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# Law and politics in the European Union: a reply to Garrett

Walter Mattli and Anne-Marie Slaughter

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Geoffrey Garrett now agrees with most of what we set out to prove in our original article.<sup>1</sup> First, we all now concur on the significance of the phenomenon under study. Garrett originally described the European Community legal system as the straightforward implementation of member state wishes.<sup>2</sup> He now acknowledges that we have witnessed the construction of a “remarkable legal system,” one not foreseen by the signatories to the Treaty of Rome.<sup>3</sup> Second, Garrett now accepts our description of the court as a strategic rational actor in its own right, with a well-internalized mandate to promote European integration according to the aims set forth in the treaty.<sup>4</sup> Third, whereas Garrett’s original model takes account only of the European Court of Justice (ECJ) and the member states as the principal actors, he now agrees with our claim that the primary mechanism for the expansion of European law has been the court’s

We thank Robert Keohane, Charles Lipson, Andrew Moravcsik, Martin Shapiro, Duncan Snidal, and Alec Stone for helpful comments.

1. Anne-Marie Burley and Walter Mattli, “Europe Before the Court: A Political Theory of Legal Integration,” *International Organization* 47 (Winter 1993), pp. 41–76.

2. Geoffrey Garrett, “International Cooperation and Institutional Choice: The European Community’s Internal Market,” *International Organization* 46 (Spring 1992), pp. 533–60. The following quotations are drawn from Geoffrey Garrett, “The Politics of Legal Integration in the European Union,” *International Organization*, this issue. Since that article forms the basis of the present response, it will subsequently be quoted without further footnote citations.

3. Garrett continues to insist “that the signatories did choose to create a very powerful legal system” but presents no evidence for this claim. By contrast, the best available account of the negotiations regarding the European Court of Justice indicates that the member states intended the Treaty of Rome to operate like any other international treaty. On this latter point, see Pierre Pescatore, “Les Travaux du ‘Groupe Juridique’ dans la Négociation des Traités de Rome” (The works of the juridical group in the negotiations of the Treaties of Rome), *Studia Diplomatica* 34 (1981), pp. 159–92.

4. Burley and Mattli, “Europe Before the Court,” p. 60; see also p. 54, note 60. In his analysis of the *Cassis de Dijon* case, he extends his earlier reasoning “by arguing that the Court of Justice is also a strategic rational actor. The justices’ primary objective is to extend the ambit of European law and their authority to interpret it.” For the text of the *Cassis de Dijon* case, see Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Preliminary ruling requested by the Hessisches Finanzgericht, ECR 649 (European Court of Justice, 1979).

co-optation of judges (and lawyers) in the member states, thereby creating a community of actors above and below the state.

What, then, is left to debate? We continue to disagree with Garrett about the nature of the state interests that the court takes into account, and hence the significance of the fact that it does take state interests into account. We also disagree on the nature of the judicial decision-making process. Finally, given these theoretical divergences, we disagree on the correct analysis of *Cassis de Dijon* and the generalizations that can be drawn from that analysis.

## Two views of interest analysis

Most of Garrett's response focuses on what he claims to be our third point: "that the European legal system is not in the interests of member governments but that they have been unable to reorient the system in accordance with their preferences." He concludes, by way of counterexample, "that the German government's behavior in *Cassis* was wholly rational." But is this the issue? If the question is whether we can reconstruct a rational account of German action, the answer is inevitably yes. Any number of courses of action would have been rational, depending on the underlying assumptions about German preferences and the specification of the constraints limiting governmental action.

We never claimed that the member states acted irrationally or that the European Community legal system per se is not in the interests of the member states. We argue that at each major step of the construction of that system, the court was able systematically to override member states' true preferences as perceived by individual states at the time and was able to impose constraints on the ability of those states to fight back. Our real argument with Garrett turns on his definition of the relevant preferences and constraints.

Three potential categories of state preference suggest themselves. First are preferences for an effective dispute resolution system—a mechanism for enforcing voluntary agreements and bargains. Second are preferences concerning the pace, scope, and degree of European integration. These preferences transcend any one particular case, generally reflecting a particular political or economic ideology. Third are specific economic or political preferences in individual cases—a desire to support citizens over foreigners, economic interests over social interests, or one economic sector over another.

With respect to the first category, Garrett is correct that the member states of the European Community, like parties to any international bargain, would prefer a functioning court to resolve disputes, fill in missing contract terms, and hold parties to their word. Such preferences keep courts in business the world over, domestically and internationally.<sup>5</sup> From this perspective, Articles 169 and

5. Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

170 of the Treaty of Rome, authorizing the court to hear cases brought by one member state against another or by the European Commission against a member state, are analogous to the articles in the United Nations Charter providing for resort to the International Court of Justice or to those in the European Convention on Human Rights providing for resort to the European Court of Human Rights. The problem is that this observation does not help us explain variance in the relative effectiveness of different international dispute resolution mechanisms. The relative effectiveness of the community legal system as compared with these other systems is due not to Articles 169 and 170 but to Article 177, which allows—and in some cases requires—national courts to refer questions of EC law to the ECJ. It is the success of the court's use of that article that needs to be explained.

With respect to the second category, Garrett originally denied any significant variance between the preferences of the court and of the member states. The court, he claimed, faithfully implements member state wishes.<sup>6</sup> We argued, by contrast, that the preferences of the member states and the court diverge in material respects. The judges do have “*une certaine idée de l'Europe* (a certain idea of Europe) of their own.”<sup>7</sup> In any given instance, they were likely to interpret the Treaty of Rome as requiring faster and deeper integration than member state preferences would have specified. It is true, however, that the court faced outer limits on the implementation of its preferences; it could not outrun its constituency without losing its legitimacy.<sup>8</sup> It is in this context that the court may have used the commission as a “political bellwether” to see how far it could go in landmark decisions.<sup>9</sup>

Even assuming that the commission did signal the court concerning the outer limits of how far it could push the member states, the question remains as to how it could push the member states at all. We argued that law provides both a mask and a shield. It hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere. The court's effectiveness in advancing its own agenda thus depends on how convincingly it speaks as the technical and apparently nonpolitical voice of “the

6. As noted above, Garrett's extended analysis does allow for some variance along the lines suggested by our own study.

7. Pierre Pescatore, “The Doctrine of Direct Effect: An Infant Disease of Community Law,” *European Law Review* 8 (June 1983), pp. 155–77 and p. 157 in particular. (Pescatore served on the ECJ from 1967 to 1986.) Another former judge of the court concurs: “The Court frequently goes beyond the conceptions which the member states may have had and sometimes still have, as parties to the Community treaties. As so often, the work is more belligerent than its creator and goes its own way.” See Ulrich Everling, “The Member States of the European Community Before their Court of Justice,” *European Law Review* 9 (August 1984), pp. 215–41. The quotation is drawn from p. 217.

8. Many of the judges we cite acknowledge this point openly. See Burley and Mattli, “Europe Before the Court,” p. 71.

9. This was Eric Stein's conclusion after reviewing eleven major cases. See Eric Stein, “Lawyers, Judges, and the Making of a Transnational Constitution,” *American Journal of International Law* 75 (January 1981), pp. 1–27.

law.” It must remain, for instance, minimally faithful to both substantive legal doctrine and the methodological constraints imposed by legal reasoning.<sup>10</sup> Within these constraints, however, the court can interpret and apply the Treaty of Rome and EC secondary legislation to reach outcomes that depart significantly from member state preferences in case after case.

With respect to the third category, Garrett suggests that the court takes into account the interests of individual states before it in a particular case. Such particularistic interest balancing contravenes the most basic precepts of the rule of law. Age-old precepts of legal reasoning require the court to apply a principle developed in the context of one case consistently across similarly situated actors in an entire category of cases. It can of course distinguish different classes of actors, but not solely on the basis of calculable economic interests. By contrast, if the court followed Garrett’s model it would quickly get a reputation for arbitrary and capricious “political” decisions, thereby undermining its legitimacy. Garrett himself could not square this model with his emphasis on the court’s long-term concern for its legitimacy and power.

### **Inside the judges’ chamber**

Garrett’s account of the decision-making process of the court is more appropriate to a legislative than a judicial chamber. His claim that judges grapple with the political and economic interests of the litigants before them flows from a false premise: that the law itself cannot guide decisions.

“The law,” in a sense of a clear, determinate body of rules, is far less clear than nonlawyers think it is. All texts, all rules are open to interpretation, to arguments and counterarguments. By exaggerating this ambiguity, however, Garrett distorts the ECJ’s decision-making process beyond recognition. He concludes that “in most cases pertaining to the free movement of goods, services, capital, and people . . . there is *no coherent legal basis* to inform court behavior” (emphasis added). This is an extraordinary statement; if true, it would mean that lawyers counseling economic actors in the European Community would have to explain that the rules likely to regulate their behavior are completely unpredictable.

Garrett’s single example of this alleged legal indeterminacy is even more remarkable. He points to the “coexistence of contradictory articles in the Rome treaty”: Article 30, which sets out a blanket prohibition on quota-like restraints on the free movement of goods, and Article 36, which sets out a limited number of justifications for such restraints. This is not a contradiction. It is a simple rule and exception, the exegesis of which is relatively straightforward for lawyers and political scientists alike. Unless a state can justify a particular measure under one of the heads set forth in Article 36, the measure

10. Burley and Mattli, “Europe Before the Court,” p. 44.

falls under the prohibition in Article 30. Garrett argues further that the exceptions in Article 36, “public morality, public policy, or public security,” are “vague and potentially of wide scope.” In fact, however, in the *Cassis de Dijon* case Germany was unable to justify its minimum alcohol requirement on any of the enumerated grounds. The closest it could come was public health; it tried to argue that minimum alcohol restrictions discourage drinking because consumers will content themselves with one very strong drink rather than several weaker ones. This argument, as lawyers say, did not pass the “giggle test.” And the court gave it the treatment it deserved.

How does the court decide? On the basis of prior cases, directives, and treaty texts, supplemented by the Advocate Generals’ technical, detailed, and often masterful opinions, as well as a wealth of academic commentary. Even if a judge has a fixed political destination in mind, how far she or he can advance toward it depends on her or his skill as a lawyer. The judge must be able to make arguments that conform to the ordinary meaning of a written text and that fit with the context of that text—the structure, organization, and stated purposes of a treaty or law.

At issue here is more than disciplinary pride and prerogative. Without understanding the way lawyers and judges think and reason on their own terms, it is impossible to grasp the mask/shield concept we put forward. Indeed, it is impossible to understand the neofunctionalist concept of indirect penetration of the political domain. Political significance ultimately will attach to legal decisions, as Ernst Haas once argued they would to economic decisions.<sup>11</sup> But political objections both during and after the decision-making process will have to be framed as legal objections—as alternative readings of the relevant legal text. In this context, as long as the court preserves sufficient fidelity to protect its legitimacy and persuade its audience of national courts, it enjoys a significant advantage over the member states.

### Charting the course of the court

We applaud Garrett’s willingness to specify hypotheses based on a theoretical model. Only thus can scholarly debate generate valuable empirical research. Unfortunately, however, the hypotheses he generates fail even on the one example he offers as confirmation for his model, the court’s rejection of liquor import restrictions in the *Cassis de Dijon* case. Nor can they be extended to other cases without a precise and externally verifiable theory of state interests.

Garrett’s model predicts that: (1) a member state will evade an adverse court ruling if the market share and political clout of an industry harmed by the decision is large; and (2) where such evasion is likely on the part of a powerful

11. Ernst Haas, “Technocracy, Pluralism, and the New Europe,” in Joseph Nye, *International Regionalism* (Boston: Little, Brown, 1968), pp. 149–79 and p. 152 in particular.

member state, the court will avoid ruling against that state in the first place. As evidence for these predictions, Garrett offers several explanations for the German government's compliance with the *Cassis* decision.

His first explanation rests on the primacy of sectoral interests in government calculations. The German government's willingness to comply with an adverse decision in *Cassis*, he claims, was based on the calculation that the decision would affect only a small segment of the German liquor industry, the producers of fortified wines, rather than the powerful wine and beer industry. This proposition is squarely contradicted, however, by a nearly identical case decided seven years later involving the German beer industry. The German government argued for the legality of German beer purity requirements on the grounds, as in *Cassis*, that these requirements protected public health.<sup>12</sup> Here is an example of precisely the sector that Garrett speculates would have led the German government, and hence the court, to reverse the positions taken in *Cassis*. Yet as in *Cassis*, the court found against Germany; and as in *Cassis*, Germany complied with the decision.<sup>13</sup> Moreover, even in *Cassis* itself, if Germany did recognize the decision as laying down a general principle of mutual recognition—allowing the import of any alcoholic beverage lawfully produced and marketed in another member state—then all domestic alcohol producers should have been concerned about the ruling. Sectoral pressures should have changed accordingly.

Garrett's second explanation for German compliance with *Cassis* posits an overlay of general economic interests on top of specific sectoral ones. After the decision was handed down and established as the foundation for a general principle of mutual recognition, he argues, Germany should have perceived its advantage as "the most competitive economy in Europe" and pushed for the principle as an instrument of trade liberalization. Yet Germany historically has *opposed* mutual recognition as a principle not of trade liberalization but of acquiescence to other nations' standards.<sup>14</sup>

In sum, Garrett's own theory, operationalized with evidence of Germany's actual positions, predicts that both sectoral and general interests should have pointed toward *noncompliance* with *Cassis*. But Germany complied.

A deeper methodological problem is at work here. Garrett is able to cut *Cassis* to fit his mold because he does not subject the interests he posits to

12. Case 178/84, *Re Purity Requirements for Beer: E. C. Commission v. Germany*, ECR 1227 (European Court of Justice, 1987).

13. Foreign beer is today readily available in Germany and the volume of foreign beer imports has increased steadily ever since 1988. See Bundesministerium für Ernährung, Landwirtschaft, Forsten, *Statistisches Jahrbuch über Ernährung, Landwirtschaft und Forsten* (Statistical yearbook on nutrition, agriculture, and forestry) (Münster-Hiltrup: Landwirtschaftsverlag, 1993), p. 244.

14. To take only the most recent study, Alter and Meunier-Aitsahalia find that "Germany and France have been the strongest opponents of mutual recognition because, being high standard countries, they have the most to lose." See Karen Alter and Sophie Meunier-Aitsahalia, "Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision," *Comparative Political Studies* 26 (January 1994), pp. 535–561; the quotation is drawn from p. 550.



external verification. Most of the cases that come before the ECJ are sufficiently complex that they may be plausibly said to affect any number of potential state interests, particularly in retrospect. Conflicting interpretations of both the issues at stake and the significance of the court's ruling introduce additional ambiguity. Meaningful testing of models like Garrett's against thirty years of ECJ case law thus will require careful specification of a preference function that takes full account of the complexity of modern economic management and that is independently verified.

## Conclusion

Overall, our best argument against Garrett is the ECJ's evident record of success and member state reactions to that success. Anthony Arnall recently reviewed the signs of member state distress, ranging from Chancellor Kohl's public charge of unwarranted judicial activism in 1992 to the restrictions on the court's jurisdiction set forth in the Maastricht treaty.<sup>15</sup> Kohl was unequivocal: "[The Court of Justice] does not only exert its competencies in legal matters, but goes far further. We have an example of something that was not wanted in the beginning."<sup>16</sup>

Has the court then dropped its mask? A neofunctionalist analysis would argue that in the march toward European Union, as community building gathered speed, the issues before the court have become more politically salient. With heightened political visibility, the mask of law becomes more porous and the shield more brittle. Even here, however, the member states tacitly accept that although they can limit the court's sphere of operation by curtailing its jurisdiction, they cannot intervene within that sphere by asserting their preferences against the court's creeping extension of community norms.

It is time to move forward. The next round of this debate needs a fresh infusion of data—specific evidence of whose interests are being advanced, and how. It will not, however, be a debate between rational choice theorists and lawyers who purportedly believe, to borrow Garrett's phrase, in "the innate power of 'the law,'" as if the label alone conferred coercive force.

This is a canard that should be banished once and for all. It is entirely rational for individuals to decide to be governed by a set of rules, applicable to and ascertainable by all on the basis of logic, consistency, and ordinary meaning. To so decide is to hive off a domain from pure political struggle. It is also to empower lawyers and judges, whose power derives from their special expertise. In the European Union, it is to establish a context in which one set of preferences, developed within a self-interested technical community on the

15. Anthony Arnall, "Judging the New Europe," *European Law Review* 19 (February 1994), pp. 1–15 and p. 11 in particular.

16. "Chancellor Kohl Accuses the Court of Going Beyond its Competencies: The 'Paletta' and 'Boetel' Cases," *Europe*, no. 5835, 14 October 1992, p. 9.

basis of an initial legal instrument, will be systematically preferred over another set of more immediate preferences advanced by member states in any given instance. This is the dynamic that Haas described with respect to economics. We argue that it worked in law. And we argue that neofunctionalism offers a powerful analytical framework precisely because it offers a political explanation of legal power.