
Following the Second World War, the European Court of Justice (ECJ) was created to promote economic and social unity in Europe. The ECJ interprets and applies the various treaties and legislation of the European Union. Cases can be brought before the ECJ via a number of channels, including appeals from the Court of First Instance, direct actions initiated by the European Commission or by member states of the European Union, and preliminary rulings sought by national courts of the member states. Furthermore, with respect to the parties involved in a lawsuit, the judgments of the ECJ related to E.U. law are binding on E.U. institutions, member states, national courts of member states, and private parties. In Justice Contained: Law and Politics in the European Union, Professor Lisa Conant explores the sources of the ECJ’s power, and the effect of ECJ decisions on the substantive policies of member states.

Various scholars have posited theories as to why member states choose to comply with ECJ rulings. Some scholars have emphasized neorationalist theories, which assert that member states usually choose to comply with ECJ decisions because doing so is in the states’ interests. Another school of thought has concentrated on neofunctionalist theories, which posit that the ECJ keeps its decisions within the boundaries of E.U. legal doctrine and gains support from judges and lawyers in order to “mask” and “shield” its decisions from political attack. Other scholars have focused on the desire of member states to obey the rule of law, since “a state, in our Western democracies, cannot disobey its own courts.” Still others have drawn upon principal-agent theory by emphasizing that the ECJ’s strength rests on authority that is delegated by member states.

2. The Court of First Instance is a lower court established in 1989 to assist the ECJ. See id.
3. The European Commission is part of the European Union’s executive branch and can prosecute on behalf of E.U. interests in the ECJ. See id. See also Court of Justice of the European Communities, Introduction: The Court of Justice of the European Communities, http://curia.eu.int/en/instit/presentationfr/index.htm.
4. National courts can, and sometimes must, seek a preliminary ruling from the ECJ on a point of E.U. law if its meaning or validity is unclear. Court of Justice of the European Communities, supra note 3.
In *Justice Contained*, Professor Conant contributes to this legal scholarship by analyzing the ECJ’s influence over the substantive policies of member states. Conant argues that the ECJ’s policy-making capability depends heavily on the mobilization of societal actors and public institutions in response to its decisions. Like many national courts, the ECJ faces a number of institutional constraints, and member states will often seek to “contain justice” by limiting the application of innovative ECJ decisions. According to Conant, member states often contain justice through a strategy of “contained compliance”: “neglecting the policy implications of judicial decisions while simultaneously respecting individual judgments.” Other dominant strategies that member states may pursue to limit the impact of an ECJ decision include “restrictive application” of an ECJ ruling as policy, and “preemption” of an ECJ decision. According to Conant, restrictive application is “when Member States place limits and exceptions on judicial principles in secondary legislation (European directives and regulations or domestic legislation) and treaty provisions.” Preemption is “when Member States carefully construct European or domestic law to avoid future judicial interference in particular areas.”

In her book, Conant first develops the basis for her contained-justice theory of judicial power, explaining why the ECJ’s policy-making influence over member states depends on the array of institutional and societal actors that support or oppose an ECJ decision. She then provides empirical support for her theory through four case studies, demonstrating the varying impact of ECJ decisions in the fields of telecommunications, electricity, public sector employment, and access to social benefits. Conant argues that the differing effect of these rulings on the practices of member states can be explained by the “constellation of affected interests and degree of institutional support” for the rulings. The book closes with a comparative analysis of judicial authority within the ECJ and the U.S. Supreme Court. In this last section, Conant argues that the ECJ has greater institutional similarities to domestic courts than to international organizations.

At the core of Conant’s contained-justice theory is the premise that policy responses to an ECJ decision will depend on the constellation of actors that are affected by the decision. Her theory isolates two variables—distributional criteria and magnitude of interest—to describe the extent to which actors can mobilize pressure in legal and political arenas to support or oppose an ECJ
decision.\textsuperscript{21} With regard to distributional criteria, Conant argues that collective action is easier when interests are concentrated, that is, held by relatively few actors, as opposed to when interests are diffuse, such as when they are held by a larger number of actors.\textsuperscript{22} With regard to magnitude of interest, Conant defines an issue of "intense" interest as having high-stakes costs and benefits, and an issue of "weak" interest as having low-stakes costs and benefits.\textsuperscript{23}

Conant asserts that concentrated, intensely interested actors are most capable of persuading member states to consider their policy concerns, whereas diffuse, intensely interested actors can only express their policy demands via isolated legal challenges.\textsuperscript{24} Accordingly, it may be up to institutional actors—such as the European Commission—to prosecute claims on behalf of such diffuse actors in order for their policy concerns to be considered.\textsuperscript{25} Because member states generally seek to preserve the status quo, Conant contends, they will usually engage in contained compliance with an ECJ decision unless a concentrated, intensely interested supporter of the decision emerges.\textsuperscript{26} Thus, when the supporter of an ECJ decision is a weak or diffuse group, the policy implications of the decision can and often will be contained.

Conant acknowledges that other scholars have already studied how organized groups apply pressure to affect the impact of judicial decisions on substantive policy.\textsuperscript{27} She claims that her theory builds on this work by creating a theoretical model to analyze the types of legal and political mobilization that arise from ECJ decisions in order to mediate policy outcomes.\textsuperscript{28} However, some of Conant's analysis seems self-evident, as common sense dictates that organized, interested actors usually have more legal and political power than disorganized, disinterested actors. Furthermore, although Conant's theory provides a convincing ex post explanation of how European states enact policy in response to ECJ decisions, it is unclear whether the theory can function as well in a predictive capacity. In this regard, the contained-justice theory may suffer from a hindsight bias: determining which actors influenced a past policy outcome may be relatively easy since the outcome has already occurred. Nonetheless, Conant's methodical characterization of the salient factors that affect the support or opposition offered by various actors in response to an ECJ decision is valuable. Her theory provides a use-

\textsuperscript{21} See id. at 23-24.
\textsuperscript{22} Id. at 25.
\textsuperscript{23} Id. at 24.
\textsuperscript{24} Id. at 27, 29.
\textsuperscript{25} The European Commission can bring suits known as infringement proceedings against member states for violating their E.U. legal obligations (e.g., when they engage in contained compliance in response to an ECJ decision). See id. at 31.
\textsuperscript{26} See id. at 33-34.
\textsuperscript{28} Conant, supra note 6, at 4.
ful metric for comparing the relative pressures that different actors can place on member states to achieve their policy goals.

After describing the doctrinal basis for her theory, Conant argues that the ECJ faces a number of inherent constraints that limit its influence over European policy in the absence of intensely interested, concentrated support for such policy. First, the incremental, case-specific nature by which courts deal with issues creates a fundamental roadblock for judicial implementation of broad policy changes.29 Furthermore, since most European countries have civil law systems, courts in the European system typically do not employ stare decisis and thus attach a narrow effect to ECJ decisions.30 The limited means by which litigants can challenge violations of European law, as well as the discretionary and variable enforcement of such claims by the European Commission and the national courts, further weaken the ECJ's ability to affect European policy.31 Finally, the absence of class actions within the European legal system prevents diffuse, intensely interested parties from litigating suits collectively, further limiting the ECJ's policy-making ability.32

In general, Conant's discussion of the constraints that limit the ECJ's effect on policy is persuasive, adding to explanations by other scholars that describe inherent weaknesses of the judiciary.33 Her description of these limitations supports her assertion that the ECJ maintains little policy-making influence over member states without the support of concentrated, interested actors.34

After discussing the limitations of the ECJ, Conant applies her contained-justice theory to four case studies. She examines ECJ decisions that established a legal basis for liberalizing European telecommunications and electricity markets, and prohibiting discrimination in public sector employment and access to social benefits.35 Conant contends that although the ECJ set a strong legal precedent in each of these scenarios, the varying impact of these decisions on European policy can be explained by the differing constellation of beneficiaries and losers from these decisions.36

In the first case study, Conant explores the effect of ECJ decisions on the liberalization of the European telecommunications sector. In a number of decisions, the ECJ upheld the European Commission's right to legislate a scheme to liberalize public undertakings (such as telecommunications monopolies).37

29. See id. at 51-52, 63-64.
30. See id. at 63-64.
31. See id. at 53, 73-74.
32. See id. at 73.
34. CONANT, supra note 6, at 94.
35. See id. at 45-46.
36. See id. at 47-48.
37. See id. at 95.
According to Conant, concentrated supporters and opponents of liberalization dominated the telecommunications sector. However, the most intense opponents of the liberalization process—civil service workers—withdrew much of their opposition once grandfather clauses were used to protect the privileges they held. As opposition to liberalization weakened, the concentrated supporters of reform gained the backing of member states, and the European Commission was successfully able to enact legislation to introduce competition into telecommunications.

Conant then explores how the European Commission tried to use the same ECJ decisions to liberalize the electricity sector. Here, the European Commission faced concentrated, intense opposition to its liberalization efforts, which could not be mitigated as in the telecommunications context. Thus, the European Commission was forced to rely on intergovernmental measures to create a limited amount of competition in electricity. Conant's detailed analysis of the varying interests affected by telecommunications and electricity reform effectively explains the different policy outcomes in these cases.

In the next case study, Conant describes how member states responded to ECJ decisions that assisted migrant workers in finding employment in the public sector. As a diffuse, politically disenfranchised group, migrant workers could not bring a significant number of lawsuits to force member states to change their policy of contained compliance. However, once the European Commission began prosecuting on behalf of migrants, member states changed their policy to allow migrants greater access to public sector jobs. Conant contends that the European Commission was successful in enforcing E.U. policy against member states in this situation because opposition to ECJ decisions regarding public sector employment was weak; member states were engaging in contained compliance only because it was the status quo.

In the final case study, Conant analyzes the effect of ECJ decisions that supported providing migrant workers with access to social benefits. Unlike

38. Id. at 116-17.
39. Id. at 115-16.
40. See id. at 120-21.
41. Id. at 122.
42. See id. at 147.
43. See id. at 147-50.
44. In her discussion of public employment, Conant uses the terms "migrants" and "migrant workers" to refer to E.U. nationals who live outside their home state. See id. at 151.
45. Article 48 of the treaty establishing the European Economic Community requires that "[t]he free movement of workers shall be ensured within the Community" but also includes an exception that "[t]he provisions of this Article shall not apply to employment in the public administration." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 48, Mar. 25, 1957, 298 U.N.T.S. 36. The ECJ narrowly interpreted this public service exception in various cases, opening a number of jobs to migrant workers. See CONANT, supra note 6, at 153.
46. See id. at 152, 162-65.
47. See id. at 152.
48. See id. at 175.
49. In her discussion of the social benefits case study, Conant uses the terms "migrants" or "migrant workers" to refer to all potential individual beneficiaries of social benefits programs, which includes E.U.
public sector employment, member states intensely opposed these ECJ decisions because providing such benefits to migrants would require large expenditures by the states.\textsuperscript{50} Although migrant workers were a diffuse, politically disenfranchised group, they were able to bring a steady stream of lawsuits in the social benefits context.\textsuperscript{51} Nonetheless, member states used contained compliance, preemption, and even overruling of ECJ decisions to limit the impact of decisions that protected migrant rights and to prevent widespread policy changes that would allow migrants access to various social benefits.\textsuperscript{52}

Although Conant’s analysis of the case studies using her contained-justice theory is insightful, she leaves many open questions. Most notably, Conant does not convincingly explain why these case studies are representative of the ECJ’s impact on European policy, nor does she address why these four studies are sufficient to prove that her theory is valid. It is possible that these case studies are merely four isolated examples that happen to support the contained-justice theory.

Deficiencies also exist within Conant’s analysis of the individual case studies themselves. For example, Conant does not explain how migrant workers, who were apparently unable to bring many lawsuits regarding public sector employment, were nonetheless able to bring a large number of suits regarding access to social benefits. It is unclear whether these differences are simply due to Conant’s varying definitions of “migrant” in each case study, or whether some other effect is responsible for this shift.

Furthermore, although Conant’s theory convincingly explains the differing results in each of these case studies, it is unclear whether her theory could effectively anticipate the policies enacted by member states in response to a new ECJ decision. Thus, Conant could have provided more support for her theory by predicting a future policy outcome in response to a recently decided ECJ case. If correct, such a prediction could have dampened concerns about bias in her case study selection.

Conant concludes the book by comparing the position of the ECJ within the European Union to the position of the U.S. Supreme Court. Unlike other scholars, who either overestimate or underestimate the ECJ’s power due to its supranational status, Conant contends that the limitations of the ECJ are more similar to those limitations typically faced by domestic courts rather than international organizations.\textsuperscript{53} To support this assertion, Conant notes that, like the ECJ, the U.S. Supreme Court also lacks enforcement mechanisms for its decisions and faces patterns of contained compliance.\textsuperscript{54} Al-

\textsuperscript{50} See id. at 177, 179.
\textsuperscript{51} See id. at 187.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 218.
\textsuperscript{54} Id. at 219. Some examples of contained compliance faced by the U.S. Supreme Court include overt
though courts such as the ECJ and the U.S. Supreme Court have the final word on the interpretation of a law, the legislative and executive branches of government can greatly alter the application of a judicial decision when creating policy.

Although Conant's choice of title for the book, *Justice Contained*, may imply that she is averse to this sort of contained compliance in either the American or European context, she also recognizes that "[t]he inconsistent application of high court decisions . . . impedes equal treatment before the law, but it also prevents a perversion of the democratic process, where the authority to impose decisions on society rests in the hands of a few judges." Hence, Conant believes that all courts naturally face some degree of contained compliance, but this feature does not necessarily bode ominously for judicial authority in general.

Conant's comparison to the U.S. Supreme Court is particularly useful for American readers, as it frames her contained-justice theory in a more familiar context. However, the twenty pages at the end of the book devoted to this analysis is not comprehensive or detailed enough to adequately compare the two court systems. Thus, although this discussion is thought provoking, it does not progress beyond a relatively superficial level, leaving much ground unexplored.

In *Justice Contained*, Lisa Conant provides a doctrinal basis for her contained-justice theory, which describes how institutional actors mediate the effects of ECJ decisions on European policy. Although the actual scope of Conant's theory is unclear, it persuasively explains the outcome in the four case studies that she analyzes. Additionally, although Conant's comparative analysis between the ECJ and the U.S. Supreme Court is cursory, it provides a novel and intriguing look at the ECJ.

*Justice Contained* should be of interest not only for scholars of European politics and jurisprudence, but for anyone interested in the interaction between the judiciary and other institutional actors. Additionally, the book provides an insightful reminder that various societal and political actors have the ability to mediate the effect of judicial decisions on policy. Overall, the well-organized nature in which Conant presents her arguments, as well as her thoughtful analysis of the case studies, make *Justice Contained* an informative and entertaining read.

Neel Sukhatme*

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55. See *id.* at 226–28.
56. *Id.* at 226.
57. *Id.* at 238.

* J.D. Candidate, Harvard Law School, 2005.