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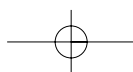
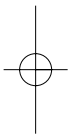
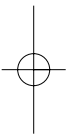
*The Juridification of Politics in the
United States and Europe: Historical Roots,
Contemporary Debates and Future Prospects*

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1. INTRODUCTION

IN AN ARTICLE prominently published a few years ago in *The New York Times*, Roger Cohen (2000) sounded a by now familiar theme: the nation-state is losing ground in Europe. But what was interesting about Cohen's article was not the general assertion, both commonplace and contested, that the European Union is characterised by the transgression of national sovereignties. Rather, its significance lay in his contention that a new European identity is in the process of being shaped that is based neither on the adoption of an elusive common 'culture', in the quasi ethnic sense of a common language, literature and history, nor on traditional nation-statist civic attributes such as mass political parties, the ritual of voting, the symbolism of flag, anthem, conscription, oath of allegiance, or passport. Rather, Cohen claimed, a new 'sense of European citizenship' is emerging, which is founded on the 'pre-eminence of European law over national legislation'.

And indeed, from its modest beginning in 1952 when the precursor to the European Court of Justice was created to settle rather technical disputes in the European Coal and Steel Community, the European Court has become a central and powerful institution within the emerging structure of the European Union, a Court whose jurisdiction has expanded to include not only narrowly defined economic issues, but also laws and rights that relate to areas like gender discrimination, human rights, working conditions, and the environment. As one official of the court notes, 'we used to be associated with abstruse things like fishing quotas, but increasingly European citizens see this as a place where they can uphold their rights', rights that are at times claimed against the national states on the basis of a developing EU charter of individual rights and anti-discrimination laws (in Cohen 2000). In other words, the European Court and the treaties on



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which the Court's rulings are based, has come to function in a manner similar to that of the American Supreme Court acting on the basis of the US Constitution and the Bill of Rights. This is an aspect of the EU that has been further strengthened through the work of the Laeken Convention, resulting in the proposed new Constitution for Europe that was presented in June 2003.

This leads us to a number of questions that we will seek to address in this chapter. To what extent is national parliamentary democracy in Europe in the process of being replaced or significantly complemented by a politico-legal culture where citizen action increasingly takes place through litigation within a transnational, European legal domain? Is the figure of the citizen, historically if not by definition bound up with the nation-state, about to be superseded by a new actor, a litigant acting within an emerging international 'community of law' (Wincott 2000) where both private and public conflicts will increasingly be fought out and resolved in international as well as national courts?

From the vantage point of normative political theory the question becomes one of assessing how one best conceives of and evaluates this newly empowered judicial realm: should this trend towards an increased juridification of politics be understood as an opening up of new opportunities for formerly disempowered individuals and groups to directly collect and exercise power, or should it, conversely, be critiqued as a debasement of deliberative and representative democracy, to put it provisionally in dichotomously charged polemical terms? We will return to these questions towards the end of the chapter.

However, let us first note that the juridification of politics to a considerable extent must be understood in empirical, rather than normative terms; that is, as one expression of the broad secular trend that is currently challenging the political order that we call 'national democracy'. From this point of view, the juridification of politics is a more or less unavoidable fact of modern political life, and the underlying assumption here is that Europeans could benefit from a deeper understanding of the American experience since there the close intertwining of law and politics has a much longer history and is far more firmly embedded in the constitutional framework and political culture.

What, then, are the secular trends that serve as the incubator for the juridification of politics? As discussed in more detail in the introduction to this book, at the broadest and most abstract level the context is that of 'globalization', first and foremost understood as the process whereby formerly sovereign or at least quasi-sovereign national economies have been overwhelmed by the emergence of a global economy. Since globalisation has occurred in the spirit of neo-liberal economic theory, this has in turn meant that the political sovereignty of the classical nation-state has been challenged as well, and that the space for national politics has shrunk.

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In Europe the institutional context for this process, to which we will return, is the EU.¹

A second crucial and related aspect of this secular trend is the rise of the modern individual, characterised by his and her reluctance to accept constraints imposed in the name of national community or state interest. Modern individualism is, like globalisation, best understood in terms of the victory of a market society that gives primacy to the individual in both political and economic terms. Thus, the globalised market society is challenging the nation-state both from above and from below.

The EU is in this context a particularly intriguing case to study since it can be understood simultaneously as an attempt to redress the lost balance between politics and the market and as an accommodation to the secular trends towards market society individualism. At one level, to be sure, it involves asserting the primacy of politics over the market. Especially with the Maastricht Treaty and the introduction of the so-called 'social dimension', ie an acknowledgement that the Union is not simply a common market but something more, a political society in which concerns about social justice must play a role along with the traditional emphasis on creating an open economy and a freer market, it has become clear that the ambitions of the EU include not only making the market safe from politics, but also its citizens secure from the uncertainties of the market. In this respect the EU is, not surprisingly, following in the footsteps of the nation-states that make up the Union. One might say that the German notion of the 'social market economy', with its dual agenda of promoting an efficient and productive economy as well as a substantial measure of social security, has been imported into the EU as a political objective.

However, the construction of the EU also entails the emergence of a political system that is profoundly different from the classical European nation-state with its affective base in a relatively homogenous national community and a corresponding politics of social solidarity. Instead, the EU is in fundamental ways more like the US, a political regime that seeks to balance the interests of the (federal) state with that of individuals, market actors, the institutions of civil society, and the governmental institutions at the (national) state and sub-national and local levels.

One key aspect of this 'Americanized' Europe is the emergence of a new juridified political culture. While neither the nation-state, nor majoritarian democracy is likely to disappear anytime soon, new avenues for collecting and exercising power are emerging that are far more complex and decentred as well as more amenable to the champions of individual and minority rights. An American style 'rights revolution' is unfolding in Europe, involving the use of the courts to claim rights and settle disputes, to seek protection

¹For a more detailed discussion of the EU from this perspective, see ch 4 by Wincott in this volume.

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from discrimination, to battle states and corporations as well as fellow citizens and citizens' organisations.

This shift signals not simply the empowering of individuals qua individuals, but also, and perhaps more importantly, the rise of identity politics. While no longer content to accept the universal and uniform identity of the imagined community of the nation, many of the modern individuals do not simply choose the path of atomised consumer individualism on a classical liberal model, but rather embrace identity politics and assert minority and group rights. Thus all manner of minority groups, defined ethnically, in terms of sexual proclivity, on the basis of (dis)abilities, age, gender, religion, and so on, have mobilised politically to further and protect group interests.

The proliferation of such groups has complicated the old political order based on a small number of class based parties and a politics that often sacrificed individual and minority rights at the altars of class solidarity, social rights, and national community. Given that a political system based on the idea of majoritarian, parliamentary democracy is not easily adaptable to the demands for protection of individual and minority rights, it is not surprising that many groups representing minority and individual rights increasingly turn to the courts, rather than to the parliaments, to claim their rights, be it the negative right to escape discrimination or the positive right to receive compensation for past acts of discrimination and oppression.

The social diversification of the body politic has been further deepened by a third crucial secular trend associated with both globalisation at large and European integration in particular, that is, increased migration within Europe and immigration from outside Europe. The central principle of the market society — the free movement of goods, people, and capital — intrinsically favours increased migration in the abstract. Concretely, the pull of European prosperity and the demand for cheap labour has translated there, as in the US, into real and large inflows of legal and illegal immigrants. These groups are even less likely to be easily integrated on the terms provided by a majoritarian social contract based on the ideal of an ethnically inflected national community.

The rationale for a comparative approach rests on the notion that the US and Europe represent two different traditions and two different historical legacies when it comes to political systems and the social contracts that inform the constitutional structures. Thus both the character of citizenship and the relation between law and politics differ. While issues of immigration are contentious on both sides of the Atlantic, the constructions of citizenship and national identity have generally been more open to immigrants and to ethnic and cultural diversity in the US than in Europe, where much 'thicker' theory and practice prevails.² Furthermore, the American constitutional

²This is not say that issues these issues have been unproblematic in the US, as we discuss in more detail later in this chapter.

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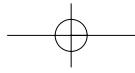
structure has given a much greater place to individual rights and to the power of the judiciary. At the same time both the US and the EU are currently subject to the same secular trend, one that is putting the future of national citizenship in question while it globally tends to juridify politics.

In order to provide a meaningful comparative context for the discussion of the current situation, we will, in the next two sections, contrast what we call the 'anti-juridical' tradition characteristic of European political culture with the American political system that in stark contrast is characterised by a close intertwining of politics and law. We argue that this intertwining is rooted in the natural law-like status of the Constitution and the Bill of Rights as 'higher' law located beyond the purview of ordinary politics. In these sections we in turn consider the long-term historical legacies stretching back to the eighteenth and nineteenth centuries, the crucial developments that have taken place more recently during the twentieth century, and the current debates that are challenging notions of citizenship, the state and politics in both Europe and the United States.

In the concluding section we will consider, within this empirical context, the normative implications for the future. On the one hand one can imagine a decentralised power grid with new opportunity structures that may empower individuals and minorities. On the other, one might detect a hollowing out of democracy as a deliberative and consensus building process, leaving in its wake on the one hand single issue populism and on the other a legal proceduralism, both fatally disconnected from broader concerns with community welfare and social cohesion. We conclude by making a number of theoretical observations. The first set will focus on state/civil society relations, suggesting that law and courts constitute a connecting ground between the state and civil society, institutions and processes that allow for a market-like flow of information and power negotiation. The second set will focus on the relationship between democracy and law, and most particularly on the idea of thin versus thick conceptions of citizenship and citizenship practices.

2. THE ANTI-JURIDICAL TRADITION IN EUROPE

As one begins to consider the varying views on the proper place of law in the political constitutional order, a startling but revealing difference between Americans and Europeans leaps out. Whereas in the US most of the voices expressing alarm when it comes to the power of lawyers and judges tend to come from the right, the opposite is true in Europe. Conversely, one looks largely in vain for the near equivalent of the American civil rights movement in the European context, at least until the very recent past. Of course, it might be tempting, not least for European



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Social Democrats, to see this simply as yet another proof of the superiority of European-style democracy; had there been a properly functioning Social Democratic Party and a political system that was not rigged to give the rich and propertied undue influence; had American workers been less inclined to fall into states of false consciousness, incapable of seeing their proper class interest, lapsing into an optimistic middle class mentality; had there not been the tragic legacy of the enslavement of African-Americans and the genocidal war against the native American; then there would have been no need for a civil rights movement that had to rely on courts rather than parliaments, and on dubious metaphysical notions of 'self-evident' truths and rights rather than the force of objective historical movement. However, while there is indeed a great deal one can critically say about the American left's reliance on the courts,³ the strong anti-juridical bent of the European left is fact rooted within the European tradition itself, and carries with it its own set of political limitations and social exclusions.⁴

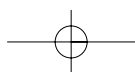
2.1. The Historical Legacy: Marx and the Law

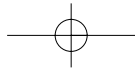
To understand the long-standing and widespread suspicion of the idea of an independent judiciary that has prevailed in continental Europe, one must begin by noting that the dominant tradition has been legal positivism. That is, unlike the English and American common law tradition, with its emphasis on adversarial proceedings, the crucial role played by the jury, and the law-making powers of the judges, in Europe courts and judges have primarily served as officials of the state, applying positive, written, codified law. Law was not independent of state power, nor was there a higher law to appeal to, no independent source of authority, no basis for judicial review, whether a constitution or some species of natural law. Given this, it is not surprising that once opposition to authoritarian regimes began to emerge in earnest during the nineteenth century, critics often viewed the law simply as a matter of state power or anti-majoritarian class interest.

To make this point more fully, one might usefully begin by considering the towering figure of Karl Marx himself. As Donald Kelley (1978, 350) has pointed out, law was in fact 'the profession first chosen by Marx'. Marx had begun his legal studies in Bonn in 1835, and transferred in 1836 to Berlin where he studied with both the famous leader of the 'historical school', Friedrich Karl von Savigny and his critic, the Hegelian Eduard Gans.

³Unlike the right in the United States, which bases its attacks on juridical politics largely on the economic costs involved, critiques originating from the liberal or left-leaning side of the ideological spectrum tend to emphasise its non-democratic nature. See, for example, Beard 1957; Lowi 1979; Putnam 2000; Kagan 2001.

⁴On this theme, also see the contributions by Hilbink and Wincott in this volume.





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However, after three hundred pages of what he in a famous confessional letter (10 November 1837) to his father referred to as ‘unhappy work’, Marx soon ‘saw the falsity of the whole thing’, and according to Kelley, ‘broke off the project’ (Kelley 1978, 354). The fundamental problem, according to Marx, was what he called the ‘metaphysics of law’, the divorce of law from its material base in ‘reality’. Even as Savigny and other members of the historical school criticised natural law theories and attempts at creating rational, codified law along the lines of the Napoleonic code, they instead turned to history itself as a metaphysical source of law, as ‘embodied natural law’. Analysing Savigny’s elder colleague, Gustav Hugo, Marx argued that this

is the frank, naïve reckless method of the historical school ... Hugo, therefore, profanes all that the just, moral political man regards as holy, but he smashes these things only to be able to honour them as historical relics; he desecrates them in the eyes of reason in order afterwards to make them honourable in the eyes of history and at the same time to make the eyes of the historical school honourable.

(Kelley 1978, 360)

In particular, Marx fastened upon the problem of property and the manner in which Savigny had used the historicist line of argumentation to derive right from fact and thus lapse into what Marx deemed to be an immoral position, one that justified ‘the right of arbitrary power’ and ‘legitimises the baseness of today by the baseness of yesterday’ (Marx cited in Kelley 1978, 361).

Where this rejection of the study of law, as taught by Savigny, led was not to an embrace of some version of natural law however, but to a rejection of law altogether and a turn towards the study of ‘the realities of possession and property’, that is, to the studies of political economy that would serve as the basis for Marx’ mature work. None the less, as Kelley points out, Marx’ youthful engagement with and rejection of law ‘continued to possess at least a negative importance’ as a target for his general attack on idealist social thought (Kelley 1978, 367). Just as religion was but the ‘opium of the people’, law was but a system for justifying and legitimising the power of the propertied classes, through which might was turned into right. And this denigration of law as lacking an autonomous source of legitimacy came to deeply inform the way in which the European left has historically viewed the law and the judiciary. Thus rights, in the classical Marxist analysis, were seen as ‘merely the ideological reflex of capitalist property and exchange relations’ (Cohen 1988, 43).

While Marx rejected ordinary politics as hopelessly naïve with respect to the fundamental nature of power, he retained — betraying here his debts to the ‘utopian’ socialism of the Saint-Simonians — a longing for a return

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to the non-alienated state that he associated with original communal property. Indeed, according to Marx 'civil law developed simultaneously with private property from the disintegration of the natural community' (cited in Kelley 1978, 365). Thus social revolution entailed the destruction not only of capitalism and private property, but also of the state and the right of might; the return of sorts to the happy state of affairs that pertained before the emergence of private property, the state, and law.

This 'realist' vision of law and rights is shared, if in different forms, by later, post-Marxist thinkers of the left, such as Michel Foucault. As Jean Cohen has pointed out, rights are in the Foucauldian scheme simply conceived as 'the product of the will of the sovereign state, articulated through the medium of positive law and facilitating the surveillance of all aspects of society' (Cohen 1988, 43). However, Foucault, influenced by Georges Bataille, made an additional move that would have been foreign to Marx. Bataille, the eminent philosopher of eroticism, had declared that the incest taboo — the ordinary law that thrust man from a state of nature into a state of civilisation — simultaneously gave birth to the possibility of transgression, ie, the breaking of the taboo and breaching of the social contract (Bataille 1993). Along these lines, Foucault imagined the modern democratic welfare state not only as a regime that used power/knowledge to discipline and normalise, but also in terms of the endless possibilities for resistance and transgression that by necessity were produced at the same time. To break the law thus becomes an erotic act, a gesture in which *servile* man — who lived according to the social contract within the bounds of the law — for a moment could become *sovereign* man — the transgressor — to use Bataille's categories. However, for our purposes it is sufficient to emphasise that Foucault shared with Marx a view of law and rights that denied that rights originated, and thus derived their legitimacy from, outside the statist production of power/knowledge.

2.2. The Place of Law in Twentieth Century European Political Systems

Of course, in the day to day world of European Social Democracy, neither an outright rejection of the state, nor politics as a form of eroticised rebellion, came to be the norm, even if a colourful minority within the left subscribed to varying versions of such attitudes, from the anarchists and syndicalists of the late nineteenth century, via the 68ers to contemporary queer theory activists, for whom protest, rebellion, resistance, revolution, romance, and eroticism were intimately linked. Rather, the enduring suspicion of the law and the judiciary found expression in the rather more humdrum conviction that the political objective of a serious socialist party must be to conquer

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the state rather than to rely on the laws created by a state controlled by the enemies of the working class. Indeed, 'rights' came to be associated with 'bourgeois' privileges, thinly veiled forms of protection of the property rights of the ruling class.

Once the formerly revolutionary movements had been transformed into stolid reformist and parliamentary parties, this attitude remained even if the language was toned down. Constitutional restrictions on the power of the parliament, formulated in terms of separation of powers and individual rights, were perceived as anti-democratic. The case of Sweden is in this respect emblematic. Since, as one observer has somewhat facetiously noted with respect to the Swedish Social Democrats, they imagined themselves as the builders of a 'good society', the so-called 'people's home' (*folkhemmet*), their view was that

all constitutionally embedded rights make it more difficult for the government to at will and at any given moment do the right thing for society at large. Furthermore, such protections are unnecessary for ordinary citizens since the Social Democrats would never do them any harm.⁵

The hostility towards the judiciary was also based on the sociologically plausible assumption that lawyers and judges belonged to the bourgeois class, and that they thus were likely to more or less consciously act on behalf of their class brethren. In this context the idea of judicial review, for example, was viewed with deep suspicion and the notion that judges should be able to overturn decisions made by a democratically elected parliament was held to be too undemocratic to be given much weight. Finally, it must be added that the lack of an independent judiciary in Sweden, even the lack of a serious discussion of this absence among lawyers, judges, and jurists themselves, is a consequence of the dominance of the Uppsala school of legal philosophy associated with Axel Hägerström. In this tradition, the law and the judiciary was subject to the power of politics, there were no rights, or right to rights, beyond what was given by the parliament. That is, in Sweden as elsewhere in Europe, suspicion of the law among left-wing democrats must be understood in the context of the dominance of legal positivism.

Since the Second World War, the anti-juridical bent typical of the European tradition in general, and of those on the left in particular, has been modified. To be sure, in countries with untarnished confidence in their own democratic traditions — the Scandinavian countries, for example — a sceptical attitude towards the power of the courts in general and judicial review in particular remains. A recent major study of the role of the courts and of judicial review in England, France and Germany by the

⁵The quote is by the influential Swedish jurist, Gustaf Petrén, quoted in Zaremba 1992, 75.

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Swedish political scientist Barry Holmström is a good example. Holmström recognises that the weightiest argument in favour of strong and independent courts concerns not so much the deepening of democracy but rather the protection of civil and human rights. None the less he arrives at the conclusion that

Politically active courts, and the judicialization of politics in democratic states, should rather be regretted than commended. It is part of a more general phenomenon, the professionalization of democratic rule, which steadily removes modern democracies from the core meaning of democracy, relieves elected representatives of their responsibilities towards the citizens, and places political power in unaccountable bodies.

(Holmström 1998)

It is symptomatic that Holmström sees the juridification of politics in terms of professionalisation and increased distance between citizens and the democratic process. As we shall see soon, this is a point of view that stands at some distance from the US experience when it comes to, for example, the civil rights movement. Indeed, Holmström here is speaking from the perspective of the European experience, and it is indeed true that European judges have by tradition been civil servants of the State, applying positive law, rather than autonomous interpreters of the law who are open to legal arguments made by lawyers representing political actors whose base is in organisations independent of the State, that is, whose location is in civil society.

However, the faith in parliamentary democracy that underlies this kind of critique of a strong and autonomous judiciary, was severely challenged in mid-twentieth century Europe. In Germany in particular, a crucial legacy of the Nazi era was a new found distrust of majoritarian democracy. After all, Hitler himself had gained power not through a violent coup but by making skillful use of the democratic apparatus set up through the Weimar constitution, one of the most democratic ever written. With the experience of the Weimar Republic in fresh memory, Germans were determined not to go too far in the direction of unadulterated democracy. Under the influence of the United States, the Germans thus have their Basic Law and Constitutional Court, there to safeguard fundamental liberal values, from (majoritarian) democracy itself if necessary.

Furthermore, the behaviour of German judges, doctors, lawyers, and other servants of the state during the Nazi period in general and the Holocaust in particular, fatally undermined confidence in the positive law tradition, and conversely opened up a constitutional door for hitherto foreign notions like judicial review and individual and human rights charters. And this experience was not limited to Germany or even to the other states that fell under fascist or authoritarian regimes. In democratic and

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unoccupied Sweden, eugenics laws were passed that allowed for the forced sterilisation of thousands of Swedish women on the grounds of genetic and social unfitness. In a situation in which the courts were subservient to the parliament, and the clergy and the medical professionals were all servants of the state, there existed *de facto* no contending legal, political or even moral authority that effectively could have questioned the laws passed by the majority of the members of parliament, under the leadership of the Social Democrats (Zaremba 1992). This shows that in a system in which all power ultimately issues from the parliamentary majority, vulnerable individuals and members of minorities may well stand to suffer. Remarkably, the laws remained in effect as late as the 1970s, long after the defeat of Nazi Germany.

Thus the current emergence of a juridified political system has its roots not only in the victory of the global market society, but also in a distrust of state power, positive law, and unfettered democracy that goes back to the trauma of European fascism, if not to the excesses of ostensibly benign social engineering. Indeed, the construction of the EU must be understood partly as a reaction to the experience of the Holocaust and the horrors of the Second World War. It is a project not merely devoted to establish a European-wide free market, but also driven by the twin desires to ensure peace in Europe, on the one hand, and to prevent to abuse of human and minority rights, on the other.

Either way, the history of the EU has to a great extent been the history of the European Court and the legal system at large (Weiler 1999; Wincott 2000). And with the emergence of the European Court of Justice as a key motor in the process of European integration, the questions of judicial review, rights, and the use of litigation in the pursuit of political ends have come to occupy a more central place in Europe, if not yet to the same extent as in the US. The courts have gained a new status and a far more powerful role. Thanks to the power of the European Court to stand in judgment of national laws and serve as a vehicle for citizens of the EU to pursue grievances and claim rights — not only in conflicts with other individuals, organisations, and corporations but also in disputes with the institutions of the national member states of the EU — the political playing field in Europe has truly changed. The courts are thus offering new possibilities for European individuals and minority groups to assert power in a political and legal zone that escapes traditional European politics where the voters vote and the (elected) rulers rule.⁶ Even in Sweden, so long resistant to judicial power, it is today possible to hear voices in support of increased power for the courts, both from those who belong to minorities such as the disabled, and from those who more generally are in favour of the separation

⁶ On the role of the European Court of Justice in the protection of individual rights against the state, see Burley and Mattli 1993; Leleux 1982.

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of powers and judicial review.⁷ Not surprisingly, it has been only during this last decade that the laws allowing for the forced sterilisation of women deemed to be less worthy for genetic, social, or moral reasons have become the focus of intense scrutiny in the mass media and the academy.

We will return to these matters, but let us first consider the American experience and a juridico-political system that now appears as not simply very different from the European, but also as a possible source of lessons, both of warning and inspiration.

3. THE ROLE OF THE LAW, THE COURTS AND LAWYERS IN THE UNITED STATES

While in Europe the law has ideally been kept at arm's length from politics, law and litigation are in the US so politicised that the judiciary arguably competes with the legislature and the executive for prominence in the political arena. This intersection of law and politics is evident in a number of ways. For example, in the United States, in addition to the national (ie, federal) court system, each state has its own set of trial and appellate courts for enforcing state laws. Thirty-nine of the 50 US states select a substantial portion of the judges for these courts in much the same way that candidates for office are selected — that is, through public campaigns and elections — making them directly accountable to the voting public. In addition, according to one recent study, between 60 and 73 per cent of federal judges from the 1930s through to the 1980s were prominently active in partisan politics prior to their court appointments (Goldman 1997). The intersection of law and politics also can be seen in the legislative branch. For example, lawyers are the most common profession of elected officials in the United States — currently 37 per cent of members of the US House of Representatives and 59 per cent of US Senators hold law degrees (*Politics in America* 2003). Indeed, the crucial role played by lawyers, judges, and the law in the US has been noted ever since European observers first made the trek to America to compare, criticise, and learn. Thus Alexis de Tocqueville, for one, noted with wonder that it was the judicial branch, not the legislature, which held the key to understanding democracy in America. Lawyers, currently the object of so much disdain in many quarters, were seen by Tocqueville as crucial to the health of American democracy because they linked the

⁷On the latter, see for example the recently completed parliamentary commission on democracy, among whose many published reports several dealt with this matter, including Nergelius, Peczenik, Wiklund (1999:58) and Nergelius (2000), who champions more power for the courts, was also featured in a face-off against Holmström in the official organ of the Swedish parliament, R&D, which focused on the question of how much judicial power would be good for democracy.

popular and aristocratic classes and infused the republic with what Tocqueville called the 'legal spirit' (Tocqueville 1969/1848, 263–70).

3.1. The Historical Legacy: The American Constitutional Regime

The key reason for this startling difference is that while in Europe majority rule is taken for granted, there is at the heart of the American political system the belief that no one institution or process can or should represent the 'public will'. To the contrary, the system was from the outset designed to explicitly distribute power among individual citizens, various organised interests, the 50 states, and the different branches of national government. This design was meant to check the abuses of any one individual, group or institution, while at the same time forcing these various sites of power to interact with each other in order to create and execute public policy. According to James Madison, one of the principal architects of the US Constitution, through this complex system of checks and balances 'it may well be that the public voice ... will be more consonant to the public good than if pronounced by the people themselves, convened for that purpose' (Hamilton, Madison and Jay 1961/1787–88, 82).

Nowhere is this American experiment in preserving democracy by limiting its excesses more evident than in the principle of judicial review — the power of appellate courts to strike down laws they deem unconstitutional. As noted by Tocqueville, this power is a crucial protection against the 'tyranny of the majority' (Tocqueville 1969/1848, 262–76). Such a system is very different from what is customary in Europe, where legislatures monopolise the law-making power and where courts function as mere administrative agencies, applying and enforcing rules and regulations to the letter of the law. In contrast, American judges are bestowed with law-making capacities as they engage in constitutional adjudication, even if these capacities differ from those of the ordinary legislative powers of Congress. The basis for this power at the national level is the US Constitution — the 'supreme' law of the land — a document perceived as a source of law independent of and able to trump the will of the legislature. Thus, through the power of judicial review the Supreme Court can overturn decisions of presidents, national legislatures, and the 50 state governments. They can also force the national and state governments — the elected representatives of the people — to act in ways they would prefer not to.

This aspect of the US political system is often criticised as thwarting the will of the people, expressed through the 'normal' democratic process of elections and legislative action. But this argument both overestimates the power of the courts to dictate, and conflates majority rule with the public will. In fact, the courts neither function as purely administrative agencies,

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nor do they operate independently of normal politics. The law-making power of the judicial branch is ultimately determined not by its ability to enforce decisions (which is controlled by the executive branch), but by its relationship to other sites of political discourse and struggle. Lacking the power of the sword or the purse, the Court is heavily dependant on both the willingness of the other branches and levels of government to support their decisions and, ultimately, on citizens' willingness to accept and comply with its rulings even if they disagree. This normative authority of the so-called 'least dangerous branch'⁸ of the government depends on its capacity to walk the fine line between avoiding capture by short-term victors in ordinary politics while also not moving too far afield from the larger public sentiment.

Thus the 'higher law' of the Constitution and the Bill of Rights is not a species of natural law in the strict sense since it both changes over time and is obviously subject to shifting political pressures from the outside and openly political struggles within the courts themselves. Indeed, we are here far removed from any notion that the law and judges somehow stand above politics.⁹ Although there are those in the US who envy the European model in which, as Kathleen Sullivan has put it in a review article, 'opinions of the high court are issued without concurrences or dissents', symbolising the objective, 'positive' nature of the law, 'a distinctive feature of the modern US Supreme Court is its proud tradition of vigorous and open disagreement' (Sullivan 1998, 18). Indeed, the dissenting opinion in one court decision often becomes the basis for future majority opinions, as constitutional interpretation reacts to changing social and political views, as well as to changing membership on the courts. While European observers often are struck by the spectacle of 'liberal' and 'conservative' judges facing off, the public authority of the Court remains surprisingly undiminished in this openly political process.¹⁰

This is the case, we would argue, because the Constitution and Bill of Rights none the less constitute the functional equivalent of such a higher, natural law that legitimately can trump ordinary laws passed by the legislature according to the democratic will of the people (or, rather, their

⁸ 'The Least Dangerous Branch' is the title of Bickel's (1962) influential book about the US Supreme Court. Bickel in turn borrowed the formulation from Alexander Hamilton's essay, 'The Judges as Guardians of the Constitution', in the 78th Federalist Paper.

⁹ For one example of a discussion of the question of the court's relation to politics by a leading legal scholar, see Sunstein (1992).

¹⁰ One recent example of this is the way in which the highly controversial decision by the Supreme Court that ended the attempts by the Gore campaign staff to contest the disputed Bush victory in Florida in November 2000 Presidential elections, while bitterly contested, was quickly accepted (by all but the most ardent partisans) across party lines, not only among the general public but also among political elites, including Gore himself. Similar examples include the Supreme Court's 1974 decision that the Nixon administration had to release the audio tapes implicating the President in the Watergate cover up.

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representatives). If you will, this higher law passes the ‘duck’ test: since it quacks and walks like a duck, it probably should be best thought of as a duck, even though it strictly speaking fails the formal test to qualify as natural law. The often rather arcane attempts to interpret the original intent of the authors of the constitution in the modern context strike outside observers as quite odd until it is grasped that such quasi-theological exercises must be viewed in terms of paying heed to the American civil religion in general and to its fundamental and effectively ‘sacred’ texts in particular. As James Bryce, writing in the early part of the twentieth century, noted, the American people ‘are profoundly attached to the form which their national life has taken. The Federal Constitution has been, to their eyes, an almost sacred thing, an Ark of the Covenant, whereon no man may lay rash hands’ (Bryce 1920, 642). Such religious references have not abated, with a more recent book describing the Constitution and Bill of Rights as ‘our two sacred national documents’ (Black 1988, 15). The power of the courts thus rests on a paradox: on the one hand the law is viewed as stable and sacred, as above ordinary ‘dirty’ politics, while on the other it is none the less constantly subject to and changing in reaction to precisely such political struggles.

A second feature of the American politico-judicial system that sets it apart from European practices is the notion of ‘trial by a jury of peers’, which Tocqueville regarded as the ‘most eminently republican element of government’ (Tocqueville 1969/1848, 272). That is, this is an aspect of the American system that serves to politicise the legal domain in a rather different way than is the case with judicial review. Rather than pitting one elite group (members of Congress) against another elite group (members of the Supreme Court), this provision hands over considerable power from legal experts to lay-people. Not surprisingly, this is also a controversial aspect of the American politico-judicial regime. While few Americans advocate abolishing the jury system, there are many who question the ability of lay people to make informed decisions when it comes to, for example, the proper size of punitive damages in tort cases, a matter to which we shall return. Others, conversely, celebrate *pace* Tocqueville the jury as a much-needed democratic counterweight to the rule by experts, elites, and big corporations. As with much of the theory and practice of the courts in United States these debates over the strengths and weaknesses of the jury system are at heart ideological, serving as one of several arenas in which the process and substance of politics is played out.

A third characteristic aspect of the American legal and political system is the Bill of Rights and the primacy and protection of individual and minority rights. Not only are specific rights enumerated in the Bill of Rights, but also enshrined is the general principle that individual rights and freedoms are protected unless explicitly excluded from protection in the constitution. For example, the 9th amendment to the constitution states that the

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‘enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people’, and the 10th amendment states that the ‘powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, *or to the people*’ (emphasis added). Again, we are dealing with a fundamental difference between the European and American traditions. The Americans’ insistence on such protections against state power is derived from the experience of the many colonists who left Europe to escape religious and political persecution. In comparison, Europeans appear to have a more optimistic view of the ability of the State to do good for its citizens, expressing the general will in Rousseauian language or universal interest in Hegelian ones. Americans, in sharp contrast, subscribe to the notion that the government that governs the least governs the best, that power corrupts, and that liberty must be safeguarded through elaborate constitutional measures in the form of separation of powers. At heart, Americans are more populist in their democratic political instincts, while European are more trusting in the state and the elite dominated political institutions and processes.

The institutional locus for the exercise of this constitutionally embedded individual rights tradition is the courts, even though the Bill of Rights and the ethos that is associated with it in fact lay dormant for a long time and only became truly significant in the twentieth century when societal changes, a shift in the balance of power in favour of the federal government relative to the states, and a more activist Supreme Court led to a more aggressive application of these amendments (known as ‘incorporation’) to state politics, policy and law through the belated use of the 14th amendment, added to the constitution in 1868. As Michael Kent Curtis notes:

From 1833 to 1868 the Supreme Court held that none of the rights in the *Bill of Rights* limited the states. From 1868 to 1925 it found very few of these liberties protected from state action. Those the states were free to flout (so far as federal limitations were concerned) seemed to include free speech, press, religion, the right to jury trial, freedom from self-incrimination, from infliction of cruel and unusual punishments, and more. State constitutions, with their own bills of rights, were available to protect the individual, but too often they proved to be paper barriers. ... [The notion that the 14th Amendment was intended to apply the Bill of Rights to the states] has never, for instance, been accepted by the United States Supreme Court, although the Court has haltingly reached much the same result by gradual incorporation of most of the rights in the *Bill of Rights* as limits on the states under the due process clause, a development that reached fruition in the 1960s.

(Curtis 1986, 1–2)

The same is true for a fourth crucial dimension of the American politico-legal system, related to the centrality of individual rights, namely tort law,

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the ability of citizens (as individuals or groups) to bring civil suits against other individuals as well as against economic and political institutions to seek compensatory and punitive damages for injuries and losses. While tort law has deep roots within the common law tradition, it has also evolved and changed in significant ways in more recent times. To appreciate the political role of tort law and the Bill of Rights, we now turn to a closer analysis of twentieth century developments.

3.2. The Rights Revolution and the Litigation Explosion: Law and Politics in Twentieth Century US

As Charles Epp (1998) has shown, the rights revolution, while it certainly does have roots in the American constitutional regime, in fact developed over time in a manner that was rather more complex and historically contingent than is often understood. Crucial to the successes of the civil rights movements of the post-WWII era was the prior building of what he calls 'support structures', without which the potential of the laws and the courts could not have been fully realised. Indeed, as late as the 1920s and 1930s the Supreme Court and the legal profession at large tended to serve the interests of not only the white majority as in the era of reconstruction, but also of Big Business in its struggle against the unions and the budding working class movement, a far cry from the latter day associations of the courts with the civil rights movement (see, for example, Irons 2003, ch 21–24). A dramatic example of the Supreme Court's ability to thwart the will of a democratically-elected government came in the mid-1930s, when it overturned a series of laws passed as part of the Roosevelt administration's efforts to pull the US out of a deep and lingering economic depression. Telling of the ultimately political nature of the legal process in the US, Roosevelt responded to these decisions by proposing to add six new (and presumably more liberal) members to the Supreme Court. While this 'court packing' plan was severely criticised as being too blatantly political, it had its intended impact — the Supreme Court reversed its earlier decisions, allowing Roosevelt's New Deal legislation to be implemented.

One reason for the courts' largely conservative bent was the make up of the legal profession itself. However, beginning in the 1920s organisations like the ACLU, the NAACP, the American Jewish Congress, International Labor Defense, the American Fund for Public Service, and the Legal Defense and Educational Fund developed a strategy that combined fund-raising for the purpose of supporting sustained efforts to push test cases through the court system with encouraging minority individuals to pursue law degrees. The result was something of a revolution when it comes to the sociological make-up of the legal profession as first Jews and Blacks and

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later women flocked to the law schools, and by the 1950s these efforts were to bear fruit as the civil rights movement began to win a series of victories in the courts as well as through Congress (Epp 1998, ch four).

The ability of Americans to bring lawsuits is, however, not limited to the anti-discrimination cases that were central to the civil rights movement. Over the last 50 years tort litigation has come to be increasingly used by individuals and groups committed to a variety of political issues, such as product liability, work place safety, the environment, and medical malpractice. This power to use the courts and tort law to advance political agendas and collective goods is based on a number of rules and practices that have developed and changed over time; the establishment of the notion of the 'private Attorney General', the liberal rules governing class action lawsuits, and the contingency fee system.

With respect to the first — the right of private citizens to bring action — it has in theory a long history, but in practice a rather much shorter one. As Shep Melnick has pointed out, it was not until 1964 when the Supreme Court changed directions, from an earlier approach that required a specific authorisation in a statutory law to allowed private right of action, to one that first 'encouraged courts to find private rights of action implicit in federal statutes', and then claimed to have discovered a general right to private action in an all but forgotten law passed as part of the Civil Rights Act of 1870 (see Melnik 1989, 205). The effect of these decisions was to open up the legal arena to individuals and groups, in the spirit of 'participatory democracy', at a time when judicial activism and the rights revolution had already radically reshaped the place of the courts and litigation in the broader field of politics.

Similarly, class action litigation — the possibility to file a suit on behalf of a large number of individuals who do not actually know each other or participate actively in the suit — has a history that is simultaneously long and short. On the one hand, this practice, unknown in continental Europe, is 'as old as the medieval English roots of the United States civil legal system', to cite the authors of a report issued by the Rand Institute for Civil Justice (Hensler et al. 1999, 1). On the other, the current controversy over class action litigation can be traced back to 1966 when the so-called Rule 23, which provides for federal class actions, was revised in a crucial respect. Previously the rule had mandated that all individuals seeking damages in this manner must sign on (or "opt in"), but after the rule-change every member of the class were to be considered part of the suit unless they explicitly declined ("opted out"). The revised Rule 23 thus made it possible to launch much larger suits with much greater ease (Hensler et al 1999, 1).

Finally, it must be noted that the great frequency of litigation, whether of the individual or class action variety, also depends on the for Europeans odd practice of not paying lawyers outright for their work, but for the lawyers to accept work on the contingency fee principle. If the lawyers win

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the suit, they routinely collect some 30 per cent of the damages, if they lose they do not receive any pay. This is a system that allows the poor to use the legal system; it is also a system that potentially rewards the lawyers with windfall awards if they win cases and the plaintiff is rewarded large damage amounts. Again, while most Americans today take contingency fee financing for granted, this was in fact not always the case, but the emergence of current practices has to be understood in historical terms.

As Peter Karsten notes in his history of the contingency fee, such contracts were in fact prohibited since the Middle Ages in England, according to the common law doctrine of champerty (Karsten 1998, 231). It is only during the nineteenth century that the English rule with respect to both champerty and the requirement that the losing party pay the attorney fees of the winning party were overturned in the United States. According to Karsten the use of the contingency fee can be traced back to at least the first few decades of the century, if not before, but it is only by the end of the century and the beginning of the twentieth century that the contingency fee can be said to have become truly acceptable in most of the country.

While taking into account other factors, such as the principle that lawyers should be free to contract, the main explanation for this momentous shift Karsten traces to the political and religious history of the US. Beginning with the Age of Jackson, a new spirit of democracy, distrust of corporations, a partly religiously informed concern for equality and the rights of the little man, and the method of electing jurists and judges translated into what Karsten calls the 'Jurisprudence of the Heart'. The right of the poor man to pursue his just claims were, it was argued, more important than the risk that such fee arrangements could encourage an increase in frivolous lawsuits. Judges who had to stand for election, Karsten argues, were far more sensitive to this type of argument than appointed judges at a further remove from the will of popular assemblies and more beholden to elite political actors.¹¹

The contingency fee remained highly controversial, however, and symptomatically the concept of 'ambulance chasing' goes all the way back to the end of the nineteenth century and the breakthrough of the contingency fee principle on a larger scale. However, the increased rate of civil litigation in recent decades and the relatively improved position of the plaintiff's bar in relation to the defendant's bar is the consequence of a number of other changes as well, including the abolishment of immunities for charities and the rise of the principle of comparative fault in place of the doctrine of contributory negligence (see Yeazell 2001; White 1985). Equally important has been the spread of consumer credit, which in turn has led to a steep increase in mandatory homeowners' and automobile owners' liability insurance.

¹¹By 1860, Karsten notes, 'jurists in just ten of thirty-four states were appointed' (Karsten 1998, 247).

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As Stephen C Yeazell notes, 'the large expansion of consumer credit and insurance created a vast pool of solvent potential defendants' (Yeazell 2001, 184).

In combination, social, political and legal changes in the twentieth century such as those discussed above dramatically expanded what was already a fundamental acceptance of the central role of judges and lawyers in the political process. As one indicator of this, consider that the legal profession in the United States grew at three times the rate of other professions from 1970 to the present, and that the number of lawyers per capita doubled during this period (Putnam 2000, 145–46).

3.3. The Current Debate: Pros and Cons of Adversarial Legalism

Advances in the position of plaintiffs and their lawyers notwithstanding, it is not the case that the plaintiff's bar today is in the position occupied by the defense bar 75 years ago, when the latter truly dominated. Rather, as Yeazell puts it, plaintiffs' and defendants' lawyers are simply 'more evenly matched than they were in the first quarter of the century' (Yeazell 2001, 183). In fact, most cases never go to trial, and the defendants win most of those that do. What is more typical is that both sides engage in risk management and settle out-of-court based on available information according to economic rationality. However, what is visible in the media are the exceptional cases involving verdicts with large punitive damages awarded to plaintiffs.

None the less litigation, or the threat thereof, is very much part of American political culture, and this litigatory approach to politics is the subject of intense feeling and debate. Critics and legal scholars, as well as civic minded citizens, have written many passionate accounts in which the central actors are not the high-minded private Attorney Generals, but rather the trial lawyers, described as 'bounty hunters', behaving like 'vultures' extorting money from corporations in the name of faceless victims who end up with little money from the settlement while ultimately having to pay it back, as consumers, as the companies raise their prices to compensate for the high costs of settlements and liability insurance (see, for example, Khavari 1990; Wills 1990; O'Connell 1979).

However, if what critics like Walter Olson (1991) decry as the 'litigation explosion' is one side of the coin, the other side is the 'rights revolution' that we have discussed above. From this perspective individual or class action litigation is viewed as a powerful strategy available to relatively powerless people, not least minorities, when they want to assert their individual or group rights, and in doing so produce changes in the behaviour of powerful institutions that also have collective benefits. By either challenging

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specific interpretations of the law, or using the law as already interpreted to demand in fact what is due in theory, individuals and groups have become empowered to claim rights, push emerging new issues on to the political agenda, and influence the behaviour of powerful élites. It is through this channel that civil rights activists have claimed many victories, and it is impossible to understand the advances made in areas like consumer rights, patients' rights, environmental protection, and gender equality, without first understanding the power of the court as a political institution. For this reason it is no accident that the most fervent opponents of 'rights' in the United States often come from the right side of the political spectrum. It is, for example, the powerful health-care industry that currently opposes moves to strengthen patients' rights to pursue their complaints through litigation, and a similar situation pertains when it comes to environmental issues, the rights of the disabled, or the attempts to address the harm created by the tobacco and gun industries.

But the question of how well litigation can serve the political agenda of those seeking to promote social reform and to protect the position of the weak is a contested one, even among those who argue from a left perspective. For each sympathetic account, for example the classic account by Donald Horowitz (1977) or, more recently, the book by Charles Epp referred to above, there can be found far more pessimistic ones, like Gerald Rosenberg's book *The Hollow Hope* (1991). One of the most prominent contemporary leftist critics of the litigatory approach is Robert A Kagan, who has coined the term 'adversarial legalism' to characterise what he also terms 'the American way of law' in a recent book (Kagan 2001) that brings together years of his work in this field.¹²

Kagan sees in the increased use of the courts and litigation a symptom of a political culture in which 'the people' have lost faith in the government and the ordinary political process. The cost of this turn towards courts and litigation is, according to Kagan, very high. Comparing the American adversarial and lawyer dominated system with Europe, where experts, impartial judges, and compromise prone parliamentary parties play the key role, he concludes that the American model is both inefficient and costly in economic terms, and unfair and unequal in its exercise of justice.

He notes that it is popular to blame lawyers for this seemingly irrational state of affairs, but he firmly rejects the thesis that lawyers cause adversarial legalism. The 'blame' ought to be shared rather more widely, Kagan suggests:

Lawyers are not the only or even the primary source of American adversarial legalism. Far more important are the preferences of their clients and of the

¹² Also see Kagan, (1991), especially on the question of the costs associated with adversarial legalism.

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political interest groups and leaders who seek to shape public policy. Adversarial legalism is the product of a populist political culture, inclined to trust courts rather than “big business” and “big government” and reluctant to finance European-style social insurance programs that could displace much civil litigation. Adversarial legalism is also stimulated by a constitutional tradition that has limited central bureaucratic government and encouraged litigation as a mode of checking governmental arbitrariness.

(Kagan 1994, 60)¹³

Thus Kagan traces adversarial legalism to the same constitutional structure and political culture that we have discussed above, with its radical separation of powers and divided government, on the one hand, and penchant for activist, populist, and anti-statist politics, on the other. These features he largely ascribes negative values. Clearly, Kagan prefers the European-style Social Democratic or Social Liberal system, with its emphasis on social insurance paid or mandated by the state. When one turns to his recipes for reform, one also finds, not surprisingly, that he favours a broad shift from market-based provisions of social services, private contract, and tort litigation, towards universal health-care, no-fault insurance schemes, and social insurance as an alternative to litigation. As one avenue for discouraging litigation he furthermore proposes the return to the English Rule, ie requiring the loser to pay the court and litigation costs of the winner. He also calls for a diminished role of the jury in civil law trials, claiming that the jury is a ‘source of inconsistency und unpredictability’, here displaying his preference for judge and expert dominated resolutions of conflicts.

While Kagan’s critique at times echoes the arguments often rehearsed by the right-wing, he differs sharply with them in that his objective is not to diminish legal restrictions on business, in particular, or decrease the power of the state, in general, but quite the opposite. He in fact seeks to promote and strengthen the role and power of government, refashioning public law and administration so as to shift power from courts to bureaucrats by drafting statutes in such a way as to narrow the possibilities for judicial interpretation and review. The need for democratic oversight would instead be satisfied through greater participation by interest groups and citizen’s organisations in the process of policy formulation, and the general quality of the administrative bureaucracy would be improved by investing more money in job-training, education, and staffing.

One of Kagan’s students, Thomas Burke, has recently offered an analysis that builds on but also departs from Kagan’s. In his book *Lawyers, Lawsuits, and Legal Rights*, Burke seeks to show that the prominence of lawyers and litigation in the US is the result of some peculiarly American lust for litigation and lawsuits, rooted in distrust, alienation, and the

¹³ Also see Kagan 1991.

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collapse of communitarian values, but rather a function of what he calls litigious policies, that is, 'laws that promote the use of litigation in resolving disputes and implementing public policies' (Burke 2002, 4).

Elaborating what he calls the 'Constitutional Theory' of litigious policy-making, Burke largely restates the essence of Kagan's thinking, emphasising the structural factors — federalism, separation of powers, and judicial independence — along with 'the significance of the distrust of centralized governmental power' that underlies 'American activists support of court-based schemes' (Burke 2002, 14). In particular, he focuses on three incentives that he sees as central for this activist support of litigious policies. First, what he calls the insulation incentive, how implementation of public policy can be insulated from political enemies by taking it out of the hands of vulnerable federal bureaucracies and granting implementation power to the courts. Secondly, the control incentive, that is the use of federal court orders to force the hand of local and state government that otherwise are relatively free from federal control through the national government. And finally, the cost-shifting incentive that allows activists and policy-makers to create rights that are not directly funded through taxation, but rather are enforced through litigation which ends up shifting cost to others, often to private actors. ADA is one example of this strategy, and the current proposal to strengthen patients' rights in relation to HMOs is another one. As Burke notes, the deep choice here is one between creating a fully funded health-care system to replace the HMOs or to 'create a "patients' bill of rights" to allow individuals to sue HMOs for their sins'. One solution would involve tax money, the other would not. One would strengthen top-down government, the other rely on activists and from-below litigation, or differently put, one would rely on a classical indirect and deliberative democratic process, the other on a more direct, even populist approach. The tension and dynamic between these two modes is, however, complex. Certainly the lack of efficacy of traditional social policy and bureaucratic agencies help create the environment in which litigation becomes attractive. But the story is not simply about the weakness of governance or the lack of trust in government; it is also, to put it in more positive terms, about grassroots activism and individual empowerment.

While Burke, as the above discussion of the health care and patients' rights dilemma indicates, is sensitive to the paradoxes and weaknesses of American style litigious policies and at times shows a great deal of sympathy for Kagan's proposals to move towards a more European-style approach to social policy, his is none the less more even handed in his account. He departs, complements, and extends Kagan's analysis in two key respects. To begin with he reasons that even if one deems what he refers to 'replacements reforms' — first and foremost involving a move towards European-style regulation or socialisation — necessary, the odds against such reform to succeed in the US are very long indeed. This, Burke argues,

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follows from the constitutional theory that he promotes, one which places emphasis on what Burke calls ‘the deep roots of litigious policy’ in the American constitutional regime and its attendant political culture. But aside from this pragmatic argument, he also raises a second, more normative point, namely that even as many Americans bemoan what they see as sue-prone society in which litigation is out of control, it may well be that ‘the extension of litigation to more and more realms is a sign not of weakness, but rather a conjunction of traits many consider strengths’ (Burke 2002, 203). Among these, Burke counts on the one hand the drive to extend justice, fairness and the power to redress to more and often formerly disadvantaged people, on the other the American constitutional tradition, which few Americans would appear to be willing to undermine or replace. ‘Litigation’, Burke concludes, maybe well be ‘the price that Americans pay for aspects of their nation that many hold dear’ (Burke 2002, 204).

In his review of Kagan, Frank Cross similarly takes Kagan to task for not sufficiently recognising the virtues of adversarial legalism while overstating the supposed evils of this system. While acknowledging the validity of many of Kagan’s specific points of criticism, and embracing some of the proposed reforms, Cross argues that adversarial legalism ‘as a more general matter has served America well, and should be celebrated more often than condemned’ (Cross 2003, 191). In particular, Cross questions Kagan’s thesis that the American system is particularly inefficient and costly from a comparative perspective, and he also seeks to defend the jury as well as other procedural values that Kagan tends to disparage.

On the first point, Cross posits that ‘for Professor Kagan, economic efficiency seems to be paramount’, and then goes on to argue on the basis of his (Cross’) own statistical evidence that while ‘American legalism may seem more time consuming, costly, and inefficient, [...] this perception is misleading’ (Cross, 2003, 200). In fact, although there are indeed many more lawyers per capita in the US, the evidence also suggest that the system works well, with fewer delays than in European countries, and with a perception among business people of policy stability. Indeed, Cross more generally tries to make the case that at the aggregate level the economic consequences of the decentralised American common-law legal system, with its numerous points of entry and access, through tort law, private right of action and litigation, seem to be positive, not negative. He marshals evidence that on the average economies with common-law, and pluralistic political systems do better than the European style, civil-law, corporatist system celebrated by Kagan. He also alludes to a link between the common-law and the market, a point to which we will return below.

Like Burke, Cross does not dispute the argument that the US has an adversarial legal system. On the contrary he states in no uncertain terms that ‘in the United States, litigation is a form of politics, and the courts are involved in governance, not in a ministerial bureaucracy. In this country,

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at least, litigation is a “political exercise” (Cross 2003, 203). But this is, he argues not necessarily a bad thing. He notes that even Kagan acknowledges that in comparison ‘American judiciaries are particularly flexible and creative’, and that ‘American lawyers, litigation, and courts serve as powerful checks against official corruption and arbitrariness’. Further on he also cites Kagan’s comment that ‘the litigiousness of Americans has made for antidiscrimination laws far more potent than comparable laws in nations that do not foster the private enforcement of public law’ (Kagan 2002, 170, as cited in Cross 2003, 201).

Kagan discounts these positives while Cross takes them as a point of departure for his defense of American legalism. Thus he argues that even if it was the case that the American system was inefficient, which, as we have just seen, he doubts, there are other values than simple economic efficiency or even redistribution. He rejects what he sees as Kagan’s utilitarianism, a vision of human welfare he deems ‘a bit cramped’, and raises the question of whether ‘adversarial legalism might actually have some intrinsic value to Americans, independent of its economic consequences’ (Cross 2003, 206). Cross suggests that the answer is yes, that procedure is of crucial, intrinsic worth. Americans value their ‘day in court’, as the saying goes, and ‘they sue not just to recover an award, but also to vindicate their own behavior, to punish those they consider wrongdoers, to effect justice, and to obtain a dispassionate ruling in disputes’ (Cross 2003, 207).

It is in this context that Cross comes out in defense of the jury, which Kagan appears to want to diminish in stature in favour of expert and judge opinion. Cross suggests, recalling Tocqueville, that ‘the right to trial by jury is a matter of fundamental liberty’, that ‘the jury is a key democratic institution’, and that ‘jurors may directly benefit from participation as jurors’ (Cross 2003, 207). He goes on to cite studies that indicate that individuals see this experience as important, and that in fact even judges when asked to choose would prefer to be judged by a jury (59.3%) than by a fellow judge (20.7%). In conclusion, Cross admits that this system is messy, that it tends towards populism and perhaps excessive distrust of the state, that it may indeed stand in need of some reform, but also that on balance it has done more good than bad for America so far.

Some of the themes that Cross took up in his review of Kagan have also been forcefully argued by Carl T Bogus in his recent book, *Why Lawsuits are Good for America* (Bogus 2001). According to Bogus, the common-law tradition, with a powerful jury and broad right to litigate, is central to what he calls ‘disciplined democracy’. In a world dominated by rich and powerful corporations, lawsuits remain as one of the few powerful means at the disposal to the relatively powerless. Bogus concedes that this system is far from perfect, but he maintains that it is a crucial complement to the right-to-vote and the power to make choices in the market place.

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It is no accident, Bogus argues, that Big Business in co-operation with allies in the political world fabricate what he calls 'tales' about the fantastic abuse of the legal system. Thus he seeks to show that most of the stories about enormous 'frivolous lawsuits', such as the infamous case in which a woman reportedly received close to \$3 millions in a jury verdict after having spilled hot coffee on herself, in fact are false or at best incomplete, failing to take into account later corrective action by higher courts or by judges. The real purpose behind these tales is in fact itself deeply political and partisan, designed to create public opinion in favour of limiting American citizens' rights to sue companies for producing bad products or offering dangerous services (Bogus 2001). Thus, beyond the formal calculations that inform economic cost-benefit analyses and concerns of transaction costs, lay deeper political questions about who gets to have access to power in the form of legal and politico-legal action. If one turns to the debate about the rule-of-law in the United States, it is from this perspective noteworthy that, as Bill Scheurman has pointed out, adversarial legalism has two enemies. From the right there are the conservatives who want to 'cut the rule-of-law down to a guarantee of economic liberty for the economically privileged', and from the left there are those liberals who, like Kagan, conversely appear willing to trade-in some aspects of American style of rule-of-law 'for a (vaguely conceived) promise of greater social and economic equality' (Scheurman 1997, 740), an attitude towards law reminiscent of the one taken by European Social Democrats, rooted in the anti-judicial tradition of the European left.

4. CONCLUSIONS

Should Europeans care about adversarial legalism? If, as Burke argues, chances are slim that Americans will adopt a European-style system to replace their litigious policies because of the deep constitutional and cultural roots of the American system, does not the same argument hold for the Europeans? Why would, from a European point of view, our analysis of the American way of laws and politics be more than a more or less interesting tale of a sue-crazy America with too many lawyers in search of at times preposterous lawsuits? Indeed, until recently comparisons between Europe and the United States have largely constituted an exercise in comparing several varieties of apples with an orange, often amounting to little more than attempts at showing that one system is better than the other. Europeans and europhiles have been able to boast of higher voter turnouts, stronger unions, and a more complete welfare state. Champions of the American model have, on the other hand, been in a position to emphasise a strong tradition of protecting civil liberties, religious freedom, and individual and

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property rights, a tradition ultimately based on the constitutionally embedded separation of powers and the strength of the judiciary.

However, it now appears that this fundamental difference between Europe and the US, while still very real, is gradually giving ways to sign of convergence. The secular trend in Europe today points to what may be termed the Americanisation of the European Union, as the ethos and values, as well as the institutions and rules, of the market society spread, and individuals and minorities search for new ways to collect and assert power. As we have noted, the emergence of the EU has gone hand in hand with a new and far more independent role of the courts of the New Europe, as well as with a more general challenge to the corporatist social contract that has underpinned the national democracies and their attendant welfare states. There are indications that Europeans vote less, that they have less trust in the governments and the elites, and even that they are turning more and more towards the language of rights and the politics of litigation.

For example, one of the strongest pieces of evidence often used to distinguish the health of European democracy from that of the United States has been voter turnout in elections. While it remains true that turnout in national elections in Western Europe remains high (averaging approximately 80 per cent over the past 20 years) as compared to the US (where turnout in presidential elections has hovered at around 50 per cent), in *both* Europe and the US turnout has declined an average of some 5 to 6 per cent over this period as compared to the years from 1945 to 1979 (Franklin, Lyons and Marsh 2001). And according to a recent survey, less than half of citizens in European Union countries report having 'some' or 'a lot' of trust in their respective nation's government (49 per cent) or their national parliaments (46 per cent), and only a third (33 per cent) report believing that their country is governed by 'the will of the people'. Tellingly, these percentages were as or lower than those found in the United States for the same questions (Voice of the People 2002). At the same time there is evidence that civil suits are becoming more common in Europe. For example, civil suits in France increased by 50 per cent between 1985 and 2000. Commenting on this trend, Noëlle Lenoir, a judge on the Conseil Constitutionnel (France's constitutional watchdog) noted that 'Cultural changes are allowing people to take a more active role in seeking justice and, in some cases, to profit financially from rulings. It's in part a result of the general Americanisation of French society, a social and legal change that is not over yet'.¹⁴

How then may we attempt to evaluate this trend from a normative perspective? Many Europeans are struck by what is often seen as the arbitrary powers of American judges and courts. And indeed the virtues of the

¹⁴A quoted in *Time Europe*, 2000.

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traditional European approach are considerable, as we have already seen Kagan and others argue. Litigation is messy, and it at least appears to be a far more ineffectual approach than European-style no-fault insurance schemes. For one, if we consider the case of health-care or disability services, it is clear that doling out social rights within the logic of majoritarian democracy allows for a rational and orderly system of prioritising in an era of rising health-care costs. Furthermore, the considerable transaction costs associated with individual rights that are grounded in civil contract law — litigation, malpractice insurance, defensive medicine, etc — can largely be avoided.

However, the question remains whether such a system is able to deal with the complex and competing demands that characterise a modern society, with its socially diverse body politic, with its ethos of individual and minority rights. A comparative analysis of disability politics and policy in Sweden and the US is in this respect quite illuminating when it comes to the relative merits and limitations of the American and European models. Surprisingly to those who associate Sweden with generous social programmes and policies, the Swedish disability rights movement has looked to the American with Disabilities Act (ADA) for inspiration. Thus Adolph Ratzka, the leading figure within the Swedish Independent Living Movement has for years been calling for ADA-like legislation in Sweden to replace what he sees as discriminatory and paternalistic policies (Ratzka 1998). But even the more mainstream organisations representing the interests of the disabled have over time come to take a similar view. Perhaps symptomatic in this respect are comments made by Lars Lindberg, a leading force within the Swedish movement for the rights of the disabled. While himself a Social Democrat and no knee-jerk enthusiast of the litigatory approach, he none the less notes what he refers to as the greater vitality of the American movement that succeeded in pushing through the ADA legislation, emphasising the empowerment of the disabled themselves as opposed to the more passive approach typical in Sweden, which relied on benevolent bureaucracies rather than the actions of the disabled themselves. Not that Lindberg would like give up the Swedish approach entirely: what he would like to see is a combination of ‘negative’ American-style anti-discrimination rights pursuable in courts *and* Swedish-style ‘positive’ social rights that involves transfer payments (Lindberg 1996, 54).

The relative disempowerment of the Swedish individual in relation to the state and the social services provided by the government has come in to focus in recent years. Swedish citizens may have rights to a variety of social services but their power when it comes to seeking redress in case of conflict or if something goes wrong is far more limited. This is true when it comes to health-care, for example. Thus, while Swedish patients have extensive access to national health-care, they have relatively few rights within the system as such (Trägårdh 1999). Similarly, victims of traffic accidents often find themselves unable to pursue their grievances since the cost of lawyers

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are too high, the legal assistance provided by the state is too meagre, and the contingency fee system does not exist. Indeed, in a recent article in the leading Swedish daily newspaper *Dagens Nyheter*, a physician working with a group that seeks to advance the rights of accident victims went as far as to claim that Sweden is de facto denying these persons their fundamental human rights (Wong 2003).¹⁵

None of this is to say that the American system is ideal, or that it always succeeds in finding the proper balance between the competing interests that exist in American society. Throughout US history the political nature of the legal system has worked to privileged individuals or minority interests over the majority in ways that seem contrary to democracy. The judicial system has also worked at times to privilege the majority over the interests of minorities or individuals in ways that show the oppressive power of the state. Nowhere is this darker side of US jurisprudence more evident than in the aftermath of the September 11 terrorist attacks and the subsequent passage of the so-called 'Patriot Act', which significantly increases the surveillance power of the federal government on its citizens. But it is a system that at other points has been used by individuals and groups to gain access to public discourse about fundamental issues of fairness, justice, and equality, to protect the rights of these individuals and groups from tyrannical majorities or coercive state power, and to ultimately reshape the direction of public policy in ways that, as Madison suggested, are 'more consonant to the public good' (Hamilton, Madison and Jay, 1961/1787–88: 82). This system is messy and chaotic to be sure, but the politics of modern pluralist democracy is inherently messy and chaotic.

As we have seen in the discussion of the ADA legislation, it is only by looking at specific empirical cases that we can determine whether litigation is better or worse from a normative perspective. To be sure litigation can in some cases justly be interpreted as a desperate measure signaling a populist frustration with politics, a lack of confidence and trust in the state and the government. In other cases, such as the disastrous and largely counter-productive history of lawsuits related to asbestos, the litigatory approach has been dysfunctional. But at other times it can also be seen as a legitimate avenue for empowerment in the context of a political process that also includes deliberative democracy and a broader, long-term political vision. It is, we would argue, not possible to either glorify or demonise the juridification of politics *in toto*. It is, however, possible to claim that the secular trends that we have identified as linked to the juridification of politics are so strong that whether we like it or not from a normative perspective, we must recognise the need to not simply condemn but to choose a more constructive approach, one that seeks to identify the conditions under which the litigatory approach is more likely to be productive than dysfunctional.

¹⁵ Bengt H. Johansson, quoted in (Wong 2003).

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What critics of the American system often miss is that the US judiciary is not simply a loose legal canon beyond the reach of democratic votes and sentiments. It is also very much part of the democratic political process. In this light, we would like to provisionally make three arguments. First, we would like to suggest that the legal system operates in a manner that is similar to the market, an open power grid accessible to a large number of actors seeking to settle disputes and come to agreements, and a system that is both flexible and self-correcting. Secondly, we would like to advance the notion that the courts can be viewed as a mediating, connecting institution, an arm of the state that is, *de facto*, located within or at least closely linked to civil society, extending the political realm into the daily life of citizen, simultaneously debasing and legitimising law as popular and accessible to ordinary men, even in litigation against the state itself. Thirdly, we will argue that that litigation can be viewed as a citizenship practice, different from voting, but consistent with the logic of the market society in which politics and power negotiations occur in a more decentralised fashion among many actors within a pluralistic and individualistic civil society, in an empirical contexts when European style national democracy is under duress.

4.1. Courts and Markets

Central to Adam Smith's analysis of the market economy is the seeming paradox that a large number of individuals bent on the pursuit of narrow self-interest in the aggregate also tended to produce a greater common good, or as Adam Smith put it, to increase the 'wealth of the nation'. It is our contention that the American politico-legal system at heart works according to an analogous logic. Thus, as Tocqueville noted, in a political system like the American one, it is the case that even though the individuals who partake in the dirty business of power and politics often are selfish, even contemptible, the final result from the point of view of society is mostly good. He detected a 'secret tendency' — the equivalent of Adam Smith's 'silent hand' in the economic domain — in the American political system that made the exertions of the citizens subservient to the prosperity of the community, in spite of their vices and mistakes.¹⁶ This he contrasted with societies ruled by virtuous men, with pretensions of expressing the

¹⁶ Frank Cross makes a similar point in his review of Kagan's book, making the following comment: 'Adam Smith famously observed how individual self-interested decisions could, via the invisible hand of competition, promote the general welfare. Likewise, the competitive legal environment of adversarial legalism might have indirect positive effects in improving the law and governance' (Cross 2003, 214).

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general will or the voice of the people. There, he argued, public men might frequently do harm without intending it, notwithstanding their talents and virtues, whereas in a democratic state like the US, 'they bring about good results which they never thought of'. In Europe the era of the authoritarian state, with its fixed legal codes serving as the ultimate tool of state power, may be over. But the longing for a single source of highly formalised, 'non-political' law survived into the democratic age. Only now the monopoly of law-making shifted from the King to the Parliament, representing the sovereignty of the people in the form of the majoritarian will expressed through the sovereign legislature.

Thus there exists, we would argue, an elective affinity between the liberal market society, on the one hand, and private contract, courts, and litigation, on the other. Both are built on the individual as the central unit, both are decentralised systems for passing information and trafficking in power, while the alternative — social rights administered by the state — is more akin to the command economy model. This is a point that we believe deserves further attention, but the literature already contains sprinkled references to this line of analysis.

For example, Cross notes in passing in his critique of Kagan that 'adversarial legalism is a populist libertarian approach to the law, while the European nations take more of a professional, statist, and elitist approach' (Cross 2003, 236). And while messy and seemingly chaotic this market like dynamic may well have its advantages, Cross argues: 'Strife and uncertainty may produce progress and even greater efficiency. The common law system may be efficient due in part to its very instability, which enable inefficient or obsolete legal rules to be vacated or reversed due to the market incentives of the litigants' (Cross 2003, 217). Conversely, he notes elsewhere, 'the hermetically sealed doctrinal analysis' characteristic of European legal scholarship 'may be resistant to law and economics' (Cross 2003, 228). Crucial to this dynamic flexibility of the common-law is the jury, which Cross, quoting Michael Saks, sees as an institution that 'allows the law to track changes in society with an efficiency that cannot be achieved by asking legislatures to rewrite laws every few months, or even by judges, who are inclined to give more deference to the legislatures than perhaps they always should' (Cross 2003, 231).¹⁷ Thus the jury, the most democratic component of the legal system, provides a fluidity and flexibility that is lacking in the corporatist political systems in Europe, where, Cross suggests, policy is made 'by interlocking business associations together with governmental bureaucracies', which 'may be less likely to yield efficient and democratically flavored policies' (Cross 2003, 232).

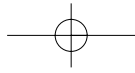
¹⁷Original quote is from Michael J. Saks, *Blaming the Jury*, 75 *Geo. L.KJ.* (1986).

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John Hasnas (1996) has discussed tort reform in the US from a similar perspective. Hasnas celebrates what he, *pace* Hayek, calls ‘the spontaneous order’, which he sees as the hallmark of the market like common-law system. According to him, tort law is at heart a method for resolving conflict peacefully, it is a system that is ‘consumer driven’, *ad hoc*, ever changing, and not guided by some definite, final, and abstract idea of social justice. He bemoans attempts at tort reform that are driven by what he (again borrowing from Hayek) calls the ‘reformer’s conceit’, the notion that jurists, judges, law professors and other intellectuals could conceive of a perfect law according to a rational plan. Such attempts at ‘centrally planned legal reforms’ are doomed to fail just as are centrally planned economies. Instead he calls for a return to ‘true common law’, a system ‘that is never correct, but always self-correcting’, that is constantly evolving ‘through a process of trial and error’ as opposed to centrally planned legal reforms that ‘are inherently static in nature’ (Hasnas 1996, 571–73). Like Cross, he sees the jury as the crucial institution, and the one reform that he does call for is ‘the liberation of the jury’, that is, no longer restricting the jury to finding the facts and assessing damages, but instead allowing them to ‘fully decide cases according to the conscience of the members’ (Hasnas 1996, 574).

4.2. Courts as Links between State and Civil Society

If, then, we view the American politico-legal system as a market like order, the courts (at least those handling civil law cases) themselves no longer simply appear as instruments of state power. Although they form a certain point of view indeed are part of the state apparatus, the availability and the daily use of the courts suggest that they also, in fact, function as institutions that seamlessly blend with civil society. While it is true that citizens can vote for members of Congress, the President, and other elected officials, this is only possible on rare and carefully specified occasions. And while members of Congress can also be lobbied, citizens have no legal right to have their particular cases heard and addressed. The courts, on the other hand, have an obligation to hear cases brought before them, and cases can furthermore be brought at any time, not just every two or four or six years. The courts thus function as arenas in which civil society actors routinely seek redress, settle disputes, and claim rights in an orderly and civil fashion. Because the courts provide a space of adversarial legalism, with each party represented by its own set of lawyers, the state (in the form of judge and jury) can appear as neutral and democratic, rather than heavy handed. Furthermore, since judgements can be appealed the process is also viewed as open-ended.



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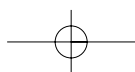
Thus, while European critics often point to the fact that Europeans vote more often in elections than do Americans, voting is not the only relevant measure of political activity. Indeed, if citizenship were to be reduced to a matter of (sometimes) voting for a party or a candidate for office, this would miss much of what constitutes citizenship in the eyes of many, certainly those who champion participatory democracy. Social and political capital is a function not only of individuals going to a polling booth, but also of their day-to-day involvement in politics and power negotiations. In this context it may be that Europeans need perhaps to focus not only on the supposed ills of American litigational culture, but also ponder the paradoxical fact that as of 1973 'there were more lawyers in New York City than in all of Germany, but more judges in Germany than in the entire United States' (Haskell 1997, 49).¹⁸ The question is what this means in terms of the exercise of power from the point of view of the individual citizen, and one possibility is that there exists a larger number of entry points to the political power grid, seen from the point of view of citizens as *activists in civil society*, not only as *voters in political society*.

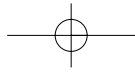
4.3. From National Citizenship to Post-National Legal Personhood?

If the courts and the litigatory system thus are linked to the secular trends that are associated with the primacy of the market society and a vibrant and pluralistic civil society, the question is what becomes of the citizen, a figure that is historically if not by definition tightly linked to the emergence of national democracy.

As political theorists such as Jean Cohen (1996; 1999) or legal scholars like Linda Bosniak (2000) have pointed out, the modern idea of citizenship contains several, partly conflicting components. Thus both Bosniak and Cohen, in discussing the possibility of 'global', 'transnational', or 'postnational' citizenship, distinguish between three related but analytically separate aspects of citizenship. First, there is the idea of citizenship as denoting the formal legal, civil, political and social rights an individual has in relationship to a state. The first two dimensions — civil and political rights — inform what often is referred to as the liberal idea of citizenship, the third one — the social rights — we associate with European-style social democracy. Secondly, there is the notion of a certain personality type, ie, the active, virtuous citizen, deeply engaged in community life under the sign of civic-minded duty. This is the idea of citizenship that is most commonly associated with the civic republican tradition, with Aristotle, Machiavelli,

¹⁸Haskell's source was Dietrich Rueschemeyer, *Lawyers and Their Society: A Comparative Study of the Legal Profession in Germany and United States* (Harvard University Press, 1973).





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Rousseau, and the civic communitarians of today. Finally, there is the idea of citizenship as identity and the affective basis for a politics of solidarity in both the warfare and the welfare state. This is the point at which the idea of citizenship bleeds into the notion of nationhood, and where the history of citizenship merges with the history of nationalism.

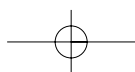
Looking at citizenship from the point of view of the current challenge to the nation-state as the hegemonic political form, it is clear that these three aspects of citizenship stand in tense relations to one another. In particular, one can identify what we may call 'thinner' and 'thicker' variants of citizenship. Thus, the figure of the citizen as a legal person tends towards the inclusive and universal, that is, a very open but also very thin conception of citizenship. On the other hand, the idea of the citizen as a member of a national community or the citizen as a virtuous, active, and civic-minded member of a polis, both suggest a much thicker and exclusionary notion of citizenship.

Looking at these distinctions from a comparative US/European perspective, it becomes clear that in the 'old' Europe of national democracies, the thicker notion of citizenship has been tightly linked to identity, social solidarity and nationhood, whereas in the US the tension between thick and thin ideals of citizenship can be seen more in the debates between liberals and communitarians, with the latter celebrating the virtues of community and thick citizenship and the former preferring a more open and thus thinner variant. The bottom line is, however, that in Europe the thicker variant associated with nationhood and national democracy has come to dominate. Associated with this emphasis on national community has been the emergence of the welfare state. The politics of national solidarity has thus translated into what Marshall called social citizenship, ie a number of substantial social benefits and rights.

In the US, on the other hand, the thinner conception of citizenship has prevailed, centred on the liberal ideas about individual rights, even though the communitarian ethos still resonates in the political discourse. In sharp contrast to the Europe of the nation-states, not only has state and church been separated, but also state and nation(alities). Thus, while communal identities have been shaped on the basis of religion and ethnic/national identity, such communities have been and remain institutionally located in civil society and kept carefully separated from the state itself. And the provision of social welfare has been carried out to a much greater extent through such civil society institutions.

This has meant that it has been easier for immigrants to find a place within the far more diverse and individualistic American society, even if this point must not be overdrawn.¹⁹ Indeed, the US — at least until the

¹⁹Thus there are plenty of examples in the US of how a more identity based conception of citizenship has dominated, for example the discrimination against non-English immigrants, at first Irish and German, later Eastern European, and during the 1920s Asian ones.



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September 11 attack pushed citizenship to the fore again — has been a country in which many people could live at least reasonably well without the benefit of citizenship, where the law in fact applied to every denizen, and where the material benefits of citizenship were sparse. In fact, as Bosniak has noted, ‘the tension between personhood and citizenship as the basis for rights is, in fact, a chronic national preoccupation’ (Bosniak 2000, 461).²⁰

From this perspective it would appear that we in the EU are witnessing a move towards a much thinner version of citizenship, away from the thicker conception of classical European national citizenship that is becoming less and less able to fully account for the individualism and pluralism of post-modern market societies. Indeed, we may be witnessing the emergence of a notion of post-national legal personhood that quite possibly will be thinner even than the one associated with the US, and what the American juridified political order holds out for the framers of a new European constitution is in this context, and for better or worse, an alternative to the classical European model, a far more decentralised and messy system for negotiating conflict in civil society. Having said this, the question remains whether the EU can attain minimum coherence as a polity, something at least close to a recognisable demos and quasi-national community, so as to be able to enjoy legitimacy as a governance regime.²¹ Again, the American example is instructive. For all its ‘thinness’ when it comes to citizenship practices, the legitimacy of the United States’ government and its fundamental institutions is beyond question. In fact, the US is currently, in the wake of the 9/11 attacks, becoming more and not less committed to the primacy of national sovereignty, expressed in foreign policy unilateralism and the refusal to submit to international treaties and institutions, such as the newly constituted international court, out of a primary concern with internal and external national security. This suggests then thin concepts of citizenship may well be an aspect of a strong national identity, leaving the Europeans with a double challenge: how to simultaneously strengthen, even create, a sense of European polity identity *and* to open its citizenship requirements to welcome and include the immigrants and other minorities it sorely needs to survive and prosper, politically, demographically, and economically, in the twenty-first century.

Or conversely, there is the outburst of a politics of national solidarity, most often associated with war-related patriotism, such as the programmes launched by Franklin D. Roosevelt.

²⁰ At the same time this commitment to offering legal standing and protection to aliens, and even illegal aliens, is grounded not in arguments referring to global, human rights doctrines, but rather by invoking the United States Constitution. This also means that the legal position of aliens is vulnerable to the changing political moods in the US, as Japanese-Americans experienced during World War II, and illegal and legal residents of Arab or Moslem descent has experienced post 9/11.

²¹ For a discussion of this problematic, see the chapter of Bellamy and Castiglione in this volume, as well as the chapter by Breckman.

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