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WHAT IS POLITICAL ABOUT JURISPRUDENCE?

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COURTS, POLITICS, AND POLITICAL SCIENCE IN EUROPE AND THE UNITED STATES

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ABSTRACT. This paper reflects on the literature on courts and politics in Europe and the United States. US-American Political Science has dealt for several decades already with the role of courts and judges as political actors, whereas this perspective has only recently emerged in Europe. The debates differ not only with regard to the number of articles, but also with regard to their content. This paper discusses the different research perspectives that are being pursued on both sides of the Atlantic. While a major part of the US-American literature investigates the *politics* of judicial action and the *politicization* of the legal system, research on European courts confines itself to analyzing the *effects* of judicial action, often describing them in terms of *juridification*. Based on a review of the existing literature, this paper suggests that European scholars ought to take crucial assumptions of the US-American research tradition more seriously.

Keywords: courts, politics, Europe, United States, juridification

1. Introduction

In the United States, the perception of courts as political actors is widely shared, and Political Science has dealt with this topic for decades (Maveety 2003). A scholar attending one of the annual meetings of the American Political Science Association (APSA) can expect to find between twenty and thirty panels on the linkage of law,

courts and politics. Scholars have investigated how judges make decisions and how they are appointed, how courts interact with the legislative branch, how interest groups make use of the legal system and so on (literature to be discussed below). By contrast, in Europe "courts and politics" as a research topic is relatively new and not really established (Stone 1992a). Moreover, with regard to its content, the literature differs remarkably from the US-American work. The question of what exactly is political about jurisprudence is answered quite differently.

This article discusses the literature on "courts and politics" on both continents. It does not provide original empirical research but presents reflections on the state of this subfield of Political Science. The paper describes the historical development of research in the United States and Europe, thereby emphasizing to what extent the US-American literature has (or has not) influenced the European perspective. I will argue that the European scholarly community developed a very distinctive (and incomplete) understanding of courts as political actors. A major part of the US-American literature has reflected on and spoken to the discipline of law, challenging the idea of neutral legal reasoning by investigating the politics of judicial action. By contrast, research on European courts has never claimed to explain judicial decision-making, but it confines itself to analyzing the effects of judicial action on politics and the political system.

The remainder of the paper is organized as follows: It begins by discussing the question of why judicial politics has been a much more popular research topic in the United States than in European countries. Conventional wisdom explains this difference by pointing to the distinction between common law and code law countries (Shapiro and Stone 1994a). But with reference to the German case, I will argue in Section 2 that this explanation is not really convincing. Section 3 discusses and compares the US-American and European streams of the literature. Section 4 draws some conclusions and suggests that European scholars take more seriously crucial assumptions of the US-American debate, which Europeans have not paid much attention to so far.

2. The Scope of Research

Most striking is the small volume and scope of research on European courts, which has only recently emerged. While there is an over-

whelming body of literature on almost any imaginable aspect of judicial policy-making in the United States, especially with regard to the Supreme Court, much less work has been done on courts in other regions of the world, Europe included. In 1983, Lee Sigelman and George Gadbois stated that since 1968 only 0.3 percent of all articles published in "Comparative Politics" or "Comparative Political Studies" had dealt with courts (Sigelmann and Gadbois 1983: 293). Roughly ten years later, Alec Stone found that nothing had changed (Stone 1992a: 6). By my own calculations, the share of articles on courts increased only slightly to 0.4 percent by 2005.

Since the 1990s, the linkage between courts and politics as a European research topic has been pushed here and there. Some major journals have published special issues which also included the European perspective (e.g. Schmidhauser 1992; Volcansek 1992; Shapiro and Stone 1994b; Vallinder 1994a; Cichowski 2006). Moreover, a small number of comparative edited volumes vastly increased the international visibility of several scholars who had been researching courts in their home-countries for quite some time (e.g. Holland 1991; Jackson and Tate 1992; Tate and Vallinder 1995; Jacob et al. 1996). In addition, the European Court of Justice has drawn scholarly attention (e.g. Stein 1981; Burley and Mattli 1993; Garrett 1995; Alter 2001).

The growing volume of literature notwithstanding, research on judicial policy-making in Europe remains limited in some respects. Firstly, research on judiciary is hardly institutionalized in European professional organizations. While "Law and Courts" is the fourth largest Organized Section in the American Political Science Association (ranking behind Comparative Politics, Political Methodology and Public Policy), the European Consortium for Political Research does not even have such a section. Instead, the topic is subsumed under the newly established Standing Group "Regulatory Governance", which also hints at substantive differences in the research perspectives (to be discussed below). The lack of institutionalization applies to many national organizations of Political Science as well (e.g. United Kingdom, Germany, Austria, Switzerland, France, and Italy).

Secondly, research is limited to the issue of judicial review by constitutional courts, which is the most obvious and spectacular type of judicial politics, as it often involves striking down a law passed by the legislative branch. Ordinary or lower courts and judicial policy-

making by means of creeping statutory re-interpretation have hardly appeared on the research agenda so far (but please note van Koppen 1992; Verougstraete 1992). Moreover, courts are rarely integrated into the analysis of broader processes of political conflict and mobilization.

How can we explain this striking research gap? Why has the study of law, courts and politics been so much more popular in the United States for the past fifty years? The literature offers several arguments, and all of them are linked to the traditional distinction between common law and code law systems. Very often judicial policy-making in countries other than the U.S. is considered to be a relatively new phenomenon of the post-war era, when many countries in Europe and elsewhere established constitutional courts with the power to declare legislative enactments unconstitutional (e.g. Stone 1992a; Shapiro and Stone 1994a; Vallinder 1994b). Many authors argue that historically, European countries with a code law tradition had established a strong commitment to the "separation of law and politics and to a vision of judges as independent, neutral law appliers rather than policymakers" (Shapiro and Stone 1994a: 398). The experience of totalitarianism and its outrage against citizenship rights changed this attitude, in Germany more than in any other European country (Vallinder 1994b: 94–95). Courts were now seen as a means to monitor and review legislative activity and therefore to protect individual rights in the future. Through this shift they became more engaged in politics than before. But the European countries chose a path different from that of the United States, where each court has the capacity to declare a law unconstitutional. In several European countries, separate constitutional courts were established to perform the monitoring function ("European model" of judicial review). Confining the task of judicial review to special constitutional courts enabled the states to preserve the main principle of the European separation of powers doctrine (Stone 1992a: 225–226). Because judicial review by constitutional courts is a post-world war II phenomenon, so the argument goes, Europe-related research in this area is relatively newer than in the U.S. and has concentrated on constitutional courts.

A second prevalent explanation for the lack of European research is also linked to the alleged separation of law and politics in code law systems. Alec Stone argues that given the distinctiveness of the legal system academic discourse on this topic remained the privi-

leged domain of law professors (Stone 1992a: 6). Moreover, the specialized technical-legal discourse requires the learning of a "second language" (Shapiro and Stone 1994a: 398), which discouraged many Political Scientists from dealing with that topic. Surely, there is much truth in this. But still, *at least with regard to Germany*, these reasons cannot fully explain why hardly any systematic research of courts and politics has emerged so far.

Firstly, one would have to pose the question, as to why Political Scientists invest significant time and effort in learning economics, statistics and game theory, yet presumably hesitate to become acquainted with judicial methodology and language. Moreover, at least in Germany modern Political Science emerged from the discipline of law. Some of the most prominent founding fathers were trained as jurists. Their work often included the analysis of courts and their effect on the functioning of the political system. Ernst Fraenkel analyzed the impact of "*Klassenjustiz*" (class-based justice) on democracy and on the labor movement as early as the Weimar era (Fraenkel 1999 [1927]). Franz Neumann saw judicial policy-making as one driving force of "The Behemoth", the National Socialist state (Neumann 1963 [1944]), and Otto Kirchheimer investigated "political justice" in Germany, France and East European countries (Kirchheimer 1961). While these scholars had a major impact on the development of political and constitutional theory in German Political Science, and while they inspired a young generation of "critical jurists" in the 1960s (Iser and Strecker 2002), they did not motivate further research on "courts and politics" in Germany. By contrast, Kirchheimer's work became prominent in the United States and was acknowledged as "a leading work" in a research tradition called "Political Jurisprudence" (to be discussed below) (Shapiro 1964b).

Secondly, the missing interest of German Political Science in law-related issues and the courts is even more astonishing given the long German tradition of sociology of law (e.g. Max Weber, Niklas Luhmann, Jürgen Habermas). In other words, Alec Stone's argument that the law has been the privileged domain of law professors tells only part of the story. Sociologists (but not Political Scientists) in Europe have always reflected on the law and the legal system.

Thirdly, while it is surely true that the establishment of judicial review has remarkably increased the political power of European courts, it is not true that judicial policy-making only began in this period, again at least with regard to Germany. Research on the

Weimar Republic and the Nazi regime in the post-war decades revealed this. Contrary to the idea of judges as law appliers instead of policy-makers, courts have been very much engaged in politics since the end of the First World War – not in the spectacular sense of striking down whole statutes, but by means of a creeping re-interpretation of existing legislation in various fields of law. Long before the emergence of the Nazi-regime, the democratic Republic of Weimar was transformed into a conservative one step by step – and jurisprudence played a major role in this process (Ruethers 1968). For scholars, such as Neumann and Kirchheimer, who recognized this process, it provided the reason to analyze the political role of courts.

Just like in other countries in the first decades of the 20th century, German courts were inclined to defend liberal property rights and freedom of contract against a newly emerging regulatory state and its ambition to organize capitalist economies. For the US-American debate on the power of the courts, the Roosevelt era is still crucial, because the Supreme Court struck down social policy and labor law legislation of the New Deal government (McCloskey 2005: 91–120). A similar process took place in Germany, when the federal court *(Reichsgericht)* declared any state intervention which affected private property to be an "expropriation" and thereby limited the government's ability to change the status quo (Kirchheimer 1976 [1930]); or when the labor courts transformed a class-based concept of collective bargaining rights into the conservative idea of a corporate community with mutual obligations of loyalty and care (Kahn-Freund 1975 [1931]). In contrast to the U.S., German courts were not able to play a veto, but political power was exercised by transforming the meaning of a given rule in the context of legal discourse and jurisprudence.[1] Similar patterns of interaction between the courts and the legislative branch generated a Political Science research stream in the United States, but had no sustainable influence on Political Science in Germany.

Finally, it is surprising that the extensive literature on corporatist patterns of policy-making in the 1970s and 1980s did not acknowledge the role of the courts and the legal system, although it has always emphasized that corporatism depends on state support (e.g. Streeck 1994; Streeck and Kenworthy 2005). Some of the policy fields in which corporatism is (or was) especially strong are also marked by significant case law elements and a high level of regu-

latory court activity, such as labor law or social law. Hence, to some extent self-regulation of interest groups has been accompanied by a high level of political court activity. Moreover, it would be interesting to investigate how the legal system has contributed to the emergence and stability of corporatist networks, given that the European patterns of interest group politics have differed so much from the US-American experience, where the "litigious society" (Lieberman 1983) is explained by the absence of political institutions of interest intermediation and conflict resolution (Kagan 2001). In the United States, a highly visible research community has investigated how interest groups have addressed the courts in order to protect women, workers, animals, consumers, patients, the environment and so on (Golann and Fremouw 1976; Handler 1978; Epp 1998; Feeley and Rubin 1998; Frymer 2003; Barnes 2006). This research tradition should have inspired European scholars to raise the question, how the courts and the legal system might (or might not) be contributing to patterns of interest representation.

To sum up, in Germany at least, Political Science had several historical reasons as well as relevant examples for developing a strong "judicial politics"-research tradition. Scholars easily could have discussed the particular role of courts and the legal system as a precondition for corporatist policy-making. But it seems as if the legal roots of Political Science simply got lost somewhere between then and now. Probably this development is due to the fact that Political Science in Germany was a latecomer: only after 1945 it was established as an independent discipline. And scholars aimed at emphasizing its differences to competing disciplines, such as sociology and law (Maus 2006). Hence, perhaps it was not *in spite of* but *because of* its legal roots, that Political Science in Germany abandoned the analysis of legal issues.

3. Different Perspectives on Courts and Politics

Research on US-American and European courts differs not only with regard to volume and scope, it also pursues different substantive perspectives. Or more precisely: European research has adopted only some aspects of the US-American debates. Scholars frequently talk about "judicialization" here and beyond the Atlantic Ocean, which means that the legal system is politically relevant in one or another way (Vallinder 1994a). But in detail, consensus ends with regard to

the question of what "judicialization" means and how law and politics interact.

In the U.S. research is done on almost any imaginable aspect of the judiciary. And a very important part of the literature discusses the politics of judicial action. In this view, the legal system is regarded as a part of the political system (Shapiro 1964b). The authors emphasize the commonalities of courts and legislative institutions or governmental agencies. Judicial action is described as a sub-type of political action and as one element among broader political processes. Judges are regarded as policy-makers driven by party affiliations or policy preferences. Just like parties or governments, courts are thought to be the target of interest group strategies. Hence, one very important research perspective refers to the *political foundation of judicial action*. This kind of analysis more or less takes away the distinctiveness of the legal system: "Legal argument incorporates more non-legal materials and adopts modes of analysis that are not so distinct from other discourses. Law firms become more like businesses; courts become more like other governmental bodies (…); legal academics become more like other academics" (Galanter 1992: 18; Cichowski 2006).

In contrast, a major part of the literature on European courts emphasizes the opposite flow direction of interaction between law and politics. The dominant research perspective focuses on the *political effects of judicial action* and the process of *juridification* (Stone 1992a). In this perspective, legal activity is not the *extension of* political action by other means, but it unfolds at the *expense of* political action (e.g. Landfried 1994). The legal system is not invaded by politics but follows its own logic. Moreover, it is not the legal system but the political system which loses its distinctiveness. Vis-à-vis the courts, governments are said to exercise self-restraint (Barreiro 1998) and to rely on judicial "technocratic government" (Shapiro and Stone 1994a: 402) ; it is assumed that judicial methods of decision-making enter the policy process (Vallinder 1994b); and that judicial discourse penetrates political discourse (Stone 1994). The idea of juridification has only recently emerged in the US-American literature. Scholars, such as Mark A. Graber and George I. Lovell, have started to investigate "legislative deferrals". This notion means that legislative actors might be interested in delegating governing power to courts as a means of escaping accountability (Graber 1993; Lovell 2003).

The already cited argument put forward by Alec Stone that Political Scientists in Europe were less engaged in research on courts because this would require them to learn a "second language," already hints at the different perspectives. Many scholars working on the US Supreme Court would doubt that it is even necessary to understand the legal discourse because to them judicial methodology is nothing but "a cloak to conceal the real bases for justices' decisions" – namely policy preferences or personal values and attitudes (Spaeth 1995: 305).

This main divergence in the research perspectives affects many aspects of the debate, because it has an impact on the perception of the relevant actors and the concept of judicial power which underlies the research. The following sections provide a historical account of how research on judicial politics developed differently in the United States and in Europe. Both traditions did not evolve independently from one another: particular streams of the US-American discourse gained attention in the European context and contributed to a particular European perspective on courts and politics. But other important messages sent by the US-American scientific community have not really been acknowledged in Europe so far. The idea of judicial decision-making as a political process still is more or less alien to Europe.

3.1 "Political Jurisprudence" in the United States

As mentioned above, the political analysis of the legal system has a long tradition in the United States. Alexis de Tocqueville, for example, devoted two chapters of his *Democracy in America* to the "political importance" of the courts (Tocqueville 1990 [1835]). A major impetus for the further development of this research tradition was given by the "legal realism" movement that enjoyed greatest prominence in the 1920's. This school of thought emphasized the interdependence of law, the legal system and society. The Realists attacked the discipline and practice of law, the dominant "mechanical jurisprudence" and "formalism" of their time, by claiming the indeterminacy of law instead (Leiter 2002: 1). First, they argued that each and every law is vague, which implies, secondly, that legal reasoning and judicial methods cannot deliver unambiguous interpretations. In this perspective, each explanation for why judges decide as they do has to look beyond the law itself. Moreover, the

Realists suggested investigating the operation of law in relation to social reality.

This approach has had a huge impact on legal scholarship and practice in the United States, and it inspired many subsequent schools of legal thought in the 20th century. Although Sociological Jurisprudence, Critical Legal Studies or Law & Economics differ in terms of their political orientations and disciplinary origins, they share the basic understanding of the non-legal foundations of judicial action claimed by Legal Realism (Kitch 1983; Trubek 1984). As a consequence, the autonomy of the legal system (and of law as a discipline) was more and more questioned (Posner 1987). In Political Science, the so-called "Political Jurisprudence", which emphasized the political character of judicial action as described above, initially became influential in the 1950s (Shapiro 1964b, a).

What were the main topics and perspectives of this research stream, which embodies the distinct character of the US-literature on courts and politics? "The core of Political Jurisprudence is a vision of courts as political agencies and judges as political actors." This quotation, taken from a landmark article written by Martin Shapiro in 1964, specifies the two different wings of Political Jurisprudence (Shapiro 1964b: 296). The macro-level *institutionalist* approach aimed at analyzing courts as part of the broader institutional structure of the US-American government and as participants of the political process. Inspired by group theory, scholars investigated the interaction of courts and interest groups that dominated US-American politics at that time. Shapiro saw the courts as the last resort for those interests lacking "immediate political power" and access to legislative actors (Shapiro 1961).

By contrast, the micro-level *behavioral* approach focused on the decision-making process of the judges (Schubert 1958). Once scholars of Political Jurisprudence had claimed that judges make rather than discover law, the question arose what – if not legal reasoning – determines judicial decisions. With his very influential work on the Roosevelt court, C.H. Pritchett introduced behavioralism into US-American judicial studies (Pritchett 1948). He examined the phenomenon that the number of individual opinions, written by Supreme Court judges in addition to the court opinion, has continuously increased since Roosevelt's presidency. He explained the rising importance of concurring or even dissenting opinions with an increasing willingness of the judges to express individual values and

preferences. In the context of the behavioral revolution in American Political Science, this approach became the predominant research perspective in the area of courts and politics with several important implications.

First, a major part of US-American research still perceives the courts as a conglomeration of individual judges. The analysis of judicial activity focuses on their individual decisions which are explained in terms of policy preferences, values and attitudes. The most prominent theoretical approach in this area is the so-called "Attitudinal Model of Judicial Behavior" (Segal and Spaeth 1993). Its underlying assumption can be captured by the principle-agent framework: once a judge of the Supreme Court[2] has achieved life tenure and the peak level of his career, he becomes independent of those actors who appointed him: the principal can no longer control his agent. As a consequence, personal preferences and values are the most important variables in explaining judicial behavior: "Justice William J. Brennan decided cases as he did because he was liberal; Justice William Rehnquist or Warren Burger, because they were conservative" (Spaeth 1995: 305).

Second, this anecdote indicates the particular understanding of judicial power which is inherent in the "attitudinal model". Earlier scholars, such as Robert Dahl, had questioned that judges dispose of any independent power flowing from their affiliation with the party which appointed them (Dahl 1957). By contrast, in the perspective of the "attitudinal model" judges are very independent and have much leeway to pursue mere policy preferences. Their room to maneuver is guaranteed by an institutional setting that ensures their income and position. Once a judge is appointed to the Supreme Court bench, institutional restrictions (or party affiliations) hardly play any role any more. For this reason institutions have almost disappeared from the research agenda.

With the predominance of behavioralism in Political Jurisprudence the institutionalist wing of the debate fell more and more into oblivion (Gillman 2004). "Political Jurisprudence", which had *claimed the linkage* between jurisprudence and politics, redefined its research agenda towards the analysis of "judicial behavior", which *replaced* jurisprudence by politics. This disciplinary evolution was not uncontested. Martin Shapiro advised the community not to neglect the role of legal doctrine, claiming that it was in the realm of legal reasoning that the judges pursued politics (Shapiro 1964a: 40).

And even one of the founding fathers of behavioralism in the field of courts and politics, Charles Herman Pritchett, became more and more skeptical: "political scientists who have done so much to put the "political" in "political jurisprudence" need to emphasize that it is still "jurisprudence". It is judging in a political context, but it is still judging; and judging is something different from legislating or administering" (Pritchett 1969: 42).

The situation changed to some extent with the emergence of the "new institutionalism" in Political Science which also affected the research community on courts and politics (Smith 1988). Hall and Taylor distinguish between three different approaches: the Rational Choice, the Sociological and the Historical Institutionalism (Hall and Taylor 1996). In the field of courts and politics, two rather than three camps have been active. The larger group of scholars embraces a Rational Choice Institutionalism (which emphasizes choice rather than institutions), while a minority group is devoted to a "historical-interpretive account" (Gillman 2004), in which the historical and the sociological approaches overlap.

The Rational Choice Institutionalism is predominantly embodied in the so-called "strategic model of judicial decision-making" (Epstein and Knight 1998). Although this approach takes institutional factors on board, hits inventors do not anchor it in the institutionalist tradition, but describe it as a reaction to the deficits of the behavioral approach. In doing so, they refer to an earlier work of Walter Murphy, who had already made use of the rational choice paradigm (Murphy 1964). Moreover, they describe their work as an answer to the emergence of "law and economics": "Over the past decade or so, numerous law and business school professors have been touting what they call positive political theory (PPT), consisting of "non-normative, rational-choice theories of political institutions", as an appropriate framework for the study of judicial decision making. In some sense, then, these professors are asking us modern-day political scientists and our students to take Murphy's intuitions seriously and to integrate them into our work. Should we take heed? The answer we offer (…) is yes" (Epstein and Knight 1998: xiii). Their model was heavily inspired and prepared by earlier scholars who thought in the same direction (Eskridge 1991; Schwartz 1992; Spiller 1992, Cameron 1993).

Just like the attitudinal model, the strategic account argues that judges seek to realize policy preferences. But Epstein and Knight

assert that judges are not unconstrained in their decisions. Instead, they are thought to act strategically in that their choices depend on their expectations about the choices of other actors, namely the other judges of the bench, the Congress, the President (and the public opinion). Institutions are regarded as important to the extent that they structure the interaction between the players. More precisely, they influence the formation of expectations about the preferences and likely decisions of the other actors involved.

By acknowledging the impact of the legislative branch for the behavior of judges, the strategic model reacts to the "old" demand put forward by Martin Shapiro, which suggested analyzing courts in their interaction with other political agencies. But the difference to Shapiro (and the proximity to the attitudinal model) lies in the fact that courts still are not regarded as an institution but as a conglomeration of individual policy-seeking judges. In this respect, the institutionalist part of the approach remains weak, as routines, roles or procedures deriving from the institutional environment and the context of law in which judges are maneuvering don't seem to play a major (socializing or structuring) role. Therefore one could describe the strategic model as a more sophisticated version of the attitudinal model.

The historical-interpretive account embraces a mixture of sociological and historical institutionalism (Clayton and Gillmann 1999). It assumes a more important role for institutions on judicial decision-making and emphasizes the particular features of judicial action (as opposed to legislative action). Studies in this area explore the particular role and self-description of judges (Gillman 1999), the influence of informal hierarchy and internal decision-making procedures on the bench (Davis 1999), or the institutional norms and organizational conditions which have an impact on judicial decisions (O'Brien 1999). Hence, most of these studies tend to treat judges as a part of an institutional setting provided by the court and the law.

The core topic of this tradition is the role of legal ideas and legal doctrine for court decisions. The particular achievement of the historical-interpretive approach is the rediscovering of the rule of law. From sociological institutionalism it borrows a very broad definition of an institution, which also includes cognitive structures. In this perspective, legal doctrine and discourse is regarded as an institution. Political Scientists often hesitate to embrace this kind of definition. But here it is argued that the character of the legal discourse is very

distinctive from political discourse as it follows strongly *formalized rules* of doctrine and reasoning which structure the result (Smith 1988). The underlying assumption is that the legal sphere disposes of some kind of autonomy and cannot be fully explained by extra-legal factors. Hence, while the behavioralist and the strategic approach has claimed that all law is politics, the historical-interpretive account brings the particular character of the law and legal system back in.

It is assumed that legal procedures and legal ideology shape not only the interactions between but also the preferences of the judges and of society at large: "legal ideologies are relatively autonomous structures with their own peculiar internal character, so that they sometimes act as independent variables that transcend and actually help shape the content of the immediate self-interest of social groups" (Smith 1988: 98). Moreover, scholars investigate how legal meaning itself is constructed (Silverstein 1996). Here, the influence of social constructivism on sociological institutionalism becomes obvious (Hall and Taylor 1996: 15).

A strong historical dimension is inherent in this body of work. In this perspective, courts shape politics by the development of legal doctrine over time (Feeley and Rubin 1998; Novkov 2001). Although the notion of path-dependency is rarely used, there is a path-dependent understanding of change, as the creeping process of shaping legal doctrine into another direction unfolds stepwise over long periods of time. The results deriving from this type of analysis are often surprising. This is especially the case with regard to the interpretation of the Roosevelt era.

As already mentioned, in the New Deal-period a major topic for Political Jurisprudence was the interaction between the Roosevelt government and the Supreme Court. While the court initially struck down much legislation in the area of tax and labor law, it eventually accepted regulatory state policies. Conventional wisdom has explained this shift by the so-called "court-packing plan" of the Roosevelt government (Leuchtenberg 1995). The argument goes as follows: after having been re-elected, Roosevelt planned an institutional reform of the Supreme Court which aimed at increasing the number of judges from nine to fifteen. This reform would have enabled him to get a majority on the bench by appointing new judges. In order to avoid this scenario, so the argument goes, the judges changed their minds about the regulatory state ("a switch in time that saved nine"). The crucial case, which has traditionally been seen as a

radical break with past decisions, was *West Coast Hotel vs. Parrish*, in which a female hotel employee filed a lawsuit against her former employer, asking for back pay under a state statute mandating a minimum wage for women.

But using a historical-interpretive account, Julie Novkov showed that the ruling in this case did not reflect a major and disruptive shift in jurisprudence, but it was the culmination of a development in legal doctrine that had unfolded over a long time period. The innovation (only) lay in the extension of an already established standard that was applied from female workers to all workers. Hence, the court-packing plan did not evoke a radical shift in jurisprudence. And the judges did not react to a legislative threat but they developed a new jurisprudence incrementally. According to Novkov, in this process "nodes of conflict" were crucial, "moments in the development of doctrine during which the various groups of actors who have access to the legal community struggle among themselves and with each other to establish their interpretations of a particular legal concept or phrase as the dominant norm" (Novkov 2001: 16). In her account, the politics of judicial action lies in the capacity of individual or collective actors to influence the legal doctrine, by mobilizing intellectual or material resources. Her analysis goes beyond the courtroom in claiming that political influence does not necessarily have to stem from the judges' policy preferences; instead there might be a political process of interest intermediation between societal groups and the court with regard to the meaning of legal provisions and cases.[3] I will return to this argument in the following section when the European research is discussed.

To sum up, one can broadly distinguish two different phases in the development of the US-American research on courts and politics. In the formative period, scholars practiced law avoidance, emphasizing the extra-legal factors of judicial decision-making. Perhaps this was necessary to discover the field as a topic for Political Science. In any case this was driven by the impact of the behavioral approach in general. Since the emergence of the new institutionalism, a tendency has gained support that takes law more seriously and focuses on the interaction of the courts with other political institutions.

3.2 European Courts and Political Science

As already mentioned, research on European courts has only recently emerged; courts drew scholarly attention from the 1980's on. The landscape is somewhat fragmented, and there is no coherent theoretical framework integrating the different streams in the literature. Moreover, the various bodies of work do not systematically speak to one another. Research on the European Court of Justice has developed rather independently from the area of judicial politics, using mainly its own paradigms drawn from international relations and theories on European integration (Weiler 1991; Garrett 1992; Burley and Mattli 1993; Garrett 1995).[4] The findings on national courts provided by European scholars are only loosely and partially connected to the US-American debates (De Franciscis and Zannini 1992; van Koppen 1992; Verougstraete 1992; Landfried 1994), while most US-Americans working on Europe link their analysis explicitly to the findings of Political Jurisprudence (Stone 1992a; Volcansek 2001). This diversity notwithstanding, there seems to be some common ground making up the distinctiveness of the literature on European courts. Table 1 compares the major features of the debate.

Table 1: Different Research Perspectives on Courts and Politics

	USA	**Europe**
Level of analysis	Micro-level: judge	Macro-level: court
Dimension of analysis	Process: Politics of judicial action	Effects: Political impact and functions of judicial action
Perception of the legal system	Extension of political system	Autonomous sphere
Interaction of legal and political system	Politicization: Politics invades legal sphere	Juridification: Judicial action invades or displaces politics

The (re-)discovering of judicial action in Europe is to some extent related to the institutionalist turn in Political Jurisprudence. In the 1990's, established US-American scholars, such as Martin Shapiro, turned to analyzing European courts, collaborated with younger colleagues and thereby "exported" the institutionalist wing of their domestic research traditions (Shapiro and Stone 1994b; Shapiro and Stone Sweet 2002). The major focus was put on the interaction of

courts and other political actors. Against this background, courts are invariably conceptualized as *unitary, institutional* actors. Hence, while a large part of the US-American research has predominantly pursued the micro-level behavioralist path of Political Jurisprudence for many decades, research on European courts has concentrated on the macro-level institutionalist wing.

The fact that many European courts function as "collegial enterprises" is conducive to the predominance of the institutionalist perspective (Kornhauser and Sager 1993: 1). While – as already mentioned – US-American Supreme Court judges are free to publish concurring or dissenting opinions in addition to the single opinion of the court, many judges in Europe are not allowed to do so. And even where individual votes are reported and diverging opinions are revealed, this is only rarely exploited as a resource (Stone 1994: 444–445).

But the emphasis on the institutionalist perspective does not only respond to differing structures of the legal system but also indicates a different general approach. It is argued that it is not the individual vote, but the majority of votes that counts: "Individual judges vote, as do individual legislators or cabinet ministers, but the policy that governs is the one that achieves the winning majority" (Volcansek 2001: 348–349). This quotation already indicates the second crucial difference in the literature: while a distinctive part of the US-American research focuses on the *process* of judicial decision-making (how do judges decide?), the work on Europe almost exclusively deals with the *effects* of court decisions. In which way does the European Court of Justice contribute to European integration (Burley and Mattli 1993; Weiler 1994)? How do courts influence policy processes (Stone 1992a) and public policies (Jackson and Tate 1992)? Under what conditions do courts block or foster policy change (Landfried 1994; Tsebelis 1995, 2000; Volcansek 2001)? It is also this outcome-perspective that nourishes the debate on courts as one of several regulatory agencies and that links courts to policy analysis (Guarnieri et al. 2002).

Many of these studies find more or less a process of *juridification* in which judicial actors, procedures and categories stepwise dominate or displace legislative politics (Stone 1992a; Vallinder 1994b; Barreiro 1998). Due to a fear of court censure, so the argument goes, legislative actors sacrifice policy goals in order to apply to court jurisprudence. Moreover, legal arguments and considerations are

thought to enter into the policy-making process (Stone 1992a; Landfried 1994; Stone 1994). And regulation by the state is displaced by court regulation (Hildebrand and van Waarden 2005).[5] This perspective describes the interaction of law and politics in the opposite direction, compared to the US-American literature that investigates the politics of judicial action and the *politicization* of the legal system.

The concept of juridification involves a particular understanding of the legal system. While Political Jurisprudence conceives of judicial action as political action by other means, the work on European courts emphasizes the *relative autonomy and distinctiveness of the legal sphere*. The bulk of the literature does not regard judicial and political action as interwoven, but they are described as separate ideal types: Legal action is said to be "rule laden" while political action is "interest driven" (Stone 1994); judges are supposed to argue while politicians bargain, judicial decisions are alleged to be made by deliberation while political decisions are based on the "majority principle" (Vallinder 1994b) and so on.

Similar to the historical-interpretive institutionalist account in the US-American literature, the European perspective stresses the impact of the "rule of law" (legal doctrine and reasoning) on politics. Courts are perceived as distinctive insofar as the legal system (…) "generates a kind of policy-making style itself" (Shapiro and Stone 1994a: 399). But while the US-American historical-interpretive account takes the distinctiveness of the legal sphere as a starting point to investigate how the development of legal doctrine is influenced by politics, research on Europe tends to treat this aspect as a black box and confines the analysis to the effects of the rule of law on politics and public policies.

Inherent in the perception of the legal system as autonomous is a particular understanding of judicial power. In the behavioralist "attitudinal model" judicial power is almost unconstrained, which derives from an institutional environment enabling the judges to pursue sincere values and policy preferences. And the "strategic model" assumes the dependence of the judges on the other actors involved (e.g. concurrent majorities in the legislative branches). By contrast, the European literature discusses another, and specifically judicial, power resource: legal knowledge and professional skills. Judges are not regarded as politicians, but as politically relevant (epistemic) experts or technocrats. Judicial power increases to the extent, so the

argument goes, that judges, lawyers (and politicians) declare a political question as a "technical question" which falls into the jurisdictional domain of the legal profession.

This argument was most explicitly put forward in the neo-functionalist account of European integration. The argument goes as follows: the European Court of Justice was able to promote integration in those domains which had been insulated and shielded against political intervention before by declaring them as technical. In this perspective, the main power resource of judges is to act as nonpolitically as possible: "Herein (…) lies a paradox that sheds a different light on the supposed naiveté of legalists. At a minimum, the margin of insulation necessary to promote integration requires that judges themselves appear to be practicing law rather than politics. Their political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning. In a word, the staunch insistence on legal realities as distinct from political realities may in fact be a potent political tool" (Burley and Mattli 1993: 44).

Here and there, the emphasis on the autonomy of the legal system seems to be grounded in the systems theory tradition. The literature on the European Court of Justice, where neo-functionalism plays a major role, is one example (Burley and Mattli 1993; Stone Sweet 1999). Another area is the debate on the "globalization of American law" (Kelemen and Sibbitt 2004), fostered by the idea that all legal systems might converge on the US-American model. With regard to Europe, critics of this thesis take the autonomy of the legal sphere as a starting point to argue that this development is very unlikely (Teubner 1998; Levi-Faur 2005). The principle of "autopoiesis", which means that law and the legal system reproduce themselves according to their own norms and logic, is thought to shield the legal system to some extent against external political invasion. This general idea, although rarely explicitly linked to systems theory, makes up the major body of work on European courts.

While all these studies on European courts are theoretically and empirically very rich, the starting assumption of US-American Political Jurisprudence has not received the attention it potentially deserves. Research on Europe tends to ask how judicial arguments and action enter and affect the policy process. But Political Jurisprudence was (also) interested in the question, how politics influences jurisprudence.

These diverging perspectives can be explained by the different scholarly projects pursued in the US-American and European literature. One major aim of Political Jurisprudence was to reflect on the discipline of law, challenging the idea of neutral legal reasoning. By contrast, European research is pushed forward by Political Scientists interested in European integration or comparative studies of the interplay of political institutions. From the US-American debate European scholars learned that courts are influential political actors, but they do not necessarily share the goal of demystifying the discipline of law. Here and there, one gets the impression that some European scholars do not even deny the possibility of neutral judicial action, e.g. when judges are characterized as "impartial" (Vallinder 1994b: 92); or when it is argued that judicial discretion only rarely plays a role, but that, in most cases, the application of law was "fairly straightforward" (De Franciscis and Zannini 1992; Verougstraete 1992: 94). By contrast, Political Jurisprudence claims that the application of law is *never* straightforward because legal reasoning and judicial methods cannot deliver unambiguous decisions.

The one political aspect of judicial decision-making which is dealt with in the European context is the role of party affiliation. But although judges all over Europe are more or less politically appointed, party political influence on court decisions is considered to be rather low, restricted to very particular policy issues or unclear (van Koppen 1990; Landfried 1994).

Two major exemptions to the rule should be emphasized. They are provided by US-American scholars working on courts in Europe. Their work integrates the European and the US-American approaches. The first one is Alec Stone Sweet and his work on the French *conseil constitutionnel* (Stone 1992a, b, 1994). His approach is "European" in the sense that he shares the assumption of the relative autonomy of the legal sphere (Stone 1992a: 10–15). Moreover, he is mostly interested in the effects of the council on public policy. At the same time, his work is "US-American" as he investigates the influence of party politics on the councils' decision. But his very rich and interesting work is not representative insofar as the French council is not a court, but a third chamber in the parliamentary arena. Positions are mainly held by party politicians (not by judges), the court is not at all linked to the judicial system, and the individual citizens don't have access to it. Hence, what we find is the interplay of different *political* institutions (which is of course a

political process). Stone only tends to treat the council as a court, given that it performs the function of "judicial review" which in other countries is performed by constitutional courts.[6] But actually, he investigates the unique case of politicians exercising jurisprudence (and not of judges shaping politics).

The second major exemption is the work by Mary Volcansek who aims at adapting the US-American strategic model of judicial decision-making to the European context. She combines it with the veto player framework developed by George Tsebelis (Tsebelis 1995, 2000; Volcansek 2001; Tsebelis 2002). Modifications of the strategic model refer to the unit of analysis. Volcansek claims that – for reasons discussed above – it is necessary to choose the macro-level perspective of courts (instead of analyzing the individual decision-making behavior of judges). For this purpose, she suggests making use of the veto player framework. She models courts as one of several bargaining partners whose agreement is necessary to realize policies.

In this context, she develops an implicit understanding of how judges make decisions. She assumes that they either pursue policy preferences (their own or those of one of the other bargaining parties), or, "with indifference to the preferences of either other player", they choose to follow the legal model, which – according to Volcansek – means that they try to achieve "legal clarity" and "legal accuracy" (Volcansek 2001: 352–353). Hence, again a clear distinction is made between political and judicial action, when Volcansek promotes the idea that courts choose arbitrarily between the different (political or judicial) logics of action, depending on policy issues and circumstances.

Although Volcansek's endeavor to transplant concepts of Political Jurisprudence more explicitly to the European context is very helpful and welcome, I would suggest heading towards another direction. First, in the course of his ongoing work, Tsebelis himself has – for several reasons – more and more abandoned the idea of analyzing courts as veto-players (Tsebelis 2002: 226–228). Second, I am not sure if Volcansek's concept really reflects the state of the US-American debate in the most useful way. My doubts apply to her concepts of judicial power and decision-making. Not even Knight and Epstein, who argue in favor of the strategic model, assume that judges can more or less independently choose between different logics of action, but they aimed at showing that courts are generally

constrained. Volcansek's concept of judicial power is more similar to that of the attitudinal model which assumes much leeway for the judges. Moreover, given that the US-American research community (with the exception of the behavioral approach) has just rediscovered the role of law and legal reasoning, research on Europe seems to be confirmed rather than disproved in emphasizing the impact of the legal dimension on court decisions.

Once one takes law seriously, the question arises if we can conceptualize judicial behavior as a *choice* between political *or* judicial action. Political Jurisprudence claimed the linkage of both by emphasizing that legal clarity and accuracy can never be achieved, but legal decisions always involve political decisions. It seems more appropriate to assume that preferences are shaped and channeled by the obligation of courts to deliver principled decisions resting on legal reasoning. Therefore only those preferences are enforceable that can be deduced from the statute (and/or prior case decisions) by judicial methods. This still leaves much leeway for choice between competing interpretations but methods of legal reasoning restrict and shape policy choices. Hence, judges who want to pursue policy preferences have to take into account that their decision has "to fit" to existing legal norms or prior jurisprudence. Therefore, I will suggest in the concluding section of the paper that it is not the strategic account but the historical-interpretive account of judicial politics which is most promising for the further development of research on courts in Europe.

4. Conclusions and Suggestions

I would agree with Stone Sweet and Volcansek that research on European courts should look more closely at the politics of judicial action in Europe. For this purpose, I want to suggest making use of the historical-interpretive account of judicial politics as exemplified by the work of Julie Novkov (see section 3.2). She analyses the politics of judicial action in terms of the influence of societal actors on the development of legal doctrine. Her analysis is not limited to the courtroom or to the preferences of the judges on the bench, but includes broader processes of interest mobilization. This approach has particular advantages especially with regard to its application in a European context:

First, the literature has often hinted at the fact that research strategies and methods of the US-American context are not easily exported to Europe, given that the decision-making processes of European courts are much less transparent than those of the Supreme Court (Stone 1994: 444–445; Volcansek 2001: 348; Tsebelis 2002: 227). That's why it is difficult to evaluate the judges' policy preferences. But we can evaluate if and how political actors (e.g. interest groups, parties) try to influence the development of legal doctrine in the legal process which takes place before the court makes a decision. A court decision does not occur out of nowhere, but responds to a legal discourse unfolding over a longer time period – sometimes months, sometimes even years. In most cases the universe of competing legal concepts is obvious before the judges make a decision, and the court just picks one of them, perhaps with some modifications. This means that political interests have to be translated into legal language in order to become successful. We can analyze how these concepts and translations emerge, how they are linked to political interests, which intellectual and material resources are used to help them become the dominant norm and to what extent they are picked up by the court. Methodologically, we can make use of the framework provided by Sociology or Political Science of Knowledge (Berger and Luckmann 1966; Nullmeier and Rueb 1993).

Second, as already indicated this approach also resumes the European tradition of analyzing interest group politics, thereby deflecting the research perspective from corporatist policy-making with the state towards the role of legal action. In policy fields which are considered as particularly legalized this might be an especially promising endeavor. In this context, European research could learn from another large body of US-American literature on law and politics, namely those studies that analyze how interest groups have used the legal system to foster social and policy change (Scheingold 1974; Auerbach 1976; Handler 1978; Handler et al. 1978; Chong 1991; Epp 1998; Barnes 2006). Even if particular strategies, e.g. filing class action lawsuits, do not play a role in Europe, US-American research has shown that this kind of litigation is only one (and not even the most important) among various strategies to influence legal development.

The third and major advantage of Novkov's account is that she neither glorifies nor denies the role of law and legal reasoning, but she assumes that the development of legal doctrine is a process

heavily influenced by politics. This approach can integrate the best parts of US-American Political Jurisprudence into the European work, thereby preserving the strengths of the latter. If Alec Stone is right in claiming that Europe suffers from a tradition of the separation of law and politics and of regarding the realm of law as the sovereign territory of the legal profession, the project of Political Jurisprudence to demystify this is more important in Europe than anywhere else. It would also be extremely useful to reveal that the development of legal doctrine and discourse (and therefore court decisions) can be analyzed as a political process of political interest intermediation.

NOTES

1. A second major difference was that at some point the US Supreme Court started to accept the policy of state intervention while the German courts did not do so, thereby actively contributing to the collapse of the Weimar Republic.

2. Segal and Spaeth always emphasized that their model aims at explaining the behavior of US Supreme Court judges. The authors concede that judicial behavior might differ from their model to the extent that e.g. lower courts work in a different environment (Spaeth 1995). Since still today eighty percent of the literature on courts and politics focuses on the US Supreme Court this limitation did not impair the success of the model.

3. This argument is also put forward by Epstein and Knight in their strategic model of judicial decision-making. They claim that judges do not only consider their own preferences or those of the legislative actors but they also respond to the public for the sake of institutional legitimacy (Epstein and Knight 1998: 46–49).

4. The most explicit reference to Political Jurisprudence is offered by Karen Alter who investigates the role of national courts for the making and supremacy of European law (Alter 2001)

5. The linkage between courts and regulation is controversial. Some scholars argue that the increasing power of judges can be traced back to the expansion of the regulatory state: "Obviously, where a legal rule exists there is also a judge who may be asked to interpret and apply it" (Guarnieri et al. 2002: 7). But others argue that de-regulation does not diminish but further increase judicial activity. For example, Hildebrand and van Waarden have shown that the de-regulation of various branches in Europe was accompanied by a higher level of litigation (Hildebrand and van Waarden 2005).

6. This already indicates the functionalist bias of his analysis.

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