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Does Europe have a “German Problem” Once Again?

Since the beginning of Europe’s sovereign debt crisis, Germany’s reluctance to shoulder the responsibility of rescuing the euro has drawn considerable criticism. Whatever we may think about the quality of Merkel’s leadership, her attitude is puzzling above all from a long-term analytical perspective. Historically, the integration of Europe started in the 1950s when the founding fathers of Europe set out to address Europe’s “German problem”. Shedding its hegemonic ambitions, the Federal Republic of Germany became for several decades an unconditional supporter of European integration. Today, Germany’s place in Europe is once again in question. Chancellor Merkel’s hard-nosed defense of Germany’s national interests seems to indicate a post-reunification shift from the pro-integration “Bonn Republic” to a more self-centered and assertive “Berlin Republic”. The question is, therefore, whether Europe has a new German problem on its hands: How far will Germany’s assertiveness go? And will it jeopardize the foundations of the European Union?

The contributions to this EUSA Forum offer tentative answers to this question. Mark Blyth and Abraham Newman criticize Germany for trying to avoid blame for a crisis that it helped create by massively extending credit and selling exported goods to peripheral member states. As Blyth and Newman see it, German leaders should now stop pushing for fiscal austerity and should underwrite a European regime of “hegemonic stability”. Tobias Schulze-Cleven sees Chancellor Merkel’s hesitant handling of the crisis as a sign of German fragility, rather than strength. He highlights Germany’s “domestic institutional exhaustion” after many years of incurring the costs of reunification and economic adjustment. For Mark Vail, Germany has effectively turned “parochial” and abandoned its postwar commitment to multilateralism. Vail sees this as a potentially durable change in Germany’s political identity. For Brigitte Young, the main problem is Merkel’s and other German officials’ adherence to “ordoliberalism”. Germany’s quasi-official economic doctrine does not work well at all in times of crisis, but policymakers are still clinging to it.

I hope these contributions will be useful for readers to think more deeply about a highly topical problem. Since this also happens to be the first EUSA Forum that I am editing, I want to acknowledge the good work of Amie Kreppel, my predecessor as EUSA Review Editor. I will do my best to continue in the same spirit.

Nicolas Jabko, EUSA Review Editor

Thanks to Germany it’s 2008 all Over Again

Mark Blyth and Abraham Newman

The greatest swindle of modern times is the massive ‘bait and switch’ perpetrated on the publics of Europe by their governments on behalf of their banks. What we refer to today as the ‘European Sovereign Debt Crisis’ began largely as a private sector financial crisis when too big to fail banks got caught with too many worthless assets on their books in 2008. Politicians deftly, and all too quickly, turned this into a crisis of the public sector by profligate governments, ironically. While the story of fiscal irresponsibility has some plausibility in the Greek case, it simply isn’t true for much anyone else. In short, ballooning public debt is a consequence of the financial crisis, it is not a cause of it. It occurred when the debt of the private sector was transformed into public sector debt via bailouts, lost revenues, lower growth, and higher transfers. Although a politics of blame and austerity may serve the short-term electoral interests of politicians from European countries that currently enjoy low debt burdens, it will undermine their long-term growth prospects and fracture the European solidarity needed to restore economic stability to the continent.

It is important to get the causality right if you are going to apportion blame. Blame should be focused in large part on unanticipated consequences of the Eurozone system. With the introduction of the Euro, credit rating agencies exported Germany’s stellar rating across the members. Banks with excess capital in Germany and other core countries found new clients in the periphery with new access to credit, who then turned around and bought German goods. A liquidity cycle was born in Europe that seemed to benefit everyone on the upside but then came crashing down when the financial crisis exposed the underlying economic fiction. The German government, however, has largely cast the blame on the individual states saddled with debt from the rupture of the Euro-liquidity boom, ignoring the larger systemic nature of the crisis. The banks are back, raking in bonuses and using the taxpayers as insurance, while European citizens are squeezed to pay for the mess.

Rather than see this transfer as a structural inevitability that Europe as a whole had to deal with, Germany painted the crisis as a struggle between the parsimonious North and the profligate South. The German answer to this misdiagnosed crisis, now universally applied, was austerity: voluntary internal deflation in the periphery to reduce wages and prices to levels commensurate with their external financial position. In other words, the Germans thought it was a good idea to run a gold standard in a multi-state democracy despite their own supposed deep historical memory of what happened the last time this was tried.



The results were predictably disastrous for the periphery states. They have suffered year-on-year GDP declines, and as a result their debt to GDP ratios have increased, not decreased, despite the cuts. This makes their bondholders more nervous, and so to placate them they must make more cuts, which results in more debt, and occasionally a loan from the Germans (kicking the can down the road), but it's really just debt on top of debt. This has been going on for a year and a half and it no longer stops at the periphery.

The initial cost of buying and holding Greek debt in order to stabilize the Eurozone was around 50 billion euros. Today, after several failed grand bargains, and the latest Merkel/Sarkozy press conference where once again nothing was actually done, if one tracks the contagion mechanism around the periphery and adds up the cost, it now ends up on the balance sheets of Italian and French banks at around 2 trillion euros. This is too big to bail.

The result is that the Eurozone today resembles a 2008 vintage subprime Collateralized Debt Obligation (CDO). The periphery are the riskiest junior tranche, the Italians are, appropriately, the mezzanine tranche, with France and Germany as the senior tranche. And just like 2007-8, all you need is the junior tranche to default and the losses rip through the mezzanine and end up destroying the senior tranche. Once again it stands or falls together, this time through contagion rather than correlation, but the principle is the same.

What will cause the CDO to implode? Exactly the austerity policies Germany demands of everyone else, which as we now see, have slowed growth in Germany's main markets and reciprocally, in Germany itself, to a standstill. All this will do is make bondholders more nervous and the German response will be the same – more austerity. Europe has reached a point where its collective bank exposures threaten to be bigger than its collective bailout capacity.

Given the real consequences of the crisis in the periphery for German growth prospects, it is time for the German government to abandon the blame and austerity line. Instead, Merkel needs to commit to a new politics of European solidarity (Newman 2010). She must educate her electorate about the German contribution to the Eurozone crisis and convince them that it is their responsibility to back faltering European partners. At the same time, a grand strategy centered on European solidarity could send a signal to market actors who have come to doubt the policy capacity of the Union and possibly forestall further contagion effects. It has come to the point where moral hazard must be sacrificed on the altar of hegemonic stability.

Mark Blyth, Brown University
Abraham Newman, Georgetown University

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Beware of German Fragility

Tobias Schulze-Cleven

"If the stakes were not so high," *The Economist* recently wrote, "Europeans' incompetence in the eurozone debt crisis would be comic." No doubt the situation is dire, and many observers are rightly pointing their fingers at Germany. Europe's largest economy has been reluctant to take on the responsibilities associated with being the continent's effective hegemon. As a result, Germany's half-hearted actions have contributed to turning the sovereign debt problems of a few small countries – Greece, Ireland and Portugal – into a full-blown European crisis with severe unemployment, austerity policies and protests in the streets.

Under German tutelage, the European Union has taken a series of small, reactive steps whose parsimony and lateness have failed to reduce market uncertainty. Current plans for the mid-2013 transfer of the temporary European Financial Stability Facility (EFSF) into the permanent European Stability Mechanism (ESM) are symptomatic. While European leaders have promised to protect private investors from losses through sovereign debt restructuring for the period of the EFSF's existence, it is unrealistic that these conditions could simultaneously be honored under the EFSF and changed under the ESM. The lack of a credible long-term policy stance has allowed speculation about sovereign defaults to spread to Spain and Italy. Moreover, simple backward induction tells us that – *ceteris paribus* – France's top credit rating will logically be questioned next, and then it will be on to Germany's.

European powerbrokers are increasingly appalled at German inaction. For instance, Luxembourg's Jean-Claude Juncker, who is the President of the Euro Group and the longest-serving EU head of government, openly charged the German government with "simple" thinking and "un-European" behavior after Chancellor Merkel "rejected" his Eurobond proposals. What is behind German thinking? Two interrelated perspectives can illuminate the drivers of German behavior.

A Marxist interpretation posits that governments are in the pocket of the financial oligarchy. Various potential mechanisms can combine to produce a tight coupling of capital and the state, including the effects of understaffing in the public bureaucracy, the desire of key public



officials to ingratiate themselves with private-sector firms with whom they plan to later seek employment, a state's mercantilist impulses, and the government's fear of domestic economic instability. Seen through this lens, Germany's support for the EFSF appears to have been oriented toward protecting the performance of its financial sector. The EFSF has effectively ensured the continued servicing of the European debt held by Germany's banks and insurance companies, while simultaneously allowing them to reduce their risk exposure and shift the potential losses associated with "problematic" bond investments onto European taxpayers. With the banks having by now sold off many of their precarious positions, the EFSF seems to have succeeded in stabilizing Germany's banking industry. In turn, the German government has now been "freed" to embrace Deutsche Bank's proposal for a "soft" restructuring of Greek debt so as to signal publically that private investors are contributing their "fair" share.

A second approach highlights the schizophrenic reactions of a public that has been put through the neo-liberal wringer. As illustrated by the widening of the euro-zone's trade imbalances over the last decade, there is no denying that Germany's industrial exporters have greatly benefited from monetary integration in Europe. It has prevented the appreciation of the German currency vis-à-vis that of other European countries, while stimulating the demand for German goods in Southern Europe through its pro-cyclical effects.

Many Germans, however, experienced the last decade quite differently. In combination with aggressive employers, "responsible" unions and reform-oriented politicians, the overly tight local monetary stance contributed to depressing income growth, pushing up unemployment and increasing economic insecurity. Over time, entirely legitimate popular discontent increased. However, just as in the United States, its expression has been channeled through the particular locally-dominant variant of prevailing liberal ideology. While the libertarian heritage of rugged individualism acted as a filter that shaped the emergence of the American Tea Party movement, the German prism has been that of ordoliberalism, which has been credited with enabling the country's postwar economic miracle and served as the inspiration behind Germany's push for the euro-zone's Stability and Growth Pact. Politicians have reacted to this popular sentiment, and the widespread associated fear of Europe's potential transformation into a "transfer-union," by emphasizing the importance of using the current crisis to get other European countries to pursue structural reforms and rein in their "fiscal profligacy."

While the first of these two stories remains largely hidden from public view, the latter features prominently in the political theater staged daily in the German

media. What connects them is the reality of German domestic fragility. Before unification, the internal "semi-sovereignty" of the German state appeared to support the country's economic performance and to produce patterns of "reflexive multilateralism" in international affairs. Since then, however, state weakness has taken its toll, and the perceived strength has become a liability. Unable to impose the costs of unification and economic adjustment on a strong corporatist society, the state's welfare institutions have been hollowed out and its debt burden has sharply increased. This domestic institutional exhaustion has acted as a negative externality that has constrained German policy toward the European Union.

At the time of writing, the further outlook remains uncertain. The German government's proposed pact for competitiveness seeks to increase European-level coordination of national policies, but it falls short of functioning as a genuine European game-changer that could compensate for the pro-cyclical effects of a common monetary policy. At the same time, German opposition to the idea of Eurobonds seems to be softening. For better or for worse, the German government will keep things exciting for scholars of the European Union.

Tobias Schulze-Cleven, University of Bamberg

The New Parochialism: Germany's Inward Turn and the European Economic Crisis

Mark Vail

In the 1990s, many observers questioned whether Germany, having tackled the challenge of reunification, could become a "normal country." This formulation evoked a Germany willing to pursue its own interests at home and abroad, no longer forced to bury them in multilateral garb or to accompany each assertion with a qualifier about the consistency of its interests with those of Europe and the wider world. With some exceptions, most held that the new, post-reunification Germany would behave much like the old, "remain[ing] committed to multilateralism" and, when forced to choose, making its interests subordinate to the trans-Atlantic and European structures to which it owed its post-World-War-II rehabilitation and its successful return to the community of nations.

Germany's reactions to the post-2007 economic crisis, and particularly to the so-called European "sovereign debt crisis," show that these predictions missed the mark, but not in the ways that some in the 1990s had feared. At the time, such skeptics predicted an increasingly aggressive Germany, willing to flex its economic muscles in the pursuit of geopolitical ends, even at the cost of its European neighbors. Instead, during the



past four years, Germany has turned inward, severing the time-honored link between national and multilateral interests and willing to adopt a parochial stance when the concomitance between national interest and multilateral packaging began to erode. This has resulted in inconsistency and even hypocrisy among Germany's leaders, as they struggle to maintain the veneer of the national-cum-multilateral model in the wake of daunting circumstances. But the trend is clear: Germany has often thrown multilateralism overboard when it conflicts with elite preferences and public opinion, real or imagined. Rather than the aggressive Germany that some observers in the 1990s feared, the past four years have witnessed the emergence of a different Germany, still an economic giant but also a country that has replaced an optimistic cosmopolitanism with a sometimes churlish parochialism as its dominant key.

Though this identity crisis has been visible in a number of domestic policy arenas, such as the adoption of a major Keynesian stimulus package in 2008-2009 that dared not speak its name, nowhere has it been more visible, and more damaging to both itself and its allies, than in the ongoing European liquidity and banking crisis. Notwithstanding its sometimes stunning amateurishness in negotiating a series of halting and inadequate bailouts for Greece (and now, it seems likely, for other European countries, as well), Germany has adopted a relatively consistent, if broken, policy line: protect German banks and other holders of debt in fiscally shaky European countries such as Ireland, Greece, Portugal, and Spain, insist on imposing crushing austerity regimes on countries that are targets of bond-market speculation and fiscal imbalances, and resist the adoption of any measure that might suggest collective European responsibility for Europe's economic welfare or any loosening of Europe's masochistic hard-currency regime. This line has been pursued even as Germany has denied or ignored the fact that Germany's massive trade surplus was funded in part by Spanish, Greek, Portuguese, Italian, and Irish consumers (among others), in part with money lent by German banks in the form of purchases of those countries' sovereign debt. It is also important to recall that one of Germany's primary interests in agreeing to European Economic and Monetary Union—the same set of institutions on whose deflationary altar Greek, Irish, and Spanish workers are now being sacrificed—and the way that the project was sold to a skeptical Germany public—was boosting German competitiveness by bundling up the Deutsche Mark with other currencies in order to dampen the prices of German goods in other European markets.

Germany's recent behavior suggests that the country of former Chancellor Helmut Kohl and Foreign Minister Hans-Dietrich Genscher, deeply committed

to multilateralism and careful to balance Germany's interests against those of its European allies, is a thing of the past. The advent of the financial and economic crisis in 2007-2008, and the resulting exposure of the unworkable deflationary bargain at the heart of EMU, which many EMU member states are now unable economically to cope with or politically to accept, confronted Germany with a stark choice: either lead by full-throated example and support European institutions, even at the price of imposing costs on German taxpayers and diluting EMU's monetarist character, or sacrifice its commitment to EMU except to the extent that it continues to serve Germany's economic interests as a large, high-skilled, export-driven economy. Germany chose the latter. For decades, Germany had profited from both Europe's political structures, which gave it political legitimacy and allowed it to rehabilitate its international image, and economic structures, which supported its export-based prosperity, and so it is surprising that it has been so willing to abandon these commitments with the economic tide turned. To be sure, some of the small-mindedness of Germany's response can be ascribed to Angela Merkel's weakness as a leader in time of crisis, her limited understanding of economics, and her sometimes stunning acceptance of clichés about southern Europeans being lazy and shiftless. To be fair, one must also recognize that Merkel's CDU is forced to deal with an ideologically strident and inflexible FDP coalition partner with a monomaniacal interest in tax cuts. But it is hard not to sense that something broader and more durable has happened to Germany's commitment to multilateralism and its associated political identity. One can only imagine what Genscher must be thinking. If Germany is still a model, then it has become a model of a very different kind than that imagined by the country's post-war leaders. Whether it has become a durable European "problem" is as yet unclear, but the evidence to date is not encouraging.

Mark Vail, Tulane University

Germany's Puzzling Response to the Eurozone Crisis: The obstinate defense of *Ordnungspolitik*

Brigitte Young

Financial panic is spreading like wildfire across the globe. On August 8th 2011, the markets registered the biggest stock market plunge (on average 5 percent) since 2008 across Europe, Asia and the United States, only to swing back and recoup some of the losses the next day. Instead of calming the markets with credible policy responses to the public and private debt crisis, the world's political leaders further unsettle the markets



by blaming each other for lack of leadership. Europeans accuse American political leaders for their ideological stand-off in raising the debt ceiling, thus provoking a historical downgrade of US Treasuries, and Americans blame Euro-leaders for their lack of policy coordination and their insistence on austerity rules to solve the sovereign debt crisis. China's unusually terse criticism of America's handling of its huge debt is a further reminder that political leaders disagree on what needs to be done to solve the financial crisis. In the process the crisis gets bigger and more expensive at each new turn of market panic.

Despite the latest agreement reached among the European leaders on 21st July 2011 to shore up confidence in the Eurozone by doubling the emergency fund to Greece, lowering the interest rates of indebted countries, permitting the European Financial Stability Facility to buy government bonds on the open market, and including private investors in debt agreements, exactly the opposite happened. The much feared contagion has now engulfed Cyprus, borrowing costs for Italy and Spain have increased to over 6 percent in early August, and France has also been caught up in the turmoil having to pay a premium above that of Germany. According to Kenneth Rogoff, it is not economics as much as the lack of credibility of policy leaders who are disconnected from reality that unsettle the markets. This disconnection is no more apparent than in Germany.

Angela Merkel saw no rush to cut short her summer hiking vacation in Trentino-South Tirol in August. While some pundits applaud her calmness in the eye of the storm, others call her policies towards the sovereign crisis as "Merkel's Folly" (Jones 2010). The follies include a lack of leadership, an inability to understand the global bond markets, her concern with domestic politics, and her insistence on fiscal discipline to cure the plight of indebted countries. Speculations vary as to the Chancellor's behavior. Explanations range from personal attributes (such as Merkel's academic training as a physicist, her distrust of markets and her trust in rules), to generational changes (from the wartime generation to a Post-World War II generation having no personal experience with war), to the constraints of domestic politics (including frequent election cycles, the conservative German Constitutional Court, voter concern with fiscal prudence, and the strong populist media outcry against using tax payers' money for any rescue efforts) (Young/Semmler 2011; Young 2011).

Yet all these explanations share one common characterization of the System Merkel: the belief in a rule-based system, which is the hallmark of German ordoliberalism. The belief in setting rules and then let the market forces work is shared by German economists, bankers, and politicians alike. This is in stark

contrast to the French notion of a politicized discretionary macroeconomic governance at the European level (Jabko 2010). While the critics of Germany cite the slow, fragmented, uncoordinated response of Angela Merkel, she and her economic advisors see the EMU as a depoliticized rule-based system based on Treaties, which need to be strengthened in order for the markets to work efficiently. That Germany violated the Stability and Growth Pact (with France) in 2003 is only one more reason for Merkel to continue to insist on automatic penalties for any violators of fiscal rules. German economists and Central Bankers abhor the idea of turning the European Central Bank into a bailout regime. This would, as Otmar Issing (2011) warns, start down a slippery road to a regime of fiscal indiscipline and threatens the "most successful project of economic integration in the history of mankind".

Setting rules and letting markets operate freely may work in normal times, but the theory may break down in times of irrational global financial markets. The problem does not lie with Angela Merkel or Germany's obstinate refusal to bail out indebted countries. It is the result of ordoliberalism which is the undisputed school of economic thought in every economics department at German universities.

Brigitte Young, University of Münster

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The Emerging History of European Law

*Bill Davies**

The European Union is, as students of all forms of European integration know, a product of the law. Since its humble origin as a limited union of six national coal and steel industries in the 1950s, its development has been greatly shaped by its uniquely authoritative Court of Justice (ECJ). The ECJ's jurisprudence and decision-making has established a European legal order that is, compared to international law, coherent, effective and enjoys a significant impact on the national legal systems. European citizens, firms and judiciaries, empowered by the structures of recourse to the ECJ, supply the court with thousands of referrals for preliminary rulings each year. The case law of the court creates 'integration-through-law, pushing the development of policy fields hitherto blocked by recalcitrant governments. We need only to think of the extensive competition policy or the area of equal pay as examples. The ECJ has placed itself on top of this system, akin to a federal and constitutional court, in some ways attempting to emulate its counterpart in the United States.

The ECJ laid the groundwork for this quasi-constitutional order in two judgments in the early 1960s – the now famous *Van Gend en Loos* and *Costa vs. E.N.E.L* decisions of 1963 and 1964 respectively. The court then built on the direct effect and supremacy jurisprudence over the subsequent decades in case law familiar to all of us. Despite its modest beginnings in the Treaties of Paris and Rome, the ECJ had now – or so the conventional interpretation, espoused by scholars such as Joseph Weiler and Eric Stein, argues – 'constitutionalized' the Treaties and secured the rule of law in the Community. Without the acquiescence and cooperation of national courts these doctrines might have been empty gestures given the striking lack of a constitutional mandate for the ECJ in the original treaties. Over time, however, national judiciaries have by and large come to accept the practical consequences of the decisions. In most Member States, this reception process has taken decades with the highest national courts offering particularly stiff and, in some cases – Germany, for instance - continuing resistance. What is all the more remarkable is that this initial legal revolution took place in a period of European integration (1963-1965) that is traditionally characterized by the demise of the federalist ambitions of the European Commission, personified

in its president Walter Hallstein, and the rise of the Member States as the key veto-holding protagonists in the Community system. How did the ECJ manage to do this? Did it slip under the radar of the governments and their populaces, pushing through legal integration while most were concerned with completing the Common Market and dealing with De Gaulle? Did the revolution have supporters outside the court? How have scholars explained the apparent success of the ECJ in driving forward legal integration? There seems to be a wealth of questions relating the evolution of the European legal order that legal historians are only now attempting to answer.

That archival documents are becoming available and historiographical work is now beginning is an important development on scholarship on EU law and the court. Until now, attempts to explain the growth in influence of the court have come predominately from the ECJ itself, or from legal and political scientists. ECJ judges and officials have been prolific in justifying its most ambitious and contested doctrines, claiming the court has defended the rule of law against the short-sighted or self-interested intrusions of the Member States. The well-known works of Robert Lecourt and Pierre Pescatore stand out as prime examples. The 'constitutionalization' school, promoted famously by the works of Eric Stein and Joseph Weiler in the 1980s, actually fortified the foundational story promulgated by the ECJ. They argue that the ECJ did indeed 'constitutionalize' the Treaties of Rome successfully, creating a European legal order that, measured on most parameters, is similar to the constitutional legal order of a federal polity. Although national administrations and high courts have certainly contested this to an extent, their ultimate acquiescence has seen the establishment of a rule of law in the European Union. While this constitutional approach was quite prevalent by the early 1990s, events such as the Maastricht Treaty, undermining legal unity by adding to two new intergovernmental pillars to the new Union, as well as the unwillingness of the German Constitutional Court to subject national constitutions to a supreme European law without democratic legitimacy in the famous Maastricht ruling led to a serious reassessment by legal scholars. In the following decade the classic constitutional narrative diversified into numerous neo-constitutional takes on the nature of European law, creating a huge volume of legal and political science scholarship of great sophistication. This scholarship focused on other factors explaining the remarkable development of European law. The Realist approach, exemplified by Geoffrey Garrett, emphasized the strategic political game played by the ECJ in facilitating the interests of the largest Member



States. Subsequently, the Neo-Functionalist focused on the conscious self-empowerment of the ECJ, working in alliances of shared interests with sub-national actors, such as lower national courts or litigants. Much of the best scholarship in this particular area has been authored by Karen Alter, Alex Stone Sweet, Anne-Marie Slaughter and Walter Mattli. Despite its search for other explanations for the court's growth, this scholarship was and is overwhelmingly written within the Stein-Weiler constitutionalisation paradigm.

Most recently, a number of new methodological approaches have emerged that have attempted to shed new light on the development of the EU's legal order. In some cases, there are the first signs of dissent against constitutionalism itself. It has been argued by Danish historian, Morten Rasmussen, for instance, that it constitutes a fundamental misrepresentation of the history of European law and originated as a legitimating strategy of the ECJ. In a similar dissenting vein, Will Phelan has emphasized the special, sui-generis 'self-contained' nature of Europe as an international organization. A new Bourdieu-infused sociology of law has emerged concomitantly claiming that the process of constitutionalisation should rather be considered a classic process of judicialization, through which jurists have managed to empower themselves and their socio-legal capital through the European construction. Writers in this area include Antoine Vauchez, Mikael Risk Madsen and Antonin Cohen. Likewise, Peter Lindseth, a legal scholar with a doctorate in European history, has recently published a highly important, major interdisciplinary synthesis, *Power and Legitimacy: Reconciling Europe and the Nation State*, arguing that European integration constitutes a new stage in the rise of the administrative state after the Second World War, in which regulatory power is defused and fragmented 'away from the constituted bodies of representative government at the national level, to an administrative sphere that now operates both within and beyond the state'. In this synthesis, the attempt to establish a constitutional practice by the ECJ went against the very nature of European law and is among the key sources of tension in the contested legitimacy of the European Union.

In this field of competing interpretations, the actual historical work completed on European law is still massively underdeveloped. Thus far, the huge degree of theoretical sophistication offered by the explanations outlined above is still undermined by their relatively weak empirical foundations. The legal and social science models are based on secondary sources, retrospective interviews and judicial decision-making theory taken from the experiences of other legal systems. Only in the last five years or so has a new wave

of legal historians emerged, who after spending long and fruitful periods of study in national and European archives, are able to offer a healthy dose of detail, nuance and documented fact to test the models so long established in the field. The first findings of the legal historians emerged in the *Journal of European Integration History* in late 2008. The forthcoming publication of a special edition of the *Contemporary European History* journal will serve to broaden and deepen the scope of current historical scholarship. Furthermore, the forthcoming book by Bill Davies, entitled *Resisting the ECJ: Germany's Struggle with European Law*, will be the first monograph in this new trend. This new history not only revisits the models explaining the ECJ's evolution, but also redresses an imbalance in existing scholarship on the EU. Historians of European integration have by and large ignored or underplayed the important role played by the ECJ. The most prominent historians of European integration – Alan S. Milward, Wilfried Loth, Michel Dumoulin, Gerard Bossuat, N. Piers Ludlow and Wolfram Kaiser – have certainly been aware of the court and its influence, but it is has never been their central object of attention. The politics and economics of European integration have, perhaps understandably, dominated its historiography. Law has been the junior partner in the story of the EU so far, but this looks to be changing in the near future.

Bill Davies, American University

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Sue Arrowsmith and Peter Kunzlik (eds.). *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*. Cambridge: Cambridge University Press, 2009.

Public procurement is the process by which government bodies purchase goods and services from the private market. Starting in the mid-1990s, the use of public procurement to promote social and environmental goals, for example by not buying from suppliers that use child labor, or by purchasing green energy, has been highly debated in the European Union. At the beginning, the European Commission, as well as most of the Member States, has been very skeptical about so called “secondary policies” in procurement law. Up until now, the skepticism regarding social goals in procurement law is highly vivid as can be seen in the debate about the case *Rüffert v. Land Niedersachsen* (C- 346/06) and the handbook of the European Commission “Buying social: A guide to taking account of social considerations in public procurement”. “Green procurement” on the other hand has become a goal in itself at the European level.

This edited volume elaborates on the current legal status of these two goals in European procurement law. Social and environmental considerations in procurement law are potential barriers to trade. The book addresses the question of how the balance between free trade and the desire of national governments to use procurement as a policy tool is drawn or should be drawn. One part of the question examines the extent to which the European law, especially the new (2004) directives, limits the discretion of the Member States. Subject to the other part is the extent to which the European law requires or encourages the Member States to use their procurement power to promote the two goals. The general aim of the book is not to provide a comprehensive account of the law but to elaborate new legal developments.

The book is organized into twelve chapters. Four general chapters discuss social and environmental policies in European procurement law written by Sue Arrowsmith and Peter Kunzlik. In the remaining eight chapters special legal questions within these field are addressed: Hans Joachim Priess and Moritz Graf von Merveldt examine the impact of EU state aid rules on horizontal policies; equality issues in EU procurement law are addressed by Christopher McCrudden; Rosemary Boyle deals with disability issues; the promotion of SMEs is examined by Nicholas Hatzis; green energy

is addressed by Peter Kunzlik; eco-labelling issues are examined by Dan Wilsher; CSR in the utility sector is outlined by Sue Arrowsmith and Colin Maund; exclusion for serious criminal offence is illustrated by Sope Williams.

In the introductory chapters, a new term for the inclusion of social and environmental policies in EC procurement law is first developed: horizontal policies. In contrast to the term “secondary policies”, this new term elucidates that horizontal policies in procurement law should have equal status with other governmental policies. Another term and category that is introduced in the book is the distinction between the government as a regulator and the government as a purchaser. Implicitly both categories are already used in the European procurement law. The editors argue that the goal of European procurement law is to create an internal market. Therefore the autonomy of the public and private purchasers should only be restricted when there are special reasons to do so, such as the tendency of governmental purchaser to favor national industry and thereby to interfere with the internal market. Generally, the European procurement regime protects the internal market through three different mechanisms: prohibiting discrimination, requiring transparent procedures and removing certain market restrictions. As saving public expenditure and improving the quality of services does not contribute to the creation of an internal market per se, the authors come to the conclusion that this is not one of the goals of the European procurement law. From a legal analysis point of view they argue that the European law gives a wide discretion to the Member States for pursuing horizontal policies.

The contribution of this book is to provide a framework and taxonomy for future analysis that has not previously been offered. It presents a good overview over the various legal problems in this area. Different views about the “new directions” for European procurement law are offered. Unfortunately, chapters five to twelve, dealing with different topics in the area of horizontal policies in public procurement like the procurement of green energy, do not always refer explicitly to the outlined analytical framework. In sum, I find this book to be a very valuable description of the legal problems and political potentials arising from social and environmental considerations in procurement law.

Rike U. Krämer, University Bremen



Alter, Karen J. *The European Court's Political Power*. Oxford: Oxford University Press, 2009.

Karen J. Alter, one of the most prolific authors in transnational judicial politics, has been studying the European Court of Justice for two decades. Her latest book collects the various fruits of this research that were previously only accessible in different journals and collections. Although the chapters – some of which are co-authored, some slightly revised – stand for themselves, taken together, they tell a common story about “how the ECJ became a political actor that was capable of transforming European and international politics” (3). Readers familiar with Alter’s writings will want to have a look at the introduction and conclusion in which the author draws more general lessons and outlines a research agenda for the future. They will also be interested in reading the newly written fourth chapter on the role of “jurist advocacy movements in Europe”. All others will find a remarkably creative and stringently argued analysis. The organization of the book follows from a historical logic, beginning with the founding moments of European legal integration and ending with the more recent developments.

Section one contains the introduction and a brief and useful primer summarizing the evolution of ECJ scholarship and explaining the ECJ rulings that have transformed EU primary law into a constitution for Europe. According to the overarching narrative, spelled out in the introduction, the ECJ became influential by strategically and cautiously allying with domestic actors to encourage respect for European law. The most relevant factors are thus exogenous to the ECJ. Indeed, simply replicating the ECJ’s institutional design is not enough for other international courts to become effective vis-à-vis recalcitrant governments. The court’s own agency as well as its activation and support by societal actors are key. The introduction also situates Alter’s work within the somewhat dated battle between neofunctionalism and intergovernmentalism. Between the devil and the deep blue sea, Alter chooses neither. Instead, she confesses a preference for historical institutionalism (HI). Whether this means that she proposes HI as yet another contender or whether in fact she joins in the now popular farewell song to all paradigmatic debates in favour of “sometimes-true” theories and “analytic frameworks” depends on the status she attests to HI – a question that is left open.

The chapters of the second section seek to explain the transformation of the ECJ from a weak and ineffectual actor to the Supreme Court in all but name of an integrated EU legal system. Chapter three examines the point of origin. Why was the ECJ so weak during the ECSC period? Part of the answer is that neither

member states nor societal actors were interested in a truly integrated coal and steel market. Contrary to the idea that legal integration is strongest during political paralysis, the ECJ refrained from aggressive rulings in this period and left practically no imprint. But while the ECJ was timid in the ECSC, it was bold in the early EEC. In the newly written fourth chapter, Alter takes another look at this period of legal revolution, thereby putting into perspective both the legalist story according to which the ECJ simply “discovered” the supremacy and direct effect of EU law, and the neofunctionalist idea that lawyers and litigants through their individual usage of the preliminary ruling procedure set the process in motion. The chapter shows how a network of prestigious Euro-law scholars and ECJ judges actively orchestrated their efforts to construct a “hegemonic constitutional narrative”. This new, Bourdieusian interpretation is in part also a revision of Alter’s own prior analysis, reprinted in chapter five, which essentially drew on a structural argument. The main claim being that the preliminary ruling system in conjunction with the doctrines of supremacy and direct effect created an opportunity for lower courts to side-step higher courts and thereby facilitated the penetration of EU law into national law. Why did national governments not intervene? The section’s last chapter refutes claims based on principal-agent theory that the major rulings basically reflect the interests of Paris and Berlin. Indeed, the Court camouflaged far-reaching doctrinal innovations in politically innocuous rulings and it bred allies in national courts. When the full implications of its new doctrines became manifest, it was too late to turn the wheel around.

The third section asks when and how the ECJ will influence political outcomes. Social support is the crucial enabling factor. Chapter seven examines the Cassis decision, famous for developing the principle of mutual recognition. It argues that the ruling neither reflected the interests of powerful member-states, nor can it be seen as creation of mutual recognition by supranational fiat. Instead, what Alter calls “political follow-through” is key: “ECJ decisions affect policy by helping to mobilize interests in support or opposition of the law, and then by provoking political responses” (17). If “follow-through” is needed to implement judgments, what are the pre-conditions for activating the European legal system in the first place? Analyzing the successful legal challenge to British gender policy, chapter eight identifies several “thresholds”. Transnational variation in court activation, it is argued, can be accounted for by the difficulty of surmounting these thresholds, which in turn depends on (Olsonian) cost-benefit distributions and domestic institutional factors. EU law is not a “one-way ratchet” leading to an ever-closer union. According to chapter nine, the thresholds model implies that “national and



EU legal systems can also be used by private litigants to challenge advances in European integration” (211). Some examples for such a legal backlash are cited, but they still seem few and far between. The final chapter of this section examines the international constraints of judicial law making. Using the WTO banana trade dispute as example, the chapter is an elaborate treatment of the complex interrelation between different legal regimes on several levels of governance.

The final section puts the ECJ in comparison. Alter first presents her comparative framework, in chapter eleven. Here, she moves her previous critique of principal-agent analyses onto a more theoretical plane. The chapter contrasts the two-sided relationship between agent (court) and principals (governments) with the three-sided “trustee” relationship, where a third actor, called the “beneficiary” changes the constellation: Governments as well as the court, understood as “trustee” rather than “agent”, want to convince the “beneficiary” that their decision is in the public’s best interest. This shapes the politics among courts and governments: Rhetorical and legitimacy politics are more important than sanctioning and shirking. The next chapter asks for the differences that make the ECJ stand out. Why is it more active and more influential than other international courts? Interestingly, the most salient factor, access for private litigants, is no longer rare among “new style” international courts. Indeed, by comparing the ECJ with its carbon-copy, the Court of Justice of the Andean Community, Alter argues that it is not the institutional design per se that matters, but rather the socio-political environment, because it shapes the actual usage of access. On the other hand, institutional design is not primarily driven by bargains about the delegation of power but by functional considerations. This sophisticated argument opens the way for comparisons with domestic courts, which also have different functions – administrative review, civil law adjudication etc. – and concomitant design features.

The conclusion of the book spells out lessons for the future study of international courts. The ECJ’s success story is seen as part of a more encompassing development in European history, in which courts in particular, and the rule of law in general have gained importance after the Second World War. For the study of European legal integration, Alter therefore advocates a larger research agenda, connecting European level changes to national evolutions.

This message suggests an orientation towards historical research, even towards the history of ideas. It is in line with Alter’s preference for complexity over parsimony. There is, as she notes “no set of unidirectional hypotheses that predicts when, why, and how the ECJ will be activist or influential” (4). It also suits her

frequent use of counterfactual analysis (would history been different if...?) and her preference for diachronic single-case studies. In addition to the fascinating substantive output, a methodological retrospection of Alter’s research would have been interesting to read. Another blind spot is the normative evaluation of the ECJ’s development and of how it transformed the EU legal system. What for some is akin to a coup d’état, others embrace as civil-rights empowerment. Alter’s is a positive analysis but it cannot escape this question. Not least when the author considers how the European “success” can be transplanted to other international courts, she implicitly takes a (cosmopolitan) normative stand. The “trustee” model in which court and governments justify their decisions in front of the “beneficiary”, a public audience, potentially offers a fruitful framework also for normative theorizing. Yet it is always easy to criticize a book for what it is not rather than appreciate it for what it is: An impressive journey through two decades of ECJ scholarship that nobody interested in EU politics and international legal studies can afford to miss.

Henning Deters, University of Bremen

Andreas Dür. *Protection for Exporters: Power and Discrimination in Transatlantic Trade Relations, 1930-2010.* Ithaca, NY: Cornell University Press, 2010.

Protection for Exporters is a history of 20th-century transatlantic trade liberalization centered on a set of hypotheses on the export lobby. Andreas Dür is professor of international politics at the University of Salzburg. In this work he explains the dynamics of the transatlantic trade policies through the testing of the following five hypotheses on the key role of exporters in trade negotiations:

1. The mobilization hypothesis: Exporters increase their lobbying efforts whenever they face losses in foreign market access resulting from the formation (or the amplification) of a preferential trading arrangement among foreign countries.
2. The influence hypothesis: The stronger the lobbying efforts of exporters, the more concerned a government should be about the protection of exporter interests, while continuing to cater to those import competitors that engage in lobbying.
3. The choice of strategy hypothesis: The more vulnerable a country, the more likely it is to of-



fer concessions to the member countries of a preferential agreement to maintain access for its exporters (“preferential access” and “non-discriminatory access” strategies), and the less likely it is to threaten others with retaliatory measures (“threat” strategy) or to join a rival agreement (“rival agreement” strategy).

4. The bargaining-power hypothesis: The mobilization of exporters excludes the government of a country from a trade agreement and forces it to accept a balance of concessions in an exchange of market access with member countries that it would have rejected given the prior balance of domestic interests.

5. The member-country hypothesis. The willingness of the member countries of a preferential agreement to conclude an agreement with excluded countries increases to the same degree that their ability to extract concessions increases.” (p. 49)

The analysis and the results of *Protection for Exporters* are organized into an introduction, a first chapter on the “protection for exporters” argument and, in the following six other chapters on the dynamics of the transatlantic trade policies, the following: Imperial Preference and US Reaction, 1932-1947; Deadlock in Transatlantic Trade Negotiations, 1948-1957; The European Economic Community, Discrimination and Transatlantic Trade Relations, 1958-1963; The First Enlargement of the European Community and US Reaction; The Single Market Programme and Transatlantic Trade Policies in the 1980s; Competition Between the EU and the US for Markets, 1995-2010.

Dür’s book develops some highly original points of view, bridging American and the European trade policies while skilfully balancing chronology and detailed analysis with general arguments, mixing empirical and qualitative approaches. Worth mentioning also is the work is written by a European scholar not focusing on a regional subject but on transatlantic relations. *Protection for Exporters* is keenly interesting for contemporary economic history, for the international political economy, for trade policies and for the political analysis of lobbying.

The proliferation of trade agreements, the US and EU bilateral trade policy relations are to be regarded with a fresh eye after Dür’s approach on the subjects. Since 1945, the trade policy liberalization has been driven by fear of discrimination in foreign markets and the need for governments to protect exporters. Policymakers negotiate trade agreements as a means of protecting their exporters and of maximizing their bargaining power. The exporter lobbying against foreign

discrimination provides a key motivation for reciprocal trade liberalization on both sides of the Atlantic. *Protection for Exporters* is of serious interest to political scientists and economists who study preferential trading areas and global cooperation.

Ferran Brunet, Universitat Autònoma de Barcelona

Giandomenico Majone. *Europe as the World-be World Power: The EU at Fifty.* Cambridge: Cambridge University Press, 2009.

The European Union has become too big, too heterogeneous, and too unpopular. In his new book, Giandomenico Majone seeks to understand how this sorry state of affairs was produced, and what can be done about it before it is too late. The problem, according to him, is that “in a steadily expanding Union the idea of straight-line evolution of the system is not only increasingly implausible but also a serious obstacle to future integration.” The solution is to be found in the economic theory of clubs, which “shows that in an expanding polity the multiplication of voluntary associations tends to be welfare enhancing.” (p. 222)

Pitched at the crossroads of positive political science and interpretive history, and then of large-scale history and policy-focused analytic narrative, Majone’s book can be read at several different levels. What no reader will miss, however, is the distinctively critical tone the book adopts towards the views and practices of “euro-elites”, “non-detached observers”, and other EU “fundamentalists”. The book’s four main points can be summarized as follows: (1) The implicit operational principles of European integration heretofore were (a) the absolute priority of centralized integration over all other goals and values, (b) “cryptofederalists” contempt for mass politics, and (c) the Union’s engagement in permanent, centripetal movement; (2) These implicit operational principles are both severely challenged as a matter of fact, and wrong from a normative point of view; (3) Point 2 above notwithstanding, political and academic elites stick to these operational principles, either because they are well served by them, or because they are true European ideologues; and (4) The way out of the current mess does not consist in eliminating the so-called democratic deficit of the EU, but in correcting the political markets which allow Member States to enter mutually beneficial exchanges.

The bulk of the book is then dedicated to an interpretive/historical explanation of how the operational principles of the EU became so dominant (chapters 2 and 3), how they have failed, both the systemic (insti-



tutional) level, and the policy-specific level (chapters 4, 5, and 7), and how the combined effects of the three operational principles of crypto-federalism have finally led to a “revolt of the masses” against the stealthy Community Method (chapters 1 and 6). Chapter 8 proposes differentiated integration as a solution: whereas the EU took a seemingly unavoidable path leading it from a club of 6 to a mess of 27, national governments should be left free to re-create several clubs of 6 (or 5 or 7, or whatever number sustains welfare-enhancing political exchanges).

Giandomenico Majone’s book is, of course, worth reading, discussing, and comparing to other “big-solution” works, such as Simon Hix’s (Hix 2008). First, it offers a succinct view of the process of European integration over the past 50 years (including current challenges) -- and often does so using refreshingly clear interpretive lenses. For example, the discussions of the political economy of EC competition law, of free movement of goods and services, and of EMU all reflect high levels of expertise and analytical rigor. Second, Majone appeals to the economic theory of clubs to revive and consolidate the idea of differentiated integration as a solution to the problem of heterogeneous member state preferences. Like previous works of the same author (e.g. Majone 1996), this intuition can spark off a new research program. Third, this book clearly defines yet another phase in the thinking of one of the most innovative thinkers of European politics.

Interesting and challenging as it may be, Majone’s argument is not always totally convincing. The application of the economic theory of clubs to the current problems of the EU is certainly intriguing; nevertheless, it is still far from being a lot more than an intuition. First, as with all other applications of economic ideas to EU politics (e.g. concepts of principal-agent, of transaction cost economics, etc) the argument would benefit from drawing clear equivalences between economic theory and IR theory. For example, what does it mean to assume that Member States behave like firms in competitive markets? Which, if any, IR theories are compatible with such an assumption, and which are not? Second, as it stands, the theoretical argument is not yet logically complete. There is no exposition of who the relevant actors are, what their preferences look like, what the terms of their interactions may be, and what kind of falsifiable hypotheses such a model may produce. For example, the victory of the “cryptofederalists” (whoever this social group may include) over others is not explained as an equilibrium condition. Third, at least some of the ideas behind Majone’s proposed solution might have been tested empirically, if only with comparative case studies. After all, if the theory comes from economics, then one might also legitimately expect the method to do so, too.

A less important criticism may be addressed to Majone’s assertion that no extant literature deals with the causes and consequences of the EU’s operating principles in a dispassionate way. I believe, in contrast, that some of the best and most innovative work in EU politics has been done by scholars who dispassionately study the patterns of delegation to the EU, find important variations therein, and attempt to explain these using fully developed theoretical models (e.g. Franchino 2007). Majone’s work should therefore not be read as the only book in its field, but as the big-picture complement to a series of more detailed studies.

Hopefully Majone will use his unique skills to more fully elaborate and test his “club” theory. In the meanwhile, this reviewer strongly recommends this book as essential reading for anyone interested in the big picture of EU politics.

Yannis Karagiannis

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