# Rethinking the Role of National Courts in European Integration: A Political Study of British Judicial Discretion

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## Introduction

Since the early 1980s, there has been an increasing awareness that the European Court of Justice (ECJ) plays a significant role in the process of European integration. Indeed, the supremacy of EC law and the powerful role of the ECJ provide the Community with supranational characteristics which distinguish it from traditional international organisations. It has also become widely recognised that development of the Community's supranational "new legal order"--which has transformed the treaty into a constitution, provided the foundation upon which to build an integrated European economy, and restricted the sovereignty and political autonomy of the member states--relies heavily on the cooperation of national courts and their decision to make preliminary references under the terms of Article 177 of the Treaty.12

Despite the political significance of preliminary references within this new legal order, analysis of the ECJ and of member state courts has mostly been confined to legal scholarship, with only a few notable exceptions which explore the political aspects of judicial activity. A common element in integration studies which do attempt to combine legal and political analysis has been to identify the motives behind ECJ rulings, and to discover incentives which propel judicial cooperation between the ECJ and national courts. These studies share a central assumption: that the role of the national courts in the process of European integration has been to cooperate with the ECJ by providing it with frequent preliminary references.

The central question addressed in this paper is whether the traditional model explains patterns of British preliminary references since its accession in 1972. The central conclusion of the paper is that the traditional model is not only incapable of explaining patterns of British preliminary references, but also incapable of accounting for patterns of preliminary references in general. These patterns raise a number of important research questions for scholars concerned with judicial politics and the role of national courts in European integration.

The paper also reveals that pre-occupation with frequent preliminary references is misguided; rather than constituting a primary measure of cooperation, the preliminary reference procedure itself is in some senses an effectively irrelevant instrument. Thus, while the pattern of British preliminary references empirically does not conform to the model, this may or may not signify judicial resistance to integration. By reconsidering the traditional model, including additional variables, and examining individual policy sectors it be possible to draw more meaningful conclusions about the role of national courts in European integration.

The paper proceeds as follows. The first section discusses the importance of preliminary references within the traditional model of cooperation. It outlines the assumptions and hypotheses which the model makes about how British courts have operated within the inherently political preliminary reference procedure. Section two then tests the applicability of the model in the case of

Britain. Several secondary hypotheses are also tested by examining comparative statistics on the frequency and pattern of preliminary references in various EC member states. A number of additional variables are introduced in order to explain empirical patterns, assess the validity of the model and raise questions for further research. Section three then tests the model on a microlevel by analysing a series of British cases in the field of environmental protection. In light of the statistics and environmental cases, the fourth
section describes the political nature of the preliminary reference procedure and its inherent affect on the process of European integration. It also reviews ECJ instructions to national courts governing the preliminary reference procedure, suggesting that this procedure, and the different interpretative methods employed by the ECJ and British courts, raise significant political possibilities. This final section then discusses how legal formalism, domestic politics, changing conceptions of national sovereignty, and psychological considerations all condition British judicial activity and help but do not fully explain patterns of preliminary references. Along with the search for new variables, these considerations should be incorporated into a refined model of judicial cooperation.

## The Traditional Model

Community law is implemented at a national level through national authorities, giving rise to implementation conflicts which must be resolved by national courts. This could allow Community law to be interpreted and applied in twelve (now fifteen) different ways throughout the Community. The Treaty does not vest the ECJ with the power to force integration by intervening in national cases. Instead, national courts must cooperate with the ECJ and request preliminary references under Article 177. Article 177 gives the ECJ jurisdiction to make preliminary rulings concerning, among other things, interpretation of the Treaty and validity and interpretation of EC acts. It provides that

> Where such a question [of Community law] is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 177 thus enables questions to be referred to the ECJ by national courts which consider a decision on the question necessary. Whereas the first highlighted provision produces enormous discretion for national judges, the second provision establishes their obligation to refer.

In order to prevent national judicial discretion from circumventing the preliminary reference procedure and thereby fragmenting the application of EC law amongst member states, the ECJ sought to maintain a steady supply of cases by tightening the guidelines under which national judges could legitimately avoid making a reference.3 Formally, there are two situations in which a preliminary reference is not necessary. First, in cases where a national judge finds that a clear ECJ precedent exists on an interpretation of Comm4unity law. Second, when no precedent exists, but the correct applic5ation of Community law is so obvious that no reference is needed. The Court recognised that "the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved." In the second situation, therefore, the Court has attenuated the obligation of a national judge to make a preliminary reference with the acte clair doctrine: "if a provision is unequivocal there is no need to interpret it," and hence no need to refer to the ECJ.

However, it has been argued forcefully that the Court's decision in CILFIT cleverly curtailed national judicial discretion while appearing to enhance it. While the Court gave the impression that national judges67
had considerable ability to withhold references, it actually established a number of strict guidelines which, if adhered8 to, effectively obliged frequent referrals. CILFIT concludes with a remarkable restriction of the acte clair doctrine; even if the correct application of Community law is perfectly clear to a national judge, this would still not completely justify withholding a reference under Article 177. National judges should consider the application of a Community rule obvious only if the matter would

be "equally obvious to courts of other member states and to the court of justice." Furthermore, national judges should bear in mind that the European Court is in the best position to address several other factors, such as linguistic differences inherent to Community legislation, terminology and legal concepts peculiar to EC legislation, and the context of Community law as a whole, with special regard to its objectives and its state of evolution.

To a large extent, the effect of these guidelines undercuts the enhanced discretion which the Court offered national judges regarding the scope of precedent, and limits the acte clair doctrine which existed before CILFIT. "The underlying rational of CILFIT, in other words, is be91011latedly to put on the brakes whic12h Da Costa failed to apply...[The decision] created a masterpiece of skilful drafting and ingenious invention of methods capable of contracting the scope on judicial cooperation."

The traditional model of cooperation takes as its starting point national judicial behaviour which occurs within the abovementioned guidelines set out by the ECJ. In particular, and of primary concern for this paper, the model places significant emphasis specifically on the number of Article 177 references which the ECJ receives. This is distinct from different forms of cooperation which also contribute to European integration, namely the application of "sympathetic interpretation" or "indirect effects" by national courts to national legislation instead of making a preliminary reference. Through sympathetic interpretation, national courts exercise their interpretative discretion and employ a rule of construction which holds that whenever possible, national law should be read as not intending to conflict with Community law. Through indirect effect, national legislatures avoid taking certain actions for fear that they will be held invalid by national courts wielding Community law. Various authors have examined the role of sympathetic interpretation and indirect effects in the assimilation by UK and other national courts of Community obligations into national legislation and in achieving uniform application of Community law. These authors usually survey a selection of diverse national cases in order to assess how receptive British courts are to ECJ doctrine.

But quite apart from sympathetic interpretation, the frequency of references provides an independent measure of the "partnership" between the ECJ and national courts. In his most recent discussions of courts and integration, Weiler goes out of his way to emphasise that each decision to refer to the ECJ strengthens the level of partnership. "When a national court seeks the Reference it is, with few exceptions, acknowledging that, at least at face value, Community norms are necessary and govern the dispute." In fact, EC lawyers have consistently emphasised the unique importance of preliminary references. In his seminal 1981 study, Bebr argued that it would be a "happy coincidence bordering on a legal miracle" for national judges to correctly interpret EC law. Thus he concludes that the doctrine of acte clair was nothing more than an inherently flawed notion which could only "gravely threaten an effective operation of the preliminary procedure and block so the development of the Community legal
order." When a question of Community law arises in a national court, he argued, national judges must refer the matter to the ECJ. In turn, the prevailing number of requests for preliminary rulings shows the willingness of national courts to play an active part in the development of the Community legal order.131415161718 The ECJ itself has recognised that preliminary references are "an index both of judicial cooperation between the Court of Justice and the national courts of the Member States and of the integration of Community law into national law." The traditional model thus defines one crucial index of cooperation as the willingness of national courts to make frequent references under Article 177.

A variety of explanations ha19ve been put forward to explain why national courts follow the instructions of the ECJ and offer preliminary references. One explanation emphasises formalism, whereby national courts complied with ECJ instructions simply because courts are charged with upholding the law. Not only was the ECJ composed of senior jurists who commanded the respect of national courts, but its rulings were enormously persuasive because they offered a logical and compelling interpretation of the Treaty and the obligations which it placed on national judges. Other authors have sug2021gested th22at national judges make preliminary references out of self-interest, stemming from their stake--professional, financial and social--in the continued expansion and 23acceptance of Community law at the national level.

Finally, a number o24f authors, particularly Weiler, have suggested a particular form of self-interest motivating preliminary references, namely, that judicial empowerment explains why national judges actively assist the ECJ in fostering integration. By supplying Article 177 references which the ECJ then uses as ammunition with which to advance European integration, the argument

goes, national judges experience the personal self-aggrandisement which comes from directly participating in Community-building. In addition, by empowering the judicial branch, national judges take the opportunity to gain partial control over the other deci2526sionmaking institutions--the Commission, Council, and indirectly over national governments themselves. Burley, for example, contends that the Court successfully convinced lower courts to "leapfrog the national judicial hierarchy and work directly with the ECJ." Other authors, including an ECJ Judge, agree that the ECJ required the cooperation of national courts and therefore appealed to their self-interests.

This study is not concerned primarily with exploring the relative strength of these competing explanations, which would require a substantial number of interviews with judges and a thorough survey of how individual judges formulated their professional and economic self-interests. These issues are currently being addressed by other scholars who noticed that almost all existing discussions of judicial cooperation eschew these crucial analytical methods. Rather, this study is concerned with testing the assumption underlying all three explanations: that national courts make frequent preliminary references to the ECJ. In particular, the study focuses on the applicability of the model to patterns of British preliminary references. Whereas most authors use formalism and interest analysi27s to answer the question why judges make any references at all, this paper asks in part whether these elements of the traditional model help explain trends in judicial cooperation.

Unfortunately, the basic assumption that national courts frequently refer to the ECJ is so ingrained in the existing theoretical literature that almost no additional theoretical claims have been put forward to

explain patterns of references from national courts. Leading textbooks and articles on the relationship between the ECJ and national courts make no reference whatsoever to the relative frequency with which each member state provides preliminary references. The most substantial published empirical study to date on preliminary references is already eight years old and contains no discussion of general cross-national quantitative trends. For his part, Weiler apparently does not consider patterns of references to be of any significance, arguing that "although the pattern of usage differs from member state to member state, and even within member states, it would be a reasonable generalisation to suggest that, on the whole...national courts, typically lower courts, have been willing partners in this use of Article 177." Nor does he discuss at any length, in recent articles or the original study, the enormous discrepancies amongst referral rates from national courts in each member state. Writing in 1981 Bebr made a similar claim about cooperation with the ECJ, that in general national courts had "used the preliminary procedure relatively frequently and quite well, leaving aside, of course, some initial difficulties." In short, what are essentially attractive grand theoretical models suffer from an absence of secondary hypotheses and a lack of empirical support.

Nevertheless, from a few passing references in existing surveys and in Weiler's unpublished study, as well as from the implicit assumptions of Bebr's prognosis, it is possible to discern several embedded assumptions within the model about patterns of preliminary references over time. Writing in 1986, Volcansek suggested that almost all judges throughout the Community were carrying out their obligations under ECJ guidelines, "although it took some time to adapt to the new legal order, particularly in their use of preliminary rulings." Weiler considers the possibility but finds no evidence to support the notion of a judicial "learning curve" whereby the number of preliminary references from a state increases proportionately to the duration of its membership in the Community. In addition, given Bebr's clear disapproval of the acte clair doctrine, his diagnosis that the system eventually functioned quite well would also seem to indicate the same hypothesis: a steady increase in the number of references after initial reluctance on the part of a few member states. This would further suggest widespread use of preliminary references amongst all member states such that we would expect a convergence over time depending on the relative size of each state.

In other words, the traditional model generates three hypotheses which deserve attention: first, that judicial cooperation between British judges and the ECJ has yielded frequent references from British courts; second, that as a new member state, the pattern of references from Britain followed a learning curve, increasing steadily over time; third, that over time patterns of British references converged with those of other states so that states of relatively equal size exhibited similar numbers of references as courts faithfully carried out their duties under Article 177.

Using the traditional model, which predicts frequent preliminary references from national courts, the figures in the following table would indicate that since its accession, Britain distinguished itself as a nation loathe to provide preliminary references, and therefore loathe to engage in judicial cooperation with the ECJ. In fact, it would appear that British judges are less inclined to cooperate with the ECJ than are judges in almost any other member state.

TABLE 1. PRELIMINARY REFERENCES: 1972-1993

| | |
|---|---|
| Belgium | 173 |
| Denmark | 34 |
| France | 286 |
| Germany | 416 |
| Ireland | 19 |
| Italy | 176 |
| Luxembourg | 21 |
| Netherlands | 200 |
| UK | 120 |
| Total | 1445 |

Source: Synopsis of the Work of the Court of Justice

With only 120 references from 1972-1993, British courts lagged well behind those of other large EC states. Even courts in the Netherlands and Belgium requested far more preliminary references from the ECJ than did British courts. While it is impossible to say with certainty what constitutes an "appropriate" number of references, based on these numbers there is no doubt that legal formalism, judicial empowerment and other forms of judicial incentives, if they operated at all, operated substantially differently in Britain than in other member states. The relatively small number of Article 177 cases originating in British courts offered the ECJ minimal opportunity to foster integration. Equipped with only the bluntest of theoretical tools, the traditional model of judicial cooperation fails to explain these statistics.

But comparing Britain with the original member states raises a serious methodological problem. One would not expect knowledge of EC law to be as common in new member states as in original member states. Aggregating twenty years of data might therefore unduly emphasise the lack of references in the first few years of Britain's membership and obscure a more subtle picture of judicial cooperation. As mentioned previously, although never actually tested, this possibility has been implicitly and sometimes explicitly recognised by other observers. The following graph confirms at least part of the learning curve hypothesis and casts British judicial cooperation in a slightly better light.

The graph depicts a clear trend of more frequent British references over time, consistent with the idea that knowledge of and experience with EC law and judicial obligations steadily diffuses through the legal system. The steady increase in references could also reflect growing judicial empowerment and the formation of judicial interests as British judges recognise the benefits of active cooperation with the ECJ.

But just as the earlier chart contained a statistical artifact by obscuring the effects of new membership in the Community, the graph of British references does not present a full picture of judicial cooperation because it fails to test the second hypothesis derived from the traditional model--that patterns of references will converge in a way which reflects the relative size of each member state. In fact, by involving relative rates of change amongst member states, this second hypothesis addresses a more profound proposition about judicial cooperation.

Based on their population sizes we would expect to find eventual convergence between the referral rates in the four largest states.28 We would further expect that as a new member Britain would start with very few references but as its learning process continued its referral rate would increase more rapidly than the already established members, steadily narrowing the gap between the four states.

The following graph plots changes in relative referral rates over time amongst the largest member states.

The graph provides evidence that over time the referral rate has increased in each of the four states, with Germany leading the way. Surprisingly, contrary to expectations, the gap between Britain and the other large member states actually increased slightly between 1972 and 1993, suggesting a relatively minimal or non-existent learning process. In fact, given that the British referral rate at the time of its accession closely resembled that found in three of the original states, we might have expected that after twenty years of learning Britain would overtake its continental neighbours and provide a relatively large number of references. This did not occur. Rather, despite an upward trend, the British referral rate remained the lowest of the four states for almost every year. This trend poses serious questions for the traditional model of judicial cooperation. The existing model simply has no capacity to explain why the British rate slowly increased while at the same time referral rates in both Italy and France moved cyclically or sporadically, and the German referral rate remained unusually high. While it is beyond the scope of this paper to address them, each of these puzzling patterns deserves further attention.

No matter what trends were occurring in the large states, one would certainly expect that the number of references from British courts would dwarf those of member states with substantially smaller populations, either immediately upon accession or eventually as the learning process continued.29 The next graph contrasts British referrals with referral patterns in the significantly smaller member states of Belgium and the Netherlands.

Amazingly, there is little evidence that the British referral rate caught up with, let alone overtook the rates of Belgium or the Netherlands. For nineteen of the twenty-two years, Britain remained at the bottom of the pile. This reinforces the findings of the previous graph, that the learning process in Britain was minimal or non-existent. These figures seem to confirm the preliminary characterisation of British judges as loathe to make referrals and thus unwilling to cooperate with the ECJ in promoting European integration.

In his own study, Weiler was unable to explain this same conclusion--that "conclusively in the UK, there is a problem"--but was prepared to rule out one possible explanation:

The hypothesis that in the UK there are simply substantially less cases involving Community law and necessitating references to the Court is difficult to accept without some persuasive evidence and explanation.30

This is a particularly intriguing hypothesis because it might cast Britain's apparent reluctance in a new light. The small number of references from British courts could be explained in part if, compared to courts in other member states, British judges rarely encountered questions of EC law.

While a small number of questions on EC law provides a plausible excuse for Britain's unusually low referral rate, it opens British judges to a second type of criticism. A low number of EC legal questions could also constitute further evidence of judicial non-cooperation. By deciding cases through national instead of EC law, British judges could entirely avoid the question of preliminary references and therefore deprive the ECJ of its primary means of fostering European integration. The following table reveals that, from 1972-1993, British courts decided questions of EC law, with or without referring them to the ECJ, approximately one half to one fifth as often as did courts in other large EC states, and even less frequently than courts in the much smaller countries of Belgium and the Netherlands.

TABLE 2. Decisions in National Courts on Questions of EC Law: 1972-9

| | |
|---|---|
| Belgium | 1179 |
| Denmark | 95 |
| France | 2021 |
| Germany | 3634 |
| Ireland | 110 |
| Italy | 1526 |
| Luxembourg | 104 |

Netherlands 2034
UK 784

Total 11487

Source: Synopsis of the Work of the Court of Justice

Based on this table we would expect Britain to have fewer preliminary references than its continental neighbours because there were fewer cases which might have been referred. This could suggest, as Weiler noted, that there has not been a problem with how British judges used Article 177. As before, however, this aggregation of data conceals trends in the pattern of references, particularly the possibility of a learning process whereby British courts eventually faced a large number of EC questions as knowledge of and experience with Community law steadily increased. The following graph tests this assumption.

As predicted, the number of times British courts faced questions of EC law did increase over time. This would suggest that British judges were not avoiding preliminary references simply by eschewing the role of EC law. But this conclusion only holds in isolation; the following graph reveals that when contrasted with trends in other states, the diffusion of EC law in Britain may in fact not signify a learning curve at all.

This graph confirms the dramatic expansion of EC law within the legal systems of the member states over the past twenty years. The total number of EC legal questions faced by national judiciaries increased nearly tenfold, rising from 114 in 1972 to 1063 by 1993. These numbers attest to the fact that as the body of EC law has grown over the years, it has been incorporated, or perhaps penetrated, into the daily affairs of national courts. That this penetration was particularly evident after 1975 is not surprising; Community law was spilling over into new areas beyond its traditional focus on the free movement of goods, thereby creating a wide range of new rights and obligations which individuals could invoke in national courts against their own governments.

However, the graph also shows that this expansion has been uneven amongst member states, suggesting only a minimal learning curve in Britain. In order to disaggregate the figures and better illuminate national patterns, the following two graphs compare Britain with the largest member states and then with much smaller states.

The potential lack of judicial cooperation and the total lack of a British learning curve are even clearer in this graph than in the graphs showing the number of preliminary references. Not only did British judges face the least number of questions on EC law every singly year since accession, but the gap between Britain and the other large states actually increased over time. This is a remarkable trend if one considers that EC law was new to Britain in 1972. With similar population sizes one would expect to find convergence as EC law played a similar role in the legal systems of each country. As original member states, one might also have expected to find that France, Germany and Italy started much higher on the graph but that Britain rapidly caught up as it learned about EC law and the judicial obligations inherent to the new legal order.

Even when compared with two much smaller states Britain was again at the bottom of the pile for eighteen of the twenty-two years. The traditional model of judicial cooperation fails to explain the fact that Britain lagged farther and farther behind the Netherlands and never overtook Belgium in the number of EC legal questions faced by its courts. In other words, those who posit that national courts fully embraced EC law and made frequent references to the ECJ, out of self-interest or as a result of legal formalism, must explain why, although increasingly significant in all member states, this law expanded so slowly in Britain.

The picture of British judicial cooperation with the ECJ is clearly much more complicated than the traditional model suggests. Based purely on the number of preliminary references, the model's central measure of cooperation, British judges performed unexpectedly poorly. The tiny number of references

from British courts paints a picture of a judiciary loathe to cooperate with the ECJ and reluctant to foster European integration. Furthermore, judicial cooperation was lacking throughout Britain's membership in the Community; instead of following a steep learning curve upon which it at least caught up with and possibly overtook its veteran neighbours, the number of references from Britain increased more slowly than from other large states and even more slowly than from much smaller states.

Britain's position at the bottom of the preliminary reference graphs appears only slightly less troubling when one shifts the focus to a different measure of judicial cooperation, the number of times national judges faced questions of EC law. Using this measure, the tiny number of British preliminary references does not constitute a lack of cooperation because British judges simply did not have much to refer. But the persistently low number of EC legal questions in Britain points to an equally troubling type of judicial non-cooperation: throughout its membership EC law never gained a significant foothold in British courts. Not only did the number of EC legal questions faced by British courts not converge with the number faced by other states of similar size, but it never exceeded the number faced by courts in much smaller states. With the number of EC legal questions, just as with the number of preliminary references, there is no evidence that British courts followed the expected learning curve of a new member state. Instead of confirming eager judicial cooperation with the ECJ, the evidence suggests a certain amount of evasion and "strategic" referral by British courts.

At the risk of further complicating the picture, I will introduce a new measure designed to isolate at least one aspect of British judicial cooperation. Combining the number of preliminary references with the number of EC legal questions faced by national judges produces what I will term the referral propensity. The referral propensity is the ratio of the number of EC legal questions referred to the number of questions actually faced. The following table gives the overall referral propensity of each member state during the period 1972-1993.

Table 3. REFERRAL PROPENSITY: 1972-1993

| | | | |
|---|---|---|---|
| Belgium | 25% (295/1179) | Denmark | 51% (48/95) |
| France | 22% (450/2021) | | |
| Germany | 22% (788/3634) | | |
| Ireland | 25% (28/110) | | |
| Italy | 20% (309/1526) | | |
| Luxembourg | 27% (28/110) | | |
| Netherlands | 18% (375/2034) | | |
| United Kingdom | 21% (162/784) | | |
| Total | 22% (2483/11487) | | |

Except for Denmark and Luxembourg, where the percentages are statistically insignificant due to the tiny number of cases involved, judges in each member state referred about one fifth of the EC legal questions they faced. Presumably they interpreted the other four fifths without the direct guidance of the ECJ. Therefore, taking referral propensity as a measure of judicial cooperation, British judges appear as willing as their continental colleagues to enter into a partnership with the ECJ and therefore participate in fostering European integration. This is precisely the type of finding predicted by the traditional model. The following graphs break down these figures by country and year in order to test the secondary hypotheses of the model--that Britain, as a new state, would follow a learning curve of gradually increasing referral propensity, and that the propensities of each state, including Britain, would converge over time.

The graph shows a definite increase in referral propensity during the first four years in which British judges faced questions of EC law (none arose in 1972), suggesting a sharp learning curve. But in the seventeen years after 1977, British referral propensity remained level at approximately 20 percent, except for three erratic years. From this data one could easily conclude that the learning process ended quickly and that British judicial cooperation stagnated at a relatively low level. How then can one explain the aggregate data in the previous table which showed that British judges referred as high a proportion of cases as did their continental colleagues? Either other countries experienced a similar

stable referral propensity, or, as predicted by the model, patterns of referrals converged over time. The following two graphs test this hypothesis.

The graph clarifies two aspects of referral propensity amongst member states. First, that a certain amount of convergence took place, particularly after 1977. Second, that for all large states besides Britain this convergence involved a gradual, although sometimes cyclical, erosion in referral propensity. As British judges became steadily more willing to present their questions of EC law to the ECJ for a preliminary ruling, judges in France, Germany and Italy moved in the opposite direction, deciding more and more questions of EC law themselves without involving the ECJ. This trend is even more striking in the smaller member states.

Here, the erosion of referral propensity in Belgium and the Netherlands which led to European convergence was dramatic.
As mentioned at the beginning of this paper, the traditional model holds that the number of references is a crucial indicator of the partnership between national courts and the ECJ. At no point does the model predict that the extent of this partnership will vary so considerably amongst member states. Nor does it provide any theoretical tools to explain trends in the number of references. As this section of this study has shown, these trends vary considerably amongst member states, a finding which is only amplified when one adds further dimensions to the analysis: the traditional model of judicial cooperation also fails to account for enormous national disparities in the number of cases dealing with EC law faced by national judges and the shifting patterns of national referral propensity. Nor is the empirical evidence adequately explained by adding the secondary hypothesis of a learning curve to the model.

## EC Environmental Cases in British Courts

In an attempt to uncover some of the variables which might refine the model and provide a more complete explanation for judicial behaviour, this section examines a series of British cases in the field of environmental protection which each contained questions of Community law. The behaviour of British judges in these cases highlights the political significance of judicial discretion as well as the variety of competing pressures which any model must consider.31
Despite the rapid expansion of EC environmental32 policy since its inception in 1972, there has been only a small handful of British cases dealing with EC environmental law, and only in very recent years. In these few instances, British judges have consistently invoked the acte clair doctrine and interpreted environmental directives themselves.

### Noise Pollution

In July 1991, the House of Lords delivered its opinion in Regina v. London Boroughs Transport Committee, a case dealing with traffic noise. A night ban on lorry traffic in London had been adopted in order to reduce noise pollution. Exceptions to the ban were granted only for lorries fitted with a special device which silenced their air brakes. EC Directives 71/320 and 70/157 established manufacturing standards for braking devices and sound levels for exhaust systems, each directive specifying that no state might prevent the use of a vehicle on grounds relating to its braking devices, permissible sound level, or exhaust system if the vehicle33 34 complied with both directives. The Divisional Court and the Court of Appeal held unanimously that the night ban violated the two EC directives.
The House of Lords examined the night ban and found that lorries were in fact not being prohibited on grounds relating to their braking devices, sound level or exhaust system. Instead, the Lords interpreted the prohibition narrowly, as regulating traffic and protecting the environment by "banning some vehicles which are unnecessarily louder than others." In order to reach this judgement, the Lords characterised both directives as measures having nothing to do with brake noise or traffic regulation. Nevertheless, the EC directives contained the explicit provisions that

No member state may refuse or prohibit the...use of a vehicle on grounds relating to its braking devices if that vehicle is equipped with the braking devices specified [in the Directive].

No member state may, on grounds relating to the permissible sound level and the exhaust system, refuse the...use of any vehicle in which the sound level and the exhaust system satisfy [the Directive].

The Lords held that vehicle noise was calculated without any regard to brake noise, and therefore the prohibition on lorries was a matter of traffic regulation not covered by the directive. Furthermore, the Lords contended that no one reading the Brake Directive would be made aware that air brakes produced any noise at all, and that the directive therefore did not invalidate the lorry ban.

The Lords might have referred the case to the ECJ for a preliminary ruling on the interpretation of the two directives. The likelihood of a referral was increased by the fact that the House of Lords is a court of final instance from which there is no appeal. ECJ doctrine specifies that such courts have a greater obligation to refer matters to the Court than do lower national tribunals. In the event, the Lords chose not to refer the matter to the ECJ, ruling instead that

The difference between traffic control in urban residential areas for environmental purposes and the Community unification of manufacturing standards for motor vehicles is so obvious that regulation of the former can be held not to infringe the latter without a necessary question of Community law arising (even if a unanimous Court of Appeal has held the opposite) and consequently a compulsory reference under Article 177 (3) EEC is not required.35

The lower courts did not refer the case to36 the ECJ but interpreted ECJ precedent and EC laws themselves to arrive at a decision. The Lords decision criticised their interpretation of EC law.

Since the Court of Appeal did not appreciate the fundamental distinction between the control of vehicles and the regulation of local traffic I do not attach significance to their decision on Community law...No plausible grounds have been advanced for a reference to the European Court of Justice.

The Brake Noise Case presents an example of British courts applying the acte clair doctrine to interpret EC law in favour of environmental protection.

One important pressure operating on the Lords might have been a desire to uphold traditional British environmental interests. The inclination to reduce noise pollution has been a consistent feature of British environmental policy, and represents one of the few areas where the UK can be called progressive. Directive 70/157, the Sound Level Directive under consideration in the case, was adopted before Britain had joined the Community, but actually allowed relaxation of British standards for lorry noise because existing UK noise regulations were more stringent than the directive. In addition, the British official at UKREP responsible for negotiating environmental directives from 1984-89, cited British pressure as the primary force behind the motor cycle noise directive, and claimed that reducing noise pollution has always been a significant British objective.37 38 For example, Britain was the only EC member to develop a prototype of a quiet heavy vehicle in the early 1970s. The Government's desire for strict noise pollution controls also did not sacrifice British economic interests--it did not escape the attention of UKREP officials that the British motorcycle industry had already practically disappeared during the 1970s.

There have also been three recent cases where the effect of British judges refusing to make preliminary references to the ECJ has been to restrict environmental protection. Each case dealt with the 1985 Environmental Impact Assessment Directive. The political significance of this directive is enormous. It could potentially restrict major national development projects, amounting to millions of pounds, as well as impose environmental restrictions on transport policy, agricultural policy and energy policy.

Planning Authority Discretion

In the 1990 case of Swale, the High Court considered whether the Medways Port Authority should have been granted permission to reclaim a 250 acre mudflat which was important to migrating birds, without having undertaken an environmental impact assessment.39 The Royal Society for the

Protection of Birds challenged the planning permission on the grounds that the reclamation constituted a project with significant environmental effects, which requires environmental impact assessment under the terms of the directive. Mr. Justice Simon Brown refused to overturn the planning permission, finding no violation of EC law. His decision addressed two aspects of local planning authority discretion which might have been referred to the ECJ.

The first act of planning authority discretion would be to classify a development project under Schedule 1, Schedule 2, or outside the bounds of the directive. Schedule 1 projects face mandatory assessment40 41, Schedule 2 projects require assessment only if they are likely to have significant effects on the environment by virtue of their nature, size or location. The directive allows member states some discretion, demanding assessment of Schedule 2 projects only where member states consider that their characteristics so require.

Thus there are two discretionary choices open to the planning authority - whether a project falls under either Schedule, and, assuming it falls under Schedule 2, whether the project is likely to have significant effects on the environment. British legislation to implement the directive allows a case-by-case determination of the likely impacts and predicts that "the number of projects [with significant effects] will be a small proportion of all Schedule 2 projects." In Swale, the RSPB contended that the planning authority abused both elements of its initial discretionary decision.

Mr. Justice Brown allowed the Swale Borough Council the widest possible discretion in meeting the requirements of the directive. The High Court held that "on the information before it, the Council was entitled to regard this development as falling outside either Schedule." Even if this had not been the case, and the project had fallen within Schedule 2, Mr. Justice Brown refused to impinge upon the discretion of the planning authority to apply whatever criteria it saw fit to determine significant environmental effects. He ruled that "even if they had categorised it as being prime facie within Schedule 2, they could not be faulted for concluding that it would not have a significant environmental effect." This ruling accords with the usual British legal test applied to discretion exercised by administrative bodies, whereby a decision is upheld unless no "reasonable person" could possibly reach such a conclusion. Mr. Justice Brown apparently felt that the environmental sensitivity of a reasonable person was not 42 43 44 a matter for reference to the ECJ. Similarly, the High Court chose not to ask the ECJ whether the directive allowed the level of discretion given by UK legislation and Circulars.

A second discretionary decision left to the planning authority when applying criteria for Schedule 2 is the definition of a "project." Clearly the nature and size of a development project depends on how one defines the project. A motorway, for example, might be considered one enormous project requiring assessment, or may be considered the sum of many tiny projects whose individual environmental impact is negligible. Government Circular 15/88 included45 a numerical threshold which could answer this exact question.

New Roads: environmental assessment may be required for new roads or major road improvements more than 10km in length, or 1km if the road passes through a national park or within 100m of a SSSI, national nature reserve or conservation area.

In Swale, Mr. Justice Brown addressed the question of whether planning authorities had unlimited discretion to permit piecemeal development projects, ruling that

in respect of Schedule 2 development, the question whether it would be likely to have significant effects on the environment should not be considered in isolation if in reality it was properly to be regarded as an integral part of an inevitably more substantial development. Otherwise, developers could defeat the objective of the regulations by piecemeal development proposals.

While Mr. Justice Brown clearly recognised that piecemeal development circumvents the goals of the directive, he did not deny that discretion to measure the impact of such projects, and the subsequent ability to grant planning permission, resides with the planning authority and is subject to few, if any, restrictions. Anderson, in his critique of the Swale case, interprets the Brown decision as allowing assessment of individual projects quite apart from the larger development contemplated beyond them. Mr. Justice Brown apparently chose not to refer the meaning of "project" to the ECJ in a preliminary reference. By making the interpretation himself, Mr. Justice Brown opened the door to enormous piecemeal development projects immune from environmental assessment.

The legitimate discretion of a planning authority was also questioned in the 1991 case of R v. Poole Borough Council. The Council did not even consider undertaking an environmental assessment for a housing development, at which point the World Wildlife Fund and the British Herpetological Society sought an injunction. As was the case in Swale, the development project could have been classed under Schedule 2, at which point the Council would have had to determine whether it posed significant effects for the environment. Circular 15/88 notes that industrial estates where the area exceeds 50 acres or where there are more than 1,000 dwellings within 200 meters of the site boundaries may require environmental assessment. Not only did the Council not consider the housing estate in question large enough to merit assessment, but they did not even classify the scheme as a benign Schedule 2 project.

Mr. Justice Schiemann ruled that the WWF and the BHS had no legal ability to initiate the EIA process if the Council had, acting upon its discretion, failed to do so. This ruling upholds an even wider discretion for planning authorities than was given in Swale. Not only did the Poole Council have the ability to classify a project outside the scope of either Schedule, but they had the power to authorise a development project without even contemplating the applicability of the EC environmental impact directive. Given that the case is distinguishable from Swale on these grounds, Mr. Justice Schiemann might have referred the question of discretion to the ECJ. The Poole case upheld the practically unfettered discretion of planning authorities without referring the matter to the European Court.

The most striking British example of acte clair occurred in the now famous 1990 Twyford Down case. In March 1990, the Secretary of State for Transport proposed a scheme to construct a motorway which would cut through Twyford Down. Three parish councils questioned the validity of the scheme and applied to the court to quash the project on grounds that the Secretary of State for Transport failed to make an environmental impact assessment of the project and to give the public an opportunity to express an opinion thereon.

The central contention presented by the parish councils was that the directive applied to projects which had been published but not yet initiated by the date the directive took force. Such projects might conveniently be regarded as being "in the pipeline." Mr. Justice McCullough recognised that the question before the court was a matter of interpreting EC law:

The answer to the question of whether or not pipeline projects were intended to be covered by the directive is not to be found by balancing the advantages and disadvantages of one construction or the other or by considering the possible, or even the practicable. The essential question is: what was the result which [Directive] 85/337 required to be achieved by 3 July 1988, and the answer must come from the terms of the directive itself.46

Nevertheless, he refused to refer the question to the ECJ, the obvious arbiter for interpretation of47 EC law. Mr. Justice McCullough stated the compelling reason to refer the case--uniformity of EC law--but chose to jeopardise uniformity by withholding a reference.

National judges must remember that the interpretation of Community legislation is all too apt to involve difficulties of which they may be unaware. A provision cannot be interpreted differently in different member states. Nevertheless I have decided to try to answer it.

After dismissing the importance of a definitive ECJ ruling, he held that the directive did not apply to pipeline projects because such projects were not explicitly mentioned in the directive.

Certainly the text of the directive allows such an interpretation, and Mr. Justice McCullough recounted numerous provisions which might demonstrate that once an assessment has been partially completed under national rules it would be cumbersome to reassess the entire project under EC guidelines. Of course there is no explicit statement in the directive that a cumbersome reassessment is not required, nor are there guidelines by which a national court might measure the actual burden, if any, of reassessment. Mr. Justice McCullough played up the fear of cumbersome reassessment as if substantial technical detail would have to be re-examined. In fact, initial stages of assessment may have involved very little effort on the part of the developer, as Mr. Justice McCullough admits.48 49 Several possible preliminary references might have been made in this case, but Mr. Justice McCullough chose to interpret the directive narrowly, maximising the discretion of developers and planning authorities.

In fact, British interpretation of the EIA--granting almost unlimited discretion to planning authorities and ignoring pipeline projects--has already been challenged by the Commission. In October 1991, the Commission demanded that Britain halt several development projects on the grounds that inadequate environmental assessment had been applied. Although the Commission explicitly indicted the Government and not the British courts, the broad national discretion which constituted the violation of the EIA was as much a product of British judicial interpretation as legislative intent. UK legislation might have been interpreted in several different50 51 ways, only one of which condoned the broad discretion of planning authorities and exempted pipeline projects.

The decision by British judges to withhold references from the ECJ in cases where the discretion of planning authority was involved might reflect domestic political objectives similar to those in noise pollution cases. Whereas in noise pollution cases preliminary references might have allowed the ECJ to interpret EC law contrary to stringent52 British standards, in the planning authority cases an ECJ preliminary ruling could possibly result in much stricter environmental assessment than that found in British practice. During the 1980s, deregulation of development projects was a primary objective of the British Government, reflecting Thatcher's free-market ideology. Throughout the development of the EIA directive, Britain resisted what it saw as unnecessary environmental regulation, securing several amendments to the final version of the directive which accorded53 54 with perceived British interests. Thus it is not entirely surprising that British judges exercised their discretion in a manner consistent with British hostility towards regulation, as opposed to allowing the ECJ to tighten regulations through a series55 of preliminary rulings.

## Explaining Patterns of Judicial Cooperation

Disparities in the quantitative evidence presented in section two could possibly be explained by structural or sociological features which vary amongst member states: differences between common law and civil law legal systems, for example, or between adversarial and inquisitorial legal systems, or simply the possibility that some societies are more litigious than others. While each of these variables merits further research there are several immediate reasons to question their value. First, major studies of preliminary references have found that differences in societal litigiousness and internal national judicial structure were either minimal or inconsequential when compared with the strong similarities in the "foundations of their legal systems and of their legal traditions." Second, even if these variables could explain why British judges faced so few questions of EC law and why the British referral rate was consistently lower than in other member states, it would tell us nothing about patterns of judicial cooperation--why the number of EC legal questions, the number of references and the referral propensity in almost every state changed so dramatically over time, and not always in similar directions. Structural and sociological factors are also unable to account for the behaviour of British judges in the environmental cases.

### National Legal Formalism

One potential explanation for the pattern of British preliminary references is that judges were simply following the instructions dictated by their own high courts. If this were the case, British cooperation with the ECJ would change according to shifting national guidelines on the proper use of Article 177. In this regard, for many years the leading British case was the 1974 Bulmer decision. After acknowledging that the House of Lords has to "bow down" to an ECJ ruling, and must refer the case for preliminary reference if an issue of interpretation arises, Lord Denning proceeded to carve out grounds upon which national judges could avoid making references. First, he ruled that "an English judge can say either 'I consider it [a question on EC law] necessary,' or 'I do not consider it necessary.' His discretion in that respect is final." Having decided that a question was not necessary to decide the case, British judges could avoid a preliminary reference. But total discretion allows the possibility of strategic neglect of Article 177--abuse of acte clair. Denning left it unclear precisely when an English court should see the issue as "clear and free from doubt".

Even if a question of EC law was necessary to the outcome of the case, Denning suggested that British judges could employ teleological interpretation and decide the matter for

themselves without needing a judgement from the ECJ. His seminal instructions to English courts were as follows:

They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent...They must not confine themselves to the English text. They must consider, if need be, all the authentic texts, of which there are now eight...They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it.56 57

The essence of these instructions was to encourage British judges to take matters into their own hands and to avoid preliminary references.

In his 1983 decision in ApS Samex, which has since become accepted as the authoritative guide for British judges, Lord Bingham significantly narrowed British judicial discretion, recognising the danger that widespread refusal to make references would fragment Community law. Bingham appeared much more willing than Denning to have British judges defer to the ECJ's transnational wisdom.

[T]he court should have regard to the advantages enjoyed by the Court of Justice in having an overall view of the Community and its institutions, a detailed knowledge of the Treaties and of much of the subordinate legislation made under them, and an intimate familiarity with functioning of the Community which a national judge denied the collective experience of the Court of Justice could not hope to achieve.5859

Bingham went so far as to conclude that even if a British judge's interpretation is clear and free from doubt, a reference may be needed because "it has emerged in some past cases that, even where questions have been considered by national courts to be clearly answerable in one sense, they have ultimately been answered by the Court of Justice in another way."

A further reason Bingham gave for limiting the use of acte clair was that British judges were inherently less able than the ECJ to employ teleological interpretation.

Sitting as a judge on a national court, asked to decide questions of Community law, I am very conscious of the advantages enjoyed by the Court of Justice, It has a panoramic view of the Community and its institutions...When comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival. The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires.60

This is a stark contrast to Denning's admonitions, and strongly encourages British judges to make frequent preliminary references.

If British judges followed the instructions emanating from their own high courts we would expect to find this reflected in the pattern of preliminary references. Based on Bulmer we would expect relatively few references from Britain from 1974-1983 because English judges would interpret EC law themselves. We would then expect to see more frequent British preliminary references after the 1983 instructions in ApS Samex encouraged British judges to defer to the wisdom of the ECJ.

It is important to note that British judicial instructions closely resembled those given by the ECJ. Prior to the 1982 CILFIT ruling national judges enjoyed considerable discretion to avoid references and were encouraged to employ acte clair. After 1982 this discretion was sharply limited as demanding guidelines eroded the legitimate grounds for applying the acte clair doctrine. Similarly, Bingham's admonishments in ApS Samex curtailed British judicial discretion and required more frequent references. Taken together these two sources of legal formalism reinforce each other and make it all the more likely that trends in the number of British preliminary references would follow a predictable pattern.

The empirical evidence confirms this prediction but only up to a point. There does appear to be a noticeable increase in the number of British Article 177 references after 1983, particularly in the late 1980s, in accordance with the post-Bulmer doctrine of ApS Samex. Bingham's instructions to British

judges, that they defer to ECJ judgement, appear to have generated more references, particularly in the late 1980s. This would suggest greater judicial cooperation as a result of legal formalism.
As the following chart reveals, changes in British referral propensity also provide at least some support for this hypothesis.

Table 4.

REFERRAL PROPENSITY

| | 1972-1983 | 1984-1993 |
|---|---|---|
| Belgium | 21% (116/557) | 28% (173/622) |
| Denmark | 44% (14/32) | 54% (34/63) |
| France | 31% (163/525) | 28% (286/1496) |
| Germany | 26% (371/1429) | 29% (416/2205) |
| Ireland | 50% (11/22) | 38% (19/88) |
| Italy | 29% (132/452) | 16% (176/1074) |
| Luxembourg | 20% (7/35) | 30% (21/69) |
| Netherlands | 31% (173/563) | 14% (200/1471) |
| United Kingdom | 20% (42/215) | 21% (120/569) |
| Total | 27% (1029/3830) | 19% (1445/7657) |

Until the early 1980s, British judges were significantly less inclined to make preliminary references to the ECJ than were judges in other member states, referring in only 20 percent of cases, compared with an EC average of 27 percent. In fact, along with courts in Luxembourg and Belgium, British courts demonstrated the lowest level of judicial cooperation with the ECJ during the period 1972-1983.
A different picture of judicial cooperation emerged during the 1980s. The proportion of EC legal questions referred by British judges remained basically constant from 1984-1993, a period when, for whatever reasons, courts in many other member states curtailed the proportion of cases they referred to the ECJ and the average referral rate fell from 27 percent to 19 percent. During this period, British courts referred to the ECJ in 21 percent of cases dealing with EC law, which more than equalled the average level of judicial cooperation throughout the Community and far surpassed levels found in Italy and the Netherlands. Although the magnitude of change amongst states was not always large, the stability in the UK referral rate during this period of relative national judicial insularity appears to support the legal formalist explanation-- the post-Bulmer period brought more frequent referrals by British judges as they conformed to the admonishments of ApS Samex. British judges did in fact make relatively more preliminary references than before, and referred a higher proportion of the cases involving EC law. Each of these developments indicate a greater propensity to engage in judicial cooperation with the ECJ.61
However, legal formalism tells us nothing at all about why, from the moment it entered the Community, the total number of references from British courts continually lagged behind those of other EC states. The substantial gap between British referrals and foreign referrals, although slightly smaller than in previous years, still remained after 1983. Thus legal formalism emanating from British high courts or from the ECJ, judicial62 empowerment or other aspects of judicial self-interest appear to have played little or no part in encouraging wide or enthusiastic use of Article 177 by British 63judges. By making more frequent use of preliminary references, judges in other member states were apparently more willing to follow the narrow guidelines handed down by the ECJ in its CILFIT ruling.
Moreover, similar disparities remained between Britain and other member states regarding the number of EC legal questions arising in national 64courts. Legal formalism65 fails to explain the tiny number of EC legal questions faced by UK judges, or the lack of a British learning curve.

And formalism does not explain the failure of British judges to refer questions to the ECJ in cases of environmental policy. All the environmental cases discussed above 66 67occurred after Lord Bingham's decision in ApS Samex which encouraged British judges to make more referrals than they would have done under Lord Denning's68 previous ruling in Bulmer. Nevertheless, British courts show no inclination whatsoever to refer environmental cases to the ECJ for preliminary rulings. This study therefore reinforces other accounts of "strategic" use of acte clair by British courts.

Domestic Politics and National Sovereignty

Because legal formalism fails to consider a number of external influences which might shape both the way in which national judges conceive of their appropriate roles and also how they employ their discretionary power, some authors have attempted to explain the historical workings of Article 177 as a product of judicial politics. One of the leading studies in this area was carried out by Volcansek, who sought to place judicial discretion in a broader context of the pervasive political, historical, economic and cultural conditions of each state. Unfortunately, her use of socio-political culture as an explanatory factor in British judicial cooperation with the ECJ was not always consistent. On one hand, she concludes that "changing economic and political tides have affected behaviour of the politicians and the diplomats, but not that of the jurists...judges serving on ordinary courts appear to have acted independently of the national regimes, impartially with regard to Community and national law, and in accord with traditions of the rule of law."

On the other hand, when describing the British experience, she clearly attributes socio-political culture with considerable influence. Prior to 1979, "much of the early recalcitrance of judges at the higher levels (the policy-making judges) to refer cases to the European Court may be understood in terms of British attitudes, economic and political conditions." Similarly, when faced with explaining the acceptance of EC law in British courts, Volcansek again highlights the link between prevailing conditions and judicial behaviour. By the late 1970s "perhaps some of those favourable inclinations [of the Government toward the Community] were infecting the judiciary." When Margaret Thatcher came to power, chilling British relations with the EC, "some of that negative sentiment was likewise expressed in the United Kingdom courts." But the emphasis of socio-political culture immediately disappears; in Volcansek's opinion, British judges subsequently "demonstrated whole-hearted compliance with the obligations imposed by Article 177" despite Thatcher's consistently aggressive stance towards Europe. In short, Volcansek leaves unclear her conception of the role played by socio-political culture.

Nevertheless, the expected role of the courts in a changing national political context is one factor which might explain disparities between the number of national preliminary references. It might be the case that British judges viewed empowerment as an illegitimate deviation from their traditional role within the UK constitutional system which emphasises Parliamentary supremacy and limited judicial review. With a traditional deference to representative branches of government, British judges might not have recognised the opportunity for empowerment until recently, or may have seen such empowerment as inappropriate.

The politicisation of preliminary references merits attention as a plausible explanation for trends in judicial cooperation because Article 177 establishes a crucial link between national judicial discretion, national sovereignty and European integration. "In the overall scheme of European integration, the judges in each country are diplomats in robes. Their willingness to expand or limit the applicability of Community norms within each country, particularly through the use of preliminary rulings, affects the scope of integration in Western Europe."69 70 It is difficult to overemphasise the fact that judicial discretion to make or withhold preliminary references has enormous political consequences both for EC integration and for the residual autonomy of national governments.

The distinct possibility that national judicial discretion could undermine the uniform interpretation and application of Community law has been thoroughly discussed by several authors. If national judges employ their discretion and frequently find that ECJ precedent addresses the question of Community law and therefore no reference is required, the "total effect would be a disastrous reduction of the volume of the Court's docket; and, hence, a sizeable reduction in the Court's sole means of influence and control."71 72 When provided with references the Court has historically used its influence to foster integration. Indeed, the Court's handling of preliminary references has sometimes led to claims that it exhibits a consistent pro-integration bias and a willingness to pursue its own political agenda.

Cooperation between the ECJ and national courts depends in part on the propensity of national judges to "strategically" withhold references. Refusal to refer could effectively circumvent what national judges consider undesirable ECJ doctrine by withholding from the ECJ the ability to return an unfavourable ruling. When a British court chooses to interpret by itself an EC directive instead of invoking Article 177, the ECJ is denied ammunition with which to foster EC integration. It is also denied the ability to impose a stringent interpretation of EC law on what might be a reluctant national government.

Differences in judicial interpretative methods also create room for political manoeuvre by judges and provide a second important reason why preliminary references foster integration while avoiding preliminary references may prevent further European integration. In deciding issues of EC law for themselves, instead of making a preliminary reference, British judges are expected to employ narrow interpretative methods, unlike the ECJ which uses inherently expansive teleological interpretation. Whereas British judges are trained to accept the notion that a result follows from the strict meaning of the words, the ECJ looks to the larger purpose of the statute. This difference in methods has an enormous impact on the pace and trajectory of European integration.

The existence of teleological interpretation is well known. Lord Slynn admits that "for the ECJ, the teleological method frequently precedes and conditions the textual method of interpretation."73 74 75 76 This diagnosis was also supported by Ulrich Everling, another ECJ judge, when he noted that when answering preliminary rulings, "the reply to the abstract question framed by the court making the reference is not infrequently influenced by the result which the Court believes to be correct in the case..." The teleological method 77 78underpinned early ECJ decisions leading to direct effect and primacy of EC law. More recently, similar interpretative techniques have been manifest in the Court's handling of human rights doctrine, as well as environmental policy. In each of these areas, the Court has achieved significant integrationist effects in part by applying an expansive treaty interpretation to questions referred by national courts under Article 177.79

The teleological approach endorsed by the Court appeared particularly unusual to British judges whose interpretative methods focus predominantly on close textual readings. When dealing with legislation, the traditional role of the British courts is to give effect faithfully to any and all acts of Parliament. The orthodox view of sovereignty restricts judicial discretion in order to avoid any diminution of legislative power. Parliament has solidified its own position by giving the courts very80 81 little to work with in terms of loose wording. Statutes are drafted narrowly, and are not principles that may easily be expanded upon. British courts are never really given the chance to exercise teleological interpretation to the extent that is seen in ECJ cases. Although British judges inevitably exercise a certain amount of discretion when interpreting a statute, they enjoy far less discretion than exists for members of the ECJ because they are limited to the different methods of literal interpretation and grammatical construction. Given these differences in interpretative method, one would expect that judicially-driven integration would be inherently greater in cases involving a preliminary reference than in cases where British judges decided issues of EC law themselves.

In sum, the manner in which national judges exercise their discretion, and the interpretative methods they decide to employ will each affect the pace and scope of integration. Taken in a positive light, strategic use of Article 177 by national courts is a mechanism actively to influence the course of ECJ doctrine. Taken negatively, it provides an opportunity to frustrate or block development of unfavourable doctrines.

During the accession debates in the Commons, the Government frequently reiterated that membership would not erode parliamentary supremacy, nor would it fundamentally alter the traditional position of British courts within the British constitutional order. Since accession, however, the traditional deference of British courts towards the omnipotence of Parliament has in fact steadily eroded. A number of authors have noted that British courts have demonstrated greater willingness to embrace the direct effect and primacy of EC law, and now regularly practice various forms of judicial review over administrative decisions and even over parliamentary legislation. These authors argue that to a large extent, the impetus for enhanced powers of judicial review stems directly from Britain's membership in the EC. Membership in a Community with supranational institutions such as the ECJ made untenable the traditional conception of sovereignty. Despite the rhetoric and actions of politicians, designed to preserve as much national autonomy as possible, British courts steadily came to conceive of their appropriate constitutional role as one in which parliamentary sovereignty was no longer appropriate.

Instead of applying British statutes or administrative decisions narrowly, British judges interpreted them in the light of Britain's Community obligations. In cases where it was impossible to reconcile Government actions with EC obligations, British courts faithfully applied the Treaty and secondary Community legislation, British law not withstanding.82

However, models based on changes in constitutional politics are just as incapable as legal formalism to account entirely for patterns of British preliminary reference. The shift in British judicial attitudes towards their appropriate constitutional role might explain the steady increase in the number of British references, as well as the relative stability in British referral propensity despite its erosion in many other states. It also raises the interesting possibility that British courts moved gradually towards a new constitutional role and greater judicial cooperation with the ECJ despite a general political climate of Euro-pessimism - it should not be forgotten that during the 1980s the Government treated European integration with open hostility.

But the willingness of British judges to question parliamentary sovereignty and to engage in judicial review fails to explain a number of other empirical patterns associated with judicial cooperation. Contrary to expectation, the total number of British referrals remained relatively low, as did the number of questions on EC law faced by British judges. The fact that, by these measures, the level of British judicial cooperation continued to lag behind the level of judicial cooperation in other member states might reflect a connection between the general political climate and the attitude of British judges. In addition, experience from the environmental cases suggests that general upward trends in British judicial cooperation produced by constitutional reform, if they existed at all, varied amongst policy sectors. British judges refused to refer questions of EC environmental law to the ECJ, even during recent years of more frequent preliminary references. Domestic factors may explain this apparent anachronism. In the case involving noise pollution, failure to refer to the ECJ allowed British judges to uphold stringent standards, in line with Britain's traditional concern for limiting noise pollution. In the series of cases involving environmental assessment of planning projects, refusal of British judges to refer questions to the ECJ allowed them to maintain the practically unfettered discretion of British planning authorities. This result accords with Britain's policy of deregulation, and its resistance to the EC Environmental Impact Assessment Directive. In each of these environmental cases, reference to the ECJ risked a ruling contrary to domestic political pressures. Refusal to refer limited the Court's ability to foster European integration, and allowed British judges to protect British environmental traditions.

Judicial Empowerment

Although this paper did not set out to test directly the judicial empowerment explanation for judicial cooperation, the ability of British judges to promote specific political interests, instead of risking these interests in a preliminary reference, places empowerment in a new light. Refusal to refer could easily reflect the fact that British judges are frustrated with replies they have received from the ECJ in previous preliminary references. Toth observes that "English courts and tribunals are (perhaps justifiably) disappointed with some of the preliminary rulings they received in the equal pay and equal treatment cases."83 84 85 He recommends that surely the answer lies not in refraining from referring similar future cases but, on the contrary, in referring and referring again, until the Court is made aware of the existence of a real problem and is virtually forced to give a relevant answer.

This advice, reminiscent of French and German judicial activity in the early days of the Community, overlooks the ramifications of consistently adverse ECJ rulings which contribute weight to Court precedent. Losing a long string of ECJ cases merely allows the Court to construct an increasingly impenetrable wall of precedent, and facilitates other member states invoking the acte clair doctrine to disseminate similar interpretations at the national level. Exercising their discretion under Article 177 and acte clair, British judges have withheld references from the Court which might have become ammunition for additional adverse rulings. In a sense, interpreting EC law themselves instead of facing the prospect of frequent frustration at the hands of the ECJ achieves a form of empowerment which the traditional model overlooks. Instead of relying on the ECJ for their empowerment against other Community institutions and national governments, British judges empower themselves by strategically withholding references from the supranational Court. The ECJ's recent move to curtail its

enormous case load by accepting fewer preliminary references from national courts will provide even greater scope for British judges to exercise strategic use of Article 177.

The link between the prevailing British political climate and the role of national courts deserves much more attention than the scope of this paper permits, but if this link does in fact exist it would demonstrate two completely different aspects of how the preliminary reference procedure can be manipulated to pursue political goals and control the trajectory of European integration. Whereas British courts, more than courts in any other state, might have strategically withheld references and avoided involvement with the ECJ, the British government has sought to turn the procedure to its own advantage by becoming extremely involved at the stage of oral and written observations.

Community legal procedure allows any member state to submit written or oral arguments whenever the member state so desires. This applies to domestic as well as foreign Article 177 references. The following table summarises the total number of observations made by member states in both domestic and foreign Article 177 cases.

Table 5. ARTICLE 177 JUDGEMENTS AND GOVERNMENT OBSERVATIONS: 1973-1992

| | Domestic Cases | | | Foreign Cases | |
|---|---|---|---|---|---|
| References | Observations | O/R (%) | References | Observations | O/R (%) |
| Belgium | 192 | 61 | 32 | 1388 | 39 |
| 3 | | | | | |
| Denmark | 33 | 17 | 52 | 1547 | 70 |
| 5 | | | | | |
| Germany | 539 | 136 | 25 | 1041 | 107 |
| 10 | | | | | |
| Greece | 9 | 4 | 44 | 1571 | 19 |
| 1 | | | | | |
| France | 239 | 141 | 59 | 1341 | 120 |
| 9 | | | | | |
| Ireland | 23 | 10 | 43 | 1557 | 24 |
| 2 | | | | | |
| Italy | 163 | 125 | 77 | 1417 | 184 |
| 13 | | | | | |
| Luxembourg | 12 | 63 | 1561 | 6 | <1 |
| 19 | | | | | |
| Netherlands | 146 | 60 | 1335 | 73 | 5 |
| 245 | | | | | |
| Spain | 10 | 6 | 60 | 1570 | 29 |
| 2 | | | | | |
| Portugal | 4 | 4 | 100 | 1576 | 17 |
| 1 | | | | | |
| UK | 104 | 88 | 85 | 1476 | 213 |
| 14 | | | | | |
| Total | 1580 | 750 | 47 | 17380 | 901 |
| 5 | | | | | |

Example: Of the 1580 Article 177 judgements given by the ECJ during 1973-1992, 104 originated in British courts. The British government submitted observations in 88 out of these 104 cases--85% of the time. Of the 1476 Article 177 judgements which originated in foreign courts, the British government submitted observations in 213--14% of the time.

Source: European Court of Justice, Legal Data Processing Service

The attitude of the Government is clearly identifiable. The percentage of references where the Government filed observations is significantly higher than average, exceeding all other member states except Portugal, where the number of cases arising was almost negligible. In foreign cases, Britain has proven more willing than any other member state to try to influence the ECJ. From 1973-1992 there were a total of 1476 references which originated from courts outside the UK. Britain intervened in 213 of these cases, far exceeding the number of observations made by any other member state.86 87 88 Clearly the Government is sensitive to the significance of Article 177 references, and takes every opportunity to influence their outcome. The above figures attest to the interventionist attitude which clearly prevails with those responsible for submitting observations.

The Government's decision to frequently intervene highlights the second of the two approaches to discretion mentioned above--that resistance to EC integration and the new legal order does not necessarily entail a minimal level of interaction between national and Community institutions. Rather than avoid interaction, the Government showed extreme sensitivity to the power wielded by the ECJ and sought to influence its rulings by frequently intervening in Article 177 cases.

## Conclusions

This paper has attempted to test the traditional model of judicial cooperation against empirical evidence drawn from British judicial activity since its accession to the Community in 1972. The traditional model, supported by Weiler, Burley, Mancini, Shapiro and a number of others, maintains that the ECJ requires preliminary references from national courts in order to advance European integration. The model posits that, due to legal formalism, self-interest and empowerment national judges eagerly provide these referrals. The traditional model also assumes either that similar patterns of judicial cooperation exist or will eventually exist in the courts in each member state, or that differences in national patterns are not significant.

This study has shown that empirical evidence does not support such assumptions and that the model fails to account for the pattern of preliminary references amongst member states, particularly from British courts. National disparities are evident in the number of preliminary references made by courts in each member state, in the number of national cases involving questions of EC law, and in the proportion of cases involving EC law which national courts referred to the ECJ. In the British case, questions of EC law and preliminary references arise far less frequently than in other member states. Furthermore, until the middle of the 1980s, British courts distinguished themselves for their propensity to decide questions of EC law themselves instead of referring them to the ECJ.

The model also fails to explain the behaviour of British judges in cases dealing with specific policy sectors such as environmental protection. The environmental policy cases show a reluctance by British judges to refer to the ECJ despite the general post-1983 trend of more frequent references. This reluctance accords with British policies in the field of noise pollution and environmental impact assessment. It remains to be seen in which other policy sectors British courts have adopted a similarly uncooperative position. Legal formalism, domestic political pressure and judicial self-interest may operate differently across different policy sectors.

The conclusion which emerges most clearly from this study is that analysis must focus on changing patterns of judicial cooperation in individual member states, and on cooperation within individual policy sectors. Claims about the general role of national courts in European integration fail to discriminate between radically different national situations and should therefore be treated with caution. This paper has offered several tentative suggestions on where future analysis of judicial cooperation might concentrate. First, instead of accepting it as a given fact, scholars might consider why referral propensity converged across the EC during the 1980s. Second, in addition to the valuable work currently focused on how national courts have applied EC law under the acte clair doctrine, there is a need to consider the enormous disparities in how often national judges in each state face questions of EC law. Counting the number of references or examining the faithful application of EC law without a reference provide only two measures of judicial cooperation and the penetration of the new legal order into national legal systems. The British environmental cases indicate that any refinement to the existing model of judicial cooperation should also draw upon experience from individual policy sectors.

Finally, and most controversially, a reconsideration of the significance of preliminary references might occupy a central position in future research on the role of national courts. If, as many

scholars have claimed, British courts have gradually come to embrace the EC legal order and have faithfully applied EC law, this process has occurred despite a relative lack of preliminary references and despite a lack of EC legal questions decided under the acte clair doctrine. One of these two empirical findings must give way: either British judges have not exhibited as much cooperation and conversion to EC law as is often claimed, or this cooperation and conversion did not depend on the use of Article 177. If the latter case holds, it requires a complete rethinking of the role played by national courts in the process of European integration because their crucial role is clearly not based on providing frequent references to the ECJ.