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978-1-107-04236-0 - Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity

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Excerpt

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## Introduction

By any standards, Europe is a lawyers' paradise.<sup>1</sup> Many figures illustrate the extent to which 'Europe' is juridified and could well be called upon here: the number of pages of European regulation in any given field, the percentage of national legislation originating in EU norms, the ever-increasing caseload of the European Court of Justice (ECJ, or 'the Court'), etc. Figures, however, fail to grasp the very deep entanglement between Europe and the law that has kept the European integration process rolling over time. In a political context in which the pan-European horizon is fading away, it seems that 'Europe is nowhere so real as in the field of law', to quote a recent 'wise men' report on the reform of the French Constitution.<sup>2</sup> Strikingly, while political scientists, historians and even economists in the field of European studies are still having a hard time agreeing on the 'nature of the beast', EU law appears to be this very unique type of knowledge capable of providing some forms of certainty when it comes to making sense of what the European Union is about and how it ought to function. In fact, 'the law' is so instrumental to Europe's very existence and identity that it has become almost 'natural' to continuously draw on a whole set of legal concepts, categories and theories when thinking about Europe's nature and future. Elevated to the rank of

<sup>1</sup> While the book puts a lot of emphasis on the *political* significance of the symbolic unification of European constructions into one consistent and historically constant reality named 'Europe', I use – for the sake of simplicity in writing – the terms 'Europe', 'European Union' and 'European Communities' (and, similarly, the terms 'European law', 'EC law' and 'EU law') as synonymous. Similarly, while I study the transformation of the founding Treaties into a *de facto* Constitution of Europe, I still follow the commonly shared convention of EU official documents that use capital letters in order to distinguish the founding European Treaties from ordinary international agreements.

<sup>2</sup> Comité de réflexion sur le préambule de la Constitution – 'Comité Veil', *Rapport au président de la République*, Paris, La documentation française, 2008, p. 47.

founding rock, or even to that of the *raison d'être* of the Union (a 'Union of law'), the law seems so well acclimated in Europe's polity that it has become difficult to see its pervasive presence as anything other than a self-evident fact.

The truth of the matter is that, over the years, EU law, and its underlying constitutional paradigm, has affirmed a strong hold on Europe's political imagination. Strikingly, despite the fact that all constitutional treaties (from the 1954 *Communauté politique européenne* to the 2005 constitutional treaty and the 1984 Spinelli treaty) have failed to be approved in national political fields, Europe still seems to be thinking of itself in constitutional terms. Need it be recalled here that the many reformist ambitions that aimed to address Europe's 'deficits' (lack of: democracy, common values, budgetary and economic coordination, etc.) have developed into a corresponding number of *constitutional* projects, from the Constitutional Treaty to the Charter of Fundamental Rights or the more recent budgetary 'golden rule' of the 2012 Fiscal Compact? How can one then account for this structural preference for law and the related resilience of a constitutional paradigm that seems to maintain itself throughout all the Union's re-foundings and reorientations ever since the 1960s?

For a long time, this symbiotic relationship between Europe and the law did not receive much attention. While lawyers would simply state that the European Union *is* a 'Union of law' (and that the European Treaties *are* a 'constitutional charter', or that the ECJ and the European Commission *are* the institutions that embody the EU's general interest, etc.), historians considered this constitutional path undertaken by Europe as essentially unproblematic and uneventful<sup>3</sup> (after all, no State- or quasi-State-building could be conceived of without the support of legal technologies). Yet, the presence of law's names and symbols (a '*de facto* Constitution', 'a court', 'judges', legal scholars, etc.) at the European level conveys a false sense of resemblance to national polities.<sup>4</sup> In fact, this apparent permanence of law from national to European settings clouds our perception of the *specific*

<sup>3</sup> But for more recent developments of EU historiography on transnational networks, cf. Wolfram Kaiser, Brigitte Leucht and Morten Rasmussen (eds.), *The History of the European Union: Origins of a Trans- and Supranational Polity 1950–72*, London, Routledge, 2008; and on the history of European law, see also the special issue edited by historians Bill Davies and Morten Rasmussen, 'Towards a New History of European Law', in *Journal of Contemporary European History*, 21(3), 2012.

<sup>4</sup> See Pierre Bourdieu, *On the State: Lectures at the Collège de France*, London, Polity, 2014.

political and social arrangement that is ‘Europe’ where the law has come to play a highly singular function.

Certainly, over the past two decades, a rich strain of interdisciplinary literature, initially inspired by American legal scholars and political scientists, has contributed to dispel the not very discreet charm of this ‘Law State’<sup>5</sup> and has provided an overarching paradigm for the wide-ranging legalization of the terms and scope of the European project.<sup>6</sup> This stream of research has pointed in particular at the formation in the mid-1960s of a constitutional doctrine at the ECJ which, by a series of forceful jurisprudential blows, has constructed the conceptual and procedural frameworks of a genuine legal federalism. In turn, then, the ECJ’s case law opened up institutional opportunities for multinational enterprises, transnational interest groups and EC institutions to circumvent and undermine national forms of regulation. The progressive, if somewhat chaotic, movement through which national courts eventually rallied the broad principles established by the ECJ consolidated the movement<sup>7</sup> – and this judicial consolidation itself generated new opportunities for the Court to further broaden the scope of its case law to new domains such as anti-discrimination, the environment, fundamental rights, etc. These further moves triggered an implacable iterative mechanism associating interest groups, multinational enterprises, EU institutions, States and the ECJ in a virtuous (or vicious) circle of judicialization with no single author or source, but to which each entity contributed in its own way. Or so have the neo-functional account of integration and its later neo-institutionalist variant<sup>8</sup> claimed, thus

<sup>5</sup> Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in Europe*, Cambridge, MA, Harvard University Press, 2011.

<sup>6</sup> The bibliography is immense, but seminal papers or books certainly include: Anne-Marie Burley and Walter Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’, *International Organization*, 47(1), 1993, pp. 177–209; Joseph Weiler, ‘A Quiet Revolution: The European Court of Justice and Its Interlocutors’, *Comparative Political Studies*, 26(4), 1994, pp. 510–34; Alec Stone, *The Judicial Construction of Europe*, Oxford, Oxford University Press, 2004; Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001; Rachel Cichowski, *The European Court and Civil Society*, Cambridge, Cambridge University Press, 2007; for an overview, see Alec Stone, ‘The European Court of Justice and the Judicialization of EU Governance’, *Living Reviews and European Governance*, <http://europeangovernance.livingreviews.org/Articles/lreg-2010-2> (accessed 15 May 2013).

<sup>7</sup> Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001.

<sup>8</sup> Neil Fligstein and Alec Stone, ‘Constructing Polities and Markets: An Institutional Account of European Integration’, *American Journal of Sociology*, 107(5), 2002, pp. 1206–43.

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shedding much-needed light on the specific contribution of law to the European integration project and process.

Yet, in its very attempt to break with a legal-centric reading of legal integration by bringing *external* factors back into explanations and theories of its sweeping dynamics, this scholarship has, I argue, missed an important point: in the European Union, even more than anywhere else, there is no possible distinction between the ‘law’ and the ‘society’. There are no areas of Europe’s politics, economics, bureaucracy or civil society that have not been produced or co-produced to some extent by lawyers, whatever their guises may be. Legal Europe is *co-extensive* with Europe itself, and it is hardly possible to think about the Union and its ‘system’, its institutions and their ‘logic’, its markets and their ‘functioning’, its civil society and its ‘causes’, without delving into the impressive corpus of *ad hoc* legal theories and methodologies of Europe.<sup>9</sup> Consequently, the very categories that are considered as *explanatory* factors for the legalization of Europe (institutions’ ‘rationales’, professional groups’ ‘interests’, sector-specific ‘frontiers’ between the ‘national’ and the ‘European’, or between the ‘legal’ and the ‘political’, etc.) have actually been produced *alongside* the history that this literature is trying to account for. At the time of the ECJ’s first landmark cases (1963–4), Europe’s law had no inherent logic of its own, the ECJ itself was hardly perceived as a ‘court’ worth its name, companies and interest groups had no view of ‘Europe’ as making up one open land of opportunities, and there was certainly no institutional terrain ‘out there’ that would have been mechanically derived from the mere signing of the Rome Treaties, or even from a sudden judicial *coup* coming from the judges in Luxembourg.

The fact of the matter is that we are still in need of an explanation as to how the law and the polity of Europe have been interconnected, and how they have been shaping and informing one another. We actually know very little about the manner in which ‘Europe’ has initially come to be defined in *legal* terms (a *de facto* ‘Constitution’, an *acquis*, a supranational court, etc.) rather than economic or political ones, and how this particular path was actually chosen (and consolidated) for *the institution of Europe*. As is well known and often recalled, the European Communities had a primarily *economic* (if not merely commercial) scope that did not call for any sort of overarching mission for the law. There were good reasons for

<sup>9</sup> On this, see Antoine Vauchez, ‘The Force of a Weak Field: Law and Lawyers in the Government of the European Union (for a Renewed Research Agenda)’, *International Political Sociology* 2(2), 2008, pp. 128–44; and Julie Bailleux, *Penser l’Europe par le droit. L’invention du droit communautaire en France*, Paris, Dalloz, 2014.

that: the European Communities were set up in a context of a marked depreciation of the authority of law and of legal professions in national political, bureaucratic and economic spheres.<sup>10</sup> Conversely, other bodies of knowledge (in particular, political economy and sociology of organizations) and techniques of regulation (such as economic planning) were deemed better suited to face the challenge of the ‘modernization’ of European States and economies. Even though legal experts arguably played an important role in the drafting of the Treaties,<sup>11</sup> they left no trace of a European ‘Constitutional Charter’, of a ‘Supreme Court’, nor any mention of a new type of international legal order. The Treaties often and mostly appealed to the *rapprochement*, the *harmonization* or even the *unification* of national legislations in terms that hardly differed from those present in the founding documents of other European organizations such as the Organization for European Economic Co-operation or the Council of Europe. Accordingly, the initial expectation was that law would essentially provide politicians with the technical expertise in *comparative law* they needed to shape the common economic laws of the Common Market.

By what ‘miracle’, then, have the variegated set of European Treaties, institutions, groups and policies been able to take shape and grow into one unique transnational polity that constitutes a relatively stable order of practice and meaning? Through what processes have they come to coalesce into one unified ‘constitutional settlement’? This book does not intend to answer these questions by retrospectively assigning a single intrinsic *economy* or *logic* to the Paris or Rome Treaties. On the contrary, it takes a radically different stance: instead of assuming that an ‘institutional terrain’ had even existed from the outset of the European Communities, it explores the *institution* of Europe’s polity as the contingent and conflictual *historical* process of symbolic, cognitive and practical unification of a variegated set of European constructions (treaties, institutions, policies, etc.) and groups into one single *order* endowed with its own specific rationality.

The book’s central claim is that the broad definitional power that law is generally endowed within the context of the European Union actually

<sup>10</sup> This overall decline can be traced in many settings starting with the decline in the share of members of Parliament with a law degree or coming from the legal professions: cf. Maurizio Cotta and Heinrich Best (eds.), *Democratic Representation in Europe: Diversity, Change and Convergence*, Oxford, Oxford University Press, 2007.

<sup>11</sup> Anne Boerger, ‘Negotiating the Foundations of European Law: The Legal History of the Treaties of Paris and Rome’, *Journal of Contemporary European History*, 21(3), 2012, pp. 339–56.

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has to do with (and reveals) EU law's historically acquired 'brokering capacity'. By this expression, I wish here to refer to the ways in which law has come to stand as the major unifying glue and core integrative programme that holds together Europe's complex, disjointed and multilevel polity. For that reason, *Brokering Europe* is not just another narrative of Europe's legal integration. Its ambition is to provide a deeper understanding of Europe's own specific way of polity (its own specific modes of legitimacy, its own specific types of political and professional authority, etc.), a question that the perpetual jousting between intergovernmentalists and neo-functionalists over Europe's major *integrative* force (diplomats or international secretariats? States or international courts? National or transnational civil society?, etc.) has to date essentially left in a dead end.

The formulation of this project has required a number of methodological moves and choices. The first one is a historical *détour* that takes the story this book tentatively retells back to the very early years of the European Communities. The motives for this sociogenetic turn stand distant from any sort of historical *point d'honneur*; nor are they the result of merely erudite interest in the history of European ideas. Rather, they lie in the notion that such a detour is the most efficient denaturalizing device, as it takes us back to a moment in time when there was precisely no common sense about what Europe's polity was about and what its connection with the law ought to be. Yet, I do not engage in historical investigation in the same way a historian would do; in fact, my goal here is not to write a full history of European integration. Some readers may be surprised that canonical episodes of European historiography are mentioned only in passing – if at all. In line with historical institutionalism<sup>12</sup> but with a deeper commitment to the broader tradition of historical sociology,<sup>13</sup> I have chosen to focus on critical junctures and long-term processes that have defined a particular constitutional function for the law in Europe's polity, and the ways in which this progressive imposition has correlatively marginalized other possible futures.

This historical turn called for a second move towards a denser description of the law; one that would allow the tracking of the many political and social connections that have been built *through* the practice of law. In

<sup>12</sup> In a large literature, see Paul Pierson and Theda Skocpol, 'Historical Institutionalism in Contemporary Political Science', in Ira Katznelson and Helen Milner (eds.), *Political Science: The State of the Discipline*, New York, Norton, 2002, pp. 693–721.

<sup>13</sup> For a general theoretical and historical framework, see Pierre Bourdieu, *On the State: Lectures at the Collège de France 1989–92*, London, Polity, 2014.

its attempts to identify the set of *external* factors that keep Europe's *judicial* dynamics moving, political science literature has sacrificed (more often than not) the analysis of the law itself – that is, of the people who set law in motion and the arenas in which law is produced, debated and interpreted. On the mainstream account, lawyers seem to act merely as transmission belts: they are nearly invisible proxies for a variety of contending players who, for their part, are assumed to be very real (States, EU institutions, companies, interest groups, NGOs, etc.).<sup>14</sup> Alongside the Weberian tradition and against this thin description of law,<sup>15</sup> the present book argues that law exists as a specific and relatively autonomous social world – one that is made of specific professional conceptions of worth and wealth, commonsensical ideas about the political and social importance of law and even, under certain historical circumstances, an agenda of its own. *Brokering Europe* therefore inserts living, acting people into what has so far tended to remain a disembodied narrative of reified actors ('the Court', 'the Commission') pursuing abstract goals and *ex ante* defined interests. Rather than contemplating the 'cathedral' of European law from the outside, this book goes inside the edifice and sheds light on the assembly of clerks on which the EU law controversies exercise a calling.<sup>16</sup> Thus shifting the focus on real life and historically situated actors, the book seeks to identify how their legal and non-legal undertakings have been shaped and informed by their

<sup>14</sup> See, however, the work of the Polilexes research group ([www.polilexes.com](http://www.polilexes.com)) and the recent edited volume, Antoine Vauchez and Bruno de Witte (eds.), *Lawyering Europe: European Law as a Transnational Social Field*, Oxford, Hart Publishing, 2013.

<sup>15</sup> For a similar critique, see Christian Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', *European Law Journal*, 2(2), 1996, pp. 105–35; Grainne de Búrca, 'Rethinking Law in Neofunctionalist Theory', *Journal of European Public Policy*, 12(2), 2005, pp. 310–36; and Jo Shaw, 'The European Union: Discipline Building Meets Polity Building', in P. Cane and M. Tushnet (eds.), *Oxford Handbook of Legal Studies*, Oxford, Oxford University Press, 2003, pp. 325–52.

<sup>16</sup> On this tradition of political sociology, see Max Weber, *On Law in Economy and Society*, Cambridge, MA, Harvard University Press, 1954; Pierre Bourdieu, 'Genèse et structure du champ religieux', *Revue française de sociologie*, 12(2), 1971, pp. 295–334; 'Une interprétation de la théorie de la religion selon Max Weber', *Archives européennes de sociologie*, 12, 1971, pp. 3–21; and Ernst Kantorowicz, 'Kinship Under the Impact of Scientific Jurisprudence', in M. Clagett, G. Post and R. Reynolds (eds.), *Twelfth-Century Europe and the Foundation of Modern Society*, Madison WI, University of Wisconsin Press, 1961, pp. 89–111; and, for the sake of this book, Antoine Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (for a Renewed Research Agenda)', *International Political Sociology* 2(2), 2008, pp. 128–44; and Antonin Cohen, 'Legal Professionals or Political Entrepreneurs? Constitution Making as a Process of Social Construction and Political Mobilization', *International Political Sociology*, 4(2), 2010, pp. 107–23.

individual backgrounds, their social and professional socialization and their oft-interlocking networks within and outside the legal field. Euro-implicated lawyers (hereinafter, 'Euro-lawyers') are therefore followed way beyond the litigation arenas, in their manifold capacities as jurisconsults-diplomats, corporate lawyers, EU institutions' legal advisers, 'politicians of the law', institution-builders, academics, etc. In particular, the book envisages lawyers as knowledge-producers: relatedly legal theories and methodologies are not considered as just esoteric forms of knowledge but also as the standard-bearers of specific representations of the Union (its own form of government and principles of legitimacy) in areas as different as antitrust policy, market regulation, supranational administration, human rights control, Euro-parliamentarism, etc.<sup>17</sup>

It is not, however, my intention to substitute a 'grand *legal* narrative' for the similarly grand economic or political master-plans that have dominated most of Europe's historiography, granting the first role to 'great men', audacious master-plans or visionary institutions. There is no hero or 'invisible college' in this tale that does not seek to replace the old heroic figures by new ones – lawyers, judges or law professors in lieu of the former politicians, civil servants and diplomats usually presented as Europe's founding fathers. Hence the third and last move towards the framing of a conceptual toolbox that would be able to account for the social and political conditions for law's authority without locating it in its purportedly eternal capacity to reconcile antagonisms, or in its intrinsic depoliticizing virtues. To this aim, this research draws particularly on Pierre Bourdieu's field-theory, a set of analytical instruments only recently mobilized for the study of the European Union. Here is not the place to discuss its general scope and value.<sup>18</sup> Suffice it to point out that field-theory is particularly well suited for the EU context in which, more than in any other research area, there is a need to consider the power

<sup>17</sup> For a similar view on the political texture of law, see Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford, Oxford University Press, 2011.

<sup>18</sup> Recent overviews of this lively stream of research include Adrian Favell and Virginie Guiraudon, 'The Sociology of the European Union: An Agenda', *European Union Politics*, 10 (4), 2009, pp. 550–76; Michel Mangenot and Jay Rowell (eds.), *A Political Sociology of the European Union: Reassessing Constructivism*, Manchester, Manchester University Press, 2010; Niilo Kauppi and Mikael Madsen (eds.), *Transnational Power Elites: The New Professionals of Governance*, London, Routledge, 2013; Didier Georgakakis (ed.), *The Field of Eurocracy: Mapping EU Actors and Professionals*, Basingstoke, Palgrave, 2013; and Antoine Vauchez and Bruno de Witte (eds.), *European Law as Transnational Social Field*, Oxford, Hart Publishing, 2013.

relations (competing forms of authority and types of social capital) that cut across the political and administrative sites of command. Field-theory enables us to locate law and lawyers in the wider historical competition that took place in the post-Second World War period over the definition of the types of policy instruments, expertise and, ultimately, elites that would be best suited for leading the unification of Europe. As the book traces back the steps and actors in the formation of a specifically European legal field, it is able to unearth the highly singular and enduring form of this transnational field which has remained over time a weakly structured and largely heteronomous social space. Being deeply enmeshed in national fields of power and deprived of strong units of internal governance, it is best described as a ‘weak field’<sup>19</sup> located at the very edge of national and European political, administrative, economic and academic fields. The book contends that the ‘brokering capacity’ of European law to act as the operator of a symbolic and practical unification of ‘Europe’ originates precisely in this *interstitial* position. The ‘weak field’ of European law is analyzed as the privileged *locus* of a transformative process whereby Europe’s ‘strong integration programme’ – namely, the constitutional paradigm of Europe<sup>20</sup> – progressively crystallized.<sup>21</sup> By these notions of ‘strong programme’ and ‘constitutional paradigm’, I do not mean a mere set of abstract ideas: they involve commonsensical assumptions regarding Europe’s standard operating modes (institutional roles, policy instruments, groups’ identities) that function at a deeper level than any given theory; they allude to taken-for-granted cognitive tools that help decipher and make sense of an otherwise complex and dispersed polity such as the EU (a *de facto*

<sup>19</sup> On the notion of a ‘weak field’ applied to the study of transnational spaces, see Stephanie Mudge and Antoine Vauchez, ‘Building Europe on a Weak Field: Law, Economics, Scholarly Avatars in Transnational Politics’, *American Journal of Sociology*, 118(2), 2012, pp. 449–92. On transnational fields as ‘crossroads’, see also Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars: Law, Economics and the Transformation of Latin America*, Chicago IL, University of Chicago Press, 2002; and Mikael Madsen, ‘Transnational Fields: Elements of a Reflexive Sociology of the Internationalization of Law’, *Retfærd*, 3(114), 2006, pp. 23–41.

<sup>20</sup> By many standards, the notion of ‘Constitution’ is a slippery one, in the EU context even more than elsewhere (cf. Chapter 6 for more references on these possible confusions). Therefore, I have made no prior assumptions regarding what its ‘authentic’ meaning ought to be; rather, I have followed the emergence of a constitutional rhetoric and tracked the competing meanings that have been given to it.

<sup>21</sup> This constitutional paradigm can be ideal – typically opposed to what could be labelled a ‘weak integration programme’ that holds European Treaties to be ones among many inter-State agreements, and sees the law as no more than an instrument serving diplomatic missions and the European Council.

autonomous constitutional order); benchmarks and rationales against which Europe's future is *assessed* (a fully fledged constitutional polity); and a transnational power map locating the ability and responsibility for the 'rational guidance' of European integration in particular institutions (Commission, Court, etc.), blends of professionals (lawyers, economists, diplomats, EU civil servants, etc.) and sets of techniques (legal, political, economic, the *acquis*, Eur-lex, etc.).

In order to seize the coalescence of this constitutional paradigm, *Brokering Europe* suggests new empirical strategies. Over the years, the study of EU legal integration has drawn more and more extensively on large-N quantitative studies, mostly drawn from the ECJ's case law.<sup>22</sup> While these statistical studies have sometimes proved enlightening, I argue they have reached the point of decreasing output, as they fail to grasp the fine-grained processes through which law and Europe have historically built (and rebuilt) each other in a continuous and perpetually reinforcing entwinement. Because much of this history happens through a transnational competition over the interpretation of Europe's nature, the book follows Euro-implicated actors as they build bridges and connexions between Europe and the law. In his search for the formation of a cross-sectoral and cross-institutional common sense about Europe, the researcher is compelled not to choose *one* level of analysis over the others (the legal over the political, or the European over the national, etc.), but rather to pay special attention to what lies precisely *in-between* them. As he casts the connectedness of Europe's legal field with its neighbouring fields, he progressively maps out the overall 'hermeneutic space'<sup>23</sup> in which this interpretative struggle is taking place, reaching out to a variety of social and professional universes and microcosms, apparently a stranger to the field of law, but oft critical to understanding its dynamics. As he traces the arenas in which intellectual and interpersonal connections or oppositions have been produced, the inquiry progressively turns into a transnational *jeu de piste*, from level to level and from empirical *corpus* to empirical *corpus*. Hence, the very diverse set of oft-unexplored empirical resources that this research has dug up over the years – biographical data, in-depth coverage of European law scholarly or professional conferences, ECJ cases' documents and commentaries,

<sup>22</sup> For an overview of the profusion of quantitative inquiries and a discussion of the rather contradictory results, see Lisa Conant, 'The Politics of Legal Integration', *Journal of Common Market Studies*, 46(2), 2008, pp. 293–314.

<sup>23</sup> Nathalie Heinich, *Glory of Van Gogh: An Anthropology of Admiration*, Princeton, NJ, Princeton University Press, 1996.