

7. Sociological institutionalism as a lens to study judicialization: a bridge between legal scholarship and political science

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1. INTRODUCTION

EU law and its interpretation by the Court of Justice of the European Union is an object of enquiry for both legal scholars and political scientists, albeit with diverging lenses. While lawyers mainly focus on legal hermeneutics and doctrine, political scientists insist on the social dynamics underlying the adoption and implementation of legal ideas. Despite the common terrain of analysis, both disciplines struggle to find common angles in approaching the subject. For political scientists, legal scholars tend to interpret EU law in a vacuum, underestimating the importance of the context in which rules are to be applied; for lawyers, social scientists focus too much on power relations and often neglect to take into account how legal norms themselves shape opportunities for action ('take the law seriously').

This chapter argues that neo-institutionalism, especially its sociological variant, leads to a better understanding of the production of EU law. Instead of focusing exclusively on the content of the law, this approach emphasises the role of actors in the European legal field, their interactions and the resources they mobilise both in the legal and the economic/political spheres of society. SI thus attempts to overcome limitations present in both disciplines, which impede cross-disciplinary methods. Critiques of formal legal analyses stress the absence of redistributive stakes and socio-economic inequalities leading to unequal resources when mobilising EU law. If in theory the law applies equally to any citizen in a polity, its mobilisation as a tool heavily depends on one's own capabilities and networks (for example, whether actors have knowledge of EU law). SI overcomes this difficulty by tracing descriptively how actors use EU law as a tool, investigating the reasons for such mobilisation (or lack thereof).

Political scientists focus almost exclusively on extra-legal considerations, yet have difficulties in explaining decisions not fitting their predictive models of behaviour. If the turn to socio-legal scholarship is welcome, political scientists arguing that EU law's application goes beyond legal merit often underestimate how legal norms still play a major role in orientating judicial thinking and action. SI attempts to reconcile these distinct stances by stressing the importance of legal norms in structuring the 'space' for agency for legal actors, while abstaining from the assumption that norms apply equally in all situations. In this sense, sociological institutionalism provides a useful inter-disciplinary framework to explore the boundaries between legal, economic and political order in Europe.

After this introduction, the chapter is split into three main sections. Section 2 will explore the boundaries between legal and political science research on EU law and the Court of Justice, linking this disciplinary split to the larger interest of this project in the 'politics of methods'. Section 3 will introduce neo-institutionalist theory and discuss its legal applications as a possible bridge between legal and political science approaches to EU law. Section 4 will be devoted to demonstrating how institutionalist methods can be (and have been) usefully applied to the study of EU law, drawing on past and current examples of CJEU decisions that can be better understood using the lenses of SI. Section 5 will conclude by discussing some of the remaining limits of institutionalist approaches, returning to some broader questions proposed by the project's editors.

2. THE PARADOX: A COMMON RESEARCH FIELD LEADING TO UNEVEN INTERPRETATIONS

EU legal scholars tend to adopt a formal approach when studying the case law of the Court of Justice. Several authors have analysed in depth the decisions of the Court over decades, either adopting typologies to describe the various techniques used by EU judges to interpret the Treaties¹ or coming up with innovative normative criteria of legal reasoning the Court should rather follow (see for example Conway,² who has argued for a closer textual interpretation of the Treaties [especially *lex specialis*] in place of teleological reasoning). Legal interpretation would thus result from a set of practices exclusively based on legal grounds as the main standards the Court adopts when adjudicating

¹ Bengoetxea, J. (1993) *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Clarendon Press; Beck, G. (2013) *The Legal Reasoning of the Court of Justice of the EU*, Hart.

² Conway, G. (2012) *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press.

cases: respect for the hierarchy of norms, the adoption of proper hermeneutics, conformity with judicial precedents, non-interference with other branches of government and clarity of judicial reasoning. Charges of bias, activism and opacity³ often therefore constitute conditions for legal scholars to reject the soundness of the Court's interpretations (often based on the notion that Courts are making expansionary or politically-motivated decisions). Others have recently stressed that extra-legal considerations may come into play, starting with 'steadying factors'⁴ such as repartition of cases between justices within the Court, or attempts by the Court to defend its own institutional position. Extra-legal factors may thus play a role. Such factors tend, however, to remain on the fringes of legal analysis.

This of course reveals some of the biases at play in formal legal analysis. For conventional EU lawyers, a deductive approach, based on the rational distilling and application of general principles of EU law to concrete cases, allows cases and rules to be divorced from their social context. Legal scholars can thus happily treat judges as mouthpieces of the law without having to analyse judges themselves, their backgrounds and their behaviour. Furthermore, they can treat EU law as a relatively unitary field, with similar sets of tools and methods applicable to a wide range of cases, without the need for a detailed understanding of the 'substance' underlying EU rules in particular areas, or the litigants raising cases. Finally, EU law can thereby be studied in a relatively power-free manner. While some authors see benefits in studying 'law in context' (the motto of the *European Law Journal*) by providing anthropological and sociological accounts in their interpretation of EU law, they have a hard time believing that power and strategies are the main drivers of the Court's justices when adjudicating cases.⁵ Normative arguments in law are therefore often divorced from the power dynamics underlying adjudication and focus instead on the implications of rulings for abstract legal and constitutional principles. To give one example, the Court's well-known ruling in *Test-Achats* could be largely welcomed for its legal revocation of a rule allowing discrimination in insurance premium pricing between men and women, without many

³ Pollack, M. (2018) 'The Legitimacy of the Court of Justice of the European Union', in Cohen and Grossman (eds), *Legitimacy and International Courts*, Cambridge University Press; Dawson, M., Muir, E and de Witte, B. (2013) *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing.

⁴ Dawson, M. (2014) 'How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice', 20 *European Law Journal* 3, pp.423–35.

⁵ De Burca, G. (2005) 'Re-thinking Law in Neo-Functionalist Theory', 12 *Journal of European Public Policy* 2, pp.310–26.

commenting on its actual impact (raising the prices of insurance premiums for the most vulnerable distributive party, that is, females seeking life insurance!).⁶

Political scientists for the most part believe that these extra-legal considerations orientate, to a major extent, the judicial endeavour. Following the early suspicions of some scholars that the Court pursued a pro-integration agenda when possible,⁷ political scientists started to analyse the social context surrounding decisions of the Court, an early example being Karen Alter's enquiry on the relationship between the ECJ and national courts and the strategy employed by each to enhance their prerogatives.⁸ Various theories, ranging from liberal intergovernmentalism⁹ to rational choice institutionalism,¹⁰ pointed to the privileged position the CJEU occupies in the EU institutional structure to advance bold judicial interpretations of the Treaties, the main examples remaining the canonical *Van Gen den Loos*, *Costa/ENEL* and *Cassis* decisions. Many political scientists thus sought to determine the extent to which the Court could pursue its own (political) agenda: if some saw legal integration as an expression of the spillover effect predicted by neofunctionalism,¹¹ others viewed the Court as an agent of the most powerful member states that remains under their control.¹²

This once again demonstrates how the study of the Court is easily drawn into disciplinary biases. The 'first wave' of interest among political scientists in the Court relates closely to their identification of another weapon in the

⁶ Mabbett, D. (2014) 'Polanyi in Brussels or Luxembourg? Social Rights and Market Regulation in European Insurance', 8 *Regulation & Governance* 2, pp.186–202.

⁷ Rasmussen, H. (1986) *On Law and Policy in the European Court of Justice*, Martinus Nijhoff Publishers; Stein, E. (1981) 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *American Journal of International Law* 1, pp.1–27; Weiler, J.H. (1991) 'The Transformation of Europe', 100 *Yale Law Journal* pp.2403–83.

⁸ Alter, K. (2001) *Establishing the Supremacy of European Law*, Oxford University Press.

⁹ Moravcsik, A. (1998) *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, Cornell University Press; Moravcsik, A. (2002) 'Reassessing Legitimacy in the European Union', 40 *Journal of Common Market Studies* 4, pp.603–24.

¹⁰ Scharpf, F. (1999) *Governing in Europe: Effective and Democratic?* Oxford University Press; Scharpf, F. (2006) 'The Joint-Decision Trap Revisited', 44 *Journal of Common Market Studies* 4, pp.845–64.

¹¹ Stone Sweet, A. (2004) *The Judicial Construction of Europe*, Oxford University Press; Burley, A.M. and Mattli, W. (1993) 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization*, pp.41–76.

¹² Garrett, G. and Weingast, B. (1993) 'Ideas, Interests and Institutions: Constructing the EC Internal Market', in Goldstein and Keohane (eds), *The Role of Ideas in Foreign Policy*, Cornell University Press.

ongoing debate within political science over the nature of the EU as an organization. The CJEU's institutional power, and its gradual 'competence creep', fit hand in glove with the neo-functional account of a spillover dynamic in integration forwarded by self-interested central institutions (that were essentially in cahoots with each other). Inter-governmentalists then sought to respond with their own account, pointing to the anchoring of EU law in national judiciaries and deference to Treaty rules. Both accounts of course tend to paint the Court as a crudely instrumental institution that operates according to a simple supra-national/inter-governmental dichotomy and without much attention to distinctions between periods, types of litigants or policy areas. Political scientists thus focused their attention on the decisions that led various pundits to call the Court a political institution, that is, where the Court performed true 'juridical coup d'États'¹³ by finding innovative interpretations of EU law that go beyond a simple textual interpretation of the Treaties. The establishment of jurisprudential achievements with limited roots in the EC Treaty thus led social scientists to believe the Court advanced an agenda which member states governments did not seek to achieve, thereby enhancing its own institutional power. *Van Gend en Loos*,¹⁴ *Costa and Cassis de Dijon*¹⁵ were thus cast as allowing dramatic changes to the constitutional landscape of the EU without the express consent of the *pouvoir constituant*.

Social scientists also highlighted that the Court may also limit at will its jurisdiction and/or fine-tune case law at times, when feeling under pressure to do so (see for example Schmidt,¹⁶ especially regarding *Zambrano*). Where this pressure comes from remains a puzzle, with many social scientists identifying it with political authorities that may eventually override CJEU decisions,¹⁷ a pressure conveyed through national media that judges are assumed to 'read'.¹⁸ Nonetheless, apart from the few quantitative studies mentioned above,

¹³ Sweet, A. (2007) 'The Juridical Coup d'État and the Problem of Authority', 8 *German Law Journal* 10, 915–27.

¹⁴ Alter, K. (2009) *The European Court's Political Power*, Oxford University Press.

¹⁵ Alter, K. and Meunier-Aitshalia S. (1994) 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision', 24 *Comparative Political Studies*, pp.535–61

¹⁶ Schmidt, Susanne K. (2017) *The European Court of Justice and the Policy Process*, Oxford University Press.

¹⁷ Larsson, O. and Naurin, D. (2016) 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU', 70 *International Organization* 2, 377–408.

¹⁸ Blauberger, M. et al (2018) 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence', 25 *Journal of European Public Policy* 10, pp.1422–41.

there remains scarce evidence of this direct pressure from political authorities on the Court of Justice. It is near impossible to determine where this direct pressure might come from, given the high degree of independence and anonymity EU judges enjoy. This doesn't seem to bother rational choice scholars since they begin from the assumption that CJEU justices think and act like political actors, driven more by the aim of enhancing their own prerogatives – thus explaining their usual push towards more integration – than their main task of interpreting the Treaties.

Legal scholarship does not deny the political underpinnings of CJEU rulings. Rather, it enshrines as a criterion of proper legal reasoning the absence of political interference (see the literature on legal reasoning mentioned above).¹⁹ Yet it also refutes the idea that the CJEU advances a pro-integration agenda 'no matter what'. If more integration is often the result of case law, it must still remain legally plausible. This plausibility or soundness is what lawyers first and foremost assess when reviewing judicial decisions.²⁰ As such they also explain rather well when CJEU justices adjudicate unconventionally, by pointing to very different things: if political scientists are mainly assessing the *result* of judicial decisions, lawyers stress the lack of coherence in alleged deductive arguments. A good example remains the controversy in *Zambrano*, where the Court used the 'substance of rights' doctrine (something political scientists barely noticed) to allow Mr Zambrano to remain within the EU. This has led more recently to a procedural turn in which both legal scholars²¹ and the President of the Court himself²² posit judicial decision-making as based on an assessment of the process by which policy-makers arrive at decisions (rather than the substance of laws themselves).

The irony of all of this is that political scientists and lawyers often point in the same direction. They both see the CJEU as an influential and often decisive factor in integration, gradually widening the scope of its power over time. At the same time, their disciplinary and methodological biases lead them to disagree fundamentally on the processes that drive case law, locating these processes either in the abstract world of principles and reasoning or in the murky sphere of raw political power (explanations that are highly de-coupled from each other). They both bring interesting insights to the work of the CJEU, but stay back (for the most part) from borrowing arguments from each other.

¹⁹ Arnall, A. and Wincott, D. (2003) *Accountability and Legitimacy in the European Union*, Oxford University Press.

²⁰ See the chapter by Eckes in this volume.

²¹ Harvey, D. (2017) 'Towards Process-Oriented Proportionality Review in the European Union', 23 *European Public Law* 1.

²² Lenaerts, K. (2012) 'The European Court of Justice and Process-Oriented Review', 31 *Yearbook of European Law* 3.

They leave us with a dilemma: how does one recognise the political ‘actorness’ of Courts without *reducing them* to their political role? Sociological institutionalism may provide such a bridge.

3. NEO-INSTITUTIONALISM

Neo-institutionalism refers to the turn taken by various social scientists in reaction to the behavioural perspectives used to analyse political dynamics. Neo-institutionalists argue that studying political behaviour requires some focus on the institutional settings, roles, norms, practices and routines that frame to a certain extent the margin of manoeuvre of actors.²³ In short, ‘institutions matter’ in studying political agency and the policy outcomes to which it leads. Hall and Taylor identified three main variants:

- rational choice institutionalism (RCI) assumes that actors are trying to maximize their interests and consent to the creation of institutions if it helps them serve that purpose.^{24,25} Institutions thus collectively defend and maximize the interests of their members.
- historical institutionalism (HI) stresses the path-dependence of institutional engineering, that is, highlights the weight of pre-existing institutional arrangements, which constrain the margin of manoeuvre of political actors.²⁶
- sociological institutionalism (SI) adopts a broad definition of institutions, stressing in particular the perception of them by actors. SI thus emphasises the double process of institution creation following human behaviour and how, in turn, established institutions have effects on human action.²⁷

Our preference is clearly for the latter variant of institutionalism, for the following reasons. Rational choice institutionalism gives us valuable insights when understanding the establishment of institutions. Regarding the EU, Moravcsik acutely showed how member states and the founding fathers aggregated their

²³ Hall, P. and Taylor, R. (1996) ‘Political Science and the Three New Institutionalisms’, 44 *Political Studies* 5, pp.936–57.

²⁴ North, D.C. (1990) *Institutions, Institutional Change and Economic Performance*, Cambridge University Press.

²⁵ Weingast, B. and Marshall, W. (1988) ‘The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets’, 96 *Journal of Political Economy* 1, pp.132–63.

²⁶ Pierson, P., (1996) ‘The Path to European Integration: A Historical Institutional Analysis’ 29 *Comparative Political Studies* 2, pp.123–63.

²⁷ Powell, W. and DiMaggio, P. (1991) *The New Institutionalism in Organizational Analysis*, University of Chicago Press.

various (sometimes diverging) preferences into the EEC.²⁸ However, RCI proves to have less operative value when explaining change within institutions, such as renewed interpretations of rules. Actors are assumed to have fixed preferences that do not evolve over time – preferences that also, per definition, aim at interest maximisation. As such, institutions should evolve parallel to the change of actors in the game, that is, new government leaders or new justices in Luxembourg. As such, RI hardly explains stability – something better explained by path-dependence (HI) or legitimate beliefs about the existing structure (SI).

Historical institutionalism explains accurately the status quo as its proponents argue that institutions carry a weight that grows eventually over time, so much so as to tie the hands of actors wishing complete overhaul of a given system. In the case of the CJEU, path dependency dynamics, such as the informal operation of precedent, are of obvious significance. But as such, HI shows limits when trying to understand the emergence of certain institutions or their change over time. The main explanation for the latter comes in cases of ‘critical junctures’, that is, when established institutions prove clearly dysfunctional for society. Change would thus be either brutal or incremental, something that reflects the development of case law in the EU only to a limited extent.

Some approaches have tried to avoid the reduction of institutional change to critical junctures by describing phenomena such as ‘layering’.²⁹ Layering refers to the adoption of new arrangements that would complete or remain at the fringes of (without replacing) pre-existing norms. That analytical path describes nicely the development of case law through precedent. Pre-existing principles such as the mutual recognition of products in *Dassonville* were specified in *Cassis* and *Keck*, without substantial alteration. While this variant would cover most judicial evolutions over time, it cannot capture the situation of clear change that does not fit pre-existing institutional routines. The Court recently used the ‘travaux préparatoires’ of the Treaties for the first time, in *Pringle* in 2012 and *Seal Products* in 2013,³⁰ that is, 60 years after it was founded. In *Pringle*, the use of the Maastricht preparatory works gave the Court another source – in quantitative terms, as these documents did not mention explicitly that safeguarding the euro area was a fundamental principle

²⁸ See Moravcsik (n 9) at 86.

²⁹ Streeck, W. and Thelen, K. (2005) *Beyond Continuity: Institutional Change in Advanced Political Economies*, Oxford University Press.

³⁰ Kuijper, P. (2018) ‘The Court of Justice of the European Union’, in R. Howse, H. Ruiz-Fabri, G. Ulfstein and M. Zang (eds), *The Legitimacy of International Trade Courts and Tribunals*, Cambridge University Press, pp.70–137.

of EU law³¹ – to assert that the European Stability Mechanism (ESM) did not infringe art. 125 TFEU. There was a clear strategic component in this case for the CJEU to adopt a new approach that would allow it to adopt a questionable³² but unavoidable decision. The exclusive focus on the weight of norms and how they shape the predispositions of actors as sole explanatory variables misses the margin of manoeuvre and the strategic component that characterise judicial behaviour.

SI provides us with the best tools to understand the compromise between institutional stability and change. The latter would be the result less of calculated efficiency than of the shared belief that change is the most legitimate move to make. Nonetheless, SI takes into account the pre-existing social arrangements that many proponents of SI frame as the ‘culture’ of the institution in question,³³ and which include pre-existing legal rules. SI thus provides a middle ground between the actor’s willingness to see some kind of evolution and the pre-existing structure which serves as a boundary for that action. The emphasis on the actors’ trajectories and socialisation allows for an understanding of legal change as a product of human interaction about the feasibility and desirability of maintaining and changing the status quo.

March and Olsen’s work on the logic of appropriateness versus the logic of consequentiality perfectly reflects the idea formulated above.³⁴ In their latest revision of their work,³⁵ they expressed the desire for approaches balancing both logics, which have so often been opposed in the past. If they remain convinced that the majority of decisions follow the traditionally accepted habits of the systems (thus that the logic of appropriateness applies most of the time), actors face uncertain outcomes and can’t use preexisting norms and routines in all situations. Such actions would occur when pre-existing rules are no longer viewed as leading to desirable outcomes, when time does not allow these rules to function properly and/or when actors lack resources to do so. SI thus allows for a better understanding of both the establishment and the evolution of legal and political institutions.

³¹ Beukers, T. and de Witte, B. (2013) ‘The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: Pringle’, 50 *Common Market Law Review* 3, pp.805–48.

³² Beck (n 1).

³³ Hall, P. and Taylor, R. (1996) ‘Political Science and the Three New Institutionalisms’, 44 *Political Studies* 5.

³⁴ March, J. and Olsen, J. (1995) *Democratic Governance*, Free Press.

³⁵ March, J. and Olsen, J. (2018) ‘The Logic of Appropriateness’, in Goodin (ed), *The Oxford Handbook of Political Science*, OUP.

4. USING SI TO ANALYSE JUDICIAL DEVELOPMENTS

What then does SI require of a researcher trying to unpack judicial developments and legal change? It requires first an understanding of the culture shared by actors within a given institutional setting. When analysing the actions of the Court tasked to assess the correct legal implications of the EU's constitutional instrument, it leads the researcher to consider the rules of the Treaties and secondary law as the most obvious norms to be followed by judges. Before starting to unveil the extent to which socio-economic concerns play a role in the outcome, one must thus follow Joerges' plea to take the law seriously.³⁶

These rules, norms or shared understandings must in a second step be assessed according to the shared methods of interpretation of the actors of a given institutional system. Regarding the EU judicial sphere, SI is thus embedded in the criteria of proper legal reasoning mentioned above. In other terms, the scholar must first and foremost engage with the doctrinal debates surrounding the interpretation of the EU legal provisions at hand. Even if the objective of this chapter and the book in general is to overcome classic approaches focused on hermeneutical analysis, it does not mean that doctrinal work should be considered obsolete. On the contrary, doctrinal analyses are relevant for both legal scholars and political scientists when studying the law from a sociological point of view.³⁷

Even if one believes that the Court is a strategic actor that tries to maximise its interests, this 'strategy' still needs to be grounded in the finite boundaries of judicial reasoning. Many assume that a decision granting more competences to the CJEU in the future is necessarily a 'judicial coup'.³⁸ But there may be a simple coincidence between the 'correct' interpretation of EU law and an increase in the competence of the CJEU. Only an agnostic doctrinal analysis allows the researcher to keep on board, or, on the contrary, discard, the hypothesis that the Court advances its interests. In other words, when the Court adjudicates a case correctly, in the sense of respecting the canons of EU legal reasoning,³⁹ then it matters little from a normative standpoint whether the Court ended its day with a rise in its prerogatives or not, because it fulfilled its main task enshrined in art. 19 TEU (to make sure that the law is observed). An SI approach thus allows a more nuanced and accurate approach to the crude

³⁶ Joerges, C. (1996) 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', 2 *European Law Journal* 2, pp.105–35.

³⁷ See the chapter by Davies in this volume.

³⁸ Sweet, A. (2007) 'The Juridical Coup d'État and the Problem of Authority', 8 *German Law Journal* 10, pp.915–27.

³⁹ Beck (n 1); Conway (n 2).

links political science often draws between judicial outcomes and institutional power.

SI thus simply requires the political scientist to be more cautious when inferring a certain type of behaviour from a decision that reflects the spirit of both the Treaties and the masters of the Treaties. Of course such a task is demanding, especially for social scientists to whom that type of exercise is alien. They may find engaging with doctrinal research daunting, maybe even useless and somehow counterproductive. Such an approach forces the researcher to focus at best on a single area of EU law or most likely on a single case, excluding de facto any recourse to quantitative methods with large-N samples. Yet, from a practical standpoint, the researcher will become familiar with that type of exercise over time. And from a theoretical standpoint, it allows one to better understand the rationality of the actors at hand (rather than superimposing political thinking to the legal world). If the researcher, along with other scholars and practitioners, concurs with the idea that the Court 'did its job', then there might be no point in pursuing the analysis further. When thinking back on nearly seven decades of integration and of CJEU case law, doctrinal analyses of these decisions may yet provide a convincing explanation for the overwhelming majority.

After, and only after, this step, the researcher can try to assess if extra-judicial considerations (that is, things not supposed to guide judges in their daily work) played a role within certain cases (the latter representing by definition only a marginal portion of the judicial workload). Such a task becomes necessary when the former step (traditional doctrinal analysis) either leads to ambiguous results or simply seems counter to the normative criteria of legal reasoning. The *Zambrano* case is an instance where experts in EU citizenship simply could not find any good justification for not tying EU citizenship with cross-border mobility. This unexpected interpretation of EU law calls for more analysis on a sociological level and for alternative or competing explanations of the interpretation of EU law at which the CJEU arrived.

In this case, subsequent cases on EU citizenship, as well as the various attempts at justification by the President of the CJEU himself,⁴⁰ show that *Zambrano* was potentially a case where extra-judicial factors (for example, the protection of the weak party against a certain feeling of 'injustice') helped to shape the outcome. This is thus a useful example of how SI alerts us in this regard not just to expressly 'political' factors but to the personal and cultural

⁴⁰ Lenaerts, K. (2013) 'How the ECJ Thinks: A Study on Judicial Legitimacy', 36 *Fordham Journal of International Law* 5.

dimensions which shape judicial action, that is, how the background, education, shared norms and ideas and networks of judges affect their decisions.⁴¹

This dimension links to a number of other existing studies, such as Antoine Vauchez's emphasis on the role of domestic political networks in embedding the Court's early landmark decisions or Angela Zhang's work on linguistic and educational homogeneity within the Court.⁴² SI also displays similarities with Bourdieusian approaches⁴³ to the European legal field. The logic of appropriateness mirrors elements of the concept of 'habitus' that Bourdieu argues drives actors in their daily work. Some political sociologists,⁴⁴ including Karen Alter in her later work on the Court,⁴⁵ used a field approach to map lawyers' interactions in the early years of the EEC.

The added value of this body of work is its focus on the micro-sociological level of analysis, which allows the reader to map quickly the players involved in a given setting while not assuming their preferences *ex ante*. The goal is rather to establish how the preferences of judicial actors may be predetermined by their earlier careers and still reshaped following their interactions. These approaches thus place less emphasis on legal institutions as such than on the social properties of the actors themselves. Vauchez thus acutely demonstrates that the doctrines of direct effect and supremacy were not simple doctrinal conclusions but rather the consequence of intense deliberations between many legal experts from various national groups and institutions such as academic circles, lawyers' associations and judicial networks.⁴⁶ The engineering of EU

⁴¹ This depends of course on the researcher's epistemology. If one expects to find judges trying to maximize their political preferences then one would assume that extra-judicial factors play a dominant role in the way the CJEU adjudicates. We prefer the opposite assumption that sees judges as legal professionals trying primarily to perform their professional task regardless of their personal preferences. If political preferences play a role in the professional behaviour of any type of actor, we claim that it must be demonstrated rather than simply postulated. The latter claim would amount to situations where emergency carers would systematically hesitate to perform Heimlich manoeuvres on persons with different ideological beliefs or where bus drivers would refuse rides to passengers without first examining their different views.

⁴² Zhang, A. (2016) 'The Faceless Court', 38 *University of Pennsylvania Journal of International Law* 71.

⁴³ Bourdieu, P. (1987) 'The Force of Law: Towards a Sociology of the Juridical Field', *Hastings Law Journal* 38.

⁴⁴ Vauchez, A. (2015) *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, Cambridge University Press; Cohen, A. (2012) *De Vichy à la Communauté européenne*, Presses Universitaires de France; Madsen, M.R. (2010) 'La fabrique des traités européens. Une analyse de la genèse et évolution de la charte des droits fondamentaux', 60 *Revue française de science politique* 2, pp.271–94.

⁴⁵ See Alter (n 14) at 63.

⁴⁶ See Vauchez (n 44).

law interpretation remains the fruit of exchanges between various legal experts. Great instances of such discussions have always been the major *Fédération Internationale du Droit Européen* (FIDE) biennial congresses, studied by the aforementioned scholars, where these legal professionals (especially CJEU judges) gather, discuss and defend various interpretations of contested legal provisions. These discussions always leave traces or fingerprints,⁴⁷ which allow researchers to immerse themselves in these debates, helping to gauge to what extent points of law are counterbalanced by factual or socio-economic considerations.

Even in cases where extra-judicial factors seem to have had a great influence over the result of specific cases, the SI approach assumes that actors will nonetheless apply, to the greatest extent possible, the pre-existing rules of the game. Even if SI distances itself from a hardcore historical institutionalist perspective that has a difficult time explaining any change other than via critical junctures, SI nonetheless posits (following March and Olsen's logic) that involved actors have an interiorised conception of the institutions they are part of and will try to apply this conception even in 'deviant' cases.

This means for the CJEU that, even when judges are charged with activism or bias in favour of integration, they still must deliver a decision that is as legally plausible as possible. The *Pringle* case constitutes a good example of a case where the Court had a difficult time matching a widely desired outcome with sound reasoning. In its judgment, the justices of the CJEU had to decide whether the newly established ESM was compatible with EU law. Eurozone member states agreed that the prohibition of financial bailouts (enshrined in art. 125 TFEU) was obsolete and that assistance between countries sharing the same currency had to become the new law of the land. But despite this widely shared drive to reform economic governance in the EU (resisted by a few marginal figures, one of which – Pringle – brought the case to Luxembourg), the CJEU nonetheless had to stick with its pre-established modes of actions and routines, including upholding the Treaties as the supreme law of the EU. Judges were forced to adopt a decision acclaimed for its 'pragmatic' result⁴⁸ but open to criticism in terms of content.⁴⁹ The seeming encouragement the Court had given to the adoption of EU measures with severe fundamental rights implications outside of the formal structure of EU law received particu-

⁴⁷ For example, the minutes of FIDE congresses are easily found on the web-pages of their dedicated events. See <https://jura.ku.dk/english/fide2014/> for the 2014 Copenhagen Congress and www.fide-hungary.eu/index.php?lang=fr for the 2016 Budapest event.

⁴⁸ Beukers and de Witte (n 31).

⁴⁹ Tuori, K. and Tuori, K. (2014) *The Eurozone Crisis: A Constitutional Analysis*, Cambridge University Press.

lar attention. This careful balancing act is of little surprise: indeed, if the Court was taking decisions that completely ignored the rules of the game, then the judiciary as an institution (and the grounding of its legitimacy in the perceived neutrality of judicial rulings) would simply no longer hold. Such a charge occurred for the *Pringle* case. Change, even when viewed as desirable by a majority of involved players, can't completely free itself from pre-existing arrangements.⁵⁰

5. SI AND ITS LIMITS

The SI approach permits a comprehensive understanding of legal argumentation and the socio-economic context surrounding the adjudication process at the CJEU. It more generally documents empirically the choice of one interpretation of EU law over others. Its advantage lay in its ability to both combine and overcome certain blind spots introduced by the bifurcated study of the CJEU in EU studies from legal and political science perspectives. By taking as its starting point how actors perceive, and are structured by, the institution they inhabit, SI avoids the repeated failure of social science to take the discourse of law seriously. At the same time, SI's focus on the backgrounds, interactions and ideational baggage of actors moves beyond the removal of law from its social context often found as a hallmark of traditional legal analysis. It carries therefore the analytical capacity to act as a bridge between both disciplines, while highlighting (as the authors of this collection urged us to do) the political stakes involved in legal methodologies.

It also does not come without pitfalls. SI as defined here requires a very extensive enquiry, that involves both a deep knowledge of legal institutions and a willingness to spend time looking at the empirical footprints left by actors. Indeed, it requires political scientists to plunge into a very technical field, something some tend to avoid. On the other hand, it also pushes legal scholars to consider factors which many do not typically take into account (for an exception, see Menéndez⁵¹). Such time-consuming research necessarily limits the number of cases under scrutiny (with potential implications for the generalisability of findings). Beyond substance, such a multi-disciplinary approach requires that entrepreneurs from law and political science leave their safe disciplinary realms and enter interstitial interdisciplinary spaces. SI thus requires social scientists to take the time to understand the core features

⁵⁰ Dworkin, R. (1986) *Law's Empire*, Harvard University Press.

⁵¹ Menéndez, A. (2016) 'Neumark Vindicated: The Three Patterns of Europeanisation of National Tax Systems and the Future of the Social and Democratic Rechtsstaat', in Chalmers et al, *The End of the Eurocrats' Dream: Adjusting to European Diversity*, Cambridge University Press, pp.78–126.

of other disciplines before saying something meaningful about the use of interdisciplinarity. Research centres such as Hertie or the EUI – which host representatives from all the social sciences – certainly offer ideal conditions to bring these perspectives to fruition, yet remain the exception rather than the rule. Finally, SI presents the problem of gaining access to the ideas and networks of judges (difficult given the reluctance of judges and practitioners to reveal any non-doctrinal basis for their decisions and more general problems of judicial accessibility).

In short, SI is difficult and time-consuming, but in service of potentially significant scientific rewards. As was once said in a famous advertisement, good things come to those who wait: the same may apply to robust inter-disciplinary research.