
INTRODUCTION

CRITICAL LEGAL HISTORIES IN EU LAW

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I. THE CONTEXT OF EU LEGAL SCHOLARSHIP

A workshop aiming to narrate the history of EU Law took place in November 2012 at a critical time for the very existence of the Union and its role as a global actor.¹ On the one hand, the current financial crisis is weakening some of the foundations and values that, in the last sixty years, EU lawyers, judges, and scholars have relied on.² On the other hand, the U.S. government is pursuing a Transatlantic Free Trade and Investment Agreement with the EU, aimed at creating a

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1. The workshop, titled “Toward a New History of EU Law,” was held at the American University Washington College of Law on November 7, 2012. Morten Rasmussen, Mark Pollack, Francesca Bignami, and Bill Davies—all authors in this special issue—participated in the workshop.

2. See Jürgen Habermas, Peter Bofinger, & Julian Nida-Rümelin *Only Deeper European Unification Can Save the Eurozone*, *GUARDIAN* (Aug. 9, 2012), <http://www.guardian.co.uk/commentisfree/2012/aug/09/deeper-european-unification-save-eurozone>; Abraham Newman, *Austerity and the End of the European Model*, *FOREIGN AFF.* (May 1, 2012), <http://www.foreignaffairs.com/articles/137611/abraham-newman/austerity-and-the-end-of-the-european-model>.

Western bloc to resist the rising Chinese power.³ The fascination of current EU law scholarship lies in either one or the other camp. For instance, by reflecting on the regulatory and political failures of the EU, scholars have exposed European integration as legitimated by a messianic project relying on the promise of a better future, rather than on a solid constitutional and democratic culture.⁴ In contrast, by praising the EU as a global actor, others have shed light on the Union's unique identity and its counterhegemonic role *vis à vis* the United States.⁵

Both fascinations leave EU law scholars and practitioners unsatisfied with the portrayal of EU law and more fundamentally its achievement or failure in shaping European integration. After sixty years of European law and jurisprudence, critics of the messianic project ask lawyers who have flirted with the notion of its constitutionalization, ranging from a narrow federalist to a more pluralist focus, to acknowledge that the Schuman vision⁶ and its dream are lost today.⁷ In this view, lawyers were essentially coopted by a constitutional narrative put forward by Europhile elite, a quasi-revolutionary vanguard, building the foundations of the Union on a thin legal legitimacy.⁸

In contrast, scholars who emphasize the EU's global anti-

3. See Nicholas Kulish & Jackie Calmes, *Obama Bid for Europe Trade Pact Stirs Hope on Both Sides*, N.Y. TIMES (Feb. 13, 2013), http://www.nytimes.com/2013/02/14/world/europe/obama-bid-for-trade-pact-with-europe-stirs-hope.html?hp&_r=1&pagewanted=all&.

4. See J.H.H. Weiler, Editorial, *60 Years Since the First European Community: Reflections on Political Messianism* 22 EUR. J. INT'L L. 303 (2011).

5. See Gráinne de Búrca, *Europe's Raison D'Être*, in THE EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER (Dimitry Kochenov & Fabian Amtenbrink eds., 2013); Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012).

6. Referring to the philosophy of the Schuman Declaration of May 9, 1950, which suggested a supranational integration of French and German coal and steel industries that led to the creation of a European Coal and Steel Community in 1951. For an insightful analysis on Robert Schuman's vision, see, Catherine M.A. McCauliff, *Union in Europe: Constitutional Philosophy and the Schuman Declaration, May 9, 1950*, 18 COLUM. J. EUR. L. 441 (2012).

7. See Joseph H. H. Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 157–58 (Julie Dickson & Pavlos Eleftheriadis eds., 2013).

8. See JACOB LEIB TALMON, *POLITICAL MESSIANISM: THE ROMANTIC PHASE* (1985).

hegemonic project depart from EU law techniques and formalities concerning the single market and the internal struggles to concentrate instead on the external action of the EU. By focusing on EU law's extraterritorial reach and its unilateralism with respect to global policies, the Union appears as a superior and benign actor when played against other hegemonic players such as the United States and China. The external focus helps to strengthen the Union's identity at a time of deep crisis.

This collection of articles spurred by the New Legal Historians offers a third way to reflect, in an interdisciplinary manner, on what EU law scholarship has accomplished until now and how it has shaped our shared European legal culture. Among the goals attained by the New Legal Historians, there is a commitment to better understand how legal change has occurred in EU law through critical legal histories of understudied everyday practices. The aim is to offer new and multiple narratives to shed light on Europe's past with implications for its future.⁹

Since the late 1970s the work of political scientists and legal scholars has shaped what we perceive today as a shared European legal culture with strong ties across the Atlantic.¹⁰ By "legal culture" or "legal consciousness," I refer to a set of arguments, modes of thinking, conflicting ideologies, training skills, shared knowledge, and social practices used by legal elites at a particular historical moment. Sixty years is a relatively short timeframe to give birth to a shared and coherent European legal culture, which is *per se* a remarkable achievement. The shaping of what lawyers and political scientists perceive as a well-established EU legal culture, however, has happened at the expense of foreclosing other avenues.¹¹

This workshop is part of a broader effort to shed light through the

9. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 112 (1984).

10. See Daniela Caruso, *EU Law in U.S. Legal Academia*, 20 TUL. J. INT'L & COMP. L. 175 (2011) (examining the evolution of EU legal scholarship and culture in the U.S. legal academia).

11. See Karl Klare & Dennis M. Davis, *Transformative Constitutionalism and the Common and Customary Law*, 26 S. AFR. J. ON HUM. RTS. 403 (2010). As the authors put it, "The discursive structure of a legal culture gives content to, but also constrains, the legal imagination of its participants, the types of questions they are capable of asking, and, therefore, the range of answers that they can provide." *Id.* at 406.

work of historians, less so as a unitary and coherent EU constitutional culture, but rather as a more fragmented, contested legal practice that has to be understood in continuous interchange and struggle among Luxembourg, Brussels, Member States' courts, parliaments, and their fragmented public opinions.¹² Rather than lifting the "veil of legal Form to reveal living essences of power and need," the new historians are engaged in a deeper reflection to show how law has played a significant role in creating major changes in European society.¹³

The work of the New Legal Historians does not emerge in a vacuum. They are in the company of other scholars who are offering new, accurate narratives, often conflicting with mainstream accounts of European integration, for a critical understanding of its past and future. For instance, Peter Lindseth reminds us that the relatively autonomous EU courts draw legitimacy from their interaction with judicial, executive, and parliamentary branches of the Member State.¹⁴ The political scientist Kalypso Nicolaidis is departing from the stifling debate surrounding a pervasive democratic deficit in the EU and moving instead toward a third direction that involves imagining the EU as neither a state nor a federation, but as a "demoicracy" that supports a union of citizens and states governing jointly.¹⁵ More radically, Alexander Somek challenges the narrative of European citizenship as creating beneficial individual rights for EU citizens. Through a critique of rights, Somek shows the increasing alienation of the European *bourgeois* that has lost touch

12. BILL DAVIES, *RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY'S CONFRONTATION WITH EUROPEAN LAW, 1949–1979* (2012).

13. See Gordon, *supra* note 9, at 109.

14. See PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* (2010).

15. See Kalypso Nicolaidis, *The Idea of European Demoicracy*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW*, *supra* note 7. "European demoicracy is a Union of peoples, understood both as states and as citizens, who govern together but not as one. It represents a third way against two alternatives which both equate democracy with a single demos: as a demoicracy-in-the-making, the EU is neither a Union of democratic states as 'sovereignists' would have it, nor a Union-as-a-democratic state *to be* as 'federalists' would have it. A Union-as-demoicracy should remain an open-ended process of transformation which seeks to accommodate the tensions inherent in the pursuit of radical mutual opening between separate peoples." *Id.* at 254.

with its *citoyen* side still rooted in his home country.¹⁶

This mapping of contemporary EU legal academia is essential to grasp the crucial contribution of the New Historian to the work of lawyers committed to EU law. While initially scholars studying the Luxembourg courts may have seen themselves as legal mandarins interpreting judicial opinions almost as if they were “divined by the Court,” later on with input by political scientists they shifted in analyzing more explicitly the relation between law and politics in EU law. The New Historians have infused in the work of lawyers a deep skepticism toward evolutionary functionalism, namely the notion that we need to conceptualize EU law according to a defined trajectory. Morten Rasmussen’s work shows that there is no pre-commitment to or against European integration, but rather a novel understanding of the forces that shaped and resisted the current European legal profession together with its legal culture and practice.

II. MORTEN RASMUSSEN’S CONTRIBUTION

It is often during times of crisis that creativity surfaces. The current EU crisis is opening new avenues for creative scholarship aimed at reflecting critically on the dominant narrative that has pervaded Europe’s legal consciousness. The project of Morten Rasmussen inserts itself nicely in this new trend that revamps the possibility of producing critical legal histories in EU law.¹⁷ The main idea is to depart from an “evolutionary functionalism”¹⁸ project that follows the evolution of EU law through developmental stages by tracking how, at every stage, law has satisfied the specific needs of a society. In this vein, the *Transformation of Europe*,¹⁹ Joseph H.H. Weiler’s influential history of EU law, created a powerful narrative of the different stages of European integration—the foundation, the mutation, and the Promised Land—often led by Europe’s judiciary branch. To overcome a political impasse in European integration,

16. See Alexander Somek, *Accidental Cosmopolitanism*, 3 *TRANSNAT’L LEGAL THEORY* 371 (2012) (relying on Karl Marx’s Jewish Question (1844)).

17. For more on Rasmussen’s collective research project, see *Towards a New History of European Public Law*, UNIV. OF COPENHAGEN, <http://europeanlaw.saxo.ku.dk> (last visited June 11, 2013).

18. See Gordon, *supra* note 9, at 59–67.

19. See Joseph H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991).

according to Weiler, the European Court of Justice shaped the new constitutional order by relying on noble goals at the expense of democratic values.²⁰ In Weiler's legal history, there are three key moments of constitutional jurisprudence in which the European Court of Justice ("ECJ") defines the European legal order as detached and almost impenetrable from social and political life.²¹ First is the creation, by the ECJ, of direct effect and supremacy doctrines to further political integration in the constitutionalization process. Second is the creation of a mutual recognition doctrine through which the ECJ could further market integration.²² Third is the ECJ's human rights jurisprudence, which sought to address the democratic shortages of European integration.²³ These are all moments in Weiler's narrative, wherein the ECJ has silently, and often relying on diluted versions of democracy, proceeded to strengthen its constitutional order. This powerful narrative resonates with a functional determinist vision whereby law responds to societal needs that change according to a resolute evolutionary path. Because of its influence, such a narrative has been widely adopted by lawyers, scholars, and judges to show how EU law satisfies the growing needs of a society in search of greater political and market integration alongside strong democratic values.

The methodology put forward by the New Historians gives us the opportunity to question functional determinist narratives of EU law that explain how each ECJ decision is part of a puzzle that creates, or fails to create, a more constitutional Union. Rasmussen's meticulous work aims instead to situate the jurisprudence of the ECJ in a web of "multiple trajectories of possibility."²⁴ For instance, instead of the narrative of the *quiet revolution*, depicted by Weiler in the three phases (direct effect and supremacy, mutual recognition, and human rights), Rasmussen's history shows that the chosen path was selected, "not because it had to be but because [1] the people pushing for alternatives were weaker and lost out in their struggle or [2]

20. See Weiler, *supra* note 7.

21. *Id.* at 154.

22. See Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649.

23. See Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- Und Vorratsstelle Getreide*, 1970 E.C.R. 1126.

24. See Gordon, *supra* note 9, at 112.

because both winners and losers shared a common consciousness that set the agenda for all of them, highlighting some possibilities and suppressing others completely.”²⁵ By narrating these critical legal histories in EU law, we begin to appreciate how the legal forms and practices created by European political and legal elites were the product of struggles among groups with conflicting agendas, characterized by a particular historical context that has become part of our European legal consciousness—a relatively autonomous legal structure with an internal coherence.²⁶

Morten Rasmussen’s lecture began by explaining that the context of European legal integration was driven by low societal demand for legal adjudication at a time when legal access to Luxembourg was not easy for individual citizens of the Member States.²⁷ This foundational moment, rather than a constitutional moment based on the spirit of the Treaties, was an intense battle of conflicting ideas and interpretations among legal and political elites that shaped the early nature of EU law. At that time, an intergovernmental approach competed with a constitutional, federalist vision. The High Authority and the executives of the Member States were tasked with the implementation of the Treaties, and the ECJ was not central to the implementation of EU law *vis à vis* national orders. In contrast, the constitutional vision placed the ECJ at the center of the new architecture, based on the ideas promoted by Walter Hallstein (the first German President of the EEC Commission), stating that this new type of international community must be subject to the rule of law—namely a *Rechtsgemeinschaft*.

Rasmussen further explains how different groups of legal experts, originally inclined toward federalism, ended up bolstering the constitutional approach by introducing and refining the mechanism of preliminary reference under article 177 EEC of the Rome Treaty. This procedure eventually allowed citizens broader legal recourse to the ECJ, while simultaneously strengthening the constitutional and legal foundation of the system and creating the possibility for more

25. *See id.*

26. *See id.* at 101.

27. *See supra* text accompanying note 1. For the article that resulted from the lecture, see Morten Rasmussen, *Rewriting the History of European Public Law: The New Contribution of Historians*, 28 AM. U. INT’L L. REV. 1187 (2013).

integration. In cases such as *CILFIT*,²⁸ it becomes clear how the ECJ can use article 177 (267 TFEU) not only to domesticate the Italian Corte di Cassazione, but more interestingly to offer a savvy lesson in comparative law. From this judgment, the ECJ emerges as a skillful comparative law practitioner in interpreting complex legal concepts embedded in a variety of languages and diverse legal cultures.

In addition, Rasmussen recounts how the breakthrough in *Van Gend en Loos*²⁹ and *Costa*,³⁰ two fundamental ECJ cases, was the byproduct of a number of factors: (1) the creation of a common market, (2) the constitutional changes in the Netherlands in the late 1950s that allowed a large number of cases to be referred to the ECJ, (3) the creation of an international federation for European law in 1962, and (4) the crucial appointment of two new judges (Alberto Trabucchi and Robert Lecourt) who favored federalism. Rasmussen then turned to the challenges inherent in the expansion of the Union and subsequent limitations in the 1970s. Up until this point, European public law was shaped by limited European elites. The post-1967 court—now presided over by Robert Lecourt and including federalist voices such as Luxembourg Justice Pierre Pescatore—moved beyond the conservatism of the earlier court and began to deepen its constitutional practices, which led to greater and more vocal opposition from the Member States.

The 1970s marked the start of struggles between ideas and among political and legal elites regarding fundamental rights, and were driven mostly by the German Federal Constitutional Court in well-known cases such as *Internationale Handelsgesellschaft*³¹ and *Solange*.³² Rasmussen relies on Bill Davies's account of pervasive resistance to the ECJ in German administrative bodies, domestic courts, and civil

28. See Case C-283/81, Srl CILFIT and Gavardo SpA v. Ministry of Health, 1982 ECR 3415; G. Federico Mancini & David T. Keeling, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, 11 Y.B. EUR. L. 1 (1991).

29. Case C-26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 2.

30. Case C-6/64, Costa v. ENEL, 1964 E.C.R. 587.

31. See Case C-11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- Und Vorratsstelle Getreide, 1970 E.C.R. 1126.

32. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 271, 1974 (Ger.).

society³³—which resulted in changes in the European legal system, determined predominantly by “national” concerns and pressure, and demonstrating the real co-constitutive impact of national receptions of EU law—to show that the conflict between national sovereignty and Union law came to only a partial end. The end result of these processes, at least as far as historians can tell into the mid-1980s, was a heavily contested European public law structure shaped by a broad range of actors, which saw the national systems and traditions play a co-constitutive role in the formation of essential aspects.

Rasmussen’s historical account does not rest on a normative explanation of the constitutionalization of Europe. Rather, it depicts the constitutional practice of the court as a struggle driven by specific actors, providing for a revisionist historical account that departs from the classic constitutionalization narratives. These narratives include that of Eric Stein and Joseph H.H. Weiler on constitutionalization through the active role of the ECJ, Walter Mattili and Anne-Marie Slaughter’s constitutional dialogue between the ECJ and the national constitutional courts, and Alec Stone Sweet and Karen Alter’s inclusion of transnational and private groups to further the constitutionalization of the EU. As Rasmussen explains at the beginning of his article, the academic paradigm launched by Weiler and Stein in the 1970s was a strategic project to create a “new scientific paradigm” and demonstrate that the ECJ had become a political actor, explaining the success of the constitutional project and its relative acceptance by national courts. This adage has become common wisdom in EU law circles, despite the fact that it is unjustifiable historically. Instead, Rasmussen’s revisionist history shows that national resistance to the ECJ’s constitutional practice did not disappear. Rather, it continued at different times. Even the preliminary reference mechanism, if not backed up by the Dutch constitutional reform, remains a fragile tool since countries like Denmark, using political control of the judicial system, have ensured that courts never send cases to the ECJ. Therefore, we come to understand that contention, resistance, and co-constitution, instead of mere top-down, gradual, inevitable acceptance, shape the ECJ’s practice in the realm of public law.

33. See DAVIES, *supra* note 12.

III. THE RESPONSES:
MARK POLLACK AND FRANCESCA BIGNAMI,
MICHELLE EGAN AND BILL DAVIES

In this part I pair the responses to the New History approach according to the authors' important interdisciplinary contributions to the field of EU law. During the workshop, Mark Pollack responded to Rasmussen's lecture with a suggestive shift of scholarly paradigms: if the 1990s were the Golden Age of law and politics research, today is the Golden Age of EU legal history. From the perspective of a political scientist, Pollack wonders about the lessons derived from a revisionist history and its mission for future research. In his detailed account, he shows how political scientists were affected by the constitutionalization narrative by developing particular scholarly agendas focusing on the ECJ.³⁴ What is striking in Pollack's elegant mapping of the political science scholarship on EU law is to understand the competing and conflicting disciplinary approaches tackling, for instance, the question of judicial independence of the ECJ. On the one hand, some scholars portrayed the ECJ as constrained by the Member States, while others depicted the ECJ as a highly independent court.³⁵ While political scientists and international relations scholars were fighting over this turf, legal academics were either on board with the constitutional paradigm in European public law or busy forming and resisting the creation of a European private law consciousness with its own vocabulary and comparative legal culture.³⁶

In his paper Pollack shows the overlap between the scholarly agenda of political scientists and New Historians in what he calls the relationship between the ECJ and the national courts. He compares the finding of political scientists with the findings in Bill Davies's book,³⁷ broadening our understanding of the German resistance, not limited to the Federal Constitutional Court of Germany, to the ECJ's jurisprudence. Pollack wants to show that, despite a similar aim, the

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

35. See *id.* at 1264–65.

36. See Fernanda Nicola, *Transatlanticisms: Constitutional Asymmetry and Selective Reception of U.S. Law and Economics in the Formation of European Private Law*, 16 CARDOZO J. INT'L & COMP. L. 87 (2008).

37. See Pollack, *supra* note 34, at 1293–1301 (citing DAVIES, *supra* note 12).

disciplinary constraints make historians highlight particularities and idiosyncrasies emerging in European integration, whereas political scientists are tempted to draw comparative conclusions between different Members States' attitudes toward the reception of EU law.³⁸ However, what appears as a disciplinary constraint in Pollack's paper becomes a normative commitment on how we understand the relation between law and society in Francesca Bignami's paper.

Francesca Bignami brings comparative law insights to the discussion.³⁹ Comparative lawyers are trained in the theoretical debates and the practice of legal transplants, namely showing why and how law adapts and changes to a different legal context when it travels. As Bignami highlights, the New Historians contribute to the comparative law tradition in the Watson sense, to show which legal networks of scholars, lawyers, and judges have shaped the European constitutional practice.⁴⁰ Bignami goes deeper to show how the domestic law of the Member States has provided not only different case-studies of resistance versus acceptance but more importantly an understudied aspect, namely a "crucial springboard for the new law of the European Community."⁴¹ If EU law influences the public—and private—law of the Member States, Bignami calls this a downward transfer of law into national systems, which appears the main focus of political scientists.

The contribution of the New Historians is in tune with the comparative law agenda of tracing the upward transfers of domestic rules that shape EU law as a relatively autonomous legal sphere. In such transfers we can detect the creation of a European legal consciousness,⁴² not a coherent doctrinal apparatus detached from society, but rather competing and conflicting approaches to legal concepts, judicial techniques, and social values that through compromises or unintended consequences shape the current

38. *See id.*

39. Francesca Bignami, *Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research*, 28 AM. U. INT'L L. REV. 1311 (2013).

40. *See* ALAN WATSON, *LEGAL TRANSPLANTS* (1970).

41. *See* Bignami, *supra* note 39, at 1315.

42. *See* DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT, 1850–1940* (2006)

European constitutional practice.⁴³

The essay by Michelle Egan brings to the fore the comparative EU and U.S. federal dimension as a way to better understand the political economy of European integration and how law played a crucial role “seeking to balance both public power and private rights.”⁴⁴ In her essay she refers to the literature that began in the mid-1980s on “integration through law” with the explicit task of comparing European integration to the U.S. federal experience.⁴⁵ In her view, such comparison is still relevant in better understanding the politics of judicial empowerment or the federal struggle over social welfare across the Atlantic. Egan is committed to continue a transatlantic comparative scholarly project that for many reasons has today lost its appeal.⁴⁶

Egan highlights that the work of the New Historians is revealing in the creation of a particular professional identity, yet it offers little guidance in addressing bigger causal questions such as the relationship of law to contemporary democracy and to the market as a comparative US–EU history would reveal. A response to Egan comes from Bill Davies,⁴⁷ who states the agenda of the New Historians is purposely limited in scope—the focus on constitutional practice—and in scale—in Fernand Braudel’s *longue durée* tradition of small stories that need to be told to understand a large-scale phenomenon such as European integration.⁴⁸ Yet Davies agrees that while, in the U.S. realist tradition, more biographies and studies have influenced the study of U.S. constitutional law, very limited work has been put forward offering a “picture of a European justice’s preferences.”⁴⁹ Even though the European context remains radically

43. See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

44. Michelle Egan, *Toward a New History in European Law: New Wine in Old Bottles?*, 28 AM. U. INT'L L. REV. 1223, 1226 (2013).

45. See 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1985).

46. See Caruso, *supra* note 10.

47. Bill Davies, *Why EU Legal History Matters—A Historian’s Response*, 28 AM. U. INT'L L. REV. 1337 (2013).

48. See FERNAND BRAUDEL, A HISTORY OF CIVILIZATIONS (trans. Richard Mayne, 1993); for an application of Braudel’s insight into U.S. legal micro-history, see Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899.

49. See Davies, *supra* note 47, at 1345.

different from the U.S. one, and in a civil law tradition this type of study is in itself less relevant than in the common law tradition, Davies is committed to advancing our knowledge in this realm in order to expose the internal and external forces that control and shape the legal discourse of European courts.

The last central issue that Davies addresses in his essay is the hard choice that he is directly or indirectly asked to make, especially by Egan and Pollack, namely the choice between what he calls applied versus pure history, or in the realm of social science presentism versus historicism. If a pure history is more scientific, the applied history is mostly concerned with its use in current struggles. Davies responds to what Martti Koskenniemi called an existential dichotomy, positioning the New Historians in two places at the same time.⁵⁰ Historians are asked to write a history of the past, but the very act of writing reflects the desire to intervene in the present. Davies admits that the New Historians are committed to an “‘indirect applied’ legal history that finds little need to redraw theoretical models but whose work is so embedded in the ‘contemporary’ period that it cannot be anything other than applicable for understanding today’s world.”⁵¹

We are living in an era in which legal education is under attack, in which resources are scarce. It would be easier to make flamboyant claims about the end of the European Union or its hegemonic role as a global actor than to commit to a careful and well-researched scholarship. The New Historians are offering an important avenue of research to better understand what has happened in EU law together with a lesson in self-awareness geared to legal scholars, lawyers, and judges shaping European legal consciousness.

50. See Martti Koskenniemi, Address at the “Histories of International Law — Significance and Problems for a Critical View” Workshop (Temple Law School, April 12–13, 2013) (ending his lecture with the image of a detective on the ruins saying, “The world is a disaster and I have nothing to offer to help you figure it out. My work is that of a detective . . . to say ‘who dunnit?’”).

51. See Davies, *supra* note 47, at 1351.