EU Law in U.S. Legal Academia*

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The history of EU law in the J.D. curriculum is a classical tale of rise and fall. An avant-garde, boutique offering in the 1970s, and a fairly popular course in the 1990s, today EU law in U.S. law schools is slowly losing prominence. This Article begins by tracking this parabolic trajectory, and argues that the discipline both rose and fell for contingent reasons that are mostly unrelated to its pedagogical and analytical significance. The Article then provides a critical appraisal of what EU law is uniquely poised to offer, both in the classroom and as a subject for legal scholarship. An illustration based on French experiences of Europeanization supports the claim that EU law, as an autonomous subject, can still make an original and nonfungible contribution to U.S. legal academia.

I. INTRODUCTION

Within a symposium aimed at assessing the state of the European Union (EU) two decades after the Treaty of Maastricht, I have been asked to speak about the EU[1] as a player in a multipolar world. Let me narrow

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1. The terms "EU" and "EU law" have been used properly only since 1993, the year in which the Treaty Establishing the European Union came into force. Until then, the subject was referred to as "European Community" (EC) or "European Economic Community" (EEC) law. In

this broad topic down to the field of legal academia—a place where I can speak from direct experience. My involvement with EU law began in January 1993, exactly when the Treaty of Maastricht entered into force. Since then, I have been teaching EU law in U.S. law schools (mostly at Boston University) and have therefore joined the American academic community of EU law specialists.[2] Within this community, it goes without saying that the EU is a significant enough player in the world to deserve the attention of burgeoning lawyers outside of Europe; that its law—a self-contained academic discipline—enjoys relative importance vis-à-vis other subject matters; and that its legal analytical framework is a proper subject of U.S.-based legal scholarship.

Such convictions are not to be espoused uncritically. The competition for J.D. candidates' attention is today fiercer than ever.[3] In light of the employment crunch and the financial crisis, legal education is growing increasingly inward looking. Loading up on courses on the domestic law of consumer protection and bankruptcy is intuitively more likely to help our law students in their job searches than focusing on the complexities of foreign legal systems. And even for those who take international matters most to heart, EU law competes with much more contemporary alternatives—most noticeably national security law, which now has its own journals and more than one dedicated casebook.[4] How valuable a player is the EU, really, in a world where other economic and political actors are emerging and posing their own complex and most intriguing legal issues? It takes, after all, a good dose of chauvinism to place additional emphasis on Western legal systems at a time when their cultural hegemony is being rightly deconstructed.[5]

Collectively, the twenty-seven EU members are the largest trade partner of the United States and this might be, per se, a reason to focus

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these pages, I occasionally take the liberty to superimpose the more contemporary EU label to all the versions of the European legal integration project since 1950.

2. *See* John C. Reitz, *A Life in the Craft of Comparative Law*, 100 MICH. L. REV. 1453, 1453 (2002) ("[S]pecialists in the law of the European Union [are] a relatively small but steadily growing group in the United States."); *see also* David Kennedy, Global Law and Governance (Fall 2010) (Course Description, Harvard Law School). The group now constitutes a discrete "community of lawyers and jurists with a common vocabulary, a shared sense of history and a shared range of professional activities," and calls therefore for self-reflection on intended and unintended impact. *Id.*

3. *See, e.g.*, *Accelerated JD (AJD), a Two-Year Program*, NW. LAW (2009), http://www.law.northwestern.edu/academics/ajd/documents/AJD.pdf (discussing reform of legal education, shortening the JD, adding practical training).

4. *See* Scott L. Silliman, *Teaching National Security Law*, 1 J. NAT'L SEC. L. & POL'Y 161, 161-68 (2005).

5. Pier Giuseppe Monateri, *Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition,"* 51 HASTINGS L.J. 479, 549, 554-55 (1999-2000).

on the EU while training to be a trade lawyer.[6] But when one breaks down the statistics, it turns out that only Germany, the United Kingdom, France, and (recently) the Netherlands make it to the top ten, and none of them rivals China, Japan, Canada, or Mexico in terms of sheer volume of trade and investment with the United States.[7] Similar perplexities arise when one considers the geopolitical status of the EU in foreign affairs: how crucial a player is the EU, in fact, when every major world conflict—most recently the North African uprisings—has its members scattered across a broad spectrum of political and military postures? Why make room for the EU, as such, and focus on its own specific legal order both in the classroom and through research endeavors?

Based on this springboard of questions, my comments provide a follow-up to a contribution authored by George Bermann for this very Journal in 1995.[8] Bermann remarked then that little had been written about "the *nature* of the interest in the European Community within the American legal community,"[9] and began investigating why and "how the U.S. legal conception of the Community ha[d] itself changed" in light of Europe's legal transformation since the 1950s.[10] The time is ripe, in my view, for revisiting that investigation, bringing it up to date, and pondering how EU law, as an autonomous discipline, can contribute to the future of U.S. law schools both in the classroom and in research workshops.

It is my impression that the trajectory of EU law in the J.D. curriculum is parabolic in shape. Curricular offerings and levels of enrollment in EU law classes, engagement of full-time faculty in the teaching and research of EU law, and publication of EU-centered articles in top law reviews, indicators of this trajectory, have not been the subject of systemic empirical assessment. Nonetheless, the trajectory emerges quite clearly from multiple examples, direct observation, and *vox populi*

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6. *See United States (Bilateral Relations)*, EUR. COMM'N, http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/united-states/ (last updated July 13, 2011) ("The EU and the US enjoy the most integrated economic relationship in the world, illustrated by unrivalled levels of mutual investment stocks, reaching over €2.1 trillion. Total US investment in the EU is three times higher than in all of Asia and EU investment in the US is around eight times the amount of EU investment in India and China together.").

7. *See Top Ten Countries with Which the U.S. Trades*, U.S. CENSUS BUREAU (Mar. 2011), http://www.census.gov/foreign-trade/top/dst/2011/03/balance.html.

8. George A. Bermann, *European Community Law from a U.S. Perspective*, 4 TUL. J. INT'L & COMP. L. 1, 3 (1995).

9. *Id.*

10. *Id.*

in relevant academic circles.[11] An avant-garde, boutique offering in the 1970s, and a fairly popular course by the time of the Treaty of Maastricht, EU law in U.S. law schools is now losing prominence. Each stage of this trajectory raises obvious questions and prompts perhaps less obvious answers. I will begin by recalling why the law of the European Economic Community (EEC) (as it was known through the mid-1980s) acquired the role of distinctive subject matter, detaching itself from more comprehensive pedagogical units such as international or comparative law. I will then track the rest of the trajectory until the present day, discussing EU law's reasons for survival and perhaps growth in contemporary U.S. legal academia. My coverage of relevant literature will be painfully selective, but hopefully detailed enough to sketch general trends. Borrowing Mark Tushnet's well-known taxonomy of comparative law methodologies—functionalism, bricolage and expressivism[12]—I will discuss the prevalence of functionalist EU law studies in the legal and cultural climate of the 1990s, the subsequent marginalization of EU law to the rank of bricolage material, and the residual role of expressivism in EU-U.S. comparative studies. I will then argue that the comprehensive study of the legal order of the EU continues to have much to offer in the J.D. classroom, and that the field—a uniquely rich illustration of free trade's intended and unintended consequences—is a prime location for global legal scholarship.

II. THE BEGINNING

The beginning of EU law in the J.D. curriculum can be conventionally identified in 1963, with the publication of the first casebook on the subject by Eric Stein and Peter Hay at the University of Michigan.[13] Born and educated in Czechoslovakia, Eric Stein left Europe in the late 1930s, and by the 1950s was an established international lawyer in the United States.[14] His casebook warned international lawyers that they might be ignoring the nascent European Communities at their

11. On March 26, 2010, Boston University School of Law hosted a one-day workshop on "Teaching European Union Law Abroad" with the goal of facilitating self-reflection among EU law instructors based predominantly in North-American law schools.

12. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999).

13. *See* CASES AND MATERIALS ON THE LAW AND INSTITUTIONS OF THE ATLANTIC AREA (Eric Stein & Peter Hay eds., 1963); *see also* Joseph H.H. Weiler, *Eric Stein—A Tribute*, 82 MICH. L. REV. 1160, 1161-62 (1984).

14. William W. Bishop, Jr., *Eric Stein*, 82 MICH. L. REV. 1157, 1157-59 (1984).

own peril.[15] Since 1957, Community institutions had steadily taken over the negotiations on trade barriers within the General Agreement on Tariffs and Trade (GATT).[16] The Commission had largely replaced the Member States in matters of agricultural policy and manufacturing standards. The practical impact of European legal integration on transatlantic trade, together with the possibility that the six founding states might coordinate security and defense matters with less U.S. input than in the aftermath of World War II, was definitely cause for concern and interest.[17] Transactional lawyers had to reckon that the locus of trade regulation was now Brussels.[18] Politically, the Marshall Plan's vision of a Western bulwark against Soviet expansion was yielding tangible results.[19]

But there was more than transactional and geopolitical interest. Stein has been credited with the early intuition that a seemingly anodyne trade arrangement between six European states would later acquire tremendous meaning for both law and world politics.[20] An interesting legal mutation was occurring—one that would finally free the continental notion of sovereignty from its Westphalian straitjacket. The Community was, in fact, a budding federation, more interesting in U.S. eyes than any other existing federal model for a number of reasons: (1) the founding states had a proven record of full sovereignty, not just of administrative autonomy as in other decentralized systems; (2) the experiment of integration could be watched live, in the making, rather than through historical accounts; (3) the politics of integration were sufficiently peculiar to the European context as to allow for a depoliticized revival of classical debates. And so it happened: the curiosity of international lawyers for the new European creature—one that started with a common international treaty but that quickly evolved into a single and coherent legal entity endowed with significant state-like features—merged with the old obsession of U.S. constitutional lawyers with issues of federalism.[21] Comparative law, as it had been known until then, was no competition.[22] EU law became the most interesting thing the Old Continent had to offer.

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15. LAW AND INSTITUTIONS IN THE ATLANTIC AREA 2-3 (Eric Stein & Peter Hay eds., 1967).

16. *See id.* at 2, 5.

17. *Id.* at 4.

18. *See id.* at 3, 6.

19. *Id.* at 1.

20. Stein "contributed to the particularization of Community law as a legal discipline." Weiler, *supra* note 13, at 1161.

21. Bermann, *supra* note 8, at 5.

22. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 699 (2002) (remarking that since the

The job market was, as always, implicated in this academic development. The 1980s saw a rapid expansion of transatlantic law practice.[23] By 1985, London, Paris, and Brussels had become (with Hong Kong) the most popular locations for overseas offices of U.S.-based law firms.[24] The progressive relaxation of regulatory barriers, exemplified by Germany's 1989 reform, allowed for an additional expansion of American law firm branches in Europe, opening up new possibilities of Europe-based employment for U.S.-educated lawyers.[25] Transatlantic legal practice seemed set to grow, and the practical relevance of EU law for U.S. lawyers was spiking upwards. Law schools adjusted their curricular offerings accordingly.[26]

By the same token, the space occupied by the Community in the syllabi of international law and in the scholarly agendas of prominent internationalists grew. The uniqueness of the European integration project in the landscape of regional organizations was celebrated in two main respects. First, this was no ordinary free trade agreement: the predictable list of market freedoms (for goods, services, labor, and capital) was accompanied by firmly regulated agricultural and industrial policies and by an active antitrust branch. The seductively simple promise of Ricardian prosperity, so often touted in multilateral fora, was by no means the only ingredient in the EU recipe; the success of European integration through law was therefore as much a triumph of free trade as a manifesto on the limits of neoliberalism.[27] A second striking trait of European legal integration was the degree of states' compliance with the rulings of the two supranational courts of the continent: the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).[28] To all those interested in testing the efficacy of international law, this by and large successful experiment in judicial supranationalism was as close as it got to the philosopher's stone.

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establishment of the American Journal of Comparative Law in 1952, comparative law in the United States had largely failed to establish itself as a "coherent enterprise" and that the scholarship was still mostly "random, unconnected, and thus inconsequential").

23. Carole Silver, *Globalization and the U.S. Market in Legal Services–Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093, 1111 (2000).

24. Carole Silver et al., *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Glocal*, 22 GEO. J. LEGAL ETHICS 1431, 1439 n.31 (2009); *see also* Carole Silver, *supra* note 23, at 1108-11.

25. SYDNEY M. CONE, III, INTERNATIONAL TRADE IN LEGAL SERVICES: REGULATION OF LAWYERS AND FIRMS IN GLOBAL PRACTICE § 11.2 (1996).

26. I am indebted to Professor Roger Goebel for authoritatively corroborating this point.

27. *See, e.g.*, David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT'L L.J. 373, 379-85, 392, 394 (1991).

28. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 276, 296 (1997).

III. SCHOLARLY ASCENDANCE

The further ascendance of EU law in U.S. legal scholarship—from international lawyers' pet project to new fuel for comparative constitutional scholarship, and then on to self-contained subject matter with an independent raison d'être—is somewhat counterintuitive and bears recounting in some detail. Under the auspices of Eric Stein and Peter Hay, EU law grew as a discipline at the University of Michigan,[29] and the collaboration between U.S. legal academia and the European University Institute (EUI) grew in quality and intensity. The year 1984 saw the coming to life of a massive research project sponsored by the EUI and the Ford Foundation, named "Integration through Law."[30] According to the vision of senior coauthor Mauro Cappelletti, an eminent Italian comparativist on the law faculties of both Florence and Stanford, the project was to be generally one of comparative law, mapping the budding European legal integration onto the lessons of a mature American federalism.[31] The parallelism between the American past and the European present was (and remains) widely acknowledged among U.S. constitutionalists.[32] The blueprint of the project had a one-way direction, identifying the United States as a source of "experience" and Europe as wide-eyed youth in need of inspiring examples. Through the special lens of European integration, for once America could be seen as the wise Old Continent.[33]

"Integration through Law," however, was not solely Cappelletti's brainchild. Another intellectual strand within the project was clearly determined to avoid the trap of ephemeral similitude, and rather set out to unearth the specific sociolegal dynamics that were allowing for Europe's legal change.[34] In this view famously heralded by Joseph Weiler,

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29. Miriam Aziz, *E. Stein's Thoughts From a Bridge: A Retrospective of Writings on New Europe and American Federalism*, 20 Y.B. EUR. L. 573, 574 (2001) (book review) ("Michigan Law School [was] the first American law school to include a course on European Community law.").

30. INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, at vi (Mauro Cappelletti et al. eds., 1985).

31. *Id.*

32. "The (uncertain) transformation of a treaty into a constitution is at the center of the European Union today; it was also at the center of the American experience between the Revolution and the Civil War." Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 776, 791 (1997) (positing that the United States from the 1780s to the 1860s and the EU since the 1950s are two historical examples of a federalist turn coinciding with a new political beginning for a nation).

33. *Old America v. New Europe*, ECONOMIST, Feb. 22, 2003, at 32.

34. *See* J.H.H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 54 (Kalypso Nicolaidis & Robert Howse eds., 2001).

European legal integration had as much to teach as it had to learn.[35] Having taught EU law at Michigan from 1985 to 1992, Weiler gave the discipline the hallmark of fame, first by penning the *Transformation of Europe* for the Yale Law Journal, and then by taking his phenomenal teaching to Harvard Law School.[36] The *Transformation* avoided any direct reference to U.S. federalism,[37] but explained Europe in terms remarkably intelligible to U.S. lawyers and in a compelling narrative form.[38] This was, simply enough, a constitutional project based on a court-led centralization of state powers. Yet its internal analytics were sufficiently rich and peculiar to dispel any off-putting déjà vu effect. The golden decade of EU law in U.S. law schools—the 1990s—had begun.

IV. THE REHNQUIST EFFECT

The U.S. Supreme Court was meanwhile unwittingly contributing to the rise of EU law in the eyes of American lawyers.[39] In his early years on the Court, Justice Rehnquist had reminded his brethren that state prerogatives were enshrined in the Constitution ("the Tenth Amendment . . . is not without significance"[40]) and had denounced the undue growth of Congress's power to regulate interstate commerce.[41] In his view, decades of Washington-friendly constitutional adjudication had turned the doctrine of delegated powers into "fiction."[42] Appointed to the role of Chief Justice in 1985, Rehnquist spearheaded what we now know as the "federalist revolution," openly aimed at restoring what he (and many others) envisioned as the proper balance between state and federal government in the U.S. constitutional design. Sandwiched between two

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35. *See id.* at 57.

36. J.H.H. Weiler, Curriculum Vitae (2009), http://its.law.nyu.edu/faculty/profiles (search "Weiler"; follow "J.H.H. Weiler" hyperlink; select "Full CV PDF").

37. That task was picked up by others. *See, e.g.*, Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 INT'L J. CONST. L. 39, 39 (2006).

38. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2405 (1991).

39. In 1995, George Bermann noted:

> Questions of federalism, though never absent from the American constitutional scene, have enjoyed a special prominence in the United States in very recent times, and seem unlikely to lose that prominence in the near future. Even before the rise of the so-called 'new Republican majority' in Congress, the U.S. Supreme Court had evidenced its intention to take federalism more seriously than it had become accustomed to taking it in recent decades.

Bermann, *supra* note 8, at 5 (footnotes omitted).

40. Nat'l League of Cities v. Usery, 426 U.S. 833, 842-43 (1976).

41. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring) (tracing the expansion of Congress's powers in interstate commerce back to Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1 (1824)).

42. *Id.*

cases that upheld federal powers, *Garcia v. San Antonio Metropolitan Transit Authority* (1985)[43] and *Gonzales v. Raich* (2005),[44] were a number of remarkable pronouncements aimed at keeping Congress's legislative reach at bay. To name just a few: *New York v. United States* (1992),[45] upholding the state's challenge of federal legislation by breathing new life into the Tenth Amendment; *United States v. Lopez* (1995),[46] narrowing the legislative reach of the interstate commerce clause; and *City of Boerne v. Flores* (1997),[47] limiting Congress's enforcement powers under the Fourteenth Amendment.

Predictably, this flurry of dramatic pronouncements energized U.S. legal academia. In polarized academic debates, federalism grew into a sort of collective neurosis.[48] It is in this context that EU law acquired its highest degree of popularity ever. In January 1993, in sync with the entry into force of the Treaty of Maastricht, a modern American casebook on EU law came out of the presses of West Publishing.[49] In 1994, the Columbia Law Review dedicated 125 pages to George Bermann's discussion of "subsidiarity"[50] (a wholly European doctrine aimed at determining, politically and perhaps judicially, the distribution of powers between Brussels, states, and sub-state entities),[51] and in 1995, the year of *Lopez*,[52] Columbia University lent its flag to a new journal devoted exclusively to European Law.[53] EU federalism was

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43. 469 U.S. 528, 554-57 (1985).

44. 545 U.S. 1, 43 (2005), *remanded*, 500 F.3d 850 (2005) (O'Connor, J., dissenting). The court upheld the federal power to prohibit medicinal use of cannabis, even when allowed by state law. *Id.*

45. 505 U.S. 144, 187-88 (1992) (holding that respecting the states' power as per the Tenth Amendment was a matter of democracy despite New York's challenge to federal legislation that required states either to acknowledge ownership of radioactive waste produced in their territory, or to legislate for waste disposal according to predetermined federal standards); *see also* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 423 (1994).

46. 514 U.S. 549, 566-68 (1995) (striking down the Gun-Free School Zone Act of 1990 as lacking a sufficient nexus with the interstate clause).

47. 521 U.S. 507, 536 (1997). The impact of this holding was amplified by other cases in which the Court announced that the Fourteenth Amendment, while proper ground for federal antidiscrimination statutes, did not always grant Congress the power to chastise states' sovereignty by means of, e.g., damage actions. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

48. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994).

49. GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW (1st ed. 1993).

50. Bermann, *supra* note 45.

51. *Id.* at 338-39.

52. United States v. Lopez, 514 U.S. 549, 566-68 (1995).

53. George A. Bermann, *Foreword* to 1 COLUM. J. EUR. L. 2405-06, 2409 (1994/95).

mainstreamed into U.S. constitutional discourse. Top law journals made room, without apologies, for EU law articles.[54] EU law classes were taught by full-time faculty members who considered the subject their main area of research.[55]

The European connection to the U.S. federalist debate was indeed clear. The three main sources of the federalist revolution—the commerce clause of the U.S. Constitution, the equal protection clause of the Fourteenth Amendment, and states' sovereign prerogatives per the Tenth and Eleventh Amendments[56]—found adequate functional equivalents in the case law of the ECJ,[57] which had meanwhile been busy constitutionalizing the Union.[58] In Luxembourg, the jargon was different, and the interested American reader would have to decipher such alien labels as "Cassis test"[59] and "Francovich liability."[60] Besides, there was something oddly "immature"[61] and even altogether "foolish"[62] in certain of those categories as treated by the ECJ. Nonetheless, the payoffs of European investigations were appealing.

First, bringing the EU experience to bear in the American debate had the effect of mixing up, and therefore diffusing, the political stakes of the Supreme Court's case law. State prerogatives in the European context of the mid-1990s were often associated with a bulwark of social protection against the flood of neoliberal deregulation, brought about by

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54. *See, e.g.*, Weiler, *supra* note 38; Bermann, *supra* note 45; Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002).

55. This line is based on personal experience and direct acquaintance with the EU law community in the United States.

56. *See* Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537, 563-64 (1996) (observing that the judicially sanctioned expansion of federal powers in the United States has occurred through the interstate commerce clause, the necessary and proper clause, the treaty power, and the Fourteenth Amendment, which served to bind the states to the Bill of Rights).

57. *See* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 369-72 (Mathias Reimann & Reinhard Zimmermann eds., 2006). The traditional functionalist approach is as follows: "The comparatist [assumes] that different societies face similar needs and that, to survive, any one society must have (functionally equivalent) institutions that meet these needs." *Id.* at 369. Michaels also provides an extensive account of the critique of this methodology. *Id.* at 369-72.

58. Weiler, *supra* note 38, at 2413, 2431, 2451.

59. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 650, 660-61, 664-65.

60. Joined Cases C-6/90 and C-9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5403, I-5417-18.

61. Bermann, *supra* note 45, at 456 (portraying subsidiarity as a "crude" concept, symptom of the European system's "immaturity").

62. *Id.* at 452 ("In a seasoned federalism like that of the United States . . . the notion of subsidiarity may . . . have a somewhat hollow, even foolish, ring to it.").

the judicial dismantlement of internal market barriers.[63] This was enough to cast state sovereignty in a different argumentative light. In the words of Ernest Young: "Considering issues of federalism in the context of Europe . . . helps us shed some of the historical baggage hindering present debate, and it demonstrates that any number of different federal settlements may be workable and legitimate."[64] For those interested in de-ideologizing and redoctrinalizing the federalism question, EU parallels offered an extraordinary opportunity.

Second, the very effort of searching for functional equivalence in an altogether different analytical system could prompt novel taxonomies and lead to deeper insights.[65] For instance, according to George Bermann, "To discover whether subsidiarity . . . plays a role in the conduct of U.S. federalism, one has in any event to transcend labels and look for equivalent thinking under any other name by which it might pass."[66] Further, "The comparison, . . . in the process, may allow us to better understand [the nature of] U.S. federalism."[67]

The EU could certainly "learn lessons"[68] or internalize the "cautionary tales"[69] that came from the United States. But the very existence of this parallel, sufficiently complicated experimentation with federalism across the Atlantic had indeed something to offer in return. This wave of academic Europhilia permeated the U.S. judiciary. Justice Breyer's dissent in *Printz v. United States* referred to the EU edifice in order to relativize the anticommandeering principle.[70] This was by no means the first[71] or the last[72] reference to European law in the Supreme

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63. *See* FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 26-28, 38-42, 58-61 (1999).

64. Young, *supra* note 54, at 1618 (footnote omitted).

65. *See* Tushnet, *supra* note 12, at 1228 ("Functionalism claims that particular constitutional provisions create arrangements that serve particular functions in a system of governance. Comparative constitutional study can help identify those functions and show how different constitutional provisions serve the same function in different constitutional systems. It might then be possible to consider whether the U.S. constitutional system could use a mechanism developed elsewhere to perform a specific function, to improve the way in which that function is performed here." (footnote omitted)).

66. Bermann, *supra* note 45, at 406.

67. *Id.* at 448-49.

68. Edwards, *supra* note 56, at 563.

69. Young, *supra* note 54, at 1614-18.

70. 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting). Breyer's foray into EU territory was promptly reprimanded by Justice Scalia. *See id.* at 921 n.11 ("[C]omparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.").

71. *See, e.g.*, Alain A. Levasseur, *The Use of Comparative Law by Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS 315, 325-28 (Ulrich Drobnig & Sjef van Erp eds., 1999) (illustrating the use of comparative law by the U.S. Supreme Court through 1995).

Court of the United States (Supreme Court), but it was by far the most structural. At stake was not just the possibility of transatlantic similarities between discrete rules, but rather a comprehensive overlap of two legal archetypes of federalism.[73] There was more, here, than the academic discipline of comparative law had ever promised.[74] For once, the legal orders of the old and new continent seemed to have reached sufficient structural convergence that dialogue could actually become relevant for the positivists.[75]

V. THE MYTH OF CONVERGENCE

Unsurprisingly, the context for this unprecedented degree of U.S. interest in the legal structure of European federalism was larger than law. It asserted itself in the way of a fad, by operating in conjunction with other sociocultural phenomena. The 1990s, the golden age of EU law in American academia, were also years of unprecedented optimism among internationalists. The end of the Cold War and the spread of the "Washington consensus" among international financial institutions led the world to the impression that international values might at last be converging.[76] This "long decade," which by Nathaniel Berman's timeline "began with '1989' and ended somewhere between '9/11' and the US

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72. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 316-17 n.21 (2002); Lawrence v. Texas, 539 U.S. 558, 572-73 (2003); Roper v. Simmons, 543 U.S. 551, 575-78 (2005); *see also* Donald E. Childress III, *Using Comparative Constitutional Law To Resolve Domestic Federal Questions*, 53 DUKE L.J. 193, 198 (2003) (positing that the time may be ripe for an increase in the use of comparative constitutional analyses).

73. Gerald L. Neuman, *Subsidiarity, Harmonization, and Their Values: Convergence and Divergence in Europe and the United States*, 2 COLUM. J. EUR. L. 573, 574-75 (1996); Patrick R. Hugg, *Transnational Convergence: European Union and American Federalism*, 32 CORNELL INT'L L.J. 43, 102-05 (1998).

74. Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 143, 144 (Keith Whittington, R. Daniel Kelemen & Gregory Caldeira eds., 2008). Contrasting the disciplines of political science and law as applied to judicially umpired federalism, Daniel Halberstam has poignantly noted law's traditional indifference to comparative observations: "Normative constitutional scholarship has . . . shunned comparative inquiry. After all, why look abroad, when the normative framework of the inquiry is rooted at home?" *Id.*

75. *See, e.g.*, Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 732 (2004).

76. John Williamson, *Democracy and the "Washington Consensus,"* 21 WORLD DEV. 1329, 1329-33 (1993) (coining the expression "Washington consensus" to designate the lowest common denominator of policy advice given to Latin American countries as of 1989: fiscal discipline, liberalization of interest rates, trade, and foreign direct investment, privatization, deregulation, secure property rights, and also a redirection of public expenditure priorities toward fields offering both high economic returns and the potential to improve income distribution).

invasion of Iraq,"[77] nurtured the "ideal of the gradual transformation of the world into a community governed by widely-accepted internationalist principles and institutions."[78] Of course, reality was more complicated, but convergence made for fashionable discourse, which recast outrageous events as unavoidable deviations from a trajectory of steady progress.[79] To this powerful (and critical) account of the "long decade," one may add that in the aftermath of September 11, 2001, the French newspaper *Le Monde* proclaimed unambiguous transatlantic alliance in a famous editorial ("Nous sommes tous Américains")[80] and that three months later, the European Council issued the Laeken Declaration (the blueprint of a Philadelphia-inspired constitutional moment for the EU).[81] These were also years of consolidation of the EU's eastward expansion, arguably attesting to the demise of once insurmountable ideological divisions.[82] This cultural climate enabled an unprecedented rapprochement between mainstream constitutionalists and comparative lawyers.

To be sure, since its very inception, European legal integration lent a tremendous boost to the discipline of comparative law, both within Europe and abroad. Inside the Old Continent, comparative law had been truly instrumental to the creation of the integration project. In its early years, the ECJ drew extensively from the laws of the founding states to develop a coherent and palatable legal order of its own, and in so doing, it energized Member States' public law comparativists.[83] In the 1980s, the incipient efforts to harmonize the laws of torts and contracts intensified the cross-border dialogue among domestic *civilistes* and gave new meaning to the then peripheral discipline of comparative private law.[84]

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77. Nathaniel Berman, *Intervention in a 'Divided World': Axes of Legitimacy*, 17 EUR. J. INT'L L. 743, 744 (2006).

78. *Id.* at 745.

79. *Id.* at 745-46, 750-53 (noting that the decade was also marked by the genocides of Rwanda and Srebrenica).

80. Jean-Marie Colombani, *Nous sommes tous Américains*, LE MONDE (Paris), Sept. 13, 2001, *translated in* WORLD PRESS, Nov. 2001, at 4-5.

81. Charlemagne, *Philadelphia or Frankfurt?*, ECONOMIST, Mar. 8, 2003, at 52 ("No meeting of the European Union's constitutional convention in Brussels is complete without a reference to 'Philadelphia.'").

82. *Cf.* JAN ZIELONKA, EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION 65, 82-83 (2006) (offering a less glorifying picture of eastern enlargement).

83. Francesca Bignami, Comparative Law and the Rise of the European Court of Justice (Mar. 2011) (unpublished manuscript) (on file with author).

84. *See* Christian Joerges, *The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines—an Analysis of the Directive on Unfair Terms in Consumer Contracts*, 3 EUR. REV. PRIV. L. 175, 184-88 (1995).

On the other side of the Atlantic, scholarly interest in civil codes, procedures, and constitutions of individual Member States, especially Germany and France, had been steady—if marginal—for a long time.[85] But the scholarly ascendance of EU constitutional federalism in the 1990s gave comparative constitutional law an altogether new role. As illustrated by George Bermann's work on subsidiarity, the dominant methodology for U.S.-EU comparisons in the 1990s became functionalism.[86] The functionalist premise was that the project of EU legal integration, as interpreted by the Union's centralized judiciary, had much of the same purpose as the Supreme Court's doctrinal apparatus.[87] Europe seemed to be doing federalism by other means, i.e., by other doctrines and, more importantly, by other politics, but doing federalism nonetheless. The effort of deciphering its language was worthwhile, because it yielded fresh evidence of good or bad practices that could somehow enrich the federalist debate at home.[88]

VI. THE END OF THE LONG DECADE AND THE ONSET OF BRICOLAGE

By definition, fads are transient and fall victim to shifts in sociocultural perceptions. The myth of the long decade soon crumbled, shattered as it was by the splintering of EU members on Iraqi matters,[89] the imploding of the EU constitutional dream,[90] and the bursting of many a financial bubble. The world found itself divided again, with no consensus on how to handle the economic interdependence of the developed and developing worlds or how to inch towards stable peace.[91] At the level of transatlantic relations, the EU's statement of friendship in the aftermath of 9/11 proved mostly meaningless, as the United States found itself negotiating its European allegiances one state at a time in

85. *See* Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 671-74 (2002).

86. *See* Bermann, *supra* note 45.

87. *See* Michaels, *supra* note 57, at 341-42.

88. *See, e.g.*, Fernanda Nicola & Fabio Marchetti, *Constitutionalizing Tobacco: The Ambivalence of European Federalism*, 46 HARV. INT'L L.J. 507, 507-09 (2005).

89. Raj S. Chari & Francesco Cavatorta, *The Iraq War: Killing Dreams of a Unified EU?*, 3 EUR. POL. SCI. 25 (2003).

90. *See* JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS 23-25 (2010).

91. *See* Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 203, 203, 208, 228 (David M. Trubek & Alvaro Santos eds., 2006) (discussing the attempt at reconciling divergent development policies after the demise of the Washington consensus).

Kissingerian mode.[92] And when the statement of friendship was not meaningless, the EU's pledge of allegiance became politically burdensome, in so far as it deepened the perceived hiatus between the post-colonial Western powers and the rest of the globe.[93]

On point of federalism, the EU's inability to produce a veritable constitution took care of all ephemeral analogies for good. Alternative narratives of the integration project, emphasizing its administrative and regulatory core, as opposed to its constitutional and federalist traits, gained scholarly currency.[94] U.S. constitutional law scholars gradually abandoned the field, and so did mainstream law journals. *Income Tax Discrimination and the Political and Economic Integration of Europe*, by Michael Graetz and Alvin Warren,[95] is to my knowledge the last EU-focused contribution to be published in a flagship journal of a top law school. EU law courses have shrunk in enrollment and can be taught by European visitors or simply outsourced to overseas campuses in the summer. The European job market has become less promising to J.D. students due to an inward-looking transformation of multinational firms, now increasingly prone to staff their European offices with local lawyers only briefly trained in the United States.[96]

To be sure, this is not the end of U.S.-based interest in the European federalist experiment. EU law as an autonomous legal system with quasi-federal features, as outlined in Weiler's *Transformation*[97] and since complicated by further layers of law, politics and history, is still the subject of many monographs, specialized law journal articles, and most importantly, political science literature.[98] In legal academia, however, the comprehensive study of the dynamics of European integration has migrated back to the fields it came from: comparative or international law. For the positivist mainstream of scholars and teachers, a shift has occurred. Within comparative law, the large-scale functionalism of the

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92. Steven R. Weisman, *Europe United Is Good, Isn't It?*, N.Y. TIMES, Feb. 20, 2005, at C1 (recalling Secretary of State Henry Kissinger's complaint that there was no single telephone number that he could dial when he needed to speak to Europe).

93. Symposium, *The West and the Rest in Comparative Law*, 2008 Annual Meeting of the American Society of Comparative Law, University of California Hastings College of the Law (Oct. 2-4, 2008).

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

95. Michael J. Graetz & Alvin C. Warren, Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 YALE L.J. 1186 (2006).

96. Silver et al., *supra* note 24, at 1449.

97. *See* Weiler, *supra* note 38.

98. R. DANIEL KELEMAN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION 8-11 (2011).

1990s has dried up, and bricolage (a term aptly chosen by Mark Tushnet to indicate the scholarly technique of taking bits and pieces of a foreign system as tools for domestic legal inquiries) is now the trend.[99]

Indeed, the "long decade" of EU law's fame as an autonomous discipline has left us with fantastic bricolage material. Once buried in foreign law libraries, EU legal scholarship has now become abundantly accessible due to the online availability of copious American writings on the subject. The result is that, while the European project of legal integration is, as a whole, less fashionable than it used to be, there is now a vast amount of information on what the EU does, written and circulated in U.S.-friendly language. A glance at major law reviews in the past few years reveals a multitude of articles whose authors have no sustained interest in the internal vicissitudes of the EU as an autonomous legal system, but care very much about discrete features of that system that are convenient terms of comparison, or units of measure, for U.S.-based or international legal phenomena.

A taste of this type of literature can be savored through such pieces as *Beyond Regional Government* by Gerald Frug.[100] The author focuses exclusively on spotting innovative techniques in the EU landscape.[101] His lack of interest for the intricate patterns of European legal integration could not be any clearer:

> I intend simply to rip from their European context specific institutional ideas that might help us reconceptualize the relationship between local separateness and regional togetherness in the United States. I shall leave unexamined most of the institutional structure of the European Union. I will focus instead solely on three specific aspects of the European Union that, once appropriately revised, suggest organizational possibilities for a regional legislature in the United States . . . .[102]

This genre of legal scholarship would not have been possible without the "long decade" experience. But it is also an unmistakable sign of the end of that era: EU law is now useful if disaggregated into single components, to be reassembled in new combinations for American consumption.[103] The functionalist mode of mid-1990s comparisons,

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99. Tushnet, *supra* note 12, at 1229. To be sure, bricoleurs may also focus on functional equivalence, but they remain radically indifferent to the big picture of the relevant legal systems and have no interest in figuring out their general operating logic.

100. Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002).

101. *Id.* at 1794.

102. *Id.*

103. *See, e.g.*, Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 133, 165-66, 170 (1999) (looking at Europe as an illustration of resilience of corporate governance rules in the face of competitive

exemplified by Bermann's search for functional equivalents of subsidiarity in the U.S. legal system, has given way to a looser, decontextualized borrowing of occasionally interesting factoids or ideas.[104] Borrowings may range and have ranged widely, from EU-based approaches to corporate governance[105] to antidiscrimination laws, or from financial regulation to protection of privacy, but they all involve "ripping" the subject of interest from its analytical context.

The point is worth stressing, because it bears directly on the "nature of the interest" in EU law in contemporary U.S. academia. Once similarities and the possibility for functional analogies have been dismantled, all we are left with is attic material: random tools and toys that may help U.S. lawyers play their game better and more elegantly. There is no need to learn about the game those toys were originally conceived for. If that is the case, EU law will remain in the attic of U.S. legal education: something to explore during summers or free semesters—a cluster of discrete topics we can happily ask others about, should curiosity arise.[106] Instead, a typical EU law course is, by definition, comprehensive and systemic: it starts with history and institutions, recounts the growth of human rights jurisprudence and other constitutionalizing doctrines in the ECJ, continues with an analysis of the internal market (freedoms and citizenship), and gives students a taste of competition law and foreign relations.[107] The whole point of the course, from both the teacher and scholar's perspective, is to lay out a self-

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pressure); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439, 449-51, 454-55 (2001) (arguing, by contrast, that regimes are converging); Ehud Kamar, *Beyond Competition for Incorporations*, 94 GEO. L.J. 1725, 1728-30 (2006) (looking at recent changes in EU corporate law as manifestations of regulatory competition).

104. Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 4 (2011).

105. *Id.* at 3-4.

106. Law and economics scholars have long taught us that European law is great material for thought experiments, and many such experiments are now enabled by the EU's additional layer of complexity. *See, e.g.*, PAUL B. STEPHAN, FRANCESCO PARISI & BEN DEPOORTER, *Preface to* THE LAW AND ECONOMICS OF THE EUROPEAN UNION (2003).

107. *Jean Monnet Program—The Law of the European Union*, JEAN MONNET CTR. FOR INT'L & REG'L ECON. LAW & JUSTICE—N.Y.U. SCH. OF LAW, http://centers.law.nyu.edu/jeanmonnet/ (last updated May 27, 2011). The Web site describes the course on EU Law as:

> [A] general introduction to the legal system of the European Union covering both its constitutional and institutional architecture and focusing on a selection of substantive law issues. . . . The materials follow three basic themes. 1) The Constitutional and Institutional Setting of the Union and its Evolution. 2) Select Issues of Intra-Union Trade in Goods and Services. 3) Select Issues of International Trade with Europe.

Id.

contained legal order, with its own internal viewpoint[108] and specific analytical grids. Are there reasons, today, for keeping such a course alive?

VII. BEYOND BRICOLAGE

Interest remains high in the way Europeans make law, perform judicial review, design taxation, handle migration, protect rights, or invent mechanisms of social protection that bypass the concept of rights altogether. Centers of European studies still thrive in the United States.[109] Departments of government, international relations, and political science, still keen on Europe as a locus of democratic experimentation,[110] continue to invest resources in the study of EU and Member States' legal and political structures. Dusk has not fallen on that front, and legal scholars with interdisciplinary stakes in such departments continue to bask in sunlight. Inside U.S. law schools, however, from the viewpoint of both students and faculty, EU law has rather receded into a corner of comparative law, where it mostly provides bricolage material and competes for attention with other national or regional legal orders. Competition stems, too, from inside the EU's own borders: the resilient individuality of each Member State's legal system is still rich material for expressivist comparative law research, so much so that the payoff of studying, say, the laws of France, Germany,[111] or Romania[112] rather than the technicalities of the EU legal order may seem overall higher. It is against this backdrop that a case for keeping a traditional (introductory and comprehensive) course in EU law must be made. And the case *can* be made, in my opinion, on grounds that I shall elliptically label as

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108. On the "internal viewpoint" (in H.L.A. Hart's terms) of EU law, see Bignami, *supra* note 83.

109. The list of European Studies Centers hosted by U.S. universities keeps growing. *See, e.g.*, *IU Center Receives Grant from European Commission To Promote Better Understanding of the EU*, IND. UNIV., http://newsinfo.iu.edu/news/page/normal/16902.html (last visited May 20, 2011) ("As a result of a $130,000 grant from the European Commission, an Indiana University research center is embarking on a wide range of outreach activities to help business people, government officials and others in the Midwest better understand the European Union and why it should matter to them.").

110. *See* LAW AND NEW GOVERNANCE IN THE EU AND THE US 1-2 (Gráinne de Búrca & Joanne Scott eds., 2006); EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE 1-2, 9 (Charles F. Sabel & Jonathan Zeitlin eds., 2010); *see also* Katerina Linos, *Diffusion Through Democracy*, 55 AM. J. POL. SCI. 678, 678-86 (2011).

111. *See, e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 5 (2003).

112. Steven Becker & Enikö Damaschin, *A Comparative Study on the Priciple* [sic] *of Celerity in Romania and the United States of America*, 16 LEX ET SCIENTIA INT'L J. 90, 90-91, 101 (2009).

Technique, *Foregrounding*, and *Globalization*. Here is a brief explanation of such grounds, followed by an illustration.

A. Technique

This is conceptually the least interesting part of the argument, and one that only pertains to the subgroup of students already invested in continental matters, but it is also the level where the comparative advantage of EU law over discrete courses in the law of Member State systems is most obvious. The regulatory apparatus superimposed by the EU upon States' legal orders is here to stay.[113] With it come a number of notions that the prospective trade lawyer, antitrust litigator, or human rights advocate needs to know in addition to the mind-numbing details of municipal law. Given the massive amount of technique needed to perform transatlantic legal work, the learning pace in the classroom needs to be fast and effective. EU law provides instructors with a particularly efficient pedagogical standpoint. The EU-driven pressure toward harmonizing state laws, dismantling regulatory barriers, and revisiting domestic hierarchies of sources brings to light the States' points of legal resistance, making their institutional architectures more transparent and their internal logic more intelligible.[114] The EU's emphasis on case law—still unparalleled in continental state systems—falls on receptive ears in J.D. classrooms and adds dynamic depth to otherwise flat, pre-realist materials on state law.

B. Foregrounding

The world is full of regional integration projects, all in the process of equipping themselves with legal norms and theoretical frameworks.[115] But the project of European integration is, by size and legal maturity, somewhat ahead of the game and has already amassed its own share of cautionary tales. Others involved in similar enterprises all over the globe will find a very advanced experiment in liberalized trade in the study of EU law. Classroom coverage of the progressive harmonization of the internal EU market begins with treaty provisions that are as simple as

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113. R. Daniel Kelemen, The Durability of EU Federalism (Mar. 20, 2010) (unpublished manuscript), http://www.ces.ufl.edu/files/pdf/JMCE/workshops/2010/DurabilityOPEUFederalism_032010.pdf.

114. *See* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 273-90 (3d ed. 2011) (noting the reaction of Member States to the ECJ's pronouncement of EU law supremacy).

115. *See* Laura Spitz, *The Evolving Architecture of North American Integration*, 80 U. COLO. L. REV. 735, 735-36 (2009).

those found in 1947 GATT's text, which outlaw all barriers to trade in goods.[116] By the end of the trade-in-goods discussion, however, EU law students acquire sophisticated and contextualized awareness of the massive legal, political, and sociological reverberations of free trade. The internal market is a perfect laboratory for observing the dynamics of such fields as taxation, intellectual property, and firm organization under pressure of supranational regulation. The interdependence of foreign trade policy with municipal regulatory matters, individual rights, and redistributive policies remains generally opaque in the fragmented teaching of U.S. law and somehow obscure even in world trade courses, but it easily leaps to the front and center of an EU law classroom. More generally, the course is a rare opportunity to see how, in law as in life, all things are connected.

C. Globalization

This is the most theoretical upshot of EU law studies, if by legal theory of globalization we mean the attempt to figure out where the world is going through the lens of the law. To a great extent the EU has transformed the relative role of law, politics, and grassroots regulation in governance.[117] The reforms imposed from Luxembourg or Brussels force national legislators to recalibrate the weight of executives, judiciaries, and regulatory bodies. The loci of rulemaking are shifting, driven as they are by supranational forces. The very concept of adjudication is being affected by the institutional need to centralize highly consequential decisions in the hands of a supranational court.[118] Scholars of jurisprudence or democratic constitutionalism must wrestle with such changes when mapping the global transformation of law as a concept.

The EU's push towards legal integration is forcing Member States to revisit their history, their postcolonial arrangements, and their philosophy of citizenship and inclusion. In so many parts of the world, the ongoing quest for regime stability, economic recovery, and constitutional solutions is profoundly impacted by choices made at the EU level on matters of immigration, development policies, human rights

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116. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 28, 34, 110 Mar. 30, 2010 O.J. (C 83) 59, 61, 93 [hereinafter TFEU].

117. *See* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 71 (David M. Trubek & Alvaro Santos eds., 2006) ("[I]n contemporary legal consciousness the question is the relationship between law and politics.").

118. *Id.* (discussing the centrality of the judge in contemporary legal theory across the globe).

advocacy, and trade regulation.[119] EU-led changes cast long shadows on the rest of the world and affect the global flow of wealth and people. Basic EU law knowledge enables much global law learning.

The following illustration, based on a recent ECJ decision that lends itself nicely to classroom discussion, is meant to give practical meaning to the three points outlined *supra* Subparts A-C.

VIII. *MELKI* AND THE PLIGHT OF THE ALGERIANS[120]

A veritable tour de force through the French legal order, the case of Mr. Melki et al., was decided by the ECJ in June 2010 upon preliminary reference from the Cour de Cassation. *Melki* takes the classroom to the north of France, where Algerian citizens were caught without proper immigration documents and arrested.[121] This would have been a purely French matter were it not for the fact that the arrest took place less than twenty kilometers from the Belgian border.[122] From the viewpoint of a Union that aims at abolishing its internal frontiers, police checks performed in the proximity of interstate borders are problematic. The Treaty on the Functioning of the European Union (TFEU) prohibits border checks as a matter of principle,[123] and the Schengen Borders Code allows police controls near internal borders to be performed only with caution and safeguards.[124] The Algerian citizens in question argued that the French police had breached EU law given the location and circumstances of the arrest,[125] and their argument ultimately prevailed before the ECJ.[126] As applied, the French statute authorizing police controls produced effects equivalent to illegal border checks.[127] The Cour

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119. *See infra* Part VIII.

120. *See* Joined Cases C-188/10 & C-189/10, *In re* Melki, 2010 EUR-Lex CELEX LEXIS 666 (June 22, 2010).

121. *Id.* para. 16.

122. *Id.*

123. TFEU art. 67. On this point, Melki's argument met with the Commission's approval. *See Melki*, 2010 EUR-Lex CELEX LEXIS para. 62.

124. *See* Regulation 562/2006, of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), arts. 20, 21(a), 21(c), 2006 O.J. (L 105) 1, 11-12. Schengen is the town where, in 1985, five of the Member States signed a treaty aimed at abolishing border controls for persons. That treaty has grown into a series of EU rules, consolidated in 2006. "Schengen" is now Euro-jargon for EU policies on frontier checks.

125. *Melki*, 2010 EUR-Lex CELEX LEXIS para. 19.

126. *Id.* para. 76.

127. *Id.* para. 73. The ECJ found that a section of article 78-2 of the *Code de procédure pénale* conflicted with the Schengen Borders Code due to the lack of requirement of "behaviour . . . and of specific circumstances giving rise to a risk of breach of public order." *Id.*

de Cassation dutifully noted the ECJ's answer and has since affirmed the resulting liberty of other foreigners in subsequent cases.[128]

The pattern of the story is deceivingly simple. On the surface, this is an individual invocation of EU free-movement rights for the purpose of curbing the police powers of a Member State.[129] But the legal strategy of the defendants is peculiar and worth noting. The issue might have been framed as one of direct conflict between state criminal procedures and EU law, without any nexus with French constitutional provisions. But Melki et al. had in mind a different itinerary: they would have liked the case to be heard by the Conseil Constitutionnel, which was recently endowed with new powers of judicial review by way of constitutional amendment,[130] because they expected the Conseil itself to declare the French statute void.[131] Many reasons of procedural expedience may have prompted this lawyerly plot. It is plausible to assume, however, that the following thoughts were looming on the mind of the defense counsel. As a practical matter, assuming success on the merits, a pronouncement of the Conseil Constitutionnel would have immediately outlawed all comparable border checks with *erga omnes* effect.[132] At a loftier level, it might have been preferable for the defendants and their fellow citizens that justice be done in Paris by the Conseil Constitutionnel itself, a national bulwark of legality. This path would have had the advantage of avoiding a practical and symbolic triangulation with Luxembourg. The issue of undocumented migration would have landed directly in the legal

128. Cour de Cassation [Cass] [Supreme Court for judicial matters] 1e civ., Feb. 23, 2011, Bull. Civ. I, No. 09-72.420 (Fr.).

129. *See, e.g.*, Case C-60/00, Carpenter v. Sec. of State, 2002 E.C.R. I-6305, paras. 31, 42.

130. Loi organique 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution [Organic Law 2009-1523 of December 10, 2009, Relative to the Application of Article 61-1 of the Constitution], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 2009, P. 21379 (inserting a new Chapter IIa, entitled 'Priority Questions on Constitutionality,' into Title II of Order No 58/1067 of 7 November 1958 on the organic law governing the Conseil Constitutionnel). After this reform, ex-post judicial review by the Conseil Constitutionnel can happen upon referral from the Conseil d'État or from the Cour de Cassation. *Id.*

131. *Id.* § 28.3 (providing for judicial review concerning the consistency of given legislative provisions not only with "the rights and freedoms guaranteed by the Constitution" but also with "France's international commitments").

132. *Melki*, 2010 EUR-Lex CELEX LEXIS para. 36 ("[R]eferral to the Conseil constitutionnel has the advantage that the Conseil can repeal a law which is incompatible with the Constitution, and that repeal then has an effect *erga omnes*. By contrast, the effects of a judgment of an ordinary or administrative court, which finds that a national provision is incompatible with EU law, are limited to the specific case decided by that court.").

and political arena of the French republic, where the larger plight of Algerians could be tackled holistically and systemically.[133]

The alternative path chosen by the Cour de Cassation (who immediately asked the ECJ for a preliminary ruling) was arguably *the* correct way to proceed, and it proved ultimately successful for the defendants. From Melki's viewpoint, however, it may have been sub-optimal, due both to the loss of immediate *erga omnes* effects and to the failure to involve the highest constitutional organ in Paris. In class, the discussion of *Melki* requires comparing the two procedural paths and unearthing the incentives of institutions and individuals involved. *Melki* illustrates, in my opinion, the pedagogical and analytical effectiveness of the EU law course.

In terms of technique, the payoffs are clear. *Melki* leads the class nicely through the maze of French judicial institutions and highlights the absolute novelty of ex-post judicial review in the French system. The recent introduction of judicial review stands in contrast with Montesquieu's characterization of the judge as the mouthpiece of the law, and it revisits the traditional notion of *exégèse* as well.[134] In this respect, *Melki* is a perfect complement to cases usually covered earlier in the course, which dwell on the French resistance to civil code amendments imposed by an EU-wide products liability reform.[135] Thanks to those cases, students already know that the myth of judicial subservience to legislative sovereignty can paradoxically enable courts' discretion,[136] and that continental civil codes may be about both corrective and distributive justice.[137] The result is a problematized and intriguing introduction to

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133. In matters of immigration, the powers of the EU are still very limited. Grant or denial of citizenship, and ultimate decision to deport, are left in the hands of Member States. *See* Francesca Strumia, *Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity*, 12 COLUM. J. EUR. L. 713, 714, 724 (2006).

134. The term "exégèse" stands for the proposition that courts are only faithful appliers of laws and cannot, by definition, review the legality of legislative commands. This proposition is conventionally attributed to nineteenth-century continental jurists. *See, e.g.*, Mario Ascheri, *A Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoleon*, 70 TUL. L. REV. 1041, 1042-44 (1996).

135. Council Directive 85/374, arts. 1-3, 10, 22, 1985 O.J. (L 210) 29, 30-31, 33. France was repeatedly brought before the ECJ for failure to transpose the product liability directive into French law. *See* Case C-52/00, Comm'n v. France, 2002 E.C.R. I-3856, I-3876-77; Case C-177/04, Comm'n v. France, 2006 E.C.R. I-2479, I-2504.

136. MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 56-60, 252-55 (2004).

137. *See* Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of the European Legal Integration*, 3 EUR. L.J. 3, 14-17 (1997). This article discusses the implementation of the 1985 EC Products Liability Directive in France, which required amending the French civil code. This meant making explicit the proconsumer approach of the French civil courts enabled for decades by the code's elliptic provisions and by the traditional opacity of

separation of powers *à la française*—an archetype in constitutional theory across the world.

The foregrounding effect is equally intense. *Melki* is part of the discussion of free movement of persons, which comes on the heels of free movement of goods and is closely patterned upon the early ECJ pronouncements on interstate trade obstacles. Border police controls on persons are eerily reminiscent of quality or health controls upon exports and fall into a known groove of regulatory barriers of which the EU presumptively disapproves. Conceptually, the case is about a paradigm initially conceived for 'things' and soon enough applied to crucial dimensions of the human condition (freedom, citizenship, post-colonialism). It is a window into the far-reaching consequences of even the most unassuming trade agreement, and the unavoidable political spillover of market integration.

In terms of globalization, *Melki* introduces the class to the EU's role in postcolonial mediation. The massive Algerian presence in France is no longer a matter reserved to national sovereignty and can no longer be contained within the borders of French republicanism.[138] While France can still control migration flows by means of citizenship rules,[139] the EU necessarily complicates the French-Algerian dynamics at multiple levels: as observed, the free movement provisions of the Schengen Borders Code result in new guarantees for Algerians in border areas, turning EU courts into arbiters of entrenched conflicts between immigrants and French law enforcement officials. The EU-Algerian Association Agreement redesigns France's economic ties with its former colony by regulating trade, investment and employees' residence rights;[140] the

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French judicial opinion. The EU-led reform ended up energizing powerful lobbies from pharmaceutical and agricultural sectors, which prompted resistance in the Assemblée Nationale and slowed down the process of transposing the Directive into French law. Paradoxically, Napoleon's civil code, intended to curb the superpower of the *ancien régime*'s judiciary, turned into a judicial bulwark of resistance against legislative pressure.

138. PAUL A. SILVERSTEIN, ALGERIA IN FRANCE: TRANSPOLITICS, RACE, AND NATION 238 (2004) ("[T]he French presence in Algeria has been replaced by an Algerian presence in France . . . . In the context of a newly unified Europe, Algerian transpolitics calls into direct question the cultural makeup of French nationality and citizenship, the particularist and universalist dimensions of the French nation-state as a political form.").

139. *See* Eleonore Kofman, Madalina Rogoz & Florence Lévy, New Orientations for Democracy in Eur., *Family Migration Policies in France*, INT'L CTR. FOR MIGRATION POL'Y DEV. 8-9, 12-13, 18, 26 (2010), http://research.icmpd.org/fileadmin/Research-Website/Project_material/NODE/FR_Policy_Report_formatted7May.pdf.

140. The EU-Algeria Association Agreement was signed in 2002 and entered into force on September 1, 2005. Council Decision 2005/690/EC, Euro-Mediterranean Agreement Establishing an Association Between the European Community and Its Member States, of the One Part, and the People's Democratic Republic of Algeria, of the Other Part, 2005 O.J. (L 265) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.dp?uri=CELEX:32005D0690:EN:NOT.

pressure on France to absorb workers from the rest of Europe, made repeatedly clear by the ECJ in the context of maritime crews, alters the socioeconomic status of North African labor.[141] One of the upshots of a one-semester full immersion into the technicalities of EU law is the ability to navigate Mediterranean geopolitics with acute awareness of pressure points, real tools for advocacy, and solid analytics.

IX. CONCLUSION

The vagaries of the EU as a player on the world scene, the transatlantic convergence of geopolitical visions, variations in trade volume, or shifts in employment trends bear no relation to the pedagogical value of EU law in the J.D. curriculum. By the same token, the usefulness of EU law as an analytical base for scholarly endeavors does not depend on the functional equivalence of federalism's legal categories or on the compatibility of regulatory strategies, adopted on the two sides of the Atlantic. The legal order realized through sixty years of integration efforts is, per se, a worthy object of investigation in U.S. legal academia. The foregoing discussion has attempted to highlight what one is not to expect out of EU law studies, and to identify, by contrast, the real payoffs. What follows is a closing synthesis.

Tushnet's taxonomy of comparative methodologies, already invoked in these pages, comes in handy again to summarize what EU law is or is not about. EU law's attractiveness as a comprehensive field of inquiry does not depend on its being a bricoleur's paradise with its rich experimentation in just about every matter of legal interest. Bricolage is, by definition, content with details and indifferent to system-wide investigations.[142] It can therefore survive among U.S. legal scholars even without painstaking efforts to understand the full dynamics of the system. Neither does the relevance of the subject lie in further functionalist studies. Functionalist U.S.-EU comparisons held promise in the 1990s, but they seem to have run out of steam, or at least to have picked and consumed all the low-hanging fruit. In its typical applications, functionalism is aseptic and therefore dissatisfying when

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141. Case 167/73, Comm'n v. French Republic (*French Seamen*), 1974 E.C.R. 361, 367. The case concerned a 1926 provision (article 3(2) of the Code du Travail Maritime) requiring that a high percentage of crew members aboard French vessels be French nationals. That piece of French legislation was part of a historical attempt to stem the in-flow of North African labor in the early twentieth century. France argued before the court that the decree was not in fact applied to keep out of France other EU workers, and that the decree did not imply infringement of EU law. The E.C.J. nonetheless found the decree incompatible with the principle of free movement of workers. *Id.*

142. Tushnet, *supra* note 12, at 1228-29.

rules are embedded in notoriously contested visions of post-national democracy.[143]

Expressivism, a third typology of comparative method in Tushnet's taxonomy, might still be an appropriate strategy for U.S.-based EU law specialists.[144] Expressivists aim at identifying the particular values embraced and promoted by other legal systems in order to compare and contrast them with the sociocultural norms embodied in U.S. law.[145] Indeed, the EU strives to define its own values by means of charters, judicial pronouncements, and particular interpretations of the law/politics divide. The ECJ, in particular, has translated hot political debates into justiciable questions[146] and contributed to transforming the status of rights discourse in Member States' legal culture.[147] Such changes, for better or worse, represent fundamental steps in the ongoing globalization of legal consciousness, which is rightly emerging as a subject of jurisprudential investigations in American academia.[148] Expressivism in "tempered" form,[149] directed not at identifying the transcendental values voiced by foreign systems' legal rules, but rather at uncovering the contestations, power struggles, and compromises that produce such rules[150] is essential to the epistemology of globalization and finds valuable research material in EU law.

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143. A notable and drastic methodological variation, aptly named "textured functionalism," may rejuvenate the genre of functionalist studies and can certainly yield great scholarship. Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687, 695 (2010).

144. Tushnet, *supra* note 12, at 1270 & n.214 (explaining the nature of expressivism and referring to Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 524 (1992), who posits that rights as construed by a given legal system "are legal manifestations of divergent, and deeply rooted, cultural attitudes toward the state and its functions").

145. *See, e.g.*, Mattias Kumm, *Why Europeans Will Not Embrace Constitutional Patriotism*, 6 INT'L J. CONST. L. 117, 134-36 (2008).

146. *See, e.g.*, Case C-420/07, Apostolides v. Orams, 2009 E.C.R. I-3571, para. 62 (holding that a judgment concerning property in Northern Cyprus could be enforced in British courts); Case C-386/08, Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010 EUR-Lex CELEX LEXIS 63, paras. 55, 58, 74.1 (Feb. 25, 2010) (holding that products originating from the West Bank do not qualify for preferential customs treatment under the EU-Israel trade agreement).

147. MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE 62 (2009).

148. *See* Kennedy, *supra* note 117, at 71; *see also* Ronald J. Daniels, Michael J. Trebilcock & Lindsey D. Carson, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111, 114-15 (2011).

149. Tushnet, *supra* note 12, at 1279.

150. *See, e.g.*, Gráinne de Búrca, *The Road Not Taken: The EU as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649 (2011); 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, 88-89, 139-41, 144 (2008).

However, the highest merit of comprehensive EU law inquiry lies beyond the list of traditional comparative law methodologies and is perhaps inherently orthogonal to comparative inquiries. If one sets aside the traditional focus on differences and convergences between territorially defined legal systems, what remains on the table of the EU law specialist is an advanced experiment in globalization. The task, utterly pragmatic and yet theoretically appealing, is to look at the Brussels-centered legal changes of the past six decades as a project of regional integration that has gone further than any other on the planet. The EU has, partially but effectively, taken adjudication, policymaking, and democracy outside of the nation-state. And it has done so thanks to the promise of peace and prosperity that every single project of economic liberalization carries within itself and boasts as political justification. There is no better place than Europe to test the limits of that promise. Ricardo's blanket does bring warmth to some corners of the world, but it always proves too short and can only be pulled in so many directions.[151] Alone, it never suffices.[152] It gets bunched up and wrinkled, and it may cover what should rather stay stark.

The distributive impact of European legal integration, the reach of the blanket and its shortcomings, its internal dynamics, and its externalities, are all proper objects of study for legal scholars interested in economic integration through law. The EU continues to experiment with cross-border wealth reallocation by means of markets, subsidies, and industrial and agricultural policies. It is a heavily legalized attempt at economic development, with many a lesson for those involved in overarching projects of global governance and growing evidence of both success and failure. Laboring through the daunting maze of structures, doctrines, and techniques of EU law is the only pathway towards this treasure of experience.

I have no doubt that other disciplines, and in particular other areas of foreign, comparative, or international law, can perform functions as important as those of the classical EU law course. But the bar is high. Should EU law disappear from the J.D. curriculum, it would leave a legacy of high returns.

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151. Damjan Kukovec, *Whose Social Europe?: The Laval/Viking Judgments and the Prosperity Gap*, (Inst. for Global Law & Pol'y, Working Paper No. 3, 2011), http://www.harvardiglp.org/wp-content/uploads/Kukovec_WhoseSocialEurope.pdf.

152. *See, e.g.*, CHRIS RUMFORD, EUROPEAN COHESION? CONTRADICTIONS IN EU INTEGRATION 94, 105-06 (2000) (noting that the free-trade regimes controlling the EU relations with prospective members states, such as Turkey, "exacerbate divergent standards of living").