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Kirk W. Junker

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Conference Conclusions “. . . and Beyond”: Judicial Review in the European Union

*Kirk W. Junker**

The most-often cited American literary critic, Kenneth Burke — who happens to have been born and raised in Pittsburgh, and whose magnum opus, *A Grammar of Motives*, happens to have begun as a study in constitutions, once referred to life as participation in an “unending conversation.” Burke wrote:

Imagine that you enter a parlor. You come late. When you arrive, others have long preceded you, and they are engaged in a heated discussion, a discussion too heated for them to pause and tell you exactly what it is about. In fact, the discussion had already begun long before any of them got there, so that no one present is qualified to retrace for you all the steps that had gone before. You listen for a while, until you decide that you have caught the tenor of the argument; then you put in your oar. Someone answers; you answer him; another comes to your defense; another aligns himself against you, to either the embarrassment or gratification of your opponent, depending upon the quality of your ally's assistance. However, the discussion is interminable. The hour grows late, you must depart. And you do depart, with the discussion still vigorously in progress.¹

We bring this conference, “Judicial Review in the Americas . . . and Beyond” to a close, but we do so not to end the discussion, but only because we must depart from the parlor, so to speak, because the hour has grown late, with the discussion still vigorously in progress. To my reading, there have been three components to the topic of our conference: “judicial review,” “beyond” and “the Americas.” I will address some fundamental elements of each of these

* Assistant Professor of Law and Director of International Programs, Duquesne University School of Law, 600 Locust Street, Pittsburgh, PA 15282, U.S.A., telephone +1 412 396 1047, facsimile +1 412 396 4014, junker@duq.edu.

1. KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM* 110-11 (University of California Press, 1941).

components during my remarks on judicial review in the European Union.

“BEYOND”

First, why the notion of “beyond?” I insist to my students of comparative law that when they address any substantive issues of comparison, they must begin their study with a justification. “Why compare?” I ask them. Comparison is not simply a juxtaposition of otherwise unlike things, laid out beside each other as though the connections — if any — are obvious. It is we who make those connections, either explicitly or implicitly. The well-known and often-cited German comparativists, Konrad Zweigert and Hein Kötz, tell us that “no study deserves the name of a science if it limits itself to phenomena arising within its national boundaries.”² Indeed, during our conference Justice Cruz-Castro of Costa Rica reminded us that in a small country with no army like Costa Rica, practicing jurists must consider other countries’ views. And yet, I would expect the audience of a conference that focuses upon the Americas to ask, “why compare European Union law with the law of the Americas? The connections are not obvious.” One would be justified in raising that question. Let me try to answer. The first answer is that our first conference in this series was entitled “Federalism in the Americas . . . and Beyond,”³ Professor Peter Tettinger of Duquesne’s partner university, the University of Cologne, joined us and offered comparisons with Germany and the European Union. That pattern was kept in place for the present conference.

But beyond that institutional-historical reason, there are other more substantive and practical reasons as well. Europe certainly qualifies as being geographically beyond the Americas, but more importantly, the type of judicial review practiced by the European Court of Justice (“ECJ”) is conceptually beyond the types of judicial review practiced in the Americas. In the Americas, our systems of judicial review may position one branch of government over another branch of the same national government, as Professor Garro described for Argentina, and as Professors Gormley and Antkowiak described for the United States, or may position a

2. KONRAD ZWIEGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 15 (Tony Weir trans., 3d ed. 1998).

3. The papers from “Federalism in the Americas . . . and Beyond” are published in 43 DUQ. L. REV. 517-653 (2005) and 44 DUQ. L. REV. 3-207 (2005).

court to review a state or provincial government's legislation within a federation, as Professor Gamas Torruco described for Mexico. The judicial review practiced by the European Court of Justice, on the other hand, positions The European Court of Justice to review the legislative and judicial acts of independent sovereign states. The unique nature of the European Union is that of a treaty union of independent sovereign states, each of which has volunteered to share some of its sovereignty with the Union, while not allowing the Union itself to become a state, but whose Union's law explicitly has been characterized by the European Court of Justice as independent of⁴ and superior to that of the member states by the European Court of Justice.⁵ Consequently, judicial reviews conducted by the European Court of Justice are in many ways beyond more traditional notions of judicial review. But as Professor Brand reminded us, before we can get beyond the horizon that is so immediate, we must be conscious of our own position such that we can have a perspective from which to look beyond. It is a geographic position, a conceptual position, and as I hope to demonstrate, a temporal position.

"JUDICIAL REVIEW" AND "THE AMERICAS"

Regarding judicial review in the United States, Judge Smith, Professor Gormley and Professor Antkowiak have all noted that the term "judicial review" is *not* found in the Constitution of the United States of America.

That so many doubts and challenges are raised is due pre-eminently to the failure of the American Founding Fathers to spell it out in the Constitution in so many words. Yet the records of the Philadelphia Constitutional Convention of 1787 indicate that the idea or principle of judicial review was a matter of distinct concern to the framers who, after all, had little use for unrestrained popular majoritarian government; that judicial review was indeed known to the colonists because the British Privy Council had established it over acts passed by colonial legislatures; that at least eight of the ratifying state conventions had expressly discussed and accepted the judicial power to pronounce legislative acts void; and that

4. Case 26/62, *van Gend en Loos (NV Algemene Transporten Expeditie Onderneming) v. Nederlandse Administratie der Balastingen*, 1971 E.C.R. 1.

5. Case 6/64, *Costa (Flaminio) v. ENEL*, 1964 E.C.R. 1141.

prior to 1789 some eight instances of state court judicial review against state legislatures had taken place. . . . Research by constitutional historians such as Charles A. Beard, Edward S. Corwin, and Alpheus T. Mason indicates that between 25 and 32 of the 40 delegates at Philadelphia generally favored the adoption of judicial review.⁶

The relevance of the term “Americas” in our conference title does not represent the limited view of the Americas from within the Americas, but also includes influences on the Americas from beyond, and influences from the Americas to the beyond. To this end, one may note that the Philadelphia Convention itself influenced the recent European Convention to draft the Treaty to Establish a Constitution for Europe.⁷ The President of the Convention, former French President Valéry Giscard d’Estaing, carried a copy of James Madison’s biography with him, and on more than one occasion the media as well as d’Estaing referred to himself as “Madison,” and to the Convention as “Philadelphia.”⁸ In fact, the papers from the Convention were published as a series, titled “The European Convention Papers,” as a conscious allusion to the publication in the New York press in 1787 and 1788 of the *Federalist Papers* by James Madison, John Jay and Alexander Hamilton.⁹ Let me just make a few points regarding the unique legal institutions and political structure of the European Union before discussing the specifics of one of its institutions, the European Court of Justice, where we find instances of judicial review practices.

It was not a coincidence that immediately after the war, while speaking at the University of Zürich on December 19, 1946, and proposing that the countries of Europe needed to work together to prevent another European war, that Winston Churchill called the new union a “United States of Europe.” By 1952, Germany, France, Italy, Belgium, the Netherlands and Luxembourg had all come together in Paris and signed the first Community Treaty which included a European Court of Justice — The European Coal and Steel Convention. Just two years later, those same six coun-

6. HENRY J. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES*, 6-7 (Oxford Univ. Press, 3d ed. 1977) (citations omitted).

7. For comment on this cumbersome title of “Treaty to Establish a Constitution for Europe,” see Kirk W. Junker, *Constitution*, 38 *FUTURES* 224 (2006).

8. d’Estaing continues to refer to Madison in his speeches on the conference and its project. See Valéry Giscard d’Estaing, Speech at the London School of Economics: The Political Future of Europe (Feb. 28, 2006).

9. *The European Convention Papers*, *IRISH TIMES*, Nov. 13, 2003.

tries formed two more treaty communities in Rome, both of which included the European Court of Justice as one of its institutions. These two additional constitutive treaties were the European Economic Community Treaty and the Euratom Community Treaty. Although the general jurisdictional competence of the European Communities has always been held by the European Court of Justice, the unique and intriguing nature of the mixtures and divisions of competencies and loyalties of the other communities' institutions must be addressed in order to understand the context of the European Court of Justice. The division of powers among the institutions of the European Communities — now the European Union¹⁰ — lies not along the lines of Montesquieu's tripartite government, nor along the lines of a parliamentary or a presidential system.

The division of loyalties legally required of the members of the institutions of the European Union is instead divided in three ways: (1) to the citizens of Europe, (2) to the governments of the respective member states and (3) to the European Union on the whole. Thus the "checks and balances" that one might imagine existing among various institutions of government work in three dimensions in the European Union. One participates in the European Union through one of three different loyalties that are divided among legal institutions with multiple and divided functions of governance. For example, the legislative function is distributed among the Parliament, the Council and the Commission, with none of the three institutions having the complete and independent ability to pass any form of legislation. In most instances, the Commission proposes legislation, but the Council must ratify it. In more recent years, due largely to calls for more representative government, the Parliament had been given some abilities either to propose or ratify legislation of some types (but still is incapable of enacting legislation on its own). Likewise, the executive function, although more centralized in the one institution of the Council than the legislative function, also remains diffused between the Commission and Council.

Moreover, the Council (of Ministers) is comprised of ministers holding various cabinet positions in their home states, and who thus are legally bound and responsible to their home states. Parliament, on the other hand, is elected by all European citizens

10. The Treaty on European Union, signed at Maastricht in 1993, was the first treaty to begin using the term "European Union" to refer to all of the communities as one entity.

through the European parties (not through domestic parties); the legal duties and responsibilities of the Parliamentarians are thus duties and responsibilities to persons as citizens of Europe (not as citizens of their respective states), as represented through their European political parties.

And finally, although the Commissioners are appointed by their home states' executives, their duty is to the public legal entity that is the European Union, not to a respective home state. Consequently, when a piece of legislation is proposed by the Commission, it is proposed by persons charged with a duty to the European Union, but that legislation can only be ratified by the Councillors who remain representatives of the interests of their several states, or the Parliamentarians, who are representatives of the European people.

The judicial function is the most centralized governmental function within the European Union, with general jurisdiction having been originally vested in the European Court of Justice alone, and the Court of Auditors having only limited subject-matter jurisdiction. In 1998, under the Single European Union Act,¹¹ the Court of First Instance was added to alleviate some of the workload of the European Court of Justice. The two-tiered system that the Court of First Instance and European Court of Justice now enjoy, could well be said to make the structure of the judiciary the most traditional structure of the European Union's institutions. Some commentators have noted that the European Court of Justice and the Court of First Instance, like most courts in civil law systems, differ from the Anglo-American common law courts in three main ways: (1) they emphasize written, rather than oral procedures, (2) they, and not the parties, direct the development of the evidence, and (3) there is an absence of dissenting opinions.¹²

JUDICIAL REVIEW OF COMMUNITY ACTION

While there may arguably be other possible judicial reviews of acts of Community institutions, the main provisions for review are found in Articles 230, 232, 235, 241 and 288 of the unified constitutive legislation of the European Community Treaty ("ECT" or "Treaty"). Article 230 of the Treaty empowers the European Court

11. Single European Act (1986), <http://europa.eu.int/eur-lex/en/treaties/selected/livre509.html>.

12. RALPH H. FOLSOM, EUROPEAN UNION LAW IN A NUTSHELL 122 (5th ed. 2005).

of Justice and the Court of First Instance to review the legality of binding institutional acts. Article 230 provides:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB [European Central Bank], other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.¹³

Article 249 provides a list of those acts considered to be binding, including directives, regulations and decisions. Perhaps as important as this mechanical application of the Treaty to the acts, is the fact that the European Court of Justice has continually considered the “nature and effect” of an act and not simply its form. While one might well anticipate that the usual legislative and executive acts of the institutions would be subject to review, the European Court of Justice has interpreted the Treaty’s term “acts” to include direct “legal effects,” similar to the concept explained by Justice Richard for Canadian law, and to institutional acts which have binding effects. Although the Community Courts do not practice the common law notion of *stare decisis*, several of their decisions do stand as seminal interpretations of Community law, including the notion of binding effect. In the 1971 case known as the *European Road Transport Agreement* (or “ERTA”) decision,¹⁴ the European Court of Justice found that although the act in question was only a resolution, it had sufficiently binding legal effects on relations among Community institutions, and therefore, the Court concluded that it was reviewable.

The European Court of Justice further held that acts that produced legal effects over and against third parties were also reviewable, even though such acts were not included in the Article 230 list of acts.¹⁵ Of course, review by the Community courts of the acts of other institutions is not always welcome by the other institutions. More than once, for example, the Commission has sought to stop the review of what it characterized as “soft law” acts.¹⁶ Appropriate to this line of resistance, some commentators have noted an increase in characterizing Community acts as “soft

13. European Community Treaty art. 230 (1957, as amended).

14. Case 22/70, *Commission v. Council* (ERTA), 1971 E.C.R. 263.

15. Case 294/83, *Les Verts v. European Parliament*, 1986 E.C.R. 1339.

16. Case C-325/91, *France v. Commission*, 1993 E.C.R. I-3283.

law,” and have therefore concluded that member states ought to welcome the vigilant approach taken by the European Court of Justice in taking jurisdiction over even such acts and reviewing them for legality, as a policy that protects the individual against the institutions.¹⁷

Article 232 provides, in part: “Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institution of the Community may bring an action before the Court of Justice to have the infringement established.”¹⁸ Article 235 provides: “The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288.”¹⁹

And finally, adding to the list of reviewable acts, Article 241 includes the ability of an individual to challenge a regulation adopted by the institutions jointly or singly. Article 241 provides:

Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.²⁰

Beyond the Treaty’s list of acts by EU institutions that are reviewable, one finds that administrative acts taken by the Commission have also been held by the Court to be reviewable.²¹ But it would be wrong to read the Treaty and the interpretations of the European Court of Justice as all-inclusive and ever-expanding. Not all acts of Community institutions are reviewable. For instance, when the member states act, even if convened as the

17. MARGOT HORSPPOOL, *EUROPEAN UNION LAW* 240 (Reed Elsevier, 3d ed. 2003).

18. European Community Treaty art. 232.

19. *Id.* art. 235.

20. *Id.* art. 241.

21. See Case 8-11/66, *SA Cimenteries CBR Cementbedrijven NV v. Comm’n*, 1967 E.C.R. 75; Case T-3/93, *Air France v. Comm’n*, 1994 E.C.R. II-121; and Case 60/81, *IBM v. Comm’n*, 1981 E.C.R. 2639; Jürgen Schwarze, *Judicial Review of European Administrative Procedure*, 68 *LAW & CONTEMP. PROBS.* 85 (2004).

Council, the European Court of Justice consistently has found the actions not to be reviewable.²²

While the Court's determinations of what actions are reviewable generally have been accepted by the member states, the issue of who has standing to apply for review of those acts has been a far more controversial issue. Potential litigants are characterized as either "privileged," "semi-privileged," or "non-privileged," when it comes to ascertaining whether the potential litigant has standing. The European Court of Justice has interpreted Article 230 of the Treaty to confer a privileged status to certain parties — the Commission, the Council and the member states themselves — because they are considered to have a direct interest in any acts under review and, therefore, automatically have standing. By comparison, the European Parliament, the European Central Bank and the Court of Auditors are all semi-privileged parties that may take action only "for the purpose of protecting their prerogatives."²³ Other applicants for review may need to demonstrate a particular interest in an act in order to have standing before the Community courts for review of the act. Natural and legal persons, as non-privileged parties, may bring actions before the Court of First Instance, but the record will show that they have a difficult time establishing the requisite interest. Article 230(4) requires of these natural or legal persons that one of three things has occurred: (1) a decision was addressed to the party; (2) a decision was addressed to another person which is of direct and individual concern to the party; or (3) a decision was made in the form of a regulation which is of direct and individual concern to the party.²⁴

Although judicial review of community action usually concerns Community Court review of the legality of the Community Institution's acts discussed above, before concluding this brief review, it would also be worth considering what are known as "referrals" under Article 234. Therein it is provided that member state courts, when presented with actions arising under, or claiming relief through, Community law, may send the issue to the European Court of Justice for advice on interpreting the issue of Community law. Specifically, Article 234 provides:

22. Case C-181/91 and C-248/91, *European Parliament v. Council and Comm'n*, 1993 E.C.R. 1-3685.

23. *European Community Treaty art. 230(3)*.

24. *Id.* art. 230(4).

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court of tribunal of a Member State, that court of tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.²⁵

Thus, while Article 234 does not provide the European Court of Justice with compulsory jurisdiction to review any additional acts of European institutions, it clearly functions to give the Court the power to "review" cases in member state courts before a decision has been taken, and to advise those courts on how the cases should be decided in accordance with established European law. Left unsaid is the suggestion that if a member state court decides not to accept the recommendation of the European Court of Justice, then it may well find its decision overturned during a later review upon formal appeal.

Looking ahead, it seems that although the Treaty Establishing a Constitution for Europe²⁶ has been stalled by the failure of France and the Netherlands to ratify, the Treaty in some form may well eventually become law. If it were to become law in its current form, judicial review in the European Union would not likely change. The Conference of the Representatives of the Governments of the Member States, convened in Brussels on September 30, 2003, to adopt the Treaty establishing a Constitution for Europe, also adopted a series of Protocols, Annexes and Declarations concerning the Treaty. One of those is entitled "Declaration concerning the explanations relating to the Charter of Fundamental Rights."²⁷ Therein, the Conference explains the relationship of the Constitutional Treaty to the Charter and to the notion of judi-

25. *Id.* art. 234.

26. OFFICIAL J. OF THE EUROPEAN UNION, C 310, Vol. 47, 16.12.2004.

27. *Id.*

cial review, stating: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."²⁸ In reference to Article II-107, the "Declaration concerning the explanations relating to the Charter of Fundamental Rights" states:

The Charter of Fundamental Rights has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice. The European Convention has considered the Union's system of judicial review including the rules of admissibility and confirmed them.²⁹

WHY DO MEMBER STATES AND CITIZENS ACCEPT THE EUROPEAN COURT OF JUSTICE'S REVIEW?

To ask why European Union member states and citizens have accepted judicial review invites comparison with the Americas, and opens the question more broadly to ask why *anyone* accepts judicial review? When American primary and secondary school students are taught the principles of American government, a standard point of instruction is to describe how a bill becomes a law. The issue is taught and tested as a simple, pragmatic question and answer process. It is anticipated by teachers and students alike that the positive statement of law found in the Constitution and law-making statutes will answer the question. It does not. No matter how lifeless the detached study of law may seem, once it is reinserted in the soil of living society, it comes back to life. Witnesses and litigating parties bring law to life and keep it alive. Through their attitude toward the law, it is *they* who make judicial decisions binding. To this end, Professor Antkowiak insisted that for a judiciary to enable a society to achieve Montesquieu's idea of virtue, it must be responsive to the society. Justice Cruz-Castro pointed out that in order to legitimize judicial review, judges must acknowledge that their work is connected with the political system.

28. *Id.*

29. European Communities, *Declaration Concerning the Explanations Relating to the Charter of Fundamental Rights*, Treaty Establishing a Constitution for Europe 458 (Office for Official Publications of the European Communities 2005), available at http://europa.eu/constitution/en/ptoc146_en.htm.

This consideration of judicial review in the relatively new judicial system of the European Union serves to highlight this theme as it precipitated from this conference. That theme is to ask why any court, state's attorney, private attorney or litigant would accept the review of the efforts of their trial by another court? In other words, rather than asking how judicial review in any of the systems of the Americas or Europe works, one must ask why does judicial review work? The legal mechanic might quickly respond with something about contempt powers over litigants and lawyers who do not obey judicial orders, or even mention criminal punishments for judges unwilling to accept the review of their judicial superiors. And yes, there are sheriffs and police to enforce these rules. But the fear of enforcement alone is no more persuasive an argument for the peaceful following of judicial review than it is for the peaceful following of criminal prohibitions on murder, rape or robbery.

My own study of delay in United States' courts from some years ago has revealed that regardless of the measures taken by courts to speed the process along, it is the local legal culture of practicing lawyers that delays pre-trial, trial, post-trial and appellate processes.³⁰ Practicing lawyers accept the legal time limits imposed, using the time prior to the expiration of those limits as their tool to obtain both flexibility in negotiations and the ability to take on more cases. Thus, the examples of judicial review and delay in the courts exemplify the fact that the inner workings of a legal system among legal practitioners are subject to the same need of acceptance by those affected from the ground upwards, just as the norms of the criminal or civil law systems themselves need to be accepted as legitimate from the ground upwards in order to be effective. This leaves open new, ripe comparative law territory to be explored in the legitimacy of judicial review, as it is accepted in various systems by those practicing under it — judges, lawyers and litigants.

While some Euroskeptics had in the past, rather predictably, concluded things such as "the ECJ does not possess a surplus of legitimacy,"³¹ it is currently undeniable that the ECJ and Court of First Instance are able to exercise the power of judicial review explicitly granted to them in the Treaty, and that they do so in an

30. Kirk W. Junker, *Delay in the Courts: A Closer Look* (1980) (unpublished manuscript, on file with the author).

31. James L. Gibson & Gregory A. Caldeira, *Changes in the Legitimacy of the European Court of Justice: A Post Maastricht Analysis*, 28 *BRIT. J. OF POL. SCI.* 63, 63 (1998).

expansive fashion.³² Thus the question to consider is not whether the ECJ has judicial review power, nor whether it has legitimacy, but rather, why do member states accept the ECJ's review? An unplanned theme has precipitated from this conference, articulated by the participants in different ways. It begins with a statement by Professor Barker in his welcome letter in the program. He notes that judicial review is "an integral part of the law *and politics* of the United States," a point that was then emphasized in the conference's opening by Dean Donald J. Guter.

The European Court of Justice stated, in what has become a landmark decision, *Costa v. ENEL*:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which . . . became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights . . . and have thus created a body of law which binds both their nationals and themselves.³³

This bootstrapping statement is no less important to the independence and capacity of the European Court of Justice than the United States Supreme Court's own bootstrapping position of judicial review announced in the landmark decision of *Marbury v. Madison*.³⁴ Judge Brooks Smith demonstrated that, historically, it has not been the mechanics and rules of judicial review that secured it firmly in place in the United States, but rather it is the legal culture's embrace that puts it there and keeps it there. Later, in his historical presentation of judicial review in Mexico, Professor Gamas-Torruco illustrated very well the interplay of law, politics and even the armed forces.

Judicial review in the European legal system also acts politically as a tool of legal integration. Political commentators have asserted that "the Court of Justice has been the prime mover in

32. HORSPOOL, *supra* note 17, at 238.

33. Case 6/64, *Costa (Flaminio) v. ENEL*, 1964 E.C.R. 1141.

34. 5 U.S. 137 (1803).

European legal integration and that national governments have accepted the court's lead."³⁵

According to Geoffrey Garrett, "governments must weigh the costs of accepting the court's decision against the benefits derived from having an effective legal system in the EU (in terms of enhancing the efficacy of the internal market)," as is exemplified in the famous *Cassis de Dijon*³⁶ case. In *Cassis de Dijon*, the German government accepted a European Court of Justice decision that hurt German trade in the short term, but could have been calculated to benefit German trade in the long term.³⁷ Garret contends that the European Court of Justice is also what he terms a "strategic rational actor," and that the Court understands that the legal power conferred by the Treaties alone is not sufficient to force member states to accept Court decisions.³⁸ Additionally, Garret notes that neither the direct effect nor supremacy doctrines are written into any of the constitutive treaties of the European Union, but instead have been invented and developed by the Court itself.³⁹ Thus, the Court's power "depends critically on the continuing acquiescence of national governments."⁴⁰

CONCLUSION

In conclusion, I return for a moment to the word "beyond." In the beginning of my remarks, I noted that as used here, I mean "beyond" in more than a geographic sense. I mean it in the sense by which we define judicial review. In the Americas, the term means some form of intra-sovereign review power. In the case of the European Court of Justice, judicial review means a trans-sovereign review power. But there is yet a third sense of the word "beyond" as well. The third sense of the word is a temporal one. An examination question that I like to use to test my students' vision begins by pointing out that the organization of legal publics is fluid and changing. Our study of history demonstrates that monarchies, for instance, are far less prevalent than they once were. And while states may seem to have replaced them, history

35. Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171, 171 (1995) (citing Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993)).

36. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*: 120/78 [1979] ECR 649, ECJ.

37. *Cassis de Dijon*, 120/78.

38. Garrett, *supra* note 35, at 172-73.

39. *Id.* at 172.

40. *Id.* at 173.

warns us that they too will change and perhaps cease to be recognized as the focus of public legal organization and identity.

So what forms of public legal organizations are on the horizon? The European Union, with its unique sense of shared sovereignty and trans-sovereign judicial review would seem to be one of them. Professor Barker, in his opening remarks, used the terms "old world" and "new world." These are not only appellations for wine, but for legal systems as well. And yet the old world's legal systems which have produced the languages that we speak as well as the legal structures through which we speak at this conference are, in a most important and fascinating way for public international lawyers, the New World again.

During the Convention to draft the Treaty Establishing a Constitution for Europe, the Convention President, Valery Giscard d'Estaing, carried the biography of James Madison with him and frequently referred to his role as that of Madison. Further, the African Union has not stated that it wishes to model itself upon the legal systems of North America, nor has it stated that it wishes to model itself upon the legal systems of Latin America; it has stated that it wishes to model itself upon the European Union. This is particularly meaningful when one considers that the old Organization of African Unity, a predecessor of the African Union, had as its main purpose a goal to rid the continent of European colonizers. In response, the European Union has established institutional initiatives that include not only economic development, as in the New Partnership for Africa's Development (NEPAD) program,⁴¹ but support in ideas for government and politics as well. So as we depart from this conference and have the opportunity to reflect upon all that we have discussed here, let us not forget the admonition from Kenneth Burke that the conversation is unending.

41. New Partnership for Africa's Development (NEPAD), <http://europa.eu/bulletin/en/200607/p133030.htm> (last visited Apr. 17, 2007).

