Was the European Court of Justice a key actor in the "relaunching" of European integration in the 1980s? This article examines the crucial political role that was played by the Court with its *Cassis de Dijon* judgment in the rejuvenation EC harmonization policy and the development of the Single European Act. The authors challenge the dominant view that the Court's legal decisions in themselves create policy consequences, or that legal verdicts reflect the views of dominant member states, so as to create focal points around which a policy consensus emerges. They argue, instead, that the *Cassis* verdict acted as a catalyst, provoking a political response by the Commission, which attempted to capitalize on the verdict to create a "new approach to harmonization." This political entrepreneurship by the Commission triggered the mobilization of interest groups that lobbied their national governments for and against mutual recognition. Generalizing from the case, this article concludes that the Court performs three crucial roles in the EC policy-making process: opening political access to self-interested individuals, launching ideas into the policy-making arena, and provoking political responses through bold argumentation and unpopular verdicts.

JUDICIAL POLITICS IN THE EUROPEAN COMMUNITY
European Integration and the Pathbreaking *Cassis de Dijon* Decision

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The European Court of Justice (ECJ) was created at the inception of the European Community (EC) with the mandate to "ensure that in the interpretation and application of [the EEC Treaty of Rome], the law is observed" (Article 164 EEC). Since the 1950s, the ECJ has expanded its jurisdictional authority well beyond its original narrow boundaries, asserting new laws and legal policies through creative interpretations, and developing a legal system that penetrates deeply into national legal orders. In its jurisprudence, the ECJ has promoted "negative integration"—the removal of

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barriers to trade—by ordering the nonapplication of national regulations that hinder economic integration. It has also promoted "positive integration"—the construction of policies that advance integration—by creating de facto policies to respond to the failure of member states or the Council to pass the implementing legislation which was to give life to the treaty.

Although it is indisputable that the ECJ has issued many far-reaching decisions, there is disagreement regarding the impact of these decisions on the policy-making process of the EC. Many legal scholars portray the Court as a hero who has greatly advanced the cause of integration by intervening when the political process is stalled and no political consensus can be reached (for examples, see Lenaerts, 1988, p. 19; Louis, 1990, p. 48). This intervention takes the form of judicial decisions that make law that transcends current policy. These judicial decisions are seen as setting the context of political integration by altering member state preferences through the creation of de facto policies, which themselves serve as constraints on the actions of member states (Weiler, 1981, 1991).

Political scientists, on the other hand, tend to discount the effect of the Court's jurisprudence, often ignoring the role of the Court when discussing EC politics. When the ECJ is not ignored, it is seen under the realist rubric where the ECJ's verdicts mimic the will of dominant member states (Garrett, 1992), where compliance with ECJ decisions is based on national interest calculations (Garrett & Weingast, 1993; Volcansek, 1986), and where ECJ verdicts echo rather than shape the preferences of member states (Garrett & Weingast, 1993). The tendency to underestimate the autonomy of the ECJ and to minimize the impact of its jurisprudence is reinforced by the dearth of empirical work showing how the Court actually influences the policy-making process in the EC, or how its jurisprudence affects member state policy preferences.

This study is meant to be a first step in providing empirical information on the impact of ECJ jurisprudence in the political arena. By exploring the implementation and consequences of one of the ECJ's best known judgments, the *Cassis de Dijon* (1979) verdict, this article attempts to identify the

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role of the Court in the creation of the "new approach to harmonization," which emerged as the cornerstone of the 1985 Single European Act. The *Cassis* ruling, decided during the period of "Eurosclerosis," is probably the most famous ECJ decision outside of the legal community because it suggested a policy of mutual recognition whereby goods lawfully produced in one member state would be allowed to circulate freely within the European market. This case has been used by the promoters of the "heroic" vision of the Court who imply that, with the stroke of a pen, the ECJ changed the playing field on which technical harmonization negotiations proceeded (Jacot-Guillarmod, 1989). Political scientists have also used this case as an example of the Court replicating the will of the member states (Garrett, 1992). The importance and saliency of the *Cassis* case in itself makes it a good candidate for empirical research. The numerous misperceptions about this case also make it worthy of greater scrutiny.

Examining, in turn, the legal and political aspects of the new harmonization policy based on mutual recognition, this article explores the implications and consequences of the Court-made principle of "mutual recognition" with respect to the "new approach to harmonization." Section 1 introduces the *Cassis* case, analyzing how the Court attempted to influence the EC policy-making process by writing its verdict in a provocative fashion. Section 2 recounts the political consequences of the Court's decision and of the Commission activism following the ruling. The third section examines two competing explanations about how this verdict impacted policy and puts forth a counter-explanation of how *Cassis* contributed to shaping a new harmonization policy based on mutual recognition. Generalizing from our case study, the conclusion focuses on how the ECJ can influence the policy-making in the EC and proposes avenues for further research.

1. LEGAL SIGNIFICANCE AND IMPLICATIONS OF THE *CASSIS DE DIJON* CASE

> Crème de Cassis, the blackcurrant elixir which transforms white wine into Kir, also transformed the nature of Europe's common market. It is largely due to a famous European Court case involving this liqueur that the 1992 single-market initiative has been able to do so much to restore progress to the European Community, but also to arouse such unease in Member States about loss of sovereignty. (*The Independent*, 1990)

The *Cassis* case has become famous for its association with the policy of mutual recognition. However, the words *mutual recognition* did not appear in the decision, and the decision itself did not mean that any good legally

produced in one member country had to be allowed into all national markets. This section provides background information on the case itself, focusing on the style of the verdict, the political context in which it emerged, and its legal contribution to the Court's jurisprudence on nontariff barriers.

In the *Cassis de Dijon* case, the ECJ was asked to rule indirectly on the legality of a German law that required spirits to have a minimum alcohol content of at least 25%. The effect of this law was that the French liquor Cassis de Dijon, which has an alcohol content of 15% to 20%, could not be marketed in Germany. This German law had been previously challenged in 1974 in an infringement proceeding raised by the Commission against Germany (Commission document 373, 17 July 1975). The Commission's case was identical to the *Cassis* case, only the liquor in question was French Anisette which, like Cassis, had too low of an alcohol content to be marketed in Germany. The infringement proceeding was dropped in 1975 after a political settlement was reached whereby Anisette was allowed into the German market, but the German law remained intact (Meier, 1991, pp. A1-A4).

By all accounts, the *Cassis* case was selected as a test case by the plaintiff's lawyer to challenge the Commission/German agreement and to provoke harmonization of the alcohol industry.[1] The import/export firm asked the German administrative agency to make the same exception for the Cassis liquor as was granted to Anisette. When the agency refused, the firm brought suit in a German national court, charging that the German regulation on minimum alcohol contents was an illegal nontariff barrier. The German court suspended its legal procedure to ask the European Court for a preliminary ruling, which interpreted Article 30 EEC in light of the German regulation. This process of freezing the national procedure and asking the ECJ for an interpretation of EC law in light of a national law is the means through which the ECJ comes to rule on the compatibility of national laws with European law.[2]

In the European Court proceedings, the German government defended the validity of its regulation primarily on health grounds, claiming that the law aimed at avoiding the proliferation of alcoholic beverages on the national

1. Contrary to what has been suggested, all parties to the dispute attest that the Commission was not involved in bringing the case.

2. This procedure is known as a preliminary ruling procedure, or Article 177 procedure. The dispute regarding the validity or interpretation of EC law is transferred to the ECJ, where a separate trial takes place. The ECJ's verdict consists of a statement of the validity of the law in question or an interpretation of the relevant EC law written so that the national judge can easily and relatively unambiguously apply the decision to the facts of the case (Mancini, 1989, p. 606). ECJ decisions are binding on the parties to the dispute and the referring national court. Because the final verdict is issued by a national court, EC law is transposed directly into national law.

market and, in particular, alcoholic beverages with low alcohol content, because such products might more easily induce a tolerance toward alcohol than more highly alcoholic beverages. The German government also offered a consumer protection justification based on the need to protect consumers from unfair producer and distributor practices of lowering the alcohol content to avoid paying higher taxes, thus creating a competitive advantage. Finally the German government argued that requiring Germany to accept French alcohol content laws would mean that one country could set standards for all member states, thus precipitating a lowering of standards throughout the EC.

In its verdict, the Court rejected the German health argument as unconvincing. Applying the legal principle of proportionality, whereby the least restrictive measures to achieve a desired goal must be chosen, the Court dismissed the Germans' consumer protection justification as excessive to achieve the desired goal. The Court then argued that removal of a minimum alcohol content law was not, per se, a lowering of standards. After dismissing the German arguments, the Court went on in its verdict to state a general principle, now the most often cited part of the ruling:

> There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State.

This second to last paragraph, in the context of the rest of the decision, was provocative. Because the Court had already dismissed the validity of the German law for legal reasons well established in the Court's previous jurisprudence, the statement was indeed redundant. But by inserting the dependent clause "provided that they have been lawfully produced and marketed in one of the Member States," the Court introduced the criterion of a product being lawfully produced in one member state as the basis for its admittance into the market of another member state. This implied that national regulations governing how a good was produced had to be recognized as equivalent to the regulations of the exporting member state. The effect of this statement will be explored later, but it is important to note that this sentence carried no legal weight in the context of the rest of the decision. At most, the phrase signaled a general principle that the Court would use in future decisions.

The *Cassis* decision itself did not mean that any product legally produced in another member state had to be admitted throughout the European market. Instead, the Court spoke of the criterion for excluding a product, saying that there had to be a valid reason to prohibit the importation or sale of the product. Although the Court rejected the German reasons as invalid, it created a general "rule of reason" whereby any national law with reasonable policy

goals, such as environmental, health, consumer protection, and so on, would be tolerated. This rule was an extension of Article 36 of the EC treaty, which permitted national laws to impede the free movement of goods only if they could be justified on the grounds of a circumscribed list of policy objectives. The rule of reason is the *Cassis* verdict's true legal contribution (Barents, 1989; Gormley, 1989; Masclet, 1980).

Although the rule of reason is important, it cannot be seen as a fundamental legal breakthrough. Indeed, in terms of confronting the problem of national regulations, which really served as a guise for protection, the *Cassis* case is not all that noteworthy. Instead, legal scholars point to the landmark *Dassonville* (1974) ruling, which established a legal basis for challenging the validity of national laws that create nontariff barriers. To the extent that the *Cassis* decision ruled invalid a national law on the basis that it created a nontariff barrier, it was a straight application of the jurisprudence established in the *Dassonville* decision. In fact, rather than moving beyond the *Dassonville* decision, the legal innovation of the *Cassis* verdict, the rule of reason, actually softened the Court's position regarding nontariff barriers. In extending the rights of the member states to maintain all reasonable national policies, which had the effect of creating nontariff barriers, the Court seemingly opened a huge loophole, albeit a loophole which could be controlled exclusively by the Court itself.

This analysis of the *Cassis* ruling raises many questions that a strict legal analysis cannot answer. Why have the legal innovations of the *Dassonville* case, which created a legal means to challenge national regulations having the effect of nontariff barriers, come to be associated in the wider community with the *Cassis* decision? Why has the real legal contribution of the *Cassis* case, the rule of reason, been largely overlooked by nonlawyers? Why has the Court's line in the end of its decision, a sentence with no real legal significance, come to dominate the layman's perception of the meaning of the *Cassis* ruling? The answers to these questions lie in the political realm, in the response generated by the verdict.

2. POLITICAL CONSEQUENCES OF THE *CASSIS* DECISION

The Legal Services of the Commission and the German government were stunned by the *Cassis* verdict. Even the German government had expected the Court to rule against its regulation, but no one anticipated that the Court would draw such wide conclusions from the case, as the phrase at the end of the judgment seemed to imply. Still, there are many examples of ECJ decisions that shock the legal community but do not even register in the

political arena. Indeed, the fame of the *Cassis* case did not come from the legal audacity of the decision, but rather from the political use and counter-use that was made of the ruling. The political debate was instigated by the Commission, which extracted from the decision those aspects useful for developing a new approach to harmonization policy, to satisfy its own political agenda of completing the internal market and furthering European integration. The flurry of reactions following the Commission's expansive interpretation of the *Cassis* ruling shed light on the Court as a major political actor in the EC and on the necessity of designing a new harmonization strategy.

The Commission rapidly drew its own conclusions from the Court judgment. Already in the fall of 1979, the internal market commissioner, Etienne Davignon, suggested in front of the EC Parliament that harmonization policy should take a new direction, based on the *Cassis* ruling (*Debates of the European Parliament*, October 22, 1979; OJCE No. C. 183/57, July 21, 1980). In July of 1980, with great fanfare, the Commission sent to the member states, the European Parliament, and the Council a communication that laid out its "new strategy" (*Agence Europe*, 1980, p. 11; Barents, 1981, p. 296).

The Commission's communication posited policy guidelines, which were derived from its interpretation of the EC Parliament that harmonization policy should take a new direction, based on the *Cassis* decision (Official Journal No. C256, October 3, 1980). The guidelines laid down the principle of mutual recognition of goods, stating that "any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State." A corollary to this principle, according to the Commission, was that member states "may not take an exclusively national viewpoint" and must "give consideration to the legitimate requirements of other Member States" when they draw commercial or technical rules that may affect the free movement of goods. The Commission informed the member states that the conclusions derived from the *Cassis* decision would serve as the foundation for a new policy of harmonization, according to which national laws inadmissible under the *Cassis* principle would be targeted through the infringement procedures to be raised by the Commission, and national laws that were admissible under the *Cassis* principle would be targeted through harmonization efforts.

This was the first time that the Commission tried to extract policy from a Court decision by issuing an interpretative communication.[3] Although the Commission's communication seemed only to restate the Court's *Cassis*

3. This new instrument, modeled after what occurs at the national level when a law is not clear, was created specifically to suit the Commission's needs in the *Cassis* case. Although the Commission could not frame its interpretation of *Cassis* and its new policy in the form of a

ruling, it was indeed an artful interpretation of the ruling and a bold assertion of new policy (Barents, 1981; Capelli, 1981; Masclet, 1980). This communication can be seen as an attempt to capitalize on the legitimacy of the Court of Justice, where the Commission used the verdict as a justification to redirect its harmonization policy in a way that promoted freer trade and further integration (Gormley, 1981, p. 454). Thus the Commission interpreted very broadly the principle of mutual recognition as the cornerstone of the new harmonization policy, stressing the "in principle" clause while minimizing most of the restrictions posed by the Court, such as the rule of reason.

The torrent of reactions following the Commission's communication contributed to the fame of *Cassis* perhaps more than the decision itself. It also revealed a profound lack of consensus with respect to the policy of mutual recognition. One month after its formal issuance, the author of the communication published an article in which he expanded on the contents of the communication and declared that the Commission was going to apply a new approach to harmonization policy based on the *Cassis* ruling to put an end to internal protectionism and safeguard the "*acquis communautaire*" (Mattera, 1980). While the member states were preparing a vigorous response to the Commission's political assertiveness, legal scholars were detecting legal flaws in the Commission's interpretation and interest groups were mobilizing for and against this new approach, thus adding to the legend of *Cassis*.[4]

The member states reacted with apprehension and discontent to the broad policy implications of the *Cassis* decision drawn by the Commission. As relatively high standard countries, France, Germany, and Italy were the most vigorously opposed to the new policy. They repeated the German government's argument that the principle of mutual recognition of goods would lead to a lowering of safety and quality standards. Even the British government had some reservations, although the United Kingdom was generally favorable to the principle of market liberalization and opposed to the excess of legislation in the EC.

The Council immediately asked its legal services to analyze the *Cassis* ruling to investigate the legal foundations of the Commission's interpretation. The legal staff delivered a counter-interpretation of the case, arguing

directive, the communication was designed to be the most constraining and solemn instrument possible. Since 1980, a little over 10 interpretative communications on recent ECJ rulings have been issued by the Commission.

4. Evidence for these arguments was gathered in interviews at the Commission, the German Ministry of Exports, UNICE, and the European consumers' union, the Bureau Européen des Unions de Consommateurs (BEUC). Primary sources were gathered at the archives of UNICE, the BEUC, and the French environmental movement. Proceedings and testimonies at Britain's House of Lords were also examined.

that although the definition of what fell under Article 30 differed from that of a 1969 directive on the subject (Directive 70/50/EEC), and although the decision gave the Commission more concrete guidelines under which to intensify its scrutiny of national measures, the criteria on which to determine whether a national measure is allowed remained the same as that of the 1969 directive (Service Juridique du Conseil des Communautés Européennes: 10690/80). In addition, the Legal Services found that the Commission's generalization of the *Cassis* argument—that any product lawfully produced and marketed in one country must be admitted into the territory of another—was excessive. Instead, they argued that the compatibility of national regulations with Article 30 could only be examined case by case, following the criteria set by the 1969 directive. Thus the Legal Services of the Council concluded that the *Cassis* ruling changed virtually nothing.

Conferences and seminars on *Cassis* and the Commission's communication were held by legal and business associations throughout Europe in 1980 and 1981, and articles attempting to create the definitive legal interpretation of *Cassis* and condemning the Commission's communication flourished in the legal literature (for example, see Barents, 1981; Capelli, 1981; Masclet, 1980). The articles criticized the Commission's extensive interpretation of the *Cassis* ruling, which deliberately ignored the rule of reason proposed by the Court. Barents (1981) concluded in a *Common Market Law Review* article:

> The Cassis de Dijon judgment, while constituting a continuation of the Court's policy outlined in the Dassonville case, is not so revolutionary as the Commission wishes to believe. It has to be regretted that the Commission has used a dubious interpretation of this judgment as a weapon to revive its crusade against protectionism.

The Commission's critics were reinforced by subsequent ECJ cases that finessed the rule of reason, creating limitations on the application of mutual recognition such as the requirement of "functional equivalence,"[5] thus bringing the Court further away from the mutual recognition guidelines defined by the Commission (see Gormley, 1989; Keeling, 1992; Nicolaïdis, 1993; White, 1989).

The publication of the communication also triggered the mobilization of various interest groups. Consumer groups were torn between welcoming and

5. The principle of functional equivalence implies that states can restrict the sale of goods from country X because country X's regulation is not functionally equivalent to country Y's regulation. The classic case is one where France was permitted to apply its own safety requirements to legally manufactured German woodworking machines because the German machinery presumed a higher worker training level than was prevalent in France (*Commission v. French Republic*, 1986, p. 419).

rejecting the Commission's interpretation of the *Cassis* ruling.[6] Although looking forward to the greater diversity and lower prices of products implied by a common market, consumer groups were worried that trade liberalization could have negative consequences on consumer safety and jeopardize the gains previously made in consumer legislation on the national front. The EC consumer group argued that "it is 'necessary to maintain a balance between the securing of free trade, which should afford consumers a broad range of products, and the need to protect the health, safety and economic interests of consumers.' We are concerned that the Commission interpretation of the Cassis ruling may jeopardize that balance." Moreover, they declared that they did "not consider competition to be a justification for banning national provisions relevant to the different situations found in the Member States nor for seeking harmonization at the lowest common denominator" (Opinion of the Consumers' Consultive Committee, 1981). Consumer groups also denounced the use of the judicial process rather than legislative harmonization because such a process prevents groups from having an impact on the eventual directives.

The reactions of producer groups also varied. Many exporters and producers, anticipating the economic benefits of a new policy of mutual recognition, advocated bringing more Court cases to flesh out the legal jurisprudence.[7] UNICE, the European association of industrial producers, also reacted favorably to the Commission's communication, which reflected many of their previously voiced demands. Other firms felt threatened by the removal of protectionist barriers and the foreign competition that would suddenly be introduced by this new policy. The firms enjoying a dominant (if not monopolistic) position in their own country, such as Italy's Barilla and Germany's beer companies, were the most vehemently opposed to the Commission's revolutionary policy assertions. Possessing money and political influence, these companies led a vehement campaign of attacks against the Commission and heavily lobbied their national governments to have the Commission's interpretation overturned. Producer groups in high-standard countries were especially worried that mutual recognition would put them at

6. By citing consumer protection in the *Cassis* verdict as an example of a potential justification for national regulation under the rule of reason, the ECJ gave consumer groups a new tool to promote their cause at the national level, and a raison d'être at the EC level. At the EC level, the Bureau Européen des Unions de Consommateurs expanded its lobbying activity considerably. In addition, national consumer groups began communicating across borders to coordinate their actions.

7. We are grateful to Maria Green for providing us with evidence that some business groups discussed the possibility of designing a Court strategy to ensure that the policy principle derived from *Cassis* would be applied.

a competitive disadvantage compared to producers in low-standard countries. Overall, business was hesitant about the implications of *Cassis*. The British Food and Drink Industries Council, for instance, recognized that "the *Cassis de Dijon* way to a true common market seems the most promising" but they were reluctant to halt the process of politically negotiated harmonization saying that "there are still those national laws to which the *Cassis de Dijon* principles cannot apply and for which harmonization will remain the only way forward" (Report of the Select Committee, 1982).

In summary, the fame of *Cassis de Dijon*, one of the best-known ECJ judgments, derives less from the originality of the decision than from the flow of responses and counterreactions it provoked. These responses were triggered primarily by the widely publicized legal and policy implications promoted in the Commission's communication, which themselves became the center of debate. Without the communication, it is likely that the fate of the *Cassis* decision would have been similar to that of the *Dassonville* decision—it would have remained important in legal circles, but have been relatively unknown in wider political circles.

3. THE NEW APPROACH TO HARMONIZATION—JUDGE-MADE POLICY, FOCAL POINT, OR POLITICAL COMPROMISE?

How did the *Cassis* decision change the course of harmonization policy in the EC? Two explanations have been suggested. Jacot-Guillarmod (1989) claimed that "the *Cassis de Dijon* principle, presupposing the mutual recognition of national legislation [. . .] has rendered *ipso jure* obsolete the harmonization of law in sectors outside the exceptions of article 36 or in sectors or areas not covered by mandatory requirements within the scope of article 30 of the EEC treaty" (p. 196). This "judge-made policy explanation" would imply that ECJ decisions can create policy consequences directly, by virtue of their legal legitimacy, thus obviating the need for a legislative solution.

In an alternative interpretation, Garrett (1992) claimed that the *Cassis de Dijon* decision itself was based on the policy preferences of dominant member states (p. 558). Along with Weingast (Garrett & Weingast, 1993) he argued that the *Cassis* decision impacted the policy-making process by constructing a focal point around which the member states' interests in a policy of mutual recognition converged. This focal point explanation would imply that the Court is not an autonomous actor and that ECJ verdicts have policy implications only when they accurately reflect a policy consensus.

This section will explore these explanations by posing two counterfactual and hypothetical questions—What would the judicial policy of mutual recognition derived from *Cassis* have looked like without the formal adoption of the new approach to harmonization in the Single European Act? How would the new approach have looked without *Cassis de Dijon*? By examining what did not happen, we can eliminate competing explanations and fashion alternative hypotheses.

JUDGE-MADE POLICY OF MUTUAL RECOGNITION?

What would the judicial policy of mutual recognition derived from *Cassis* have looked like without the formal adoption of the new approach to harmonization in the Single European Act? To ask this question assumes that courts do make policy; yet judges do not see themselves as policymakers and in a civil law system, policy-making is not considered as an appropriate role for courts. Indeed, European legal scholars vigorously refute any assertion that courts are making law, let alone making policy; discussing the Court as a policy player would be an anathema to most of them. But there are many examples where judges do actually attempt to make policy—that is, to render consistent rulings according to articulated guidelines so as to shape the behavior of public and private actors. The *Cassis* case is a good example of the ECJ attempting to make policy by promulgating a legal principle.

Hartley (1988) has observed that the ECJ has a general style invoked when the Court makes policy. Hartley writes,

> A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed. (pp. 78-79)

The *Cassis* decision exemplifies this style perfectly. By including the phrase "provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should [. . .] be introduced into any other Member State," the decision introduced the general principle of mutual recognition. The actual verdict, however, was firmly grounded in previous case law, so that the principle was not directly applied to the case itself. As suggested by the Hartley formula, the rule of reason was offered as a potential qualification of the principle. The rule of reason also served as a sweetener to member states that seemingly gained prerogatives under the *Cassis* precedent, and as a back door of retreat for the Court.

One could imagine that a judge-made mutual recognition principle could create legal expectations that would encourage lawyers and plaintiffs to bring more cases. Furthermore, if an established Court-made legal principle was consistently applied across a body of cases, one could expect that anticipation of a specific legal outcome would shape the behavior of public administrators, who might then choose to settle before going to court. Thus it is possible that Jacot-Guillarmod (1989) could be right, and that the *Cassis* legal decision could have produced direct policy effects by creating a general principle of mutual recognition. If this principle was widely applied by national courts and anticipated by national administrators, the free flow of goods would have been greatly advanced and the old process of harmonization would have been rendered largely obsolete.

A generalization of this logic implies that court decisions, by virtue of their legal authority, create direct policy effects. Indeed, because the legal profession is trained to think in terms of what is "the law," the Commission's legal services at first assumed that the verdict would derail the harmonization process, and the division of the Commission responsible for harmonization policy also feared that their raison d'être would disappear.[8] Many legal scholars, in fact, implicitly assume that legal decisions have policy consequences. Written ten years after the verdict was rendered, Jacot-Guillarmod's comment exemplifies this assumption. But such a general theory provides little room for politics.

What were the actual policy repercussions of the judge-made principle of mutual recognition? Hartley's characterization of the ECJ policy style implies that had there been no political reaction, the Court would have proceeded to "whittle away the exceptions" by narrowly applying the rule of reason and revealing the full force of the principle of mutual recognition. Politicians, however, did not react favorably to the policy of mutual recognition. Given the political opposition mobilized by the Commission's communication, it is not surprising that the Court took the escape route of maintaining the legal qualifications in its subsequent jurisprudence (Nicolaïdis, 1993a). This meant that although the principle established by the Court in the *Cassis* judgment appeared on the surface to be a general rule of thumb that could be applied by all, its actual application remained quite complicated because national legislation could be defended under the rule of reason and because subsequent ECJ jurisprudence created even more qualifications, such as the requirement of functional equivalence (see note 4 and Gormley, 1989; Keeling, 1992; Nicolaïdis, 1993a; White, 1989). In practice, only the European Court could apply the policy and then only on a case-by-case basis.

8. Based on interviews at the Commission.

The ECJ's decision not to consistently apply its legal doctrine of mutual recognition undermines the first assumption of the judicial policy-making explanation. Indeed, private interests protesting state regulations could not be sure of a positive outcome and thus had less of an incentive to raise cases, and public authorities had little incentive to compromise outside of Court. In fact, the *Cassis* decision did not precipitate a large increase in the number of cases involving nontariff barriers brought before the Court. Following the *Cassis* ruling, from 1981 to 1989 there were an average of 9.3 judgments a year in cases raised by private parties involving nontariff barriers.[9] This was slightly fewer than the average of 10 cases per year from 1974 to 1980, following the *Dassonville* (1974) ruling (Barents, 1981, Annex). In terms of increased Commission vigilance of national laws that could constitute nontariff barriers, between 1981 and 1989 the Commission brought to completion 31 infringement proceedings involving nontariff barriers, compared to 11 proceedings in the same area from 1961 to 1980. In all likelihood this greater number reflects a general trend of the Commission raising more infringement cases.[10]

How then would the judge-made policy of mutual recognition have looked without the Single European Act? Between 1980 and 1989, there were a total of 115 cases raised by private parties and by the Commission involving nontariff barriers. Some of these cases were decided in favor of the national legislation; however even if all cases involving nontariff barriers between 1980 and 1989 had been decided against the national legislation, at most 115 national regulations could have been declared to be in conflict with European law. This does not mean that 115 areas of legislation could have been harmonized on the principle of mutual recognition, but rather that, at the most, 115 types of products could have been allowed into one member state from which they perhaps had been illegally excluded. Although these figures do not take into account the cases decided at the national level, without being referred through the preliminary ruling process to the ECJ, interviews reveal that the application of the judge-made policy was hampered at the national level because national administrators, unaware of the ECJ jurisprudence, continued to apply obstructionist national laws. All of these factors meant that, in practice, the judge-made policy did not greatly increase the free circulation of goods.

9. Calculated by the authors from the "Synopsis of the Work of the Court of Justice" issued by the Court.

10. Between 1981 and 1989, nontariff barrier cases comprised only 5% of all cases raised by the commission, as compared to the period of 1958 to 1980 when they comprised 10% of all cases.

But what if there had been no negative political reaction and the Court had proceeded to whittle away the exceptions and apply a judge-made policy of mutual recognition? This question ventures too far into the speculative to be answered with certainty; however, when wondering about the extent of the Court's ability to make policy through law in the most favorable circumstances, a few characteristics of judge-made law in general, and in the EC specifically, should be remembered. The judicial process is inevitably slow and costly because judge-made law can only be applied on a case-by-case basis and courts must wait for cases to be raised in front of them. Judge-made law also creates biases in its application because it tends to favor those groups with the resources to raise cases through the legal system and pursue appeals of the verdicts if necessary.

In the European context, these problems are exacerbated. A case that is sent to the European Court today might take as long as 2 years to go through the process of rendering an ECJ verdict. Taking into account the time needed by the national judiciary to first refer the case to the European Court and then interpret the Court's verdict, the entire process can easily take 3 to 4 years. This assumes, however, that a case will be sent to the ECJ in the first place. National judges are often reluctant to refer questions of EC law to the European Court, or to accord EC law supremacy over national law. Variation in the application of EC law across countries further intensifies the resource biases and time problems of relying on judge-made law. For example, in Britain, lower-court judges are instructed not to refer cases to the ECJ, so the issue would have to be appealed up the entire legal hierarchy before it could reach the ECJ (Painter, 1981). One can thus imagine that only the larger import/export firms would have the resources to pursue a legal case against a national practice that created a nontariff barrier; moreover, the willingness to pursue cases would probably vary by country.

In sum, the Court did not continue to develop its principle of mutual recognition, at least in part because of the negative political response the verdict generated. Furthermore, any attempt by the ECJ to enforce a policy through law would have been greatly impeded by the limitations of judge-made law, which in the EC context are greatly exacerbated. Indeed, it is misleading to assume that Court decisions necessarily have policy effects. It is also misleading, however, to conclude that a lack of direct policy effects means that there is no judicial politics.

THE NEW APPROACH AND JUDICIAL POLITICS

If judicial politics was important in creating the new approach to harmonization, one would expect to find evidence that the legal verdict in some

way affected the politics of harmonization policy. To evaluate the effects of the legal verdict, we asked how the new approach to harmonization would have looked without the *Cassis de Dijon* verdict.

Garrett and Weingast's (1993) focal point explanation suggests that ECJ verdicts can create focal points that serve as policy prescriptions around which interests converge. Underpinning this argument is the assumption that EC justices, fearing for their own professional futures and concerned about undermining the "authority, legitimacy and independence" of the Court, are reluctant to make decisions that go against the interests of the member states (Garrett, 1992, p. 557; Garrett & Weingast, 1993, manuscript 24-26). Although the constraints limiting the discretion of the ECJ are highly underspecified, Garrett and Weingast imply that ECJ verdicts themselves are based on a reading of the interests of the influential member states, and they argue that ECJ verdicts only have policy repercussions when they accurately reflect a policy consensus (manuscript 4). With respect to the *Cassis de Dijon* case, Garrett (1992) sees the *Cassis* verdict as being based on the interests of France and Germany (p. 558), and he deduces that the verdict had policy consequences because "the policy of mutual recognition was the preferred economic principle of the most powerful political and economic actors in Europe" (Garrett & Weingast, 1993, manuscript 16).

There are grave empirical problems with the focal point argument in terms of its application to the *Cassis* case. Not only was there no consensus for mutual recognition before the *Cassis* verdict, there was also no consensus after the verdict. Interviews with the German government and the Commission revealed that mutual recognition was not, and is still not today, the preferred policy for the majority of member states. In addition, contrary to Garrett's assertions, Germany and France have been the strongest opponents of mutual recognition because, being high-standard countries, they have the most to lose. It has even been suggested that the unattractiveness of mutual recognition is actually a motivating force, encouraging member states to reach cooperative harmonized solutions rather than risk de facto harmonization at the lowest common denominator.

According to accounts of the actors involved, the Court's verdict went well beyond what was being debated with respect to harmonization policy in 1978. Although the idea of mutual recognition was not totally new[11] and the notion that mutual recognition might be applied to goods had been evoked

11. The expression *mutual recognition* was used in the Treaty of Rome in Article 57 with reference to diplomas and professional qualifications. It was also used during the 1970s with respect to financial services. At the time of *Cassis*, however, the expression was not used with reference to goods; only the terms *harmonization*, *approximation*, or *coordination* were applied to goods.

previously in some Commission circles, it was never acted on or even officially suggested because of the member states' opposition. The Court contributed to the debate by openly and visibly launching the notion of mutual recognition applied to goods, an idea that could have potentially enabled the traditional harmonization process to be circumvented and the completion of the single market to be reached earlier. The idea took off mainly as a result of opportune timing.

At the time of the *Cassis* verdict, the Commission was searching for an instrument able to achieve the removal of technical obstacles to trade more efficiently than negotiated harmonization, the so-called "old approach." The institutional procedure for the adoption of a harmonization directive was generally very slow, drawn out, and costly. Because of the unanimity rule required by the Treaty of Rome, harmonization directives required years of negotiations. Sometimes, no political agreement was reached even after years of shuttling between the Commission and the Council, wasting time and resources (Vogel, 1991). As a result, about 159 directives were adopted between 1962 and 1984, an average of only 7 directives a year (Lauwaars, 1988). Another major drawback of the old approach was the rigidity and the insistence on details of harmonization directives, which were valid for only one specific product and were often rendered obsolete by technical innovation (Vogel, 1991). Finally, the old approach was politically hampered because it was believed to call for Euro-products, standardized goods that were associated in people's mind with a standardized way of life. The Commission's harmonization efforts had become objects of derision, if not objects of popular anger (Meunier-Aitsahalia, 1993).

The problem of disparate regulations had become increasingly acute in the late 1970s and the old approach had proven unable to break the rising tide of protectionism created by the economic recession. Indeed, there were more nontariff barriers resulting from divergences in national regulations in the early 1980s than when the harmonization policy of the EC was initiated in the 1960s. Under Commissioner Davignon's leadership in the late 1970s, the Commission increased its vigilance over barriers to trade, actively attempting to redirect its harmonization policy.[12] Whereas in 1974, the time of the *Dassonville* ruling, the Commission was still hopeful that a recently adopted directive designed to confront the problem of nontariff barriers would rectify the situation (Directive 70/50/EEC), by 1979 it was ready for a radical

12. In 1978, the Commission complained to the member states about the increasing number of restrictive and protectionist measures and informed them that it was investigating over 400 cases of barriers to the free movement of goods (Communication from the Commission to the Parliament and the Council, November 10, 1978).

change. Thus the Commission was extremely eager to accept the *Cassis* decision as the basis of a new policy and therefore produced its communication.

The *Cassis* decision advanced the idea of mutual recognition, and the entrepreneurship of the Commission put the issue on the table and forced a debate. Both the decision itself and the Commission's response were necessary to produce the new harmonization policy. The legal decision was needed to encourage the Commission, an institution lacking power and authority, to issue its bold communication. Testimonies indeed revealed that without the *Cassis* verdict, it would have taken significantly longer for the Commission to dare to suggest the application of the mutual recognition principle (based on private interviews). The Commission's communication, however, was also necessary to bring the legal decision into the political arena. One can think of many important ECJ decisions that do not have policy consequences because the Commission, a member state, or an interest group does not seize on the judgment to exploit it for policy purposes (for example, the *Dassonville* decision). The *Cassis* verdict became part of the political discourse because the Commission focused the political spotlight on the legal judgment.

In relying on the Court's verdict as the basis of its policy, the Commission sought to use the Court's legitimacy as a neutral institution of law (Burley & Mattli, 1993) and to circumvent the political process by basing the policy on the previously established law of the Community. Thus the Commission presented its new policy to the member states as inevitable, as deriving directly from the *Cassis* ruling, and justified the new policy outlined in the communication on the basis of the legal foundation of the *Cassis* judgment.

Neither the Court nor the Commission can force a policy on member states, however, as only the Council can adopt legislation. The Commission can propose a policy, but the member states must choose to adopt it. Given the member states' antagonism toward mutual recognition, the Commission's effort to impose a new approach to harmonization policy resting on the legal foundation of the Court's jurisprudence had very limited success. After the Legal Services of the Council had reinterpreted the communication, little remained of the Commission's policy and only a few of the ideas originally enunciated in the communication eventually became part of EC policy. Although in March of 1983 the Council passed a directive adopting the Commission's 1980 proposal to create a procedure to review newly proposed national legislation, the directive was not given real enforcement powers and therefore was only a meager victory for the Commission whose communication was much more ambitious (Directive 83/189/EEC, OJEC No. L 109/8 of 4.26.83). Also following from the communication was the Commission's plan to systematically review national laws not yet harmonized, which

became part of EC policy with Article 100b of the Single European Act, but remained without results.[13]

But the Commission's activism eventually proved effective in producing a new harmonization policy, which was enshrined into the EC treaties with the 1985 Single European Act. Although the communication did not convince the member states, it did mobilize interest groups that referred explicitly to the Commission's interpretation of the *Cassis* verdict when they testified in front of parliaments and lobbied for and against the new policy. Because these groups were responding to the *Cassis* verdict and the Commission's exploitation and generalization of the Court ruling, one can conclude that without these stimuli, the groups would not have been as rapid to mobilize, and less urgency would have been put on the issue of a new harmonization policy. This was especially true for consumer groups who were given a raison d'être by virtue of the *Cassis* ruling (see note 5). In addition, the fact that the political debate regarding mutual recognition continued even after the Commission's legal argument had been thoroughly undermined by the Council's own legal counterinterpretation and even after member states had politically undermined the attempt of the Commission to impose a new policy indicates that interest groups were important in keeping the mutual recognition debate alive.

Ultimately, the idea of mutual recognition originally suggested by the *Cassis* judgment was transformed into policy because the priorities and interests of member states had changed. As Sandholtz and Zysman (1989) and Moravcsik (1991) point out, the idea of the completion of the internal market was relaunched thanks to simultaneous changes in the governments of the major EC member states. The convergence in liberal economic thinking in Europe, which followed the comeback of the Tories to power in Britain in 1979, the return of the CDU in Germany in 1982, and the dramatic reversal of French economic policy in 1983 happened just as the *Cassis* principle was being watered down and rendered less easily applicable as a result of a restrictive legal analysis of its implications by the Council and

13. Article 100b states that the Commission and the member states must draw up an inventory of national laws and regulations that have not yet been harmonized and that "the Council, acting in accordance with the provisions of Article 100a, *may decide* that the provisions in force in a Member State must be recognized as being equivalent to those applied by another Member State." (emphasis added). This also means that member states may decide *not* to apply mutual recognition. Indeed, some commentators observed that this provision was worse than the status quo resulting from the Court decision and an actual setback compared to the procedure to combat protective national legislations available to the Commission under Article 169. As of 1993, no inventory has been compiled by the Commission and this provision of the Single European Act appears to be dead.

application of the principle by the Court. At this point, the Court's and the Commission's endeavors had been taken up by the interest groups who lobbied the more receptive leaderships.

It is hard to see the Single European Act's new approach to harmonization as convergence around the Court's or the Commission's principle of mutual recognition. The Single European Act established a mixture of mutual recognition and negotiated harmonization, what has been called "managed mutual recognition" (Nicolaïdis, 1993a, 1993b), which is very different from the initial mutual recognition proposed by the Court and the Commission. Whereas the Commission proposed applying mutual recognition to any unharmonized area, the new approach only applied mutual recognition on top of a base of harmonization, so as to minimize its deregulatory effects. The main contribution of the new approach was to redirect the goal of the harmonization process. Instead of creating detailed Euro-standards, harmonization endeavors were to be directed toward the broad definition of European-wide general essential objectives and requirements (such as preservation of health, safety, consumer protection, and the environment). In addition, the decision-making process for reaching the broad harmonized standards was changed from unanimity to qualified majority voting.

It should be noted that this new approach reflected the concerns of organized consumer and business groups. For example, Article 100a paragraph 3 of the Single European Act, which states that "the Commission, in its proposals [. . .] concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection," embodied the concerns of consumer groups. The idea that mutual recognition would only be applied on top of a base of harmonized regulation also addressed the concerns of businesses operating in high-standard countries. Similarly, the expedited harmonization process, as well as the codified mutual recognition, reflected the interest of most business groups. Rather than having to rely on a legal concept that was poorly understood by national administrators, businesses preferred codified rules, which the administrators were instructed to apply.

In sum, the Court's *Cassis* decision acted as a catalyst by introducing in the European debate the concept of mutual recognition, and thus the idea of transforming the harmonization process. The catalyst worked because it came at a time when the Commission was looking for a new approach to harmonization, and then later because member states' interests in the completion of the internal market were being revived. However, the policy that was ultimately adopted was neither the policy derived from the Court decision nor the policy advocated by the Commission's communication, but rather a compromise reflecting the concerns of mobilized interest groups and

of the different member states. Although timing is very important, the idea of mutual recognition also mattered. Without *Cassis* and the debates triggered by the Commission's communication, it is likely that interest groups would not have been mobilized on the issue of nontariff barriers to trade and that the relaunching of Europe might well have taken longer to be designed.

This "Court as provocateur" argument differs from the other explanations in numerous ways. It implies that policy effects do not flow directly from court verdicts themselves, but rather from a political process triggered by a Court verdict. A political response is generated either because the decision is seized by individual actors or organized interests and used as a tool to promote a political agenda, or because the verdict is so politically unpopular that it is seen as desirable to legislate a new policy instead of allowing the Court to develop and apply its jurisprudence. This argument implies that legal decisions succeed in jarring the political process precisely because they do not represent the interests of the dominant political actors, who seemingly would not need a Court decision to create a policy that serves their interests. Instead, the political process triggered by Court decisions helps to generate a counter consensus. This process of consensus building is crucial because it greatly increases the likelihood that the policy will actually be implemented at the national level.

Further research is needed to specify under what conditions the Court will succeed in provoking a political response, and under what conditions the response will generate policy change. Indeed, the many intricacies of the *Cassis* case suggest numerous research agendas.

4. CONCLUSION: JUDICIAL POLITICS IN THE EUROPEAN COMMUNITY

Although acknowledging the limitations of generalizing from a single case study, the saga of the political aftermath of the *Cassis* decision does offer some important insights into how judicial politics can influence the policy-making process in the EC. In the *Cassis* case, the Court played an important role in providing self-interested individuals access to challenge national policies, in proposing ideas for policymakers, and in provoking political responses. There is preliminary evidence that the Court has played similar roles in other cases as well.

The Court as a medium through which interests can pursue individual and group agendas. In the *Cassis* case, a private import/export firm used the EC

legal system to challenge and circumvent a political deal between the Commission and the German government and promote harmonization of the alcohol sector. The European Court of Justice responded as a purposeful player, writing into its legal decision the notion that legally produced alcohol products should be allowed into the markets of all member states. There are other examples of individuals and groups appealing to the European legal system when political channels fail, and of the ECJ responding with decisions that promote the agendas of these plaintiffs. For instance, in Britain, the women's movement has repeatedly and systematically used the European legal system to promote equal pay for women (Brittan, 1993). In France, the EC legal system has been used to challenge the petroleum distribution monopoly. Further research could reveal more examples where groups have used the EC legal system with the effect of provoking policy change at the EC level and at the national level.

The availability and willingness of the ECJ to promote these individual agendas also implies that the ECJ can and does act autonomously of the policy interests of the Commission and the member states. This is not to say that the Court is immune to political influence. Rather, the Court is a political actor, responding to the political environment as do all political actors, but nonetheless able to act autonomously from the member states. Although the Commission may at times serve as a bellwether for the Court, signaling what will be politically tolerable to the member states and how the Court can contribute to the integration process (Stein, 1981), the Court is also able and willing to go beyond the recommendations of the Commission, as it did in the *Cassis* verdict. It has even been suggested that, in some areas, the Commission prefers to allow the Court to voice ideas and make verdicts that might be politically unpopular.

Similarly, the Court is willing to decide against member state interests (Stein, 1981; Rasmussen, 1986), a point that is especially significant given that public administrators are the defendants in the vast majority of cases raised through the preliminary ruling procedure. It might also be the case that member states prefer to have the ECJ disappoint domestic groups rather than be seen as supporting policies that are unpopular at home. Further research is needed to better understand how the Court interacts with the Commission and the member states. Indeed, little is known about how the ECJ, as one of the four institutions of the European Communities (the others being the Council, the Commission, and the Parliament) affects policy-making in the EC.

The Court as a provider of ideas. In the *Cassis* case, the Court influenced the policy-making process by writing its decision provocatively, so as to gently launch the idea of mutual recognition into the harmonization debate. The timing of the decision is important in understanding why this idea had such an impact, but it is undeniable that the idea itself provoked a debate about mutual recognition and the need to change the old approach to harmonization. There are other examples of the Court providing ideas of how to handle policy problems. For example, Nicolaïdis (1993a) has argued that the Court created a "road-map," which was used by negotiators for the mutual recognition of services. Legal scholars have also observed that legal reasoning offered by the ECJ has been adopted by national courts, leading to a general European convergence of certain disciplines of law, such as labor law (Bercusson, 1993).

The Court as a provoker of political responses. Rather than usurping the legislative role, the Court can be seen as jarring the policy-making process by provoking political responses to its decisions. We have argued that the *Cassis* verdict was written provocatively so as to test the political waters with respect to the idea of mutual recognition. The issuing of the communication by the Commission can be seen as a direct consequence of this provocation. The Court also provoked a political response from interest groups and member states by generating a principle that was seen as politically unappealing, and implying that the Court would apply this principle to rule national laws incompatible with EC law. The threat of a de facto policy of mutual recognition encouraged interest groups in higher-standard countries to support and promote the harmonization process as a preferable alternative to mutual recognition, and it provoked member states to negotiate Article 100b of the Single European Act, which allowed them to eliminate from a list generated by the Commission national regulations that should not be touched by mutual recognition. Article 100b potentially undermined the jurisprudence of the Court, as articulated in the *Cassis* case, because political agreement could now allow national laws incompatible with EC law to remain in force.

There are other instances where the ECJ has provoked a political response by issuing a verdict with undesirable implications. In the area of equal pay for women and men, which was actively promoted by women's groups in Britain and Belgium, the potential fiscal consequences of forcing member states to compensate for decades of unequal and illegal disparities in the

payment of pensions provoked a backroom political deal, passing the Barber protocol of the Maastricht agreement, which seeks to minimize the effects of the ECJ's jurisprudence in the area of equal pay.

Although the *Cassis* case is an extremely noteworthy example of the Court affecting EC and national policy-making, it is by no means the only example. It should be noted that the *Cassis* case managed to provoke a political response in 1979, a time when member states were not very interested in European integration and few politicians or scholars paid attention to the Court of Justice as a major political actor. This would imply that judicial politics has been an important factor in the EC for quite a long time, and that it remains an important factor even when political enthusiasm for integration ebbs. Yet it is also true that there are many ECJ decisions with huge policy implications, many of which would probably be seen as politically intolerable if there was a broader understanding of the potential implications involved. Further research is needed to increase our understanding of when ECJ verdicts are most likely to have an impact on EC policy.

Since the *Cassis de Dijon* case, political scrutiny of the Court has heightened. Court decisions are watched more closely, both by member states and in the popular press. This rising scrutiny has been accompanied by criticism of the Court and its jurisprudence, and the potential for political usage of the appointment process. Anti-EC British think tanks have been openly and vociferously criticizing the Court as a nonneutral institution with an agenda of its own (Smith, 1990). The Maastricht Treaty has often been interpreted as a first attempt to limit the Court's power by explicitly excluding the ECJ from two of the pillars of the Accord. Another challenge to the Court is on the horizon. In 1996, member states will entertain the idea of restricting lower-level national courts from sending preliminary ruling questions to the Court. Because the vast majority of referrals come from lower courts, and because higher courts are less likely to refer to the ECJ broad questions about the reach of EC law, this is indeed a strong threat to the autonomy and influence of the ECJ. Regardless of what happens in 1996, however, judicial politics in the EC is here to stay, a fact that European politicians have recognized. Maybe it is time for scholars to the European Community to pay more attention to it too.

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