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**LOCHNER IN EUROPE: A COMMENT ON KEITH  
WHITTINGTON’S “CONGRESS BEFORE THE  
LOCHNER COURT”**

**DANIELA CARUSO\***

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INTRODUCTION

In 1904, St. Louis, Missouri was the place to go. In conjunction with its spectacular world's fair, the city also hosted the Universal Congress of Lawyers and Jurists, known in academic circles as the foundational event of American comparative law.<sup>1</sup> Within a big screen entirely devoted to the *Lochner*<sup>2</sup> centennial, this comment aims at opening a window on another centennial – the hundredth anniversary of comparative law in the United States.

Though inspired by the Universal Congress, this comment does not partake in the celebratory spirit of anniversaries.<sup>3</sup> Far from espousing a romanticized

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<sup>1</sup> See David S. Clark, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 888-92 (2001) (observing that Universal Congress “emphasized courts, procedures, and practical lawyering with some discussion of legal harmonization”).

<sup>2</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>3</sup> It is indeed remarkable that Justice Harlan engaged in a survey of foreign labor practices, and used them to argue that the New York statute challenged by *Lochner* was not at all extravagant in its regulatory reach. *Id.* at 71 (listing daily workday averages in several European countries). It is also remarkable that contemporary U.S. courts occasionally look at European case law before deciding politically salient issues. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (Kennedy, J., concurring) (considering a Northern Ireland case and its parallels to the *Lawrence* case). But there is nothing intrinsically comforting or legitimizing in the occasional convergence of judicial practices, and divergence is by no means a *per se* evil. U.S.-E.U. comparisons, in particular, may suffer from entrenched Western biases likely to be reinforced by the practice of transatlantic dialogue. See David Kennedy, *The Methods and Politics of Comparative Law*, in *THE COMMON CORE OF EUROPEAN PRIVATE LAW* 131, 200-201 (Mauro Bussani & Ugo Mattei eds., 2003)

or universalist conception of comparative law, these pages simply stem from the belief that foreign perspectives may help revisit conventional wisdom, and occasionally reveal blind spots in one's vision.

### I. COMPARATIVE GAPS

Before commenting on Professor Whittington's contribution to this conference,<sup>4</sup> it is essential to establish a few points of congruence between the U.S. treatment of *Lochner* and the contemporary sensitivity of European jurists. At first, this may seem a daunting task. In the U.S., *Lochner* still haunts contemporary jurists.<sup>5</sup> Some treat it as a metaphor of error.<sup>6</sup> Others consider it a form of misapplied wisdom and point out that momentous accelerations of constitutional history can still happen in the name of substantive due process.<sup>7</sup> The ultimate challenge for these jurists is to save the baby in the *Lochner* bath water.<sup>8</sup> In one way or another, *Lochner* is a legacy that still begs coming to terms with, and as such enjoys undying popularity in U.S. legal discourse. By contrast, scholars who have recently tackled the *Lochner* theme in light of EU constitutionalism have noticed that there is very little overlap between the two.<sup>9</sup> In the perspective of a typical European jurist, *Lochner* would likely be dismissed as old news, bad news, and news that does

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(observing that “[the practice of] distinguishing regimes in loose cultural ‘families’ and economic ‘stages’ of development [may] reinforce elite notions about cultural affinities and differences in ways which affect policy making.”). For a comprehensive critique of comparative law projects aimed at producing “legal truth” by international exchange of discoveries and opinions see Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2574-75 (2004) (book review).

<sup>4</sup> Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821 (2005).

<sup>5</sup> See, e.g., Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605 (1996) (discussing how “those opposed to the Court’s [takings] direction season their arguments with charges of a return to *Lochner*, while most defenders of the new takings jurisprudence take pains to draw distinctions with *Lochner*”).

<sup>6</sup> See, e.g., Patricia A. Carlson, *Adarand Constructors, Inc. v. Peña: The Lochnerization of Affirmative Action*, 27 ST. MARY’S L.J. 423, 445-47 (1996) (“The majority’s decision in *Adarand* harkens back to an era that many had thought long gone – the *Lochner* era.”).

<sup>7</sup> See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 941 (1973) (finding that *Lochner* established a rational basis test but misapplied the analysis).

<sup>8</sup> See, e.g., David A. Strauss, *Why was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003) (criticizing the *Lochner* court not for simply valuing freedom to contract as a “plausible constitutional right” but for making the right “a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected representatives, serves important social purposes”).

<sup>9</sup> See, e.g., Michael R. Antinori, Note, *Does Lochner Live in Luxembourg?: An Analysis of the Property Rights Jurisprudence of the European Court of Justice*, 18 FORDHAM INT’L L.J. 1778, 1780-82 (1995).

not belong in the old Continent.

This seemingly unbridgeable distance stems primarily from technical difficulties. There is a remarkable time lag between the judicial review of the *Lochner* era and the practice of centralized scrutiny of states' statutes in contemporary Europe. Adequate comparisons between mature and incipient federalism are *per se* improbable.<sup>10</sup> Scholars' reluctance to technical generalizations prevents *Lochner* from attracting more interest in European circles.

Even more problematic is the diffuse sense of an insurmountable ideological chasm between the *Lochner* court and contemporary federal or supranational courts in Europe. If *Lochner* "elevated individual rights at the expense of popular sovereignty" and of publicly conceived common goods,<sup>11</sup> in no way can the *Lochner* Court find a match in the constitutional discourse of contemporary Europe. In the early 1950s, the German federal constitutional court made it clear that the Basic Law did not guarantee absolute economic freedom.<sup>12</sup> The experience of post-World War II Germany is commonly

<sup>10</sup> See Mark Tushnet, *Conclusion* to COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA 139 (Mark Tushnet ed., 1990). Technically speaking, the European Union is not even a federation, but rather a *sui generis* "multi-level system of governance." See Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149, 190, 191 (2004). The term "supranationalism" still describes accurately the member states' partial transfer of sovereignty to the EU, and their subjection to centralized lawmaking in Brussels and to the authority of the European Court of Justice in Luxembourg. See generally Joseph H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 YEARBOOK OF EUROPEAN LAW 268 (1981) ("[L]ike all 'federal models,' the Community presents a tension between the whole and the parts, centrifugal and centripetal forces, central Community and Member States.").

<sup>11</sup> Antinori, *supra* note 9, at 1978-79 ("[C]onstitutional property rights were the guise under which judicial officers usurped the powers of legislative majorities and implemented their policy preferences into the economy.").

<sup>12</sup> 4 BVerfGE 7 (1954); see also WALTER F. MURPHY & JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 278 (1977). The German federal constitutional court had to address the plaintiffs' argument that state aids granted to selected firms violated the constitutional principle of neutrality in economic policy, as well as the customary economic and social order. The court explained that

the 'constituent power' has not adopted a specific economic system. This absence enables the legislator to pursue economic policies deemed proper for the circumstances, provided the Basic Law is observed. . . . Although the present economic and social order is . . . congruent with the Basic Law, it is by no means the only one possible. It is based upon a political decision sustained by the will of the legislator which can be substituted or superseded by a different decision. Consequently, it is constitutionally irrelevant whether the Investment Aid Act fits in with the existing economic and social order and whether the means employed for guiding the economy are congruent with a market system.

*Id.* at 279. While the case makes no mention of *Lochner*, the language of the opinion makes it at least plausible to assume that the German justices had *Lochner* in mind, and that they

understood as one of both *Rechtstaat* and *Sozialstaat*, of individual rights *as well as* social responsibility.<sup>13</sup> In German constitutionalism, it seems to go without saying that social legislation can redefine the very meaning of economic freedoms.<sup>14</sup> The European Court of Justice (E.C.J.) builds upon such jurisprudential milestones of the *Bundesverfassungsgericht* (German Federal Constitutional Court) and of other states' constitutional courts.<sup>15</sup> In the E.C.J.'s case law, private economic rights are to be enforced and protected up to a point. Enjoyment of these rights may certainly be restricted by the Brussels lawmakers in light of "objectives of general interest pursued by the Community."<sup>16</sup> More generally, the E.C.J.'s attitude towards social causes is dramatically more progressive than the *Lochner* Court's. Not surprisingly, when the E.C.J. had a chance to decide a *Lochner*-like dispute, it forcefully upheld the limitation of bakers' working hours imposed by a Dutch statute.<sup>17</sup>

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were consciously taking distance from Peckham's economic dogma, while adopting Holmes' lucid dissent. On the links between German and American jurisprudence in the first half of the twentieth century, see Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 203-208 (1994) (discussing the "legal transplants from civil law to the common law" and hypothesizing "that there is an inverse relationship between leadership in Western law and the degree of positivism and localism of a given legal culture").

<sup>13</sup> See Antinori, *supra* note 9, at 1788-96 (discussing with special regard to the social function of property rights how *Rechtstaat* and *Sozialstaat* both "influenced German constitutional tradition"). See also David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 343 ("[T]he social duties of property in Germany, like various public interests in this country, justify limitations that go far beyond the simple case of preventing affirmative harm to others.")

<sup>14</sup> See Currie, *supra* note 13, at 371-72 ("The tendency of the German decisions has been progressive rather than reactionary . . . [u]nlike their American counterparts during the *Lochner* years, the German judges do not seem often to have blocked desirable or even fairly debatable reforms.")

<sup>15</sup> This is due to the fact that, to this day, the European Union does not have a fully binding bill of rights of its own. To make up for this lacuna, and to guarantee member states that the Community would nonetheless take fundamental rights seriously, the E.C.J. in 1979 explained: "In safeguarding [fundamental rights, the Court] is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those states are unacceptable in the Community." Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, 3728 (E.C.J.). The Treaty establishing a Constitution for Europe, signed by all the member states on October 29, 2004, is waiting for ratification. If it comes into force, it will contain a binding "bill of rights" for the Union.

<sup>16</sup> Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, 3747 (E.C.J.).

<sup>17</sup> Case 155/80, *Criminal Proceedings Against Sergius Oebel*, 1981 E.C.R. 1993 (E.C.J.). As in *Lochner*, Sergius Oebel, a bakery owner, was prosecuted for violating a state regulation, banning nighttime work in bakeries. *Id.* There was no equivalent of the

The social and economic policy implemented by the Netherlands was, in the words of the court, “consistent with the objectives of public interest pursued by the Treaty.”<sup>18</sup>

Against this background, Justice Peckham’s formalist protection of individual economic freedom may appear impossibly distant from the ‘social’ core of current European constitutionalism, and therefore ultimately uninteresting.

## II. ESTABLISHING COMMON GROUND: *LOCHNER* AND *FRANZÉN*

There is, however, a sense in which *Lochner* contains a wealth of valuable insights for contemporary Europe, and prompts fundamental reflections on core problems of EU law. Achieving this perspective requires the technical step of replacing one dogma with another. Coarsely speaking, the role of freedom of contract in Justice Peckham’s worldview is played out on the European stage by freedom of movement (for goods, people, and capital). The mission of the E.C.J. in the past forty years has been to make sure that state regulation – even regulation inspired by goals of social protection – would pose as few constraints as possible upon inter-state trade. The parallel is still quite rough, because the E.C.J. has never really espoused pure economic due process as a guiding principle,<sup>19</sup> and because the Luxembourg court has always strived for a nuanced balance between trade interests and social protection.

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Fourteenth Amendment in the Treaty of Rome. The Treaty, however, provided for the free interstate movement of goods. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 30, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. According to *Oebel*, prohibiting nighttime activity made it impossible for bakers to have baked goods ready by dawn and to deliver them beyond state borders in time for breakfast. See *Oebel*, 1981 E.C.R. at 1996-97. Inter-state sales suffered a “quantitative restriction” prohibited by the Treaty. The Court rejected *Oebel*’s arguments and upheld the regulation. *Id.* at 2020.

<sup>18</sup> *Oebel*, 1981 E.C.R. at 2008 (“It cannot be disputed that the prohibition in the bread and confectionery industry on working before 4 a.m. in itself constitutes a legitimate element of economic and social policy, consistent with the objectives of public interest pursued by the Treaty. Indeed, this prohibition is designed to improve working conditions in a manifestly sensitive industry . . .”). The Court’s reasoning was not simply based on Holmes’s abstention from economic judgment. See *Lochner*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”). Nor was it based on Harlan’s defense of states’ legislative autonomy. See *id.* at 69 (“Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation.”). Although the E.C.J. might have confined itself to a *de minimis* rationale, it, instead, went as far as to endorse a specific economic constitution. Cf. *Oebel*, 1981 E.C.R. at 2010.

<sup>19</sup> MIGUEL POIARES MADURO, WE, THE COURT: THE EUROPEAN COURT OF JUSTICE & THE EUROPEAN ECONOMIC CONSTITUTION 77 (1998) (observing that “there is not an ‘economic due process’ approach to Article 30 or the European Economic Constitution”).

But if one bears for a moment with this simplification, *Lochner*-like paradigms become evident on EU soil. The following story – chosen from among many as a simple and convenient illustration – may show how and why.

Sweden has a worrisomely high rate of alcoholism. For this reason, a 1955 Swedish statute established a state monopoly over the distribution of alcohol and subjected the import of foreign alcoholic products to a strict system of licenses and controls.<sup>20</sup> Soon after Sweden's accession to the EU, the E.C.J. reviewed this licensing system, and struck it down as unduly protectionist.<sup>21</sup> The court found that the state monopoly operated on non-discriminatory terms, and that Sweden's overall restrictive policies (including a prohibition of alcohol advertisements) applied to products of all origins. However, the monopoly's license fees hindered the diffusion of foreign liquors and wine on Swedish territory, and therefore reinforced the local habit of consuming Swedish vodka rather than French cognac or Scotch whiskey. Sweden's concern for public health could be addressed, according to the court, by less restrictive, proportional measures.<sup>22</sup>

On its face, *Franzén* only struck down a most protectionist detail of a state's trade regulation. However, the case triggered a chain of events that altered the very core of alcohol policy in Sweden.<sup>23</sup> De-regulatory lobbies were tremendously empowered, and eventually managed to dismantle – again with the help of the E.C.J. – the traditional Swedish ban on alcohol advertising.<sup>24</sup>

This story bears a number of analogies with *Lochner*. State legislation enacted with the aim of protecting citizens from unhealthy practices was weakened by a supreme court endowed with powers of judicial review, not in the name of freedom of contract, but due to an equally basic faith in the

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<sup>20</sup> See PAULETTE KURZER, *MARKETS AND MORAL REGULATION: CULTURAL CHANGE IN THE EUROPEAN UNION* 59 (2001).

<sup>21</sup> Case C-189/95, *Criminal Proceedings against Franzén*, 1997 E.C.R. I-5909, I-5974-77 (E.C.J.) (finding that Articles 30 and 36 of the Treaty of Rome “preclude domestic provisions . . . such as those laid down by Swedish legislation”).

<sup>22</sup> *Id.* at I-5976-77 (finding that “the public health aim pursued . . . could not have been attained by measures less restrictive of intra-Community trade”).

<sup>23</sup> See KURZER, *supra* note 20, at 86-87.

<sup>24</sup> Case C-405/98, *Konsumentombudsmannen v. Gourmet International Products Aktiebolag*, 2001-3 E.C.R. I-1795, 1796 (E.C.J.) (holding that “unless it is apparent that . . . the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade,” an advertising prohibition is not precluded by the Treaty of Rome). In this case, the E.C.J. left to the referring Swedish court the ultimate decision on the proportionality of the advertising ban. In February 2003, the Swedish Market Court eventually struck down the ban as disproportionate to the goal of preventing alcohol abuse. See *Konsumentombudsmannen v. Gourmet Int'l Product Aktiebolag*, Market Court [Sweden] (Feb. 2003); see also BrandEye AB, *Shortcuts to BrandNews: Cases in Issue 2/2003*, at [www.patenteye.se/pdf-filer/SC2BN-0203.pdf](http://www.patenteye.se/pdf-filer/SC2BN-0203.pdf) (last accessed April 12, 2005) (discussing briefly the Swedish Market Court decision in *Konsumentombudsmannen v. Gourmet International Products Aktiebolag*).

Common Market. Like *Lochner*, the *Franzén* decision aimed to define proper federal boundaries, and set limits upon a state's police powers in the name of economic freedom. Most notably, the E.C.J. demonstrated a deep belief, shared by Peckham and Harlan, in the possibility of drawing clear lines between police powers and individual rights, between state and federal government, and between the private and the public sphere. The E.C.J. also shared Peckham's faith in the possibility of drawing such lines by judicial interpretation of a basic text (in Luxembourg, the EC Treaty).<sup>25</sup>

This faith in impartial line-drawing by judicial fiat is as fundamental in contemporary European legal discourse as it was for U.S. jurists in the *Lochner* era. The E.C.J. could only become the powerful supranational institution that it is today by pledging allegiance to the rule of law and to a close reading of foundational Treaties.<sup>26</sup> At the core of the Court's historical success lies its ability to 'constitutionalize' the project of economic integration without ever seeming to blur the line between law and politics, or between supranational powers and states' sovereignty, or between common policies and individual rights.<sup>27</sup> To this end, the Court has developed multiple, sophisticated line-drawing techniques (such as the test of proportionality, or the distinction between products requirements and selling arrangements), and revised or updated them as necessary to withstand doctrinal blurring and erosion.<sup>28</sup>

Yet, as Holmes might remark if situated in present-day Luxembourg, these

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<sup>25</sup> For a discussion of the formalism of the *Lochner* Court see DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* 14, 18-20 (1998).

<sup>26</sup> See J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2413-17 (1991) (discussing the importance of the E.C.J. in the constitutionalization of the integration process).

<sup>27</sup> See MADURO, *supra* note 19, 20-21 ("What is remarkable in the Court's case law is that the conflicts of values inherent in the exercise of discretion and the choices made thereon are not made explicit, but remain hidden behind formal reasoning."). There may be many explanations for the resilience of this judicial style, and yet one seems by far the most powerful. The project of European integration is characterized at its foundations by the need to come to terms with the Nazi experience. See generally DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS (Christian Joerges & Navraj Singh Ghaleigh eds., 2003). There is a sense in which Nazism was the mirror image of *Lochner*. While *Lochner* (in its vulgarized but current European version) was about the sacrifice of just social causes on the altar of absolute individual freedoms, Nazism stemmed from the opposite move of treading upon individual rights in the name of allegedly collective values. The challenge for European jurists is to face this dark legacy, and to continue the practice of balancing individual rights and social causes without ever slipping into sin again. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 73-74 (1997) (observing that the "stakes in general ideological conflict have been higher" in Europe than in the U.S. because the centrists must defend "against a communist left and a fascist or authoritarian right that have actually held and have continuously threatened to take power").

<sup>28</sup> See Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 *EUR. L.J.* 751, 764 (2004).

lines remain self-effacing. The *Franzén* saga, among many others, can attest to this point. How serious is the plague of alcoholism in Sweden? Are import controls or advertising bans a disproportionate state reaction to an otherwise manageable social problem? Considering that EU legislators cannot really regulate the field, is the de-regulatory impact of Europeanization a fatal blow for Sweden's public health?<sup>29</sup> Or is it rather a welcome demise of old-time paternalism?<sup>30</sup> Opinions on the subject abound. The Treaty of Rome, just like the U.S. Constitution as read by Justice Holmes, provides no real answer. The test of proportionality cannot produce one definite answer. The peaceful coexistence of individual freedom (of trade) and social responsibility in European constitutionalism – allegedly a major point of distance from *Lochner* – breaks down into conflicting strategies of governance.<sup>31</sup> A united Europe must deal with the fact that social policy has a variety of irreconcilable meanings.<sup>32</sup> *Franzén* opens a window on a rough ideological battlefield, on which the Treaty casts long shadows and sheds no light. Against this background, *Lochner* becomes worthy of close attention in EU circles, and so do Keith Whittington's reflections.

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<sup>29</sup> EU-wide harmonization of measures regarding alcohol abuse is likely to remain impracticable for a long time as "European laws or framework laws may also establish incentive measures designed to protect and improve human health and to combat the major cross-border health scourges, *excluding any harmonisation of the laws and regulations of the Member States.*" See SECRETARIAT OF THE EUROPEAN CONVENTION, DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, art. III-179 § 5 (2003), at [http://europa.eu.int/constitution/futurum/constitution/index\\_en.htm](http://europa.eu.int/constitution/futurum/constitution/index_en.htm) (last accessed April 12, 2005).

<sup>30</sup> Surveys of public opinion indicate a growing resistance towards invasive regulation of alcohol consumption among certain categories of Swedish nationals. See KURZER, *supra* note 20, at 90-91, 95.

<sup>31</sup> With particular focus on the E.C.J.'s attitude towards states' provision of subsidized public services, Christian Joerges has recently observed that the E.C.J. may be beginning to move beyond the compelling language of doctrinal logic and to engage in a dialogue with different national traditions. See Joerges, *supra* note 10, at 187-88.

<sup>32</sup> Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR. L.J. 712, 715 (2004).

[The] inevitable tension in the welfare state concept itself . . . makes it possible to deduce all types of contractual régimes—from extremely libertarian to extremely interventionist—from this general concept. The tension referred to lies in the fact that the welfare state, on the one hand, believes in market forces and private enterprise as the instrument of creating the economic basis of welfare, and, on the other hand, intervenes in the market forces in order to secure goals connected with redistribution and social security. In other words, the welfare state is characterized by a continuous balancing between market-oriented efficiency and solidarity-based interventions of the state. The idea of the welfare state does not specify where and how these interventions should be made.

*Id.*

## III. WHITTINGTON'S LESSONS

Whittington's contribution is an optimal vehicle for transatlantic dialogue in matters of judicial politics. In Europe it is still hard to talk about the "politics" of judicial review. Europeans – including the legal community – tend to ignore the actual people who sit as justices in Luxembourg. It is a common belief that their work is strictly informed by the rule of law, and that their preferences should not and do not have any bearing on the ultimate outcome of E.C.J. cases. Dissenting opinions do not exist, and decisions are seemingly unanimous.<sup>33</sup> Against this background, Whittington's argument that a sort of political calculus can inform the behavior of non-political judicial bodies comes across as thought-provoking but not threatening.<sup>34</sup> Whittington explains that the *Lochner* court was, on one hand, "insulated from political pressure and immersed in legal tradition."<sup>35</sup> On the other hand, it displayed a penchant for rational choice and carefully picked its battles. When it struck down federal statutes, the U.S. Supreme Court often did so in such a way as to minimize its own political costs; its timing and its choices were at least in part motivated by political opportunism and strategies of institutional survival.<sup>36</sup>

The E.C.J. is "[t]ucked away in the fairyland Duchy of Luxembourg"<sup>37</sup> and definitely "insulated from political pressure."<sup>38</sup> E.C.J. judges are not vetted by the European Parliament. The *Lochner* Court's institutional connection with Congress and the White House finds no parallel in Luxembourg. Whittington's lesson applies nonetheless. No court operates in a political vacuum, and judicial responsiveness to political demands is a matter of necessity, not of choice. The E.C.J. is obviously an active participant in the shaping of EU policies.<sup>39</sup> In order to strengthen the impact of its institutional

<sup>33</sup> See Joseph H.H. Weiler, *Epilogue: The Judicial Après Nice*, in THE EUROPEAN COURT OF JUSTICE 215, 224-25, (Gráinne De Búrca & Joseph H.H. Weiler eds., 2001). Weiler explains that the E.C.J. has mostly adopted a cryptic, "Cartesian style, with its pretense of logical reasoning and inevitability of results." *Id.* at 224. For a most nuanced analysis of the E.C.J.'s judicial style, see MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 20 (2004) ("[T]he E.C.J. depends on a conglomerate mode that pastes together facets of the institutional and argumentative approaches.").

<sup>34</sup> Keith Whittington more fully develops the analysis of the relationship between textual interpretation and constitutional politics. See generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

<sup>35</sup> See Whittington, *supra* note 4, at 856.

<sup>36</sup> See *id.* at 856-58 (discussing the court as a "strategic actor").

<sup>37</sup> Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 Am. J. Int'l L. 1, 1 (1981).

<sup>38</sup> See Whittington, *supra* note 4, at 856.

<sup>39</sup> For an updated survey of the interdisciplinary literature that explores the role of the E.C.J. as a major player in the collective decision making process of the EU, see George

role, the E.C.J. constantly struggles to preserve legitimacy and maximize credibility. Furthermore, like the *Lochner* court, the E.C.J. may remain “immersed in legal tradition,” but it cannot avoid engaging in strategies of political survival, or partaking of current ideologies.

Another insight in Whittington’s contribution finds fertile ground in the EU and is worthy of scholarly investigations. One cannot understand the relationship between the *Lochner* court and Congress without considering that “the legislator” of the *Lochner* era was a very composite entity. Whittington demonstrates that, in taking a seemingly counter-majoritarian stance, the *Lochner* court was simply responding to the wishes of a powerful constituency, which, for contingent reasons, had been bypassed at the time in which the statute was adopted.<sup>40</sup>

Applying these lines of inquiry to Europe, we find out that when the E.C.J. struck down the above-mentioned Swedish measures, it did so because the Swedish constituency was highly divided on alcohol policies, and because the protective regulations no longer seemed to please several political forces.<sup>41</sup> Without this part of the picture, we would necessarily fail to understand what the E.C.J. is doing, and would be left with over-simplified, primitive readings of judicial behavior.<sup>42</sup>

Finally, EU scholars may benefit from Whittington’s many examples, illustrating how the presence of a federal structure of government complicates the dynamics of judicial review. The *Lochner* court may not have been engaged in an active mission to strike down all sorts of social legislation. Congress fared quite well before it, and its statutes, even if ‘progressive,’ were rarely invalidated by the Supreme Court. This brings us to look beyond the many constraints posed by the E.C.J. upon states’ social measures, and to highlight the Court’s consistent support for the development of EU-wide social policies in Brussels. Any evaluation of the E.C.J.’s agenda needs to take into account how the Union’s legislators fare before it – and their score is indeed remarkable, even in matters of “progressive” legislation.<sup>43</sup> In 1998, for

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Tridimas, *A Political Economy Perspective of Judicial Review in the European Union: Judicial Appointments Rule, Accessibility and Jurisdiction of the European Court of Justice*, 18 EUR. J. OF L. & ECON. 99 (2004).

<sup>40</sup> See Whittington, *supra* note 4, at 821-23.

<sup>41</sup> See KURZER, *supra* note 20, at 95-96 (arguing that Europe’s deregulatory pressure has radically affected Swedish alcohol politics).

<sup>42</sup> For the argument that the E.C.J. partakes in an active dialogue with a number of different voices, not always coinciding with the official ‘spiel’ of states’ legislators, see Fernanda G. Nicola, *Multilevel Alliances and Distributive Consequences in the Harmonization of European Contract Law* (paper presented at the conference *Rethinking Ideology & Strategy: Progressive Lawyering, Globalization and Markets*, November 6-8, 2003, Northeastern University) (manuscript on file with the author).

<sup>43</sup> See Case C-376/98, *Federal Republic of Germany v. Council*, 2000-10 E.C.R. I-8419 (taking the exceptional action of annulling a Council Directive limiting the advertisement of tobacco products).

instance, the E.C.J. upheld the imposition of maximum working hours throughout Europe, even though this required rather bold interpretive moves.<sup>44</sup> The E.C.J. may have no principled objection to public intervention in the market, or to the “social function” of private rights. The same court, however, may object very firmly to such forms of intervention when they are enacted by individual states in a way that hinders cross-border trade.<sup>45</sup>

#### IV. EUROPE’S CLUES

By now it should be clear that Professor Whittington’s contribution passes the test of translation with flying colors. It remains interesting even when exported, with unavoidable over-simplifications, onto the legal landscape of the European Union. The closing part of this comment is devoted to show, in turn, that contemporary European jurisprudence may provide useful clues in the context of legal inquiries concerning the *Lochner* era. In fact, by observing recent EU developments, U.S. scholars may be better able to gauge the impact of centralized judicial review upon states’ patterns of policy making.

Supranational judicial review is relatively novel in the EU.<sup>46</sup> The legal landscape of social legislation in most modern European nation-states was developed under the assumption that the legislator would be sovereign, or at least subject only to the control of an internal – not supranational – constitutional court. In this landscape, social policy thrived according to states’ budgets and/or according to the preferences of states’ constituencies. Both good and bad memories of those days are still very fresh in European legal consciousness. It is only recently that the E.C.J. has begun to strike down state measures of social dimension, and it has done so with a rather light touch.

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<sup>44</sup> See Case C-84/94, *United Kingdom v. Council*, 1996-11 E.C.R. I-5755, I-5756-57. By adopting a broad reading of a Treaty article concerning the “health and safety” of workers, the E.C.J. upheld for the most part “the working time directive” (Directive 93/104) setting EU-wide limits on working hours in most economic sectors. See *id.*

<sup>45</sup> See MADURO, *supra* note 19, at 77-78 (finding that the standard of review applied to community legislation is more deferential to the Community legislator than the standard applied to national legislation is to the national legislator).

<sup>46</sup> While the general concept of judicial review boasts a long pedigree in Continental history, the institution of a dedicated federal (or supranational) court in charge of upholding the constitution (or a foundational Treaty), both in matters of individual rights and with regard to the definition of state and federal powers, is a modern development. If one disregards the interwar Austrian model, it is only in the 1950’s that the Bundesverfassungsgericht became the guardian of the basic law of the Federal Republic of Germany. The supranational judicial review of the European Court of Justice only took off in the 1960’s. See Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L. Rev. 477, 481 (2000) (discussing the Bundesverfassungsgericht’s role as the guardian of the Basic Law); Theo Öhlinger, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, 16 *RATIO JURIS* 206, 207 (2003) (The origin of the “concentration of the power or review in a single court . . . was the establishment of the Austrian Constitutional Court in the Austrian Federal Constitution of 1920.”)

Now, scholars have started to notice that the few instances in which the E.C.J. invalidates state legislation of a social character may produce ripple effects. The size of social policies may remain the same, but their reach may be seriously affected.<sup>47</sup> State legislators can become more cautious, and much more responsive to deregulatory lobbies.<sup>48</sup> This effect is hard to quantify, but it is real, and noticeable.<sup>49</sup>

In the U.S., the Supreme Court's practice of invalidating unconstitutional state legislation dates back to 1816.<sup>50</sup> The social movements of the late nineteenth century, and the legislative enactments that responded to their demands, were born in the shadow of judicial review. It is impossible to know what kind of welfare legislation might have developed in a *Lochner*-free landscape. Reverse engineering does not apply to judicial history, and innumerable other reasons may explain why U.S. labor and social law took their peculiar shape and flavor. But in light of recent European developments, it is plausible to infer that States would have acted differently without *Lochner*, and that for better or worse *Lochner* caused a shift in legislative patterns.<sup>51</sup>

Professor Whittington's tables provide us with valuable information concerning the many statutes that were enacted, and the few statutes that were struck down.<sup>52</sup> The very structure of those tables, however, makes it impossible to take into account the statutory measures that were not even considered by state or federal legislators in anticipation of *Lochner*-like scrutiny. Figures cannot convey the fact that a non-quantifiable change in social legislation may have resulted from *Lochner*. Whittington explores extensively the argument that the Court was constrained by political

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<sup>47</sup> See Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 J. COMMON MKT. STUD. 645, 648-49 (2002) (discussing the constraints European integration places upon states' welfare policies); cf. Paul Pierson, *Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies*, in THE NEW POLITICS OF THE WELFARE STATE 410-11 (Paul Pierson ed., 2001) (concluding that the most serious constraints upon European welfare states stem from cost-containment necessities, and that necessary recalibrations may even prompt extension of social provisions).

<sup>48</sup> For an illustration of this phenomenon see KURZER, *supra* note 20, at 95-96.

<sup>49</sup> For an economic model of the effect of judicial review on the size of EU and States' policies see Tridimas, *supra* note 39, at 109-12 (analyzing "how the presence of judicial review affect the size of the policy measures taken by the policy makers").

<sup>50</sup> *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (overturning state court judgment regarding land tenure laws in post-revolutionary Virginia).

<sup>51</sup> See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 51-52 (1991). Forbath counters the opinion that judicial review in the early 20th century "had only the slightest stymieing effect on the progress of labor reform," and instead highlights "the courts' cumulative effects upon the development of labor's political vision and aspirations." *Id.* at 51-52 n.79. Forbath argues that "the general contours and political implications" of *Lochner* era judicial review made clear that "[b]road, class-based legislative initiatives would not pass constitutional muster." *Id.* at 52.

<sup>52</sup> See Whittington, *supra* note 4, at 837-38.

calculations and strategies in its pursuit of judicial review. By contrast, his contribution pays less attention to the fact that both state and federal legislators were in turn constrained by the prospect of *Lochner*-like holdings. When a Court endowed with powers of judicial review sends messages as strong as *Lochner*, it prompts a silent change in the quantity or quality of social legislation. The change might be for better or for worse, and may be refractory to measurements, but it is an important factor in the overall evaluation of the *Lochner* era. It might perhaps be possible to make Whittington's contribution even richer by considering such non-measurable data, or by wondering what kind of story we would tell now, if *Lochner* had never been decided.

