#### Subject Formation—absence of shared yardsticks for argument and the mismatch of interpretational scope limits out the possibility of debate.

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Discourses take place in many political, judicial and societal arenas within and beyond nation-states. They are alternatives to bargaining, voting or authoritative decision making and can foster consensus in pre- or post-agreement interactions.1 Compared to pre- agreement interactions, post-agreement interactions are rarely in the center of attention, although discourses matter in these settings, too. Judicial discourses take frequently place in international courts, such as the European Court of Justice (ECJ), the Court of the Andean Community, the Court of the European Free Trade Association. International judicial discourses are good laboratories to analyse dynamics of arguing. The density of exchanged arguments is very high and judicial discourses are, in this sense, most likely settings for successful arguing. At the same time, effective arguing is very difficult before courts, since the parties have eminently strong interests, because they maintained non-compliance despite being detected and did not negotiate pre-judicial settlements. In this sense, non-complying states are not open to persuasion. Drawing on the example of the ECJ with its mixed record of effective judicial discourses, this article analyses the conditions under which judicial discourses promote compliance. This requires tackling the more general question: Under which conditions can discourses foster consensus and when do they fail? The key to the answer is that the quality of arguments matters. If actors share a common standard for the assessment of the goodness of exchanged arguments, they can filter unconvincing and bad from convincing and good points and thereby incrementally develop a consensus. If they don’t have a common yardstick to evaluate the quality of claims, intersubjective validity cannot be achieved. Consequently, actors talk at crosspurposes although they exchange arguments and discourses end in dissent. The argument proceeds in five steps. The next section introduces the EU infringement procedure, demonstrates that judicial discourses take place for all cases that reach the ECJ, and illustrates that not all judicial discourses succeed in quickly fostering compliance (II). Why is it that arguing takes place in all cases but is not always effective? The subsequent section develops a theoretical explanation (III). Unlike Habermasian arguing or social psychology approaches on persuasion, 2 this article inquires into the quality of arguments in order to explain the varying success of discourses. Not every argument is per se good and suited to convince others. Arguing is only effective if actors exchange arguments and share a yardstick based on which they can commonly evaluate the quality of claims. Under these restrictive scope conditions, participants of a discourse can equally sort good from unconvincing arguments and thereby incrementally develop a consensus. If the parties lack a common standard with which they can intersubjectively assess the goodness of exchanged ideas, they talk at cross-purposes and discourses end in dissent – even though we might observe pure arguing. As a consequence, persuasion fails and non-compliance prevails. The German drinking water case illustrates this theoretical claim (IV). Germany violated the European drinking water directive (DWD) though a legal transposition that restricted the applicatory scope of the DWD and granted de facto many exceptions. While this saved compliance costs, it hampered the effectiveness of EU law. The European Commission opened an infringement procedure and referred the case to ECJ. A judicial discourse started, but failed in the first stage, since the parties lacked a common standard on which the quality of exchanged arguments could be equally evaluated and talked at cross-purposes. Later on, the advocates used arguments to which they could mutually relate in a meaningful manner and the judicial discourse became effective. Non-compliance could no longer be defended with good arguments and the argumentatively entrapped government quickly adapted the German drinking water policy in line with a demanding water quality approach. Alternative constructivist arguing and persuasion approaches as well rationalist enforcement, bargaining and principle-agent theories cannot sufficiently account for these compliance dynamics (V). The article concludes with the finding that intersubjective validity of arguments is the key to successful discourses. This requires that arguments are exchanged, that actors share quality yardsticks, and that the type of arguments fits shared evaluative standards. Only then, participants can commonly sort unconvincing and bad from good and convincing claims and incrementally arrive at a consensus. For example, truth-claims require a shared scientific paradigm; normative arguments a shared idea on righteousness. If either common evaluative standards are lacking or do not fit the type of arguments, discourses fail because the actors cannot meaningfully relate to each other but argue at cross-purposes. Common lifeworlds are important for effective arguing,3 since they inhibit shared reference standards for the evaluation of the quality of ideas. The presence of a European lifeworld is helpful, but not sufficient for effective arguing. Even in the EU, every discourse risks dissent, because a European lifeworld competes with domestic or party-political ones. Hence, if the meaning of a particular norm is contested, such as in the German drinking water case, a shared European lifeworld is too broad to decide which competing interpretation is superior. In such hard cases for effective arguing, judicial discourses offer an expedient: Judicial methods of interpretation serve as additional yardsticks to evaluate the quality of arguments. Yet, they only foster consensus, if actors exchange arguments and share methods of legal reasoning whose interpretational scope fit the interpretational scope of the problem at stake.

#### Ideational Change—no chance of ideational change in their framework—lack of agreement over truth or between competing paradigms eliminates discussion.

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Judicial discourses accelerate argumentative speech acts. Yet, exchanging arguments is not sufficient to induce ideational changes, since not every argument is persuasive per se. Only good arguments can be convincing and possibly end norm violations. What characterises a good argument? Which ideas might change actors’ compliance interests? Simply put, the answer is that good arguments have to be intersubjectively valid. This requires that arguments are exchanged and that actors share a yardstick which allows them to equally assess the quality of arguments in a discourse. Truth, righteousness and appropriateness are three standards to intersubjectively evaluate the goodness of communicated ideas.19 If actors share a common conception of how to assess the quality of truth, normative and value-based claims, they can commonly factor out good from less compelling factual, normative or value-based arguments, substitute old by better ideas, and incrementally arrive at a consensus. A truth paradigm encompasses ontological, epistemological and methodological elements. Exchanged causal or factual arguments are conducive to ideational change and consensus, if the actors adhere to the same scientific paradigm and share expertise on the subject matter.20 Similarly, norm generating discourses can end in consensus, if actors share a standard of righteousness on which they measure how certain aims, procedures or scopes of norms express or hamper the fulfillment of their common interest. However, sharing a standard of righteousness does not help to solve questions of truth or vice versa. Common evaluative standards have to fit the type of arguments made. Unlike these discourses, judicial discourses deal with contested norms rather than truth claims or common interests.21 Once norms are contested, a dilemma emerges: in order to argumentatively solve norm interpretation conflicts, it would be necessary that actors consent on which common interest is expressed by a norm’s aim, procedure or scope, while the very fact that a case has been carried to Court indicates that there is dissent. Nevertheless, the parties of norm interpretation disputes are not trapped in talking at cross-purposes. Judicial discourses offer an expedient: different judicial methods of interpretation allow specifying what norms are about and to which situations they should be applied. In this sense, judicial methods of reasoning serve as additional yardsticks to commonly measure the quality of arguments. They differ in their interpretational scope. The broadest scope has the historical method of judicial interpretation, which specifies scope and content of legal norms through references to the initial will of the norm-creators.22 The teleological method is only slightly more specific, since it specifies the purpose and content of a norm though analysing the general aim of the broader legal context: What is the purpose of the treaties and how does it relate to the norm in question?23 The directive-immanent teleological interpretational device is more specific than the general teleological means, since it specifies content and scope of a disputed issue (for example, is exception X acceptable?) by analysing the general aim of the norm at hand. The general systematic method is a bit more specific than the general teleological one. It inquires into the broader legal context in order to solve interpretational questions of a norm embedded in the context: Is there another legal norm that delimits or specifies the meaning of the norm in question? The directive-immanent systematic method of legal interpretation is suited to solve more detailed interpretational issues by analysing the paragraph or article in question in the context of the whole legal norm: Are new concepts introduced in other paragraphs that define or delimit the issue in question? Are there exceptions in other parts of the norm that impact scope and content of the interpretational issue at hand? The wording method aims at solving interpretational differences of great detail by analysing the exact phrasing of the paragraph in question: Are new concepts introduced? How are they defined? Are exceptions specified?

#### turns their debate activism impacts—effective clash, deliberation, and contest over the veracity of their claims is essential for their project

Robert Talisse 2005 (Department of Philosophy, Vanderbilt University, Philosophy and Social Criticism, Sage Publications, 31:423)

Young considers two deliberativist criticisms of political activism. On the one hand, deliberativists accuse activists of adopting the kind of ‘pressure group interest based politics’ (106) that deliberativists cite as a prime obstacle to proper democracy. On the other hand, deliberativists charge activists with unreasonableness. Reasonable modes of political action, the deliberativist contends, consist in ‘willingness to listen to those whom one believes are wrong, to demand reasons from them and to give arguments oneself aimed at persuading them to change their views’ (106–7). Note that this pair of criticisms derives from the two components of deliberative democracy outlined above: the deliberativist rejects aggregative or adversarial models of democracy and adopts a model of reasoned discourse as the proper means to achieving political justice. Taking the criticisms in turn, Young’s activist replies that activism is not an instantiation of the kind of adversarial interest-driven ‘power politics’ that the deliberativist derides. This is so, the activist maintains, because the activist ‘is committed to a universalist rather than a partisan cause’; activism is not directed by self- or group-interest, but is rather aimed at the ‘redressing of harm and injustice’ (107). To the charge that he is unreasonable, the activist responds that the deliberative democrat ‘relies on far too narrow an understanding’ of reasonableness (107). According to the activist, reasonableness extends beyond ‘orderly reason-giving’; properly construed, reasonableness consists in ‘having a sense of a range of alternatives in belief and action, and engaging in considered judgment in deciding among them’ and being ‘able and willing to justify’ one’s ‘claims and actions to others’ (ibid.). Young claims that there is nothing in the activist’s mode of political action that is inconsistent with reasonableness in this sense; therefore activism as such is not unreasonable.14 Although Young treats these replies as adequate, they are not. The activist has misunderstood the deliberative democrat’s criticisms, and so his replies to them cut little ice. Consider first the activist’s expansion of what he takes to be the ‘far too narrow’ conception of reasonableness countenanced by the deliberativist. There is nothing in the proposed expansion that the deliberative democrat cannot hold, and in fact many deliberativists characterize deliberation in precisely these terms. Nonetheless, the deliberativist conception of reasonableness differs from the activist’s in at least one crucial respect. On the deliberativist view, a necessary condition for reasonableness is the willingness not only to offer justifications for one’s own views and actions, but also to listen to criticisms, objections, and the justificatory reasons that can be given in favor of alternative proposals. In light of this further stipulation, we may say that, on the deliberative democrat’s view, reasonable citizens are responsive to reasons, their views are ‘reason tracking’. Reasonableness, then, entails an acknowledgement on the part of the citizen that her current views are possibly mistaken, incomplete, and in need of revision. Reasonableness is hence a two-way street: the reasonable citizen is able and willing to offer justifications for her views and actions, but is also prepared to consider alternate views, respond to criticism, answer objections, and, if necessary, revise or abandon her views. In short, reasonable citizens do not only believe and act for reasons, they aspire to believe and act according to the best reasons; consequently, they recognize their own fallibility in weighing reasons and hence engage in public deliberation in part for the sake of improving their views.15 ‘Reasonableness’ as the deliberative democrat understands it is constituted by a willingness to participate in an ongoing public discussion that inevitably involves processes of self-examination by which one at various moments rethinks and revises one’s views in light of encounters with new arguments and new considerations offered by one’s fellow deliberators. Hence Gutmann and Thompson write: Citizens who owe one another justifications for the laws that they seek to impose must take seriously the reasons their opponents give. Taking seriously the reasons one’s opponents give means that, at least for a certain range of views that one opposes, one must acknowledge the possibility that an opposing view may be shown to be correct in the future. This acknowledgement has implications not only for the way they regard their own views. It imposes an obligation to continue to test their own views, seeking forums in which the views can be challenged, and keeping open the possibility of their revision or even rejection.16 (2000: 172) That Young’s activist is not reasonable in this sense is clear from the ways in which he characterizes his activism. He claims that ‘Activities of protest, boycott, and disruption are more appropriate means for getting citizens to think seriously about what until then they have found normal and acceptable’ (106); activist tactics are employed for the sake of ‘bringing attention’ to injustice and making ‘a wider public aware of institutional wrongs’ (107). These characterizations suggest the presumption that questions of justice are essentially settled; the activist takes himself to know what justice is and what its implementation requires. He also believes he knows that those who oppose him are either the power-hungry beneficiaries of the unjust status quo or the inattentive and unaware masses who do not ‘think seriously’ about the injustice of the institutions that govern their lives and so unwittingly accept them. Hence his political activity is aimed exclusively at enlisting other citizens in support of the cause to which he is tenaciously committed. The activist implicitly holds that there could be no reasoned objection to his views concerning justice, and no good reason to endorse those institutions he deems unjust. The activist presumes to know that no deliberative encounter could lead him to reconsider his position or adopt a different method of social action; he ‘declines’ to ‘engage persons he disagrees with’ (107) in discourse because he has judged on a priori grounds that all opponents are either pathetically benighted or balefully corrupt. When one holds one’s view as the only responsible or just option, there is no need for reasoning with those who disagree, and hence no need to be reasonable. According to the deliberativist, this is the respect in which the activist is unreasonable. The deliberativist recognizes that questions of justice are difficult and complex. This is the case not only because justice is a notoriously tricky philosophical concept, but also because, even supposing we had a philosophically sound theory of justice, questions of implementation are especially thorny. Accordingly, political philosophers, social scientists, economists, and legal theorists continue to work on these questions. In light of much of this literature, it is difficult to maintain the level of epistemic confidence in one’s own views that the activist seems to muster; thus the deliberativist sees the activist’s confidence as evidence of a lack of honest engagement with the issues. A possible outcome of the kind of encounter the activist ‘declines’ (107) is the realization that the activist’s image of himself as a ‘David to the Goliath of power wielded by the state and corporate actors’ (106) is naïve. That is, the deliberativist comes to see, through processes of public deliberation, that there are often good arguments to be found on all sides of an important social issue; reasonableness hence demands that one must especially engage the reasons of those with whom one most vehemently disagrees and be ready to revise one’s own views if necessary. Insofar as the activist holds a view of justice that he is unwilling to put to the test of public criticism, he is unreasonable. Furthermore, insofar as the activist’s conception commits him to the view that there could be no rational opposition to his views, he is literally unable to be reasonable. Hence the deliberative democrat concludes that activism, as presented by Young’s activist, is an unreasonable model of political engagement. The dialogical conception of reasonableness adopted by the deliberativist also provides a response to the activist’s reply to the charge that he is engaged in interest group or adversarial politics. Recall that the activist denied this charge on the grounds that activism is aimed not at private or individual interests, but at the universal good of justice. But this reply also misses the force of the posed objection. On the deliberativist view, the problem with interest-based politics does not derive simply from the source (self or group), scope (particular or universal), or quality (admirable or deplorable) of the interest, but with the concept of interests as such. Not unlike ‘preferences’, ‘interests’ typically function in democratic theory as fixed dispositions that are non-cognitive and hence unresponsive to reasons. Insofar as the activist sees his view of justice as ‘given’ and not open to rational scrutiny, he is engaged in the kind of adversarial politics the deliberativist rejects. The argument thus far might appear to turn exclusively upon different conceptions of what reasonableness entails. The deliberativist view I have sketched holds that reasonableness involves some degree of what we may call epistemic modesty. On this view, the reasonable citizen seeks to have her beliefs reflect the best available reasons, and so she enters into public discourse as a way of testing her views against the objections and questions of those who disagree; hence she implicitly holds that her present view is open to reasonable critique and that others who hold opposing views may be able to offer justifications for their views that are at least as strong as her reasons for her own. Thus any mode of politics that presumes that discourse is extraneous to questions of justice and justification is unreasonable. The activist sees no reason to accept this. Reasonableness for the activist consists in the ability to act on reasons that upon due reflection seem adequate to underwrite action; discussion with those who disagree need not be involved. According to the activist, there are certain cases in which he does in fact know the truth about what justice requires and in which there is no room for reasoned objection. Under such conditions, the deliberativist’s demand for discussion can only obstruct justice; it is therefore irrational. It may seem that we have reached an impasse. However, there is a further line of criticism that the activist must face. To the activist’s view that at least in certain situations he may reasonably decline to engage with persons he disagrees with (107), the deliberative democrat can raise the phenomenon that Cass Sunstein has called ‘group polarization’ (Sunstein, 2003; 2001a: ch. 3; 2001b: ch. 1). To explain: consider that political activists cannot eschew deliberation altogether; they often engage in rallies, demonstrations, teach-ins, workshops, and other activities in which they are called to make public the case for their views. Activists also must engage in deliberation among themselves when deciding strategy. Political movements must be organized, hence those involved must decide upon targets, methods, and tactics; they must also decide upon the content of their pamphlets and the precise messages they most wish to convey to the press. Often the audience in both of these deliberative contexts will be a self-selected and sympathetic group of like-minded activists. Group polarization is a well-documented phenomenon that has ‘been found all over the world and in many diverse tasks’; it means that ‘members of a deliberating group predictably move towards a more extreme point in the direction indicated by the members’ predeliberation tendencies’ (Sunstein, 2003: 81–2). Importantly, in groups that ‘engage in repeated discussions’ over time, the polarization is even more pronounced (2003: 86). Hence discussion in a small but devoted activist enclave that meets regularly to strategize and protest ‘should produce a situation in which individuals hold positions more extreme than those of any individual member before the series of deliberations began’ (ibid.).17 The fact of group polarization is relevant to our discussion because the activist has proposed that he may reasonably decline to engage in discussion with those with whom he disagrees in cases in which the requirements of justice are so clear that he can be confident that he has the truth. Group polarization suggests that deliberatively confronting those with whom we disagree is essential even when we have the truth. For even if we have the truth, if we do not engage opposing views, but instead deliberate only with those with whom we agree, our view will shift progressively to a more extreme point, and thus we lose the truth. In order to avoid polarization, deliberation must take place within heterogeneous ‘argument pools’ (Sunstein, 2003: 93). This of course does not mean that there should be no groups devoted to the achievement of some common political goal; it rather suggests that engagement with those with whom one disagrees is essential to the proper pursuit of justice. Insofar as the activist denies this, he is unreasonable. These arguments demonstrate that the deliberativist’s criticisms of activism are more subtle and powerful than Young has supposed. The two quick replies Young puts in the mouth of her activist are inadequate as they stand. However, the deliberativist cannot let the matter rest here; the view of reasonableness sketched above bids the deliberativist to consider the activist’s challenges to deliberative democracy.

#### Only tolerance developed through having a point of stasis and being able to sort out the differences between seemingly valid arguments—best way to combat “group think”

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In many ways, Linklater’s leaning on the Habermasian rendition of discourse ethics is rehearsing the ambiguities of the Kantian critical project. Discourse ethics’ legitimacy rests on a thin proceduralism which allows it to appear as an all-encompassing framework for accommodating diverse ethical claims. At the same time, pluralism is not essentially accepted at face value but only as a rhetorical device since agreement is understood as convergence around a set of supposedly non-metaphysical presuppositions which are accepted on the basis of their alleged neutrality. What is usually silenced is that these decontextualised ‘impartial rules’ of engagement with difference are reflecting a particular, historically conditioned response to the challenge of diversity, ‘that of an “overlapping consensus” of diverse worldviews around a minimal, non-metaphysical morality’.55 This is a distinctively European understanding of accommodating difference arising out of the devastating experience of religious strife and intransigence during the religious wars of 16th and 17th century Europe. Ever since, tolerance was equated with the effort of establishing the impartial means by which different conceptions of the good can coexist and sort out their differences in peace. Impartiality and stability were elevated to the status of the only acceptable public values while comprehensive conceptions of the good life were reduced to mere aesthetic preferences or tastes on which there can be no rational agreement. Linklater insists that the ethical universalism of Critical Theory does not display any inherent aversion to cultural diversity and difference nor does it tacitly imply a secret agenda of ‘bringing aliens or outsiders within one homogeneous, moral association’.56 Discourse ethics, the argument goes, remains faithful to procedural universalism and the possibility of an ‘undistorted communication’ that would lead to a cross-communal understanding through the force of the better argument. What remains unsaid, according to Shapcott, is that conversation oriented towards universalism is only achievable between subjects who have reached a ‘postconventional’ level of consciousness – that is, morally mature, reasonable beings able to be governed by the unforced force of the better argument – and as such it is ‘an advocacy of a particular conception of agency’.57 Shapcott goes on to imply that this particular type of agency privileges a culturally specific type of community which has traditionally been developed in the West by citing Seyla Benhabib’s reference to ‘a secular, universalist reflexive culture in which debate, articulation and contention about value questions as well as conceptions of justice and the good have become a way of life’.58 Shapcott’s critique has successfully shown that discourse ethics raise obstacles to communication with the radically different through exactly the same means employed to achieve universal inclusion.59