

Reason and Authority in the European Court of Justice

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INTRODUCTION

A surprising feature of current debates about institutional reform in the European Union (EU) is the dearth of references to the European Court of Justice (ECJ). For an institution hailed as “the most powerful and influential supranational court in world history,”¹ the Court has thus far played a comparatively limited role in the transformation of the EU in the early twenty-first century. That transformation aims at bridging the gap between, on the one hand, ever closer political and economic integration within the EU and, on the other hand, its citizens’ persistent aloofness about European matters. How can the Court contribute to the creation of a robust European identity? What changes in its style, methods, or doctrinal approach would it need to undergo as part of that effort? Finally, what is and should be the relationship between Europe’s citizens and their apex court, half a century after the ECJ’s inception?

This Article argues that the Court can contribute to the development of the European citizenry’s political identity by “politicizing” its judicial style, that is, by bringing into the open the legal debate about the choice of conflicting methods and values that informs its judgments.²

1. ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 153 (2000). For a detailed treatment of the development and the institutions of the EU, see generally GRÁINNE DE BÚRCA & PAUL CRAIG, *EU LAW: TEXTS, CASES AND MATERIALS* (4th ed. 2008).

2. Some participants in the Community legal system have shown candor about this aspect. See Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, 1992 U. CHI. LEGAL F. 93, 106 (“A balancing of conflicting policy values . . . often is at the center of the ECJ’s decisionmaking. This is especially the case with regard to the Treaty provisions securing the free movement of goods, workers, self-employed persons (freedom of establishment), and

The most effective means to that end is to allow its members to enter separate opinions. Dispensing with the single, collegiate judgment would enable the Court to “renegotiate” its relationship with the European public.³ From its newly adjusted position, the Court could play an important role in the formation, as much as it is possible and desirable, of a shared political consciousness among the European citizenry.⁴ Far from being a mere technicality, multiple judgments are a bold, but necessary, step in the EU’s ongoing experiment in governance.⁵

This development is long overdue. The ECJ finds itself alone among supranational and international courts and one of only a handful of national apex courts that bans its judges from writing concurring or dissenting opinions. The explanation for its unique position is not the lack of reasonable disagreement about the choice of methods of interpretation or the application of one method to any given case. The ECJ has made, and will continue to make, choices that are—or at least appear to be—inescapably controversial.⁶ Recently, in *Laval v. Svenska*, the Court gave priority to the demands of the European market for services over a union’s right to strike.⁷ In the *Spanish Strawberries* case, it held that a

services—the cornerstone of the common (internal) market.”).

3. See CHARLES TILLY, *WHY?* 20 (2006) (identifying two roles of reason giving as a general social practice as, first, the negotiation of relationships and, second, the creation and the reparation of relationships).

4. The case for the importance of a shared political identity is typically made by reference to the political viability of a host of political projects, from the allocation of structural funds to the coordination of immigration policies, which are said to depend on the existence of such a shared political identity. This is the core of Jürgen Habermas’s famous plea for a European constitution. See Jürgen Habermas, *Why Europe Needs a Constitution*, *NEW LEFT REV.*, Sept.–Oct. 2001, at 5; see also Mattias Kumm, *Why Europeans Will Not Embrace Constitutional Patriotism*, 6 *INT’L J. CONST. L.* 117, 118–19 (2008) (“If the EU is to master, successfully, the tasks assigned to it and, using a nonconsensual procedure, decide on policies that concern the security of its citizens or that have significant distributive effects, then a sufficiently robust common identity seems necessary to legitimate the polity and ensure its functioning in the long term.”).

5. Rethinking the role of consensus is part of the experimentalist ethos in the EU. See Charles S. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 *EUR. L.J.* 271, 274 (2008) (“In conventional views of deliberative decision making, the goal is consensus and reflective equilibrium. In the EU by contrast, deliberative decision making is driven at least as much by discussion and elaboration of difference. Indeed, consensus is regarded as provisional, a necessary condition for taking decisions that have to be confronted now, but certainly not the final word of discussion nor even a reflective equilibrium.”).

6. Some authors have explained this by reference to the conflict of incommensurable values. For an example in the context of national appellate adjudication that applies, *mutatis mutandis*, to supranational adjudication, see John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 *OXFORD J. LEGAL STUD.* 221, 222 (2000) (“There is . . . no reason to assume that a majority is more likely to be right than a minority in relation to a value judgment.”). But see Frederick Schauer, *Instrumental Commensurability*, 146 *U. PA. L. REV.* 1215 (1998).

7. Case C-341/05, *Laval v. Svenska*, 2007 E.C.R. I-11767.

member state is under an obligation to intervene when private groups interfere violently with the intracommunity movement of goods.⁸ Further, in *Omega v. Oberbürgermeisterin*, the Court upheld a member state's decision to ban the import of violent video games from another member state on the grounds that such importation violates its citizens' dignity rights.⁹

There is, in principle, nothing objectionable about this *modus decedendi*. Choosing among conflicting legal values and methods of interpretation is an integral part of what courts everywhere do.¹⁰ What stands out, however, is the rather thin justification the Court offers in support of its most crucial choices. Its justificatory style has often been criticized as overly abstract, vague, and elliptical. That is, to a large extent, the effect of judicial form on the substance of legal reasoning.¹¹ Adherence to a single, collegiate judgment forces on the Court a pattern of reason giving that makes its judgments read, in the words of one former member, like documents drafted by committee.¹²

For instance, in *Chacón Navas v. Eurest Colectividades SA*,¹³ the Court interpreted the Employment Equality Directive 2000/78 to implement the medical, as opposed to the social, model of disability,

8. Case C-265/95, *Comm'n v. France (Spanish Strawberries)*, 1997 E.C.R. I-6959.

9. Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609.

10. Seasoned readers might shudder at this admittedly overconclusory statement. After all, some of the debates that shaped academic discourse in European law were sparked by charges that law is politics in disguise. See generally HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE* (1986). Those early debates were important, but, as some early participants rightly noted, flawed by their normative deficiencies. I take that to be a central point in J.H.H. Weiler, *The Court of Justice on Trial*, 24 *COMMON MKT. L. REV.* 555 (1987) (reviewing RASMUSSEN, *supra*). As I argue later, I believe that choices between alternative methods and values in the context of interpretation and application are internal to law. See also Miguel Poiars Maduro, *Europe and the Constitution: What if This Is as Good as It Gets?*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 74, 75 (J.H.H. Weiler & Marlene Wind eds., 2003) (arguing structurally that the "true nature of constitutionalism [is] the balancing of diverse and often conflicting interests and fears").

11. Scholars have noted the importance of the form of judgment. See Takis Tridimas, *The Court of Justice and Judicial Activism*, 21 *EUR. L. REV.* 199, 210 (1996) ("The influence that the form of the judgment has is intangible but should not be underestimated."). For a critical view, see NOREEN BURROWS & ROSA GREAVES, *THE ADVOCATE GENERAL AND EC LAW* 297 (2007) ("The Court of Justice seems to have a preference for avoiding complex reasoning in its judgments even in the most complex of cases In difficult cases, clear succinct arguments appear to have more benefit for the Court than abstruse and convoluted interpretations of Community law."). See also Giuseppe Frederico Mancini & David T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 *COLUM. J. EUR. L.* 397, 402 (1995) (criticizing the Court for not following a rigorous case law technique similar to the one practiced by common law judges).

12. See David Edward, *How the Court of Justice Works*, 20 *EUR. L. REV.* 539, 557 (1995).

13. Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, 2006 E.C.R. I-6467.

though it failed even to acknowledge the latter model's existence, much less its explicit endorsement by all the political institutions as the framework for the EU's disability policies and programs.¹⁴ In a vaguely worded opinion, the Court distinguished sickness and disability as legally distinct conditions and held that discrimination based on sickness is not prohibited under Community law.¹⁵ It failed, however, to speak to the heart of the matter, namely why the directive is interpreted to confer lesser protections to people suffering from long-term, disabling illnesses.¹⁶ This judgment, like many others, does not reflect a court subscribing on prudential grounds to a minimalist judicial philosophy. Rather, it presents a court cornered by legal form and institutional self-understanding into deciding consequential cases by thin and unstable compromises.¹⁷

An analysis of the Court's judicial style is all the more timely given the substantive reforms envisioned for the EU's near future.¹⁸ Some of

14. See generally Council Regulation of 15 July 2003, Promoting the Employment and Social Integration of People with Disabilities, 2003 O.J. (C 175) 1, available at http://www.ec.europa.eu/employment_social/news/2003/oct/resolution150703en.pdf; Commission Communication for Equal opportunities for people with disabilities: A European Action Plan, COM (2003) 650 final (Oct. 30, 2003), available at http://ec.europa.eu/employment_social/news/2003/oct/en.pdf. A list of relevant documents regarding European disability policy is available in chronological order at European Commission, Employment, Social Affairs & Equal Opportunities, Disability Issues, at http://ec.europa.eu/employment_social/index/7003_en.html (last visited Nov. 16, 2008). For an analysis of the evolution of the EU's disability policy, see LISA WADDINGTON, FROM ROME TO NICE IN A WHEELCHAIR: THE DEVELOPMENT OF A EUROPEAN DISABILITY POLICY (2006). For a study of the EU's disability policies, including a comparison between the medical and social models of disability, see Thomas F. Burke, *The European Union and the Diffusion of Disability Rights*, in TRANSATLANTIC POLICYMAKING IN AN AGE OF AUSTERITY 158, 158–176 (Martin A. Levin & Martin Shapiro eds., 2004). For a general discussion of the social model of disability in the European and global contexts, see COLIN BARNES & GEOFF MERCER, THE SOCIAL MODEL OF DISABILITY: EUROPE AND THE MAJORITY WORLD (2005).

15. *Chacón Navas*, 2006 E.C.R. I-6467, paras. 43–47.

16. This point was not lost on scholarly commentators. See David L. Hosking, *A Higher Bar for EU Disability Rights*, 36 INDUS. L.J. 228 (2007); Lisa Waddington, *Case C-13/05, Chacón Navas v. Eurest Colectividades SA*, 44 COMMON MKT. L. REV. 487 (2007).

17. Some authors have advocated a minimalist paradigm for the Court. See T. Koopmans, *The Role of Law in the Next Stage of European Integration*, 35 INT'L & COMP. L.Q. 925, 930–31 (1986) ("It [minimal law] will enable us to rediscover the heart of the matter—which is that the law is there to maintain the peace, and that the means to that end is to stylise the conflict in such a way that the strength of the arguments will be decisive, not the strength of the fist or the length of the knife."); see also Martin Shapiro, *The European Court of Justice*, in THE EVOLUTION OF EU LAW 321 (Paul Craig & Gráinne de Búrca eds., 1999) (advocating a move toward compromise, nuanced decision making, and balancing). The most elaborate discussion of minimalism, in the American context, is CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

18. As of the writing of this Article, the Treaty of Lisbon has been rejected in a popular referendum in Ireland. Sarah Lyall & Stephen Castle, *Ireland Derails a Bid to Recast Europe's Rules*,

these reforms include making the provisions of the Charter of Fundamental Rights legally binding, instituting more liberal standing rules for individuals, and expanding the Court's jurisdiction in the areas of freedom, security, and justice. A growing docket of cases on the free movement of services and persons, with unmistakable—and thorny—social and market implications, will usher in a period that, in the words of one commentator,

heralds not only an expansion of judicial power, but also a transformation of the ECJ . . . [which] is . . . likely to be transformed from a body concerned mainly with the trade and tax law into a human rights court. This change will affect not just the nature of its daily work but, more fundamentally, its saliency and the manner in which it is perceived across Union societies.¹⁹

These developments will increase the public visibility of the Court and highlight the position of the European citizenry as a crucial element of the Court's audience.²⁰ Important opportunities arise from this complex, dialectical relationship. This Article argues that the Court can profit from this period of flux if it transforms its judicial style. Part I discusses the Court's reasoning style through the normative lens of the duty to justify legal and political action in the EU. The ECJ's statutory duty to give reasons²¹ and the concomitant duty incumbent upon the

N.Y. TIMES, June 14, 2008, at A1. Despite these developments, it seems safe to predict that many institutional reforms envisioned by the Treaty of Lisbon, which are substantively similar to those of the ill-fated Constitutional Treaty, will eventually be implemented one way or another. These reforms are the outcome of protracted and complex political negotiations.

19. Damian Chalmers, *Judicial Authority and the Constitutional Treaty*, 3 INT'L J. CONST. L. 448, 463 (2005). While these comments were made by reference to the Constitutional Treaty, the Treaty of Lisbon retains all the relevant reforms that were initially included in the Constitutional Treaty. The Court's authority is reinforced by Article 1(20) of the Treaty of Lisbon, which states: "[The Court] shall ensure that in the interpretation and application of the Treaties the law is observed." Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community art. 1(20), Dec. 13, 2007, 2007 O.J. (C 306) 21, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf> [hereinafter Treaty of Lisbon].

20. Writing in 1993, J.H.H. Weiler's predictions about the increased public visibility of the Court were prescient. See J.H.H. WEILER, *THE CONSTITUTION OF EUROPE* 207 (1999) ("The Court will . . . be called upon to adjudicate disputes which will, inevitably, subject it to public debate of a breadth and depth it is unaccustomed to. . . . [I]ts overall visibility is bound to grow and it will be judged by a media and public opinion far more informed than before.").

21. Treaty of Nice Amending the Treaty on European Union, the Treaty Establishing the European Communities, and Certain Related Acts art. 36, Feb. 26, 2001, 2001 O.J. (C 80) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:080:0001:0087:EN:PDF> [hereinafter ECJ Statute] ("Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.").

EU's political institutions²² share common foundations in the demand that a legitimate exercise of official power be one justified by reasons.²³

Part II supplements normative analysis with the instrumental case for the introduction of separate opinions.²⁴ Specifically, it argues that separate opinions can help the Court succeed where other reforms have thus far failed: in creating an institutional setting in which citizens' collective political identity can take root. This capacity for "external deliberation"²⁵ with institutional and noninstitutional actors has been eroded by decades of successfully converting political conflict into neutral legal language spoken with one voice from behind the "mask of the law."²⁶

22. "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty." Consolidated Versions of the Treaty Establishing the European Union and the Treaty Establishing the European Community art. 253, 2006 O.J. (C 321 E) 1 [hereinafter EC Treaty].

23. Some authors have also mentioned in this context the importance of transparency and accountability. As late as 1996, T. Koopmans's limited account of how the Court operates was seen by the author as an attempt to break the deafening silence on judicial decision making. See T. Koopmans, *Judicial Decision-making*, in LEGAL REASONING AND JUDICIAL INTERPRETATION OF EUROPEAN LAW 93, 104 (A.I.L. Campbell & M. Voyatzi eds., 1996). Other such accounts are available. See, e.g., Edward, *supra* note 12. Of course, this type of "behind the door" account is not the type of openness that the normative requirement calls for. For a useful list of scholarly work discussing the importance of judicial openness and candor, see Chad M. Oldfather, *Writing, Cognition and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1300 n.86 (2008).

24. Consequentialism is not the only ground for separate opinions. For instance, such a system would force judges to write more and would change the nature of the Court's deliberations by blocking off "ideological amplifications" and inducing the group consideration that tames intuitions. On ideological amplifications, see CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 163–93 (2003). For a discussion of how "thinking through" impacts intuitive judgment, see Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007). *But see* Frederick Schauer, *Is There a Psychology of Judging?*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING (David E. Klein & Gregory Mitchell eds., forthcoming 2008), available at <http://ssrn.com/abstract=1015143>.

25. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1697–99 (2004) (discussing the judicial capacity for "external deliberation").

26. Low public visibility and the technical nature of the legal controversies made the existence of "the mask" credible. Eric Stein's description is well known: "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal type structure in Europe." Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 1 (1981); see also Christiaan Timmermans, *The European Union's Judicial System*, 41 COMMON MKT. L. REV. 393, 394 (2004) ("[T]he potential consequences of these decisions [the early fundamental case law], indeed a time bomb capable of shattering traditional concepts of national sovereignty, was only perceived much later at political levels."). This phenomenon is theorized in Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993). *But see* Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995).

While “pivotal in helping to articulate substantive aspects of a European identity,” the public’s reaction to ECJ judgments has seldom been strong or lasting.²⁷ Hence, the cost of its past success has been a growing disconnect between the EU’s institutional trajectory and the political self-understanding of its citizens.²⁸ Looking back half a century, the story of the Court’s evolution is that of an institution becoming somewhat ill adapted to the political environment that its judgments helped to create. Part II argues that separate opinions could bring about a dialogical turn in the Court’s style of reasoning,²⁹ which might help to ease the stalemate between Europe’s court and Europe’s citizens.³⁰ That development is overdue.³¹

Part III discusses the objections to the introduction of separate opinions. It focuses on the taxonomy of shared assumptions about institutional design and culture, including the Court’s position in the overall judicial system; the juriscultural influence of the civil law; the effectiveness of European Community provisions; issues surrounding the overloaded docket and translation services; the impact of dissents on

27. Franz C. Mayer & Jan Palmowski, *European Identities and the EU—Ties that Bind the Peoples of Europe*, 42 J. COMMON MKT. STUD. 573, 589 (2004).

28. That story is seldom told. Too busy analyzing the Court as a strategic actor interested in maximizing its reputation and authority in its interaction with other equally self-interested players in the Community and national spheres, political scientists have largely glossed over long-term internal and external effects of this widening gap. There are exceptions. For evidence of changes in the supranationalists’ position, see Walter Mattli & Anne-Marie Slaughter, *Revisiting the Court of Justice*, 52 INT’L ORG. 177, 185 (1998) (“At bottom, the inability of neofunctionalism to provide a richer account of the interests motivating these actors gives rise to its traditional Achilles heel of teleological bias. Because actors are always presumed to follow their ‘self-interest,’ neofunctionalists cannot convincingly specify the limits to integration. They have no tools to determine when self-interest will align with further integration, due to the triumph of functional demands over national identity, and when it will not.”).

29. This would bring to an end the era of elliptical and conveniently vague judicial reasoning. See J.H.H. Weiler, *The Judicial Après Nice, Epilogue to THE EUROPEAN COURT OF JUSTICE* 215, 225 (Gráinne de Búrca & J.H.H. Weiler eds., 2001) (“One of the virtues of separate and dissenting opinions is that they force the majority opinion to be reasoned in an altogether more profound and communicative fashion.”); see also Edward, *supra* note 12, at 557 (“Introduction of dissenting opinions would also involve a change of style for the majority judgment since the majority would wish to explain their position vis-à-vis the dissenter(s).”).

30. It is important to point out that this measure would be consistent with the Court’s previous incremental approaches to reform. See Shapiro, *supra* note 17, at 324 (defining “incrementalism as a superior policy making technique” because it “allows judicial review courts to introduce big, long-term policy changes through a series of low-visibility events”). For a discussion of incrementalism in the context of the EU’s broader institutional reform, see J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2447–48 (1991) (discussing the watershed importance of changes in the voting system in the Council by the Single European Act).

31. GORDON SLYNN, INTRODUCING A EUROPEAN LEGAL ORDER 162 (1992) (arguing that the introduction of separate opinions was a project for the next century); see also Gráinne de Búrca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 36 J. COMMON MKT. STUD. 217, 233 (1998).

collegiality of the Court and on the role of the Advocate General (AG). Part III concludes that none of these objections offset, for the EU as a whole, the larger benefits of reforms in the Court's judicial style. The inevitable loss of authority resulting once the appearance of unanimity breaks down is ultimately compensated by medium- and long-term gains in external legitimacy and influence.

I. REASON GIVING IN EUROPEAN LAW AND POLITICS

This Part places the ECJ's duty to give reasons within the larger framework of the duty to justify the exercise of all public power. At a formal level, the ECJ is under a statutory duty to justify its judgments.³² However, the ECJ Statute provides little guidance as to the precise content of the duty, other than to mention that the Court's judgments should contain the names of the judges who took part in the deliberations and that they should be signed by the President of the Court and the Registrar.³³ These provisions have been interpreted to mandate the use of a single collegiate judgment. Formal amendments that would allow the use of concurring and dissenting opinions are of course possible,³⁴ but why should the Court change the form of its judgments?³⁵

A cogent analysis of legal form must be accompanied by an analysis both of the content of judicial justification and of the normative foundations for imposing a judicial duty to give reasons. The argument for change is presented in Part II. Part I aims to set the stage for that argument by placing the ECJ's duty to give reasons alongside similar duties at the national level as well as comparing it with duties of justification

32. ECJ Statute, *supra* note 21, art. 36.

33. *Id.* art. 37.

34. In the past, the procedure for amending Article 36 of the ECJ Statute was quite burdensome in that it required the Council to approve unanimously the amendment proposed by the Commission. *See* EC Treaty, *supra* note 22, art. 245. The Treaty of Lisbon, if and when it comes into force, will simplify the procedure by providing: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the [ECJ] Statute, with the exception of Title I [judges] and Article 64 [languages]. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice." Treaty of Lisbon, *supra* note 19, art. 2(226). For a discussion of the amendment procedure under Article 27 of the ECJ's rules of procedure, see ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 10 n.48 (2d ed. 2006). Another amendment method would be to include a provision to this effect in the Treaty of Lisbon itself, as indeed it is not uncommon that such matters be addressed in constitutions or other constitutive legal documents.

35. I borrow this formulation—the unitary form of judgment—from Valerio Gremontieri & Cornelius Joseph Golden, Jr., *The United Kingdom and the European Court of Justice: An Encounter Between Common and Civil Law Traditions*, 21 AM. J. COMP. L. 664, 669 (1973).

incumbent upon the EU's administrative and legislative institutions. The latter's duties to give reasons, which are enshrined in Article 253 of the Treaty Establishing the European Community (EC Treaty),³⁶ have been mentioned by the Court as among the fundamental principles of Community law.³⁷

Some normative justifications of the duty to give reasons are specific to administrative, legislative, or judicial actions. Others are common to the exercise of all forms of official power. As far as the justifications common to the exercise of all forms of official power are concerned, this Part focuses on the need for transparency in the exercise of official power and on the duty to justify the imposition of coercive force. Of the two, only the need to justify the imposition of coercive force applies across all institutional settings.³⁸

A. *Administrative Reasons*

The reason giving requirement is a staple of the exercise of administrative function in modern bureaucratic states.³⁹ Because considerations of both scale and expertise make it necessary to delegate the implementation of national policies away from the political center, the duty to give reasons acts as an essential reminder that delegation is not a license to lawlessness. This duty is typically justified on prudential grounds: reason giving makes the exercise of administrative discretion more transparent; it creates a record; and it makes administrators accountable by facilitating hierarchical review within the administrative system or by the judiciary, at the request of the individuals affected.⁴⁰ Noninstrumental justifications ground the duty in a correlative individual right to

36. EC Treaty, *supra* note 22, art. 253 (“Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.”).

37. Case T-241/97, *Stork Amsterdam BV v. Comm’n*, 2000 E.C.R. II-309, para. 74.

38. Political theorists have analyzed this duty at great length. See generally GERALD F. GAUS, *JUSTIFICATORY LIBERALISM* (1996); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 765 (1997).

39. See Administrative Procedure Act, 5 U.S.C. § 557(c)(3) (2000) (“[Decisions] shall include a statement of . . . findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record.”). For a discussion of the record generating function, see David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in *COMMON LAW THEORY* 134, 138–40 (Douglas E. Edlin ed., 2007). See also Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 182.

40. See Jerry L. Mashaw, *Reasoned Administration*, 76 GEO. WASH. L. REV. 99, 105–12 (2007). See generally Shapiro, *supra* note 39.

be given reasons for administrative outcomes that are binding upon the concerned individuals.⁴¹

Some of these justifications carry over to the supranational European level. The first one is transparency.⁴² For much of its history, the Community has been the object of attacks—mounted frequently by national politicians seeking to gain political capital—about the size and power of its bureaucracy. While substantively weakened by overstatement, these attacks nevertheless resonated with the public perception of a political structure at the European level enmeshed in an overly secretive decision making environment. The technical content of Community decisions and intricate decisional procedures contributed to that perception. As far as the justifications for secrecy go, it is true that, at least in the beginning, the requirements of collegiality of the European Commission called for a certain level of secrecy. But as the Community, and later the Union, has amassed more power over time, perceptions of its insulation have become more pronounced. Against this background, the duty to give reasons embodied in Article 253 of the EC Treaty (then Article 190) presented itself as one way to increase the transparency of the Community administrative processes.

The ECJ has used Article 253 to oversee the exercise of administrative discretion in ways similar to what national courts do in their respective jurisdictions.⁴³ It has thus been up to the Court to decide what the duty to give reasons required in terms of form and content. To start, the Court has held that, because reason giving is the way to make the administrative process transparent to all interested parties, the duty is an essential procedural requirement whose violation constitutes grounds for annulment of a Community administrative act.⁴⁴ This rationale is crisply restated in the recent case *Sison v. Council*:

[T]he statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its

41. See P.P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 CAMBRIDGE L.J. 282, 283–84 (1994); Mashaw, *supra* note 40, at 118.

42. For a recent analysis, see Sabel & Zeitlin, *supra* note 5, at 313–15.

43. See Shapiro, *supra* note 39, at 180 (distinguishing between two forms of administrative discretion: rulemaking and resource management).

44. For a recent statement, see Case C-378/00, *Comm'n v. Parliament and Council*, 2003 E.C.R. I-937; see also Case C-24/62, *Germany v. Comm'n (Branntwein)*, 1963 E.C.R. 63.

power of review.⁴⁵

Over time, the Court moved from a purely procedural to a substantive interpretation of Article 190 (now Article 253).⁴⁶ Considering how willing the ECJ was to scrutinize and invalidate administrative acts whenever it deemed the supporting statements of reasons insufficiently “clear and unequivocal,” it is not surprising that the Court eventually started inquiring into the quality of the reasons and ceased to settle for their existence.⁴⁷ This approach broadened the scope of its review and altered the nature of the interactions among participants at the Community level. The Court’s expanded normative justification went beyond transparency to include a more general, if diffuse, duty to justify administrative actions that place institutional demands on individuals.⁴⁸ The Court captures both dimensions of its substantive review in this statement:

Article 190 [now Article 253] is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty.⁴⁹

While substantive review broadened the audience, the Court continued to shape the content of the duty to give reasons and thus continued to renegotiate its relationship of authority with the EU’s administrative institutions.⁵⁰ The process that started with the Court’s assertion of au-

45. Case C-266/05, *Sison v. Council*, 2007 E.C.R. I-01233, para. 80; see Case C-380/03, *Germany v. Parliament and Council*, 2006 E.C.R. I-11573, paras. 107–14; Case C-100/99, *Italy v. Council and Comm’n*, 2001 E.C.R. I-5217, paras. 62–65.

46. See generally Bo Vesterdorf, *Transparency—Not Just a Vogue Word*, 22 FORDHAM INT’L L.J. 902 (1999).

47. See *Sison*, 2007 E.C.R. I-01233, para. 80.

48. Scholars often note that a far-reaching dialogue requirement has not replaced transparency as a normative ground for justificatory demands for administrative action. The Court held that the duty to give reasons did not require the Commission to address all the factual and legal arguments invoked by the parties during the administrative proceedings. Joined Cases 240–242/82, 261–262/82 & 268–269/82, *Stichting Sigarettenindustrie v. Comm’n*, 1985 E.C.R. 3831. For a discussion of these cases within the larger context of the duty to give reasons, see BÚRCA & CRAIG, *supra* note 1 (noting a more assertive stance of the Court of First Instance in areas such as competition, where the competencies of the Commission are vast).

49. *Branntwein*, 1963 E.C.R. at 69. It is important to recall that there may be noninstrumental grounds for the substantive interpretation of the duty. See generally Mashaw, *supra* note 40 (discussing the individual right to reasons as being fundamental to the moral and political legitimacy of the American and European legal orders). Other scholars, however, have pointed out that there is no convergence of the specifics of procedural rights in American and European law. See Francesca Bignami, *Creating European Rights: National Values and Surpranational Interests*, 11 COLUM. J. EUR. L. 241, 343–44 (2005).

50. That story, with all its twists and turns, is told authoritatively in Shapiro, *supra* note 39, at

thority to require administrative reasons gradually changed after the Court expanded its review powers to pass judgment on the quality and substance of those reasons. As one scholar puts it, “the judicial demand for *reasons* has become a legitimate procedural version of an otherwise illegitimate substantive demand for *reasonableness*, as judicially determined.”⁵¹ Alongside other normative grounds, transparency and the need to justify the administrative action informed the Court’s enforcement.

B. *Legislative Reasons*

Deciding without giving reasons has traditionally been part of the legislative prerogative under the assumption that legislation represents the expression of popular will, as discerned by the people’s elected representatives.⁵² Since the people are sovereign, there is, in this view, no standpoint from which courts can review the justification for legislative action. This approach has important limitations. First, it is overly juriscentric and disregards the reason giving during legislative deliberations that is addressed to the legislators’ electoral constituencies. Second, even as far as courts are concerned, the practice of constitutional review of legislation subverts the uncomplicated account of legislative prerogative.⁵³ Inquiries into the justification of legislation are sometimes part of the judicial process of determining its validity.⁵⁴ It has therefore been up to courts to determine the content of the legislative duty to give reasons. Because, from this juriscentric perspective, the legislative duty to give reasons arises when the validity of enacted legislation is challenged in courts,⁵⁵ scholars have interpreted this duty to entail the rational reconstruction of legislative reasons.⁵⁶

197–217.

51. Mashaw, *supra* note 40, at 111 (emphasis added).

52. For a classic statement of the legislative prerogative, see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3–4 (Liberty Fund, 1982) (1885). See also Philip B. Kurkland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 29 (1969) (identifying the legislative prerogative as the power to “create rules without the need for justifying them”). For a judicial application in the U.S. context, see *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“Where, as here, there are plausible reasons for Congress’ actions, our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision’ because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.” (quoting *Fleming v. Nestor*, 363 U.S. 603, 612 (1960))).

53. See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 7–8 (2004) (describing six scenarios of constitutionalization and establishment of judicial review).

54. See generally NICHOLAS EMILOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW (1996).

55. On this basis, Martin Shapiro argues that the process does not increase the transparency or

Some of the arguments for a legislative duty to give reasons are similar to the justifications of judicial review and include the existence of structural shortcomings in the political process, the need to protect individual rights, and the requirement that any coercion on free and equal citizens be justified. It should be noted that transparency is not typically included among these grounds. The reason for its absence is that demands for transparency would be either unnecessary or impossible to satisfy. Such demands would be unnecessary to the extent that legislative deliberations and history are available to the public, both contemporaneously through hearings and in retrospect through legislative history and other records. The demands would be impossible—or at least notoriously difficult—to satisfy because of the challenges inherent in attempts to delimit why a multimember, noncollegial body adopts a specific legislative measure. These factors explain why courts applying proportionality analysis typically defer to the legislature as to the purpose of the piece of legislation under review.⁵⁷ Only the most assertive form of judicial review requires full transparency, that is, access to the actual reasons that motivated a legislature to act.⁵⁸

As far as EU legislative action is concerned, the issue of justification arises in a judicial context when the ECJ exercises its authority⁵⁹ to determine the validity of acts of secondary legislation under the EC Treaty.⁶⁰ This differs from the national context insofar as the EC Treaty—per the same Article 253—provides for a (proactive) duty to justify legislative measures. The duty to give reasons has been indispen-

democratic legitimacy of the process: after all, its aim is to elicit not the reasons that *did* justify the legislative act, but rather those that *could* have justified it. See Shapiro, *supra* note 39, at 193.

56. *Id.* at 217–20. This is not true when courts, such as those in the United States, apply a particularly demanding standard of review—strict scrutiny—and inquire into the “actual purpose” of a statute. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

57. See generally Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L. REV. 369 (2007); Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 801 (2007); Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007). I discuss proportionality analysis at length in Vlad Perju, *Positional Objectivity and the Case for Proportionality Analysis in Constitutional Law* (Sept. 2008) (unpublished manuscript, on file with the Virginia Journal of International Law).

58. This is the so-called “actual purpose review” in American constitutional law. For an overview, in the area of equal protection, see GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 512–16 (5th ed. 2005).

59. This authority is exclusive. See Case 314/85, *Foto-Frost v. Hauptzollamt Lubeck-Ost*, 1987 E.C.R. 4199. For a critique, see Damian Chalmers, *The Reconstruction of European Public Spheres*, 9 EUR. L.J. 127, 167–68, 173 (2003) (arguing for the abolition of the *Foto-Frost* doctrine and for allowing national courts to set aside Community legislation in the face of sound arguments about the protection of “collective identities”).

60. EC Treaty, *supra* note 22, art. 230.

sable to the Court in determining the legal basis of Community legislative action under the Treaty. The Court, however, has been perceptibly more lenient when scrutinizing legislative action than in reviewing administrative acts. For instance, it has held that the required level of specificity in the statement of reasons varies and depends on the type of measure under review. Thus, when the measure takes the form of a regulation, the preamble will satisfy the duty to give reasons, provided that it indicates the general situation that led to the adoption of the regulation and its general objectives, without having to set out specific and complex facts.⁶¹

Leniency in reviewing legislative reasons is problematic because, in contrast to national legislators, the need for transparency is a justification for transnational legislative action in the EU. This concern with transparency is due to the peculiar structure of the EU's legislative system. Not only are the legislative and executive powers in the EU partly fused, but legislative actors—especially the Council of the European Union (Council)—fall short of the level of transparency that democracy mandates. For instance, the level of secrecy in the Council's deliberations, both before and after the introduction and expansion of the codecision mechanism, has exacerbated the EU's transparency deficit.⁶² The use of preambles as a way of mitigating the lack of access to the Council's legislative deliberations is insufficient. Crafted with an eye to possible future judicial challenges, preambles identify the legal basis of the Community measure and restate its content, without revealing details of the legislative deliberation.⁶³ This comparative lack of popular representation in legislative matters explains the renewed urgency of the transparency rationale.

A second and related justification is the requirement that legislatures justify to their subjects the exercise of their coercive power. This is the same ground as the one identified above in relation to the national context as the duty owed by representatives to their constituents to provide reasons for the passing of laws that are binding on those constituents. The EU's legislative acts produce both direct and indirect legal effects within the member states. They have direct impact through doctrines

61. Case 87/78, *Welding & Co. v. Hauptzollamt Hambourg-Waltershof*, 1978 E.C.R. 2457, paras. 9–10.

62. For a description of the codecision mechanism, see KOEN LENAERTS & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 592–601 (2d ed. 2005).

63. Recent reforms—such as those envisioned by the Treaty of Lisbon—would open legislative deliberations to the public. See Treaty of Lisbon, *supra* note 19, art. 1(17). Even under this system, the Court will continue to retain an important role in further promoting institutional transparency.

such as horizontal direct effect, by which European legislation can impose duties on individual citizens.⁶⁴ They also have indirect effects. For instance, Article 10 of the EC Treaty imposes on member states a duty of fidelity, which implies, among other things, an obligation on the part of their state actors and institutions to render effective Community legislation.⁶⁵ Compelled reason giving becomes a way of assessing justifications for legislative outcomes that arise from the EU's democratically imperfect legislative processes.⁶⁶

C. *Judicial Reasons*

Provisions similar to those requiring the ECJ to give reasons are enshrined in the laws of member states.⁶⁷ The formal invocation of this duty both stems from and reinforces the perception that judicial authority and judicial reasons are interdependent.⁶⁸ Scholars have argued that a court's authority "ultimately rests on giving persuasive legal reasons in support of . . . [its] holdings."⁶⁹ The same applies to the ECJ, whose authority is said to "depend[] in the first place on the persuasive charac-

64. See Case 152/84, *Marshall v. Southampton*, 1986 E.C.R. 723.

65. This obligation also applies to national apex courts. See Case C-224/01, *Köbler v. Austria*, 2003 E.C.R. I-10239.

66. I discuss these imperfections *infra* Part II.A.2.

67. ECJ Statute, *supra* note 21, art. 36. This may be true of all the member states, but here I reference specifically Italy, Luxembourg, and Spain. See, e.g., Costituzione [COST.] art. 111(6) (Italy), translated in *International Constitutional Law, Italy Constitution*, at http://www.servat.unibe.ch/law/icl/it00000_.html ("Reasons must be stated for all judicial decisions."); Constitution art. 89 (Lux.), translated in *International Constitutional Law, Luxembourg Constitution*, at http://www.servat.unibe.ch/law/icl/lu00000_.html ("All judgments shall be reasoned. They are pronounced in public court session."); Constitución [C.E.] art. 120(3) (Spain), translated in *International Constitutional Law, Spain Constitution*, at http://www.servat.unibe.ch/law/icl/sp00000_.html ("The sentences shall always be motivated and shall be pronounced in public audience."). Statutory duties also require that judicial decisions be motivated. See *Nouveau code de procédure civile* [N.C.P.C.] art. 455 (Fr.); *Code de procédure pénale* [C. PR. PÉN.] arts. 485, 593 (Fr.); *Code administratif* [C. ADM.] art. 9 (Fr.).

68. The relationship is sometimes framed as being between reason giving and the judicial function, as opposed to being between reason giving and the legislative or executive functions. See Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 15–16 (1959) ("No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that . . . is intrinsic to judicial action—however much we may admire such a reasoned exposition when we find it in those other realms."). For a discussion of the relationship between the Reasoned Elaboration movement in the United States and the argument of this paper about the ECJ, see *infra* Conclusion.

69. Ferejohn & Pasquino, *supra* note 25, at 1680. But see Harm Schepel, *Reconstructing Constitutionalization*, 20 OXFORD J. LEGAL STUD. 457, 467 (2000) ("There are, however, good grounds to reject . . . the notion that full reasoning and articulation are preconditions of legitimate adjudication."). Those good reasons, in Harm Schepel's view, are found in Cass Sunstein's work on incompletely theorized agreements. See generally Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

ter of its decisions and their reasoning.”⁷⁰ Yet, for all the undertones of definitional necessity in these strong statements, the relationship between judicial reasons and judicial authority has important historical and cultural dimensions.⁷¹ The fact that some authors persist in placing reason giving in “the very concept of political authority, or indeed any kind of authority, [in the Western tradition]” speaks to the need to justify coercion may become a requirement of legitimate authority in a given political culture.⁷² Within such cultures, authority without reason is perceived as “dehumanizing.”⁷³

Yet even within the Western tradition, there is no homogeneous interpretation of what the judicial reason giving duty requires as to form and content.⁷⁴ In common law systems, where the values of legality and the rule of law did not begin to impose a general judicial duty to give reasons until well into the twentieth century,⁷⁵ apex courts established a practice of delivering seriatim judgments, which to this day remains unique in Europe.⁷⁶ By contrast, in Germany the duty to give reasons has stature as an element of the constitutional principles of legality and

70. Timmermans, *supra* note 26, at 398. This is a rather curious statement, given that the ECJ’s authority developed based on judgments whose reasoning was often too summary to count as persuasive. I discuss this at some length *infra* Part II.A.

71. At a conceptual level, the argument actually goes the other way around: to require that commands be justified is to acknowledge that their force turns on the persuasiveness of that justification and hence that they are not sufficiently authoritative as commands. The paradigmatic authority of legal commands is content independent. See generally Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

72. Shapiro, *supra* note 39, at 181 (citing Carl J. Friedrich, *Authority, Reason, and Discretion*, in AUTHORITY 28 (Carl J. Friedrich ed., 1958)). Within that tradition, the relation between reason and the authority is presented in dialectical terms. See Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 810 (2000) (“[T]he [U.S. Supreme] Court’s exercise of power is its reasons. . . . [T]he judicial opinion is not just power disciplined by reason; it is also reason disciplined by power and that aspect of power that requires assent before its assertion.”).

73. Mashaw, *supra* note 40, at 118.

74. Generally, historical conditions have played a central role in shaping these interpretations. See generally JOHN DAWSON, *THE ORACLES OF THE LAW* (1968). It is possible, however, that normative demands on judges can also shape judicial style. For an example in the U.S. context, see Mark Tushnet, *Style and the Supreme Court’s Educational Role in Government*, 11 CONST. COMMENT. 215, 219 (1994) (quoting JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 19 (1992) (“[Justices] have a professional obligation to articulate in comprehensible and accessible language the constitutional principles on which their judgments rest.”)). But see Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L L. 81 (1994).

75. Dyzenhaus & Taggart, *supra* note 39, at 138–40 (discussing possible explanations for that state of affairs, such as the existence of the jury system, the evolution of judicial records and recording systems, and the development of judicial conventions, which goes beyond the scope of this Article).

76. For more on judicial reason giving in the United Kingdom, see generally Alder, *supra* note 6.

lawfulness and is considered an effective judicial protection against an overreaching executive power.⁷⁷ Heated political battles led to the 1970 reform that implemented a transition away from unitary judgments in the German Constitutional Court.⁷⁸ In France, the duty to give reasons was imposed as a mechanism of control against the perceived danger of a *gouvernement des juges*.⁷⁹ In such a context, concurring and dissenting opinions would have defeated the purpose of a system designed to prove that judges do not depart from the letter of the law.⁸⁰ The idea that the judge applies law, and does not make it, continues to hold sway in French legal discourse to this day.⁸¹

It is helpful to classify the different interpretations of the duty into two ideal type models. The first model, the “justification model” of authority, grounds judicial authority on the reasons that justify it.⁸² Authority does not derive from its source, but rather from its content. The content is addressed to the court’s multiple audiences, among them other higher and lower courts, political institutions, the litigants, the public at large, and legal professionals. In this model, judicial decisions document the reasoning on which they are based, including the disagreements within the court.

A second model—the “command model”—comes closer to type of authority that is content-independent. With specific reference to the French legal culture, one commentator captures its features as follows: The function of the judgment is “to provide a brief explanation of the outcome, but not . . . the reasons behind that justification.”⁸³ The judgment “claims authority and aims to present an outcome, but without deeper explanations. It . . . appeals to the authority of the rule, rather than the authority of the decision maker.”⁸⁴

77. Bignami, *supra* note 49, at 343–44 & n.433.

78. For a discussion of the political struggle that preceded the reforms, see Kurt Nadelman, *Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany*, 13 AM. J. COMP. L. 268, 271–76 (1964). For a more elaborate discussion of Germany, see *infra* Part III.C.

79. See SWEET, *supra* note 1, at 40–42. See also Alec Stone Sweet, *Why Europe Rejected American Judicial Review—and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2746–65 (2003).

80. For an account of the specific historical conditions in French law, see generally Wells, *supra* note 74.

81. Even a subtly subversive position, such as Pascale Deumier’s, pays heed to it. See Pascale Deumier, *Création du droit et rédaction des arrêts par la Cour de cassation*, in ARCHIVES DE PHILOSOPHIE DU DROIT 49, 53 (2006).

82. I borrow these two models from David Dyzenhaus and Michael Taggart. See Dyzenhaus & Taggart, *supra* note 39, at 151–67.

83. JOHN BELL, JUDICIARIES WITHIN EUROPE 74 (2006).

84. *Id.* at 73.

As I argue below, each legal system—including that of the EU—contains elements of both models. The content and form of legal reasons in any particular legal system will depend on which model predominates within that system. But the accepted formulation of the relationship between reason and authority is only one factor that influences the form and content of judicial reason giving. Other factors are also important. Some authors have argued that the exercise of giving reasons filters out arbitrariness: there are some decisions that simply “won’t write,” because the act of committing reasons to paper reveals hidden flaws in reasoning.⁸⁵ Others have identified self-government, and specifically the idea of democracy, as one argument for imposing justificatory requirements on courts.⁸⁶ Another factor, which applies equally to both the “command” and “justification” models of authority, is institutional and relates specifically to the existence of judicial hierarchy. The form and content of judicial justifications depend on where a court finds itself within a judicial hierarchy.⁸⁷ This often overlooked factor is the key to understanding the full implications of the ECJ’s statutory duty.

Higher courts have jurisdiction to control the legality of the decisions of the courts below them. Reason giving is an efficient tool for supervision within the judicial hierarchy. Accordingly, higher courts set the parameters for acceptable justificatory practices of lower courts. By definition, hierarchical control is not a plausible rationale for imposing a duty to give reasons on apex courts because that duty is unenforceable, at least judicially.⁸⁸ There is evidence of quasi-enforcement, if it can be so called, which takes the form of external pressure on the judicial hierarchy exerted by the legislature or other political institutions, legal commentators, political actors, and civil society. The cumulative impact of these incremental pressures on the behavior of courts exhibits itself structurally in that it shapes the broader environment in which courts

85. See Richard Posner, *Judges’ Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447 (1995) (“Reasoning that seemed sound when ‘in the head’ may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would react.”). But see Oldfather, *supra* note 23, at 1309–17.

86. See Alder, *supra* note 6, at 224. The author does not claim that this factor applies to the particular case of the ECJ.

87. See Oldfather, *supra* note 23, at 1339–42.

88. As far as apex courts are concerned, their duty is justified by the fact that, by publicizing their justifications, they teach lower courts how to reason in future cases. Formally, the doctrine of *stare decisis* is not recognized in civil law systems or in the EU. In practice, things are different. See Shapiro, *supra* note 17, at 325 (“Even when civil law systems may profess to disdain horizontal *stare decisis*, they too must necessarily condone vertical *stare decisis*, that is the practice of lower courts conforming themselves to the decisions of higher courts in order to achieve uniformity of national law throughout the national jurisdiction.”).

operate and may influence doctrinal trends, but it does not constitute a binding means of redress in particular cases.

This unenforceability of the duty to give reasons is particularly relevant in the case of the ECJ, given its position within the EU's judicial architecture. The jurisdictional bifurcation in the EU, between the courts in Luxembourg and national courts operating across EU territory as Community courts, is such that the duty to give reasons exists independently from the duties of the lower courts. We have seen above how judicial enforcement shapes the content of the administrative and legislative reasons. For instance, in certain circumstances, the Commission is under a duty to give "good" reasons, as defined by the Court.⁸⁹ When the Commission resorts to elliptical reasoning, the Court can step in and invalidate an act. There is no corresponding recourse available when the Court's reasons are not "good." Absent formal enforcement mechanisms, the judicial duty to give reasons is not likely to be effective except in extreme (and thus far hypothetical) cases.⁹⁰

Despite these inherent structural limitations, the lack of formal enforcement does not completely eviscerate the judicial duty to give reasons. There are normative grounds for the existence of the duty that, unlike supervision or systemic consistency, do not depend on judicial hierarchy. As we have seen, one such ground is the duty to justify the exercise of coercive judicial power. The centrality of reason to law and, implicitly, to legal adjudication, makes this ground especially compelling.⁹¹ The exercise of courts' power must be disciplined by constraints that include the duty to give reasons.⁹²

Consider how this approach sheds new light on the process of preliminary references. This is the process whereby national courts refer questions to the ECJ regarding the interpretation of the Treaty, as well as questions pertaining to the validity and interpretation of secondary legislation, when such questions are relevant to deciding the case before them.⁹³ The Community rule is, by virtue of the doctrine of supremacy,

89. See *supra* notes 46–49 and accompanying text.

90. For example, if the ECJ entirely disregarded the duty to give reasons, Council intervention would be statutorily permitted. See ECJ Statute, *supra* note 21, art. 36 ("Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.").

91. See Jeremy Waldron, *Foreign Law and the Modern Jus Gentium*, 119 HARV. L. REV. 129, 145–46 (2005).

92. Other authors have argued that democracy is another normative ground for the duty to give reasons, although without claiming that it applies to the particular case of the ECJ. See, e.g., Alder, *supra* note 6, at 224.

93. This is the preliminary reference procedure pursuant to Article 234 of the EC Treaty. EC Treaty, *supra* note 22, art. 234.

at the top of the hierarchy of legal norms which the referring court must apply.⁹⁴ Accordingly, the referring court is bound to decide the case before it in a manner consistent with the ECJ's answer.⁹⁵ The national court will justify its final decision by reference to the hierarchical structure of authority that binds it to follow the ECJ's judicial command. The question thus arises: at what point should the judicial system give the parties in the original case reasons for the particular outcome? Oftentimes, the only such opportunity is in the ECJ's formulation of its answer to the preliminary reference request. The distance—both spatial and temporal—between the issuing of the legal order and its application in this reason giving procedure may conceal but does not lessen the coercive nature of the legal relationship.

The foregoing account of reason giving across the three types of EU authority (administrative, legislative, and judicial) reveals, first, that the content of the judicial duty to give reasons is unspecified in the applicable provision of the ECJ Statute and, second, that the lack of an enforcement mechanism makes the implementation of the duty depend in large part on the Court's institutional self-understanding. While a formal amendment to the ECJ Statute could dispense with the current form of unitary judicial judgments, an even more important target for advocacy is the Court's own perception of its role and obligations in relation to reason giving. The success of this reform rests ultimately in the hands of the Court itself. The opportunities for a new style of reason giving afforded by a formal amendment would go to waste if the Court was unwilling to revisit its deeply entrenched conception of itself. The case for a shift towards a "justification" model of authority must therefore rest on both normative and instrumental grounds.

II. POLITICIZING EUROPEAN LAW

"The overwhelming majority of the population that is currently resistant or hesitant can only be won for Europe," Jürgen Habermas noted, "if the project is extricated from the pallid abstraction of administrative

94. Case C-6/64, *Costa v. Ente Nazionale per l'Energia Elettrica (E.N.E.L.)*, 1964 E.C.R. 585.

95. While it is unequivocally the duty of the national court to apply the ECJ's interpretation of the requirements of EU law to the case before it, sometimes the ECJ takes steps to limit the discretion of national courts even further in such decisions: "It is no secret . . . that in practice, when making preliminary rulings the Court has often transgressed the theoretical border line . . . [by] provid[ing] the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision." Hjalte Rasmussen, *Why is Article 173 Interpreted against Private Plaintiffs?*, 5 EUR. L. REV. 112, 125 (1980).

measures and technical discourse or, in other words, is politicized.”⁹⁶ This Part analyzes how the ECJ can assist in this process. Specifically, it argues that a discursive turn in the Court’s judicial style would contribute to the positive “politicization” of European law.

Talk of such “politicization” is likely to be resisted in some quarters. Some will no doubt see it as a reckless enterprise that can undermine the rule of law at the Community level. In this view, “politicizing” European law will undo attempts to carve out a special space for a law that is uncorrupted by political partisanship and influence.⁹⁷ Others will take an opposite view and see the infusion of politics into European law as a moot point. When the political is understood not as partisanship based on interest, but as governance writ large, the Court is already a political institution.⁹⁸ If any degree of national influence on the Court is sufficient to “politicize” European law, then the nomination process for membership to the Court has such an effect.⁹⁹ Conversely, politicization may also track the EU’s influence as an authority independent of national governments. This understanding has already led scholars to see the politicization of European law as the inescapable consequence of the early process of constitutionalizing the Treaties.¹⁰⁰

Because the meaning of “politicization” depends on how the political sphere is delineated, it is important to note from the outset that the justification model of authority, and the corresponding discursive turn, do not sanction unfettered political influence or partisanship on the Court. The proposed “politicization” effect would instead be to include in the public reason giving process the substantive legal debate about doctrinal choices and jurisprudential visions that inform the Court’s specific decisions and its overall case law. The aim is merely to lift the veil on debates already informing the Court’s conclusions.

Thus understood, politics is also underdeveloped at the European “political” level.¹⁰¹ The ever-present rhetoric of consensus stunts the

96. Habermas, *supra* note 4, at 24–25.

97. See generally RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* (1998).

98. Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 INT’L J. CONST. L. 69, 74 (2007) (“Courts, being part of government, cannot escape being classified and treated as part of the political world.”).

99. Even under the new system envisioned by the Treaty of Lisbon, where a panel of jurists would assess the suitability of candidates nominated to be Judge or Advocate General, member states will remain in charge of proposing and approving the candidates. See Treaty of Lisbon, *supra* note 19, art. 2(209).

100. Schepel, *supra* note 69, at 460–61 (“The Court’s ‘constitutionalization’ of the Treaties has thus ‘juridified’ Community politics, a process that has led inevitably to the ‘politicization’ of Community law.”).

101. See Perry Anderson, *European Hypocrisy*, LONDON REV. BOOKS, Sept. 20, 2007, at 13,

development of the European political project and thwarts the EU's essential nature as an experiment in governance. The EU's political institutions need to take steps to infuse politics into governance processes. The EP in particular could use a dose of "politicization."¹⁰² Scholars making the case for a written constitution voice the same warning. Ulrike Guérot argues, "Politically, a constitution could help 'politicize' the EU and thus enhance its legitimacy—that is, make clear that a democratic compact is the source of the extensive EU law that is now in force on the continent."¹⁰³

My object here is to present the instrumental case for adopting the "justification" model of authority. Central to this case is the argument that the "politicization" of EU law would allow the Court to reposition itself with respect to the European public and engage it in a relationship that will enhance the citizenry's sense of shared political identity. If that influence materializes, the Court would succeed where past decades of institutional reform in the EU have failed: in creating the institutional setting in which citizens' collective political identity can develop.

A. *Historical Path Dependency and the Challenge of a European Political Identity*

I begin with a discussion of the early period during which the Court formed its particular form of legal rationality. Part II.A.2 presents the current identity problem in the EU and discusses possible causes of past failures to solve it.

1. *The Early History of the ECJ*

It is common for any periodization of European law to emphasize the role of an assertive ECJ that took upon itself the task of furthering European integration during its foundational stage. Faced with Gaullist intergovernmentalism stalling the political development of the Community, the Court forged strategic relationships with national courts and individuals by developing landmark doctrines such as direct effect and

17. Perry Anderson notes the same attenuation of politics that takes place within the EU as a whole also taking place between individual member states: "In the disinfected universe of the EU, [politics between states] all but disappears, as unanimity becomes virtually de rigueur on all significant occasions, any public disagreement, let alone refusal to accept a prefabricated consensus, increasingly being treated as if it were an unthinkable breach of etiquette." *Id.*

102. For an analysis in this vein, see Mattias Kumm, *To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty*, 11 COLUM. J. EUR. L. 481, 516 (2005).

103. Ulrike Guérot, *For a New Constitution*, 2 TRANSATLANTIC INSTITUTIONALE POLITIK 12, 13 (2001).

supremacy. How much of the Community's legal architecture was constructed behind the back of the member states remains a matter of controversy.¹⁰⁴ According to J.H.H. Weiler's authoritative account, the greater the extent to which legal integration was accomplished, with corresponding Community legal burdens imposed on the member states, the greater their stakes in using the political process in order to preserve their influence.¹⁰⁵ The political means available to national governments for using that influence seemed at its apogee at this time, when unanimity was the rule in the Council.¹⁰⁶

Yet unanimity cut both ways. This requirement was also protective of the Court's influence because it implied that any member state could block the Council's attempts to overturn the Court's interpretations of secondary legislation.¹⁰⁷ It should be recalled that in the instances during the early periods when the Treaty was amended, the amendments often codified, more than modified, the Court's earlier interpretations.¹⁰⁸ The amendment process has been called the closest to a Community-wide deliberation available in the EU, and the early judicial interpretations of the Treaty can be seen as undeveloped mechanisms through which the Court indirectly intervened in the functional equivalent of an incipient European public sphere.¹⁰⁹

Early in its existence, the Court pursued its integrationist agenda aggressively and with political acumen.¹¹⁰ It took advantage of the Community's institutional framework to break out of its assigned role as "a tribunal which was neither intended [sic] nor equipped to act as anything but a traditional Continental European type of administrative court," albeit one with an international flavor.¹¹¹ Notably, the ECJ maintained a low profile while accomplishing this "quiet revolution."¹¹²

104. See Mattli & Slaughter, *supra* note 28, at 185.

105. See Weiler, *supra* note 30, at 2410–13. Weiler's account draws on the distinction between "exit" and "voice" in ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATION AND STATES* (1970). Weiler, *supra* note 30, at 2411.

106. See WEILER, *supra* note 20, at 36–38.

107. Shapiro, *supra* note 17, at 329.

108. See, e.g., Case C-70/88, *European Parliament v. Council*, 1990 E.C.R. I-02041; Case 294/83, *Les Verts v. European Parliament*, 1986 E.C.R. 01339.

109. See Bruno de Witte, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in *CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 39* (Paul Beaumont, Carole Lyons & Neil Walker eds., 2002).

110. MITCHEL DE S.-O.-L'É. LASSER, *JUDICIAL DELIBERATIONS 287* (2004) ("ECJ decision after ECJ decision thus demonstrates an overriding policy concern for the fashioning of a proper legal order.").

111. RASMUSSEN, *supra* note 10, at 220 (emphasis omitted).

112. WEILER, *supra* note 20, at 192 (emphasis omitted).

During the period—or periods¹¹³—of its evolution through the early 1970s, the Court did not attract much notice outside of a circle of close observers whose business, political, or legal interests gave them a stake in its decisions.¹¹⁴ There are many possible explanations for how the most assertive supranational court of that time managed to fly under the radar so successfully. Some point to the technical nature of the controversies before the Court.¹¹⁵ Other explanations focus on the Court's methods of reasoning by way of deductions from general principles, which it teleologically read into the Treaty. Scholars have also mentioned the formalism that characterizes the Court's style of judicial reasoning.¹¹⁶ As we will see, some of the Court's methods have changed over time, as the body of doctrine available to it has continued to grow and the relationship with national courts or Community political institutions has gradually accreted a historical framework. Part of the reason the changes have not been greater is the Court's continuing encapsulation of its judgments in single, collegiate opinions. This arrangement has hindered erosions of formalism and allowed the Court, for better or worse, to preserve through time the recipe of its initial success even amid great changes in the larger EU institutional landscape.

The ECJ's ability to speak with one voice accounts for much of its success in establishing its authority and pursuing an integrationist project during the foundational period. This form of judgment is itself a legacy of the Court's early development. Veiling the Court's political choices behind legal neutrality—a method much emphasized by neo-functional accounts of that early period¹¹⁷—would not have been possible if the Court had allowed its members to write separate opinions.¹¹⁸

113. For different approaches to periodization, see Koopmans, *supra* note 17, at 926–27 (identifying an institutionalist stage during the 1950s and early 1960s, followed by an instrumentalist stage beginning in the 1970s); Lenaerts, *supra* note 2, at 94–95; Weiler, *supra* note 30, at 2407–08.

114. See DESMOND DINAN, *EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION* 119 (2004).

115. See, e.g., Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1.

116. See WEILER, *supra* note 20, at 195–96. Sometimes formalism is extrapolated from the Court's preference for doctrinal categories. See Malcolm Ross, *Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?*, 31 *EUR. L. REV.* 476, 497 (2006) (mentioning that, “somewhat disappointingly,” the ECJ is inclined to avoid open engagement with policy balancing if doctrinal distinctions are available).

117. See, e.g., Burley & Mattli, *supra* note 26, at 72–73.

118. Those member states with civil law systems that have come to allow dissents in their national courts did so gradually and with very little enthusiasm. See generally Nadelman, *supra* note 78.

It is possible that the reception of dissenting opinions from the ECJ, especially given the system of preliminary references, would have complicated the process of implementing the Court's judgments. Furthermore, there is evidence that the Court was divided in some of its foundational cases across its doctrinal development, if the departure from the opinions of the AG is any indication.¹¹⁹ Publicizing the Court's dissenting voices likely would have impeded the growth of the Court's authority during the foundational period.

Slowing down the Court's expanding role might not, however, have had devastating effects on the Community as a whole. Counterfactuals are notoriously problematic, but it is worth raising the hypothetical of an alternative evolution of the Court in which its authority would have been established less rapidly and with different "external effects." If the Court had been more open in both the form and content of its decisions to the value judgments that its cases constantly called for, then one might suppose that by now a European public sphere would have advanced beyond the incipient stage. When we continue on to recent reforms in the next Section, the genealogy of some current challenges, as well as the EU's *maladroit* answers, will take us back to historical path dependency.

2. *Recent Challenges: The Formation of a European Identity*

Two complementary aims have driven EU institutional reforms over the past decades. The first relates to the EU's capacity to function efficiently in the face of enlargement and the expansion of its competencies vis-à-vis member states, in areas ranging from the environment, employment, and energy, to coordination in foreign policy and the antiterrorism efforts. The second aim is to bridge the gap between the high levels of political and economic integration within the EU and citizens, who show little interest in European matters. The reforms to date have had some success in creating moderately effective institutions, but they have come nowhere near accomplishing the second goal.

The identity challenge is best understood through a dialogue with scholars skeptical of the necessity for this reform, for not everyone is troubled or even surprised by the failure to secure some convergence in citizens' political self-understanding. Some scholars view this participa-

119. These cases include *Van Gend & Loos*, *Rewe*, *Cassis de Dijon*, *Van Duyn*, and, later, *Francovich*. For a more complete list, see Cyril Ritter, *A New Look at the Role and Impact of Advocates-General—Collectively and Individually*, 12 COLUM. J. EUR. L. 751, 762 (2006). For more on the role of the AG, see *infra* Part III.A.3.

tion gap as an inevitable consequence of the EU's supranational nature,¹²⁰ while others view proposed reforms in this area as misguided and even dangerous attempts to replicate, at the European level, national myths of common political identity.¹²¹ From this perspective, the goal of reform should be institutional efficiency in a legitimate political and legal supranational system. These thinkers argue that reforms do not require the coalescence of a shared European political identity.

Nevertheless, even the skeptics might agree that institutional effectiveness and the development of shared political identity are not completely unrelated goals. Most importantly, the failure to create a robust European identity may end up undermining the EU's stability in the long run. The political construct at the European level will be frail if it remains grounded—despite rhetoric to the contrary—solely on the interests of national governments, which fluctuate over time.¹²² The corollary of this weakened condition is that some of the EU's political projects, especially those involving the redistribution of material resources within the EU, are endangered by a splintered European social texture.¹²³ Both of these familiar arguments highlight what is at stake in these institutional reforms: not only the preservation of past successes in economic and political integration, but also the viability of ongoing and future political projects. The skeptics are correct in the sense that a thickly condensed common identity that rests on, and in turn reinforces, blinding solidarity is not an essential precondition for reform. But solidarity is a matter of degree, and some version of it is indispensable to political advancement.¹²⁴ We should think of this shared sense of belonging to a common Europe as one layer of a political subject's complex identity. This is not the blinding solidarity of ethnic belonging, but a milder form of political commonality.¹²⁵ From the Italian political dis-

120. Weiler, *supra* note 30, at 2429–30 (discussing this phenomenon in structural terms as a “permanent feature of the Community”).

121. Andrew Moravcsik, *In Defence of the “Democratic Deficit”: Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603, 604 (2002).

122. See Kumm, *supra* note 102, at 481 (“A sufficiently robust European identity is widely believed to be necessary for the long-term stability and efficiency of the European polity.”).

123. See Habermas, *supra* note 4, at 5–6.

124. Solidarity remains a pivotal concept in European scholarship. See, e.g., Catherine Barnard, *Solidarity and New Governance in Social Policy*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 153, 153 (Grainne de Búrca & Joanne Scott eds., 2006); Joshua Cohen and Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 345, 352–53 (Johnathan Zeilin & David M. Trubek eds., 2003).

125. See JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM 1–2 (2007); Mattias Kumm, *The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History*, 6 GERMAN L.J. 319, 321–22 (2005); Kumm, *supra* note 4, at 120.

course about Romanian residents¹²⁶ to the Republic of Ireland's "what's-in-it-for-Eire" attitude during the recent referendum on the Treaty of Lisbon,¹²⁷ much would be altered if EU citizens shared that additional layer of concern and respect. For our current purposes, however, it suffices to assume that there is a plausible prima facie case about the need for, at minimum, a loosely knit form of shared identity as a primary goal of the EU's development.

Of course, a shared political understanding does not just spring into existence; policies and institutions must offer settings for the kind of protracted interaction among political subjects that make it possible. These interactions create the conditions for reflecting on the nature of the political world that citizens inhabit together. A defining element of collective self-government is that individuals, communities, and even nations learn about one another through such interactions, which in turn facilitate the advancement of shared knowledge and common understanding. There is nothing new or mystifying about this approach. Models such as the heavily subscribed Erasmus exchange programs, which allow university students to live and study outside their home countries are built precisely on these premises, and they have proven infinitely more effective than the sorry attempts to bring about common identity by way of political documents and so-called strategies of "improved communication."¹²⁸

Past institutional reforms have not triggered, let alone entrenched, the type of Europe-wide public debates that are necessary, though probably insufficient, to the formation of a shared consciousness of political self-government. The EP has been the target of choice for EU institutional reforms under the assumption that, in a representative political system, supranational or national, the legislature is the locus of collective self-governmental energies. Reforms have thus focused on allowing European citizens to vote for their representatives in direct elections, enhanc-

126. See Isabella Clough Marinaro, *Whose Security?*, GUARDIAN, May 29, 2008, at <http://www.guardian.co.uk/commentisfree/2008/may/29/whosesecurity>; Brendan O'Neill, *True Europeans*, GUARDIAN, May 23, 2008, at <http://www.guardian.co.uk/commentisfree/2008/may/23/truereuropeans>.

127. See *Ireland and the Lisbon Treaty: Vote Early, Vote Often*, ECONOMIST, July 26, 2008, at 34; Stephen Collins, *Lack of Understanding Main Reason for Lisbon No Vote*, IRISH TIMES, Sept. 10, 2008, at <http://www.irishtimes.com/newspaper/breaking/2008/0910/breaking62.html>.

128. See *The European Identity*, BULL. E.C., 12-1973, at 118-22. For a more recent attempt, see *Commission White Paper on European Governance Working Group 1a, Broadening and enriching the public debate on European matters* (June 2001), available at http://europa.eu.int/comm/governance/areas/group1/report_en.pdf. For a list of similar documents, see Ulrich Haltern, *On Finality*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 736 n.21 (Armin von Bogdany & Jürgen Bast eds., 2006).

ing the EP's decision making authority in the legislative process and increasing its budgetary powers, to name just a few of these attempts.¹²⁹ Technically, these reforms were successfully implemented, yet the paltry turnout in election after election indicates that strengthening the EP's powers did nothing to set in motion the hoped for identity building processes.¹³⁰ To explain this in terms of the EP elections' low stakes might be accurate, but it would assume a degree of familiarity with the workings of the EU among the enfranchised population that is illusory.¹³¹

129. Other reforms are currently envisioned, such as the expansion of the powers of national parliaments within the EU political framework. See Treaty of Lisbon, *supra* note 19, art. 1(12) (detailing how national parliaments contribute to the EU by keeping abreast of EU initiatives and membership applications, ensuring that the EU conforms to basic principles such as subsidiarity, participating in the Freedom, Security, and Justice area, helping to revise treaties, and cooperating with the EP); *id.* art. 1(56) (mandating treaty revision protocols whereby national parliaments are notified and representatives from each parliament are invited to a convention to discuss proposed revisions); *id.* art. 2(64) (requiring that national parliaments be notified to ensure compliance with subsidiarity); *id.* art. 2(64) (directing that parliaments be informed when the EU evaluates their member states' implementation of EU policies/decisions); *id.* art. 2(64) (stating that parliaments must be informed of progress on integrating security and also updated on work done by the standing committee on security coordination); *id.* art. 2(66) (stating that parliaments must be informed and can veto (by notification to the EP and Council) measures for judicial coordination and mutual recognition taken by those bodies); *id.* art. 2(289) (pledging that parliaments will be notified and empowered to monitor for subsidiarity any actions taken to expand powers); see also Protocols to Be Annex Ed [sic] to the Treaty on European Union, to the Treaty on the Functioning of the Union and, Where Applicable, to the Treaty Establishing the European Atomic Energy Community, Dec. 17, 2007, 2007 O.J. (C 306) 148. It remains to be seen if these reforms will stir the interest of Europe's citizens in matters European. For recent data on the national parliaments in the process of identity formation, see Mark Beunderman, *Apathy undermines national parliaments' EU power*, EUOBSERVER, May 11, 2007, at <http://euobserver.com/9/25087/?rk=1>.

130. Participation rates among member states for the 2004 EP elections have gone as low as seventeen percent in Slovakia. See Markus Steinbrecher & Hans Rattinger, *Turnout in European and National Elections*, INTUNE, Oct. 11 2007, at http://www.intune.it/file_download/62/Steinbrecher-Rattinger.

131. The Treaty of Lisbon would require that results in the elections of the EP be taken into consideration in appointing a new European Commission. See Treaty of Lisbon, *supra* note 19, art. 1(18). It is true that the practice inaugurated by the Commission led by Romano Prodi (1999 to 2004) has politicized the appointment process by enabling the relevant committees of the EP to organize public hearings of the proposed commissioners. See, e.g., Giandomenico Majone, *The European Commission: The Limits of Centralization and the Perils of Parliamentarization*, 15 GOVERNANCE 375, 383–85 (2002); *The European Commission: A Knight in Tarnished Armor*, ECONOMIST, Oct. 30, 2004, at 34; Věra Řiháčková, *Making the European Commission More Accountable? Enhancing Input Legitimacy and its Possible Impact* 1, 8–9 (Inst. for European Policy 2007), available at <http://www.europeum.org/doc/pdf/884.pdf>. In turn, that led to some degree of increased visibility, especially when turmoil surrounded some Commission appointments, as was the case with the current Commission led by José Manuel Barroso; however, the debates it stirred failed to seep into a wider field of transnational European discussion. Finally, and in a similar vein, as far as the Commission is concerned, there are renewed calls that its President be directly elected by citizens. Honor Mahony, *Barroso admits legitimacy problem for commission president post*, EUOBSERVER, Feb. 28, 2008, at <http://euobserver.com/?aid=25740>.

It is, of course, possible that these reforms have been not so much misdirected as incomplete. A meaningful electoral system for the EP is still lacking.¹³² As long as the electorate continues to choose representatives from lists drawn by national parties, the public debate surrounding the election cycle, which at this point is clearly insufficient to create and support a shared political identity, will remain focused on national politics. Every election that passes unmarked by popular deliberation is a missed opportunity. Collective deliberation not only legitimizes political outcomes, but also carves out the public space in which citizens live politically. These deliberations facilitate bringing about and preserving the fiber of common political identity, though they are not in themselves sufficient to sustain it.¹³³ They have their salutary effect not necessarily by revealing to participants similarities previously unknown, as one might intuit, but sometimes when quite the opposite happens.¹³⁴ Still, the mere existence of subject matter convergence in debates across Europe may help to loosen strands of prejudice, self-entitlement, and resentment that have been wound together by a long history of conflict. This is the goal of the collective learning process in the public sphere.

Moving beyond the electoral context, deliberations or manifestations of political interest neither presuppose nor require policy convergence.¹³⁵ In fact, some of the most intense political instances are adver-

132. See Kumm, *supra* note 4, at 127 (“By not changing the role of electoral politics significantly in the European Union, the CT [Constitutional Treaty] and its successor, the reform treaty, leave intact the European institutional arrangements that hinder rather than foster the development of a robust European identity. Whatever else may be necessary for such an identity to develop, without meaningful electoral politics on the European level, it is unlikely to happen.”).

133. A version of this argument—that debates are instrumental in the preservation of the citizenry’s common political identity—held sway in the German Constitutional Court in its *Maastricht* judgment. See *Maastricht Decision*, 89 Bundesverfassungsgericht [BVerfGE] 55 (1993) (F.R.G.), translated in 33 I.L.M. 388, 395–444 (1994). In that case, the German court had to decide whether, by signing the Treaty of Maastricht, Germany was in fact relinquishing to the EU so much of its sovereignty that the act of signing amounted to a backhanded amendment to the German constitutional provision that made German citizens the holders of sovereignty, a provision which, under the terms of the German Basic Law, could not be amended. Part of the perceived danger in giving up sovereignty over too much of the political sphere was the alienation of the citizenry, which would be disincentivized from engaging in political deliberations in areas beyond Germany’s sovereign control. In the German court’s view, limiting opportunities for political deliberation undermines collective self-government. This judgment has been criticized for its thorough-going emphasis on the concept of a homogenous European political community. See J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos, and Ethos in the German Maastricht Decision*, in *THE QUESTION OF EUROPE* 265 (Peter Gowan & Perry Anderson eds., 1997).

134. See e.g., Frederick Schauer, *Discourse and its Discontents*, 72 NOTRE DAME L. REV. 1309, 1310 (1997).

135. Prominent European public intellectuals saw the coordinated popular protests across Europe against the Iraq War on February 15, 2003, as a manifestation of a united European political will. See Jürgen Habermas & Jacques Derrida, *February 15, or What Binds Europeans To-*

sarial; the citizenry announced its opposition to proposed reforms in the Maastricht Treaty, the Amsterdam Treaty, the Nice Treaty, and the Constitutional Treaty in a very public and passionate voice.¹³⁶ There is nothing inherently amiss with fierce opposition. Indeed, one recalls when copies of the proposed Constitutional Treaty were on bestseller lists in France during the debate surrounding the ratification referendum.¹³⁷ Similarly, the need to engage citizens explains recently proposed reforms to institutionalize the Council and give it a new president.¹³⁸ Few EU events draw more attention from national media outlets than these meetings, although the Council meets only a few times a year and even then the interest it elicits rarely outlasts the meetings themselves.¹³⁹

These past reforms have tinkered with institutional arrangements in which the rationality of institutional actors is largely taken for granted. Path dependency has reinforced, at least as much as it has undermined, the forces hindering the development of a common European political identity. The next two Sections argue that a transition in the judicial style of the ECJ, specifically toward a justification model of authority, could help the EU succeed in these reforms.

gether: A Plea for a Common Foreign Policy, Beginning in the Core of Europe, 10 CONSTELLATIONS 291, 291–97 (2003).

136. See Witte, *supra* note 109.

137. In the context of the Constitutional Treaty, some scholars have noted a tension between agendas imposed from the top down and citizens' perceptions of their own needs. *But see* Daniel Halberstam, *The Bride of Messina: Constitutionalism and Democracy in Europe*, 30 EUR. L. REV. 775, 777 (2005) ("Perhaps in a twist of irony, even the rejection of the TCE [Treaty establishing a Constitution for Europe] can be seen as a further strand of constitutionalism in Europe. The 'no'-vote was not the rejection of European integration, but the emphatic rejection of an attempt on the part of political elites—whether at the member state or European level of governance—to impose a European agenda from above in disregard of citizens' wants and needs.").

138. See Treaty of Lisbon, *supra* note 19, art. 1(16) (referring to a new Article 9 B(5)). For a discussion of the likely impact of this institution, see HOUSE OF LORDS EUROPEAN UNION COMMITTEE, *THE TREATY OF LISBON: AN IMPACT ASSESSMENT*, HL 62-I, at 41–44 (2008), available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/lducom/62/62.pdf>.

139. One of the most forceful advocates of a European-wide public sphere, Habermas, has argued that the potential which lies in the EP be tapped: "A real advance would be for national media to cover the substance of relevant controversies in the other countries, so that all the national public opinions converged on the same range of contributions to the same set of issues, regardless of their origin. This is what happens temporarily—if only for a few days—before and after the summits of the European Council, when the heads of the member states come together and deal with issues of equal perceived relevance for citizens across Europe." Habermas, *supra* note 4, at 18–19.

B. Breaking Free: Toward a Discursive Turn in European Law

Part II.B.1 discusses the impact of a transition toward a justification model of authority. Part II.B.2 argues that the “external effects” of the discursive turn will bring about a renegotiation of the relationship between the Court and the European public. That repositioning is an important part of the larger effort to create an institutional setting within which a shared political identity can develop at the European level.

1. The Internal Dimension: The Form and Substance of Judicial Reasons

Part I introduced two models of relating judicial reasons to judicial authority. It argued that the first model—the justification model—grounds judicial authority on the reasons that justify it, whereas in the second model—the command model—the authority of a judicial pronouncement derives from its source, not from its content. Part I also asserted that no legal system is a perfect embodiment of either model and that both of them are found, to different degrees, in all legal systems. This Section argues that the ECJ’s judicial style should move closer towards the justificatory model and suggests that such a development would be consistent with experiments in the form and content of judicial reason giving that have been present throughout the Court’s history.

Like most courts, the ECJ has established its authority by borrowing from both the command model and the justification model.¹⁴⁰ Its experiments in these models have taken the form of institutional innovation and the ability to adapt its particular form of legal rationality to the evolving political reality. As innovations go, the publication of the opinions of the AG stands out as a significant departure from the French legal system from which much of the ECJ’s institutional structure was borrowed.¹⁴¹ The ECJ’s capacity to adapt is apparent in the evolution of the form and substance of its judgments.¹⁴² Over time, the ECJ gradually changed the formal content of its decisions to include the facts of a

140. For a discussion of the French legal system, see *infra* Part III.B.1.

141. I discuss this at length *infra* Part III.A.3. For now it suffices to note that while its judgments have taken the form of formulaically justified commands signed by all deliberating judges, the Court has also published the opinions of its AGs. A full member of the Court, who nevertheless neither partakes in judges’ deliberation nor casts a vote, the AG’s role is to set forth policy and doctrinal choices open to the Court. See generally LASSER, *supra* note 110, at 103–41.

142. See Mancini & Keeling, *supra* note 11, at 399–403 (discussing the evolution of the Court’s style, method, and procedure from the early judgments to later periods under German and British influence). For a discussion of changes in the structure of the ECJ’s judgment, see L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 56 (5th ed. 2000) (mentioning the reforms introduced in 1979).

case and the arguments of the parties in its decisions.¹⁴³ The effect has been a departure from the highly deductive and elliptical form of French judgments of which the ECJ's first decisions were, as Giuseppe Federico Mancini and David Keeling famously put it, "like . . . carbon cop[ies]."¹⁴⁴

What makes further experimentation necessary is the relatively modest success of previous attempts. The justification enhancements of the AG's opinions and the marginally more elaborate decisions are only stopgap measures in the Court's continuing effort to find its place in the early twenty-first century.¹⁴⁵ Specifically, the adoption of separate opinions would bring the Court closer to the justification model of authority and would preserve the valuable tradition of experimenting with institutional form. Consider the connection between form and substance of judicial reasons. The majority in a case such as *Chacón Navas* would have had to defend its choice of the medical model of disability in the face of public criticism mounted by dissenting members of the Court.¹⁴⁶ Specifically, it would have had to defend its acceptance of the medical model of disability, which informed its definition of disability, against the social model that had been endorsed by the Community's political institutions. The point is not—or not primarily—that the result in that case would have been different if multiple judgments were allowed. Separate opinions might not necessarily have led the Court to reach the "correct" legal result.¹⁴⁷ In both respects, one is left relying on one's informed intuition to suggest that such a different, or correct, outcome may well be more likely. What is certain is that the Court's judicial style would change.¹⁴⁸ Exchanges between the members of the Court over

143. For a more detailed academic treatment of this transition, see ARNULL, *supra* note 34, at 9–10.

144. Mancini & Keeling, *supra* note 11, at 399. Part III discusses this evolution in greater detail.

145. The Court's ability to respond to the EU's needs has been invoked as an explanation of its success. See, e.g., Lenaerts, *supra* note 2, at 94 (arguing that the ECJ's success is due to its "focus[] on the pressing institutional and legal needs of the [EU] for successive periods of time").

146. See Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, 2006 E.C.R. I-6467. For an example of criticism from the legal academy, see Hosking, *supra* note 16, at 228 and Waddington, *supra* note 16, at 487.

147. See Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1466 (1995) ("[I]t is far from self-evident that a poorly written, inaccessible, unstylistic and highly complex opinion is any more likely to fail as a piece of legal reasoning than one that is well-written, understandable by a wide audience, elegant and simple Moreover, for every case in which a highly formal and complex structure masks deficiencies in reasoning, there seems to be at least one in which the same deficiencies are masked by an elegant or memorable phrase." (citations omitted)).

148. In addition to its impact on the Court's style of reasoning, the discursive dimension would have a radiating effect on the Court's structural relationship with national courts. The need to secure the authority of the ECJ's pronouncement vis-à-vis referring courts, and national courts

which method of interpretation to use or how to apply any given method in a case at hand, as well as exchanges over their contrasting conceptions of the Court's relationship with other institutions or that of the EU vis-à-vis member states, must already occur, but making these disputes public would bring about a discursive turn in the Court's style of reasoning.¹⁴⁹

This is not just a matter of counterarguments or alternative positions being aired to the public. If that were the aim, then dispensing with the unitary judgment would be in some sense redundant; after all, the AG opinions are published, and academics already react to the Court's judgments.¹⁵⁰ What is essential—and not achieved by the existing mechanism—is the open contestation among the members of the Court, which will occur in this context when the majority takes the step to defend publicly its positions against publicly mounted challenges from within the Court. Open contestation will not endanger the integrity of legal discourse, because it will not involve a free pass for judges to air their inner thought processes. Debates among the members of the Court will retain their doctrinal nature. Legal formalism, which is a function of law's doctrinal nature and is not endangered by a legal style that publicizes interpretative choice, secures law's stabilizing effect. That formalism, which pervades the judiciary's institutional self-understanding, explains why dissenting or concurring opinions do not destabilize legal systems.¹⁵¹ It is important to emphasize that a transition toward a justification model of authority does not open up the process of judicial deci-

in general, under the preliminary reference procedure has always been of paramount importance. Over time, that relationship has evolved from one of partnership, in which the ECJ's influence depended on references from national courts, to one of coordination between a superiorly positioned ECJ and national courts. See Case 314/85, *Foto-Frost v. Hauptzollamt Lubeck-Ost.*, 1987 E.C.R. 4199; see also *supra* note 58 and accompanying text. There have been negative reactions to this development from many quarters. See Thomas de la Mare, *Article 177 in Social and Political Context*, in *THE EVOLUTION OF EU LAW*, *supra* note 17, at 215; see also Chalmers, *supra* note 59 and accompanying text. The transition toward the justificatory model of authority is one way of answering the call of many scholars who want that relationship to return to a partnership basis.

149. For a general discussion of the influence of style on content, see Posner, *supra* note 85, at 1446–49.

150. So do the unions, as was the case in the aftermath of the recent case, *Laval v. Byggnads*. Case C-341/05, *Laval v. Byggnads*, [2008] 2 C.M.L.R. 177. See Honor Mahony, *EU Trade Unions Condemn Court for Minimum Wage Ruling*, EUOBSERVER, Apr. 4, 2008, at <http://euobserver.com/?aid=25920>.

151. This dynamic is confirmed by the experiences of other apex courts around the world, including the U.S. Supreme Court, the South African Constitutional Court, the European Court of Human Rights (ECHR), the Canadian Supreme Court, and the German and Hungarian courts in the EU. For a similar argument, see Weiler, *supra* note 30, at 225. See also Edward, *supra* note 12, at 556–57.

sion making. That process is, and will remain, secret.¹⁵² The normative ideals of candor and transparency are not the ones guiding this transition.¹⁵³ Unlike with administrative or legislative action, transparency is not at the normative foundations of the judicial duty to give reasons.¹⁵⁴ The Court's style of reasoning will remain a mix of command and justification models of authority.

2. *The "External Effects" of the Discursive Turn*

It is time now to analyze the "external effects" of the Court's discursive turn. The claim is that the proposed changes would allow the Court to generate the long-awaited response from the EU's citizens. Changes in the Court's style will make it possible for it to renegotiate the relationship between itself and the citizens and, through this process, to set up the institutional space within which shared political identity can be explored.

This argument rests on empirical assumptions about the quality and quantity of attention Europeans pay to the workings of the Court. Admittedly, these assumptions are difficult to prove in a definitive fashion absent empirical work in this area. Available data shows that citizens trust the Court as an institution, yet there is no indication that they pay more than occasional attention to its decisions.¹⁵⁵ We are thus left having to articulate informed assumptions about the impact of the Court's decisions on the European citizenry. Unmediated public apprehension of ECJ decisions, to the extent it exists, is confined to outcomes and rarely, if ever, includes the reasoning that justifies the outcome. It is unsurprising that outcomes are much more visible and intelligible than legal reasoning. That is unlikely to change, even if concurring and dis-

152. For a discussion of secrecy, see *infra* Part III.B.1.

153. With respect to candor, Weiler's observation that few courts have been more open than the ECJ in their use of purposive interpretation is very pertinent. Weiler, *supra* note 10, at 573.

154. To the contrary, it is commonly assumed in civil law systems—the so-called "secrecy systems"—that dissenting or concurring opinions unveil the secrecy of a court's internal deliberations and that such revelation is improper. For a discussion, see *infra* Part III.B.

155. Polls conducted by the Public Opinion Analysis (POA) sector of the European Commission confirm this. While fifty percent of Europeans polled in fall 2007 trusted the ECJ, thirty-three percent claimed never to have even heard of the ECJ. European Commission, *Eurobarometer 68: Public Opinion in the European Union*, at 90, 94 (May 2008), available at http://ec.europa.eu/public_opinion/archives/eb/eb68/eb_68_en.pdf. Compare this to the spring 2008 poll by the same POA sector, which reported that only thirty-two percent of those polled tended to trust their individual nationality governments (this number rises to thirty-four percent for the national parliaments), fifty percent tended to trust the EU as a whole, and that the EP is apparently the most comforting institution, with fifty-two percent tending to trust it. European Commission, *Eurobarometer 69: Public Opinion in the European Union: First Results*, at 30, 37 (June 2008), available at http://ec.europa.eu/public_opinion/archives/eb/eb69/eb_69_first_en.pdf.

senting opinions are allowed, although one would expect a marginal increase in the depth of public perception.

Nevertheless, even a marginal increase will prevent the legal disputes among the members of the Court from dissipating into the ether. It would be a mistake to ignore the *indirect* means through which the Court's decisions can penetrate society. Many intermediaries—jurists, politicians, unions, academics, and other groups in civil society—will fuel the debate over the Court's decisions at the national level. This may be a shortcoming if debates continue to be anchored at the national level, although it is difficult to see how that could change given the EU's peculiarities in terms of linguistic diversity, cultural differences, and the like.

A deeper worry as far as intermediaries are concerned is that they will end up distorting the Court's messages. Such messages will be exploited—they already are—in service to the particular interest or ideology of the intermediary. As Andrew Moravcsik puts it, politicization would then mean the introduction of “symbolic rather than substantive politics.”¹⁵⁶ Such a development could undermine the positive external effects of the discursive turn.

This is a valid concern, as there are certainly cases in which the intermediaries are addressees, albeit indirectly, of the Court's decisions. Sometimes the Court invalidates national legislation when the national courts or national politicians have proved unwilling to stake their reputation or political capital on a principled outcome. In both of these situations, as well as when the Court is confronted with “hard” cases, the danger of distortion by intermediaries looms large. But we should keep things in perspective. This barrier looms less large when one accepts that in societies of scale, as most of the member states are, such intermediaries are unavoidable. The media—the biggest intermediary of all—selects and filters messages that are circulating within the national political sphere.¹⁵⁷ But the existence of separate opinions could make the Court's decisions more media worthy, attract wider coverage in traditional and digital outlets, and take pragmatic advantage of media influence.

Part of the Court's situational advantage consists of an ability to intervene often in the public sphere. These interventions are not unidirectional, and the Court finds itself in a dialectical relationship with the

156. Andrew Moravcsik, *What Can We Learn from the Collapse of the European Constitutional Project?*, 47 *POLITISCHE VIERTELJAHRSSCHRIFT* 219, 227 (2006).

157. The EU has long created relatively successful media outlets to promote its message. See, e.g., EuroNews, at <http://www.euronews.net> (last visited Sept. 10, 2008).

participants in that sphere. To speak of the “collective learning” of Europe’s citizens, as scholars sometimes do,¹⁵⁸ does not mean that the Court does all the teaching, even though, when successful, it may be able to demonstrate the possibilities of practical reasoning for European law and the overall EU project.¹⁵⁹ A politically savvy court is never in a unidirectional relation to its audiences and the ECJ is no exception.¹⁶⁰ The already osmotic nature of that relationship will become even more open once separate opinions are allowed. The fluidity of the dialectical relationship could be facilitated by less strict entrenchment mechanisms. Overruling the Court, which is possible as far as its interpretation of the Treaties is concerned only by treaty amendments, should be made easier by giving to the EP and Council, and perhaps also to national parliaments, powers similar to that of the “notwithstanding” clause in the Canadian Constitution. Proposals to this effect were advanced, unsuccessfully as it turned out, during the negotiations for a Constitutional Treaty.¹⁶¹

This argument may appear to have one loose end. If the purported external effect of the deliberative turn in the Court’s style of reasoning is to stir interest on European matters, and if the Court’s positional advantage consists of sending normative messages in a dialectical relationship with its audience, how can the accuracy of the Court’s messages matter? Would there be anything that gets citizens to reflect and debate issues related to Europe satisfy that goal?

The answer is no. Recall the normative grounds of the case for the discursive turn. The Court is under a normative obligation to justify its exercise of power. It is not indifferent as to whether that justification

158. See Piet Strydom, *Collective Learning: Habermas’s Concessions and Their Implications*, 13 PHIL. & SOC. CRITICISM 265, 265 (1987). See generally JÜRGEN HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (Thomas McCarthy trans., Beacon Press 1979) (1976); AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION* (Joel Anderson trans., Polity Press 1995) (1992).

159. A similar argument has been made in a domestic context, with particular reference to the U.S. Supreme Court. See Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 24 (1986).

160. See Mayer & Palmowski, *supra* note 27, at 588 (describing the ECJ as being “acutely aware of the public acceptability of its decisions”). This awareness is no surprise considering the Court’s longstanding institutional posture. See BURROWS & GREAVES, *supra* note 11, at 29 (“Given that the European Court of Justice is the supreme court of Europe, the process of justification is crucial to any public acceptance of its role. The Court itself must convince a wide audience of the soundness of its decision-making to legitimate its role and to create the conditions in which its judgments are accepted by the parties, by the member states on which its existence depends, and also by the citizens of Europe.”).

161. See *European Convention Secretariat Working Group III, The Comments of Dr Gunter Pleuger to the Preliminary draft report submitted by the Chairman at the meeting of 18 July 2002*, at 3 (Sept. 5, 2002), available at <http://european-convention.eu.int/docs/wd3/2484.pdf>.

reaches its addressees. The second reason has to do with the nature of the cases the Court decides. Some are technical and as such are of interest only to experts. Others are not. Soccer is the example de rigueur for a topic capable of stirring interest in an ECJ decision,¹⁶² but the list goes on to include cases about the nature of the market, especially in the face of demands by organized labor; questions about whether national conceptions of dignity enable states to preclude the importation of violent video games;¹⁶³ whether protesters, exercising their freedom of speech, can disrupt highway traffic, including that of trucks transporting intra-Community goods;¹⁶⁴ or whether institutions of higher education can charge higher tuition from citizens of other member states.¹⁶⁵ Collective reflection on these questions raises awareness of how politics is conducted, and what it is about, at both national and supranational levels. Both skeptics and proponents of recorded dissent agree that this type of reflection would be a very positive development indeed.¹⁶⁶

Finally, it is important to recall that conclusions about the external effects of the discursive turn apply specifically to the ECJ at this point in the EU's evolution. The claim does not extend to courts in general, especially in political cultures where alternative sites for identity formation and preservation are available.¹⁶⁷ Finally, even in the European context, it is not meant to replace other political reforms or nonpolitical, cultural mechanisms aiming at the same goal.¹⁶⁸

162. See Case C-415/93, *Union Royale Belge des Societes de Football Association ASBL v. Bosman*, 1995 E.C.R. I-4921.

163. See Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609.

164. See Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Österreich*, 2003 E.C.R. I-5659.

165. See Case 293/83, *Gravier v. City of Liege*, 1985 E.C.R. 00593.

166. See, e.g., Andrew Moravcsik, *The European Constitutional Settlement*, in *MAKING HISTORY: EUROPEAN INTEGRATION AND INSTITUTIONAL CHANGE* 23, 50 (Kathleen McNamara & Sophie Meunier eds., 2007).

167. For instance, French courts continue to remain faithful to their long entrenched tradition of unanimous judgments. Their style is accordingly formalistic and both their ability and willingness to engage with the legal public is very limited. See KONRAD ZWEIFERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 127 (Tony Weir trans., 2d ed. 1992) (“[N]o dialogue between the Cour de Cassation and the legal public is possible . . .”). Nonetheless, these characteristics do not undermine the foundations of French political identity, which has historically been rooted in the parliament. It is precisely the lack of such an alternative site for identity formation within the EU that grounds the argument for using the ECJ to shape political identity.

168. I have already mentioned some of the other reforms. Of the ones I have not, the reform of the value-added tax (VAT) system stands out. See generally Agustín José Menéndez, *Taxing Europe: Two Cases for a European Power to Tax*, 10 COLUM. J. EUR. L. 297, 334 (2004) (discussing effectiveness of efforts to reform EU finances, including the introduction of a VAT on the sale of goods and services).

III. THE PRESERVATION OF JUDICIAL AUTHORITY: ANSWERS TO COUNTERARGUMENTS

How does the “politicization” of European law impact the ECJ’s authority? The concern with preserving judicial authority is of foremost importance to both national and international courts. The reasons are apparent: a perception of authority is central to their effective functioning and, unsurprisingly, separate opinions are often seen as potential threats, even in courts whose members use them as a matter of course. For example, in the United States, Chief Justice John Roberts has advocated an increase in the number of unanimous decisions to preserve and enhance his court’s authority.¹⁶⁹ In the international arena, critics have traced the challenges that the International Court of Justice (ICJ) faces in establishing its authority to its practice of separate opinions.¹⁷⁰ In both cases, separate opinions have generated open, and at times heated, debates about the Courts’ policies and jurisprudential choices. Concerned about how such openness might impact their institutional authority, other courts—including those in Germany, Spain, and the WTO’s adjudicatory bodies—actively discourage judges from exercising their right to open dissent.¹⁷¹

169. “‘I think it’s bad, long-term’ . . . ‘if people identify the rule of law with how individual justices vote. . . . You do have to put [the Justices] in a situation where they will appreciate, from their own point of view, having the Court acquire more legitimacy, credibility, that they will benefit from the shared commitment to unanimity.’” Anthony Lewis, *The Court: How “So Few Have So Quickly Changed So Much,”* N.Y. REV. BOOKS, Dec. 20, 2007, at 58, 58 (quoting Interview by Jeffrey Rosen with John Roberts, Chief Justice, U.S. Supreme Court (July 2006)); see also Chief Justice John Roberts, Address to Georgetown University Class of 2006 (May 21, 2006), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144>. For a general discussion, see Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996); Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959); James Markam, Note, *Against Individually Signed Opinions*, 56 DUKE L.J. 923 (2006).

170. See IJAZ HUSSAIN, DISSENTING AND SEPARATE OPINIONS AT THE WORLD COURT 2 (1984); MOHAMED SHAHABUDDEN, PRECEDENT IN THE WORLD COURT 177–208 (1996); R.P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT’L & COMP. L.Q. 788, 788–90 (1965); Edward Dumbauld, *Dissenting Opinions in International Adjudication*, 90 U. PA. L. REV. 929, 939–40 (1942); Farrokh Jhabvala, *The Development and Scope of Individual Opinions in the International Court of Justice (1977)* (unpublished Ph.D. dissertation, Fletcher School of Law and Diplomacy) (on file with University Microfilms International).

171. For a survey of the historical evolution of dissents through the 1950s, see Kurt H. Nadelman, *The Judicial Dissent: Publication vs. Secrecy*, 8 AM. J. COMP. L. 415 (1959). For a discussion of dissents—or lack thereof—in the WTO, see Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT’L ECON. L. 895 (2006). Interestingly, new international courts, such as the International Criminal Court, allow judges to express dissents on points of law. See Rome Statute of the International Criminal Court art. 83(4), July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“The judgment of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgment shall state the rea-

Such worries resonate with renewed power in the context of a supranational court like the ECJ.¹⁷² The fear is that the Community judicial system, whose central architecture is court made through the doctrines of supremacy, direct effect, and effective remedies, might implode under the pressure of separate opinions.¹⁷³ While its early reliance on the command model indicates that the ECJ did not establish its authority by relying exclusively on detailed reasoning, there is still a risk that the Court may lose that authority by dramatically altering its reason giving practice. The position is intuitive: once the Court's judgments become a forum where judges debate the merits of their respective interpretative choices, the institution will become immersed in political currents and countercurrents from which it cannot emerge with its authority intact.¹⁷⁴ Furthermore, in this view, the Community legal system is sufficient in its current form and taking such additional risks is unreasonable.

This Part answers these counterarguments. It divides them into three subcategories: objections based on institutional design (Part III.A); objections based on the juriscultural heritage (Part III.B); and objections based on the integrity of the European legal system (Part III.C). None of these objections offsets the larger benefits for the EU of reforms in the Court's judicial style. The inevitable loss of authority that results once the appearance of unanimity breaks down is ultimately compensated by medium- and long-term gains in external legitimacy and influence.

sons on which it is based. When there is no unanimity, the judgment of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.”). At the trial level, Article 74(5) of the Rome Statute provides: “When there is no unanimity, the Trial Chamber’s decision shall contain the views of the majority and the minority.” *Id.* art. 74(5).

172. Mayer & Palmowski, *supra* note 27, at 587 (discussing the “singular success story” in creating “a European body of law that has acquired constitutional status . . . [and] that had a crucial effect on the nature of European integration”).

173. Of course, an important question is how much good dissent can do in a legal system. While the answer might differ across jurisdictions, Cass Sunstein’s take is probably right. *See* SUNSTEIN, *supra* note 24, at 89 (“The question ‘How much dissent?’ is no more susceptible to an abstract answer than the question ‘How much music?’”).

174. A similar set of arguments has been marshaled with respect to the ICJ. In answering those arguments, Sir Hersch Lauterpacht drew a distinction between formal and substantive authority. Dissents may affect the appearance of certainty and show the addressees of the decision and others in the audience the controversy within the Court. That might have an impact on the formal authority, but he argued that “it would be prejudicial to the cause of international justice to assume that the weight of the Court’s decisions is irrefutably entrenched behind its formal authority.” HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 66 (1958).

A. *Objections Based on Institutional Design*

This Section discusses the objections that the introduction of separate opinions and corresponding changes in the Court's judicial style are damaging (because they would make the members of the Court vulnerable to political pressure); unnecessary (because there is sufficient flexibility built into the legal system in its current form); or impractical (given the jurisdictional configuration of the Community judicial system).

1. *Vulnerability: Renewable Terms and the Danger of Political Pressure*

The tenure of members of the Court is limited in time, but member states can reappoint judges at the expiration of their term.¹⁷⁵ This mechanism potentially threatens judicial independence because it enables national governments periodically to evaluate the work of judges using political standards. Modifications in the Treaty of Lisbon, which would set up a panel to advise on candidates' suitability, do not allay such fears because the proposal of candidates remains within the jurisdiction of the member states.¹⁷⁶ Compared to a system of life tenure—with or without mandatory retirement—or nonrenewable terms, the political pressure on the ECJ judges is sizable, especially in light of the prestigious and lucrative nature of Court membership. Asking all judges to join the judgments in which they participate, regardless of how they cast their vote during the deliberation, diffuses political pressure from the judges themselves to the Court as an institution, thus protecting their—and its—*independence*.

Opinions differ on the virtues of the current system of judicial appointments.¹⁷⁷ There is, however, virtually unanimous agreement that, so long as the current system remains in place, the Court should not resort to the kind of personalized judicial reasoning that would be the

175. EC Treaty, *supra* note 22, art. 223.

176. The Treaty of Lisbon inserts the following new Article 224a: "A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the member states make the appointments referred to in Articles 223 and 224. The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts, and lawyers of recognized competence, one of whom shall be proposed by the EP. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice." Treaty of Lisbon, *supra* note 19, art. 2(209).

177. *But see* Weiler, *supra* note 30.

likely outcome of a system of multiple judgments. This Section questions the cogency of this widely held view.

In its most persuasive formulation, this objection is less about impossibility than about desirability. At least one other successful supranational court in Europe—the European Court of Human Rights (ECHR)—allows its members to write separately, while still providing national governments the option to reappoint members at the expiry of their six-year term.¹⁷⁸ This system has neither silenced the ECHR judges, who have developed a rather robust practice of separate opinions, nor undermined their court's authority. Despite differences in their histories and institutional missions, the experience of the ECHR rebuts the claim that the tension between separate opinions and a system of tenure renewal in the ECJ is conceptually unsolvable.¹⁷⁹

Although it is feasible, it might nonetheless be unwise to allow separate opinions in a court whose members can be reappointed in a political process. It is not difficult to see why one would take this view. Separate opinions disclose how each judge voted, thus making it possible for governments to retaliate when the time comes for reappointment. There is a danger that judges, aware of their vulnerability, would sacrifice legal principle under political pressure. After all, the sword of Damocles does its work while hanging in the air. Additionally, the introduction of separate opinions could have the perverse effect of giving judges a tool whose strategic use would gain them political favors. Accusations of political partisanship under systems of multiple judgments are not unheard of in the international legal system.¹⁸⁰ This constraint might compel inappropriate silence as well: not filing a separate opinion is tantamount to legitimatizing a judgment, which a judge might have opposed under cover of anonymity.

There are three main difficulties with this interpretation of the objection based on political pressure. The first is sociological, namely that it

178. See Convention for the Protection of Human Rights and Fundamental Freedoms arts. 23, 45, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>; see also European Court of Human Rights, Rules of the Court, Rules 53, 31, at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf>.

179. The analogy might be imperfect given that, during the early period when both courts developed their styles in the context of their aspirations, the two courts did not perform identical tasks. Unlike the ECHR, the ECJ was not expected to create an entire new system of law. Therefore, its interventions needed to be more forceful and less discursive. But the ECJ's domain has evolved significantly after the Maastricht Treaty, with the expansion of the EU's competencies and will continue in that direction given the modifications in the status of the Charter of Rights in the Treaty of Lisbon. For the history and institutional mission of the ECHR, see generally MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW (3d ed. 2008).

180. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26).

treats judges as shrewd political actors ready to sacrifice their integrity as jurists in order to maximize their chances of reappointment. That assumption is not self-evident. Over recent decades, the member states have selected ECJ judges from among established career jurists in their respective legal systems, that is, from individuals used to being independent.¹⁸¹ This is not to idealize judges; the unflattering assertion about their political instincts may not be dead wrong, but the phenomenon of political influence is not so simple. From the perspective of the judge, the national government is not the only relevant audience. A judge canvassing for his government, whether in the secrecy of judicial deliberations or in writing separately from the majority, is likely to see his reputation among his colleagues damaged. As David Edward, an early member of the Court, wrote, “[In judicial deliberations] the role of the judge of the country from which the case comes is not to urge on the Court a solution favorable to that member state. Such advocacy would almost certainly be counterproductive.”¹⁸² Moreover, from the perspective of national governments, their power to reappoint judges is valuable. If member states customarily reappoint their judges on the Court, as is presently the case, then there are likely to be substantial reputational costs for not reappointing a judge on political grounds.¹⁸³

The second concern about political pressures is institutional. Different systems can be devised to curtail the political pressure on judges in a system of separate opinions, where internal disagreements in the Court are made public. For instance, such opinions could be delivered anonymously, together with a tally of the votes.¹⁸⁴ The requirement of secrecy as to deliberations, which is strictly adhered to even in legal systems such as that of the United States, would prevent disclosure of how individual judges vote, thus walling off political pressure. Such suggestions were indeed tabled—unsuccessfully, as it turned out—in Italy and Germany at the time when reforms were being envisaged in each country. The arguments presented in Part II above show why such a solution would be suboptimal in the case of the ECJ. Hence, merely mentioning

181. Moreover, the assumption is questionable even with respect to the early Court, which was composed mostly of persons with established political careers. See RASMUSSEN, *supra* note 10, at 266.

182. Edward, *supra* note 12, at 553.

183. It is important to remember that the ECJ exists within a broader institutional architecture, and national governments devise their policies against that broader background. This can be seen in the tendency for new member states to appoint activist judges to the Court. See Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the ECHR* (Sept. 6, 2006), at <http://ssrn.com/abstract=939062>.

184. For such a proposal, see HJALTE RASMUSSEN, *THE EUROPEAN COURT OF JUSTICE* 66 (1998).

its existence is not tantamount to endorsing it. But the existence of the alternative acts is a useful reminder that experiments with judicial form are possible.

At the same time, a system of signed separate opinions might in fact strengthen the authority of a particular judicial decision. Under the current system of the ECJ, the lack of open dissent is not tantamount to unanimity of votes. Therefore, some of the Court's more difficult cases, especially in cases where the AG argued for a different outcome, are prone to fueling speculation about an opinion being reached by narrow majority. When such speculation is incorrect, disclosure of the tally of the votes would end the speculation and strengthen the authority of a given decision.¹⁸⁵

The third difficulty with the interpretation espousing the threat to judicial independence is normative. Separate opinions are not mere disclosures of votes in violation of secrecy requirements. In most cases, when a judge writes a separate opinion, she does more than publicly indicate disagreement with the majority: she offers reasons for her disagreement. That practice of justification has become so central to the development of law that it cannot be dismissed as a sham, although of course it can be proven to be such in specific cases. When the disclosure of a vote is the end product of a separate opinion's legal reasoning, this practice undercuts simplistic accounts of causality between disclosing votes and political pressure.

Finally, the above analysis has exclusively addressed threats to judicial independence that originate from political institutions invested with the power to decide on reappointments. There is, however, a different type of pressure, which is more informal, but potentially just as consequential, that is mounted by the mass media or civil society more generally. The risk is that separate opinions would fuel attacks on the Court. Fearful of the damage to the Court's public legitimacy that such attacks might inflict, the Court may feel pressured to salvage its reputation in ways that would sacrifice its independence.¹⁸⁶ Consider, for instance, the reaction to decisions of the ECHR in which the United Kingdom was condemned for violating the Convention for the Protection of Human Rights and Fundamental Freedoms. Anti-European British newspapers typically report the outcome of the cases by highlighting the nationality of the judges who condemned the United Kingdom and

185. See Nadelman, *supra* note 78, at 272.

186. The same danger of indirect pressures through media campaigns and surges of public opinion is mentioned as an argument against dissents in THE BRITISH INST. OF INT'L & COMPARATIVE LAW, THE ROLE AND FUTURE OF THE EUROPEAN COURT OF JUSTICE 12 (1996).

alluding to their countries' poor human rights records.¹⁸⁷ When nationalistic rhetoric gets involved, the presumed independence of the judges on the Court becomes forgotten in the fervor.¹⁸⁸ The fear is that such a reaction might be replicated in the case of the ECJ.

That may well be true. Some similar reaction would be inevitable in a system of separate opinions. Attacks in the media in all member states could become more fine-tuned and put particular judges on an equal footing in the allocation of blame with the Court as an institution. Perhaps some of those reactions would scrutinize the level of consistency over time in the jurisprudence of specific judges and should therefore be welcomed. Others, of course, will be more poisonous responses. Their occurrence is certain; what is less clear is how far reaching their impact will be. The important point is that, just like in the case of political pressure from the states, the primary worry is not the existence of such attacks, but rather the Court's reaction to them. More specifically, the danger is that the Court would either restrain itself or would respond to this pressure in ways that would endanger its independence and mission as a court of law. Yet independent courts throughout the world are regularly faced with such challenges; the risk is familiar and far from dispositive.

2. *Timing: The Problem of Original Jurisdiction*

This objection begins with the observation that, with the exception of appeals from the Court of First Instance (CFI) and reviews of that court's decisions on appeals from the EU Civil Service Tribunal, the ECJ sits as something akin to a court having original jurisdiction.¹⁸⁹ At that initial stage of the litigation cycle, the dispute on the points of law raised by a case is often insufficiently crystallized. This has led some observers to assert that open public debate among judges on the ECJ would be premature and could undermine the quality of the judgments as well as the Court's authority.¹⁹⁰

To gauge the strength of this objection, consider the preliminary reference mechanism. National courts forward to the ECJ questions on the interpretation of the Treaty and secondary legislation and/or challenges to the latter's validity that are raised in cases before them. These courts

187. See Henry G. Schermers, *Separate Opinions*, in MARTENS DISSENTING: THE SEPARATE OPINIONS OF A EUROPEAN HUMAN RIGHTS JUDGE 1, 5 (W.E. Haak et al. eds., 2000).

188. For more on this, see *infra* Conclusion.

189. For an account of the relationship between the CFI and the ECJ, within the larger Community judicial system, see Paul Craig, *The Jurisdiction of the Community Courts Reconsidered*, in THE EUROPEAN COURT OF JUSTICE, *supra* note 29, at 177.

190. Edward, *supra* note 12, at 557.

may hear the case on appeal from a lower national court or they may be sitting as courts of first instance. Litigation before national courts of first instance typically involves factual challenges in addition to disputes about how to frame legal questions. In contrast, once a case has gone through several stages of litigation, the facts have been authoritatively settled and the legal questions are likely to have been more or less distilled.

Under the preliminary reference system, the ECJ is a court of first instance with respect to questions of European law. Furthermore, some of the preliminary references it receives may originate from national courts of first instance. Thus, the Court often intervenes in the early stages of the litigation cycle. Since the Court does not apply the norms it interprets, it does not resolve the initial dispute, which remains before the national court, even though its answer, in effect, determines the decision in the case at hand.

In light of these procedural features of the Community legal system, the Court appears to lack the positional advantage of higher courts which need not start their analysis from scratch; a preliminary legal framework, as constructed by the lower court whose judgment is appealed, always constitutes their starting point. Therefore, separate opinions, which often involve debates over the points of law among members of a court, are more informed, more fully articulated, and generally better suited for appellate courts. Because, this objection goes, the ECJ cannot build upon the decision of a court of first instance, it is precluded from engaging in the type of legal debates for which separate opinions are best suited. It would therefore be detrimental to the Court's instant decision and ultimate authority to provide a public forum for internal Court disputes.

This objection need not be exaggerated to appreciate its strength. Even assuming a clear separation between fact finding and law-selecting and law-interpreting tasks, the proper framing of a legal question may remain controversial throughout the appeal process. With respect to the ECJ, preliminary references are not answered in a contextual vacuum; national courts must present the facts of the case and thus enable the Court to refuse to answer "put up" questions.¹⁹¹ Furthermore, the ECJ's answers to preliminary references have at times been so specific that they all but applied the law to the facts of the case at hand. This has occurred typically in the context of proportionality analysis,

191. See, e.g., Case 244/80, *Foglia v. Novello*, 1981 E.C.R. 3045.

when the Court engaged in the type of empirical work that theoretically should fall within the jurisdiction of the referring court.¹⁹²

This objection, even in this nuanced form, can be answered. While it is formally correct to claim that the Court has no lower judicial decision to take as a starting point for its deliberations, there may be functional substitutes for such a decision that are visible when one takes a broader view of the Court's operational framework. The opinions of the AG have been described in these terms as "first instance judgment[s] in a case being automatically taken to appeal, but [the AG's] opinion, while it may have authority in future cases, does not of course decide the instant case, even provisionally."¹⁹³ We will return to the caveat about authority below. For now, let us note that, just like a decision of a lower court that is appealed, the opinion of the AG constitutes the starting point—*only* the starting point—for the Court's deliberations. The opinion is meant to present to the Court the legal questions raised by the case at hand and offer advice as to how they should be answered. The AG's institutional role, as a member of the Court, is very important; it sets her framing of the legal problems apart from those found in the submissions of the parties or of other institutions.

There are, of course, differences between an opinion of the AG and a judgment of a national court of first instance. The caveat about authority mentioned in the above paragraph is the most obvious one. The opinion of the AG is not a judicial decision: its tone is advisory, not conclusory, and the authority it enjoys is persuasive. Moreover, the so-called "appeal" to which the opinion is automatically subjected is unique because the Court deliberates without the parties having had the opportunity to submit their comments on the AG's opinion.¹⁹⁴ This difference is especially relevant given that a legal controversy on appeal usually takes shape as the different parties argue over the merits of the decision that is being appealed. The lack of AGs in the CFI illustrates the critical differ-

192. See Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574, 579–82 (2004) (discussing the normative and empirical dimensions of the method of proportionality).

193. BROWN & KENNEDY, *supra* note 142, at 66. "The main justification for the institution of [the AG] lies precisely in the fact that it introduces a two-stage process in which the [AG] provides an independent judicial appraisal of the case." Francis G. Jacobs, *Advocates General and Judges in the European Court of Justice: Some Personal Reflections*, in JUDICIAL REVIEW IN EUROPEAN UNION LAW 17, 20 (David O'Keefe & Antonio Bavasso eds., 2000), *cited in* Ritter, *supra* note 119, at 752 n.3. For a similar approach, see BURROWS & GREAVES, *supra* note 11, at 5–6.

194. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 58 (5th ed. 2003) ("[The AG's] opinion could in fact be regarded as a judgment of first instance which is subject to constant and invariable appeal. It is, however, an appeal of a special nature, since the parties have no opportunity to comment on the opinion before the Court begins its deliberations.").

ence: unlike the judgments of the Court of Justice, the opinions of the CFI can be appealed.¹⁹⁵

Yet these differences are largely irrelevant for our purposes, and they do not undermine the analogy. The opinion of the AG is the *functional* equivalent of a judgment of a court of first instance. The formal authority invested in the judgment of a court of first instance is, as a rule, of limited relevance for the higher court that reviews it. From a substantive viewpoint, that authority is largely persuasive, and in that respect similar to that of the AG's opinion. Furthermore, the AG frames the legal questions, oftentimes even more transparently than a court of first instance would. This internal feature of the Court's procedure mitigates the effect of intervening at an early stage, and it answers the timing objection to separate opinions in the ECJ.

3. *Flexibility: What Role for the Advocate General?*

This Section considers the objection that the AG's opinions provide sufficient flexibility to the Court's style. In this view, the costs of tampering with the existing institutional innovations of the European judicial system, in its current form, outweigh the likely benefits. This objection has both descriptive and prescriptive dimensions. Descriptively, this is a claim about the nature of contribution of the AG to the ECJ and, more generally, to the Community legal system.¹⁹⁶ At a prescriptive level, the claim is that no changes in the current structure are necessary. This Section analyzes both prongs of this argument.

Let us begin with the publication of the AG's opinions. In the Community legal system, in contrast to the French practice on which it is modeled, the AG's opinions are not subject to the requirements of secrecy. At a formal level, it is not surprising that the secrecy requirement does not extend to the AG's opinions, since that principle applies only to the Court's deliberations in which the AG does not partake.¹⁹⁷ Nevertheless, the opinion of the AG is not like any other brief submitted to the Court. Its special status is a function both of its institutional role and

195. The CFI can appoint ad hoc AGs from among the judges at the court, but this practice has been very rare. See BURROWS & GREAVES, *supra* note 11, at 34–35.

196. The EC Treaty makes the AG a full-fledged member of the Court: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement." EC Treaty, *supra* note 22, art. 222.

197. Nevertheless, the AG's voice is not absent from the deliberations. As one member of the Court famously said to an AG, the Court deliberated "in your physical absence, but not with your voice silent." BURROWS & GREAVES, *supra* note 11, at 30 ("en l'absence de votre personne, mais non dans le silence de votre voix") (author's translation).

prestige. It would be difficult to gauge how often prestige turns into influence, especially because more empirical research of the impact of the AG's opinions is needed.¹⁹⁸ For our purposes, however, quantitative analysis of the AG's influence on the Court is an ancillary matter. The more relevant question is whether the AG's opinions are the functional equivalent of separate opinions and, as such, can be interpreted as dissents to the Court's judgments or indicators of a split in the Court. As appended to the Court's judgments, they offer nuance and confer discursiveness on the Court's judicial style. What would separate opinions add to the EU's legal system?

To answer this question, we need to take a closer look at the institutional role of AGs. We have seen that, while they are members of the Court, the AGs are not present during the Court's deliberation process. Their opinions are delivered before the Court's process of deliberation starts and, as such, they represent solely the views of their authors. The AGs do not deliberate with a counterpart, or with other members of the Court. Their exchanges with the *juge rapporteur* (i.e., an ECJ judge who reports to the Court the facts of the case and the arguments of the parties) in a given case and with their own legal interns are not institutionalized. They have, of course, access to all the documents on file, but the process of opinion writing is deeply personal throughout. This is especially relevant because the Court's ever-expanding docket could give the AG a disproportionately large influence on a court that lacks the time and resources to go beyond the analysis presented in an AG's opinion. There is only one AG in a given case: even if the lone AG were a Herculean jurist, the wisdom of such jurisprudential solitude would remain questionable.¹⁹⁹

198. For the latest available analysis, see Ritter, *supra* note 119, at 764–70. Other institutional considerations, such as the Court's increasing workload and the opportunities for interaction between the AG and the *juge rapporteur* have also raised the profile of the AGs. It is undeniable that the early AGs had a great impact on the Court; one need only recall AG Maurice Lagrange providing the ECJ with the comparative materials on the laws of the initial six member states in the 1950s, when there was no research unit in the library of the ECJ, let alone Internet access. See BURROWS & GREAVES, *supra* note 11, at 293. Analysis of the AG's influence in the aggregate, however, is difficult. Even under the old system, when AGs entered opinions in each case, and for which a rate of correlation between the AG's recommendations and the Court's decisions could theoretically be determined, this would not account for the great number of difficult cases that at the time were assigned to the full Court. Former AG Walter van Gerven strikes a cautionary note in pointing out that the rate of influence in such difficult cases may be lower than the average. See *id.* at 123. The heavier workload and the maturation of the Court's jurisprudence have forced it to modify procedures. Now the Court has the option to decide a case without an AG opinion.

199. Such doubts are only reinforced by examining the long list of foundational cases in which the Court did not take the approach recommended by the AG. For a complete set of such cases, see Ritter, *supra* note 119, at 762.

The contrast between the AG's working environment and the Court's deliberations could not be more striking. The Court's protracted deliberations have been invoked to explain why its judgments look like they have been drafted by a committee.²⁰⁰ The solitary process by which the AGs draft their opinions is the opposite end of the spectrum from the one used by the Court. This explains the clarity of AG opinions. At the same time, however, it also explains why they do not constitute part of the judgment of the Court. The AG opinions are distinguished by their specific features, from the timing of their submission, before the Court begins to deliberate, to their final advisory nature.²⁰¹ This advisory nature comes through in the content of the opinions, which usually emphasize conceptual analysis over advocacy.²⁰²

These are relevant differences that show why the opinions of the AG are not an appropriate functional equivalent of separate opinions in the Court. Sometimes separate opinions might be written as, and in the style of, majority opinions but may fail to gather a sufficient number of votes. That, obviously, is never the case with the opinions of the AG. While of assistance in illuminating the Court's judgment, they are not, *and were never meant to be*, the judgment itself. This is not to downgrade them to the rank of mere commentary but rather to point out features that show why they cannot be considered the functional equivalent of separate opinions. The AG's opinions are cardinal in the Court's overall judicial architecture because they guide the Court and cast light on its judgments, but they are not an adequate substitute for the evolution of ECJ's jurisprudence.²⁰³

200. "[T]he Opinions of the Advocate General also have value for others concerned with the Court's activities, be they practising lawyers or academics or simply members of the general public. Being the product of a single mind, the Opinions often have a clarity and directness which judgments of the Court, essentially committee documents, may lack." ARNULL, *supra* note 34, at 9.

201. There are also similarities to court decisions: parties cannot reply to the AG submissions. See Case C-17/98, *Emesa Sugar v. Aruba*, 2000 E.C.R. I-665. On the advisory nature of the AG's role, see Ritter, *supra* note 119, at 751.

202. "[W]hile [the opinion] will often mention policy considerations that could affect the judgment, [it] is less likely than an American Supreme Court opinion to dwell on these considerations or to treat them as decisive. Instead, the [AG] is more likely to concentrate on defining legal concepts, explaining their elements, deciding their scope and then deducing from this analysis his proposed resolution of the case." John J. Barceló, *Precedent in European Community Law*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 407, 411 (D. Neil MacCormick & Robert S. Summers eds., 1997).

203. Some authors have called into question the future of the AG position. They have argued that the role of the AG is anachronistic in a court that is busy and overburdened. See BURROWS & GREAVES, *supra* note 11, at 296-97.

B. Objections Based on Juriscultural Heritage

This Section discusses two different, though related objections. One objection is that the influence of civil law in general, and of French law in particular, on the European judicial system has instilled a legal culture inimical to the changes associated with the discursive turn advocated in this Article. I answer this objection in two ways: first, by reinterpreting this civil law tradition and, second, by reframing its influence on European law. The second objection is that, even assuming that they could write separately, institutional self-understanding of duties of loyalty and collegiality would prevent the members of the Court from debating one another in public. The two objections are related because the interpretation of institutional loyalty has roots in the civil law tradition. But, as we will see, there is more to the institutional argument than the culturalist objection, and, as such, it deserves separate treatment.

1. Legal Tradition: The Influence of the Civil Law

The objection under scrutiny in this Section is that the influence of French law, and civil law more generally, undermines the chances of a successful transition in the ECJ's judicial style towards a justification model of authority. Its premise is that the justification model of authority and multiple judgments are "foreign" to the civil law culture that has had a formative influence on the ECJ.²⁰⁴

French legal culture plays a prominent role in this account as it provided the ECJ with a serviceable—though rundown—intellectual infrastructure at the beginning of its existence.²⁰⁵ From language to the categories of legal analysis, and from the structure of the legal proceedings to the ECJ's style of judgments, the French tradition determined how the Court was to accomplish its tasks and, in the process, shaped its institutional self-understanding.²⁰⁶ French judgments exemplify the command model of justification inimical to separate opinions. Their style has been described as "legalistic, deductive and magisterial . . . in which the final ruling is presented as the last and necessary outcome of a legal

204. For a discussion, see *supra* Part II.A.1.

205. German legal thought was recovering in the aftermath of the war and from the role that German jurists played during the Nazi regime. See generally INGO MULLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 201–92* (Deborah Lucas Schneider trans., 1991) (1987).

206. See BROWN & KENNEDY, *supra* note 142, at 55 ("The influence [the French] style of drafting judgments has upon the law which they contain is not to be underestimated, even though it be intangible.").

and logical set of arguments that is formally structured as a demonstration.²⁰⁷

This Section challenges the current assessment of the influence of civil law, in general, and of French law in particular, on the likely success of the dialogical turn.²⁰⁸ It argues, first, that neither the French nor the larger civil law traditions are homogeneous or static; like any legal tradition, they evolve constantly.²⁰⁹ Secondly, it argues that the influence of the French legal tradition on European law is considerable but not unique and therefore not controlling. The AG's published opinions, for one, represent a major "deviation" from the French legal tradition, which remains very influential to this day, but the influence of which is not sufficient to undermine single-handedly the transition to a justification model of authority. If anything, the French influence *underdetermines* the likelihood of success.

Let us begin with the observation that, of the legal traditions in the six original members of the Community, all of which tended toward the command model of authority, French legal thought played the greatest role in shaping the early Court. French law was, and continues to be, widely seen as the most formalistic among the European civil law systems. French judicial decisions have a particular grammatical structure and are written in formulaic code, as if their different elements were all part of one single sentence.²¹⁰ As Konrad Zweigert and Hein Kötz write in their classic introduction to comparative law:

It is difficult to believe that these decisions are the work of judges of flesh and blood who ever indulged in the luxury of

207. Michele Taruffo, *Institutional Factors Influencing Precedents*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, *supra* note 202, at 437, 448.

208. My concern here is the legal cultural assumptions of civil law systems. Other authors have suggested that civil law systems underdetermine how cases are decided under Community law because of differences in the subject matter. See David A.O. Edward, *The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice*, in THE CIVILIAN TRADITION AND SCOTS LAW 309, 311 (David L. Carey Miller & Richard Zimmermann eds., 1997), available at <http://iuscivile.com/materials/reprints/ed-1.htm> ("Community law is late 20th-century law to deal with late-20th-century social and economic problems on a transnational basis. So it is not surprising that national systems provide few clues to the solution of questions which, almost by definition, go beyond the scope of national law.").

209. For the latest example of such evolution, see the process of constitutional reform underway in France under the guidance of the Balladur Commission. See Comité de Réflexion et de Proposition sur la Modernisation et le Rééquilibrage des Institutions de la Vème République [Commission for the Study and Propositions for Modernizing and Balancing the Institutions of the Fifth Republic], at <http://www.comite-constitutionnel.fr/accueil/> (last visited Sept. 1, 2008).

210. See Mitchel de S.-O.-L'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1341 (1995); see also DAWSON, *supra* note 74, at 380-81; Wells, *supra* note 74, at 94-95.

doubt; it seems to be required by the “*majesté de la loi*” that a judgment should appear in perfect purity as the act of an anonymous body.²¹¹

The underlying assumption is familiar: judges do not make the law but rather apply the law as drafted by the legislator. Consequently, in the established jurisprudential theories of modern French law, the principle of the separation of powers accounts for why—in theory, if not always in practice—case law is not considered a formal source of law.²¹² While judges do deliberate, they are bound by an oath of secrecy not to share the contents of their deliberation processes.²¹³ The oath of secrecy is common among courts, including the ECJ. What is special about civil law systems—“secrecy systems”—is the interpretation of separate opinions as disclosures of judicial deliberation and thus a violation of the oath of secrecy.²¹⁴ In this view, the majority opinion becomes an embodiment of “the court” and judges entering concurring or dissenting opinions are writing separately not only from the majority, but also from the court. The assumption is that separate opinions undermine collegiality and violate the oath of secrecy.²¹⁵

As Part I has shown, transparency is not a normative ground for the judicial duty of reason giving.²¹⁶ The assumption that separate opinions undermine the secrecy of the deliberations is unwarranted, at least normatively. To understand its resilience, we need to turn to history. Since the fourteenth century, French judges have been under a duty to keep their deliberations secret. The practice of nondisclosure was thought to protect judicial independence, although the French revolutionaries also saw secrecy as a tool for protecting certain interests under the mask of judicial neutrality. In 1791, the revolutionaries reversed the practice and went to the other extreme of requiring that deliberations take place in public.²¹⁷ The reform was short lived—it lasted only four years—

211. ZWEIGERT & KÖTZ, *supra* note 167, at 127. Contrast this with the “substantive, discursive and personalized style” where “the decision is supported by several and even competing or converging arguments, including value judgments and personal opinions of the judge.” Taruffo, *supra* note 207, at 449.

212. JULIEN BONNECASE, INTRODUCTION A L’ETUDE DU DROIT 63–65, 67–68 (1926).

213. Arthur von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. COMP. L. 197, 201–02 (1956).

214. *See generally* Nadelman, *supra* note 171.

215. *See supra* Part III.B.2 (arguing that this view is mistaken and that dissenting judges continue to speak for the Court). For discussion in the context of the ICJ, see SHAHABUDDIEN, *supra* note 170, at 195–200.

216. *See supra* Part I.C.

217. Few courts around the world—for instance, in Brazil, Mexico, and Switzerland—continue the practice of public deliberations to this day. For the legal basis of public judicial deliberation in Brazil, see Lei da Acao Direta de Inconstitucionalidade [Direct Unconstitutionality

presumably because such deliberative acts were rather undignified.²¹⁸ The secrecy of deliberations and brevity of the judicial reasons were sharpened after the enactment of the Code Civil,²¹⁹ at a time when, according to the dominant *école de l'exégèse*, the concern was exclusively the literal interpretation of the Code, completely disregarding judicial decisions.²²⁰ Internal procedures and rules regarding the form and content of judgments of the highest French civil court—the Cour de Cassation—were modified to reflect these changes. Over the years, judicial self-understanding has internalized them to the point where guides to the style of judgments, for the Court's internal use, mention explicitly:

Extrajudicial arguments which do not assist in the solution of a case are among those which lend a merely sophistical appearance to a decision. To invoke considerations of economics, sociology or diplomacy is to confuse different types of arguments and to conceal the correctness of sound reasoning.²²¹

The lack of *stare decisis*, the procedures before the court, and the style of judicial decisions are all byproducts of this historical evolution.²²²

And so, this argument goes, is the ECJ's legal culture, given its juriscultural French origins. Just as one cannot imagine English courts abandoning the practice of delivering seriatim judgments or American courts prohibiting their members from writing separately, it is impossible for French or French-inspired courts to depart from their entrenched jurisprudential tradition. This would be a logical conclusion, at least with respect to French courts, assuming that the above description of the

Litigation Act] arts. 7–9, Lei No. 9.868, de 10 novembre de 1999, D.O. de 11.11.1999 (Brazil), available at http://www.planalto.gov.br/ccivil_03/LEIS/L9868.htm. For cases where this form of deliberation was used, see, for example, S.T.F. ADPC 54-8 (Aug. 26, 2008) (convocation order) (Brazil), available at <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=processoAudienciaPublicaAdpf54> (discussing the constitutionality of application of the Penal Code's criminalization of elective abortion of anencephalic fetuses); S.T.F.-Distrito Federal, Ap. No. 3510-0, Relator: Carlos Britto, 29.5.2004 (Brazil), available at http://media.folha.uol.com.br/ciencia/2008/05/29/ayres_britto.pdf (discussing the compatibility of article of Lei da Bioseguranca [Biosecurity Act] allowing for stem cell research with the constitutional principle of unconditional dignity of human life).

218. I rely here on Nadelman, *supra* note 171, at 422–23; see also Mathilde Cohen, *Reason-Giving in Court Practice: Decision-Makers at the Crossroads*, 14 COLUM. J. EUR. L. 257 (2008).

219. The Code Civil, also known as the Code Napoléon, is the French Civil Code, which entered into effect on March 31, 1804. For a discussion of the drafting, spirit, and essential features of the Code Civil, see ZWEIGERT & KÖTZ, *supra* note 167, at 82–99.

220. See generally *id.* at 98; Dyzenhaus & Taggart, *supra* note 39, at 159 & n.128.

221. ZWEIGERT & KÖTZ, *supra* note 167, at 127 (quoting PIERRE MINIM, *LE STYLE DES JUGEMENTS* 255 (4th ed. 1978)). There are of course many distinctions and nuances that are relevant to grasp the intricacies of French legal culture. See generally Deumier, *supra* note 81 (discussing these differences in the specific context of the form of judgments).

222. See generally MINIM, *supra* note 221; FREDERIC ZENATI, *LA JURISPRUDENCE* (1991).

French legal culture is accurate. But is the intellectual structure of French judges' institutional self-understanding so exquisitely compact and homogeneous?

A number of elements cast doubt on such an image of juriscultural purity and on the strength of its heritage. We have already seen that moments of experimentation with judicial styles are not unknown in French history. A number of comparativists, most prominently Mitchel de S.-O.-L'E. Lasser and John Bell, have painted an unofficial portrait of the French judge.²²³ Drawing on secret internal judicial documents such as the drafts of the *juge rapporteur* or the conclusions of AGs in French courts, Lasser has identified a hermeneutical dimension of judicial reasoning that is the opposite of the formalism propounded by the orthodoxy. These documents do not resemble the impersonal style of the official judgment; they confront squarely the policy debate, mention precedent, and present the doctrinal options before courts, while factoring in overtly pragmatic considerations.²²⁴ The origins of this counter-current are present in early French legal thought, which is less homogeneous than it appears on the surface. To take just one example, if one goes back in history to some of the earlier interpretations of the Code Napoléon, one will find mention of the possibility that judges could take into consideration the consequences of a given interpretation, though naturally, only in exceptional circumstances.²²⁵

To be sure, this rift between the monolithic perception and the nuanced reality is more striking in some areas of the French legal system than in others. Administrative courts, up to and including the apex court, the Conseil d'Etat, employ a more flexible, less grammatical style of reasoning than the Cour de Cassation and equivalent lower courts of private law.²²⁶ No French court experiments significantly with the form of judgments—multiple opinions are prohibited—but the reasons that courts give vary in their intricacies. On a spectrum that ranges from the command to the justification models of authority, French courts cluster toward the former extreme but do not all occupy the end point. This diversity is mirrored, with enhanced variations, in the writings of legal scholars, where authors have at times advocated more elaborate judicial reasoning and the use of separate opinions.²²⁷

223. John Bell, *Reflections on the Procedure of the Conseil D'Etat*, in DROIT SANS FRONTIERES 211, 214–19 (Geoffrey Hand & Jeremy McBride eds., 1991); Lasser, *supra* note 210, at 1343–45; cf. DAWSON, *supra* note 74, at xi–xii.

224. See Lasser, *supra* note 210, at 1383–84.

225. See 1 C. AUBRY & C. RAU, COURS DE DROIT CIVIL FRANÇAIS 130 (4th ed. 1869).

226. See Shapiro, *supra* note 17, at 326. *But see* Deumier, *supra* note 81.

227. See generally Adolphe Touffait & André Tunc, *Pour une motivation plus explicite des*

Scholars debate if, and how, these two dimensions of legal thought in civil, primarily French, law systems can be reconciled. Some see them as the mark of judicial hypocrisy,²²⁸ others as indicators of a deep, mutually self-reinforcing duality in French legal thought.²²⁹ The most interesting interpretation, for our purposes, is the one that focuses on the development of the judiciary's institutional self-understanding. The judiciary has to speak with one voice; lifting the veil on how judges decide cases is not an option. The central feature of this outlook is the great weight put on the public face of the law. Litigants are not part of the audience for which courts speak.²³⁰ Higher courts issue commands to other courts, while lower courts issue commands to the executive: "The lack of engagement with the argument [of the parties] . . . means that [the appellate court] does not really seek to explain the decision. Rather it seeks to provide an answer to the lower court."²³¹

Institutional self-understanding hides, but cannot resolve, the hermeneutical tension in French legal thought. That constitutive heterogeneity casts a different light on the French legal tradition as well as on its influence on European law. It is now apparent that the publication of the opinions of the AGs marks a departure of the ECJ from the influence of the French judicial tradition.

I now make my second answer to the stated objection and suggest that we should revisit the influence of the civil law system on European law. There are good reasons to do away with a linear and static conception of cross-border judicial influence. The development of European law is dynamic and dialectical: the Court was shaped by the heterogeneous legal traditions of the Community's member states and it, in turn, has shaped their legal traditions. Understood in this light, past legal influences do not impede changes in the ECJ's style of legal reasoning in regards to either content or form.

The terms of this interaction between French and European legal rationales have changed over time. They have evolved from an early stage

décisions de justice et surtout celles de la Cour de cassation, 73 REVUE TRIMESTRIELLE DE DROIT CIVILE 487 (1974).

228. See BELL, *supra* note 83, at 74 (citing A. Bancaud, *Considerations sur un "pieuse hypocrisie": La forme des arrêts de la Cour de Cassation*, 7 DROIT ET SOCIÉTÉ 373 (1987)); see also Lasser, *supra* note 210, at 1402 n.291.

229. See Lasser, *supra* note 210, at 1402-09.

230. For an early discussion of the importance of judicial audiences, see RUPERT CROSS & J.W. HARRIS, *PRECEDENT IN ENGLISH LAW* 13 (4th ed. 1991).

231. BELL, *supra* note 83, at 74 (referring to the Conseil d'Etat); see also ZWIGERT & KÖTZ, *supra* note 167, at 127 ("[N]o dialogue between the Cour de Cassation and the legal public is possible . . ." (quoting A. Breton, *L'Arret de la Cour de cassation*, 23 ANN. UNIVERSITÉ SCIENCES SOCIALES DE TOULOUSE 5 (1975))).

when, as Mancini and Keeling put it, “the judgments of the European Court looked like a carbon copy of the judgments of the great French courts,” toward a more flexible style of judgments.²³² On the spectrum to which I referred earlier, the judgments of the ECJ broke away from those of the French courts, which tend to come closer to the command model of authority. The departure has been so significant that the ECJ’s judicial style has been described as lying between that of the French and American styles.²³³

What explains this evolution along the jurisprudential spectrum? For one thing, no legal system maintained a static position on this spectrum during the second half of the twentieth century. Unsurprisingly, legal cultures change over time.²³⁴ In this context, the advent of judicial review was of course of paramount importance. The legal landscape in the immediate aftermath of the Second World War was one in which judicial review of legislation was still limited and very few courts availed themselves of the opportunities open to them. That landscape changed over time, to such an extent that by the turn of the twenty-first century, the practice of reviewing legislation had become the norm throughout Europe.²³⁵ Two other factors influencing these changes are the newly discovered power of national courts under Community law and the work of the ECHR.²³⁶ Scholars of French law have suggested that European law, as well as the turn to constitutional rights have helped “free French law and courts from the dogmas of parliamentary sovereignty.”²³⁷ The recently introduced constitutional reforms in France that would allow concrete review by granting individual litigants the right to invoke the unconstitutionality of legislative acts before ordinary courts constitute a

232. Mancini & Keeling, *supra* note 11, at 399.

233. LASSER, *supra* note 110, at 317 (“Now several times longer than the typical Cour de cassation decision, the ECJ judgment canvasses, summarizes and responds to the arguments of each to the parties of the case, thereby overtly recognizing serious interpretative and normative conflict and thus opening up the possibility of multiple legitimate decisional paths. The ECJ must therefore publicly explain and justify its decisions and reasoning in a way that obviously has far more to do with the American mode of judicial accountability than with the French.”).

234. See Vlad Perju, *Comparative Constitutionalism and the Making of A New World Order*, 12 CONSTELLATIONS 464, 474–75 (2005).

235. The model adopted is Hans Kelsen’s, not John Marshall’s. See generally Ferejohn & Pasquino, *supra* note 25, at 1671–77; Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT’L J. CONST. L. 618, 641 (2006).

236. See e.g., *Simmenthal v. Comm’n*, 1979 E.C.R. 777, paras. 29–30 (acknowledging the national courts’ sole jurisdiction over disputes arising from national intervention agencies’ violations of Community legal provisions).

237. Sweet, *supra* note 98, at 71.

significant step in this direction.²³⁸ Similar conclusions have been reached about the evolution of the English legal system.²³⁹

Regarding the ECJ's evolution, two factors are relevant at this stage. The first is the important, though limited, role of the AG. Although the role of European AGs is modeled on that of their French counterparts, whose opinions are secret, the opinions of European AGs are published. The publication personalizes the formal and detached judgments of the Court. The AG presents to the Court the available legal choices and the arguments that support each position. It is easy to see the significance of publishing this document when we recall that, from a French judicial perspective, decisions ought to "possess[] a univocal quality that denies the possibility of alternative perspectives, approaches or outcomes."²⁴⁰

A second factor is the gradual demystification of the civil law tradition. Consider, for instance, the issue of dissenting opinions. In all continental legal systems, a central argument against dissents was their "foreignness" to the domestic legal tradition. Yet, history reveals periodic experimentation with the form of judgments. As we have seen, one such moment occurred during the French Revolution, and one can find similar moments in other nations' histories: in Germany such experimental periods occurred in both nineteenth-century Baden and twentieth-century Bavaria;²⁴¹ and Naples and Tuscany in Italy both enjoyed a similar phase before the unification under the Code Napoléon.²⁴²

The debate after the Second World War in Germany—a "civil law" country—regarding the introduction of separate opinions provides a helpful example.²⁴³ Along with the legal systems of France and the United Kingdom, German law also began to have an impact on the European jurisprudential system, especially once the reputation of the German Federal Constitutional Court, established after the Second World War, began to grow.²⁴⁴ The importance of fundamental rights in

238. *Projet de loi constitutionnelle de modernisation des institutions de la Ve République* [Draft constitutional modernization law of the institutions of the Fifth Republic] art. 26, No. 820, Apr. 23, 2008, available at http://www.assembleenationale.fr/13/dossiers/reforme_5eme.asp.

239. European jurisprudence has influenced the development in U.K. courts of a recognition of a judicially enforceable duty to give reasons. See Dyzenhaus & Taggart, *supra* note 39, at 116; see also Gráinne de Búrca, *Proportionality and Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law*, in *ENGLISH PUBLIC LAW AND THE COMMON LAW OF EUROPE* 53 (Mads Andenas ed., 1998).

240. Lasser, *supra* note 210, at 1341–42.

241. See Nadelman, *supra* note 78, at 271–72. For a discussion of the early evolution of the practice of reason giving in German courts, see DAWSON, *supra* note 74, 432–50.

242. Nadelman, *supra* note 78, at 269.

243. *Id.* at 271–76 (discussing the historical treatment of dissents in the German Constitutional Court).

244. See Mancini & Keeling, *supra* note 11, at 399–403; see also Cindy Skach, *We, the Peo-*

ECJ jurisprudence and the use of proportionality in the ECJ's interpretation of abstract clauses in the late 1960s stemmed from German influence and added a new layer to European law.²⁴⁵ The influence was substantive rather than stylistic and occurred at a time when debates were ongoing within German legal academia regarding the introduction of dissenting opinions.

Dissents had been banned in Germany during the Weimar era. The German Basic Law reaffirmed this position in 1949 on the ground that "[t]he trust in justice and especially in constitutional justice [was] not sufficiently developed . . . to preclude the possibility . . . that public reactions . . . dangerous for the entire institution . . . may result if, in litigation involving political issues, a judge himself asserted that it would have been possible to decide otherwise."²⁴⁶ The timeliness of introducing dissents in German courts was a hotly debated issue on the German political scene in the 1950s and 1960s.²⁴⁷ It took two decades after the adoption of the Basic Law to establish sufficient trust in constitutional justice such that legal academics began to argue that dissents should be introduced. The reform was inspired not only by changes in the German legal culture, but also by practices in other legal traditions. In particular, Anglo-American practices and those of the ICJ, which had allowed dissents since the end of the Second World War, were influential.²⁴⁸ Even after reforms permitting dissents were adopted, however, it took time for these reforms to leave an imprint on German law after they were introduced in 1970. They eventually did, and the authority of the German Constitutional Court did not diminish after the introduction of separate opinions; if anything, it continued to grow to the point where it has become arguably Europe's most prestigious apex court.

It is true that reforms were confined to the Constitutional Court and that concurring and dissenting opinions are not allowed in lower courts.²⁴⁹ The strict separation between public and private law might

ples? Constitutionalizing the European Union, 43 J. COMMON MKT. STUD. 149, 164–65 (2005) (discussing the role of the German Constitutional Court in legitimizing the hegemonic constitution making process of the Basic Law).

245. Mancini & Keeling, *supra* note 11, at 399–401.

246. Mehren, *supra* note 213, at 209 n.42 (translating remarks made during negotiations in the German Bundestag).

247. *See generally id.* at 270–75.

248. "German law . . . offers the judges of the Constitutional Court the possibility to give separate and dissenting votes, whereas before the Court spoke with one voice only. This new system was inspired by looking at the Anglo-American practice and that of the International Court of Justice." Karl Doehring, *The Auxiliary Function of Comparative Law for the Interpretation of Legal Rules of National and International Law*, in 4 INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO 47, 61 (1987).

249. It is true that in Germany the *Grundgesetz* (Basic Law) allows for judicial flexibility and

suggest that Germany's civil law tradition was not impacted. That could be true if the separation between private and public law was indeed a strict one, but the German constitutional doctrine of the horizontal application of constitutional rights to private law makes it less so.²⁵⁰ Even if it did not, the German Constitutional Court still constitutes a good model for the adoption of multiple judgments in the ECJ because that court's workload now resembles more that of a constitutional court than of a typical private law court in a civil law system. Hence it is important to highlight the complexity of the civil law tradition and to find elements that would in fact support the ECJ's transition toward a justification model of authority.

2. *Institutional Culture: Collegiality and Loyalty*

Let us turn now to an objection that emphasizes the Court's internal, institutional culture. This position does not object directly to the proposed reforms; rather, it questions their impact in terms of the Court's presence in the European public sphere, which made the reforms appealing in the first place. According to this view, the case for separate opinions is overstated. It seems possible that, even if separate opinions were allowed, judges would not avail themselves of these new opportunities. Just as dissents have typically played a marginal role in national legal systems that allow them, the Court's own institutional culture, as it has developed over half a century, seems to support a conclusion that they would have a limited impact here, too. Even when inclined to do so, ECJ judges would come under sizable institutional pressure to desist. In Italy, Spain, and many of the new EU member states, including Romania and Poland, judges are discouraged from exercising their right to dissent. The same is true of the adjudicatory bodies of the WTO, where dissents have been used only very rarely.²⁵¹

Two different but related duties account for this dimension of institutional culture: the duty of loyalty and the duty of collegiality. In this particular interpretation, loyalty requires that judges blend in with a

creativity, but outside of the constitutional realm, that has not translated into more openness for debate. See BELL, *supra* note 83, at 136–48.

250. See Lüth, 7 BVerfGE 198 (1958) (F.R.G.), translated in VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1625–31 (2d ed. 2006). For more on the horizontal application of constitutional rights, that is, on the application of constitutional rights as between nonstate actors in legal systems that do not have a state action doctrine, see generally Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 388 (2003); Frank I. Michelman, *The Bill of Rights, The Common Law, and The Freedom-Friendly State*, 58 U. MIAMI L. REV. 401 (2003); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003).

251. Lewis, *supra* note 171, at 899–900.

court as an institution for the greater good of the institution. In cases where they do disagree, however strongly, with the majority, they refrain from voicing disagreement because doing so would damage the institution's interests.²⁵² While this applies to any independent adjudicatory body, the claim to authority of the ECJ and its particular institutional position within Europe places a particularly strong duty of institutional loyalty on its members. The duty of collegiality is an example of loyalty at the deliberative stage. Because the members of the bench are collectively responsible for the Court's judgments, the deliberative process should be structured so that each of them has an equal chance to influence the Court's pronouncements.²⁵³ The deliberative process, understood to include the many phases of deciding a case, is therefore a controlled environment in that it has strict requirements of secrecy and professional courtesy. These requirements are all the more important for the effective functioning of the ECJ, where judges come from a multitude of legal traditions and oftentimes have had very different professional experiences. As a result, it is apparent why, in this interpretation, dissents are seen as a threat to the unity of the Court as a collegial body.

Institutional loyalty and collegiality are of paramount importance, and I offer an alternative interpretation of both duties that supports the rationale for allowing dissenting opinions. Neither my forthcoming interpretation nor the one I rejected above is self-evident. Allowing dissents should strike a balance, as a member of the judiciary acknowledged, between "institutional loyalty to the Court of which the judge is a member, and devotion to the law whose servant he remains."²⁵⁴

To begin, the argument that dissents undermine both loyalty and collegiality in the Court assumes that dissents represent solely their authors instead of the Court as an institution. This assumption is not self-evident. First, it seems tautological to argue that dissents undermine the Court's collegiality without showing independently that collegiality

252. See DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 26 (2d ed. 1997) ("Dissenting justices—even if they have circulated written dissents inside the court—more often than not choose not to publish their dissents or even to be identified as dissenters partly out of a sense of institutional loyalty. The prevailing norm seems to be that personalized dissenting opinions are proper only when promoted by deep personal convictions.").

253. See Edward, *supra* note 12, at 556 ("If there is a vote, this does not mean that, from then on, the majority alone determine[s] the form and content of the judgment. The minority may be quite as active as the majority in testing the soundness of the legal reasoning in the draft. . . . This, essentially, is what 'collegiality' means. All members of the Court are responsible, up to the last minute, for making the judgment as good as it can be, even if they disagree with the result.").

254. SHAHABUDDIN, *supra* note 170, at 184.

mandates that courts speak with only one voice. Many courts around the world allow dissents at no expense to their collegial nature. Secondly, dissents are typically not drafted outside of the institutional structure for judicial deliberations: they remain part of the opinion of the Court. As one observer wrote in reference to the ICJ, “[T]he whole Court is much involved in the separate, even dissenting, opinions, just as the judges making separate opinions are all the time involved in the Court’s own decisions.”²⁵⁵ This practice is justified not by judicial necessity but rather by a particular understanding of the requirements of collegiality. That understanding is already deeply engrained in the culture of the ECJ.²⁵⁶

A second assumption underlying the objection to dissents is that they erode the culture of loyalty shared by the members of the Court. Even assuming *arguendo* that this is factually accurate, I suggest that this assumption is normatively indefensible. Consider for instance the argument that, by having to talk through their disagreements, judges end up seeking common ground through discussion. This is probably a positive outcome for a court from an institutional point of view, but one must remember that a court’s role is not to enhance its authority at all costs, but rather to fulfill the functions for which it was created. Judges might have to increase the level of abstraction in their legal reasoning to overcome the disagreements among them. Resorting to elliptical reasoning might be good for the court, but yet not benefit the people to whom the court owes reasons for its imposition of a certain course of action or national courts faced with similar cases in the future.

When collegiality and institutional loyalty are not interpreted as ends in themselves, their prominence within the ECJ’s institutional culture can have a highly positive influence within a framework that allows separate opinions. Its members will likely write dissents when they feel strongly about the position they want to advocate, and this is precisely when one wants to hear their voices. Their opinions would represent important positions outside the Court’s majority that would otherwise not find themselves included in the judgments. The ECJ is prepared to strike an effective balance between institutional considerations and open discourse. It is precisely the civility instilled by the institutional culture

255. *Id.* at 197 (quoting Sir Robert Jennings, *The Internal Judicial Practice of the International Court of Justice*, 59 BRITISH Y.B. INT’L L. 31, 43 (1988)). For the argument that dissents are also part of the Court’s collective work, see *id.* at 195–200.

256. See Edward, *supra* note 12, at 556 (“The minority are not excluded from the deliberations of the majority, nor do they have any interest in excluding themselves since they may yet be able to swing the majority towards their point of view or at least attenuate what they find objectionable.”).

that rules out, at least in the foreseeable future, a development along the lines that have become associated with the style of the U.S. Supreme Court.

C. *Objections Based on the Integrity of the European Legal System*

This Section discusses two objections that argue, in different ways, that the introduction of separate opinions would have the effect of undermining the integrity of the European legal system. The first objection is that such reforms would undermine the unity of European law and, by consequence, the effectiveness that constitutes one of its core doctrinal pillars. The second objection questions the viability of the reform by looking into the practicalities involved in its implementation.

1. *Fragmentation: Preserving the Effectiveness of European Law*

The principle of effectiveness occupies a central role in the architecture of the Community legal system.²⁵⁷ The ECJ has invoked the requirement that provisions produce their intended effects as a principle that shapes national legal regimes of remedies for violations of Community law.²⁵⁸ Effectiveness has been used as a trump card in support of the Court's favored, generally expansive, teleological interpretation, and it has been frequently urged that any interpretation other than the Court's would endanger the effectiveness of a given provision.²⁵⁹ For instance, when the Court held that Article 39 has vertical direct effect,²⁶⁰ or that Article 119 has horizontal direct effect,²⁶¹ it opted for the interpretation that, in its view, maximized the effectiveness of the provision. Effectiveness has also been invoked with regard to the Treaty as a whole. For instance, when deciding whether member states could be held liable for failure to implement a Community directive, the Court held that a denial of liability would undermine the effectiveness of the

257. For early commentary, see generally Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MOD. L. REV. 19 (1993). For examples of cases in which effectiveness was articulated and applied, see Case C-224/01, Köbler v. Austria, 2003 E.C.R. I-10239; Joined Cases C-46/93 & C-48/93, Brasserie du Pecheur SA v. Bundesrepublik Deutschland, 1996 E.C.R. I-01029; Joined Cases C-6/90 & C-9/90, Francovich v. Italian Republic, 1991 E.C.R. I-05357.

258. For a discussion of the development of the effectiveness requirement, see BÚRCA & CRAIG, *supra* note 1, at 313–25.

259. See, e.g., Case C-271/91, Marshall v. Southampton and South-West Hampshire Area Health Authority, 1993 E.C.R. I-4367; Case 35-76, Simmenthal v. Comm'n, 1979 E.C.R. 777.

260. See Case C-281/98, Angolese SpA v. Cassa di Risparmio, 2000 E.C.R. I-4139.

261. See Case 43-75, Defrenne v. Societe Anonyme Belge Sabena, 1976 E.C.R. 455.

directives as a form of Community action and thus the full effectiveness of Community rules.²⁶²

One assumption underlying the need for unitary interpretation is that law is a system and that fragmented interpretations undermine its systemic nature.²⁶³ The civil law principle that courts should interpret legal provisions so as not to deprive the provision of legal effects reinforces this understanding of the nature of legal systems. Of course, there are situations when this principle of interpretation is not helpful, since the specific legal effects of a given provision cannot always, or often, be known prior to interpretation, and hence they cannot assist in the interpretative process. That aspect, however, does not diminish the challenge it poses to separate opinions. My discussion here addresses the perceived danger that separate opinions would legitimize alternative interpretations of a Community legal provision and trigger the “fragmentation” of its interpretation across the national legal systems, thus undermining the provision’s—and the ultimately the Treaty’s—effectiveness. This is a common objection to separate opinions. One scholar writes that “EC courts do not use dissenting opinions, mainly with the aim of performing a unifying function in the interpretation of EC law.”²⁶⁴

When judges depart from the view of the majority, an element of doubt is introduced regarding the majority’s choice of an interpretative method or its application in that particular case.²⁶⁵ The best understanding of this doubt is institutional. The Court’s judgments must be not only content ready to secure the effectiveness of European law but also be perceived as such within the EU’s institutional architecture. The longer the “distance” between Luxembourg and some of Europe’s courts, the stronger the perception that must bridge that distance. Separate opinions are seen as a threat to the Court’s authority and thus to the unity and overall effectiveness of European law. As a report commissioned in 1996 on the future of the ECJ put it, “Undoubtedly, the great advantage of the single, collegiate judgment is to enhance its authority. Now that the role of the Court is widely accepted, its authority seems

262. See *Francovich*, 1991 E.C.R. I-05357.

263. See Edward, *supra* note 208, at 316–18 (identifying system and coherence as part of the influence of civil law systems on Community law).

264. Taruffo, *supra* note 207, at 451.

265. What is less clear is how that element of doubt could unilaterally endanger the doctrinal unity—the effectiveness—of European law. Empirical evidence is at best unclear, if one is to look at courts with strong dissenting practices, such as the German Constitutional Court or the ECHR, not to mention the U.S. Supreme Court. Instead of a purely doctrinal reading, this objection must be understood in a broader institutional context.

assured. The single judgment, however, has special value in reinforcing the unity of Community law.”²⁶⁶

The special features of the EU’s judicial architecture explain this perceived need for constant reinforcement of authority. Historically, the Court’s most important judgments took the form of answers to preliminary references sent by national courts.²⁶⁷ Even today, Article 234 references make up half of the Court’s docket.²⁶⁸ In this context, the complex relationship between the ECJ and national courts has been the object of intense study.²⁶⁹ The Court has been, and to some extent it remains, dependent on the willingness of national courts to send it preliminary references as well as their readiness to act upon the Court’s answers. The Court’s success in establishing the appropriate relationship of authority with national courts is well-documented and it need not be rehashed here.²⁷⁰ The claim that separate opinions would bring about a change in the style and content of judgments that would seriously alter the fundamental structure of the EU’s judicial architecture is important for our purposes. In this view, publicizing the split in the Court opens avenues for possible abuse by national courts, especially the more recalcitrant ones, to undermine the Court’s authority.²⁷¹

This need to gain and maintain authority is one of the most common arguments marshaled against the use of separate opinions in both domestic and supranational or international courts. Since courts lack the means to enforce their decisions, the loss of legitimacy can endanger

266. THE BRITISH INST. OF INT’L & COMPARATIVE LAW, *supra* note 186, at 121.

267. *See, e.g., Francovich*, 1991 E.C.R. I-05357; Case 43-75, *Defrenne v. Societe Anonyme Belge Sabena*, 1976 E.C.R. 455; Case C-6/64, *Costa v. Ente Nazionale per l’Energia Elettrica (E.N.E.L.)*, 1964 E.C.R. 585; Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1.

268. *See* European Court of Justice, *2007 Annual Report*, at 80, *available at* http://curia.europa.eu/en/instit/presentationfr/rapport/stat/07_cour_stat.pdf.

269. *See generally* KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001); ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & J.H.H. WEILER, *THE EUROPEAN COURTS AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* (1998).

270. *See* ALTER, *supra* note 269, at 24; *see also* Harm Schepel & Erhard Blankenburgh, *Mobilizing the European Court of Justice*, in *THE EUROPEAN COURT OF JUSTICE*, *supra* note 29, at 27–28.

271. HENRY G. SCHERMERS & DENIS F. WAELEBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 497 (5th ed. 1992) (“More than any other court the decisions of the Court of Justice must enjoy authority. As a result of the poor legislative machinery of the Communities the Court of Justice must fill important gaps in the legal order and thus help to create legal certainty for those subject to Community law. Such legal certainty is more readily secured by firm rulings than by decisions characterized by hesitancy where the possibility exists that the Court could reverse its position when one of the Judges is replaced. A new legal order in particular needs firm and unequivocal rulings as a basis for its future development.”).

their ability to fulfill their functions. This challenges a linear account of the evolution of judicial authority, in which an initial authority-establishing stage is followed by an authority consolidation stage. If success during the first stage is volatile, then it follows that authority cannot be taken for granted. The volatility of authority continues to resonate even for courts that have reached their zenith.

The intensity of such misgivings is only amplified at the supranational level: the harder it is to establish authority, the stronger the cry about its fragility. Given the difficulties inherent in the recognition of any supranational court, calls for the protection of the court's authority will be exponentially stronger. They will be aimed at preserving the system that has led the court to gain authority in the first place. Under this conception, the grounds for opposing separate interpretations of what effectiveness requires in a given case are readily apparent. A court that speaks with more than one voice weakens its message and fails to reinforce its authority, just as it could not have gained such authority in the first place without recourse to unity. For example, EU law would probably look much different today if the Court's split in *Van Gend & Loos v. Nederlandse administratie de belastingen* had been public.²⁷²

Unfortunately, this institutional objection is as strong as it is self-serving. Especially when invoked by judges, its effect is to legitimize existing practices and forms of discourse independent of the soundness of their underlying justifications. To see why that might be so, let us identify the scenario in which separate opinions might end up undermining the effectiveness of EU law. Proponents of this view claim that open dialogue in the ECJ might further empower disobedient national courts when they are offered a split ECJ answer to a preliminary reference accompanied by a powerful dissent. The fear is that national courts would take the liberty of disregarding the Court's answer or that it would come under intense pressure from their national governments to adopt the interpretation offered by a separate opinion. Such a course of action could undermine the ECJ's authority and the effectiveness of its interpretation, because there is little the Court can do to enforce its judgment in such a situation. The principle of effectiveness is in this context a nondelegation principle: the decision making authority to determine the meaning of a provision rests with the Court, which delivers unitary interpretations which are to be applied across the EU. Disobedient courts thus undermine the effectiveness of the unitary interpretation and, with it, the authority of the ECJ itself.

272. The Court's split is mentioned in Schermers, *supra* note 187, at 3.

But there are no more reasons to believe that the dialogue would undermine the Court's authority than there are to believe that it would reinforce that authority. A national court's decision not to act on the Court's answer would likely be the result of a process of deliberation. In the process, some of the arguments invoked by the ECJ, both in the majority and the separate opinions, are likely to be reiterated and reexamined as the debate trickles down to the province of national courts. If national judges deem them good arguments, the authority of the Court will not be completely undermined because it will continue to structure the debate in the referring court. The Court's authority will be undermined inasmuch as there will still be a debate, given that the ECJ's judgment will have failed to end that debate. While the ECJ will have delivered the final judgment within its own province, the national courts will still have to decide within theirs. From a command model of authority, this is unacceptable regardless of the outcome national courts will reach: if the referring court decides the case that generated the reference in light of the ECJ's answer, it will not do so because the ECJ so ruled, but rather because the referring court found its justification cogent and convincing. From this perspective, however, there is a similar danger that the referring court might not apply the ECJ's answer even if it was adopted under the guise of unanimity.

It is thus unclear why interpretive variance poses such a threat to effectiveness. First, the ECJ has always been dependent on feeder courts, and the range of duties incumbent on national courts through the ECJ's application of the Treaty are still not sufficient to guarantee that the ECJ will effectively regulate all juridical relations within its sphere of responsibility.²⁷³ Secondly, when a national court is disinclined to apply the answer given by the Court, it most likely has strong reasons for such action. It is unclear why the solution of formal unanimity should be preferred to bringing those reasons to light through open judicial dialogue. That dialogue could bring back the paradigm of partnership to the relationship between the ECJ and national courts.²⁷⁴ There is also a third answer, assuming that nothing else can answer the fears about the impact of separate opinions on the principle of effectiveness in the context of preliminary references. It is possible that a new institutional scheme could be set in place whereby, given the importance of preliminary references, the Court would not allow separate opinions in deciding Article

273. See Case C-224/01, *Köbler v. Austria*, 2003 E.C.R. I-10239; Case 283/81, *CILFIT v. Ministry of Health*, 1982 E.C.R. 3415.

274. See *Mare*, *supra* note 148. See generally *Chalmers*, *supra* note 19 (analyzing the partnership paradigm in the system of preliminary references).

234 cases, while simultaneously allowing members to do so in all other types of actions.²⁷⁵ The richness of the institutional regimes in force in the different member states provides all the necessary inspiration. For instance, in Ireland, dissents are not allowed when that country's supreme court interprets the constitution.²⁷⁶ For the reasons mentioned in Part I, I do not believe that the Irish solution is worth replicating, but it helps to illustrate that experiments with institutional arrangements are possible.

2. *Feasibility: Scarcity of Institutional Resources*

The final institutional objection targets the viability of the proposal for change. Does the judicial system have the resources and infrastructure to meet the challenges inherent in a changed framework? Separate opinions and the corresponding lengthening of majority opinions, in any of the Court's possible configurations, will strain a translation service that is already overburdened.²⁷⁷ Appeals have already been made to shorten AG opinions and the judgments of the CFI; a major institutional change in the ECJ itself might stretch the system beyond the breaking point.²⁷⁸ Moreover, the Court's lack of control over its docket following the failure of reforms proposing to give it discretionary jurisdiction makes judicial overload a significant problem. As ECJ Judge Koen Lenaerts openly acknowledged, "Judicial overload constitutes a threat for the quality of the reasoning of judgments and for the speed with which they can be delivered."²⁷⁹ No one wishes to see the quality of the ECJ's service decline, and yet, this might be the outcome if the proposed reforms were to be implemented in the current system.

275. Similar subject matter restrictions could be devised. Cases involving security measures would be one candidate for such restrictions. For an analysis of how the jurisdiction of the Court in these areas would be changed under the Treaty of Lisbon, see HOUSE OF LORDS EUROPEAN UNION COMMITTEE, *supra* note 138, at 74, 124–31.

276. IR. CONST., 1937, art. 34(4)(5), available at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf ("The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.")

277. See Edward, *supra* note 12, at 557; see also Francis Jacob, *Recent and Ongoing Measures to Improve the Efficiency of the European Court of Justice*, 29 EUR. L. REV. 823, 827 (2004).

278. See BURROWS & GREAVES, *supra* note 11, at 297.

279. Koen Lenaerts, *The Unity of European Law and the Overload of the ECJ—The System of Preliminary Rulings Revisited*, in 1 THE GLOBAL COMMUNITY: Y.B. INT'L L. & JURISPRUDENCE 2005, at 211, 212 (2006).

There may be something unsatisfactory in answering a practical concern at a theoretical level, yet this is the only available answer in this context. First, let us note that this is not primarily a question about the scarcity of resources; it is rather one about their particular allocation. Even in this form, the objection has merit, but it seems to approach priorities in the wrong order. Some elements of the judicial system in its current form are very onerous, but they are dictated by structural requirements of equal partnership within the EU or by the requirements of justice. For instance, it is very difficult for infrastructure and the effort of dispensing justice to have twenty-seven judges on the Court coming from different legal traditions. They have different native languages and professional expectations, which have been shaped by sometimes radically varying national circumstances. Nevertheless, that is what the principle of equality of member states in the judicial arena requires. Similarly, it is very burdensome to allow participants in the European judicial process to make submissions to the Court using any of the languages spoken in the member states, yet that is what access to justice entails. Because the reform proposals advocated in this Article rest on both normative and strategic grounds, and because they do not require a complete overhaul of the entire system, which would require the allocation of exorbitant and anyway unavailable resources, the objections about the practicality of the proposal are noteworthy but ultimately unconvincing.

CONCLUSION

Implicit in my argument for a discursive turn is a rejection of judicial minimalism as an auspicious model for the Court.²⁸⁰ The suggestion that the ECJ should keep a low profile in order to carry on with business as usual loses its appeal once we approach the Court from within a framework that enlarges the traditional understanding of its audience. The Court should make use of its capacity to send normative and informational impulses to set in motion or preserve ongoing processes of collective learning in the European public sphere. The most effective means to that end is a transformation in its style of reasoning. Concurring and dissenting opinions would bring about a discursive turn in its style and enhance the Court's ability to engage in "external deliberations."

Typically, calls for better justifications of judicial decisions indicate dissatisfaction with the methods or doctrines developed by the judiciary.

280. For examples of scholarly work advocating the minimalist paradigm, see Schepel, *supra* note 69, at 467, Shapiro, *supra* note 39, at 179, and Timmermans, *supra* note 26.

Looking into legal discourse in the EU and beyond, one finds the label of “elliptical” reasoning as an indication of dissatisfaction with the outcome of a case or line of cases to which it is applied. Students of American legal history will recall the “Reasoned Elaboration” movement of the 1950s. Its influential proponents set out to criticize the U.S. Supreme Court for what they saw as insufficiently justified decisions. Driven by institutional and political conservatism, the movement argued for limiting the role of courts and emphasized the need for neutral principles and technical expertise in the work of the judiciary.²⁸¹

Mutatis mutandis, in the European context, pleas for better justification, candor, or openness have oftentimes originated from some of the ECJ’s fiercest critics. Troubled by the expansive view of the Court’s—and the Community’s—powers, critics defended national sovereignty that was being trampled by the European judiciary. Behind their calls for better justification was the assumption that no good reasons could justify the Court’s decisions and the implication that the Court should desist from interpreting the EC Treaty expansively.

This history makes a final caveat necessary. The argument presented in this Article assumes neither that a discursive turn would favor any particular understanding of the market or of a “social Europe” nor that it would salvage national sovereignty. It does, however, allow for the possibility—indeed the likelihood—that such subject matters will become part of the public legal debate. One could therefore ask whether even the mere revival of subjects such as national sovereignty, or indeed nationalism, is not sufficient to resist the discursive turn.

The answer to this question turns on one’s ultimate views about the role of the Court and the direction of the EU. Some might take the view that advocating for national sovereignty sooner or later summons back the demons of nationalism, a development that is to be avoided at all costs. It is true that opening up the legal debate would not be risk free, but nationalism is alive and well in the public’s mind and ever-present in the agendas of national governments. The only question is what will be its force in Community legal discourse.

If the Court were a political actor with an integrationist agenda, then perhaps the above worries would be somewhat warranted. Whatever such roles the Court has played in the past, however, the future is likely to be different. Even if one believed that complete integration was desirable and that the Court could deliver it, one should nevertheless resist assigning that role to the Court. The reasons are the same as those for

281. For a discussion of this movement, see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 290 (1973).

why we resist the seduction of benevolent tyrants and philosopher-kings, namely the belief that debate, within legal doctrine and outside in the political world, is the means by which the path of open societies is charted. This is especially true in the case of the open-ended experiment in governance that is the EU, an attempt like no other in the contemporary world.

There comes a moment in the existence of any long-lived institution when the recipe for its success changes. The tools that brought success in the past will not deliver the same in the future. Half a century after its inception, the ECJ finds itself at such a moment. The Court has been instrumental in creating a political environment in which its continuing influence requires it to revisit and revise its old methods. There is much at stake in this project for itself and for Europe, and one can only hope that the Court will answer this call.