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Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community

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We present a theory of European legal integration that relies on three causal factors: transnational exchange, triadic dispute resolution, and the production of legal norms. After stating the theory in abstract terms, we explain the construction of the legal system and test the relationship among our three variables over the life of the European Community. We then examine the effect of the EC legal system on policy outcomes at both the national and supranational levels in two policy domains: the free movement of goods and gender equality. Our theory outperforms its leading rival, intergovernmentalism. The evidence shows that European integration has generally been driven by transnational activity and the efforts of EC institutions to reduce transaction costs, behavior which governments react to but do not control.

No international organization in world history has attracted as much scholarly attention as the European Community (EC).¹ The reason is straightforward: The EC has evolved from a relatively traditional (albeit multifaceted) interstate system into a quasi-federal polity. In a word, Europe has *integrated*, as the linkages between politics on the EC level and politics on the national level have expanded in scope and deepened in intensity. Scholars working in diverse fields, including public law, international relations, and comparative politics, have been fascinated by the integration process, not least because of the challenge of understanding the reciprocal effect, over time, of international and domestic systems of governance.

Current theoretical disagreements about how to understand European integration are largely disputes between intergovernmentalists, whose imagery is drawn from the international regime literature (Garrett 1992; Keohane and Hoffmann 1991; Moravcsik 1991, 1993; Taylor 1983), and supranationalists, whose imagery is often federalist (Burley and Mattli 1993; Leibfried and Pierson, eds., 1995; Marks, Hooghe, and Blank 1996; Sandholtz 1993, 1996; Sbragia 1993; Stone Sweet and Sandholtz 1997). Intergovernmentalists accord relative priority to member state governments—representatives of the national interest—who bargain with one another in EC fora to fix the terms and limits of integration. Supranationalists (especially the heirs of neofunctionalism), accord relative priority to EC institutions—representatives of the interests of a nascent transnational society—who work with public and pri-

vate actors at both the European and national levels to remove barriers to integration and to expand the domain of supranational governance. This paper is implicated in these disputes. One of our claims is that, on crucial points, the intergovernmentalists have gotten it wrong.

More important, we propose a theory of European legal integration, the process by which Europe has constructed a transnational rule-of-law polity. The theory integrates, as interdependent causal factors, contracting among individuals, third-party dispute resolution, and the production of legal norms. We test the theory, with reference to the EC, in two stages. First, we explain the construction of the legal system, and analyze the relationships among our three key variables over the life of the EC. Second, we examine the effect of the operation of the legal system on governance, that is, on policy processes and outcomes, at both the national and supranational levels.

CONTRACTING, DISPUTE RESOLUTION, AND LAWMAKING

Our theory relies on three analytically independent factors that we expect to be interdependent in their effect. Because we believe the theory has general application (it helps us understand how all rule-of-law governmental systems may emerge and develop), we present it in an abstract form here. It has been elaborated more formally elsewhere (Stone Sweet n.d.)

The first factor is a simple contract—an exchange relationship—between two persons. Contracts, which are codified promises, fix the rules for a given exchange by establishing the rights and obligations of each contracting party with respect to the other. The contract is an inherently social institution, embedded in a cultural (or normative) framework that enables individuals not only to conceive, pursue, and express their interests and desires but also to coordinate them with those of others. Furthermore, to get to the very notion of a codified promise we must have language, notions of individual roles, commitment, reputation, and responsibility (which have no meaning outside a social setting) as well as some set of collective expectations about the future. As exchange proceeds over the life of the contract, or as external circumstances change, the

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¹ Although "European Union" is now commonly used to denote the European polity, we use "European Community" throughout. Formally, the EC remains distinct from the EU, and the EC is the most inclusive term for how the organization and its legal system function most of the time.

meanings attached to the same set of rules by the contractants may diverge. To the extent that such conflicts arise, contracting generates a social demand for third-party dispute resolution, for law and courts, the function of which is to sustain social exchange over time.

The second factor, then, is effective triadic dispute resolution. Without it, the costs of exchange may be prohibitive, since each prospective party may doubt that the other will abide by promises made over the life of the contract. A judicial system lowers these costs, providing a measure of certainty to each contractant and a means of reconsecrating the terms of the contract over time, given the certainty that differences in interpretation will arise as unforeseen circumstances arise. Transaction costs are particularly high in situations in which strangers—those who do not share a common normative framework (whether cultural or legal)—contemplate exchange and no effective triadic dispute resolution exists.

The triad—two disputants and a dispute resolver—constitutes a basic, probably primal, institution of governance (Simmel 1950, 145–69). In every human community about which we know anything, we find such triads, arrayed along a spectrum that stretches roughly from consent-based mediation to arbitration to coercive-adjudication. Commonly, triadic dispute resolution performs profoundly political functions, including the construction, consolidation, and maintenance of political regimes (Shapiro 1980, chapter 1), functions that inhere in the lawmaking dynamics of dispute resolution itself.

Consider formal adjudication, wherein judges are required, for legitimacy purposes among others, to provide legal reasons to support their decisions. When a judge decides, the lawmaking effect of the decision is always twofold. First, in settling the dispute at hand, the judge produces a legal act that is particular (it binds the two disputants) and retrospective (it resolves an existing dispute). Second, in justifying the decision, the judge signals that she will settle similar cases similarly in the future; this legal act is a general and prospective one (it affects future and potential contractants). Thus, judges do not simply or only respond to demands generated by social exchange. Rather, they adapt, continuously, the abstract legal rules governing exchange in any given community to the concrete exigencies of those individuals engaged in exchange.

The third factor is legislating, the elaboration of legal rules. Rules facilitate and also structure exchange by restricting some practices while permitting others. Conceived in this way, the legislator serves a social function rather similar to that of the judge: both produce rules that serve to reduce the transaction costs, enhance the legal certainty, and stabilize the expectations of those engaged in or contemplating exchange. Legislating, of course, is a far more efficient means of coordinating activity than is case-by-case adjudication and rule making. But because legal norms are so efficacious (immediately binding on broad classes of people and activities), their production poses a collective action problem. Partly for this reason, and

partly due to the dynamics of judicial rule making, judges may legislate on matters before legislators do. In any case, in polities that possess both a permanently constituted legislature and an independent judiciary, lawmaking powers are shared, and boundaries allegedly separating institutional functions blur. Thus, legislatures rely on the legal system to enforce its law; and the judiciary possesses broad capacity to generate legal rules where none existed prior to a given dispute as well as to reconstruct legislative norms in interstitial processes of interpretation.

Viewed in dynamic relation to one another, contracting, triadic dispute resolution, and legislating can evolve interdependently and, in so doing, constitute and reconstitute a polity. Thus, as the number of contracts rise, the legal system will increasingly be activated. To the extent that the legal system performs its dispute-resolution functions effectively, it reduces contracting costs, thus encouraging more exchange. As the scope of legislation widens and deepens, the conditions favoring the expansion of exchange are constructed, the potential for legal disputes increases, and the grounds available for judicial lawmaking expand. New collective action problems are posed as older barriers to exchange are removed, and these problems push for normative solutions.

Components of the virtuous circle just described have been identified empirically and theorized by scholars working in diverse fields. North (1981, 1990) argues that differential rates of national economic development are in large part explained by the relative effectiveness of legal systems to reduce the costs of exchange among strangers. Although they did not focus on law and courts, Haas (1958, 1961) and Deutsch (1957) understood, somewhat differently, that sovereign states will respond to increasing levels of transnational interaction by integrating politically, that is, by creating common institutional and normative frameworks that in effect give birth to new systems of transnational governance. Haas used the term “spillover” to capture the expansive logic of integration. In their studies of the birth and subsequent development of legal systems, Kommers (1994), Landfried (1984, 1992), Stone (1992, 1994b), and Burley and Mattli (1993) show that tight linkages can develop between self-interested litigants and judges; these interactions generate a self-sustaining dynamic, which by feeding back into the greater political environment can reconfigure the inner workings of the polity itself. These sorts of “policy feedbacks,” and their political consequences, are also familiar to historical institutionalists, who give them pride of place (Pierson 1993; Steinmo, Thelen, and Longstreth 1992).

In the rest of this paper, we examine the development of the European polity, focusing on the construction and operation of the legal system.

CONSTRUCTING THE SUPRANATIONAL POLITY

The emergence of a transnational rule-of-law governmental system cannot be presumed. Our theory sug-

gests that transnational exchange is a critical catalyst for such an event, generating a social demand for dispute resolution (transnational triadic dispute resolution), revealing important collective problems that beg for normative solutions (transnational rules), and thereby pushing for modes of supranational governance. The theory further suggests that once the causal connections among exchange, triadic dispute resolution, and rules are forged, the legal system will operate according to a self-sustaining and expansionary dynamic. But the development of causal linkages among our three variables implies the existence of, respectively, some measure of individual property rights, some form of adjudication, and a lawgiver. For well-known reasons (e.g., Waltz 1979), these conditions have been notoriously difficult to achieve and sustain in the interstate system.

In Europe, the six states that signed the Treaty of Rome in 1958, establishing the European Economic Community, were able to overcome some of these difficulties but only partly. The treaty contained important restrictions on state sovereignty, such as the prohibition, within the territory constituted by the EC, of tariffs, quantitative restrictions, and national measures "having equivalent effect" on trade after December 31, 1969. It enabled the pooling of state sovereignty by establishing legislative institutions and a process for elaborating common European policies. And it established "supranational" institutions, including the European Commission and the European Court of Justice, to help the Council of Ministers (the EC institution that is controlled by national executives) legislate and resolve disputes about the meaning of EC law. Despite these and other important innovations, the member states founded an international organization, not a transnational rule-of-law polity. Some treaty provisions announced principles that, if implemented, would directly affect individuals (e.g., free movement of workers, equal pay for equal work between the sexes), but the treaty did not confer on individuals judicially enforceable rights.

Even within a European free trade zone we would expect the transaction costs facing transnational exchange to be higher than costs faced by those who contract within a single national jurisdiction, other things equal, to the extent that at the supranational level there exists no secure common legal framework comparable in its efficacy to that furnished by national legal systems. In the absence of such a framework, those who exchange cross-nationally would face a kaleidoscope of idiosyncratic national rules and practices that would act as hindrances. The establishment of an effective European system of dispute resolution as a means of overcoming national barriers to exchange is therefore a crucial first step.

In the next section, we briefly examine the European Court of Justice (ECJ) "constitutional" case law. These judgments recast the normative foundations of the EC, radically upgrading the capacity of the legal system to respond to the demands of transnational society. It bears emphasis that this case law constitutes a neces-

sary condition underlying all the causal models tested in this paper.

The Constitutionalization of the Treaty System

The constitutionalization of the treaty system refers to the process by which the EC treaties have evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory. The phrase thus captures the transformation of an intergovernmental organization governed by international law into a multi-tiered system of governance founded on higher law constitutionalism. Today, legal scholars and judges conceptualize the EC as a constitutional polity, and this is the orthodox position (Lenaerts 1990; Mancini 1991; Shapiro 1992; Weiler 1981, 1991); international relations scholars are more reticent to do so for reasons internal to the development of international relations theory (Stone 1994a). In its decisions, the ECJ has implicitly treated its terms of reference as a constitutional text since the 1960s and today explicitly refers to the treaties as a "constitutional charter" or as "the constitution of the Community" (Fernandez Esteban 1994).

The ECJ, the "constitutional court" of the EC (Shapiro and Stone 1994, Weiler 1994), is the supreme interpreter of this constitution. The court's function is to enforce compliance with EC law. Although the outcome was not anticipated, the greater bulk of the court's case load is generated by preliminary references from national judges responding to claims made by private actors. The preliminary reference procedure is governed by Article 177 of the Rome Treaty. According to that article, when EC law is material to the resolution of a dispute being heard in a national court, the presiding judge may—and in some cases must—ask the ECJ for a correct interpretation of that law. This interpretation, called a preliminary ruling, shall then be applied by the national judge when settling the case. Article 177 was designed to promote the consistent application of EC law throughout EC territory. The member states did not mean to provide a mechanism by which individual litigants could sue their own government, or to confer on national judges the power of judicial review of national legislation. Both of these outcomes, however, inhere in the ECJ's vision of the community as a constitutional polity.

The constitutionalization process has been driven almost entirely by the relationship among private litigants, national judges, and the ECJ interacting within the framework provided by Article 177 (see Burley and Mattli 1993). The process has proceeded in two phases. In the 1962–79 period, the court secured the core constitutional principles of supremacy and direct effect. The ECJ made these moves without the express authorization of treaty law and despite the declared opposition of member states (Stein 1981). The doctrine of supremacy, announced in *Costa* (ECJ 1964), lays down the rule that in any conflict between an EC legal rule

and a rule of national law, the former must be given primacy. Indeed, according to the court, every EC rule, from the moment of entry into force, “renders automatically inapplicable any conflicting provision of . . . national law” (*Simmenthal*, ECJ 1978). The doctrine of direct effect holds that provisions of EC law can confer on individuals legal rights that public authorities must respect and that may be protected by national courts. During this period, the ECJ found that certain treaty provisions (*Van Gend en Loos*, ECJ 1963) and a class of secondary legislation, called “directives” (*Van Duyn*, ECJ 1974a), were directly effective. The “regulation,” the other major type of secondary legislation, is the only class of Euro-rule that was meant (according to the Treaty of Rome) to be directly applicable in national law.

These moves integrated national and supranational legal systems, establishing a decentralized enforcement mechanism for EC law. The mechanism relies on the initiative of private actors. The doctrine of direct effect empowers individuals and companies to sue national governments or other public authorities for not conforming to obligations contained in the treaties or regulations or for not properly transposing provisions of directives into national law. The doctrine of supremacy not only prohibits public authorities from relying on national law to justify their failure to comply with EC law but also requires national judges to resolve conflicts between national and EC law in favor of the latter.

In a second wave of constitutionalization, the ECJ supplied national courts with enhanced means of guaranteeing the effectiveness of EC law. In *Von Colson* (ECJ 1984), the doctrine of indirect effect was established, according to which national judges must interpret national law in conformity with EC law. In *Marleasing* (ECJ 1990a), the court clarified the meaning of indirect effect, ruling that when a directive either has not been transposed or has been transposed incorrectly into national law, national judges are obliged to interpret national law as if it were in conformity with European law. The doctrine thus empowers national judges to rewrite national legislation—in processes of “principled construction”—in order to render EC law applicable in the absence of implementing measures. Once national law has been so (re)constructed, EC law, in the guise of a de facto national rule, can be applied in legal disputes between private legal persons (i.e., nongovernmental entities). Finally, in *Francovich* (ECJ 1991a), the ECJ declared the doctrine of governmental liability. According to this rule, a national court can hold a member state liable for damages caused to individuals due to the state’s failure to implement a directive properly. The national court may then require the state to compensate such individuals for their financial losses.

In this case law, the ECJ has imagined a particular type of relationship between the European and national courts: a working partnership in the construction of a constitutional rule-of-law European Community. In that partnership, national judges become agents of the community order—they become community judg-

es—whenever they resolve disputes governed by EC law. The ECJ obliges national judges to uphold the supremacy of EC law, even against conflicting subsequent national law; encourages them to make references concerning the proper interpretation of EC law to the ECJ; and empowers them (even without a referral) to interpret national rules so that these will conform to EC law and to refuse to apply national rules when they do not.

The effectiveness of the EC legal system thus depends critically on the willingness of national judges to refer disputes about EC law to the ECJ and to settle those disputes in conformity with the court’s case law. Although national judges embraced the logic of supremacy with differing degrees of enthusiasm, by the end of the 1980s every national supreme court had formally accepted the doctrine (Stone Sweet 1997a). National judges, persuaded by compelling legal arguments in support of supremacy, empowered themselves by, among other things, appropriating the power of judicial review of national legislation (Burley and Mattli 1993; Weiler 1991, 1994). The ease with which they were able to accommodate supremacy contrasts with the slower and more conflictual consolidation of the U.S. federal system (Goldstein 1994).²

Figure 1 plots the annual rate of Article 177 references, beginning with the first reference in 1961. It also temporally locates the leading constitutional decisions discussed here. The growth in the number of references is steady and dramatic. Without the doctrines of supremacy and direct effect, the level of preliminary references doubtlessly would have remained stable and low. In proclaiming supremacy and direct effect, the ECJ broadcast the message that EC law could be used by individuals, businesses, and interest groups to obtain policy outcomes that might otherwise be impossible, or more costly, to obtain by way of national policy processes. It is evident from the graph that litigants and national judges heard this message and responded.

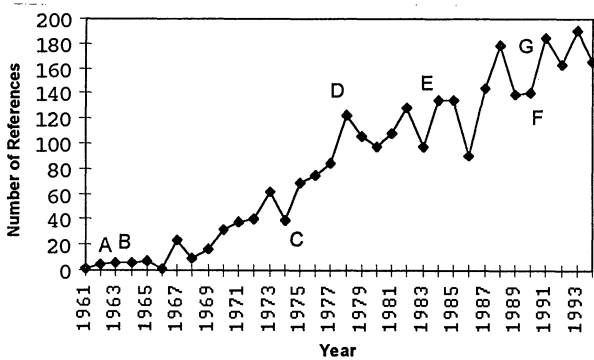
Finally, it cannot be stressed enough that the EC legal system was constructed without the explicit consent of the member states. They possessed the means to reverse constitutionalization, but only by revising the EC’s constitution. Treaty revision requires the unanimous vote of all members, acting as a constituent assembly, followed by national ratification (according to diverse procedures, including referenda). Given this decision-making rule, it is not surprising that the member states have never overturned an ECJ interpretation of the treaties.

Data Analysis

Our theory yields a set of testable propositions. First, transnational exchange generates social demands for transnational triadic dispute resolution. Specifically, higher levels of cross-national activity will produce

² In the nineteenth century, transformations in the common law, rather than in constitutional law, were fundamental to American economic development and therefore to American integration (Horwitz 1977).

FIGURE 1. Annual Number of Article 177 References to the European Court of Justice



Source: The source for Article 177 references is data collected by the authors and the ECJ.

Note: Landmark decisions are highlighted: A, Doctrine of Direct Effect of Treaty Provisions (1963); B, Doctrine of Supremacy (1964); C, Doctrine of Direct Effect of Directives (1974); D, Simmenthal Doctrine (1978); E, Doctrine of Indirect Effect (1984); F, Marleasing Doctrine (1990); and G, Doctrine of State Liability (1991).

more conflicts between national and EC law and therefore more Article 177 references. Second, higher levels of transnational activity will push for supranational rules (judicial or legislative) to replace national rules. Third, to the extent that European judicial and legislative institutions function with minimal effectiveness, European integration—as evidenced by the rising tide of the ECJ’s case law and of EC legislation—will feed back into society. The consolidation and expansion of European governance will fuel more transnational activity and provide the normative context for more Article 177 references in an increasing number of domains. Fourth, to the extent that the above propositions hold, transnational activity, transnational judicial activity, and the production of European legislation will develop interdependently, and this interdependence will drive European integration in predictable ways. That is, once the causal linkages among these three factors have been constructed, a dynamic, self-reinforcing process will push for the progressive expansion of supranational governance. These propositions, of course, depend critically on the prior announcement by the ECJ of supremacy and direct effect.

We tested our theory with data collected in 1995 at the ECJ in Luxembourg. With the help of the court, we gathered information on Article 177 reference activity from 1961 to mid-1995 for a total of 2,978 references. We then coded each by country of origin, year of referral, the national court making the reference, and the subject matter of the dispute, among other things. These data had never been compiled. We also compiled data on transnational exchange and the production of European legal rules; for the former, we make heavy use of data on intra-EC trade, because it is the only reasonable indicator of transnational exchange for which we have reliable information reported annually, partner-by-partner, over the life of the EC.³

³ We are not arguing that intra-EC trade, one type of transnational

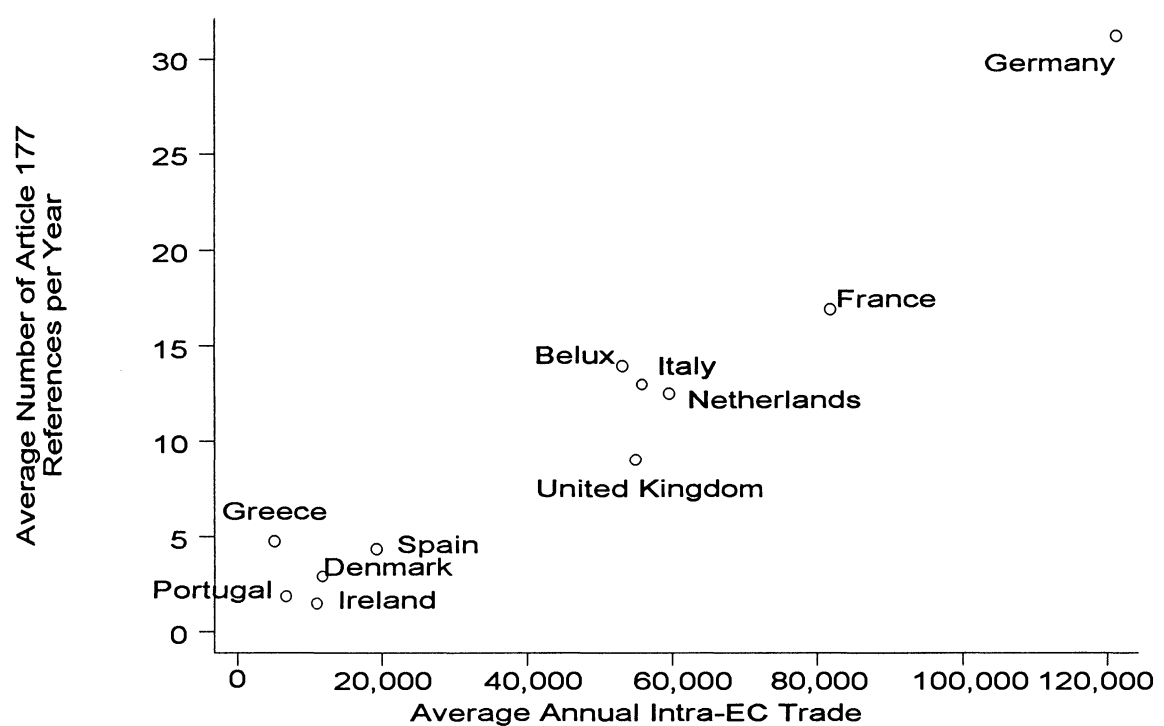
We have argued that transnational exchange is fundamental to the construction of a transnational legal system. To begin testing the proposition, we confronted one of the deepest mysteries of European legal integration: What accounts for the wide cross-national variance in the number of Article 177 references? The scholarly literature on the problem has produced a handful of reasonable candidate explanations, including the role of legal culture, the bureaucratic organization of the courts, the extent of constitutional monism or dualism, and the length of a judiciary’s experience with judicial review. Two recent studies, one by Dehousse (1996) and the other a collaborative project focused on the reception of supremacy by the national courts (Slaughter, Stone, and Weiler 1997), assessed these and other factors in comparative perspective. Both studies generally conclude that variance in the intensity of the ECJ-national court relationship is overdetermined and/or explained by factors operating with different effects across national borders.⁴

Our theory provides an alternative explanation, one based on cross-national activity. Figure 2 depicts the correlation of the average level of intra-EC trade over 1961–92 on the average number of Article 177 references per year from the national courts of each of the twelve member states.⁵ We averaged the number of references annually in order to correct for the fact that some states joined the EC later than others, and we have combined reference data for Belgium and Luxembourg because the trade data for those states are combined by Eurostat reporting services. The linear relationship between intra-EC trade and references is nearly perfect (adj. $R^2 = .92$), with countries that trade more with their partners in the EC generating higher levels of Article 177 references. The results broadly support our theoretical claims. We also examined the effect on references of other plausible and quantifiable independent variables, including cross-national measurements of “diffuse popular support” for the EC legal system, population, and GDP, but none came

activity, subsumes other important forms of exchange, such as labor and capital flows, and the formation of EC interest groups and social movements. Unfortunately, data on these and other forms of exchange are incomplete and often unreliable. We would expect that increasing transnational activity of a particular type, within a given domain, will drive integration processes in that area (e.g., patterns in cross-national flows of workers will drive litigation in social security). Generally, we had good reason to expect that trade would dominate the construction of Europe since, for most of the life of the EC, the core of the European integration project has been the creation of a common market for goods and agriculture. For further discussion of this point, see tables 3 and 4.

⁴ There is little point in formally testing these explanations. We know by simply looking at the raw data on references comparatively that alleged relationships do not hold between the factors cited above and national levels of Article 177 references (e.g., the more monist the constitutional order, the more references generated). If these factors do affect levels of Article 177 references, they must operate with different effects across the EC.

⁵ In 1995, the Eurostat reporting service furnished annual intra-EC trade figures for 1958–92. Because the service has not yet updated these figures, and because subsequent data are reported on different scales, we have not used data after 1992 in any of the regression models reported here.

FIGURE 2. Intra-EC Trade and Average Number of Article 177 References

Source: Trade data are from Eurostat: *External Trade 1958–93*, Brussels: EC Publications, 1995. The source for article 177 references is data collected by the authors and the ECJ.

Note: For each member-state, the total number of Article 177 references was divided by the number of years in which that member-state has been making references to the ECJ. Belux is Belgium and Luxembourg combined. Trade figures are the annual average of intra-EC imports and exports for each member-state measured in Ecu (European currency unit), 1960–93. The regression equation is $y = .2105 + .0002247(\text{Trade}) + e$. Adjusted $R^2 = .92$, $n = 11$, and the $SEE = 2.46$. The t -statistics are .178 for the constant and 10.8 for intra-EC trade.

close to performing as well as intra-EC trade. See Appendix B.

Figure 2 depicts the relationship between intra-EC trade and Article 177 references cross-nationally, with no time element. Figure 3 depicts the relationship between the same two variables over time, since 1961, with no cross-national element. In this model, we include a dummy variable to account for (1) the constitutionalization of the treaties and (2) the prohibition of national restrictions on intra-EC trade (Article 30, EEC) that took effect on January 1, 1970. As we have seen, the doctrines of supremacy and direct effect made it possible for individuals to have their rights under EC law protected before their own national courts; and, as of 1970, Article 30—which proclaims the free movement of goods—provided the legal basis for traders to claim those rights (Poiarés Maduro 1997).⁶ We coded the dummy variable 0 from 1961–69 and 1 from 1970–92 (hereafter the “post-1969 dummy”).

Figure 3 plots the actual and predicted annual levels of Article 177 references for the EC as a whole. The predicted level—generated by a regression analysis in which the dependent variable is the yearly number of

Article 177 references and the independent variables are annual intra-EC trade and the post-1969 dummy—plots the references predicted by the independent variables. The adjusted $R^2 = .91$, and the coefficients for both intra-EC trade and the dummy variable are positive and statistically significant.

Our time-series data for intra-EC trade and Article 177 references are nonstationary (the augmented Dickey-Fuller test), a common problem for data containing a strong trend. We argue that our results are nevertheless valid for two reasons. First, the data on intra-EC trade and Article 177 references are cointegrated, indicating that a linear combination of the two variables is stationary.⁷ Second, we checked for serial autocorrelation in the error terms and found none.⁸

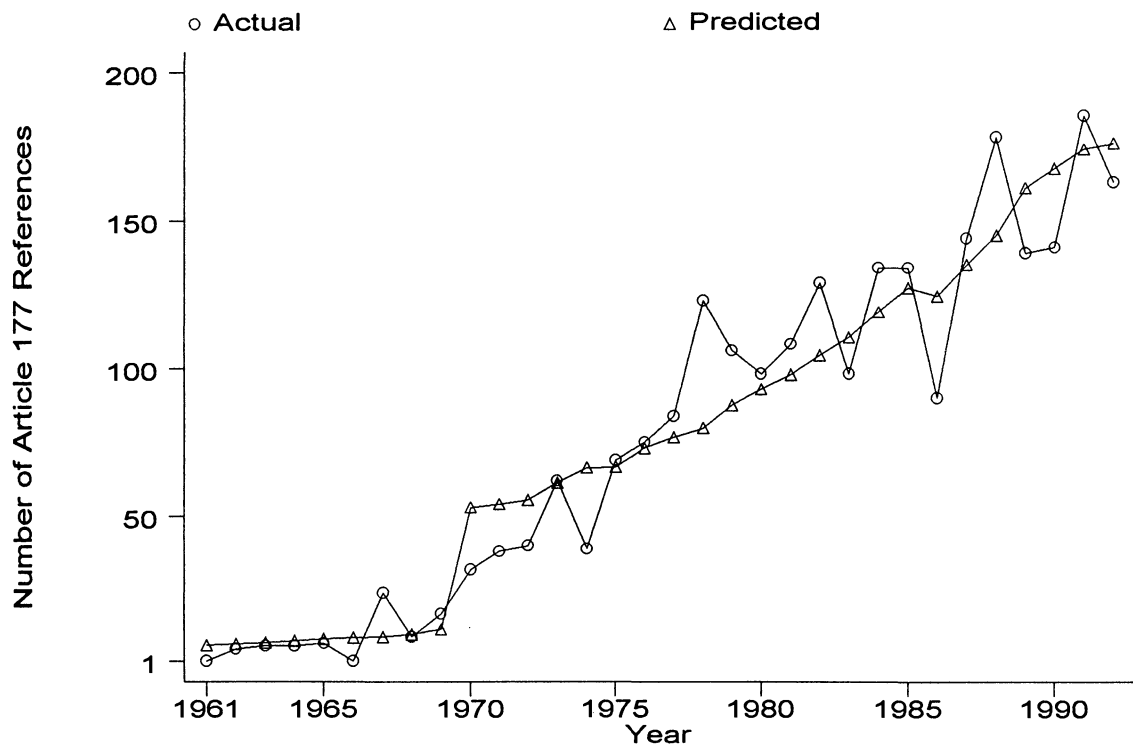
We would be more confident in our results if we had more observations. By using our time series and our cross-national data together, we were able to increase the number of observations and provide a more stringent test of the effect of transnational exchange on judicial activity. Table 1 presents the results of two pooled models. The first examines the effect of in-

⁶ In addition (pursuant to Article 33, EEC), in 1970 the European Commission produced a directive clarifying the meaning of the principle of free movement of goods and the lawful exceptions to it.

⁷ Using the Johansen cointegration test, we reject the hypothesis of no cointegration between these two variables at the .01 level.

⁸ Using Econometric Views 2.0, we examined the correlogram. All the autocorrelations of the residuals, with the exception of one (at $t - 8$), were within plus or minus two standard errors of zero.

FIGURE 3. Actual and Predicted Annual Levels of Article 177 References from Intra-EC Trade



Source: Trade data are from Eurostat (1995). The source for Article 177 references is data collected by the authors and the ECJ.
 Note: The actual line plots the yearly number of Article 177 references by national courts to the ECJ, 1961–92. The predicted line plots the number of annual references predicted by the regression analysis in which intra-EC trade and a post-1969 dummy variable (coded 0 from 1961–69 and 1 from 1970–92) are the independent variables, and the dependent variable is the annual number of Article 177 references for the EC as a whole. Levels of aggregate trade begin with the original six member states (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands); as new member states join the EC, their trade figures are included. The regression equation is $y = 3.56 + .0000938(\text{intra-EC Trade}) + 39.93(\text{post-1969 dummy}) + e$. The adjusted $R^2 = .91$, $n = 32$, $SEE = 17.92$, and the Durbin-Watson statistic for the regression equation = 1.85. The t -statistics are 0.59 for the constant, 10.59 for intra-EC trade, and 4.52 for the post-1969 dummy.

TABLE 1. The Effect of Intra-EC Trade on Article 177 References: Pooled, Cross-sectional, Time-Series Models

	Model 1	Model 2
Intra-EC Trade	.000126*** (18.89)	.0000995*** (13.29)
Post-1969 Dummy		7.64*** (6.25)
Adjusted R^2	.73	.77
SEE	6.19	5.74
N	246	246

Source: The source for the trade data is Eurostat (1995). The source for Article 177 references is data collected by the authors and the ECJ.

Note: Entries are unstandardized regression coefficients, with t -statistics reported in parentheses. The dependent variable is annual Article 177 references for each member state, per year. The independent variable for model 1 is intra-EC trade, the value of both imports and exports for each member state (Belgium and Luxembourg combined) with all other member states, for each year. The independent variables for model 2 are intra-EC trade and a dummy variable coded 0 from 1961–69 and 1 from 1970–92. The model consists of 246 observations: Belgium-Luxembourg 1961–92; Denmark 1973–92; France 1961–92; Germany 1961–92; Greece 1981–92; Ireland 1973–92; Italy 1961–92; Netherlands 1961–92; Portugal 1986–92; Spain 1986–92; and United Kingdom 1973–92. Econometric Views 2.0 was used to estimate a fixed effects model. See Stimson (1985) and Sayrs (1989) for a discussion of pooled models.

*** $p < .001$.

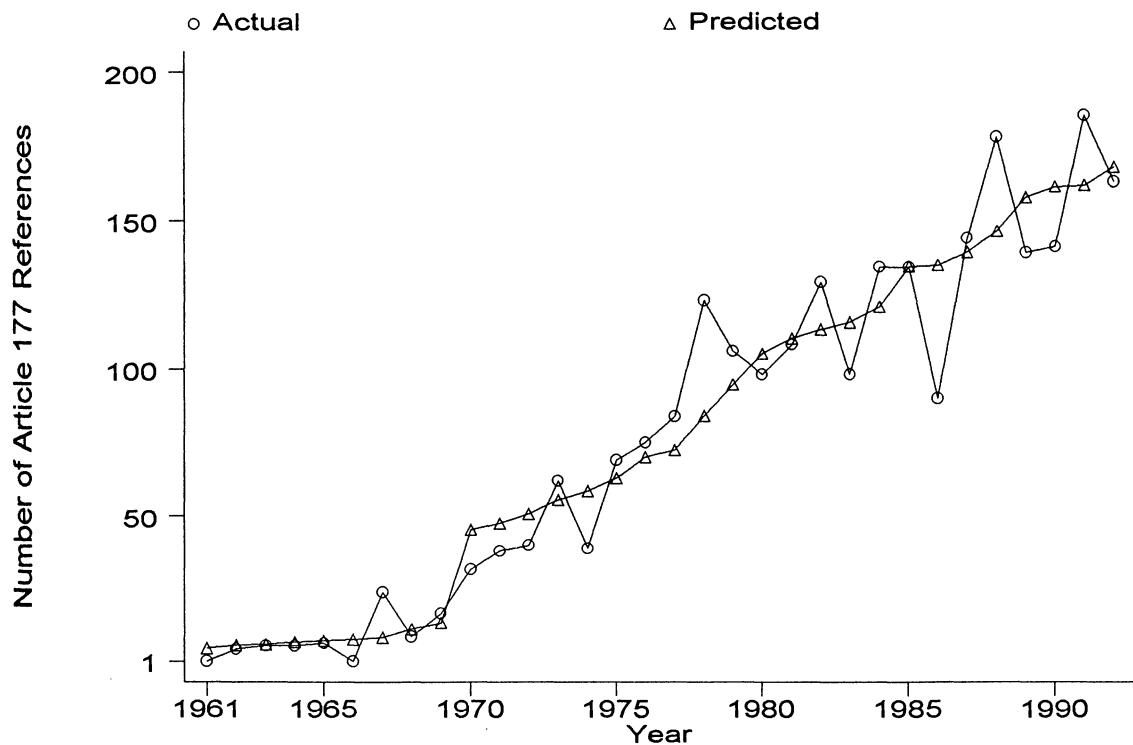
tra-EC trade on Article 177 references, cross-nationally and over time; the second examines this same relationship but with the post-1969 dummy included as a second independent variable. The trade variable in both models is positive and highly statistically significant. Following the advice of Stimson (1985) and King (1986), after estimating the models, we ensured that no serial autocorrelation of the errors existed.⁹

Thus, we find strong support for our claim that transnational exchange has been a crucial factor driving the construction of the EC’s legal system.¹⁰ Furthermore, our analysis does not conflict with—indeed, it builds on—the basic narrative told by legal scholars of how the ECJ constitutionalized the treaties.

⁹ Using Econometric Views 2.0, we examined the correlograms for each panel. All the autocorrelations of the residuals were within plus or minus two standard errors of zero, and no significant patterns were found.

¹⁰ We expect that as the European polity matures, the litigation of EC legal disputes will increase. We do not expect that Article 177 references will continue to rise indefinitely. The capacity of the ECJ to process references is limited. We predict that national judges themselves will increasingly resolve EC legal disputes on their own, without a prior reference. For a discussion of the problem of Article 177 and the overloaded docket of the ECJ, see Weiler 1987.

FIGURE 4. Actual and Predicted Annual Levels of Article 177 References from Intra-EC Trade and Euro-rules



Source: Trade data are from Eurostat (1995). Euro-rules are the annual number of directives and regulations promulgated by the EC. The source for Article 177 references is data collected by the authors and the ECJ.
 Note: The actual line plots the yearly number of Article 177 references by national courts to the ECJ, 1961–92. The predicted line plots the number of annual references predicted by the regression analysis in which intra-EC trade, Euro-rules, and a post-1969 dummy variable (coded 0 from 1961–69 and 1 from 1970–92) are the independent variables, and the annual number of Article 177 references for the EC as a whole is the dependent variable. Levels of aggregate trade begin with the original six member states (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands); as new member states join the EC, their trade figures are included. The regression equation is $y = 2.84 + .0000731(\text{intra-EC Trade}) + 2.04(\text{Euro-rules}) + 31.35(\text{post-1969 dummy}) + e$. The adjusted $R^2 = .92$, $n = 32$, $SEE = 17.01$, and the Durbin-Watson for the regression equation = 2.18. The t -statistics are .50 for the constant, 5.55 for intra-EC Trade, 2.04 for Euro-rules, and 3.34 for the post-1969 dummy.

We have also argued that the emergence of effective transnational triadic dispute resolution is seminal to the emergence of supranational governance. Our theory suggests that the operation of the legal system will produce powerful feedback effects, the most important of which are normative (rule based). One crucial function of triadic dispute resolution is to produce stable, normative solutions to collective action problems. In principle, a governmental system can be constituted entirely by judicial rule making: The dispute resolver governs by the pedagogical authority of its decisions. In practice, courts share governmental authority with legislative bodies, not least because legislating is a more efficient way to produce legal rules than is adjudicating. Once a transnational legal system has been consolidated, the production of European legal rules—whether by judicial or legislative processes—will facilitate the expansion of transnational exchange.

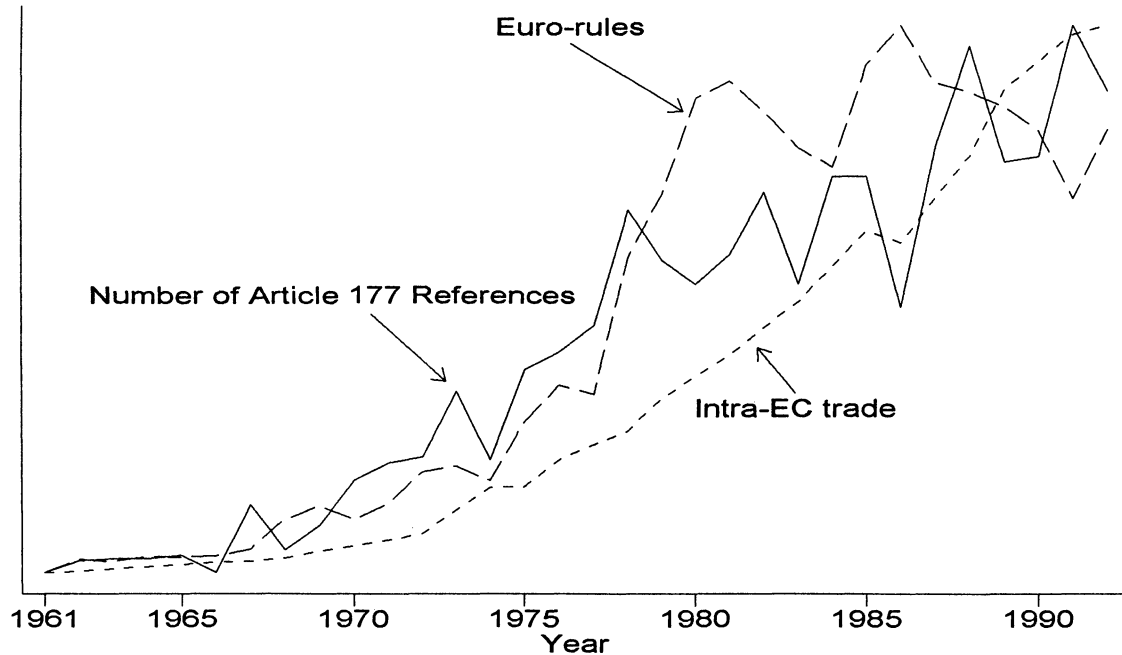
To evaluate the interrelationships that may have developed among our three variables, we collected data on the annual production of the two general categories of EC legislation: regulations and directives (hereafter called Euro-rules). Both types of legislation

are drafted and proposed by the European Commission, a supranational body that blends legislative and administrative functions (Ludlow 1991). Simplifying a complicated process, these proposals can be amended in interactions involving the European Parliament, the commission, and the Council of Ministers (Tsebelis 1994). Euro-rules are finally adopted by the council, a body composed of ministers from member governments, the exact composition of which is determined by the subject matter of EC law under discussion (Wessels 1991).

Figure 4 plots the actual and predicted annual levels of Article 177 references for the EC as a whole. The predicted line (generated by a regression analysis in which the dependent variable is the yearly number of Article 177 references and the independent variables are annual intra-EC trade, the annual number of Euro-rules promulgated, and the post-1969 dummy) plots the level of references predicted by the independent variables. The adjusted $R^2 = .92$, and the coefficients for all three variables are positive and significant, as expected.¹¹

¹¹ Using the Johansen cointegration test, we rejected the hypothesis

FIGURE 5. Annual Levels of Intra-EC Trade, Euro-rules, and Article 177 References



Note: The Article 177 references are the yearly number for the EC as a whole, 1961–92. The Euro-rules are the annual number of directives and regulations promulgated by the EC. The intra-EC trade line plots levels of aggregate intra-EC trade for the EC as a whole. The graph has been rescaled since the variables are on different scales.

Figure 5 depicts the growth of transnational exchange (in the form of intra-EC trade), the evolution of transnational judicial activity (in the form of Article 177 references), and the development of transnational legal norms (in the form of Euro-rules). It thus shows the development of the European polity. The high intercorrelation among the three variables is another way of describing the virtuous circle at the core of our theory.

Do European integration processes serve to expand transnational activity? To answer that question, we compared annual rates of growth in trade over the life of the EC among (1) EC states with one another and (2) non-EC states with EC members. In order to maximize comparability, we focused on two groupings: the original six members and the three states (Den-

mark, Ireland, and the United Kingdom) that joined in 1973. As the numbers in Table 2 show, before 1973, the growth in trade was far higher among EC members than between EC states and the three nonmembers. Once these latter joined the EC, their growth rates rose above levels achieved by the original six. Although trade is a crucial measure of the degree of integration among EC members, its relative importance in activat-

of no cointegration among these three variables at less than the .05 level. To test further the existence of a cointegrating relation, we undertook two separate tests (see Johnston and DiNardo 1997, 266–70). First, using the augmented Dickey-Fuller test, we checked to ensure that the residuals from the regression analysis were stationary. We were able to reject the hypothesis of nonstationarity at the .01 level. Second, we fitted a general autoregressive distributive lag (ADL) specification to these variables. This entails using lagged values of the three variables on the right-hand side of the OLS equation. We then conducted *F*-tests on the sums of the coefficients for current and lagged values for each variable (results omitted). Results show that the sums of the coefficients for both the Article 177 references and intra-EC trade variables differ significantly from zero at the .01 level. The *p*-value for the sum of the coefficients for the Euro-rules variable was .076, which approaches statistical significance. Taken together, these tests provide further support for our claim that these three variables have come to develop interdependently.

TABLE 2. Average Growth Rates in Trade between Individual States and All EC Members, by Period, in Percentage

	1961–72	1973–92	Percentage Change
Belux	11.8%	9.4%	–20.1%
France	13.5	9.2	–31.7
Germany	12.1	10.4	–14.3
Italy	13.3	10.8	–18.2
Netherlands	11.3	9.4	–16.9
Average	12.4	9.8	–20.2
Denmark	6.0	9.9	+65.0
Ireland	9.3	11.4	+22.1
United Kingdom	8.8	11.3	+28.0
Average	8.0	10.9	+38.4

Source: Eurostat (1995).

Note: Entries under the 1961–72 and 1973–92 columns are the average rate of growth in trade between each member state listed with all members of the EC. Entries under the third column are the change registered, between the two periods, in the growth rates in trade between each state listed with all members of the EC. Belux combines Belgium and Luxembourg. Denmark, Ireland, and the United Kingdom entered the EC in January 1973.

TABLE 3. Distribution of Legal Claims by Subject Matter, Article 177 References

<i>Subject Matter</i>		1961-70	1971-75	1976-80	1981-85	1986-90	1991-95
Agriculture	%	20.4	30.9	25.1	20.3	19.6	12.5
	<i>n</i>	(30)	(109)	(176)	(153)	(160)	(135)
Free movement of goods		13.6	19.6	17.1	19.8	18.5	14.9
		(20)	(69)	(120)	(149)	(151)	(161)
Social security		19.7	12.5	10.3	8.4	9.1	10
		(29)	(44)	(72)	(63)	(74)	(108)
Taxes		11.6	2	4.6	4.8	8	8.5
		(17)	(7)	(32)	(36)	(65)	(92)
Competition		8.8	6.3	3.6	4.5	5	8.2
		(13)	(22)	(25)	(34)	(41)	(89)
Approximation of laws		2.8	.3	1.9	4.9	3.8	5.1
		(4)	(1)	(13)	(37)	(31)	(55)
Transportation		2	6	1.4	1.3	1.5	2.9
		(3)	(2)	(10)	(10)	(12)	(31)
Establishment ^a		.7	2.6	2.3	2.7	5.6	6.6
		(1)	(9)	(16)	(20)	(46)	(72)
Social provisions		.7	.3	1.1	3.7	4.2	8.8
		(1)	(1)	(8)	(28)	(34)	(95)
External ^b		.7	2.8	1.7	2.4	.9	1.5
		(1)	(10)	(11)	(18)	(7)	(16)
Free movement of workers		.7	4.3	2	4.1	5	3.2
		(1)	(15)	(14)	(31)	(41)	(35)
Environment		0	0	.4	1.6	.9	2
				(3)	(12)	(7)	(22)
Commercial policy and dumping		0	.6	1.4	.9	.9	1.8
			(2)	(10)	(7)	(7)	(19)
Total claims		147	352	702	754	816	1084
Percentage of total claims by period		3.8	9.1	18.2	19.6	21.2	28.1

Source: Data compiled by the authors with the help of ECJ.

Note: The table lists only the thirteen most important legal domains, which together comprise more than 80% of the 3,855 total claims. We coded references by subject matter and relevant provision of the EEC Treaty. Each of the legal subject matters listed in the first column corresponds to the articles of the EEC Treaty following in parentheses: agriculture (38-47); free movement of goods (9-37); social security (51); taxes (95-9); competition (85-94); approximation of laws (100-2); transportation (74-84); establishment (52-66); social provisions (117-22); external free movement of workers (48-50); environment (130R-T); and commercial policy and dumping (110-6). Although most references are limited to a single subject matter of EC law, some references contain claims based on as many as five subject matters. This accounts for the difference between the total number of references and the total number of subject matters invoked in references.

^aThe freedom to establish undertakings and to provide services.

^bA miscellaneous category including all EC economic policies affecting the European Free Trade Area, the GATT, food aid, and special agreements with non-EC states.

ing the legal system also must be evaluated in terms of changes in the density and scope of Euro-rules.

The theory, after all, posits an expansive logic to integration processes. According to this logic, the growing interdependence of transnational exchange, judicial activity, and Euro-rules drives the progressive construction of the supranational polity. By that we mean the process by which governmental competences, in an increasing number of domains, are transferred from the national to the supranational level. Simply put, as triadic dispute resolution and other processes remove the most obvious hindrances to transnational exchange (border inspections, fees and duties, and so on), and as supranational coordinative rules replace the disparate rules in place in the member states, new obstacles to integration are revealed and become salient (such as regulations protecting consumers and the environment). These national rules and practices will be targeted by litigants, and pressure will be exerted on EC legislative institutions to widen the jurisdiction of EC governance into new domains. We think of this dynamic as a kind of legal "spillover."

Our data provide some preliminary support for our

contention. First, we examined the evolution of the substantive content of Article 177 references. Recall that these claims constitute allegations, by private litigants, that rules or practices in place in an individual country conflict with Euro-rules. Litigants have therefore requested national judges to enforce EC law by, in effect, eliminating conflicting national rules or practices. Table 3 charts this evolution, vividly recording the extent to which the domain of EC law has expanded. The percentage of claims involving the direct exchange of goods—the free movement of goods and agriculture—has steadily declined, dropping from more than 50% in 1971-75 to 27% in 1991-95. At the same time, more indirect hindrances to trade, such as national rules governing equal pay for equal work (social provisions), environmental protection, and taxation policy, have become important sites of contestation.

Second, we assessed the relationship between trade and Article 177 references over time by including a variable to capture the interaction of intra-EC trade and time. Table 4 presents the results of this model. Our expectation about the interaction variable was that

TABLE 4. The Declining Effect of Intra-EC Trade on Article 177 References: Pooled, Cross-sectional, Time-series Models

Intra-EC trade	.000283*** (5.26)
Post-1969 dummy	4.62** (3.11)
Trade *interaction	-.00000554** (-3.44)
Adjusted R^2	.78
SEE	5.61
N	246

Source: The source for the trade data is Eurostat (1995). The source for Article 177 references is data collected by the authors and the ECJ. Note: Entries are unstandardized regression coefficients, with *t*-statistics reported in parentheses. The dependent variable is annual Article 177 references for each member state, per year. The independent variables are intra-EC trade, or the value of both imports and exports for each member state (Belgium and Luxembourg combined) with all other member states, for each year; a dummy variable coded 0 from 1961–69 and 1 from 1970–92; and an interaction variable, which is intra-EC trade multiplied by year. The model consists of 246 observations: Belgium-Luxembourg 1961–92; Denmark 1973–92; France 1961–92; Germany 1961–92; Greece 1981–92; Ireland 1973–92; Italy 1961–92; Netherlands 1961–92; Portugal 1986–92; Spain 1986–92; and United Kingdom 1973–92. Econometric Views 2.0 was used to estimate a fixed effects model. See Stimson (1985) and Sayrs (1989) for a discussion of pooled models.

** $p < .01$; *** $p < .001$.

the coefficient would be negative, indicating a declining effect of trade on Article 177 references over time. The coefficient for the interaction variable is indeed negative and statistically significant. We believe that the growing articulation and differentiation of the Euro-rules that constitute the EC's normative structure will gradually generate more Article 177 references.

In the next section, we examine more closely our contention that the operation of the EC legal system both provokes and reinforces the spillover effects that partly drive the construction of supranational governance.

DISPUTE RESOLUTION AND THE DYNAMICS OF SUPRANATIONAL GOVERNANCE

We have argued that integration processes are *generally* driven by transnational activity, by efforts of supranational institutions to reduce transaction costs, and by the positive feedback effects on transnational society of supranational judicial lawmaking and legislating. In this section, we cross-check our theory by, among other things, examining concrete policy outcomes in specific domains of EC law. We therefore shift the perspective from the broad relationships depicted in the statistical analysis to a more fine-grained examination of how, and to what effect, the legal system operates. Because our theory fundamentally conflicts with the dominant framework, intergovernmentalism, we begin by summarizing our differences.

Intergovernmentalists argue that national executives are in control of every crucial step in the construction of the European polity. Employing a logic derived from two-level game imagery (Evans, Jacobson, and Putnam

1993), Moravcsik (1993, 1994), for example, claims that governments, acting in the Council of Ministers and in summit meetings, establish the parameters that determine the content, scope, and pace of integration. Governments cooperate to achieve their policy goals and to enhance their autonomy in domestic politics. Due to the decision-making rules in place in most EC legislative processes (unanimity and super-majority voting), the Euro-rules produced reflect the preferences of those governments which support the least amount of integration in any given area (the lowest common denominator). The behavior of private actors, subnational public authorities, and the EC's organs are secondary; they serve to "consolidate" new levels of integration (Moravcsik 1995).

Intergovernmentalists also have sought to explain the operation of the legal system. Employing a logic derived from principal-agent theories of delegation (Kiewiet and McCubbins 1991), Garrett (1992) argues that the ECJ (the agent) serves the interests of the dominant members in the EC (the court's principals). The ECJ, intergovernmentalists claim, codifies the preferences of these states in its case law. It does so in order to avoid court-curbing measures and to secure compliance with its rulings.

In contrast, we argue that governments do not control legal integration in any determinative sense and therefore cannot control European integration more broadly. We do not want to be misunderstood. The EC polity contains strong "intergovernmental" components, that is, EC politics are partly constituted by the interactions among representatives of the governments. But it is our contention that "intergovernmentalism," when that term denotes the body of theory and causal propositions about European integration, is deeply flawed (see also Pierson 1996). In using the word *intergovernmentalism*, we need to distinguish the descriptive from the theoretical label. Moreover, any theory of European integration must notice and take account of the role of governments, clearly stating how that role is conceptualized.

The Council of Ministers and representatives of the member states are important actors in European politics. We understand their effect on integration to be positive when they (1) work with supranational institutions to adopt, at the supranational level, Euro-rules and (2) transpose, on the national level, European directives into national law. They have a negative influence on integration when they (1) block EC legislation (in their capacity as members of the council) and (2) refuse to comply with the Euro-rules they do not like (in their capacity as national governments).

Generally, we expect governments to be more reactive than proactive within integration processes. European integration facilitates not only transnational trade but also the construction of associations and social movements, and this exchange, as it rises, pressures governments to act in prointegrative ways. At any point in time, and in any particular area, governments can fail to respond to transnational interests, but (if levels of exchange are rising) only at ever-increasing costs. Thus, we expect that the pace of integration will vary

across issue areas, partly as a function of the relative intensity of transnational activity in a given area. And we expect the EC's legal system to serve the interests of transnational society, not individual governments, or even a consortium of powerful governments (the argument is elaborated more fully in Stone Sweet and Sandholtz 1997).

Empirically, our differences with intergovernmentalists must begin with the challenge of explaining the constitutionalization of the treaty system. As we have tried to demonstrate, constitutionalization profoundly transformed the EC polity. As discussed above, the ECJ, activated by Article 177 references, constructed the EC legal system: It worked to diffuse the doctrines of supremacy and direct effect and to provide national judges with the means to enforce EC law, even against national governments and the legislatures that governments control. Further, constitutionalization did not take place surreptitiously. During the proceedings that preceded the ECJ's announcements of supremacy and direct effect, various governments argued, in formal "observations"—briefs advising the court how it should decide—that the Treaty of Rome could not be interpreted so as to support either doctrine (Burley and Mattli 1993, Stein 1981). Nevertheless, the court revised the treaty by authoritatively interpreting it, and these interpretations transformed the nature of EC governance. Governments agreed to this transformation, but only after the fact and only tacitly, by progressively adjusting their behavior to the emergence of new rules.

We view the ECJ, not unlike Weiler (1981, 1991, 1994) and Burley and Mattli (1993), as generally working to enhance the autonomy of the EC legal system, autonomy that is then exercised to promote the interests of transnational society and to facilitate the construction of supranational governance. The court does not work in the interests of member governments, except in the very loose sense in which those interests can be construed as being in conformity with the treaty's purposes broadly—not narrowly—conceived. The move to supremacy and direct effect must be understood as audacious acts of agency. The ECJ could afford to move aggressively to revise the treaty on its own, because its formal relationship with the member states is a permissive one. Given the decision-making rule in place (unanimity), the credibility of the threat that the member states would reverse constitutionalization—or any ECJ treaty interpretation—was and remains low.

We now examine the dynamics of integration in two very different areas: the free movement of goods and the Europeanization of social provisions. While we cannot claim a representative sample, the cases selected vary along a number of dimensions, several of which deserve emphasis. The free movement of goods domain constitutes *negative integration*, the removal of national rules that hinder transnational exchange. This domain is a core value of the EC polity and is the most highly developed of European law. The production of EC social provisions constitutes *positive integration*, the elaboration of supranational rules that replace (or fix

standards for) national rules governing in a particular area. Such rules regulate exchange among individuals and between individuals and their government. Unlike negative integration processes, wherein the dominance of the ECJ and its case law is virtually total, the competence to make rules in the social area is shared by the court and the EC's legislative institutions (including the Council of Ministers, which generally has the last word). Since the late 1970s, the EC has produced five major directives on equal treatment and nondiscrimination between the sexes in the workplace and in benefits. In negative integration processes the potential for large collective gains from trade is obvious; in positive integration processes, the efficiency logic of integration is greatly reduced. Given these and other important differences, to the extent that the EC legal system operates in invariant or similar ways, our claims are better supported or undermined.

We begin with Article 177 references. Recall that most are triggered by litigants who claim that rules or practices in place in a member state are not in compliance with EC law and request, nevertheless, that a national judge enforce EC law. Activated by these references, the ECJ was able to construct the EC legal system by taking decisions that voided the application of national rules and practices in favor of Euro-rules. Thus, most rulings are rendered in the bright light of clearly revealed preferences on the part of a member state *not* to comply. This dynamic belies, on its face, intergovernmentalist assertions. And, as mentioned above, governments participate directly in Article 177 processes by regularly filing with the court legal briefs defending the legality of their own (or any other national) rule or practice, and by indicating to the court how they believe the dispute ought to be decided. Thus, in advance of any important decision, the ECJ is normally well informed of governmental preferences.

Congruent with our theory, we expect Article 177 litigation to be patterned in predictable ways. In stating these expectations as testable propositions, we further clarify our differences with intergovernmentalists. First, other things being equal, references will target disproportionately those national barriers to transnational activity that hinder access to larger markets relative to smaller markets. The hypothesis can be tested by examining the effect of litigation on negative integration, that is, the removal of barriers to trade and other activity. Second, other things being equal, references will target disproportionately those national rules and practices that operate to downgrade the effect and application of European secondary rules. The legal system will then operate to push the lowest common denominator upward, in a progressive and prointegrative direction, nullifying the lawmaking effects of unanimity voting in the council. The hypothesis can be tested by examining the effect of litigation on positive integration via the production of harmonized European rules and their transposition into national legal regimes. Our general claim is, therefore, that the EC legal system works to dismantle barriers to transnational activity in place in the dominant member states and to ratchet Euro-rules upward from the lowest

TABLE 5. Article 177 References Regarding Free Movement of Goods and Social Provisions: Percentage Difference, Actual Number, and Proportional Share

Member State	Free Movement of Goods			Social Provisions		
	Percentage Difference	Actual Number	Proportional Share	Percentage Difference	Actual Number	Proportional Share
Austria	-.05	0	.4	.55	1	.1
Belgium	-4.89	42	74.8	.22	19	18.36
Denmark	-.57	10	13.8	6.92	15	3.4
France	.23	116	114.3	-12.90	7	28.5
Germany	9.32	265	202.3	-6.28	40	50.3
Greece	-.73	3	7.9	-.58	1	2.0
Ireland	-.38	5	7.5	1.87	5	1.9
Italy	-.82	84	89.4	-7.97	9	22.2
Luxembourg	-.30	5	8.8	-.45	1	2.2
Netherlands	-1.43	86	95.5	2.50	28	23.8
Portugal	.51	7	3.6	-.54	0	.9
Spain	.27	11	9.2	-.77	1	2.3
Sweden	.19	2	.7	-.11	0	.1
UK	-1.34	34	42.9	17.54	40	10.7

Source: Excerpted from Appendix A.

Note: The first column indicates the positive or negative extent to which litigants are attacking the rules of a particular member state in a particular legal domain relative to other member states and other areas. The second column indicates the number of Article 177 references in that legal domain in each member state. The third column indicates the number of references each member state *would have registered* if there were no difference between overall litigation rates for each member state and rates of litigation for each member state in each policy area. For instance, France accounts for slightly less than 17.1% of all references. Thus, France's proportional share of free movement of goods references is 17.1% of the 670 total references in that category, or 114.3. In other words, the proportional share entries are from the table of no association (the basis for the chi-squared test). French courts actually made 116 references in this same legal domain. Therefore, the percentage difference for France is calculated as follows: $(116 - 114.3)/670$. Entries may differ slightly due to rounding.

common denominator. If we are right, another proposition follows logically: State preferences will not have a significant effect on judicial outcomes. These claims and predictions conflict, fundamentally, with intergovernmentalist expectations.

Table 5 depicts cross-national patterns of litigation in the legal domains of free movement of goods and social provisions (more complete material is contained in Table A-1). The "percentage difference" column provides us with a rough benchmark for evaluating these patterns. The "actual number" column indicates the total number of Article 177 references registered in each of the member states, per legal domain. The "proportional share" column indicates the number of references each state would have generated if there were no difference between overall litigation rates and rates of litigation in specific legal areas. Thus, if a state accounted for 12% of total references, we assigned a proportional share of 12% of the references in each domain to that state (in other words, they are entries from the table of no association, the basis of the chi-squared test). We then subtracted, for each category and for each state, the predicted number of references from the actual number of references and standardized the difference by percentage. Thus, the percentage differences have positive and negative signs. A high positive value indicates that litigants are attacking the rules of a particular country in a particular legal domain relative to other countries and other areas. A negative value indicates that a country is not being dragged to the ECJ as often as we might expect based on overall litigation rates relative to other member states and policy areas.

Note that in the free movement of goods domain,

accusations of German noncompliance dominate EC litigation. Of 670 references concerning that domain, 265 (40%) target German laws. This does not mean that Germany has been more protectionist than every other EC member. It does mean that the German market, the largest in the EC, is the prize of free traders. Furthermore, it means that the matrix of trade-relevant rules in place in Germany has provided the predominant context for the ECJ's construction of an integrative case law.

Confidence in our theory is further strengthened by empirical studies of outcomes. Kilroy (1996), in her analysis of free trade cases, assessed the relationship between observations—the briefs filed by the European Commission and governments in pending cases—and the ECJ's rulings. She found that in 81 decisions (two-thirds of her pool), the court struck down national rules as treaty violations; in 41 cases (one-third of her pool), the court upheld national rules as permissible under EC law. She further found that in 98 of 114 cases in which the commission intervened, the court sided with the commission. The commission's position therefore predicted the ECJ's decision 86% of the time. The position of governments utterly failed to predict the court's rulings; German interventions were found to be particularly ineffectual in generating outcomes. Following the logic of Garrett (1992), Kilroy (1996, 23) finds it "surprising that Germany has a relatively lower impact on the Court." But we do not. The EC's supranational institutions—especially the commission and the court—operate to facilitate transnational activity, not to codify or give legal comfort to the preferences of the dominant states.

These numbers tell only part of the story. As impor-

tant has been the positive feedback effect of ECJ decisions on integration processes. The free trade case law, initiated in 1974 with *Dassonville* (ECJ 1974b), sustained the integration project at a time when the legislative process was stalled by disputes among governments and between the Council of Ministers and the commission (Gormley 1985, Oliver 1988). Out of this case law came the famous principle of mutual recognition of national standards, which the ECJ used to help construct the common market. In developing this principle, the court demonstrated how member states might retain their own national rules, capable of being applied to the production and sale of domestic goods within the domestic market, while prohibiting members from applying these same rules to goods originating elsewhere in the community. The ECJ's case law also placed national regulations in "the shadow of the law," raising the specter of relentless litigation against rules that do not comply with the dictates of mutual recognition.

Simplifying a complex chain of events, the adjudication of disputes over free movement of goods between traders and member states triggered a political process by which the commission, in alliance with transnational business coalitions, converted mutual recognition into a general strategy that could be extended beyond free movement. That strategy ultimately resulted in the 1986 Single European Act. The literature on the act has sufficiently demonstrated that governments did not meaningfully control this process (Alter and Meunier-Aitshalia 1994, Dehousse 1994, Sandholtz and Zysman 1989). Instead, governments were forced to adapt to it. Governments did act, of course, in negotiating a treaty that codified prointegration solutions to collective action problems (Moravcsik 1991), including the principle of mutual recognition. But most of these solutions had already emerged out of the structured interactions among transnational actors, the ECJ, and the commission.

We turn now to social provisions, the cluster of treaty rules and directives governing nondiscrimination on the basis of sex in pay and employment benefits. Table 5 shows that litigation originating in the British judiciary has driven the ECJ's docket in this area. Fully 24% (40/167) of all references in this domain have attacked, as inconsistent with EC law, legal rules and administrative practices in the United Kingdom. It is well known that the British government has constituted the crucial veto point in legislative deliberations within the Council of Ministers on social provisions (Pillinger 1992, 85–101). Indeed, since the first directive was adopted by the Council of Ministers in 1975, the British government has not wavered in its intention, publicly declared, to veto any European proposal that would enshrine in EC law any rules not already enacted by Parliament (Kenney 1992). The data show that, in this sector, litigation has disproportionately attacked the national rules and practices that represented the lowest common denominator position on EC secondary legislation adopted by the council.

We then tested our predictions concerning outcomes and the effect of observations made by the commission

and the governments in all Article 177 references to the ECJ in the social provisions area, from 1970 (the date of the first reference in this domain) through 1992. Rulings were coded into one of two categories: either the court accepted a national rule or practice as consistent with EC law or declared it to be in violation. Of the 91 judgments that could be unambiguously coded,¹² the ECJ declared violation of EC law in 48, a success rate of 53% for plaintiffs in national courts. The ECJ considered the lawfulness of British practices in 24 rulings, declaring violations in 13. Aggregating results from litigation involving the big three—France, Germany, and the United Kingdom—the court ruled violations in 24 of 41 decisions (59%). We also found, as Kilroy had in the free movement area, that the commission's briefs tracked results far better than did the observations filed by governments. The commission's success rate is a whopping 88%: 73 of its 83 observations predict the direction of the final ruling. The United Kingdom's rate of success was 58% (31 of 54 observations tracked final results). This challenges the intergovernmentalist assertion that the preferences of the most powerful states systematically constrain the ECJ.

The effect of the ECJ's case law on national and supranational policy processes and outcomes in the social domain has been deep and pervasive. A large body of scholarship (e.g., Ellis 1991; Harvey 1990; Kenney 1994, 1996; Pierson 1996; Pillinger 1992; Prechal and Burrows 1990) has documented the extraordinary extent to which the ECJ has used its powers for creative interpretation of EC secondary legislation, like directives, and to ratchet up the lowest common denominator position in the Council of Ministers. Kenney (1992, chapter 3), who has examined the relationship between EC and British sex discrimination law in great detail, shows that by the mid-1980s "the EC [had] eclipsed the British parliament as the arena of innovation" in this respect. Tory governments have been forced by national court decisions to ask Parliament, on successive occasions over the past fifteen years, to amend British statutes to conform to the ECJ's evolving case law.¹³ In this area, at least, lowest common denominator bargains struck in the council of Ministers have not stuck. Instead, the court has more or less systematically ratcheted obligations upward, in a prointegration direction.

Finally, we examined the relationship between this case law and the work of the Council of Ministers. We found that the ECJ has used Article 177 references to

¹² We were forced to exclude data from ECJ judgments rendered in 1993 (14 cases); as of June 1997, the European Court Reports for that year were unavailable, having been recalled to correct for errors.

¹³ Relative to other European judiciaries, one would expect the British courts to enforce EC law only with great difficulty. The doctrine of parliamentary sovereignty formally prohibits judicial review of legislation, on any grounds, and doctrines governing the resolution of conflicts between treaty law and parliamentary statutes conflict with the ECJ's doctrine of supremacy. Both of these long-lived orthodoxies have been swept aside, in areas governed by EC law, as the British judiciary has incorporated as national law the doctrines of supremacy, direct effect, and indirect effect (Craig 1991, Levitsky 1994).

legislate, by judicial fiat, provisions vetoed in the council. In a wave of cases decided in 1990 and 1991, the ECJ boldly usurped the council's legislative primacy by enacting (as a matter of treaty interpretation) the substance of provisions contained in three different legislative proposals.¹⁴ Each of these proposals had been drafted by the commission, either to extend nondiscrimination provisions to new areas or to enhance the enforceability of Euro-rules on equal treatment in the national courts. And each had been vetoed by the United Kingdom, among other governments, in the council.

Thus, outcomes in both of the legal domains examined are broadly consistent with predictions derived from our theory, but they are inconsistent with intergovernmentalist expectations. Although our analysis does not constitute a definitive test, we are confident that our theory outperforms intergovernmentalist theories more generally.¹⁵ Again, we have not argued that member state governments are irrelevant. It is our contention, however, that they do not meaningfully control integration processes. Existing intergovernmentalist theories of integration may well help us understand the bargaining processes in the Council of Ministers and in European summits. But this bargaining takes place within contexts constructed by processes explained by our theory.

In summary, we believe that the EC legal system operates according to a generalizable dynamic. Individuals ask national judges to void national rules or practices in favor of EC legal rules within a particular domain of activity. Transnational dispute resolution—the interaction among litigants, national courts, and the ECJ—recasts the law governing that domain of activity and, therefore, the policymaking environment. As new rules are generated and existing rules are reinterpreted, national governments (in whose territory rules or practices are now out of step with EC rules) are placed in an ever longer and darker “shadow of the law.” The court's case law provides the commission with the constitutional backing for its own policymaking goals, to the extent that these goals are them-

selves integrative. And this case law enhances the capacity of individuals to initiate future litigation, by providing potential litigants with more precise information about the content and scope of European law. Thus, in process tracing, we see again the self-sustaining dynamic that we theorized and then found in the quantitative analysis.

CONCLUSION

We have proposed a theory of how a transnational rule-of-law polity may emerge. This emergence, the theory implies, depends critically on the construction of causal linkages among three factors: exchange, triadic dispute resolution, and the production of legal rules. We derived a set of propositions from the theory and tested them in the case of the European Community. We then cross-checked our quantitative results by process-tracing in two discrete areas of EC law. We found broad support for the general theory and for specific claims about how the EC legal system operates.

We emphasized the transformative effect of the ECJ's early case law, which “constitutionalized” the treaty system. Relative to the EC as originally conceived by the member states (and relative to pure intergovernmental fora), constitutionalization made the EC far more responsive to the demands of transnational society—those who exchange across borders. In the EC, individuals can activate transnational adjudication processes on their own. In virtually all other international regimes, individuals must rely on intermediaries, usually representatives of governments, to press their claims and to pursue their other interests. But in the EC, the operation of the legal system has progressively reduced the capacity of national governments to control policy outcomes, while it has enhanced the policy influence of the EC's supranational institutions, national judges, and private actors.

We end by suggesting that our theory may help us understand the evolution of rule-of-law systems more generally. North (1990) has shown us that individual behavior, governmental organizations, and rules often evolve symbiotically, determining a great deal of what is most important about modern economic and political systems. North (1990, 35) has further argued that “impersonal exchange with third party enforcement . . . has been the critical underpinning” of successful modernization and political development. Shapiro (1980) has demonstrated that courts are crucial to regime formation, state-building, and the consolidation of political legitimacy. Judges, because they are agents of normative (rule-oriented) change in rule-of-law societies, possess the broad capacity to configure and reconfigure the polity. Certainly, they have done so in North America (e.g., Horwitz 1977; Russell, Knopff, and Morton 1989; Wolfe 1986), in Europe (e.g., Burley and Mattli 1993; Kommers 1989; Shapiro and Stone 1994; Stone 1992, 1994b; Weiler 1991), and in some international regimes (e.g., Hudec 1993, Stone Sweet 1997b). As we are now experiencing a “global expansion of judicial power” (Tate and Vallinder 1995), we have

¹⁴ The court enacted: (1) in *Barber* (ECJ 1990b), abrogations of those provisions of the Equal Treatment (1976) and Social Security (1979) directives that had permitted member states to derogate from principles of equal treatment in retirement pensions; (2) in *Dekker* (ECJ 1991b), the main provisions of the “pregnancy directive,” which were designed to protect pregnant women from discrimination; and (3) in *Hertz* (ECJ 1991c), the core elements of the proposed “burden of proof” directive, which was designed to shift the burden to the member states in cases involving sex discrimination.

¹⁵ Intergovernmentalists tend to conceptualize the activities of the ECJ in terms given by game theory or principal-agent theory. In this imagery, the Eurolaw “game” is dyadic, played by member states (or principals) in one seat and the ECJ (the agent) in another (e.g., Garrett 1992, Kilroy 1996). Such analyses all but ignore two sets of actors—private litigants and national judges—who are crucial to how the legal system functions. Moravcsik (1993, 513) openly admits that his intergovernmentalism cannot explain the construction of the legal system (but see also Moravcsik 1995). It is our contention that the operation of the legal system—highly structured interactions among private litigants, national judges, and the ECJ—is at the very core of European integration processes writ large. Political scientists cannot begin to explain the dynamics of European integration without a coherent account of legal integration.

APPENDIX A. Article 177 References: Actual Number, Proportional Share, and Percentage Difference by Legal Subject Matter

	A	B	C	D	E	F	G	H	I
Austria	-0.05%	-0.05%	-0.05%	-0.05%	-0.05%	0.55%	-0.05%	-0.05%	-0.05%
Actual number	0	0	0	0	0	1	0	0	0
Proportional share	0.4	0.4	0.1	0.3	0.2	0.1	0.2	0.1	0.1
Belgium	-4.89%	-6.83%	1.79%	-3.22%	17.56%	0.22%	-6.61%	5.91%	11.47%
Actual number	42	33	29	5	112	19	2	28	31
Proportional share	74.8	85.1	25.0	7.0	43.5	18.4	4.9	18.3	15.3
Denmark	-0.57%	-0.10%	0.17%	-2.07%	-1.81%	6.92%	0.21%	-1.46%	-2.07%
Actual number	10	15	5	0	1	15	1	1	0
Proportional share	13.8	15.7	4.6	1.3	8.0	3.4	0.9	3.4	2.8
France	0.23%	-3.72%	13.72%	-1.21%	-4.01%	-12.90%	5.64%	0.60%	-5.41%
Actual number	116	102	69	10	51	7	10	29	16
Proportional share	114.3	130.0	38.2	10.7	66.4	28.5	7.5	27.9	23.3
Germany	9.32%	13.54%	-11.03%	15.80%	-5.62%	-6.28%	-27.96%	-14.99%	0.43%
Actual number	265	334	43	29	96	40	1	25	42
Proportional share	202.3	230.0	67.5	18.9	117.6	50.3	13.3	49.4	41.3
Greece	-0.73%	-0.26%	-0.29%	-1.18%	-0.67%	-0.58%	-1.18%	3.70%	-0.45%
Actual number	3	7	2	0	2	1	0	8	1
Proportional share	7.9	8.9	2.6	0.8	4.6	2.0	0.5	1.9	1.6
Ireland	-0.38%	1.23%	0.66%	-1.13%	-0.61%	1.87%	-1.13%	0.09%	-0.40%
Actual number	5	18	4	0	2	5	0	2	1
Proportional share	7.5	8.6	2.5	0.7	4.4	1.9	0.5	1.8	1.5
Italy	-0.82%	1.71%	2.27%	-0.66%	-11.82%	-7.97%	32.10%	1.89%	-6.06%
Actual number	84	115	35	8	6	9	20	25	10
Proportional share	89.4	101.6	29.9	8.4	51.9	22.2	5.9	21.8	18.3
Luxembourg	-0.30%	-0.39%	-0.60%	-1.05%	-0.28%	-0.45%	-1.05%	1.39%	1.87%
Actual number	5	5	1	0	3	1	0	4	4
Proportional share	8.8	10.0	2.9	0.8	5.1	2.2	0.6	2.2	1.8
Netherlands	-1.43%	-2.34%	-4.45%	0.02%	5.73%	2.50%	1.64%	-2.08%	-3.32%
Actual number	86	91	22	9	78	28	7	20	15
Proportional share	95.5	108.6	31.9	8.9	55.5	23.8	6.3	23.3	19.5
Portugal	0.51%	-0.54	1.25	-0.54	-0.28	-0.54	-0.54	0.07%	-0.54%
Actual number	7	0	4	0	1	0	0	1	0
Proportional share	3.6	4.1	1.2	0.3	2.1	0.9	0.2	0.9	0.7
Spain	0.27%	-1.11	1.31	-1.37	-0.09	-0.77	-1.37	4.73%	-0.64%
Actual number	11	2	6	0	5	1	0	10	1
Proportional share	9.2	10.4	3.1	0.9	5.3	2.3	0.6	2.2	1.9
Sweden	0.19%	-0.11%	-0.11%	-0.11%	-0.11%	-0.11%	-0.11%	0.50%	-0.11%
Actual number	2	0	0	0	0	0	0	1	0
Proportional share	0.7	0.8	0.2	0.1	0.4	0.1	0.1	0.2	0.2
United Kingdom	-1.34%	-1.04%	-4.63%	-3.24%	2.05%	17.54%	0.41%	-0.31%	5.27%
Actual number	34	41	4	2	33	40	3	10	16
Proportional share	42.9	48.8	14.3	4.0	24.9	10.7	2.8	10.5	8.8

Note: A = free movement of goods; B = agriculture; C = competition and dumping; D = external policy; E = social security; F = social provisions; G = environment; H = establishment; I = free movement of workers; J = taxes; K = transportation; L = common policy; M = approximation of laws; N = other. Actual number indicates the number of Article 177 references in that legal domain for each member state. Proportional share entries are the number of cases that each member state would have registered in each legal domain if there were no difference between overall litigation rates for each member state and rates of litigation for each member state in each policy area. Thus, if Germany accounts for 30% of the references overall, we assigned a proportional share of 30% of the references in each policy area to Germany. In other words proportional share is the "table of no association" (the basis of the chi-squared test). Bold entries are percentage differences, which are calculated the following way: (Actual number - Proportional share)/total number of references in the legal domain. These entries are indicative of the positive or negative extent to which litigants are attacking the rules of a particular member state in a particular domain relative to other member states and other areas.

APPENDIX A. (continued)

J	K	L	M	N
-0.05%	1.42%	-0.05%	-0.05%	-0.05%
0	1	0	0	0
0.1	0.04	0.2	0.1	0.3
-3.13%	7.96%	-8.94%	-0.52%	-0.21%
20	13	1	15	66
27.8	7.6	5.0	16.8	67.3
4.36%	6.76%	0.16%	0.06%	-1.57%
16	6	1	3	3
5.1	1.4	0.9	3.1	12.4
-3.43%	-5.32%	-8.20%	-0.07%	8.95%
34	8	4	24	157
42.4	11.6	7.7	25.7	102.7
-0.91%	-2.29%	9.77%	-9.66%	-11.49%
73	19	18	29	113
75.1	20.5	13.6	45.5	181.8
-0.38%	-1.18%	-1.18%	-1.18%	-1.80%
2	0	0	0	18
2.9	0.8	0.5	1.8	7.1
-1.13%	-1.13%	3.32%	-1.13%	-0.63%
0	0	2	0	3
2.8	0.8	0.5	1.7	6.8
2.30%	-7.48%	4.42%	10.05%	3.56%
39	4	8	33	102
33.2	9.1	6.0	20.1	80.3
-0.64%	0.42%	-1.05%	0.37%	0.94%
1	1	0	2	12
3.3	0.9	0.6	1.9	7.9
3.00%	-2.51%	-0.94%	2.04%	1.65%
43	8	6	23	96
35.4	9.7	6.4	21.5	85.8
0.67%	0.93%	1.69%	0.17%	-0.37%
3	1	1	1	1
1.3	0.4	0.2	0.8	3.2
-0.16%	-1.37%	-1.37%	1.47%	-0.04%
3	0	0	4	8
3.4	0.9	0.6	2.1	8.2
-0.11%	-0.11%	-0.11%	-0.11%	0.06%
0	0	0	0	1
0.3	0.1	0.1	0.2	0.7
-0.39%	3.88%	2.48%	-1.45%	-2.60%
15	7	4	7	23
15.9	4.4	2.9	9.7	38.5

Note: A—See preceding page.

every reason to theorize more rigorously the political effect of triadic dispute resolution.

APPENDIX B

We tested whether higher levels of references per member state are generated, respectively, by (1) higher levels of diffuse support for the European legal system (measures developed by Caldeira and Gibson 1995), (2) larger populations (aggregated as the average population for each member state, 1961–93), and (3) larger economies (aggregated as the average GDP for each member state, 1961–93). The dependent variable for each model is the average number of Article 177 references per member state, and $n = 11$. Our results are summarized as follows:

	Inter- cept	t	coefficient	t	Adj. R^2	SEE
Diffuse support	10.08	3.92	19.88	1.18	.04	8.54
Population	6.40	1.55	9.43 (10^{-8})	1.16	.03	8.55
GDP	3.33	1.48	1.48 (10^{-11})	4.30	.63	5.27

The index of diffuse support for the ECJ is from Caldeira and Gibson (1995, 364). Population data are from the World Tables of Economic and Social Indicators (World Bank 1990). GDP data for 1960–69 are from the Cross-National Time-Series Study Banks 1976; and GDP data for 1970–94 are from the World Tables (World Bank 1995).

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