supra* note 15, at 71.

[169] Garrett, *supra* note 161, at 558.

[170] Dehousse, *supra* note 15, at 95 ("There is little evidence to support this view. In a survey of the free movement of goods, Bernadette Kilroy found that in 86 per cent of the cases, the Court followed the Commission submissions, rather than those of member state governments." (citation omitted)); Hix & Høyland, *supra* note 6, at 98 ("At an empirical level, there is substantial evidence that the ECJ and national courts have often taken decisions that governments have opposed, and which have had negative effects on the competitiveness of national economies in the single market." (citation omitted)); Burley & Mattli, *supra* note 2, at 50–51 (arguing that Garrett's analysis with respect to France and Germany is simply wrong and that the Court does not track the positions of the Member States). However, in Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 145, 171–72 (1998) and in Carrubba et al., *supra* note 165, this approach is defended empirically. The main issue is how to operationalize the concepts. At any rate, it would be difficult to agree that E.C.J. decisions are consistently coherent with Member States' interests.

information on the part of all the actors,[171] and tends to "deduce interest-compatibility from compliance."[172]

Neofunctionalism offers a different view on this process.[173] The neofunctional approach explores the interplay of many actors, both supranational (the judges and the advocates general, and even the European Commission) and infranational (such as private litigants, especially big corporations,[174] lawyers, law professors, and lower national courts).[175] These actors would be glued together by their own self-interests, and their interaction enabled by the direct effect and primacy doctrines, as well as the process of reciprocal empowerment between the E.C.J. and national courts. The key here is that the interaction produces *spillovers*, both functional and political, so that integration in one sector inevitably leads to integration in another sector, thus creating a never-ending integrative spiral.[176] The role of the Court, and especially its dynamic method of interpretation, is essential to the process. Spillovers may only take place through a very dynamic construction of E.U. law, and their effectiveness depends on the perception that they are not politicized.[177] Perhaps neofunctionalism "overemphasizes the autonomy of supranational institutions and transnational interests in the promotion of EU legal integration,"[178] but it is still the most complete and plausible theory to explain this phenomenon.

4.2 A More Nuanced Legal Approach

Political scientists usually dismiss the possibility of explaining the Court's integrative dynamic, and thus its way of construing E.U. law, merely from a legal standpoint. They are right to say that any purely legal answer is incomplete. However, they underestimate the role of law in this process.

What both intergovernmentalism and neofunctionalism have in common is that they see law, and the role of the Court, as a dependent variable. Whereas intergovernmentalism is clearly an interest-based theory, neofunctionalism is more refined, but in the end extra-legal variables prevail. Both theories consider law as a "'transmission belt,' whose primary function is to implement choices made elsewhere."[179] In my opinion, this approach, or the merely legalist one, falls short of providing a satisfactory analysis.

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[171] Hix & Høyland, *supra* note 6, at 98.

[172] Burley & Mattli, *supra* note 2, at 51.

[173] *See generally* Saurugger, *supra* note 162, at 67–92.

[174] The role of big corporations in the process of integration through law in Europe cannot be stressed enough. Hix and Høyland argue that "[t]he main non-state actors that have sufficient resources to bring cases to the ECJ are private firms and interest groups." Hix & Høyland, *supra* note 6, at 98. In this respect, see Richard Rawlings, *The Eurolaw Game: Some Deductions from a Saga*, 20 J.L. & SOC'Y 309, 309 (1993), who speaks of "sagas" of litigation, that show the "potential in the internal market for the use of litigation strategies to achieve economic ends by powerful corporate interests which are able, as 'repeat players', to litigate frequently."

[175] Burley & Mattley, *supra* note 2, at 59–64.

[176] Saurugger, *supra* note 162, at 79.

[177] Burley & Mattli, *supra* note 2, at 68–73.

[178] Hix & Høyland, *supra* note 6, at 100.

[179] Dehousse, *supra* note 15, at 78.

Neofunctionalism is probably the best theory to explain legal integration, as spillovers correctly capture the integrative dynamic, and it accounts for the incentives of the actors involved in the process.[180] However, neofunctionalists take law for granted. And, when they do so, they engage in a *petitio principii*. They assume that spillovers take place because the actors that interact in the European scenario are bound together by the constitutional doctrines laid down by the E.C.J. and the preliminary reference procedure. But this statement begs the question. Why did these doctrines, and a particular understanding of the preliminary reference procedure, emerge in the first place?

Almost three decades ago, Burley and Mattli (as sophisticated neofunctionalist scholars as they come) argued for a return to "sophisticated legalism," that is, to a legalism that "recognizes the existence of countervailing political forces but that nevertheless accords a role for the autonomous power of law."[181] In the next few paragraphs, I will attempt to follow their suggestion, and so demonstrate that law indeed has great explanatory power within the E.U.'s integrative project.

The Court is a good starting point. The existence of an autonomous judicial body charged with the application of E.U. law is relevant, independent of other variables. The decisions of E.U. judges cannot be regarded as a pure consequence of choices made elsewhere,[182] and account for the fact that "the legal sphere has experienced a dynamic all of its own."[183] The Court is now a thriving organization of judges coming from all corners of Europe, where different legal visions interact with one another. But this was not always the case. During the foundational period, the Court was a rather small body of judges with a similar sociocultural and legal background.[184] French law, whose proclivity towards teleology is well known, imbued the Court's legal outlook.[185] The prevailing ethos of those lawyers was also alike. After the wars that tore Europe apart, they all shared the view that national power needed to be confined to secure the peace, and countries needed to be contained.[186] These "Monnet's men" were the perfect candidates to constitutionalize the E.U.[187]

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[180] *See id.* at 76–96 (analyzing the dynamics of the ECJ, member states and national actors that permitted legal integration).

[181] Burley & Mattli, *supra* note 2, at 76. Some scholars, such as Dehousse or Weiler, have already tried a subtler legal approach, known as "integration through law." *See* Renaud Dehousse & Joseph H.H. Weiler, *The Legal Dimension*, *in* THE DYNAMICS OF EUROPEAN INTEGRATION 242 (William Wallace ed., 1990); Dehousse, *supra* note 15. For more recent approaches, see generally Grimmel, *supra* note 13. I am aware of the fact that in some of these works the interaction between legal and extra-legal variables is often fuzzy and that the incentives for action remain unclear. Burley & Mattli, *supra* note 2, at 46. However, these attempts can only be praised.

[182] *See* Dehousse & Weiler, *supra* note 181, at 246–47 (acknowledging the role of the courts in European integration).

[183] Dehousse, *supra* note 15, at 78.

[184] Antonin Cohen & Antoine Vauchez, *The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited*, 7 ANN. REV. L. & SOC. STUD. 417, 420 (2011).

[185] *See* Fennelly, *supra* note 10, at 658.

[186] *See* Grimmel, *supra* note 13, at 65 ("[After the War,] there was broad consent that the old system of nation states ha[d] to be contained within an effective institutional structure.").

[187] *Cf.* Cohen & Vauchez, *supra* note 184, at 419–20 ("[W]e argue that the general dynamics of the emerging European field of power, as well as the socioprofessional profiles of the members of the Court, strongly determined the early path towards constitutionalization.").

But the soil they encountered was also fertile. There is some truth in the legalist assertion that the integrative logic of European provisions was a determinant in the Court's approach to legal reasoning. Although there was no pre-ordained teleology of legal integration,[188] the provisions the judges were called to apply were indeed favorable to integration. Not only are the Treaties framework treaties that grant considerable discretion to the interpreter, but E.U. law also enshrines a series of integrative principles, chief among which is the "closer union" objective, that call for a dynamic legal interpretation to secure their attainment.[189]

The general context also helped. Burley and Mattli rightly capture the dynamics of legal integration when they argue that there was a true process of demand and supply of (integrative) law that triggered functional spillovers.[190] This model, however, overlooks some elements. Whereas Burley and Mattli talk about political spillovers,[191] they do not consider the fact that the Court was dependent on the political reality of the E.U. —more specifically, on its shortcomings.[192] In the integration process, law has acted as an institution, both responding to an environment and altering it.[193] Law, in fact, is part of a governance system,[194] and it cannot be separated from the decision-making process of the community. On this view, the constitutionalization of the E.U. legal system through the Court's approach to legal interpretation appears natural. In fact, during the first few decades into the European project, positive integration was completely absent.[195] In this context, the Court found itself in a "double bind."[196] Because the legislator refused to define the legal nature of

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[188] Armstrong, *supra* note 104, at 156.

[189] *See* Fennelly, *supra* note 10, at 670–71. How this kind of law operates for a judge is exemplified by the conclusion drawn by Lord Denning in the well-known opinion of Bulmer v. Bollinger [1974] Ch 401 at 425–26 (Eng.) Authors usually cite the part of the latter relating to the difficulties that E.U. law raises for English courts. What is rarely noted is the conclusion that Lord Denning draws from this new form of legislation that British courts face, the interpretive rule that they must follow. The decision reads:

> Seeing these differences, what are the English Courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. To quote the words of the European Court in the *Da Costa* case . . . "they must deduce from the wording and the spirit of the Treaty the meaning of the Community rules." They must not confine themselves to the English text. They must consider, if need be, all the authentic texts, of which there are now eight . . . . They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same. Those are the principles, as I understand it, on which the European Court acts.

[190] Maduro also makes a very functional argument when he says that "[i]nterpretative criteria are not simply a result of judicial drafting, but of a complex process of demand and supply of law in which a broader legal community participates." Maduro, *supra* note 55, at 148.

[191] Burley & Mattli, *supra* note 2, at 67–68.

[192] Grimmel, *supra* note 13, at 75.

[193] *See* Armstrong, *supra* note 104, at 156. In fact, "we find a process of legal change in which institution-building within law . . . creates path-dependencies and routines which make long-term control over law by actors (including the ECJ) increasingly difficult." *Id.* at 161. In this respect, "legal developments [are] attempts by the ECJ to mediate between law and its environment," *id.* at 162, which in turn modify it, as "if we . . . argue that legal actors like the Court do mediate between law and its environment, it must follow that political actors must mediate between politics and its environment (including law as part of its environment)." *Id.*

[194] Egan, *supra* note 11, at 1244.

[195] *See* Dehousse, *supra* note 15, at 79.

[196] Grimmel, *supra* note 13, at 81.

the community, the Court was forced, as *non liquet* was barred,[197] to decide cases posing integration issues.[198] And its response was not necessarily unexpected. In the scenario in which it found itself, the Court simply tried to ensure the maximal effectiveness of Treaty provisions.[199] As Grimmel rightly puts it, it "was not *judicial* activism but the lack of *legislative* activism . . . that was the problem."[200]

Additionally, the Court's influence was not easy to counteract, contrary to what intergovernmentalism suggests. The judges were smart. The Court was effective in presenting its decisions in a coherent and incremental manner.[201] Furthermore, by acting as a constitutional court, the E.C.J. made sure that its judgments could only be overridden by a change in the Treaties, a difficult process subject to unanimity.[202]

More importantly, however, the very nature of E.U. law, and especially the dilemma in which it places its interpreter, played a crucial role. Dynamic interpretation, and the constitutionalization that came with it, responds to the "specific structural features of the EU legal system, in particular its status as a hybrid legal system between national and international law,"[203] as well as the unfinished nature of the European project. This kind of law, unlike typical national law, often confronts the Court with the dilemma with which I opened this Note —it either furthers integration or interrupts the process. More specifically, E.U. cases often present two overlapping issues. On the one hand, the immediate issue that the case raises, which may involve topics as disparate as human rights law and banking capital requirements. And, on the other, a more essential integrative question, which interrogates the Court over the fate of European integration. In the words of Bredimas:

> [T]he Court constantly and in almost every case faces a dilemma and a choice that can be subsumed into the following: do we want a solid a coherent construction based on respect for common rules or a system where each state keeps what it believes to be its rightful due?[204]

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[197] This is a remarkable difference from the U.S. Supreme Court. While the Court (as its American counterpart) can only issue decisions when a case comes before it, and only within the terms of the issues raised by the case, the Court cannot choose not to decide a case if it falls within its jurisdiction. There is no *certiorari*, as in the United States. On this question, and more specifically on the possibility of the Court to reformulate the questions presented before it, see generally Beck, *supra* note 59, at 325–29.

[198] *See* Grimmel, *supra* note 13, at 79–82.

[199] Dehousse, *supra* note 15, at 79. *See also* Grimmel, *supra* note 13, at 76 (arguing that without the doctrines developed by the Court E.U. law would have had no binding effects). It should be noted that, through negative integration, the Court fostered a process of positive integration from the 1980s. This connects with the second aspect of considering law as an institution; it not only responds to an environment, but it also alters it. These are the political spillovers mentioned by Burley and Mattli, Burley & Mattli, *supra* note 2, at 67–68, and mentioned by other authors too, although with a different name, *see, e.g.*, Dehousse & Weiler, *supra* note 181, at 247 ("[L]egal and institutional factors largely condition the evolution of the integration process.").

[200] Grimmel, *supra* note 13, at 82.

[201] *Id.* at 72–73.

[202] Dehousse, *supra* note 15, at 81.

[203] Beck, *supra* note 59, at 8.

[204] Bredimas, *supra* note 1, at xvi–xvii.

The answer to this question has been clear.[205] And it should come as no surprise. After all, if the Court desired the organization in which it was inserted to survive, and hence its own survival, a dynamic interpretation of E.U. law was only natural. Given the hybrid status of E.U. law and the ongoing nature of the European project, how was the Court going to respond to the integration issues raised by the cases it faced if not in the affirmative? Integration was the answer. Former Judge Pescatore was quick to capture this phenomenon, and more specifically the position in which E.U. law put its interpreter, when he spoke of it as a "law of integration."[206]

Finally, the Court's construction of its own role in the light of these circumstances may certainly be criticized, but one thing remains true: the E.C.J. did not overstep its judicial role.[207] Its interpretation of its own role is reasonable, given the peculiar features of E.U. law. The almost unanimous acceptance of the Court's approach by national courts, scholars and Member States can be read in this way. The E.C.J., while making the most of its interpretive possibilities, was not perceived as a political, and hence illegitimate, Court. This is also because there are some limits to its integrative stance. In general, "[t]he effectiveness of law in the integration process . . . depends on the perception that is a domain distinct and apart from politics."[208] The limits are therefore those posed by the case before the Court and by legal interpretation itself. The Court must be able to justify its result with the available and commonly accepted methods of legal interpretation —and so it did.[209]

5. CONCLUSION —TOWARDS A MORE MODERATE COURT?

Throughout this Note, I have tried to provide an overview of the methods of interpretation of E.U. law used by the Court with respect to the process of constitutionalization of the E.U. legal system, where the integrative dilemma appears more clearly. It is apparent from the analysis that the Court has laid down a veritable constitutional framework, effectively making E.U. law the higher law of the land in the Member States. To achieve this goal, the E.C.J. has relied principally on an integrative cumulative approach to legal interpretation, which has allowed it to carry out a teleological or meta-teleological reading of E.U. law with the aim of furthering European integration. Additionally, I have argued that this phenomenon can only be explained if both extra-legal and legal variables are taken into consideration. In my view, the explanative power of E.U. law cannot be disregarded.

I have also noted that, in its endeavor, the Court was able to secure the approval of national courts, scholars, and national governments alike. This unanimous

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[205] Bredimas perhaps exaggerates when she says that "the only consistent and overriding principle of interpretation, which can be traced throughout the case law [of the E.C.J.], is interpretation promoting European integration," Bredimas, *supra* note 1, at 179, but she is not too far from the truth.

[206] Pescatore, *supra* note 54, at 83. The expression is the title of his book, and he treats the "law of integration" as an entirely new type of law throughout his essay.

[207] *See* Grimmel, *supra* note 13, at 74 ("[T]he CJEU and its judges had the competence to develop such momentous legal doctrines . . . [without] crossing the divide into politics.").

[208] Burley & Mattli, *supra* note 2, at 69.

[209] Burley & Mattli, *supra* note 2, at 73 ("[A] court seeking to advance its own agenda must accept the independent constraints of legal reasoning, even when such constraints require it to reach a result that is far narrower than the one it might deem politically optimal."). *See also* Beck, *supra* note 59, at 324–29 (arguing that the Court is limited by the availability of acceptable legal arguments).

acceptance merits additional attention, especially in the current stage of European integration. Literature, and legal literature more specifically, should engage more often in a debate on the interpretive methods of the Court. This debate, which is ongoing in the United States, would be beneficial at the current stage of European integration.

I would like to make some final remarks in this respect. This Note has referred mainly to the pre-Maastricht period of E.U. law. Some of the conclusions drawn here are fully applicable today, but the rest of them cannot be extrapolated into the present. In light of new developments, an argument can be made in favor of a more moderate Court, at least with respect to some of the cases it decides.

There is nothing particularly wrong, I believe, about the integrative approach of the Court during the initial period. Though the E.C.J.'s actions have occasionally sparked polemic, it remains true that it did what needed to be done for the E.U. to be what it is today. That period, however, has come to an end. Things have changed in the E.U. since the 1990s.[210] Thanks, among other things, to the process of constitutionalization developed by the Court, the E.U. is now a quasi-federal, stable polity, which has been able to survive severe shocks, such as the Euro Crisis and (hopefully) Brexit. In this new environment, the Court is increasingly called to decide ordinary cases, some of which may be of a constitutional nature, but that do not pose the integrative question referred to above, and where integration cannot act anymore as a guiding principle for a judicial decision.

When this happens, a case could be made in favor of a more moderate or neutral court, adopting a more orthodox approach to legal interpretation. From a separation-of-powers perspective, the judiciary should constitute a check on the other branches of government. But the Court can hardly constitute that necessary check if it does not abandon its dynamic interpretation of the law. This approach allows it to control the centrifugal tendencies of the Member States, but not to decide ordinary cases that do not present an integration issue.

Additionally, it can be argued with Granger that some of the changes that have taken place in the E.U. since Maastricht affect the very premises of the Court's approach.[211] He specifically refers to the rise of a new intergovernmentalism and the coexistence of multiple *teloi*, which "by entertaining a state of confusion as to what the EU is ultimately about . . . . [render] toothless the Court's most powerful 'integrative' tool, the teleological (or purposive) method of interpretation."[212] Moreover, as negative integration has given way to positive integration, the legislative stalemate of the foundational period has also ended, removing yet another one of the premises of the Court's interpretive approach and integrative stance.

The risk here is that as the Court is increasingly called to adjudicate on social issues, the latter will be progressively perceived as a politicized actor if it does not

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[210] *See* Sankari, *supra* note 74, at 38–47 (reviewing literature on the periodization of the integration process).

[211] *See* Marie-Pierre F. Granger, *The Court of Justice and the Transformation of Europe: Looking to the Future, Dealing with the Present, but Living in the Past?*, SEMANTIC SCHOLAR 1 (2013), https://pdfs.semanticscholar.org/1304/25c5255ef9749042207cdad53c469c8d046f.pdf.

[212] *Id.* at 2 (citation omitted).

change its construction methods —something at which literature has already been hinting.[213] The E.C.J. would be departing from the referred need to appear apolitical.

I would like to emphasize that I am not criticizing the original approach of the Court. This approach may still play a decisive role in the cases that raise integration issues. At the risk of oversimplification, it might be suggested that the Court, when facing a new case, asks itself whether it faces an integrative case or simply an ordinary dispute. If the action poses an integration issue, its cumulative approach, and the special role that dynamic interpretation plays in it, would be justified. But if, on the contrary, the Court is facing an ordinary claim, its role should increasingly resemble that of a traditional national court.

I am aware of the limitations of this proposal, as there no clear divide between both types of cases, but this does not justify disregarding the issue that is being pointed out here. Some changes are already taking place, and the Court seems more moderate lately.[214] Furthermore, some changes could be introduced in the judicial structure of the E.U. and in the Court's procedural law (as a way perhaps to curb the "curt and apodictic style" of the judgments,[215] such as allowing dissenting opinions, even if anonymous) [216] to face this new reality. A more thorough examination of these questions may nonetheless be necessary.

For the time being, however, it seems clear that the E.C.J. has been willing, and still is, to achieve a full constitutionalization of the E.U., even if this implies adopting a somewhat unconventional approach to legal construction, and that the very nature of E.U. law has played a decisive role in this process.

[213] *See generally* Azoulai & Dehousse, *supra* note 116, at 358–61; Egan, *supra* note 11, at 1223, 1229–30, 1244.

[214] *See generally* Granger, *supra* note 211; Schepel, *supra* note 11, at 461; Sankari, *supra* note 74, at 19–86. Sankari also argues that, as of recently, the Court's legal reasoning has adopted the following features: "the use of silence in judgment, the distinction between single concrete cases and lines of cases polishing a legal interpretation, as well as the Court of Justice's output multilingualism." *Id.* at 77.

[215] De Waele, *supra* note 57, at 25.

[216] *Cf.* HJALTE RASMUSSEN, THE EUROPEAN COURT OF JUSTICE 66 (1998).