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## Forum section

# Law, Political Science and Legal Studies

## An Interdisciplinary Project?



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## 1 A political science perspective

Karen J. Alter

Ask anyone who does interdisciplinary work: they will say it can be a thankless task. It is virtually impossible to stay on top of the literature from your own let alone the other discipline. A person's home discipline does not appreciate or reward attempts to cross the divide. And the other fields that share your interest are inevitably unhappy with your failure to debate the issue on their terms, using the latest literature and findings in their field. European legal studies are no exception. Perhaps because of these reasons there is not really an interdisciplinary attempt to advance our understanding of the influence of European law and the European Court of Justice (ECJ) on European Union (EU) politics.

Worse yet, there is a tendency to discount the contributions of the other discipline. An example reveals the nature of this problem. Both law and political science identify similar legal phenomena and legal rulings as being important – e.g. the construction of the European legal order through ECJ decisions,<sup>1</sup> or the *Cassis de Dijon* ruling establishing the principle of mutual

recognition.<sup>2</sup> Both want to know what led to the key legal rulings, and what the impact of the ruling/doctrine was. But, because of how each discipline addresses these questions, the analysis of the other discipline is seen as contributing little. The typical legal article describes key rulings, analyzes the legal logic behind them, and discusses how doctrine is altered or updated through subsequent legal decisions. If it considers what a ruling or doctrine implies for policy in the EU, it does this by analyzing how practice must change in order to comply with the ruling. Such an analysis is frustrating for political scientists, because it does not address the issues they find most important – why these legal outcomes now, and how has practice actually changed as a result of the legal outcomes? A typical political science analysis examines the political context, the interests at play and the distributional and political consequences of a ruling or doctrine. Such an analysis is frustrating for legal scholars because it gives cursory attention to what is most significant to them – the legal basis of the ruling – and it implies that the law and legal concerns are a secondary factor shaping judicial decision-making and political outcomes.

Multiply this example, and broader conclusions tend to be drawn. Through a political science lens, legal scholarship seems anecdotal, lost in details, fatally flawed because the influences of extra-legal factors are not seriously explored, or unpersuasive because of a tendency to say that everything matters. Through a legal lens, political science work seems woefully misinformed about law and the legal process, simplistic if not crude, stating the obvious as if it were newly discovered, and ignorant or in denial of important cases that seem to disprove the argument made. Not only is it not worth reading the literature of the other discipline, but the work of the other field appears to be of a lesser quality. I exaggerate, but only in the degree of these beliefs.

This essay is not an attempt to craft an interdisciplinary synthesis. I do not think such a synthesis is possible or desirable. I will speak in the end about how the two disciplines can work together more productively, but my main objective is to identify the source of difference between the disciplines of law and political science. I am assuming, perhaps naively, that a lack of understanding of each discipline is hindering communication across disciplines, undermining scholars' ability to learn more fully from each other. Greater understanding will, I hope, improve the scholarship in each discipline, and discussions across disciplines. But it will not lead to a convergence in approaches.

## The different enterprises of legal scholarship and political science

Before I begin, it is worth pointing out that within both law and political science there are a number of different paradigms, each starting from very different assumptions about how legal and political factors shape legal decision-making and political outcomes. To name but a few: law has formalist, realist, critical, cultural and postmodernist paradigms; political science has realist, institutionalist (liberal and historical), constructivist and cultural paradigms. Paradigmatic differences likely exacerbate the already present disciplinary differences regarding European legal studies, since the paradigm currently dominating political science analysis of EU and international law (institutionalism, with its assumption that actors are motivated by instrumental incentives) disagrees strongly with the dominant paradigm in European legal scholarship (traditionally legal formalism, with its assumption that law and legal reasoning are usually determinative, and more recently legal cultural approaches that assume that worldview(s) or culture(s) – and not self-interest – shape how lawyers and judges interpret and think about the law.) In addition to paradigmatic differences, I believe that fundamental differences in enterprise, method and style thwart productive communication across disciplines.

The most fundamental difference between law and political science is that law and legal analysis are fundamentally normative enterprises whereas political science is fundamentally a positivist enterprise. Law itself is a normative construct. Laws are normative rules underpinned by consent (either through a political legislative process, or by custom) and by a belief in the sanctity and legitimacy of the norm and the legal process. Legal scholarship is part of law's normative enterprise, itself a sort of normative advocacy.<sup>3</sup> Legal scholars describe the reasoning behind legal rulings, helping to legitimate legal decisions. They critique rulings to encourage judges to improve their reasoning in the future. Many scholars also try to shape legal interpretation to promote the ends they see as benefiting society. Indeed, often a legal article is more about what the scholar wants to happen, than about what is actually happening. The scholar may make the ruling more convincing than the judge did, or imply that the seeds of an optimal legal solution to the case are present in the ruling, or elsewhere. They may discuss the law in a way that implies that forces of change are already working in the direction they advocate – that political forces are aligning, that judges in other contexts are sympathetic to the interpretation discussed, and that the interpretation is already becoming the accepted norm. Said differently, legal scholars are writing about the legal world they see, reinforcing the legitimacy of this

world, and trying simultaneously to craft a legal world that is more rational or desirable than what they have before them. The normative project is recognition of the normative nature of law. Legal scholars know that, if they convince lawyers and judges (and perhaps the wider body politic) to see the world as they do, then law will develop in the way they advocate, creating a legal and perhaps even a political reality.

Political scientists can also have normative projects underpinning their scholarship.<sup>4</sup> And many political scientists appreciate the power of norms to shape political behavior and define how actors understand their interests.<sup>5</sup> At its base, however, political science is a positivist enterprise that seeks to explain how the world works in practice. It wants to show why some outcomes triumph over others, and why outcomes that might seem suboptimal, if not irrational, are nonetheless an intelligible product of a political process. And political science is always cognizant that different actors have different preferences, that power matters and that any outcome has distributional consequences. What political science scholarship really seeks is to know which explanatory factors matter most (and which not at all) so as to focus the attention of political actors in a world where resources are scarce and political actors need to set priorities.

The difference in overall enterprise permeates the scholarship in each discipline. Though the questions asked may seem the same, scholars in the two disciplines focus on different dimensions of the questions, having different objectives, and probably different audiences,<sup>6</sup> in mind. Different questions lead to different methods and styles of analysis. Because what is considered appropriate in method and style in one discipline is considered inappropriate or unnecessary in the other, the methodological and stylistic differences make the other discipline's scholarship quite frankly seem compromised and thus less useful.

### **Different methods and style in legal scholarship and political science**

Legal scholars tend to focus on important legal cases, doctrines or principles. The method of a typical legal article is legal exegesis – analyzing legal texts and legal decisions to reveal their meaning.<sup>7</sup> Most legal articles start with a textual analysis, turning next to legal contextual factors (the treaty or constitution overall, the intent of the drafters) and then sometimes to political contextual factors, to fill in where the legal analysis is inconclusive. The scholar will then compare the law or ruling in question with other similar laws and rulings, to reveal a general logic, and may also address how to improve the reasoning or law itself, borrowing from practices used to good ends in other

legal contexts. These methods are appropriate when the goal is to understand the meaning of the law and the legal reasoning behind a decision. They are also consistent with the larger project of improving law, legal reasoning and legal legitimacy. But to the extent such analyses treat political factors as a residual category that comes into play only where law and legal reasoning fall short, they can lead to an impoverished view of the role of politics in legal decision-making, and contribute to a perception that politics corrupts rather than aids the legal process.

In legal exegesis, finding nuance is a prized objective, and attention to detail is of critical importance. This is understandable. Lawyers earn their high salaries by being very attentive to detail, and parsing cases to create legal exceptions for your client is perhaps the most valuable skill a good lawyer can have. Legal scholarship is also about searching for and documenting law's authority. The more one can embed the analysis in authoritative sources, the more credible the analysis (and law) becomes. Thus the legal style involves ample (some might say excessive) citations of primary sources, legal rulings and other scholars.

Viewed by the standards of legal scholarship, political science scholarship earns a poor if not failing grade. Good legal work is accurate, well documented, full of citations, up to date and sensitive to nuance and exceptions. None of these attributes is especially valued in political science, where the goal is to sort through alternative explanations to find a general explanation that states which factors matter most. Indeed, political scientists can still find significant value in an article that a lawyer may grade an F. Here is why.

Political scientists focus on puzzling behavior – a behavior that does not conform to expectations or prevailing theory, or a behavior that marks a discontinuity from the past and is important for the future. Thus almost by definition political scientists are focusing on less straightforward, and perhaps less typical, cases. The political scientist's main task is to sort out which explanation most persuasively accounts for the observed behavior. Good political science need not use the terms hypotheses, or dependent or independent variables, but it should clearly define what it is that will be explained (the dependent variable) and the relevant causal hypotheses to be examined (the independent variables). The variables should be clear, but they do not have to be identified with nuance or subtlety. Indeed, what to the lawyer is important nuance and detail providing greater accuracy can to the political scientist be simply irrelevant noise confusing the reader and undermining the clarity of the discussion.<sup>8</sup>

The goal of political science analysis is usually not to explain the specific case per se, but to unlock the generalizable political logic that explains a larger phenomenon. A political scientist studies the Second World War to gain

insight into the causes of war. She studies healthcare policy to gain insight into the policy-making process more generally.<sup>9</sup> Exceptions that do not fit the scholar's findings do not mean the political scientist is wrong. A political science explanation tries to capture a pattern of behavior, to explain what is generally happening in a certain category of cases, not what is happening in all circumstances. A fantastic political science explanation may capture 90% of what is happening, which means by definition it does not capture 10% of the cases. To challenge an argument by highlighting an exception, one must show that the exception itself proves the fallacy of the general rule; it is not enough to show that there are exceptions to the rule.<sup>10</sup>

Good political science is underpinned by good methodology. The main method of analysis is comparative political analysis. First one hypothesizes about what could explain the behavior in question, drawing potential explanations from theory, from conventional wisdom, from deductive reasoning and from scholarly literature. The second step varies by type of study. A single case study will first show how the case is part of a larger category of cases. One needs variation to sort through alternative explanations, thus in examining a single case the scholar will usually trace the process of decision-making to show variation in outcomes over time. Qualitative comparative analysis will select a small number of cases to explore, choosing cases that vary in terms of the potential explanatory factors (the independent variables) to be examined. Large-*N* quantitative studies will select a random sample of cases where one can control for the different explanatory factors. Although not everyone employs these techniques,<sup>11</sup> identifying causal variables, hypothesis creation, hypotheses testing and comparison across cases are at the heart of most political science, especially in the United States.

For political scientists, high-quality scholarship selects cases appropriately, makes a serious effort to find both supportive and undermining evidence, is honest in its evaluation of the evidence and, very importantly, evaluates alternative explanations. And, for many, good political science is parsimonious, using as few variables as possible while still being true to the phenomenon studied. The goal of parsimony – in some ways the antithesis of nuance – is what makes political science work at times seem simplistic. Parsimony is of value because it allows for the clear tests of how and which factors matter, it creates clear arguments that can be easily summarized and turned into hypotheses, and it thus leads to more easily generalizable findings. Political scientists know reality is more complex than their models and theories, and they are not attempting to provide a full history or accounting of the event under study. Remember, the goal is to prioritize factors that matter not to generate a comprehensive list (derogatorily called a 'laundry list') of all the factors that played a role in the outcome.

In examining cases, political scientists find it not only appropriate but also necessary to go beyond so-called authoritative sources – legal texts, legal rulings and official statements. Indeed, to stop one’s analysis after looking only at formal documents is to be either utopian, in the belief that the document represents a political consensus, or naive, in the belief that these sources are all that do or should matter. Political scientists regularly use sources and methods that most lawyers do not see as authoritative, including testimonials of participants (memoirs, testimony in political forums, newspaper editorials, official and non-official correspondence, ex officio writings and interviews); public speeches; statistical evidence; coding of statements, events or rulings; process tracing; counterfactual analysis; and revealed preferences (what the behavior may reveal about intent). Political scientists are in no way unique in this. Politicians, journalists, historians, sociologists and others are also willing to impute political motivations to actors even though they do not publicly say ‘I endorse this position to get re-elected, win a promotion, earn campaign contributions, satisfy special interests, and because I care about my own power.’ Political scientists know that the sources they use are far from perfect. But the world is not a controlled experiment, and in practice the perfect evidence either does not exist or is not accessible. Good political science tries to overcome the limitations of the evidence by creatively using a variety of indicia that point in the same direction.

I have heard and seen lawyers say that small errors in analysis call into question the skill of the scholar or make work non-credible. Political science values the article’s argument above all else. Details of the cases matter to the extent that they undermine the argument, but they are not important per se. Because the authority of the analysis comes from the construction of the study and the quality of the analysis, factual errors are discounted. Indeed, if the argument stands when all the empirical ‘corrections’ are incorporated, the fact that there were empirical errors is not all-important. And citations are not as numerous in political science work. Where legal scholars often pride themselves on the number of footnotes, political science publications impose strict word limits and editors often discourage the ‘over-use’ of footnotes. An accepted fact, a well-known theoretical argument, a categorization of a phenomenon, even an idea such as the supremacy of European law often garners no citation at all.

I believe these differences in enterprise, method and style go a long way to account for a failure fully to appreciate the contributions of the other discipline. I should say that there is plenty of bad political science, just as there is plenty of bad legal scholarship. One could easily find work that earns a failing grade by any standard. Flawed work is flawed work – and should

be called such. But differences in priorities, method and style should not be considered flaws per se.

### **Why we should try to bridge but not merge the disciplines of law and political science**

The disciplines of both law and political science are key in understanding the interaction of law and politics. Legal analysis must take into account political factors if it is to be at all faithful to the phenomenon studied. Political studies must take into account what the law says, and how lawyers and judges think about the law, to understand legal and political outcomes. I think most would agree that the majority of scholarship in both disciplines is weak when it comes to considering how politics shape legal outcomes and how the legal process shapes political outcomes. Thus, improving communication across disciplines is important for improving scholarship in both disciplines.

Improving our understanding of how law and politics interact can also lead to greater respect for the law and to helping law better serve societal interests. Law and politics are connected as were the pushmi-pullyu (the two-headed creatures connected at the waist, with their heads pointed in opposite directions) in Hugh Lofting's tales of Dr Doolittle. In order for the pushmi-pullyu to walk, they had to work together – one had to walk backwards so the other could go forwards. For law to have any meaning, it must be respected. This means political actors must give up their discretion to do whatever they please, following legal rules simply because they are the rules. But yielding to law must not demand too great a sacrifice, and compliance with the law must be in the actor's interests. In other words, for law to work it must induce political actors to yield voluntarily, and, if they are to yield, the legal process must take into account deeply felt political concerns even if it leads to outcomes that are poorly reasoned from a legal perspective.

As the above analogy makes clear, I believe that law should at times yield to politics, and that doing so in no way corrupts the legal process. This is also why I believe that law and political science should speak more effectively to each other but not seek to converge as disciplines or approaches. The normative enterprise of legal studies plays an important role in building respect for the law and in improving the law. Legal scholars are right: if they can convince judges, lawyers and the wider body politic to believe in their legal vision, they can create a legal and political reality. Lawyers should not walk away from this objective. The political science enterprise of understanding which factors matter most at which times can also lead to better legal decision-making and improved respect for the law. At its best, political science unmask how power matters, showing when and how law does and

should yield to political forces, and highlighting who wins and loses under alternative interpretive scenarios. Power and distribution matter if we are to have a complete discussion of alternatives and make well-thought-out social choices.

So how should we bridge the disciplinary divide? First, find out what is the best work of the other discipline and read it. Then invite the authors of this scholarship to be discussants and commentators on your own work (or, if they themselves are too busy, ask the authors whom you should invite). As you read scholarship from other disciplines, take off your own discipline's lens that tells you what is valuable; instead think about what the scholarly piece is trying to do, and judge it according to how well it accomplishes its objective. Criticize sloppy methods, sloppy empirics, poor reasoning and false assumptions. But don't equate a lack of nuance with ignorance. Don't chuck a study out the window because a few of the facts are old or even wrong, or because there is one case that doesn't prove the rule.

Secondly, each discipline should stretch. I know from talking to legal scholars that there is a lot of knowledge and insight not put into scholarly work because of the conventions of the legal discipline. I think legal scholarship would be vastly improved if incorporating extra-legal factors in legal analyses was the norm rather than the exception. Lawyers may still feel compelled to couch extra-legal insights as speculation; just don't leave the insights out (and, further, please explain what factors lead you to your intuitions!). Such information would help political scientists know where to look and what alternative explanations to investigate.

Political science scholarship should stretch by improving its understanding about the law and legal process, incorporating the insights of legal scholarship into how the legal process works. Most answers in political science are a matter of degree. Power differences influence outcomes, but not in all situations at all times. In most cases, the real question is, when do certain factors matter most? When do the interests of the powerful triumph over straightforward applications of the law? Which groups tend successfully to mobilize to counter legal decisions, and when? Which groups usually fail to influence legal and political outcomes, and when? Political science can learn from lawyers how law and precedent shape legal decision-making, where legal indeterminacy opens up room for greater political influence and how indeterminacy can be manipulated to craft different legal and political outcomes. Legal scholarship also helps to identify slight variations in interpretation that can have significant distributional consequences.

Bridging the divide will I hope help both disciplines get beyond the unsustainable assumptions one sees over and over – that law represents broad political consent, that following the law is ultimately in the enlightened

actor's interest, that legal decisions ipso facto lead to changes in political outcomes, that most legal violations are pursued when there is a functioning legal system, that legal actors are extremely concerned about not ruffling the feathers of the powerful, and that law is discarded when it cuts against the interests of the powerful. Getting beyond these assumptions means better understanding the locomotion of the pushmi-pullyu – a topic that is far from exhausted.

For those who want to do real interdisciplinary work – work that is read by and employs the methods of both disciplines – I have two modest proposals. First, do not conflate and exacerbate disciplinary differences with paradigmatic differences. Interdisciplinary studies should be open about the paradigmatic assumptions underpinning the analysis, trying to pair paradigms in law and political science that share similar assumptions (pairing, for example, constructivist approaches with legal cultural approaches). Multi-scholar interdisciplinary projects should look at a phenomenon from a number of paradigms. This would allow for a clearer sense of how different assumptions shape the study of law, politics and legal process. Secondly, interdisciplinary projects should carefully identify the questions of inquiry, being sure to frame the questions in ways that provide clear meaning to both disciplines and, even better, are of interest to both disciplines. Projects should also make conscious choices about methods of inquiry, and come up with multiple means to examine questions incorporating factors and approaches important to both disciplines.

These are modest suggestions to be sure. For myself, I try to be legally sophisticated in my political science analysis. I am hardly alone here. And there are a number of legal scholars who are politically sophisticated in their work, including Joseph Weiler, Christian Joerges, Carol Harlow, Jo Shaw and Renaud Dehousse. But we straddle the divide while remaining within our own disciplines – publishing largely in journals within our disciplines, using methods in our disciplines, and housed in departments in our own disciplines. At the end of the day it is always clear who is the political scientist and who is the lawyer – this is not truly interdisciplinary work. A few scholars, such as Anne-Marie Slaughter and Martin Shapiro, speak to both audiences directly, publishing across disciplines and melding methods. But the way they frame their work is shaped by which audiences they speak to: they are speaking to two disciplines, one at a time, striving for but not yet having an interdisciplinary discussion.

Bridging the divide between law and political science is important if we are to improve our understanding of the interaction between law and politics. But approaching the study of law or politics from an interdisciplinary perspective is fraught with difficulties. Strong institutional incentives and

structures within the academic and legal professions make it difficult for scholars to step too far out of their own discipline, especially at the junior level. And the factors that make interdisciplinary work a thankless task sap one's willingness to go very far into the other camp. I'm not going to lionize those who stand up to the plate and try anyway. I'll just say that we should all aspire to doing the best work possible. And good work in both fields requires an attempt to bridge the divide.

## 2 Law as politics

Renaud Dehousse

Karen Alter's is a reasoned plea in favour of cautious, methodologically sound attempts at bridging the gap between law and political science in the study of European integration. Space considerations will lead me to adopt a bolder thesis: good political science cannot ignore legal constraints, just as lawyers must make sense of the politics of laws, i.e. the way in which legal arguments are used by a variety of actors to pursue their own interests. Interdisciplinary approaches are not a kind of exotic trip on which only a few adventurous travellers may embark; they are, more often than not, part and parcel of good scholarship.

In order to explain why in my view the two disciplines are intrinsically tied, I should start by pointing out that the standard descriptions that are often given of the main features of each discipline tend to overemphasize their distinctiveness.

### The separation thesis

The starting point of many surveys of the relationship between law and political science is that the ambitions of each discipline are on a different plane. Karen Alter's article is no exception to the rule: law, we are told, is 'a normative enterprise', where more attention is given to 'what the scholar wants to happen, than [to] what is actually happening'. In contrast, political science is 'a positivist enterprise', in that it primarily 'seeks to explain how the world works in practice'. From these divergent ambitions, huge methodological consequences follow. Legal scholarship mainly rests on 'legal exegesis – analyzing legal texts and legal decisions to reveal their meaning', whereas political scientists are primarily interested in causality relationships.

Interestingly, this thesis is by no means limited to the realm of political science; it finds an echo in many law works (e.g. Joerges, 1996). Furthermore, as anyone familiar with the history of scholarship on European integration

will know, the professional worlds of lawyers and political scientists are fairly separate: with a few exceptions, they teach in different departments and rarely read each other; they do not publish in the same journals, and do not often attend the same conferences.

And yet it must be acknowledged that the divide between the two worlds is perhaps no longer as big as it used to be. Political scientists have discovered that Community law was indeed relevant to understanding the development of European integration, as Joseph Weiler forcefully argued some 20 years ago. Conversely, a younger generation of lawyers have come to admit that the broader context in which legal integration takes place bears more weight than 'classical' legal reasoning would admit.

True, this evolution has its limits, geographical as well as substantive. Writing from France, I can bear witness to the fact that the conversion to the virtues of interdisciplinary dialogue is still far from universal. At the same time, I believe few would dispute the fact that things have been moving over the past 15 years.

How so? Is European integration such a special phenomenon that it has triggered a unique movement? For my part, I would rather argue that this evolution merely reflects trends that have been at work in other sectors of the two disciplines.

### The convergence thesis

One simple way to explain this convergence process is to show that the differences between the two disciplines were not as big as the description in the previous section would lead us to believe.

To start with, very few lawyers would subscribe to the purely exegetic approach described above. Even a legal positivist such as Hans Kelsen recognized that interpretation is a creative exercise. Legal rules always contain an (admittedly variable) degree of indeterminacy, so the interpreter must opt for one out of the various meanings that are compatible with the legal rule, which will always lead to the question: why was *that* interpretation preferred? Although it will always be presented as *the* proper one, dictated by professional standards of good interpretation, this choice will often be dictated by extra-legal concerns, be they value bound or linked to considerations of interest.

Secondly, the exegetic approach in question does not enjoy the same importance at all stages of the law-making process. It has of course played an important role in judicial rulings. But, even in common law countries, judge-made law is no longer in the same position as in the past. Statutory law or administrative rule-making have acquired considerable importance

and, in order to explain those law-making processes, one is bound to go beyond textual analyses and the syllogistic reasonings with which law is often associated.

Turning to the judiciary, lawyers in general – and, I would argue, practising lawyers in particular – know that judges' decisions, even when they speak the arid language of law, are strongly influenced by their values and, not infrequently, by interest considerations of various kinds (be they the interests of their country, of the judiciary or of specific segments of the populace). For this reason, judges often are, or can be made, sensitive to the socioeconomic implications of their rulings. Hence, *inter alia*, the development of techniques such as the 'Brandeis brief', advocated by Justice Louis D. Brandeis in order to enable the US Supreme Court to perceive more clearly what the implications of its rulings might be. In such a context, legal argumentation and policy considerations are so closely linked that even the most traditional lawyers would hesitate to draw a clear line between the two. Good lawyers know that their ability to convince a tribunal is often dependent on their ability to translate the formalist language of law references to the judges' values.

Thirdly, it follows from the above that law cannot be confined to a mere normative exercise.

Here a point of semantic clarification is in order, for the concept of law is ambiguous: the term can refer both to a social phenomenon (legal rules) and to one of the disciplines that studies it (legal scholarship).

It is plain that legal rules are by essence normative, because they are conceived to structure human behaviour and at times even have the ambition to change social reality. But if one wishes to ascertain the existence of a legal rule, to make sense of its origins, or to analyse its impact, one is bound to engage in an analysis of a series of variables that will stretch well beyond judicial reasonings. At this stage, the research questions will often be similar to those of political science, and good scholarship will entail looking at the same kind of independent variables.

Needless to say, such variables can easily be, and at times are, integrated in political science theories. But they have also influenced entire strands of legal literature, from legal realism to critical legal studies. Understanding social reality is at times indispensable to identifying the very existence of a legal rule. This is, of course, most clear in decentralized legal systems, where the creation of legal rules is not confined to the oracular statements of courts of legislators. In international law, reviewing state practice is necessary to discover the existence of a customary rule; commercial rules not infrequently refer to 'good practices' whose tenor can be ascertained only after an inquiry into the functioning of a given sector. More generally, legal theorists often

include references to practice in their definition of law, for they recognize that the authority of legal rules is dependent on the way they are regarded in a given polity.<sup>12</sup>

Thus, reducing legal scholarship to exegetic interpretation is tantamount to, say, treating rational choice as the only method used by political scientists, or econometrics as encapsulating the whole of economic thinking.<sup>13</sup>

### The politics of law

So far, I have essentially argued that, if they take their role seriously, lawyers are bound to address analytical questions that do not significantly differ from those political scientists would ask. But the reverse is also true: very often, to make sense of a given phenomenon, political scientists will have to include within their analyses developments within the legal sphere. The reasons are manifold.

First, the judiciary often has a strong policy role of its own, as Europeanists have (somewhat belatedly) discovered. It can act as a policy innovator, suggesting concepts and approaches that can then be exploited by 'real' policy makers. It can act as an agenda setter, highlighting problems that need to be addressed. It can serve as a legitimating agent, indicating the 'right' solutions to a problem.

Secondly, legal politics are an important element of the policy-making (at times even of the political) process. The fact that courts can step in is a factor that many political actors have integrated in their strategies, in the EU as in other political systems. The legal scene can therefore become the forum in which important political battles are waged. All this is known to EU institutional actors – hence *inter alia* the European Parliament's stubborn insistence on getting access to the ECJ courtroom or the development of litigation on the legal bases of EU decisions in the years since the Single Act. It is also clear to a number of private actors, which have not been shy in exploiting the potential of the legal battleground.

Finally, there appears to be in post-industrial societies a strong tendency towards legalization. Not only do ever larger numbers of issues fall into the public sphere but, within the latter, there are indications of a shift towards the legal sphere. Decisions that used to be taken by political bodies are now taken in judicial arenas. The integration process is no exception to the rule; for the reasons mentioned earlier, it can even be argued that this has contributed to its acceleration in Western Europe.<sup>14</sup>

Political scientists working on European issues are therefore likely to be confronted with legal dynamics at different stages of their work. No doubt,

if they consent to explore this new ground, they will find useful elements to fuel their own ‘domestic’ controversies. Constructivists will stress law’s influence in the construction and legitimation of given cognitive schemes. Interest-minded scholars will show how legal structures may favour certain types of interests, to the detriment of others. However, to be able to exploit this potential fully, they must be equipped to make sense of the formal logics that, as Karen Alter has rightly recalled, play an important role in law-making processes. This does not mean they should accept them uncritically for what they claim to be, or regard them as all-powerful, as political scientists discovering the legal universe at times tend to do. On the contrary, familiarity with legal schemes and their construction processes may help them to adopt a more detached view. But, if they want to assess the specific weight of legal considerations properly, they must be conversant with the language of law. Which brings me back to my starting point: good political science and good legal scholarship must necessarily converge.

### 3 Law, politics, and interdisciplinary work

Georg Vanberg

Karen Alter’s insightful and provocative piece accomplishes several goals:

- to explain why there appears to be, at the moment, a division in scholarship on European legal integration between political science approaches (‘judicial politics’) and legal scholarship (‘law’),
- to argue that scholars in both disciplines can benefit by bridging this divide and learning from the insights of the other field, and finally
- to offer some practical advice on how scholars ought to proceed in doing research that can speak to both audiences.

I come to this debate as somewhat of an ‘outsider.’ Although I try to keep abreast of the literature on the ECJ, my own work has not been concerned with European legal integration. Instead, it has dealt mostly with the interactions between national high courts and legislatures, especially the German Bundesverfassungsgericht and Bundestag. Not being as deeply immersed in the specific issues that have dominated the scholarly debate on European integration, I probably bring a slightly different perspective to the table. I largely agree with Alter’s diagnosis concerning the interactions between political scientists and legal scholars who study European legal integration. Many of the points she raises apply not only to debates over European legal integration but to comparative judicial politics more generally. I also believe

that the article points to important areas in which collaboration and cooperation could benefit scholars from both disciplines. Instead of using my comments to reinforce points on which we already agree, I would therefore like to address a larger issue that the discussion of interdisciplinary work between political scientists and legal scholars raises, namely the prospects for scientific progress in the comparative study of judicial politics (after all, why care about interdisciplinary work unless it helps to improve scholarship?). In particular, I believe two important challenges facing judicial scholars are raised by Alter's article that deserve additional emphasis. The first is a methodological challenge and concerns empirical testing, the other poses a larger theoretical question, closely connected to interdisciplinary work.<sup>15</sup>

### Empirical testing in comparative judicial politics

Scientific progress in the social sciences requires both theoretical development and empirical evaluation of theories – usually in the form of a 'dialogue' between these two components. As Karen Alter notes, political scientists who study judicial politics place importance on both aspects: '[H]ypothesis creation, hypothesis testing, and comparison across cases are at the heart of most political science.' The past 20 years have seen considerable progress in testing theories of judicial behavior. However, this empirical work in comparative judicial politics, especially on European integration, has consisted mostly of qualitative, small-*N* case studies. So far at least, large-*N*, multivariate, statistical research on European legal integration (or on comparative judicial politics more generally) has been rare.<sup>16</sup>

Although the value of existing work goes without saying, the comparative case study method has important limitations. As an example, the debate between 'neofunctionalists' and 'neorationalists' (somewhat of a misnomer) over empirical support for contending models of European legal integration has essentially dissolved into a dispute over ever more intricate interpretations of specific cases (such as the *Cassis de Dijon* decision), all of which have facial plausibility (see Burley and Mattli, 1993; Garrett, 1995; Garrett and Weingast, 1993; Mattli and Slaughter, 1995). As Carrubba (2001) has demonstrated, these studies, and the interpretations they offer, do not adequately control for competing hypotheses and do not discriminate between alternative explanations. As a result, they cannot – contrary to the usual claims – settle theoretical debates.<sup>17</sup> And yet, as Alter stresses in her article, 'high-quality scholarship . . . very importantly, evaluates alternative explanations'.

The need to overcome these shortcomings and to improve empirical work

by testing theories systematically in ways that discriminate between competing hypotheses constitutes a central challenge for scholars studying European legal integration (and comparative judicial politics more generally). Traditional case-study approaches are undoubtedly going to play an important part in this effort because they offer the potential for in-depth analysis that is virtually impossible to accomplish in a statistical study. At the same time, I would argue that successfully meeting this challenge, and living up to the high standards for empirical work that Karen Alter advocates, will require the more widespread introduction of large-*N*, multivariate, statistical analysis, which allows for systematic evaluation of rival hypotheses that is difficult to achieve within the framework of small-*N* studies. In other words, in addition to new and subtle interpretations of specific cases, we need systematic predictions that discriminate between theories and that can be tested in the context of a large number of cases. Making this transition will necessarily involve considerable data-collection efforts,<sup>18</sup> demand an increased receptiveness by judicial scholars for such approaches and open up opportunities for collaboration with scholars from other sub-fields who may be less versed in judicial politics but more familiar with the relevant statistical techniques.

### A deeper theoretical challenge

As Karen Alter argues, legal scholarship and political science research are characterized by differences in outlook and in methods. (Naturally, as Alter readily admits, any general characterization of a discipline must gloss over important intradisciplinary differences.) European legal scholarship tends to focus on *legal* reasoning, applying various interpretative frameworks to legal texts (judicial decisions, statutes, constitutions) to arrive at plausible and legally consistent interpretations or conclusions. Factors that are considered irrelevant or inappropriate from the point of view of legal exegesis (such as political or economic considerations in specific cases) are, for the most part, ignored. In proceeding this way, much legal scholarship contains an important (and perhaps intentional) ambiguity. It does not clearly specify whether it purports to *explain* actual judicial behavior or to provide a *normative standard* by which to judge (or which can guide) a particular jurisprudence.<sup>19</sup>

Political scientists, on the other hand, tend to be more explicit that the focus of their research lies in explaining actual behavior or phenomena: How important has the ECJ been for the process of European integration? Do the economic interests of powerful groups in member states influence decisions? Do member states comply with ECJ decisions and, if so, why? In answering

such questions, political scientists tend to be skeptical that pure legal scholarship as described earlier can offer a satisfactory explanation. Political factors, such as judges' and politicians' personal policy preferences, the involvement of interest groups, the political and economic consequences of a decision, the salience of a case, the complexity of an issue, or public opinion become important.<sup>20</sup> Whether such factors should matter for legal analysis (a normative concern) is secondary. What matters is whether they add explanatory power in trying to understand judicial behavior or the reactions of other agents to the court's decisions.<sup>21</sup>

A useful way to cast this difference in outlook is as a divergence in the perceived importance and power of principled legal argument. One position views legal arguments as relatively precise prescriptions equipped with an inherent authority that commands (or at least should command) the respect of judges, politicians and citizens. The other emphasizes the fact that legal arguments are ambiguous and that they may not command immediate respect, thus creating room for other (political) factors to fill the void. Framed as a question of the 'bite' that legal arguments possess, it becomes evident that this difference in outlook is a question of degree and not of kind. Few would deny that legal (especially constitutional) arguments can be influential or that non-legal factors may sometimes shape a particular interpretation or decision.

More importantly, this difference is not particular to the distinction between legal scholarship and political science but raises a deeper *theoretical* issue that may well divide scholars *within* the same discipline. Unfortunately, this issue is often left implicit in judicial scholarship, whether by legal scholars or political scientists, despite the fact that it has important theoretical ramifications. This is the problem of explaining the power and the limits of principled legal argument (what I will refer to, for lack of a better term, as a 'theory of legal argument').<sup>22</sup> Are principled arguments important because they have the power of the 'categorical imperative'? Do they matter because they allow actors to link issues strategically and thereby build new coalitions, as William Riker maintained in his theory of heresethics? Do they serve a coordinating function and thus have the 'force of convention'? Do they place particular interests in the context of more general or long-run interests and thereby alter individual preferences over an issue? Different 'theories of legal argument' will answer these questions in different ways, with important implications. Depending on the answer, legal arguments are expected to shape political outcomes in different ways and in different circumstances, and different factors will affect the extent and the manner in which they do so.

An example may help to illustrate. The 'mask and shield' argument

advanced by Burley and Mattli (1993) to explain European legal integration contends that the ECJ, in cooperation with special interest groups and national courts, can advance integration in so far as it is able to maintain an aura of non-political decision-making based on legal criteria. The appearance that decisions are non-partisan and purely 'legal' is important because it can hide the court's true agenda (the mask) and makes it more difficult for those unhappy with a decision to attack the court (the shield). Significantly, however, the need to maintain this appearance imposes constraints on the court's freedom of action: it must respect legal methods and conventions in pursuing its aims.<sup>23</sup> Implicitly, this account relies on the assumption that legal arguments exercise real influence over the behavior of judges, politicians and citizens – independent of their direct economic or political interests. It is precisely because legal arguments have such independent force that they can be used by the court to advance its interests. Garrett and Weingast (Garrett, 1992, 1995; Garrett and Weingast, 1993), on the other hand, argue that legal arguments and rulings by the ECJ are powerful as long as they serve the (sophisticated) interests of member states by helping them to overcome a problem of incomplete contracting. This account also imposes constraints on the court, but of a very different nature. Whereas the court is constrained by legal considerations in the first instance, it is constrained by political considerations (in particular, the interests of member state governments) in the second.

One way to conceptualize what differentiates these two accounts of the process of European legal integration is a disagreement over the appropriate 'theory of legal argument,' that is, over what lends force to legal arguments and therefore over the circumstances in which such arguments will 'bite.' Unfortunately – often for understandable reasons – research in judicial politics tends to suppress or leave implicit the theory of legal argument that a scholar subscribes to while focusing on features of more immediate concern. Nevertheless, as my example illustrates, the implicit theories of legal argument that underpin our research are often significant, and may ultimately drive more immediate theoretical disagreements. As a result, I would argue that a more conscious, explicit discussion of why we think legal arguments do (or do not) matter and of the factors that determine their 'bite' constitutes another important challenge facing judicial scholars. Moreover, to be successful, such a discussion cannot be limited to the perspective and the methods of a particular discipline, since the theoretical problem at issue spans the boundaries of multiple fields. It must consider the insights of a wide range of fields in which the power of principled argument in human interactions is relevant, including legal scholarship, political science, philosophy, psychology and undoubtedly others as well. All of which is just a round-about way of saying that

Karen Alter's appeal for a breakdown of interdisciplinary boundaries simply signifies the recognition that these boundaries are often arbitrarily constructed and can become 'misfits' that constrain rather than enable productive research as we face new theoretical problems and challenges.

## Notes

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- 1 Legal accounts include Hartley (1994), Rasmussen (1986), Stein (1981) and Weiler (1991). Political science accounts include Alter (2001), Burley and Mattli (1993), Stone Sweet (1998) and Stone Sweet and Brunell (1998).
- 2 Legal analyses of this case include Barents (1981), Masclet (1980) and Mattera (1980); political science accounts of this case include Alter and Meunier-Aitsahalia (1994), Garrett (1992), Garrett and Weingast (1993), Moravcsik (1995) and Wincott (1995).
- 3 As Mary-Ann Glendon et al. (1985: 162–3) have said, 'the weight of [legal] scholarly authority is everywhere taken into account by legislators and judges when they frame, interpret or apply law . . . [and a] critical case note by a leading author, is, in effect, like an important dissenting opinion, indicating where controversy exists and the possible future direction of the law'.
- 4 Most American political science scholarship, however, hides its normative project. Indeed, for many, bringing in normative assessments and goals corrupts the scientific enterprise and undermines the credibility of the findings. Personally I find this disingenuous since normative judgments are inherent in the assumptions of the analyst and the language of political science conveys normative biases and judgments.
- 5 For a good brief discussion of how legal norms are seen in political science, see Stone Sweet (2000: 1–12). For political science studies on the influence and power of norms, see Katzenstein (1995), Kratochwil (1989), Risse et al. (1999) and Wendt (1999).
- 6 Legal scholars are usually teachers, employed by law schools, where their audience is future lawyers and judges. Their scholarship often begins with the premise that it will somehow help lawyers and judges, or help a society working with lawyers and judges. Although political scientists are also primarily teachers, they are not writing for their students as future professionals. They are writing to influence the debate in the discipline itself, and perhaps policy as well.
- 7 This method is especially prevalent in European scholarship, perhaps because European legal rulings stick more closely to the text than do American rulings, where judges more often openly incorporate extra-legal concerns.
- 8 Political scientists also do not need to be absolutely up to date in order to identify and measure the dependent and independent variables. In fact, since the evidence needed to sort through explanations is less likely to be accessible with respect to contemporary events, most political scientists feel it is safer to study the past, using older understandings of the law relevant perhaps more in the past than in the present.

- 9 There are scholars interested in the case per se, but their work is usually seen as policy studies. You will notice a distinct separation if not rivalry between schools of public policy and political science departments.
- 10 I should note that many political science theories are not in fact subject to falsification at all, because the categories are so fungible that any negative example can be explained away. Non-falsifiability is a flaw of a theory. It should make one wary of the significance of the finding. That said, many of the dominant approaches in political science rely on highly fungible definitions that make them non-falsifiable. (What is, for example, the national interest or self-interest? These can be defined to justify virtually any behavior).
- 11 Such techniques are not, for instance, prevalent in postmodern or deconstructionist approaches to studying politics.
- 12 See, for example, the works of L.H. Hart in the United Kingdom, of Hauriou in France or of Weinberger in Austria.
- 13 Incidentally, it would not be difficult to show that political science often has strong normative underpinnings. Fritz Scharpf's analysis of the impact of market integration on national welfare systems or Giandomenico Majone's views of regulatory policies, to take but two well-known examples, contain many indications of their value systems.
- 14 These points are developed in Dehousse (1998).
- 15 Writing as a political scientist in a political science journal, and with apologies to legal scholars, I focus on judicial politics. However, the theoretical issue I raise has close connections to legal scholarship.
- 16 Stone Sweet and Brunell's piece on European legal integration is a prominent exception (1998).
- 17 As Carrubba shows, the same is true for Stone Sweet and Brunell's study (1998). The results reported there are also consistent with neofunctionalist *and* neorationalist accounts.
- 18 One important reason for the scarcity of statistical analysis has been the unavailability of suitable data. A necessary first step in bringing such methods to bear on problems of European legal integration is the systematic coding of a large number of ECJ decisions (in other words, the creation of an 'ECJ Decision Data Set'). Such efforts are beginning to get under way, not just for the ECJ but for other high courts as well.
- 19 Alter's interpretation of the purpose of legal scholarship focuses on its normative dimension. As she puts it, '[l]egal scholarship is part of law's normative enterprise, itself a sort of normative advocacy'. Although I agree that this is one important aspect of legal scholarship, I do not think that legal scholars view their work as purely normative. At least to the extent that 'ought implies can,' there must also be a conviction that judges are in fact going to be or can be influenced by a particular argument – which implies that such arguments can explain judicial behavior to that extent.
- 20 Most European legal scholars probably would not deny that such factors influence judicial decisions (at least where statutes and constitutions are ambiguous and legal reasoning provides no clear answer). As a clerk of the German Constitutional Court said to me during an interview a few years ago: 'In law school, students are taught deductive, logical reasoning . . . when they read actual decisions by the Constitutional Court, they realize that most of

- the time the decisions aren't logical, but contradictory. And of course that's a result of dealing with political reality . . . of the extra-judicial considerations that always have to go into deciding a case.' For a more systematic analysis of the impact of *raison d'état* on the German court's jurisprudence by a legal scholar, see Hans Klein's (1968) excellent essay. Klein later served as a judge on the German Constitutional Court.
- 21 Posing the distinction in this way already suggests an important reason, hinted at by Karen Alter, why interdisciplinary work in judicial politics is valuable. To the extent that European judges have adopted and internalized the outlook of European legal scholarship, their *behavior* may be influenced and determined by normative and interpretive concerns. As a result, political scientists trying to explain judicial behavior must necessarily develop at least a rudimentary understanding of 'how judges think.'
  - 22 The problem has a more general analog in trying to explain the power of any kind of general principled argument in human interactions, e.g. in political deliberation.
  - 23 As Burley and Mattli (1993: 73) put it, 'a "legal" decision that is transparently "political," in the sense that it departs too far from the principles and methods of law, will invite direct political attack. It will thus fail both as mask and shield. Conversely, a court seeking to advance its own political agenda must accept the independent constraints of legal reasoning, even when such constraints require it to reach a result that is far narrower than the one it might deem politically optimal.'

## References

- Alter, Karen J. (2001) *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press.
- Alter, Karen J. and Sophie Meunier-Aitsahalia (1994) 'Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision', *Comparative Political Studies* 24: 535–61.
- Barents, R. (1981) 'New Developments in Measures Having Equivalent Effects', *Common Market Law Review* 18(3): 271–308.
- Burley, Anne-Marie and Walter Mattli (1993) 'Europe before the Court', *International Organization* 47: 41–76.
- Carrubba, Clifford (2001) 'The Politics of Supranational Legal Integration: National Courts, the European Court of Justice, and Development of EU Law', typescript, Emory University, Atlanta.
- Dehousse, Renaud (1998) *The European Court of Justice: The Politics of Judicial Integration*. London: Macmillan.
- Garrett, Geoffrey (1992) 'The European Community's Internal Market', *International Organization* 46: 533–60.
- Garrett, Geoffrey (1995) 'The Politics of Legal Integration in the European Union', *International Organization* 49: 171–81.
- Garrett, Geoffrey and Barry Weingast (1993) 'Ideas, Interests and Institutions: Constructing the EC's Internal Market', in Judith Goldstein and Robert Keohane (eds) *Ideas and Foreign Policy*. Ithaca, NY: Cornell University Press.

- Glendon, Mary Ann, Michael Wallace Gordon and Christopher Osakwe (1985) *Comparative Legal Traditions*. St. Paul, MN: West Publishing Co.
- Hartley, Trevor (1994) *The Foundations of European Community Law*, 4th edn. Oxford: Clarendon Press.
- Joerges, Christian (1996) 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', *European Law Journal* 2: 105–35.
- Katzenstein, Peter (1995) *The Culture of National Security: Norms and Identity in World Politics*. New York: Columbia University Press.
- Klein, Hans (1968) *Bundesverfassungsgericht und Staatsraison*. Berlin: Alfred Metzner Verlag.
- Kratochwil, Friedrich (1989) *Rules, Norms, and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press.
- Masclet, Jean-Claude (1980) 'Les articles 30, 36, et 100 du traité CEE à la lumière de l'arrêt Cassis de Dijon', *Revue de Droit Européen* 16: 611–34.
- Mattera, Alfonso (1980) 'L'Arrêt "Cassis de Dijon": une nouvelle approche pour la réalisation et le bon fonctionnement du marché intérieur', *Revue du Marché Commun* 241: 505–13.
- Mattli, Walter and Anne-Marie Slaughter (1995) 'Law and Politics in the European Union: A Reply to Garrett', *International Organization* 49: 183–90.
- Moravcsik, Andrew (1995) 'Liberal Intergovernmentalism and Integration: A Rejoinder', *Journal of Common Market Studies* 33: 611–28.
- Rasmussen, Hjalte (1986) *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers.
- Risse, Thomas, Stephen Ropp and Kathryn Sikkink (1999) *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press.
- Stein, Eric (1981) 'Lawyers, Judges and the Making of a Transnational Constitution', *American Journal of International Law* 75: 1–27.
- Stone Sweet, Alec (1998) 'Constitutional Dialogues in the European Union?', in Joseph Weiler, Alec Stone Sweet and Anne-Marie Slaughter (eds) *The European Court of Justice and National Courts – Doctrine and Jurisprudence*. Oxford: Hart Publishing.
- Stone Sweet, Alec (2000) *Governing with Judges*. Oxford: Oxford University Press.
- Stone Sweet, Alec and Thomas Brunell (1998) 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', *American Political Science Review* 92: 63–80.
- Weiler, Joseph (1991) 'The Transformation of Europe', *Yale Law Journal* 100: 2403–83.
- Wendt, Alexander (1999) *Social Theory of International Politics*. Cambridge: Cambridge University Press.
- Wincott, Daniel (1995) 'Institutional Interaction and European Integration: Towards an Everyday Critique of Liberal Intergovernmentalism', *Journal of Common Market Studies* 33: 597–610.

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