
WHY EU LEGAL HISTORY MATTERS—A HISTORIAN’S RESPONSE

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For a field of study still as nascent as the one the historians of the European Union’s legal system find themselves, it is hugely beneficial to receive the constructive criticism of experienced and important political scientists and lawyers. By highlighting the strengths and exposing the weaknesses of the existing research of the “New Historians,” progress will certainly be facilitated in filling existing lacuna, following the paths that these new insights open up, and, hopefully, inspiring other researchers to begin work in this important but still incompletely addressed area.

One purpose of my response is to speak to and, where possible, provide answers to the prompting in the commentaries on Morten Rasmussen’s opening paper from the perspective of a legal historian working closely in the area of European studies.¹ Certainly, one of the most important questions from all of the commentaries is what the respective disciplines involved can learn from our new legal

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1. See 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); Michelle Egan, *Toward a New History in European Law: New Wine in Old Bottles?*, 28 AM. U. INT’L L. REV. 1223 (2013); Mark A. Pollack, *The New EU Legal History: What’s New, What’s Missing?*, 28 AM. U. INT’L L. REV. 1257 (2013); Morten Rasmussen, *Rewriting the History of European Public Law: The New Contribution of Historians*, 28 AM. U. INT’L L. REV. 1187 (2013) [hereinafter Rasmussen, *Rewriting the History of European Public Law*].

history and what, if anything, is “new” about them at all. At the core of these questions is what, as one prominent legal historian has asked, is the “cash out value” involved here?² I hope to explore the underlying importance of legal history generally in this contribution and how it relates to a legal profession in which a necessary advocacy and a teleological reading of sources do not necessarily harmoniously sync with the purported objectivity of historical science. I will touch upon the recently made distinction between “applied” and “pure” legal history³ and how the new EU legal history can contribute to those discussions. I ultimately hope to use the commentaries provided to reflect on how the group of New Historians—myself included—can self-reflect about the current state of our own research and identify ways in which we can further progress.

I. THE CONTRIBUTION OF THE NEW HISTORIANS

In his contribution to this issue, Morten Rasmussen attempts to provide a preliminary overview of what the “story” of the development of European law looks like given the contributions of new research undertaken by historians.⁴ Special emphasis in his piece falls on the actors who shaped the development of EU law, particularly at the transnational level. Rasmussen’s in-depth recollecting of the role of the European Commission’s Legal Service and its allied academic associations in pushing for a teleological, constitutional reading of the Rome Treaties against the hesitancy of a reluctant and conservative European Court of Justice (“ECJ”) is revelatory. This story can only possibly be a prelude to a much richer narrative because “there are still many questions and even entire subfields [of this legal history] that remain unexplored.”⁵

Nonetheless, Rasmussen describes an evolution that was much more contested in nature and involved a much larger number of

2. Mary Dudziak, *What’s the Cash Out Value*, LEGAL HIST. BLOG (Oct. 20, 2010, 7:24 AM), <http://legalhistoryblog.blogspot.com/2010/10/whats-cash-out-value-more-aalsinterview.html>.

3. Alfred Brophy, *Introducing Applied Legal History*, 31 L. & HIST. REV. 233, 233–240 (2013).

4. *See generally* Rasmussen, *Rewriting the History of European Public Law*, *supra* note 1.

5. *Id.* at 1218.

actors—national and European—than had been assumed in the existing body of political science literature and legal scholarship amply described in the start of his article.⁶ As such, Rasmussen emphasizes the relative and quite unexpected complexity of the legal history under scrutiny here, in which national reactions to key ECJ decisions feed back in a profoundly constitutive way into the European system and in which even public opinion and media reaction play an influential role in legal outcomes.⁷

Driven by this initial historical impulse, Rasmussen goes further still, using these findings to reassess the contemporary understanding of successfully “constitutionalized” treaties that has become ubiquitous in multi-disciplinary scholarship on the EU.⁸ He boldly asserts that the “ECJ did not manage to ‘constitutionalize’ the Treaties of Rome before 1992,” arguing that the “relatively limited” impact of the Court’s case law and “continued contestation and resistance” offered by the member states means that we might better understand the functioning of law in the European Union as a deeply contested “constitutional practice.”⁹ This “practice” is comprised of a still-not-fully-reconciled duality in European law, in which the pro-Europeanists in the Commission, Parliament, and academic associations posit a constitutional role for the Court and the Treaties.¹⁰

At the same time, this constitutional claim has been only very reluctantly accepted by the member states’ governments and judiciaries, who are bound to pre-existing national constitutional orders. Acceptance has followed only under conditions of co-authorship in the system¹¹ and in some cases under heavy reluctance

6. *Id.* parts I & II.

7. See BILL DAVIES, *RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY’S CONFRONTATION WITH EUROPEAN LAW, 1949-1979* (Cambridge University Press, 2012) [hereinafter DAVIES, *RESISTING THE EUROPEAN COURT OF JUSTICE*] (providing an example of the role played by public opinion in framing a national court’s resistance to European law).

8. Rasmussen, *Rewriting the History of European Public Law*, *supra* note 1.

9. *Id.* at 1219.

10. Morten Rasmussen, *Establishing a Constitutional Practise: The Role of the European Law Associations*, in *SOCIETAL ACTORS IN EUROPEAN INTEGRATION: POLITY-BUILDING AND POLICY-MAKING 1958-1992* 173, 173-196 (Kaiser & Meyer eds., 2013).

11. Bill Davies, *Pushing Back: What Happens When Member States Resist the ECJ: A Multi-Modal Approach to the History of European Law*, 21 *CONTEMP.*

to participate or apply EU law at all.¹² Rasmussen admits that contestation should not be a surprise and that this happened even in more established federal polities. Yet equally, he argues that by adopting uncritically the teleological and “deeply normative” interpretation that the Treaties “will develop into a European constitution,” we limit our ability “to discern the extent to which the constitutional practice was contested and even more crucially empirically trace the way European public law was *actually* practiced in the Community/Union and the member states.”¹³ As such, the replacement of the “constitutionalization” term with the more neutral moniker of “constitutional practice” allows firstly for a more balanced and well-documented exploration of the “true history” of the EU’s legal system, which, secondly, Rasmussen ambitiously contends, offers a more informed basis for discussion and potential solving of ongoing legitimization crises suffered by the supranational institutions.¹⁴

II. NEW WINE IN OLD BOTTLES?

With these two objectives of the New Historians clearly in mind, the Biblical reference in the title of Michelle Egan’s commentary takes on an important secondary meaning.¹⁵ If the promise of the New History is correct, then it does seem that the old bottles—in this case, the long-established conclusions of political science and legal scholarship about the constitutional nature of the Treaties—cannot contain the empirical reality emerging from the national and European archives. As Luke details, “the bottles shall perish.”¹⁶

EUR. HIST. 417 (2012) [hereinafter Davies, *Pushing Back*].

12. For example, Danish and British courts were particularly reluctant to send cases to the ECJ. See Bill Davies & Morten Rasmussen, *From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950–1979*, in INSTITUTIONS AND DYNAMICS OF THE EUROPEAN COMMUNITY, 1973–83 (Johnny Laursen ed., 2013) [hereinafter Davies & Rasmussen, *From International Law to a European Rechtsgemeinschaft*]; see also Alec Stone Sweet & Thomas Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–1995*, 5 J. EUR. PUB. POL’Y 66, 66–97 (1998) (offering a quantitative analysis of member states’ participation in the ECJ).

13. Rasmussen, *Rewriting the History of European Public Law*, *supra* note 1, at 1221.

14. *Id.*

15. See Egan, *supra* note 1.

16. Luke 5:36–39 (King James).

But lest historians get drunk on their initial enological successes, Egan highlights a particularly important set of issues that historians must address if their findings are to find a foothold in the work of other disciplines. Foremost among these is the need for the new historical studies 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.”¹⁷ Hunkering down into the silos of specialized, case- or period-specific studies, as has been the case in much of the New History scholarship to date, precludes the possibility of writing a history of European law as part of a broader “administrative, regulatory, and judicial realm” with a greater relevance for the large number of scholars who understand law in this way.¹⁸ Egan believes that “a comparative assessment of the relationship 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.”¹⁹ Despite the best efforts of the EU legal historians, it may be that their chosen object of study is “neither unique nor unusual.”²⁰

In highlighting the comparison with the development of the federal legal structures in the United States, Egan points out the apparent similarities between the roles played by the U.S. Supreme Court and the ECJ in interpreting the “constitutional” order as autonomous judicial actors and as foci for the contestation of much broader political-judicial battles. In both systems, the “federal” judiciaries found themselves in multi-tiered systems, in which their awareness of being young institutions with delegated powers made their task of ensuring the efficacy and uniformity of the nascent legal systems especially complicated. As such, that similar legal experiences have been felt in both is “unsurprising.”²¹ In the American case, pressure from the economic power of the industrialized north demanded a more active role for federal courts

17. Egan, *supra* note 1, at 1235.

18. *See id.* at 1234.

19. *See id.* at 1235–36.

20. *See id.* at 1246.

21. *See id.* at 1244.

willing to invoke the commerce clause to remove obstacles to the flow of goods and services. Despite no small measure of resistance, the continuing expansion of federal judicial jurisdiction went hand-in-hand with the growth of a national economy and an administrative state to regulate it. This “rise of the jural state”²² was accompanied by greater police powers, social policies, and definition of the concept of rights and citizenship well into the twentieth century. Egan highlights the close similarity to the legal developments in Europe: the growth of the social regulatory state, enabled by the ECJ in some cases, as well as the firming up of definitions of citizenship and private rights, which were preceded by a similar demand for the ECJ’s services from businesses, industries, and litigants looking for outcomes that favored inter-member states’ trade. Here, Egan harkens back to the neo-functionalist scholarship of Stone Sweet and Brunell, whose work in the late 1990s posited a correlative relationship between inter-state trade levels and activity at the ECJ, but which has come under fire from various quarters recently.²³

Egan’s rejoinder about the importance of comparison and breadth of the theoretical scope of historical scholarship is extremely pertinent. In regard to the first issue, the “precedent” of the evolution of federal power in the United States is an ever-present thorn in the side of the New Historian. We know that when the first President of the European Commission, Walter Hallstein, called for a “Supreme Court” for Europe,²⁴ a certain type of integration based on the American experience was intended by (at least some of²⁵) the EU’s

22. *See id.* at 1240.

23. *See generally* Stone Sweet & Brunell, *supra* note 12. This article has long played a role in shaping views on the ECJ, EU law, and EU trade. For a more contextualized approach that questions the triadic relationship, see Davies & Rasmussen, *From International Law to a European Rechtsgemeinschaft*, *supra* note 12.

24. WALTER HALLSTEIN, *UNITED EUROPE: CHALLENGE AND OPPORTUNITY* (1962).

25. New Historical work emphasizes just how different the starting positions of the member states were in this regard. The German position was one extreme in the debate. On the whole, the French position won out. *See* Anne Boerger-de Smedt, *La Cour de Justice dans les Négociations du Traité de Paris Instituant la CECA*, 18 J. EUR. INTEGRATION HIST. 7, 7–33 (2008); *see also* Anne Boerger-De Smedt, *Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome*, 21 CONTEMP. EUR. HIST. 339, 339–56 (2012) [hereinafter Boerger-De Smedt, *Negotiating the Foundations of European*

own “Founding Fathers.” Moreover, the field of EU legal studies sits—perhaps increasingly shakily—on the “Integration through Law” research project that explicitly used “the United States federal system as a comparative point of reference.”²⁶ The comparison seems so easy and attractive that, even thirty years later, it still draws scholars together to discuss²⁷ and publish²⁸ on the viability of a US–EU comparison. And yet despite all of this, the comparison still remains enigmatic, and there has not yet been a definitive statement on the benefits and viability of the comparison. Why, after so much time and scholarship, is there still hesitancy to use the same kind of terminology to describe the two judicial systems? Even if Rasmussen concedes that “ECJ case law contains important federal doctrines,”²⁹ is it simply that, despite the resemblance, these are two very different animals and that comparing the development of a pre-industrial republic in the late eighteenth century with a post-war project to unify well-established European nation states with centuries-old enmities and extremely strong, entrenched national identities is just not possible? Even if we distill out of the historical substance just the notion of two complex federal polities in the making, Rasmussen contends that the comparison is “mistaken.”³⁰ Just because the ECJ says that it has constitutionalized and federalized the Treaties does not make it so. Indeed, the question as to whether the ECJ has managed to promote the federalization of Europe or whether this has been a high-profile failed attempt³¹ remains the impetus for most of the historical research being undertaken.

So if the viability of the US–EU comparison in substantive terms remains contentious, what other lessons can historians draw from Egan’s commentary? In fact, very important ones indeed. The

Law].

26. Mauro Capelletti, *Preface to Integration Through Law*, 1 METHODS TOOLS AND INSTITUTIONS (Mauro Capelletti et al. eds., 1986).

27. A workshop, *The Comparative Constitutional Evolution of the European Union and the United States*, was held at The American University in December 2010, which four of the five authors in this issue attended.

28. ANDREW GLENCROSS, WHAT MAKES THE EU VIABLE?: EUROPEAN INTEGRATION IN THE LIGHT OF THE ANTEBELLUM US EXPERIENCE (2009).

29. Rasmussen, *Rewriting the History of European Public Law*, *supra* note 1, at 1220.

30. *Id.*

31. *See id.* at 1220–21.

relative maturity of U.S. federalism has given legal historical scholars of that system greater time and material to develop much more advanced theoretical means for considering the role of the judiciary in the construction and transformation of complex federal structures. Egan lists some of these approaches in great detail. For one, the jurisprudential tradition of the court as an institution is important and, as Egan recounts, the position of the U.S. Supreme Court in relation to social rights and the welfare state remains a bone of contention today.³² This is an avenue for much further research from a European perspective, though we might find prospects for much variation between courts and constellations of judges much less, seeing as, to a large extent, the “jurisprudence” of the ECJ is locked—broadly—into place by its obligations under the Treaties.³³

But even despite this constraint, the initial findings of the historical research indicate that there are still differences between “courts,” particularly when key personnel come to the bench or the Court President position changes hands. In fact, one of Rasmussen’s most important findings is that the ECJ in 1963 was extremely reluctant to hand down the *Van Gend en Loos* ruling, given that a lot of the judges were conservative in their reading of the “original nature” of European law.³⁴ In fact, Rasmussen has contended that a good approximation suggests a 4–3 vote in the *Van Gend* Court, with the deciding vote coming from the unexpected corner of the Gaullist French appointment, Robert Lecourt.³⁵ It was when Lecourt came to the Court Presidency that the ECJ entered its most proactive phase in the early 1970s.³⁶ Much more time and effort on the part of the historians must be spent exploring the jurisprudential ideas in the

32. See Egan, *supra* note 1.

33. The Court, like the other supranational institutions, are required by Article 2 of the Rome Treaty to “promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.” Treaty of Rome art. 2, Mar. 25, 1957, 298 U.N.T.S. 3., available at http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf.

34. Morten Rasmussen, *Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65*, 21 CONTEMP. EUR. HIST. 379 (2012).

35. See *id.* at 388–89.

36. Davies & Rasmussen, *From International Law to a European Rechtsgemeinschaft*, *supra* note 12.

Court. Even if the deliberations remain secret, opinions and ideas can be found in academic publications, speeches, and private letters in personal and official archives. While this is no guarantee of voting behavior, it is certainly informative in discerning conservative judges, like the German Otto Riese,³⁷ and fervent integrationists like Lecourt.

Secondly, the influence on outcomes of the personal preferences of judges, facilitated in the United States by widespread media coverage and the publication of dissenting opinions, has been the subject of wide study in U.S. legal history. While made extremely difficult in regards to the much more guarded ECJ, it is possible, through careful tracing of academic and professional publications pre- and post-tenure, to build a picture of a European justice's preferences. How and whether this translates into actual voting behavior will always be much more difficult to tell. Initial historical work in this area suggests that a key variable in judicial preferences is their preference for Europe, so that when major changes in personnel on the ECJ took place in 1967, the resulting years saw a much more aggressively integrationist institution than the *Van Gend* Court, which is why there is so much national "resistance" in the 1970s, not in the years immediately after the "revolution."³⁸

Thirdly, while EU legal historians laud the finding that "we need to include a wider range of actors to understand the development of European public law,"³⁹ this already appears to be a given for U.S. legal historians, and the mobilization of "counterthrusts"⁴⁰ against the federal judiciary are part of the historical canon. Recent historical scholarship on Europe has emphasized not just the mobilization of professionals, academics, and public figures in favor of the

37. Otto Riese (1894–1974) was a Law Professor at the University of Lausanne in 1950, became Chief Justice on the Federal Court of Justice in Karlsruhe in 1951, before moving to the ECJ in 1952 and serving twelve years in Luxembourg as a judge. He favored national control over the European institutions. See Ernst von Caemmerer, Walter Hallstein, & Ernst Steindorff, *PROBLEME DES EUROPÄISCHEN RECHTS: FESTSCHRIFT FÜR WALTER HALLSTEIN ZU SEINEM 65. GEBURTSTAG* 420 (1966).

38. See Davies & Rasmussen, *From International Law to a European Rechtsgemeinschaft*, *supra* note 12.

39. See Rasmussen, *Rewriting the History of European Public Law*, *supra* note 1, at 1218.

40. See Egan, *supra* note 1, at 1248.

constitutional idea, but also often that this mobilization proved to be a failure—almost fully in France⁴¹ and to a very large extent in Germany.⁴² One area in which the breadth of the actors involved in the formation of the European legal system is particularly relevant, and also one where I tend to emphasize more than my New Historian colleagues, is the general public. In the German reception of European law, influential media coverage ensured that there was a well-informed public forum that certainly played a role in the German Constitutional Court's controversial reaction to important ECJ doctrine at the start of the 1970s. How else do we explain why the President of the German court would make the effort to appear in print, on the radio, and on television to explain the court's reasoning?⁴³ U.S. legal historians are already much further advanced in this area. We only have to consider Pauline Maier's magnificent *Ratification: The People Debate the Constitution 1787–1788* as a template for a similar investigation into European debates.⁴⁴ This is made all the more compelling an investigation due to the prevalence of the “permissive consensus” argument—that early European publics did not care or know what their leaders were up to in Brussels—which still holds sway across much political science and public opinion scholarship.⁴⁵

Fourthly, the impact of institutional constraints on, and possibilities for, the U.S. courts has been a subject of study for almost as long as European integration has existed. Walter Murphy's

41. See Alexandre Bernier, *Constructing and Legitimizing: Transnational Jurist Networks and the Making of a Constitutional Practise of European Law*, 21 CONTEMP. EUR. HIST. 399, 414 (2012).

42. See Davies, *Pushing Back*, *supra* note 11, at 419–20 (exploring the German Constitutional Court's controversial denial of European law's primacy); Bill Davies, *Meek Acceptance? The West German Ministries' Reaction to the Van Gend en Loos and Costa Decisions*, 14 J. EUR. INTEGRATION HIST. 57, 59 (2009).

43. See Ernst Benda, *Das Spannungsverhältnis Von Grundrechten Und Übernationalen Recht*, Deutsches Verwaltungsblatt 10.11 at 395–56 (1974); see also Interview with Ernst Benda, *Zur Frage der Schaffung eines europäischen Grundrechtskatalog*, Deutsche Welle, (Sept. 4, 1975).

44. See generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010).

45. See ELISABETH NOELLE-NEUMANN, *Phantom Europe: Thirty Years of Survey Research on German Attitudes Toward European Integration*, in CONTEMPORARY PERSPECTIVES ON EUROPEAN INTEGRATION 57–58 (Leon Hurwitz ed., 1980); LEON N. LINDBURG & STUART A. SCHEINGOLD, *EUROPE'S WOULD-BE POLITY: PATTERNS OF CHANGE IN THE EUROPEAN COMMUNITY* 53–63 (1970).

description of how an “intellectually respectable argument”⁴⁶ in the dissent to *Yakus v. United States* persuaded a congressional committee to implement major procedural reform is certainly reminiscent of the early arguments about the perceived acceptance of the European legal revolution by the national governments due to the apolitical, legally authoritative reasoning of the ECJ.⁴⁷ The New History has done much to undermine the idea that acceptance was widespread at all, but equally we are now seeing important examples of how the ECJ was forced to backtrack and change its case law because of the constraints imposed by influential national courts.⁴⁸ Indeed, there is much to be said for the argument that the ongoing controversy between the German Constitutional Court and the ECJ is a continuing reformulation of the original constraints imposed by the former on the latter in the 1970s.⁴⁹ The strategic nature of ECJ decision making within the complex constellation of national, subnational, and European actors in the integration project certainly requires further investigation by historians in a broader range of cases. Whether the reality emerging from the archive sources can be interpreted best by rational choice theory, or any theory at all, is an intriguing question. Historians are uniquely well placed to answer this question and more, given their emphasis on systematic exploration of ministerial and government archives, which can reveal the world of political pressures facing the ECJ.

Finally, Egan poses the broadest dilemma of all for the historians: What do the findings mean for our conceptualization of the rule of law, democracy, federalism, and compliance? While posing these questions in terms of a series of counterfactuals that historians tend to shy away from, Egan gets right to the heart of a crucially important issue. The choice *not* to create a constitutional document was made by democratically elected heads of governments and their representatives. The choice to make the Treaties a constitution was made by judges and legal officials with only a second order of

46. See WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 125 (1964) (noting that judges, senators, and representatives are open to persuasion by such arguments).

47. See Martin Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537, 538 (1980).

48. See Davies, *Pushing Back*, *supra* note 11, at 424, 431–32.

49. See *id.* at 434–35.

democratic legitimacy (being delegated by democratically elected officials). What then are we to make of the “constitutionalization” of the Treaties against the background of a Community and then Union that has consistently and ever more struggled for a sense of legitimacy or even popularity among the people of Europe? It would seem that the ECJ’s attempt to constitutionalize European law has been to the benefit of the Commission and its expanding list of management competencies, particularly as the workings of the Fiscal Treaty become clearer.⁵⁰ While historical scholarship has demonstrated that the ECJ and Commission have not always worked hand-in-glove in this regard,⁵¹ when they do, does it come at cost of further alienation from the European citizen? Can we then understand the position of the German Constitutional Court in its *Solange* line of jurisprudence, with its recurring call for democratic control over the European institutions, whether this be through the European or national parliaments, as an attempt to democratize the judicial mechanism vesting European law with supremacy? Equally, is the British Prime Minister’s promise to hold a referendum on succession less a cynical electoral ploy and instead a means of legitimating continued membership through a regular (and recurring?) call to the people?

III. WHAT’S NEW? WHAT’S MISSING?

An analogous counterfactual, begging the same questions about federalism and democracy, stands—tellingly—in Mark Pollack’s sharp commentary on Rasmussen’s paper.⁵² He asks “how *Van Gend* and other critical rulings might have been received in national capitals had it been known that this weightiest of rulings had been adopted by a bare majority over the objections of a sizable minority of judges—that a single vote had started a legal revolution and

50. See *Legislation Against Euro-Counterfeiting*, EUROPEAN COMMISSION, available at http://ec.europa.eu/anti_fraud/euro-protection/legislation/index_en.htm (providing an example of an ideal-type expansion of supranational powers by stealthy “spillover” from the nascent criminal law procedures being developed by the European Commission in the area of euro banknote counterfeiting).

51. For instance, the ECJ frequently stymied Commission attempts to expand its reach in the area of competition policy. See Laurent Warlouzet & Tobias Witschke, *The Difficult Path to an Economic Rule of Law: European Competition Policy, 1950–91*, 21 CONTEMP. EUR. HIST. 437 (2012).

52. See Pollack, *supra* note 1.

undermined national sovereignty for decades to come.”⁵³

As one of our most prolific American legal historian colleagues has pointed out, “legal history has moved from recording manifestations of the rule of law to actively investigating how law rules.”⁵⁴ The more light we historians can shed on the early stages of the development of European law, the clearer answers to these questions of existential importance for the EU will become. That both scholars raise the same questions and hypotheticals—not just here, but throughout their analyses—is crucially important considering both are political scientists with great awareness of the ECJ in their work. In his piece, Pollack identifies four core assumptions about the European legal system found commonly in political science scholarship, namely on (i) the nature and preferences of the Court, (ii) competing views of judicial independence, (iii) European and national judicial interaction, and (iv) the constitutionalization paradigm.⁵⁵ He then proceeds to skillfully assess and schematize the findings of the New Historians to address the ways in which these findings might force a revision of the theoretical assumptions (the “What’s New”). In essence, he aims to establish the “‘value added’ of this new scholarship.”⁵⁶

The “What’s Missing” portion of Pollack’s piece is what strikes me as most interesting, not just because Pollack (like Egan) poses such difficult and hugely insightful questions that my only response, aside from those given above in the “New Wine” section, can be “We’re getting there!” Most intriguingly, though, is that both political scientists focus in on almost an identical set of topics and issues. My fellow historians, take note! If our ultimate aim is to engage with and revise the theoretical models of political scientists, providing them with a healthy dose of correction from archive-based empirical narratives, we have here the opportunity to distill recurring substantive questions raised by the initial findings of our research. It is a fantastic opportunity to understand the concerns and thought processes of another discipline, allowing us to address them much

53. *Id.* at 1283–84.

54. Christopher Tomlins, *Expanding Boundaries: A Century of Legal History*, in *A CENTURY OF AMERICAN HISTORIOGRAPHY* 78, 88 (James M. Banner, Jr. ed., 2010).

55. See Pollack, *supra* note 1.

56. See *id.* at 1309.

more directly and accurately. More generally, the concerns of historians and political scientists converge on questions of and factors affecting behavior, preferences, institutional constraints, decision making, and the role of ideas. Even if one group looks forward, the other back, there is much that one can do to inform the other. Yet, as historians, an essential internal debate we must have is whether this really is a sufficient “ultimate aim” in and of itself? To what extent can historical research fulfill the purpose of addressing contemporary assumptions or filling in the gaps left by necessity when trying to build predictive theory? As legal historians, the question becomes more acute, since we not only address academic theory, but in many cases, the narratives we retell relate directly or indirectly to contemporary legal doctrine, case law, and legislation. As the recurring counterfactuals above force us to consider, how and what we present about the evolution of the law and legal structures can have a profound impact on questions of essential importance to the life of the polity. This is not just applicable for the EU facing a severe legitimacy crisis, but equally for the United States, where judicial interpretation, particularly in a constitutional context, has relied on historical approaches as heavily as one would expect in a system where the common law features so importantly in legal training.

In U.S. legal historiography, a current debate on the purpose of historical work revolves around the relevancy and importance of the distinction between “applied” and “pure” legal history and whether legal history must address contemporary structures. The proponent of the applied side, Alfred Brophy, describes this form of history as “deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues,”⁵⁷ differing from the much-maligned but similarly focused “law office history,” in that the latter is “advocacy-oriented and unlikely to be good history.”⁵⁸ Applied legal history “asks questions that are not solely about advocacy and it asks questions about meaning to the framing generation. It puts into context the issues that the framing generation faced.”⁵⁹ It appears to

57. Brophy, *supra* note 3, at 233.

58. Alfred Brophy, *Applied Legal History vs. Law Office History*, THE FACULTY LOUNGE (July 24, 2012, 12:06 AM), <http://www.thefacultylounge.org/2012/07/applied-legal-history-vs-law-office-history.html>.

59. Brophy, *supra* note 3, at 234.

hold promise as a way to make historical narratives “useable”⁶⁰ and accessible to scholars and students outside of the field by showing how legal change has occurred and by inspiring activism in such areas. Applied legal history is also work that “normalizes (or in some cases destabilizes) some contemporary practice by showing that it has antecedents (or lacks antecedents).”⁶¹ In accordance with this, Rasmussen’s conclusions “[offer] a revisionist account to the mainstream understanding of the history of European public law in law and the social sciences.”⁶² By allowing their conclusions to address the political scientific assumptions central to our general understanding of the ECJ, Rasmussen and the other New Historians appear to be engaging indirectly in a Euro-centric form of applied legal history, particularly if we remember just how important and contemporarily relevant the larger questions raised by both Egan and Pollack about federalism, legitimacy, and democracy are. Perhaps then, the New Historians offer a nuance to the bipolarity of “applied” and “pure” legal history, offering conclusions from legal history that can be used in contemporary debates by other disciplines to clear up uncertainties and falsehoods. This is a kind of “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.

That these analyses have been done in a rather unconscious way that remains largely unaware of the corollary debates in U.S. legal historiography could be to the detriment of the European-focused scholarship. The majority of the New Historians are historians of European integration *in toto*, not just of its legal structures. This offers obvious benefits and disadvantages, but as long as we write legal histories, we must be better aware of these disciplinary discussions. Critics of the applied approach, such as Karen Tani, point to the fact that legal history in this vein might fall into the trap of being labeled “normative” by default, since any “pure” legal

60. See Alfred Brophy, Towards a Bibliography of Applied Legal History, THE FACULTY LOUNGE (Feb. 15, 2013, 12:47 AM), <http://www.thefacultylounge.org/2013/02/towards-a-bibliography-of-applied-legal-history.html>.

61. *Id.*

62. Rasmussen, *Rewriting the History of European Public Law*, *supra* note 1, at 1189.

history, which does not carry an explicit contemporary relevance, would become merely “descriptive.”⁶³ The prescriptiveness inherent in the political science and legal narratives is exactly what Rasmussen warns us against in the conclusion to his article.⁶⁴ Moreover, if history must necessarily be “useable,” as critics equally claim, then this may well shield the real reason for writing that history, at least in the author’s eyes, behind a mask of “applicability” that underserves the importance of the narrative being retold.⁶⁵ If making the New History relevant and useful to our political science and legal scholar colleagues comes potentially at the cost of undermining the hoped-for objectivity and inherent curiosity in the narrative, is this a price worth paying? How can we write a history of EU law that retains the features of “pure” history, yet at the same time produce narratives that are applicable and able to respond to the questions of fundamental importance raised by scholars like Egan, Pollack, and Bignami? Perhaps there is then a strong need for the New Historians to self-reflect a little more and engage with the theoretical assumptions in their own field—legal history—than necessarily being driven by concerns from outside the discipline?

These questions of application, usability, and normative impact strike at the heart of the historian’s discipline. A brief return to—where else?—the past may be informative on this point. Herodotus, the West’s first historian, referred to the term “historia” as a sort of inquiry, a search to explain why the world was the way it was. To complete his own work, Herodotus scoured the sources of the eastern Mediterranean, weaving together the narrative that is now so familiar to us. His purpose in writing his *Histories* was dual: to preserve “from decay the remembrance of what men have done” (retelling a narrative of events and actions) and secondly to prevent the “great and wonderful actions of the Greeks and the Barbarians from losing their due meed of glory; and withal to put on record what were their

63. See Karen Tani, *What Is Applied Legal History*, LEGAL HIST. BLOG (July 11, 2012, 9:59 AM), <http://legalhistoryblog.blogspot.com/2012/07/what-is-applied-legal-history.html>.

64. See Rasmussen, *Rewriting the History of European Public Law*, *supra* note 1.

65. See Karen Tani, *More on Applied Legal History*, LEGAL HIST. BLOG (July 25, 2012, 12:30 AM), <http://legalhistoryblog.blogspot.com/2012/07/more-on-applied-legal-history.html>.

grounds of feuds” (explaining why the world today is the way it is).⁶⁶ In other words, the impetus for historical inquiry since the very beginning has always been twofold, and the great challenge facing the historian is being able to keep these two objectives in appropriate balance.

IV. IF NOT A CONSTITUTION, THEN WHAT?

The end product of well-researched, detailed historical scholarship is to provoke revisions of contemporary understanding through accurate retelling of past events. History is also very much a competition—a battle between competing interpretations of historical events. To the victor goes the spoils of shaping a small part of our understanding and the functioning of the contemporary world. The importance of the immediate subjects of legal history—laws, jurisprudence, and institutions that create and administer law—makes the battle of interpretation in this field acutely important. Nowhere is this clearer than in Francesca Bignami’s commentary⁶⁷ from the perspective of a legal scholar, which seeks clarification on what EU law actually *is*, given this new interpretation. If the New Historians have been successful in at least raising questions about the constitutionalization paradigm, as Rasmussen claims to have done in his piece, then Bignami’s question is particularly pertinent. From a background as a EU legal scholar, the practical implications of this shift in how to view and comprehend the EU’s legal system in concrete terms is entirely understandable. If it’s no longer constitutional, then what is it?

Rasmussen’s answer is that it is better to understand the system as a “constitutional practice,” in which “the continuation of national resistance to the present day makes it very uncertain to what extent the ECJ and the Commission have been successful in their endeavor of fully ‘constitutionalizing’ European law.”⁶⁸ The New Historians have documented in various case studies⁶⁹ the ways in which the

66. See HERODOTUS, THE HISTORY OF HERODOTUS, Book I (George Rawlinson trans.) (440 B.C.E.), available at <http://classics.mit.edu/Herodotus/history.html>.

67. See Bignami, *supra* note 1.

68. See Bill Davies & Morten Rasmussen, *Toward a New History of European Law: An Introduction*, 21 CONTEMP. EUR. HIST. 316 (2012).

69. See generally Special Issue 3, 21 CONTEMP. EUR. HIST. (2012) (providing a comprehensive overview of the New History work).

system designed by the Treaties was inherently weak with its reliance on national-level enforcement,⁷⁰ the unreliability of data based on the preliminary ruling mechanism given historical context,⁷¹ and just how contested the case law of the ECJ has been (and remains).⁷² As a result, the idea and rhetoric of “constitutional law” promoted by the supranational institutions and by the group of academics in this paradigm remains just that—a particular interpretation of how European law works. A historical examination of how it evolved in this manner points strongly to the conclusion that, in fact, it does *not* work in this way. The idea has been contested, challenged, and even modified⁷³ as a result of national resistance. Importantly, the central idea of the constitutional paradigm—that the Treaties in themselves give constitutional legitimacy to the supranational institutions—has been rejected by the national high courts.⁷⁴ In this alternative vision, legitimate governance comes from the openness and ability to delegate sovereignty found in the *national* constitutional system. As such, the ability of the supranational institutions to act in a constitutional manner remains very much tied to the constraints and possibilities determined not in the Treaties but in the national arenas.

Given the points raised by Rasmussen and Bignami, it is perhaps best to envision the evolving European legal system as fragile, partially utilized, highly dynamic, and contingent on a successful symbiosis of national interests and European aspirations. It is a legal space that arises at the convergence of contest and compromise among competing conceptions of effectiveness, utility, and national conditioning. It is a legal patchwork, in which a relatively unified constitutional paradigm has been promoted by particular institutions

70. See Boerger-De Smedt, *Negotiating the Foundations of European Law*, *supra* note 25 (noting initial design weaknesses); Warlouzet & Witschke, *supra* note 51 (explaining implementation difficulties).

71. See Davies & Rasmussen, *From International Law to a European Recthsgemeinschaft*, *supra* note 12, at 8–9.

72. See Bernier, *supra* note 41, at 410–11; DAVIES, RESISTING THE EUROPEAN COURT OF JUSTICE, *supra* note 7, at 97, 114–15, 120, 122, 136–37.

73. See Davies, *Pushing Back*, *supra* note 11, at 434–35 (providing examples of the co-authorship of the European system by both European and national institutions in the area of fundamental rights).

74. See Davies & Rasmussen, *From International Law to a European Recthsgemeinschaft*, *supra* note 12, at 20–22 (presenting the rejection in Britain, France, and Germany in historical context).

and academic groups and which has been captured in the case law of the ECJ. Its promotion has been heavily contested right from the start. Different national contexts and legal traditions have resulted in varying conditions being placed on the acceptance of the constitutional paradigm. Some member states have accepted it relatively easily; others have not. With this disparate reception, it is difficult to stand by the position that the Treaties have been successfully turned into a proto-federal constitution resulting in a proper European rule of law. This delicate and rather fragile equilibrium between the national and European levels is what the New Historians refer to as a “constitutional practice.” Our work now consists of continuing to enlarge the rather small-*n*⁷⁵ of case studies that we are currently able to master in order to better understand this constitutional practice and to offer EU legal scholars a more comprehensive definition of what this means for their scholarship and profession.

V. CONCLUSION

The New History of European Law offers the potential for reassessing a number of important questions about the origins, evolution, and contemporary implications of the EU’s legal structures. It remains a new field of study, and there are a multitude of avenues for further research that need to be traversed. This hopelessly light response to the important questions raised in the commentaries will have to remain as such until more time is spent in the various national and European archives by historians and other scholars interested in discovering just how this important and unique system came to be. Much remains to be done. We have still to develop collaborative and historiographical links with our “cousins” working in U.S. legal history. Whole fields of “law” remain unexplored; from the 1970s alone, hugely important topics relating to citizenship, fiscal policy, and the strengthening of the European Parliament need to be researched and integrated into the stories we already have. Furthermore, a fleshing out of the “constitutional practice” interpretation is needed. I hope that some of the questions raised here in response to other questions will prompt further research and collaboration in this important, interesting, and still-underdeveloped historical field.

75. See Pollack, *supra* note 1, at 1303.