TOWARD A NEW HISTORY IN EUROPEAN LAW: NEW WINE IN OLD BOTTLES?

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I. INTRODUCTION

Over the last thirty years, research in both law and political science has adhered to a dominant discourse that looks like a coherent set of notions about European constitutionalism and the role of law in fostering the momentum for further European integration.[1] Emblematic of this traditional view are Eric Stein, Joseph Weiler,

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1. *See* Loïc Azoulai & Renaud Dehousse, *The European Court of Justice and the Legal Dynamics of Integration*, *in* THE OXFORD HANDBOOK OF THE EUROPEAN UNION 350, 350–64 (Erik Jones et al. eds., 2012); J.H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999); Joseph Weiler, *The Community System: the Dual Character of Supranationalism*, *in* THE YEARBOOK OF EUROPEAN LAW I 1981 267 (F.G. Jacobs ed., 1982); *see also* R. Daniel Kelemen & Susan K. Schmidt, *Introduction – The European Court of Justice and Legal Integration: Perpetual Momentum?*, 19 J. EUR. POL'Y 1, 2–5 (2012) (noting that the European Court of Justice ("ECJ") has played an indispensible role as a motor of European integration resulting in "pro-integration preferences"); *cf.* Morten Rasmussen, *Establishing a Constitutional Practice of European Law: The History of Legal Service of the European Executive, 1952–65*, 21 CONTEMP. EUR. HIST. 375, 376–83 (2012) [hereinafter Rasmussen, *Establishing a Constitutional Practice*] (noting the very existence of the Court was debated in treaty negotiations and depended on the cooperation of national courts to function).

Renaud Dehousse, and Pierre Pescatore, whose work on legal integration has shaped the field of EU studies.[2] At the core of this research is the question: How do we account for the expansion of judicial power in the European Union? Much of this research describes a constitutional narrative where legal decisions set the European integration process on a clear trajectory, in which it shifted from being an intergovernmental organization, transforming itself into a federal system, and subsequently advocating for a more democratic constitutional union. The so-called "judicial empowerment" thesis provided the dominant theoretical and empirical explanation for why the European Court of Justice through its legal doctrines reconstituted the jurisdictional foundation of the legal regime in Europe by expanding judicial power of courts at both the national and European level through joint allocation of legal authority to both levels.[3] Through the seminal rulings, *Van Gend en Loos* and *Costa v. ENEL* in 1963 and 1964 respectively, the Court established direct effect and supremacy as core principles on which to build the subsequent case law over the next five decades.[4] National courts acquiesced to this constitutional practice, referring thousands of cases to the European Court of Justice ("ECJ") for preliminary rulings concerning a wide range of socio-economic disputes. This well-known legal analysis describes an evolutionary development that seems natural and inevitable as the subsequent rationale for deepening integration through law rests on a functional premise, framed in terms of efficiency gains, in which the extension of the market, promotion of economic freedoms, and rise of

2. RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION 71 (1998); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2406 (1991); PIERRE PESCATORE, THE LAW OF INTEGRATION: EMERGENCE OF A NEW PHENOMENON IN INTERNATIONAL RELATIONS, BASED ON THE EXPERIENCE OF THE EUROPEAN COMMUNITIES 44–52 (1974).

3. Weiler, *supra* note 2.

4. *See, e.g.*, Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 587 ("A Member State's obligation under the EEC Treaty . . . is legally complete and consequently capable of producing direct effects on the relations between Member States and individuals."); Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 8 (holding that Article 12 of the EEC Treaty "produces direct effects and creates individual rights which national courts must protect").

regulatory agencies require legal doctrines that provide solutions to the growing complexity of "shared rule."[5]

However, the contraction of the European economy due to the sovereign debt crisis has raised concerns about both the effectiveness of the European Union and its constituent Member States and the institutional and administrative capacity of the political system to deal with the crisis. In the current context, European constitutionalism has become seemingly disengaged from the major debates about growth, prosperity, and competitiveness. While for some the locus of power has shifted away from Member States to central banks or international financial institutions, in terms of promoting macro-economic stability, the jural state is as central to the history of European economic integration as it is central to the history of American political development.[6]

In contemporary European history, courts also operate in the context of social and economic change and political volatility. The economic recession and ensuing euro crisis in Europe has generated pressure on domestic wages and prices through cuts to public spending aimed at reducing a state's debts and deficits and increasing the overall economic competitiveness and investment climate. However, judicial intervention has played a critical role in reviewing the bailouts, the so-called fiscal compact and its constitutionality, in several Member States. In Germany, petitions challenged the lack of parliamentary involvement in the passage of the "bailout" treaties. The German Constitutional Court ruled that the resulting European stabilization mechanism conforms to German budgetary

5. *See generally* DAVID MCKAY, DESIGNING EUROPE: COMPARATIVE LESSONS FROM THE FEDERAL EXPERIENCE (2001); THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaidis & Robert Howse eds., 2001) [hereinafter THE FEDERAL VISION]

6. *See generally* MICHELLE P. EGAN, CONSTRUCTING A EUROPEAN MARKET: STANDARDS, REGULATION, AND GOVERNANCE (2001) [hereinafter EGAN, CONSTRUCTING A EUROPEAN MARKET] (outlining the importance of the "jural state" to integration); MICHELLE P. EGAN, SINGLE MARKETS: ECONOMIC INTEGRATION IN EUROPE AND THE UNITED STATES (forthcoming) [hereinafter EGAN, SINGLE MARKETS]. The term "jural state" is taken from William J. Novak, *The Legal Origins of the Modern American State*, *in* LOOKING BACK AT LAW'S CENTURY 249, 252 (Austin Sarat et al. eds., 2002) [hereinafter Novak, *The Legal Origins of the Modern American State*]. The work of William Novak and Howard Gillman has been influential in terms of shaping arguments in this essay.

sovereignty.[7] By comparison, the Portuguese Constitutional Court ruled that specific austerity measures passed by the legislature breached the Constitution, as they discriminated between public and private workers.[8] Courts at the national level can therefore provide a level of uncertainty to European Union efforts to address the eurozone debt crisis. At the same time, the current protectionist pressures and renationalization of economic policies face similar scrutiny from the ECJ to ensure that economic freedoms and competitive market practices are not undermined.[9] In this sense, the courts play a continuing role in addressing the functional deficiencies of a common currency framework as well as fostering and maintaining a single market. The scope and interpretation of European law is central to the functioning of the European economy; furthermore, the federal preemption of state laws and regulations to create that integrated economy has generated new issues for both state and federal courts seeking to balance both public power and private rights.[10] The ECJ has derived its authority from multiple constitutional sources—both national and international—in expanding its legal framework and jurisprudence.[11] Even then, the

7. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 10, 2012, [BVerwGE] 17–19, (Ger.) (discussing the implications of global market stabilization on German budgetary sovereignty); *see also* Kenneth A. Armstrong, *Pringle Has His Chips*, EUTOPIA LAW, eutopialaw.com/2012/11/27/pringle-has-his-chips/ (Nov. 27, 2012) (explaining the Court's stance that any unilateral state action must be consistent and compatible with obligations under EU law, specifically in the context of the validity of the European Council Decision and the "alleged incompatibility between the ESM Treaty and EU law").

8. *See* Acórdão do Tribunal Constitucional n.º 187/2013, Diário da República, 1.ª série — N.º 78 — 22 de abril de 2013, *available at* http://dre.pt/pdf1sdip/2013/04/07800/0232802423.pdf.

9. *See* Hugo Brady, *The Politics of European Justice*, CTR. EUR. REFORM (June 1, 2011), www.cer.org.uk/publications/archive/bulletin-article/2011/politics-european-justice (considering the ECJ's move into "areas that affect national sovereignty and personal freedoms" to be "controversial").

10. *See generally* MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION: A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY (1998) [hereinafter MADURO, WE THE COURT] (discussing how the balance of power between the Member States and the Union, and between public power and the market, has created powerful constitutional dilemmas in promoting market integration).

11. *See* J.H.H. Weiler & Nicolas J.S. Lockhart, *Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence Part I*, 32 COMMON MKT. L. REV. 51, 52–53 (1995) [hereinafter Weiler & Lockhart, *Taking Rights*

acceptance of European law has not been unconditional, for it has been resisted by national constitutional courts.[12] Some scholars argue that Member States have, in some instances, challenged this incursion upon domestically entrenched rights and legislative statutes and their refusal to accept the primacy of European law reflects a long-held concern about rights protection within the Community framework.[13] Others see the European legal order as based on competing claims of authority, with the resulting legal pluralism leading to a system where constitutional claims are continuously accommodated given the multiplicity of constitutional jurisdictions.[14]

Few dispute the central role of the Court in the integration process. As state actors failed to slow down the surge of trade barriers and protectionism, the Court was consequential in shaping markets and fostering agreement on common policies in the early decades. Not only did the Court generate innovative rules and norms—such as

Seriously] (suggesting that protection of human rights serves as a grounds for jurisdiction); *see also* Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUD. 1, 14 [hereinafter Maduro, *Interpreting European Law*] (noting as an example that "the authority which the Court itself recognizes to its previous decisions is a consequence of the need to guarantee the values of coherence, uniformity and legal certainty inherent to any legal system").

12. *See generally* KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 60–71 (2001) [hereinafter ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW]; BILL DAVIES, RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY'S CONFRONTATION WITH EUROPEAN LAW, 1949-1979 7–19 (2012).

13. THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter et al. eds., 1998); *see* Verwaltungsgericht [VG] [Administrative Trial Courts] Dec. 17, 1970, [BVerwGE] (Ger.) ("Although Community regulations are not German national laws, but legal rules pertaining to the community, they must respect the elementary, fundamental rights guaranteed by the German Constitution and the essential structural principles of national law."); KAREN J. ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS (2009).

14. *See* J.H.H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, *in* THE FEDERAL VISION, *supra* note 5, at 55, 58–59; *see also* Daniel Halberstam, *Pluralism in Marbury and Van Gend*, THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 30–32 (Miguel Poiares Maduro & Loïc Azoulai eds., 2010) (comparing pluralism in the United States and Europe by juxtaposing limits on the Supreme Court's power of judicial review with the scope of supremacy and Community law over national law and the scope of rights that European law affords individuals within Member States).

mutual recognition—to foster market integration by accepting regulatory equivalence among states, the courts have been charged with monitoring and enforcing market regulations to ensure compliance.[15] Legal historians have fostered a lively debate about the reliability and accuracy of these dominant interpretations that have emerged to explain the constitutional foundations of the European Community.[16] While there were initial concerns about a *gouvernment de juges*, resulting in conditional controls over the European Court,[17] throughout the 1950s and 1960s, the Court kept its focus on procedural questions. While the ECJ was designed to establish regularity in court procedure, it did not take a proactive role addressing treaty violations or pushing the common market forward.[18] Initially, the ECJ drew upon the terms outlined in the Treaty of Rome and Treaty of Paris to create a court that could a) establish a standard interpretation of EU laws; b) annul legal proceedings contrary to Community goals; c) assess breaches of Community obligations; d) penalize European institutions for failure to act; and e) provide advisory opinions.[19] However, the Court has sought to use the conferred powers through the preliminary rulings mechanism in which domestic courts could seek an interpretation of the application of European law in the domestic context (article 267 TFEU) into a more systematic mechanism for promoting the uniform application of EU law.[20]

While some of this earlier scholarship generated a seminal

15. EGAN, SINGLE MARKETS, *supra* note 6.

16. Antoine Vauchez, *'Integration-through-Law' Contribution to a Socio-history of EU Political Commonsense* 2–3 (European Univ. Inst. Robert Schuman Ctr. for Advanced Studies, EUI Working Papers RSCAS 2008/10, 2010), *available at* www.eui.eu/RSCAS/WP-Texts/08_10.pdf; *see also* Rasmussen, *Establishing a Constitutional Practice*, *supra* note 1, at 378.

17. ROBERT LECOURT, L'EUROPE DES JUGES (1976); Morten Rasmussen, *Exploring the Secret History of the Legal Service of the European Executives, 1952-1967* 10 (EUSA Conference, Mar. 2011), *available at* http://euce.org/eusa/2011/papers/5d_rasmussen.pdf.

18. *See* Karen J. Alter, *The Global Spread of European Style International Courts*, 35 W. EUR. POL. 135, 140 (2012) [hereinafter Alter, *The Global Spread*].

19. *See* Azoulai & Dehousse, *supra* note 1, at 357–59; Anne Boerger-de Smedt, *La Court de Justice dans les Négociations du Traité de Paris Institutant la CECA* 1 (2011), *available at* euce.org/eusa/2011/papers/5d_boerger.pdf.

20. Note that the United States Supreme Court requires an actual case or controversy to grant certiorari and does not provide an advisory review function.

"integration through law project,"[21] proponents of a new legal history have called for a more finely grained analysis of the historical evolution of European law, and in doing so, call on us to reconsider the canonical histories that have triggered a more normative approach in which there has been a shift from legal reasoning and analysis to broader questions about the role of courts in a democratic society.[22] Some critics perceive this teleological interpretation as judicial activism,[23] since the shift from interpretation of the legal rules to a broader "constitutional *telos*" implies a different conception of courts than those that rely on text such as constructivism or originalism[24] Other critics perceive the constitutional asymmetry inherent in EU treaties and case law as undermining the social model in the face of market integration.[25] In

21. *See generally* Mauro Cappelletti, *Integration Through Law: Europe and the American Federal Experience—A General Introduction*, *in* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 3 (Vol. 1: Methods, Tools, and Institutions, Book 1: A Political, Legal, and Economic Overview) (1986).

22. *Compare id.* (emphasizing the early view that the role of law was crucial to effective integration), *with* Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 281–83 (1957) (drawing on his seminal arguments in the Preface to *Democratic Theory* in relation to the role of courts in a democratic society as not simply institutions to protect minority rights against majority tyranny, but frequently called upon to select among alternative policies in which there is contestation and disagreement, so that the court must "choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found in or deduced from precedent, statute, and Constitution"). *See* Giandomenico Majone, *Europe's Democratic Deficit: The Question of Standards*, 4 EUR. L.J. 5, 11 (1998) for a similar application about non-majoritarian institutions in the EU context.

23. *See* HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING 377 (1986).

24. Maduro, *Interpreting European Law*, *supra* note 11, at 7–8. *See generally* ANTONIN SCALIA, A Matter of Interpretation: Federal Courts and the Law 3 (Amy Cutmann ed., 1997) (arguing that an originalist perspective is appropriate when interpreting the United States Constitution).

25. *See* Jonathon W. Moses, *Is Constitutional Symmetry Enough? Social Models and Markey Integration in the US and Europe*, 49 J. COM. MKT. STUD. 823, 824–26 (2011); *see also* Michelle Egan, *Single Market*, *in* THE OXFORD HANDBOOK OF THE EUROPEAN UNION, *supra* note 1, at 410–11 ("[T]he economic constitution of the EU not only promotes cross-border liberalization, contingent on specific judicial exemptions, but also provides for the possibility of addressing market failure through the establishment of rules in the common interest."); Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*,

this view, national welfare and employment policies are subject to scrutiny and may be incompatible with economic integration.[26] For Giandomenico Majone, the European Union cannot pursue the same type of distributional politics that characterize national welfare states due to its lack of legitimacy and efficiency.[27] By contrast, advocates perceive the expansion of EU social rights, addressing the rights of individuals, not only in terms of "market citizenship" through employment rights, working conditions, and pay equity, but also through new social rights for third country nationals through family reunification, social protection, and assistance schemes,[28] as critical for socio-economic legitimacy.[29]

II. NEW APPROACHES TO EU LAW

Are such approaches correct *and* desirable in understanding the development of the European legal order? In his analysis, Hjalte Rasmussen argues that scholars have not looked critically enough at the "constitutional" paradigm and its subsequent adoption almost wholesale into academic, political, and judicial circles.[30] It has become the dominant narrative that few scholars challenge the transformation of the treaties into a constitutional polity. Regardless

40 J. COM. MKT. STUD. 645, 649–50 (2002).

26. Scharpf, *supra* note 25, at 645. *See generally* Case C-346/06, Rüffert v Niedersachsen, 2008 E.C.R. I-01989, 01994; Case C-438/05, Int'l Transp. Workers' Fed'n et al. v. Viking Line ABP et al., 2007 E.C.R. I-10806, 10835; Case C-341/05, Luval un Patneri v. Svenska Byggnadsarbetareförbundet et al., 2007 E.C.R. I-11845, 11888. These cases focus on the relationship between market freedoms and fundamental social rights, with a particular focus on the freedom of association, the right to collective bargaining, and the right to strike.

27. Majone, *supra* note 22, at 15 (explaining that the development of welfare policies at the European level would actually aggravate the legitimacy problem).

28. *See* Lisa Conant, *When Courts Decide: Foreigners' Rights and Social Citizenship in Europe and the US*, 7 EUR. POL. SCI. 43, 44–45 (2008) (comparing Europe to the United States in a discussion of new social rights recognized in European courts).

29. *See* MARIO MONTI, A NEW STRATEGY FOR THE SINGLE MARKET: AT THE SERVICE OF EUROPE'S ECONOMY AND SOCIETY 23–24, 71 (2010), *available at* http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf (observing a certain "integration fatigue" as well as a "market fatigue," suggesting there is a need to restore a much-needed legitimacy to the single market to promote both economic growth and social rights).

30. *See* Rasmussen, *Establishing a Constitutional Practice*, *supra* note 1, at 381.

of whether this emerged from instrumental, conscious judicial actions on the part of legal activists or through incremental, cautious expansion of legal competences through the doctrines of direct effect, supremacy, and the liberalized criteria for standing to sue, the European Court has paralleled many of the moves made by federal constitutional courts.

In recent years, new archival work by legal historians has emphasized the importance of the historical and institutional context for understanding the evolution of EU integration, as one that involves a multitude of actors—from lawyers and judges to elected officials—who were pursuing independent and often strategic goals coalescing around an agenda that enabled court-centered activism.[31] First, this was a period when the legal community was expanding its own professional identity. Lawyers became key advocates in the debates, and successfully mobilized a transnational network of jurists through the legal service and national federations of European law.[32] Second, elected officials provided the opportunity to expand the venue for legal jurisdiction by including provisions for amending constitutions to allow for the prospect of a supranational legal framework, that has subsequently expanded the options for litigation, and providing for remedies, including sanctions and financial penalties, to enlarge the ambit of judicial power. Third, the scope of litigation interacted with the opportunities provided by other institutions. Litigation rates were not high initially, arguably due to the predominance of politically driven integration through strategies of harmonization and approximation.[33] Once recalcitrant States blocked further political integration, fearing threats to state hegemony, the strategic game shifted to the legal arena. A constitutional entrenchment of rights through the supremacy and

31. *See* Morten Rasmussen, *Constructing and Deconstructing 'Constitutional' European Law: Some Reflections on how to Study the History of European Law* 2–3, 12 (EUSA Conference, 2011) [hereinafter Rasmussen, *Constructing and Deconstructing*], *available at* euce.org/eusa/2011/papers/6a_rasmussen.pdf. *See generally* TRANSNATIONAL NETWORKS IN REGIONAL INTEGRATION: GOVERNING EUROPE 1945–83 (Wolfram Kaiser et al. eds., 2010).

32. Rasmussen, *Constructing and Deconstructing*, *supra* note 31, at 15. *See generally* ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 12; Karen Alter, *Jurist Social Movements in Europe*, 20 EUSA REV. (Fall 2007), *available at* http://www.eustudies.org/publications_review_fall07.php.

33. EGAN, CONSTRUCTING A EUROPEAN MARKET, *supra* note 6, at 106.

direct-effect doctrines resulted in institutional empowerment to foster credible commitments, reduce decision-making costs, and prevent policy reversals.[34]

These analyses over time opened up new lines of inquiry into the role of legal pluralism, in terms of how the role of preliminary rulings shape the incentives and constraints facing lower courts,[35] the strategies of litigation and legal mobilization,[36] and the diffusion of legal norms beyond the European context.[37] Fascination with the origins of the constitutional paradigm has given way to more formal analysis looking at the relationship between the courts, the degree of autonomy or constraints imposed by state signaling,[38] and more comparative work on constitutional review and administrative rule-making, which provides a plurality of approaches from principal-agent to deliberative democracy models.[39] Though these models hold

34. *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the US, 1875-1891*, 96 AMER. POL. SCI. REV. 511, 511 (2002) ("Studies have attributed institutional empowerment to a variety of political motivations including a desire to protect . . . favored policies against reversal."); Alec Stone Sweet, *Constitutional Courts*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 818–820 (Michel Rosenfeld & András Sajó eds., 2012) (discussing the emphasis on rights in the new constitutionalism).

35. *See* Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 62–64 (1993) (describing the intra-judicial dialogue between the ECJ and national judges, which following neo-functionalist analysis enabled them to empower one another). *See generally* ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 12.

36. LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION (2002); RACHEL A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE (2007).

37. Alter, *The Global Spread*, *supra* note 18, at 140; *see* Karen J. Alter & Laurence R. Helfer, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT. ORG. 563, 565 (2010).

38. *See* Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT. ORG. 149, 150, 156–57 (1998) (attributing to the ECJ an important but constrained role in enforcing contracts and engaging in dispute resolution).

39. *See* Christian Hunold, *Corporatism, Pluralism, and Democracy: Toward a Deliberative Theory of Bureaucratic Accountability*, 14 GOVERNANCE 151, 152–54 (2001); Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 861 (2001) (proposing an administrative law model that puts accountability at the heart of the network). *See generally* MARK A. POLLACK, THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE

much promise, the focus on institutional rules and design or attitudinal values to explain legal outcomes has been much more prominent in the U.S. context than in the European context.[40] While such institutional settings provide bargaining situations in which we can understand how majorities are constructed or whether specific cases are accepted or declined, there has been little work on the role of judicial preferences in the European context. Consequently there has been limited research on opinion assignment, circulation of opinion drafts, bargaining among justices regarding opinion language, and so forth, to see how such legal procedures and norms impact outcomes. Rasmussen's challenge has broader implications in that studies of the ECJ have not focused on the issue of appointments and nominations, which receive far less scrutiny given the range of issues that come before the Court's purview. In addition, both formal procedural Chamber rules and informal Court practices matter more in crafting the law than scholarship has documented, since the degree to which judges concede on an opinion, strategically control the breadth of the judgment, or defer to present state of law or legally relevant factors, deserves greater attention.[41]

In this special issue, Rasmussen offers a new historical understanding of EU law that calls for a more sociological approach to European law, and a more synthetic, integrative history that includes greater attention to legal history to understand the historiography of European integration.[42] But such a history may benefit from moving beyond its single-case focus to think

EU 323 (2003) (noting that delegation can be a sign of credible commitment, may prevent policy reversals, and may reduce transaction costs, thereby increasing its economic utility).

40. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 19, 20–23 (1993) (examining the separation of powers model in the United States to support the notion that such delegation and deliberative models are more effective in the United States than in Europe).

41. *See generally* Forrest Maltzman, James F. Spriggs II, & Paul J. Wahlbeck, *Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); POLLACK, *supra* note 39.

42. *See* Morten Rasmussen, *Rewriting the History of European Public Law: The New Contribution of Historians*, 28 AM. U. INT'L L. REV. 1187 (2013). For a general overview, *see* Bill Davies & Morten Rasmussen, *Towards a New History of European Law*, 21 CONTEMP. EUR. HIST. 305 (2012).

comparatively in a wider sense about legal method and history. Unsurprisingly given their methodological orientation, legal historians drawing on sociological approaches have also raised important questions about networks, culture, perceptions, rhetoric, and the connections between state and civil society.[43] Like legal realists in the United States, however, many of the pioneers of legal integration in Europe are not simply documenting the emergence and development of legal doctrines; they view law in context, not as an autonomous legal order (despite the language of *Van Gend en Loos*), but as part of the administrative, regulatory, and judicial realm.[44] They are interested in broader patterns of legal action and inaction that come from the decisions of administrative agencies as well as judge-made law.[45] Without neglecting the central role of the judiciary in shaping European governance, such legal scholarship has also focused on the growth of administrative governance in which the diffusion of power to the supranational level generated concerns about democratic legitimacy due to the delegation of power to non-majoritarian institutions whether public or private.[46] These scholars are raising important substantive and procedural questions about constitutional practices where majoritarian principles may be undermined by judicial or administrative review.[47] By raising

43. *See, e.g.*, Davies & Rasmussen, *supra* note 42.

44. Andreas Grimmel, *Integration and the Context of Law: Why the European Court of Justice is not a Political Actor*, 3 LES CAHIERS EUROPÉNS DE SCIENCES PO, at 6, 21 (2011) (shifting the emphasis from an expansive framework of law that focuses on actors and interests toward the social *context* of reasoning and action and to view law as "an independent context of reasoning and action").

45. Bignami, *supra* note 39, at 898 (describing administrative law in the United States, Australia, and Britain).

46. *See* Peter Lindseth, *Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 139, 141–43 (Christian Joerges & Renaud Dehousse eds., 2002) (finding weakness in new conceptions of democratic and constitutional legitimacy through deliberative democracy and non-hierarchical institutions because they fail to account for the continued hierarchical modes of governance associated with nation states that are still viewed as reflecting the demos).

47. *See* Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSP. POL. 804, 806–12 (2009) (assessing the compatibility of majoritarian principles and judicial review, and noting that despite many critics' opinions supposing judicial review undermines democratic representation, judges do not serve a counter-majoritarian role).

normative implications about delegation in European governance, it reminds us that we also need to understand both the constitutional and statutory nature of issues under judicial purview, as the role of the court may differ from that of administrative rule-making depending on the issue area and policy domain.

Certainly specialized legal histories are important—as are specific policy studies—to enhance our understanding of European integration, but they need to embrace bigger causal questions of theoretical and historical interest such as the relationship of law to contemporary democracy, the rights and conceptions of citizenship, the relationship of law to market capitalism, and the issues of internationalism, sovereignty, and legal pluralism—all of which have been at the forefront in recent high profile legal judgments such as Zambrano, Ruffert, Viking, Laval, and Kadi.[48] The consequences of past actions and political choices in the European legal context are monumental for the present as European law has been instrumental in both the simultaneous creation of new powers and competences and the constitutionalization of new individual rights.[49]

European law has "contained" the centrifugal forces in European societies and polities by overcoming the fragmentation of multiple local jurisdictions and integrating them into a system that enlarges its field of economic scrutiny into social welfare activity by regulating private power in the public interest, privileging and providing selective benefits to citizens and workers, and allowing private interests to provide public functions.[50] Through, for example, the creation of a strong competition regime, the expansion of non-discrimination provisions for pension portability and equal pay, and the delegation of standard setting to private bodies, legal rules have shaped market competition. In the context of this larger transformation of governance, the contentious politics over the status and primacy of law in a federal context is neither unique nor specific to Europe. Making a comparative assessment of the relationship

48. *See* Stephen Weatherill, *The Constitutional Context of (Ever-Wider) Policy-Making*, *in* THE OXFORD HANDBOOK OF THE EUROPEAN UNION, 570, 571–73 (describing the widening scope of European law).

49. Andrew Moravcsik & Andrea Sangiovanni, *On Democracy and "Public Interest" in the European Union*, *available at* http://www.princeton.edu/~amoravcs/library/scharpf.pdf (last visited Mar. 19, 2013).

50. *Id.*

between legal supremacy and federalism using studies in U.S. legal history may shed light on the interactions between the central and constituent legal units that provide ways of re-imagining European legal integration. In particular, the development of legal jurisdiction, the contestation surrounding federal court supremacy and subsequent legal reforms, and the issue of social rights and market citizenship in the United States provide important reference points for studies of European legal developments. The field of American political development ("APD") can provide a fertile environment for scholars interested in the study of legal institutional change.

III. THE POLITICS OF EMPOWERMENT IN FEDERAL COURTS

A quarter-century ago, Stephen Skowronek, in his seminal work, recognized the indispensability of a "state of courts" to contain the centrifugal forces in American politics.[51] Within the historiography of American political development there are different characterizations of the role of law in shaping the American polity.[52] The judicial role in American governance is worth considering, given its promotion and constraint of commercial interests, civil and political rights and the propriety of this constitutional independence that has often led to constitutionally contentious boundaries between federal and state jurisdictions. Just like its European counterpart, the Supreme Court has become the constitutional interpreter, but just as importantly, it has been contested by different groups, from segregationists to pro-life groups.[53]

In the United States, the Supreme Court does not merely solve disputes between contesting litigants, it authoritatively interprets and

51. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 39 (1982).

52. *Id. See generally* Novak, *The Legal Origins of the Modern American State*, *supra* note 6, at 252 (highlighting different interpretations of the constitutive role of law in constituting social regulations, ordered market relations, and public welfare); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999) [hereinafter SUPREME COURT DECISION-MAKING].

53. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 4 (2007) (elaborating on the role of the Supreme Court in terms of constitutional construction and interpretation in relation to broader political regimes, the politics of constitutional authority, and how it plays out over time).

develops constitutional reasoning. This constitutional interpretation has to be accepted by other political actors, which is often the source of contention against expansive judicial reasoning. At times, there has been deference to judicial authority, and in other instances, state officials, presidents, and federal executives have challenged the Court's purview.[54] In the United States, judicial empowerment has generated different interpretations, with legal historians focusing on judicial power as a product of legal action derived from judges' own independent choices.[55] Whereas political scientists have viewed judicial empowerment as contingent on the efforts of legislative and executive institutions to fashion a judiciary that serves particular partisan interests[56] or provides stability and security of outcomes under situations of institutional instability and gridlock.[57]

However, like the constitutional narrative in the European Union, the standard story in the United States is also problematic. The attention given to *Marbury v. Madison* in 1803, where Chief Justice John Marshall established the power of judicial review, is misleading since the power of judicial review evolved over the course of the nineteenth century.[58] Although there were sixty cases between 1789 and 1861 in which the Court evaluated the constitutionality of a federal statute, the Court was "laying the foundations for that practice and establishing its role as a forum for testing the limits of congressional powers."[59] Parties often raised challenges to the application of federal law, particularly in the federal district courts and circuit courts where cases were often highly controversial, touching on slavery, taxation, and bankruptcy provisions.[60]

54. Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790–1860) and the European Community (1958–94)*, 11 STUD. AM. POL. DEV. 149, 157–59 (1997) [hereinafter Goldstein, *State Resistance*].

55. *See* Gillman, *supra* note 34, at 512.

56. *See id.* (offering support for the view that judicial empowerment is meant to serve certain partisan interests).

57. Barry R. Weingast, *The Political Foundation of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 246 (1997).

58. Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1285–86 (2009) [hereinafter Whittington, *Judicial Review*].

59. *Id.* at 1267.

60. *See* LESLIE FRIEDMAN GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT 54–55 (2001) [hereinafter GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY] (demonstrating state

The federal courts were regularly called upon to consider the legitimate scope of congressional authority and exercise their judicial authority to review the validity of legislative and executive action. But the Supreme Court largely built its power of judicial review in the early decades against recalcitrant states as it struck down many local and state policies, and imposed few restrictions on the national government until after the Civil War.[61] The independence of state and local government had been the source of tension, so the judiciary was conceived as a means of preserving peace and fostering unity as part of a "power constraint" system.[62] In an effort to undercut localist tendencies, the Marshall Court sought to vest lower courts with federal authority, empowering the Court's jurisdiction in the aftermath of the repeal of the Federal Judiciary Act of 1801 when its legislative grant of federal jurisdiction was curtailed.[63] The goal of Marshall and others was to use these "local" federal courts to apply "the supreme law of the land" uniformly throughout the localities.[64] Just like the new legal history in Europe, the federal courts were embedded in a complex, multi-level system that enhanced the jurisdiction of the federal courts through delegation and the right to review state laws, both of which were key issues in early debates on U.S. federalism.[65]

But such judicial empowerment was not inevitable. In nineteenth century America, federal district courts, according to Howard Gillman, had remarkably limited jurisdiction.[66] Hostilities towards federal judicial power were not uncommon. Most federal issues were

resistance to federal authority, including the formative early years of the American state); Goldstein, *State Resistance*, *supra* note 54, at 157–63.

61. *See* Gillman, *supra* note 34, at 516; Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 586 (2005); Whittington, *Judicial Review*, *supra* note 58, at 1308–10.

62. *See* Daniel H. Deudney, *The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-Union Circa 1787-1861*, 42 INT. ORG. 191, 202–03 (1995) (explaining that, far from producing anarchy, the Philadelphia system was built on union and the mediation of interests, in contrast to the European balance-of-powers system).

63. Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 210 (2012).

64. *Id.* at 211.

65. *Id.* at 211–12.

66. Gillman, *supra* note 34, at 513.

heard in state courts where there was often resistance to the higher court in the first several decades over a range of issues.[67] The Supreme Court also faced strong sectional interests, and was unable to leverage its role in shaping federal policies, as vested interests sharply curtailed its competences.[68] Efforts to enhance the federal judiciary were rejected until after the Civil War. Federal judicial districts and circuits were tied to state boundaries, no circuit contained both a free and a slave state to ensure the protection of Southern regional interests, and while riding circuit, federal judges were required to include the local federal judge who made the original decision in the subsequent appeals process.[69] For Gillman, local and regional considerations remained paramount, thus preventing the creation of a national judiciary.[70]

The creation of a more effective national judicial system owed much to the pressure from Northern financial and commercial interests that sought to improve the efficiency of the federal judiciary.[71] While there were some calls from judges, lawyers, and newspapers to increase the number of district courts and eliminate circuit riding by justices, the subsequent legislative reforms expanded the federal role of courts, redirected civil litigation involving national commercial interests out of state courts, and resulted in a more active role for federal courts in confronting the new corporate and financial practices.[72] The result was a federal judiciary that invoked the Commerce Clause with unprecedented frequency and interpreted it to require courts to eliminate barriers to the free flow of interstate goods and services. However, such involvement generated a significant increase in case load, with rising

67. *See* GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY, *supra* note 60, at 64; *see also* Goldstein, *State Resistance*, *supra* note 54, at 157–59.

68. *See* RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900 518 (2000) (expounding on the judicial construction of a national market).

69. Gillman, *supra* note 34, at 514.

70. *See id.* at 516 (quoting *Keller* (citation omitted)) ("Public life in the years immediately after the Civil War was dominated by the conflict between the impulse to foster an active state and a broader national citizenship on the one hand, and deeply rooted countervalues of localism, racism and suspicion of government on the other . . . .").

71. *Id.*

72. *Id.* at 515.

rates of litigation on the appellate, circuit, and district dockets.[73]

The subsequent restructuring of the federal judiciary through Congressional action in the 1870s was not uncontested. Partisan politics played a significant role in judicial empowerment as prevailing debates between Republican and Democratic politics over economic regulation shaped jurisdiction and constitutional practices.[74] The federal context provided the opportunity for the Supreme Court to promote national supremacy, resolve interstate disputes and contribute to the process of state building through striking down legislative barriers that undermined the consolidation of the national market.[75] However, the result was to remove localizing pressures and expand the powers and responsibilities of the federal judiciary as part of a broader enhancement of federal capacity and administration in the late nineteenth century. The rise of the jural state[76] corresponded with the rise of the administrative regulatory state in the United States as the need for greater administrative capacity to deal with the growth of large-scale enterprises and new commercial and financial practices generated new responsibilities for non-majoritarian institutions.[77] Under the guise of jurisdictional and procedural reforms, as part of a larger process of delegated powers to public agencies dealing with issues arising from industrialism, the political construction of judicial power advanced throughout the nineteenth century.

As major economic transformations took place in the United States, the corresponding social changes also fostered important legal

73. *Id.* at 519–20.

74. *See* BENSEL, *supra* note 68, at 502–03 (highlighting examples of the deeply partisan debates in 1890 over the McKinley Tariff Act and the Sherman Silver Purchase Act).

75. *See id.* at 516–17 ("[W]hile rhetorically acknowledging the possible need for restraints on market expansion, the Republicans turned most of the implementation of laissez-fair principles over to Republican judges on the Supreme Court who, well insulated from popular influence, could turn back state and local attempts to Balkanize the national market."); *accord* Gillman, *supra* note 34, at 519 ("[T]he overall record demonstrates that conservative Supreme Court justices were quite willing to support Congress's efforts to expand the control of federal courts over commercial litigation.") .

76. William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 767 (2008) [hereinafter Novak, *Myth of the "Weak" American State*].

77. *See generally* Novak, *The Legal Origins of the Modern American State*, *supra* note 6, at 249–83.

debates about the scope of citizenship, individual rights and political inclusion, and the role of the state in regulating social and economic life.[78] While courts grappled with issues of public goods and private rights from the early days of the republic, the predominant view was to characterize the American law "[a]s something of a conservative roadblock to liberal reform—part of a reactionary and exceptional American juridical tradition that continually frustrates the development of a proper American welfare state" and restricts its "[c]ommitment to civil rights."[79] This narrative misses the substantial role of the police powers that, in the nineteenth century, encompassed a range of social policies that provided for "the people's welfare."[80] The broad legal definition of police power was upheld by the Supreme Court, which invalidated state laws when they were related to class legislation, providing preferential treatment to specific groups. However, states and localities enacted thousands of public laws protecting welfare, securing social order, and employing regulatory powers of government.[81] The new legal history of American private law, according to William Novak, challenges the dominant narrative of law as a protector of private liberty, property rights, and a "jurisprudential commitment" to private rights over public goods.[82] The resulting "new social legislation" or "industrial legislation" generated a host of statutory measures that amounted to what Majone describes in the European context as social regulation rather than social welfare.[83] While the response to industrialism produced a national police power through the creative exercise of commerce, taxing, spending, and postal powers, the provision of public goods and public services highlights the changes that took place in American governance.

78. *See* William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, *in* THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY (Meg Jacobs et al. eds., 2003) [hereinafter Novak, *Legal Transformation of Citizenship*].

79. Novak, *Myth of the "Weak" American State*, *supra* note 76, at 767.

80. Novak, THE PEOPLE'S WELFARE, *supra* note 77, at 21.

81. *Id.* (including "regulation of dangerous buildings; railways and public conveyances; corporations; the use of streets, highways, wharves and docks . . . .").

82. *Id.* at 23. The U.S. term "affected with a public interest" should be familiar to Europeans in terms of "service publique."

83. Giandomenico Majone, *The European Community Between Social Policy and Social Regulation*, 31 J. COM. MKT. STUD. 153, 156 (1993).

Novak also argues that there was a further "constitutionalization of rights" in the United States, but this was not uniform and universal in much the same way that European legal jurisprudence initially focused on market citizenship, social rights, boundaries, and benefits for European citizens.[84] American citizenship in the nineteenth century was also based on a hierarchy of rights.[85] Sharp restrictions were imposed by gender, race, and ethnicity in terms of mobility, freedom, and property rights. Like EU citizenship that was only formalized in the Maastricht Treaty in 1993, American citizenship as a concept was not central to constitutional debates; instead it was applied as a jurisdictional, rather than a rights issue.[86] States were thus able to discriminate against non-residents in numerous ways, such as in debtor-creditor relations, marketing, or corporate privileges.[87] As Novak concludes, in the nineteenth century, "[i]ndividual rights and obligations remained the products of local governments and courts elaborating highly differentiated common-law rules of status, membership and association."[88] The sudden emergence of citizenship as an issue came after the Civil War driven by the Fourteenth Amendment. The conflict about who was a citizen of the United States brought to the forefront the right of free blacks and the application of the privileges and immunities clause of Fourteenth Amendment, which generated broad debates about rights

84. *Compare* Novak, *Legal Transformation of Citizenship*, *supra* note 78, at 94 (arguing that the Bill of Rights did not begin as a "top-down constitutional enumeration of the rights and responsibilities of citizens of a new nation-state, but with a bottom-up common law tradition in which citizenship was considered the last form of membership in a continuum of public jurisdictions and civil associations"), *with* Maurizio Ferrara THE BOUNDARIES OF WELFARE: EUROPEAN INTEGRATION AND THE NEW SPATIAL POLITICS OF SOCIAL PROTECTION 167 (2005) (discussing obstacles to social protection in Europe, and noting that "federalism delayed welfare state formation in the North American context, in both Canada and the USA").

85. Novak, *Legal Transformation of Citizenship*, *supra* note 78, at 95.

86. *Id.* at 97 (describing the early concept of citizenship as based on membership to particular groups rather than an individual right).

87. *See, e.g.*, Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631, 641 (1978) (describing efforts by commercial enterprises to overcome interstate barriers in response to changing structure and operation of business enterprises, as out-of-state manufactures could not sell directly to non-wholesalers within the state, and out-of-state salesmen had to pay licensing fees to the state for the privilege of conducting business).

88. Novak, *Legal Transformation of Citizenship*, *supra* note 78, at 92.

in the post-Civil War period.[89] The federal government would come to guarantee those rights based around the concept of national citizenship. Though expanded to include previously marginalized groups, debates continued into the twentieth century through the civil rights and other social movements, as rights became the purview of national jurisdictions at the expense of local and state authority. This is something that we should not be surprised to see in the European context, as the effects of integration bring to the forefront the impact of differentiated treatment of citizens, non-residents, and the strains between boundaries, citizenship, and non-discrimination.[90]

Taken together, these developments bear a strong resemblance to the legal developments in Europe. Initially, the preliminary review process did not bestow significant power upon judges. The ECJ was limited to reviewing issues related to EU law and so Member States saw it as a body to safeguard EU law rather than an institution actively involved in European integration. The ECJ also had few cases to consider in the early period, from around a dozen cases per year on average during the 1960s to more than two hundred cases per year since the early 1990s.[91] While the ECJ provided an opportunity for private litigants to "forum shop," whether litigants were able to achieve more favorable outcomes depended on rules of access, acceptance of referral, and other factors. In the United States, businesses were eager to move their disputes to federal courts. This was due to the emergence of separate federal and state legal systems to deal with local affairs, resulting in difficulties for those operating interstate businesses, so they sought "sympathetic courthouses" amidst a multiplicity of rules and institutional fragmentation in the search for order.[92] Above all, courts contributed to the process of market building where a "well-regulated society"[93] emerged in which

89. *See* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 74–83 (2011) (explaining that the initial debates on privileges and immunities centered around mobility, comity and cross-border travel, and later focused on to whom those rights extended).

90. *See* Ferrara, *supra* note 84, at 167.

91. COURT OF JUSTICE OF THE EUROPEAN UNION, STATISTICS CONCERNING THE JUDICIAL ACTIVITY OF THE COURT OF JUSTICE 115–16 (2012), *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf.

92. Gillman, *supra* note 34, at 519.

93. Novak, THE PEOPLE'S WELFARE, *supra* note 77, at 21.

there was an expansion of police and regulatory power in the United States that corresponds to the rise of the regulatory state in Europe. In both cases, law was a forceful source of expansive public authority and governance, as it simultaneously dealt with market externalities, promotion of public services, and private rights. This reflects the socially embedded nature of capitalism, and the important role of the public interest in the construction and regulation of the market. The developments in Europe and the United States were overwhelmingly legal in nature, as the promotion of market integration in labor, consumption and commerce, expansion of new economic and social rights (for some), and the contestation for power between competing political-economic jurisdictions was anything but settled.

IV. NEW WINE IN OLD BOTTLES

Of particular interest in this special issue are the varied sources of ideas and pressures for change, both internal and external, to the judicial and legal system. In both the European and American case, we see that law can be innovative with major changes fostering a "rights consciousness" that can generate substantial litigation for addressing economic discrimination, social protection, and democracy promotion. On the one hand, law can foster doctrinal changes and legal remedies to deal with the increasing complexity of society. Then again, law is neither fixed nor immutable, but rather, part of a broader system of governance, which is flexible in terms of its jurisdictional authority and scope.

While Rasmussen provides a more nuanced view of the role of law in fostering and strengthening European integration through detailed historical analysis, the legal practices observed are unsurprising in a federal-type system. While pointing to the challenges from deep-seated national legal traditions to the creation of a European legal order, the important question is whether these structural constraints identified by legal historians are unique to the European Union. In many federal systems, each level of government has a "constitutionally grounded claim to some degree of organizational autonomy and jurisdictional authority"[94] that is a product of a

94. Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 142 (Keith E. Whittington et al.

constitutional bargain.[95] While central courts seek to promote legal uniformity within the federation, the degree to which they can ensure uniformity varies as well.[96]

Despite the inclusion of constituent units to administer, implement, and transpose federal policies into constituent state laws, the preliminary ruling system in Europe does not guarantee uniformity of judicial norms and practices. For example, the presumption of constitutionality is interpreted in different ways: some constitutions, without formally adopting the claim, incorporate the supremacy claim of European law, and others provide supremacy to their own constitutional claims over that of European law.[97] Even in the United States, there are conflicting interpretations of federal law among circuit courts, as well as a history of state resistance to the Supreme Court in the early foundational period of the American republic. Though many scholars point to the *Marbury v. Madison* ruling as the expression of judicial authority, the Court repudiated it shortly afterwards in *Stuart v. Laird*.[98] In this instance, the Supreme Court refused to undermine Congressional authority.[99] We might conclude that courts were fully aware of the potential consequences of acting out of step with majoritarian institutions, thus they may refrain from expansive interpretations of judicial review.

While providing an important corrective, the history of European

eds., 2008).

95. *Id.*

96. Daniel Halberstam & Mathaias Reimann, *Federalism and Legal Unifications: Comparing Methods, Results, and Explanations Across 20 Systems* 11–12 (Univ. Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 186, 2011), *available at* http://ssrn.com/abstract=1557690 (outlining various mechanisms which courts employ to attempt uniformity).

97. Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism* 12–13, *available at* http://www.wzb.eu/sites/default/files/u32/miguel_maduro_three_claims_of_constitutional_pluralism_hu-coll_may_15_2012.pdf (last visited Mar. 19, 2013).

98. *See* Daniel Halberstam, *Constitutionalism and Pluralism in* Marbury *and* Van Gend 3 (Univ. Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 104, 2009), *available at* http://ssrn.com/abstract=1103253 [hereinafter Halberstam, *Constitutionalism and Pluralism in* Marbury] (noting that Chief Justice Marshall polled fellow judges before the *Stuart* case and did not find enough support, resulting in a judgment in which he sought a recusal, leading the Court to uphold the constitutionality of the repeal of the Judiciary Act, thus acknowledging the political reality that Federalist circuit judges could be purged).

99. *Id.*

law needs to be linked to broader comparative studies of federalism where constitutional orders have been constructed and transformed.[100] The legitimating strategy promoted by the ECJ, along with support from the legal academy, is neither unique nor unusual, despite the efforts of legal historians to revise the conventional understanding of the narrative in Europe. There is a continuing debate about the appropriate role of courts in the American constitutional order.[101] Here we see clearly some parallels with European debates. American constitutional history has produced a strong narrative about the rule of law and constitutionalism that parallels the deeply ingrained narrative of the ECJ and its role in the integration process. According to Novak, progressive historians in raising concerns about compliance with judicial decisions have "focus[ed] on three great constitutional moments (1787, 1868, and 1937) . . . [resulting in the origins] of constitutional review, the content of constitutional rights, and Lochnerism and its New Deal repudiation"[102] to explain the constitutional limitations that hindered the expansive welfare state regimes prevalent in European states. These critical junctures show how law suppressed labor rights, promoted liberty of contract, and curbed state and local government spending and tax power until the New Deal era.[103]

Consequently, this predominantly "negative legalism"[104] views law as undermining social democracy, providing a constitutional barrier to the development of a modern regulatory and administrative

100. THE FEDERAL VISION, *supra* note 5; Halberstam, *Constitutionalism and Pluralism in* Marbury, *supra* note 98.

101. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 59 (1998) (arguing that "[l]awyers and judges must resist the temptation to make the Supreme Court the alpha as well as the omega . . . [t]he basic unit of analysis should be the *constitutional regime*, the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life"); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1 (1999) ("After a long period of almost exclusive concern with the normative questions of judicial review, constitutional scholars are beginning to recognize the importance of nonjudicial actors for construing constitutional meaning.").

102. Novak, *Legal Origins*, *supra* note 52, at 258.

103. *See id.* at 258–59 (providing the observations of constitutional scholars to support the premise that the law has often been an obstacle to social welfare reforms).

104. *Id.* at 251.

welfare state, in similar ways to those who perceive the constitutional asymmetry in the European Union as undermining social rights and welfare.[105] In the United States this is often viewed as "residuum of a nineteenth-century jurisprudential tradition of natural law and individual rights out-of-step with the needs of a modern economy."[106] In Europe, the path to market integration also faces legal and constitutional irregularities where selective Europeanization results in eviscerating social programs, since European law "would take precedence over all rules and practices based on national law . . . all employment and welfare-state polices at the national level had to be designed in the shadow of 'constitutionalized' European law."[107] Thus, "the governance challenge within Europe remains the resolution of conflict within the Internal Market" along with the need to address its regulatory and redistributive problems.[108]

Rather than see a jurisprudential tradition as hostile to rights and redistribution, a more positive (as opposed to negative) role of law in the construction of a central regulatory welfare state has emerged that challenges the progressive historiography in the United States.[109] Rather than a critique of law, this approach views markets as socially embedded through the expansion of state and federal police power to deal with social dislocation, modernization, and industrialization, with law playing a much more socio-progressive role in economic policymaking.[110] Such "embedded liberalism" is also viewed as emerging through judicial intervention in Europe where the ECJ has

105. *See, e.g.*, Scharpf, *supra* note 25, at 645 ("National welfare states are legally and economically constrained by European rules of economic integration, liberalization, and competition law . . . .").

106. Novak, *Legal Origins*, *supra* note 52, at 252–53.

107. Scharpf, *supra* note 25, at 646–47. EU law is radically circumscribing state sovereignty, even in areas such as taxation and health care where it has no competence, but promotes the fundamental freedoms and removal of interstate trade restrictions in an expansive manner. *See* Case C-372/04, Watts v. Bedford Primary Care Trust, 2006 E.C.R. I-4325 (interpreting Article 49 EC to provide broad access for medical services for members of other European states); Case C-446/03, Marks & Spencer v. Hasley, 2005 E.C.R. I-10866.

108. Michelle Everson, *Adjudicating the Market*, 8 EUR. L. J. 152, 152 (2002).

109. *See, e.g.*, McCurdy, *supra* note 87, at 647 (providing an example in which the Supreme Court was ahead of Congress in nurturing consumer protection by enabling federal inspection of meat products).

110. Novak, THE PEOPLE'S WELFARE, *supra* note 77, at 21.

shown a willingness to promote social rights, using market freedoms and fundamental rights to promote access to collective goods for European nationals, whether in terms of professions, education, justice, or national systems of social protection.[111] As such, there are some important parallels between their respective political developments in terms of the politics of rights.

Equally important, legal historians have focused attention on the personal preferences and professional ethos surrounding the constitutionalization of European law.[112] While identifying key actors and organizations that contributed to the development of the European system, such strategic legal mobilization is not unique to the European case. Legal historian Harry Scheiber notes, "Since the Progressive era, some ninety years ago, the leadership of the organized bar and the judiciary have pursued the agenda of what is called 'judicial reform'—with the support of various political leaders, legal academics and scholars in the field of court administration, and reform groups dedicated to upgrading governmental institutions."[113] As Charles McCurdy has argued in his influential work on nineteenth century commercial practices, "skillful counsel" within large corporations took action against restrictive state laws and pushed for new juridical principles to preserve free trade among the states.[114] In challenging the legitimacy of protectionist state legislation, litigants with sufficient resources advanced lawsuits to combat state governments' efforts to mobilize "counterthrusts" against the Supreme Court's nationalistic doctrines, [115] in arguments that bear a strong resemblance to judicial scholars focusing on the strategic mobilization of specific legal constituencies

111. *See* Case C-127/08, Metock v. Minister for Justice, Equa. & Law Reform, 2008 E.C.R., *available at* eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0127:EN:HTML (exploring the right to move freely between Member States of the EU); *see also* Case C-76/05, Schwarz v. Gootjes-Schwarz, 2007 E.C.R. I-6879 (prohibiting the refusal of a Member State to accept an education tax benefit on the basis of the location of the private school in another Member State).

112. *See, e.g.*, Rasmussen, *Establishing a Constitutional Practice*, *supra* note 1.

113. Harry Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960–1990*, 66 S. CAL. L. REV. 2049, 2071 (1993).

114. McCurdy, *supra* note 87, at 648.

115. *See id.* at 641.

in the European Community context.[116]

In addition, the role of policy preferences on judicial outcomes has been widely recognized in studies of the U.S. Supreme Court.[117] Much of this behavioral research focused on how the justices' attitudes and values shaped their votes on a case, since the Supreme Court's institutional features of lifetime tenure, dissenting opinions, and coalition building, shape their ability to vote their policy preferences.[118] Such an argument is now emerging in legal history research on the role of European judges in terms of how individual preferences shape court behavior and outcomes.[119] Further research on voting patterns in the ECJ could contribute significantly to an understanding of the role of attitudinal factors in forecasting judicial outcomes based on aggregating the preferences of judges.

However, legal historians have also pointed to the institutional constraints imposed by other political actors, including national governments, courts, and administrators, in shaping the development of the European legal system.[120] This suggests that judges take account of the constraints they may encounter and understand the consequences of their own action in introducing their policy preferences into law.[121] These constraints can take the form of formal

116. *See, e.g.*, Rasmussen, *Establishing a Constitutional Practice*, *supra* note 1.

117. *See* SEGAL & SPAETH, *supra* note 40, at 4 ("The authoritative character of judicial decisions results because judges make policy. Policy making involves choosing among alternative courses of action, where the choice binds the behavior of those subject to the policy-maker's action.").

118. Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutionalist Approached to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING, *supra* note 52, at 43 [hereinafter Maltzman et al., *Strategy and Judicial Choice*].

119. *See* Clifford J. Carrubba et al., *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 435, 449 (2008) (using quantitative analysis to show how political constraints affect judicial decision-making; specifically, the threat of non-compliance and legislative override induce courts to amend decisions, and the preferences of Member States exert powerful influences on the jurisprudence of the Court). This is similar to the exogenous constraints approach, widely known as the separation-of-powers model, in the United States.

120. *See* Davies & Rasmussen, *supra* note 42, at 316.

121. *See* Maltzman et al., *Strategy and Judicial Choice*, *supra* note 118, at 51 (describing the role of policy preferences and institutional constraints in shaping Court outcomes and noting the strategic behavior of judges is shaped by preferences and actions of other actors outside the Court, as well as the action

rules or informal norms, where internal rules of procedure about the use of judicial panels, assignment of Advocates General to specific cases, assignment of specific opinions to judges, as well as norms of consensus and use of precedent can impact judicial behavior. As such, the story told by legal historians about the strategic interactions between the judicial, executive, and administrative branches at the national and European level are not dissimilar to the exogenous and endogenous constraints emerging from the American federal court system. Yet we know remarkably less about the strategic behavior of justices—at the national and European levels—within existing institutional constraints.[122] It is possible that the discursive practices, legal reasoning, and legal remedies to accommodate the justices' respective legal claims to supremacy are aimed at avoiding frequent and divisive constitutional conflicts.[123] The well-known example of the fundamental rights jurisprudence of the ECJ illustrates its ability to acknowledge the importance of human rights practices in national constitutions.[124]

By focusing on political processes in which legal decisions are made rather than on final case law opinions, the new legal history highlights the importance of coalition formation and opinion-writing on the Court as key explanations for emergence of constitutional practices and legal precedents in the European Union. As a result, legal historians are developing a much richer understanding of the political, strategic nature of judicial decision-making in the formative period of integration.[125] But judicial review and the norms of direct effect and supremacy that derived from such legal reasoning are not formal provisions established by conscious institutional design and treaty bargains. They are the product of political willingness to

taken by other judges. Justices engage in strategic behavior that can be used to model judicial behavior and outcomes, allowing for changing preferences in the course of decision-making, from opinion writing through joining the majority).

122. *But see* Carrubba, *supra* note 119, at 449.

123. *See* Burley & Mattli, *supra* note 35, at 41–42 (noting the importance of doctrinal discourse that allows legal reasoning to "mask" the implications of its rulings, affording it strong protection against national governments' opposition).

124. *See* Weiler & Lockhart, *Taking Rights Seriously*, *supra* note 11, at 61 (noting *Rutili*, *Cinéthèque*, and *Klensch* as landmark decisions of the ECJ applying its fundamental rights jurisprudence to national constitutions).

125. *See, e.g.*, Boerger-de Smedt, *supra* note 19 (discussing early negotiations in treaties).

accept such norms. Legal historians have sought to explain what caused the commitment to reviewing the constitutionality of both European and national statutes by courts through archival research. However, we might theorize about the broader implications of such inter-institutional politics by using a framework drawn from rational choice to understand the political and strategic preferences of different actors, the political context in which the dispute takes place, and the strategic behavior of jurists.[126]

Equally important are the implications of vesting federal supremacy through judicial mechanisms, rather than legislative processes, meaning that the European Community chose to deal with the inevitable friction between levels of government in a federal system in much the same way as the Americans in their founding document. Choosing judicial supremacy has resulted in resistance.[127] In highlighting concerns about compliance with judicial decisions, scholars have raised an issue of both empirical and theoretical importance. Compliance with laws, treaties, and statutes is critical for democracy, yet it has often been assumed that adherence to judicial decisions and rulings are routine in advanced industrial democracies. When judicial rulings call on multiple governments to act, they may do so to different degrees and understandings. This complex issue of compliance, supremacy, independence, and power in relation to courts also suggests that understanding what drove legal integration in Europe can generate multiple causation and inferential challenges. Ideas about what factors influenced European legal developments may be helped by counterfactuals in testing new historical arguments: What if European Member States had reversed court rulings, either through treaty amendment or legislative action? How different would the Community look if they had taken the Madison path and opted for broad legislative oversight and negative vetoes over state legislation by a federal legislature or

126. For a strategic model in the context of constitutional cases, *see* Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & SOC'Y REV. 87, 92 (1996); Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POL. SCI. 285 (1994).

127. Alison L. LaCroix, *What if Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 IND. L. REV. 41, 41–42 (2012) (discussing the decision of the founders of which branch would have supremacy, and noting that Madison argued for the legislature over the judiciary).

government?[128] Would there have been more resistance to the supremacy doctrine? What might be the implications if supremacy was vested in other institutions rather than the Court?

V. CONCLUSION

Bridging the disparate approaches to the study of European law is difficult given different theoretical and empirical orientations in European integration. While legal historians have pointed to the contradictory efforts of promotion and resistance to European constitutionalism within Member States, they have offered more nuanced understandings of key legal opinions. In so doing, they open up new avenues for research that can provide a richer historical context about the strategic nature of European- and national-level judicial policy-making. Building upon this research, we can further theorize about the agenda-setting role of specific national courts, the dynamic political process in which legal decisions are made, and the changing of preferences in the course of legal decision-making based on more detailed empirical data. Though initially conceived of as an international organization, the ECJ is like a federal court, which brings possibilities of further comparisons with other federal systems.[129] While one recent direction has been to focus on the ECJ in terms of judicial emulation and diffusion to other regional courts,[130] the other direction is to think about the historical parallels where the intersection of national law with federal constitutional law in Europe can generate comparisons with the American experience where local common law was displaced by federal constitutional law in the post-Civil War period with corresponding legal mobilization and resistance, and concerns about the balance between enumerated rights, state autonomy, and constitutional tolerance.[131] In the United States, the role of law contributed to the growth of the modern

128. *See, e.g.*, *id.* (explaining that the founders rejected Madison's request for a Council that would review all state laws before adoption).

129. *See, e.g.*, Mauro *Cappelletti*, *supra* note 21.

130. *See* Alter & Helfer, *supra* note 37, at 563 (arguing "that international judges are more likely to become expansionist lawmakers where they are supported by sub-state interlocutors and compliance constituencies, including government officials, advocacy networks, national judges, and administrative agencies").

131. Novak, *Legal Transformation of Citizenship*, *supra* note 78, at 94; EGAN, SINGLE MARKETS, *supra* note 6.

regulatory state and the growth of constitutional individual rights that are among the most important changes in American governance in the nineteenth century.

Interestingly, what emerged was a "veritable cult of constitutionalism" in the late nineteenth century, where a variety of local and state laws came under the purview of the U.S. Supreme Court, which defined the boundaries between public and private as well as state and federal power.[132] Miguel Poiares Maduro has pointed to a similar development in the ECJ.[133] Rasmussen has sought to challenge the classical historical narrative of a progressive process of "constitutionalization" in ways that are reminiscent of American legal historians who challenge the dominant paradigm widely accepted by progressive constitutional historiography and critical legal studies that the expansion of individual rights and governmental power that characterized the modern liberal state is a New Deal phenomenon. Constitutional practices were as unsettled in nineteenth and twentieth century America as they were in post-war Europe. Constitutional doctrines and statutory practices emerged to deal with the changes in production and consumption and rights and citizenship throughout the nineteenth century.[134] What emerges from this comparison is the creative and constitutive role of law in balancing market liberalism and social welfare, individual rights against collective public goods, and promoting national and international commerce through regulating the conditions for economic growth, competitiveness, and development.[135]

Together the changes made by law contributed to a tremendous restructuring of American and European political economies and democratic governance—arguably significant transformations that deserve consideration in their own right. American law responded to the changes of industrialism by expanding rights through a paradigm of national citizenship, along with democratic legal control over markets. Though by no means mitigating conflict or fully recognizing individual identities, many difficult constitutional questions confronted the U.S. Supreme Court as it sought to exercise

132. Novak, *Legal Origins*, *supra* note 52, at 267–68.
133. *See generally* MADURO, WE THE COURT, *supra* note 10.
134. *See, e.g.*, Novak, *Legal Transformation of Citizenship*, *supra* note 78, at 85.
135. *See* Egan, Single Market, *supra* note 25, at 410–12; EGAN, SINGLE MARKETS, *supra* note 6; *see also* MONTI, *supra* note 29.

its jurisprudence. As Europe continues to be in turmoil with considerable protest about the integration project, legal historians are contributing to the debate about democratic legitimacy by studying the framework in which such Court-expansionist cases were decided. In doing so, they are implicitly raising questions about the counter-majoritarian tendencies of the European Union and the relationship of law to the empirical and normative development of political union. Rasmussen suggests that "we need a very broad understanding of the actors and societal forces that shaped the development of European public law."[136] Legal historians are shedding light on the early development of the ECJ, adding their own intellectual and methodological contributions to our understanding of courts and politics, leading us to ask how their historical contextualization changes the way we understand legal decision-making and legal change.

Although acknowledging their contributions, my aim has been to utilize the insights of American Political Development ("APD") so that the ongoing reassessment of the role of law in both federal systems suggests new understandings and directions for research for scholars of European integration. American political development is distinguished by its engagement with the past through empirical rigor, its challenge to path dependency, through systematic consideration of temporality, and its emphasis on conceptualizing historical processes of change. APD scholarship has contributed to a broader understanding of judicial activism that challenges the behavioral approach to judicial policy-making as well as the more normative work on justice and the law.[137] To some degree, EU legal historians are going down the same path. Though the substantive focus of APD is on the American system, it is contributing to the historical turn in political science by "unraveling the teleological assumptions" of earlier studies and reexamining traditional themes.[138] APD scholarship stresses institutional change that may be endogenously generated by frictions and "incurrence" between multiple political orders and traditions, or exogenously driven by

136. Rasmussen, *supra* note 42.

137. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

138. KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT xi, 123 (2004) (defining APD in terms of "durable shift in governing authority").

their interaction with other institutions.[139]

As such, APD scholars have shown that the American judiciary has played a strong role in the creation of a national economy, advancing certain individual rights at the expense of others, and constituting national citizenship.[140] Not only does the institutionalization of specific legal practices occur, but it also provokes contestation and change. Equally relevant, APD scholars have focused on the structural weakness of other institutions—namely legislative and executive—to understand why other actors and institutions assert or assent to such legal activism.[141] This accords with Weiler's seminal argument that portrays "integration through law" as a rational response to a changing political environment.[142] Arguably, legal historians need to explore the consequences of legal changes for state development, authority, and power, and they need to elaborate upon how jurisprudence and the interplay of ideas, institutions, and ideological agendas generate different political logics that can result in contradictions and dysfunctional outcomes. This will enable legal historians to broaden their paradigmatic and substantive questions to engage not only the fields of European integration specifically, but international law, international relations, and comparative politics more broadly.[143]

139. *Id.*

140. Novak, *Legal Transformation of Citizenship*, *supra* note 78; BENSEL, *supra* note 68.

141. WHITTINGTON, *supra* note 53.

142. Weiler, *supra* note 2.

143. Mark A. Pollack, *The New EU Legal History: What's New, What's Missing?*, 28 AM. U. INT'L L. REV. 1257 (2013).