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# Assessing the Transformation of Europe: A View from Political Science

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## Assessing the *Transformation of Europe*: A View from Political Science

R. Daniel Kelemen and Alec Stone Sweet

*The Transformation of Europe* [TE] is arguably the most influential paper ever published on the European Court of Justice [ECJ]. Read as political science, the importance of the piece is three-fold. First, it laid out a subtle, reconstructive account of the Court's "constitutional" case law. This discussion quickly became a standard reference point<sup>1</sup> for scholars developing new empirical research on the legal system's impact on integration. Second, Weiler described (and reflected normatively upon) the steady expansion of the scope of the EU's jurisdiction, findings that would be confirmed in more systematic research to come.<sup>2</sup> Third, it blended doctrinal analysis with a strategic, "political" account of why two sets of actors – Member State Governments and the national courts – did not destroy the process of legal integration in its infancy, though each had the power to do so.<sup>3</sup> Weiler showed how the ECJ's (often conflictual) interactions with national judges had served to allocate joint authority between the supranational and national legal orders, while enhancing judicial power on both levels. The so-called "judicial empowerment" thesis remains a dominant approach to explaining legal integration.<sup>4</sup> Third, and most important for present purposes, TE presented a theory of how the Court's doctrinal moves related to state power within the EU's system of lawmaking and governance.

Weiler forcefully argued that the consolidation of the various "constitutional" doctrines (direct effect, supremacy, preemption, human rights, and implied powers) had "radically" reconstituted the juridical foundations of the regime, transforming an international organization into something akin to a federal arrangement.<sup>5</sup> At the same time, he stressed the fact that the Member States had resisted the move to supranationalism within legislative processes, which he conceived as majority voting in the Council of Ministers to enact EU measures to complete the common market. Spurred by this paradox, Weiler developed the following thesis:

The "harder" the law in terms of its binding effect both on and within States, the less willing States are to give up their prerogative to control the emergence of such law. ... When the international law is "real," when it is "hard" in the sense of being binding not only on but also in States, and when there are effective remedies to enforce it, [State control of] decisionmaking suddenly becomes important, indeed crucial (TE: 2426).

In this account, governments had tolerated the legal transformation of the regime only because each retained a veto over important new policy.

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<sup>1</sup> Along with Stein (1983).

<sup>2</sup> The phenomenon of the EU's "creeping competences" (Pollack 1994), called "spillover" in neofunctionalist integration theory, has been the topic of extensive empirical research (Sandholtz and Stone Sweet 2012).

<sup>3</sup> See also Weiler (1994).

<sup>4</sup> Related literature reviewed in Stone Sweet 2010 (section 6.1).

<sup>5</sup> To describe the transformation, Weiler uses variations on the word "radical" no less than fourteen times.

The equilibrium thesis is the overarching theoretical construct of TE, weighing heavily on how the transformation is to be appraised, both before and after the 1986 Single European Act [SEA]. The SEA had, after all, “shattered” the equilibrium [TE: 2459-62]. Henceforth, every Member State would at times be required to enforce EU market rules that its Government had opposed in the Council of Ministers, a situation that “threatens [the EU’s] very constitutional foundation” [TE: 2465]. If a major crossroads in the history of European integration had been reached, Weiler was unsure as to which the direction the system would take [TE:2465]. In the post-SEA, the constitutional settlement might unravel, if governments chose to exit the system. On the other hand, the Member States might leave it intact, if they had learned to value its benefits (an outcome noted, but left untheorized). Nonetheless, two strong implications flow from the theoretical framework (that the political legitimacy of constitutionalization rested on a specific equilibrium between a *supranational* legal system and an *intergovernmental* legislative system). First, the SEA would provide a strong test of the viability of the supranational order; the Member States could, after all, destroy or reconfigure it. Second, liberating the legislature from the veto would reduce the need for strong lawmaking and catalytic court. The ECJ might, accordingly, be led to constrain its supranational, integrationist impulses on its own.

In this chapter, we assess TE as political science, in light of research that has taken place since the article’s publication. We do so in order to honor the article’s immense contributions to our discipline. In TE, Weiler contrasted the European lawyer’s view of Europe, which was “becoming more and more federal,” with the political scientist’s then pessimism about the future of supranationalism [TE: 2410-11]. In fact, TE appeared at the beginning of an important revival of political science research on European integration, after a long period of hibernation. Indeed, over the past 20 years, political scientists have produced more empirical research on the ECJ and its impact than on any other court in the world.<sup>6</sup>

We proceed as follows. In part 1, we briefly discuss the equilibrium thesis in light of alternative theory and relevant empirical results. The equilibrium thesis may well explain the Court’s success during what TE labels the “foundational period” (1958-73). Nonetheless, once the Court’s case load took off in the 1970s, the Court’s dominance over Treaty interpretation, coupled with majoritarian and federalist dynamics, overwhelmed the capacity of any state or consortium of states to resist the steady expansion of supranationalism. In part 2, we consider legislative politics and outcomes after the SEA.<sup>7</sup> As we will show, the Member States did not roll-back constitutionalization, or curtail the authority of the courts, nor did the ECJ abandon its constitutional commitments and stage a retreat. Instead, with the completion of the internal market, the EU became even more rule-oriented, legalistic, procedurally complex, and adversarial (in an American sense), all factors that bolstered the centrality of the courts.<sup>8</sup> The EU’s legislative organs themselves chose to reinforce these features, notably, by delegating to the courts the charge of monitoring and enforcing EU market regulations, as they emerged. The mechanism they chose – to govern through establishing judicially enforceable rights – make sense in a multi-level system with weak command and control features. But it also constituted massive delegation to the courts and, with delegation, state legitimation of judicial governance.

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<sup>6</sup> Scholarship reviewed in Stone Sweet (2010).

<sup>7</sup> Weiler himself devoted roughly half of his text to considering the SEA and its potential ramifications.

<sup>8</sup> Kelemen (2011).

The fact that the supranational-intergovernmental equilibrium did not long survive is powerful evidence for the view that TE underestimated how transformative the move to juridical federalism actually was.

## I

TE paved the way for the political science to come. Weiler had shown that the legal system had, in effect, become the nervous system of the EU. The empirical challenge, then, was to chart and assess the legal system's impact on the overall course of integration, and on policy outcomes in specific domains. TE also forced scholars to confront a set of fundamental political questions. Why did the Member States permit constitutionalization? To what extent were governments able to constrain the Court's supranationalist biases beyond the foundational period? Political scientists have since produced a significant quantity of systematic research that bears on these issues, based on both quantitative analysis of comprehensive data and detailed case studies of the impact of judicial rulings on policymaking at both the EU and national levels.

If one considers the equilibrium hypothesized to be an empirical benchmark *ex ante* for the assessment of later developments, then it is clear that the equilibrium began to erode immediately after the foundational period. In the second period (1973-1985), Weiler rightly emphasizes, EU competences steadily expanded to new areas [TE: 2442-52]. Social scientists showed that the Court was instrumental in facilitating such "spillover," then and afterwards, through constructing causal connections – positive feedback loops – between transnational activity, litigating EU law in the courts, and lobbying and legislating in Brussels.<sup>9</sup> It was also during this period that the Court's expansive, and politically intrusive, free movement of goods case law (the *Dassonville-Cassis de Dijon* framework) steadily undermined national capacity to regulate intra-EU trade, which was rapidly expanding. As has been conclusively demonstrated, this jurisprudence powerfully linked processes of "negative integration" (the Treaty-mandated removal of barriers to intra-EU exchange) and "positive integration" (legislating EU market rules to replace national regulations), fatally undermining national control. In the end, it was the interactions between litigants, the courts, the Commission, and a newly cohesive European business lobby that constructed the context for the intergovernmental decision to revise the treaty with the SEA.<sup>10</sup> Weiler knows these facts well, as he elegantly demonstrated in a later paper.<sup>11</sup>

It is today obvious that the dice were loaded in favor of the supranational side of the equation. Of the many important elements that weighed in favor of enhanced supranationalism, we will emphasize two. The first is the Court's status as the authoritative interpreter of the Treaty which, among other things, gave it *de jure* authority over the exercise of legislative authority. Unanimity decision-rules underpinned legislative intergovernmentalism prior to the SEA, Weiler stressed, but unanimity rules also grounded and protected the Court's supranational authority. The Court's pro-integrationist, supranationalist interpretations of the Treaty were

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<sup>9</sup> Sandholtz and Stone Sweet, eds. (1998); Stone Sweet, Fligstein, and Sandholtz, eds. (2001).

<sup>10</sup> Stone Sweet (2004: ch.3).

<sup>11</sup> Weiler (1999).

insulated, *de facto*, from reversal by the Member States.<sup>12</sup> If it had been otherwise, the various constitutionalist doctrines and the free movement jurisprudence might not have stuck. Rather than retreat in the post-SEA period, the Court in fact continued to interpret the Treaty aggressively. In the legal basis cases, for example, it extended majoritarian voting to policy domains stubbornly considered by the Council of Ministers to be subject to unanimity (the veto), thereby bolstering the authority of the Parliament and the Commission.<sup>13</sup> And in 1991, the Court famously moved to develop a new constitutional doctrine, of state liability, making EU law even more “real and “hard,” in TE’s terms, providing a strong judicial remedy for harms related to compliance failures on the part of states (*Frankovich*; *Brasserie du Pecheur*). The ECJ did so through treaty interpretation, without any express basis in the Treaty, and in the face of strong and explicit Member State opposition.<sup>14</sup>

Second, beginning in the 1970s, the Court developed a strategic disposition that aligned it with the majority of Member States on key issues, further securing its position as lawmaker and agenda setter. Maduro examined every ruling subjected to the *Cassis de Dijon* framework in the free movement of goods domain. The ECJ, he found, engaged systematically in what he called “majoritarian activism.”<sup>15</sup> Once the ECJ had determined that the national measure in question was more unlike than akin to equivalent measures in place in a majority of states, the ECJ would strike it down as a violation of the Treaty (ex-Art. 30). On its own initiative, the ECJ had begun, in the early 1980s, to ask the Commission to provide such information. Strikingly, Maduro found no exception to this rule. In contrast, the court tended to uphold national measures (under ex-Article 36 and its case law on ex-Article 30) in areas where no dominant type of regulation existed. “Majoritarian activism” also appropriately describes cases in which the Court enacts, through Treaty interpretation, policy that would have been adopted under majoritarian rules, while being blocked under unanimity. In the post-SEA period, the court regularly enacted, as constitutionally-mandated, important legislation that was supported by the Commission and a majority of governments in the Council of Ministers, but which had stalled under the veto.<sup>16</sup>

In sum, the Court’s moves in favor of strong supranationalism made the legislative process a sub-system of EU decisionmaking (albeit one that was often crucial to outcomes), within a greater constitutional system, the evolution of which the Court (not the states) dominated.

From a theoretical standpoint, Weiler’s equilibrium thesis suffers from having been built from static, binary oppositions: the “Intergovernmental-Supranational” and “Exit-Voice.” A “radical mutation of the Treaty” was effected (TE: 2428), but the underlying logics and constraints posited by the theory somehow remain in place over time. Pre-supposing the

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<sup>12</sup> As we discuss below, the relationship between decision-making gridlock and judicial empowerment in the EU reflects more general findings from judicial politics research about the relationship between political fragmentation and judicial power. See, for instance, Shapiro (1991); Ginsburg (2003); Vanberg (2008).

<sup>13</sup> The judicial politics of such disputes have been the subject of systematic research. Jupille (2004) and McCown (2003) found that the Court’s rulings on legal basis served to strengthen majoritarianism, and to reduce the Council of Ministers’ dominance in the legislative process.

<sup>14</sup> Stone Sweet (2013: 76-77).

<sup>15</sup> Maduro (1998).

<sup>16</sup> The so-called “constitutionalization” of sex equality and the non-discrimination principle more generally has been heavily documented. Cichowski (2004); Stone Sweet (2004: ch. 4).

equilibrium beyond the foundational period, however, leads one to downplay or miss altogether how transformative the transformation really was.

In contrast, the most successful theories of how the legal system operates all (at least implicitly) predicted the demise of the supranational-intergovernmentalism equilibrium,<sup>17</sup> given a steady a case load, the commitment of the Court to supranationalism and the inability of reluctant member states to meet the high decision-making threshold necessary to rein in expansive Court jurisprudence. While the theories differ in important ways, what they have in common is a conception of integration as an inherently expansive, self-sustaining process. The most comprehensive account demonstrated that the activities of market actors, lobbyists, legislators, litigators and judges became causally connected to one another in important ways. The analysis also showed that two parameter shifts – whereby important qualitative events generated quantitatively significant transformations in the relationships among variables – had occurred, and these roughly map on to Weiler’s periodization scheme. The first shift began in the early-1970s, the second in the mid-1980s. The EU’s evolving legal system was implicated in both transitions, first, through constitutionalization, and, then, through supervising Member State compliance with EU law, especially with regard to rules governing the common market (Part II below).<sup>18</sup>

Political scientists also addressed the question of why governments acquiesced to the transformation, and why they were not able to constrain the Court and the legal system even when they tried to do so.<sup>19</sup> The dominant type of explanation<sup>20</sup> is rooted in the logics of delegation – the role of courts in making credible state commitments to be governed by law – factors that Weiler largely ignored in TE. It is now broadly understood that the constitutionalization of the EU succeeded because it enabled the states to overcome tenacious collective action problems associated with integration in federal arrangements more generally.<sup>21</sup> Once constitutionalized, the legal system provided a powerful mechanism for making the commitment to building a single market credible, for example. Without the court’s active pursuit of market building in the 1970s, the SEA would not have been adopted in 1986. The states, after all, had utterly failed to complete the common market by the deadlines stipulated in the Treaty. After the SEA, as the corpus of EU secondary legislation grew exponentially, states harnessed the courts as a central mode of governing the Union.

## II

The equilibrium thesis posited that member states were only willing to accept the ECJ’s constitutionalization of the Treaties and its expansion of EU competences in so far as they maintained veto power over Community decision-making. Weiler warned that the shattering of this equilibrium by the SEA presented profound dangers for the Community, particular with regard to compliance and legitimacy, and he worried that the elimination of the veto might lead

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<sup>17</sup> Burley and Mattli (1993); Stone Sweet (2004); Cichowski (2007).

<sup>18</sup> Fligstein and Stone Sweet (2002).

<sup>19</sup> For a detailed quantitative analysis, see Stone Sweet and Brunell (2012). See also Alter (2001); Cichowski 2007; Scharpf (2006) and Kelemen (2012).

<sup>20</sup> Pollack (2003); Tallberg (2002); Mattli and Stone Sweet (2012).

<sup>21</sup> Mattli (1998); Shapiro (1998); Kelemen (2004).

states to seek to roll-back constitutionalization and to constrain judicial power in EU governance. But in the subsequent two decades, this has not come to pass. The shift to qualified majority voting in the SEA and the subsequent “unblocking” of legislative decision-making did not herald an end to the judicial construction of Europe. Quite to the contrary, the period after the introduction of the SEA saw the EU embrace a highly judicialized approach to governance. To understand why, we must consider the political and legal dynamics involved in completing the Single Market.

Weiler emphasized that the more binding was law on member states, the less willing they would be to give up control over the production of such law. While states may be reluctant to give up control over the crafting of “hard law,” another set of considerations pushes in just the opposite direction. The establishment of the SEA involved both negative integration – the elimination of national barriers to trade – and positive integration – the introduction of common norms that establish a “level playing field” for the Single Market.<sup>22</sup> Much of the hard law imposed by the Court on member states took the form of “negative integration”: “deregulatory” judicial rulings that declared invalid national measures constituting barriers to free movement. But in many areas of policy-making, purely deregulatory, negative market integration is politically unacceptable to member states. For instance, it would be politically unacceptable to create a single market in agricultural products simply by eliminating all national food safety regulations, or to create a single financial market simply by eliminating all national regulations designed to protect investors against fraud and malfeasance. In such cases, the elimination of national regulatory barriers to trade must, politically speaking, be coupled with the establishment of common, EU wide regulations.

These realities suggest a rather contradictory corollary to Weiler’s thesis.<sup>23</sup> The more binding the negative integration law imposed by European courts, the more member states would need positive integration – the adoption of common EU norms – to reregulate the Single Market. In such a situation, intergovernmentalism, defined as the veto, may well become too costly to maintain. In fact, the harder the treaty law governing negative integration became, the *more* states proved willing to give up a veto over the emergence of EU legislation – in stark contrast to Weiler’s thesis.

New, common EU market regulations governments help to produce must be suitable to the liberalized, continental scale Single Market.<sup>24</sup> And what sort of regulation is suitable to a large liberalized market, with a diversity of players and political demands for a ‘level playing field’? The answer: highly judicialized regulation. As Steven Vogel<sup>25</sup> has explained, economic deregulation is often coupled with “juridical reregulation,” as freer markets actually require more not fewer rules. Where governments limit entry into national markets, they may rely on less formal modes of governance, and trust between a limited circle of stakeholders. With liberalization, these more opaque modes of governance become untenable. In the EU, market integration entailed the replacement of opaque, informal systems of regulation at the national level with highly formal, legalistic and judicialized modes of governance at the EU level. This

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<sup>22</sup> On the concepts of negative and positive integration in the EU context, see Scharpf (2006).

<sup>23</sup> See Stone Sweet (2004: ch. 3).

<sup>24</sup> The following paragraphs draw heavily on Kelemen (2011).

<sup>25</sup> Vogel (2007).

cycle of national deregulation and EU juridical reregulation served to empower both EU level and national courts, increasing judicial involvement in many areas where courts had previously played little role.

The structure of EU political institutions also encouraged this trend. Political authority in the EU has always been highly fragmented and has become increasingly so over time, with power today divided vertically between the EU and national organs, and horizontally at the EU level between the Council, the European Parliament, the Commission and the Court. And as an abundant literature demonstrates, fragmentation encourages judicial empowerment.<sup>26</sup> In the EU, fragmentation has chronically generated gridlock, which has given courts the space to play an assertive role without fear of override, as Weiler recognized in TE. It also creates principal-agent problems, for example, between EU lawmakers (the Commission, the Council, the Parliament) and those who implement EU law (national administrations, EU-level regulatory officials). The European Parliament understandably fears that governments may not live up to their commitments, and even governments represented in the Council may doubt one another's commitment to implementation of EU norms. To control their agents and to enhance the credibility of their commitments to implement EU law, EU lawmakers have been led to fill laws with detailed requirements, typically framed as justiciable rights, and to invite public authorities (including the Commission) and private actors to enforce these norms before national and European courts. In other words, the judicialization of EU governance has not simply been the product of self-assertion by the ECJ (though there certainly has been a good deal of that). Government themselves have repeatedly backed legislation requiring the ECJ, national courts and private litigants to play a central role in governance.

The EU's extremely weak administrative capacity has also encouraged reliance on judicialized modes of governance. Courts and litigation have become the EU's substitutes for a developed, effective administrative state. The EU's bureaucracy is tiny, and member states have continually made it clear that they will not permit the construction of a centralized administrative apparatus on the scale necessary to enforce EU law effectively across the Union. Relying on private actors and national courts to enforce EU norms means loading legislation with justiciable provisions, framing policies in the language of individual rights, and promoting "access to justice" initiatives.

In the second half of TE, Weiler expressed two main concerns with regard to the shattering of the equilibrium. First, he feared that reducing "Voice" might lead states to "selective Exit," through the adoption of a "strategy" of "noncompliance" [TE: 2465]. Second, Weiler worried that the shift to majority voting would worsen the democratic deficit and further undermine the legitimacy of EU policymaking [TE:2466-77]. Both concerns seem well-founded, but we can now see that – rather ironically – the EU sought to address them by enhancing the role of law and courts.

Post-SEA developments actually made noncompliance a less tenable strategy than it had been in earlier periods. Throughout the 1990s and into the 2000s, the Commission took an increasingly tough stance on enforcement and promoted decentralized enforcement of EU law by private actors. These developments were part and parcel of the judicialization of EU governance

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<sup>26</sup> See *supra*, note 12 and Kelemen (2011: 24-25).



described above. The Commission had barely used “infringement proceedings” before the 1980s, and many EU directives were viewed then more as statements of aspirations than as strict legal obligations. As concern over uneven implementation grew, the Commission began to deploy the infringement procedure more aggressively, beginning in the mid-1980s – just as it was launching the 1992 initiative.<sup>27</sup> In the 1990s, the Court moved on state liability, while the Commission further intensified its use of the infringement procedure. It did so not simply on its own initiative, but with the endorsement of the member states, who gave the Commission new enforcement powers in the Maastricht Treaty, including the authority to request the ECJ to impose penalty payments on states that failed to comply with infringement rulings. EU lawmakers, too, encouraged the intensification of decentralized enforcement by private parties, establishing a host of new substantive economic, social and political rights for private parties and establishing procedural right and remedies in EU administrative law to facilitate private enforcement.<sup>28</sup> Together, these measures significantly increased the likelihood and the cost of litigation in response to member state non-compliance, raising the cost of “selective exit” just at the moment when governments might have been tempted to engage in it.

Weiler focused heavily on legitimacy problems facing the Community. While a full discussion of the democratic deficit is beyond the scope of this paper, one aspect of the EU’s response to the problem directly relates to our argument. With the dramatic expansion of EU powers that accompanied the SEA and the Maastricht Treaty, EU leaders grew sensitive to critics who questioned the EU’s expansion into a wide range of increasingly sensitive policy fields. To address these concerns, the EU leaders put in place stronger, Treaty-based guarantees that the EU would act to protect fundamental rights (such as Articles 2 and 6 of the Maastricht Treaty). More generally, they embraced a language of rights across a host of policy areas ranging from free movement, to anti-discrimination, to social policy, to consumer protection, to securities regulation.<sup>29</sup> In these fields and many more, EU policy-makers have crafted Treaty provisions, directives and regulations that grant private parties substantive and procedural rights and encourage them to enforce them before national and sometimes European courts. They have sought to back this “Europe of rights” with a “Genuine European Area of Justice,” promoting various access to justice initiatives to ensure that European citizens and firms can enjoy equal and effective access to justice to enforce their EU rights across the Union.<sup>30</sup> And therein lies a final irony: in order to address the perceived legitimacy deficit associated with the EU’s expansive powers, EU lawmakers have sought to create a Europe of rights, expanding the protection of individual rights and opportunities to enforce those rights under European law. The legitimacy deficit they are seeking to address was in part the product of a judicially driven process of integration, and yet the Europe of rights they are promoting as a partial remedy will serve to encourage even more judicially driven integration.

## Conclusion

The impact of TE on political science scholarship has been pervasive and enduring. The article’s central positive claims regarding the relationship between political and legal integration

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<sup>27</sup> Kelemen (2004: 31-34).

<sup>28</sup> Kelemen (2011: 45-56). See also de Búrca (1995); Harlow (2000); Shapiro (2001).

<sup>29</sup> De Burca (1995).

<sup>30</sup> Kelemen (2001): 58-62. See also Hartnell (2002).

in the EU, helped to set the agenda for a generation of research on the ECJ. We have focused primarily on the positive claims made in TE, rather than on the important normative questions addressed in TE, which others in this volume discuss at length. With the benefit of hindsight, and on the basis of a wealth of subsequent research, we have argued that the core claims Weiler derived from his theory of equilibrium, and the resulting concerns expressed about the impact of the SEA, have not been borne out by subsequent developments. TE illuminated the dynamics of the foundational period but underestimated just how transformative the constitutionalization of the EU legal system really was. Judicially-driven integration proved to be self-reinforcing. The ECJ, coordinating with EU organs and the national courts, strengthened its capacities to manage the complexities of supranational governance, despite the controversies that recurrently attend many of its important rulings. Today, many scholars voice concerns that echo those raised in TE, warning that the ECJ must constrain its supranational impulses, or risk undermining its authority. And yet, to date, the ECJ appears unbowed, presiding over a system of judicialized governance that continues to widen and deepen.<sup>31</sup>

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<sup>31</sup> See Schmidt and Kelemen (2012); Kelemen (2012).

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