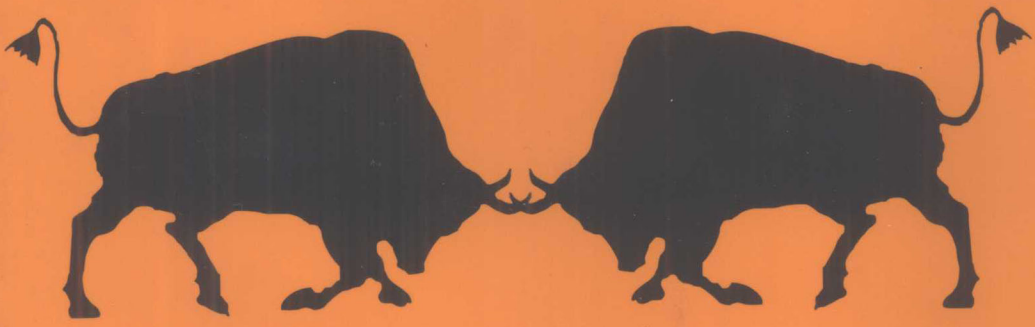
Eurolegalism



THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION

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HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
London, England
2011

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Kelemen, R. Daniel.
Eurolegalism : the transformation of law and regulation in the European Union/ R. Daniel Kelemen.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-674-04694-8 (alk. paper)
1. Law–European Union countries. I. Title.

KJE947.K45 2011
341.242'2—dc22 2010039552

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CHAPTER 1

The Juris Touch

In crowded airport terminals from Brussels to Bratislava, the European Union (EU) reaches out to weary travelers. Posters sponsored by the European Commission and adorned with the blue and yellow European flag remind disgruntled passengers that they have rights. Have you been denied boarding on an overbooked flight? Has your flight been delayed by several hours or canceled? Has the airline lost your baggage? If so, the Commission would like to remind you that European law gives you a legally enforceable right to compensation. (See Figure 1.1.)

The EU's call to arms resonated with many frustrated passengers. After the EU adopted a passenger rights regulation in February 2004,[1] airlines were hit with a dramatic upsurge in claims—with a total of twenty-two thousand complaints during the first eight months the regulation was in force. The International Air Transport Association (IATA) estimated that new compensation claims could cost the typical midsized European airline €40 million annually, approximately 20 percent of its annual operating profit (Minder 2006). Easyjet, Ryanair, and other low-cost carriers were particularly threatened by the compensation requirements, because compensation payments are linked to the length of the flight, not to the ticket price. As a result, passengers who pay pocket change for one of Ryanair's celebrated discount tickets could be owed compensation of €600 should they be bumped from their flight.

Ten of these discount airlines from nine countries formed a trade association, the European Low Fares Airline Association (ELFAA), for the

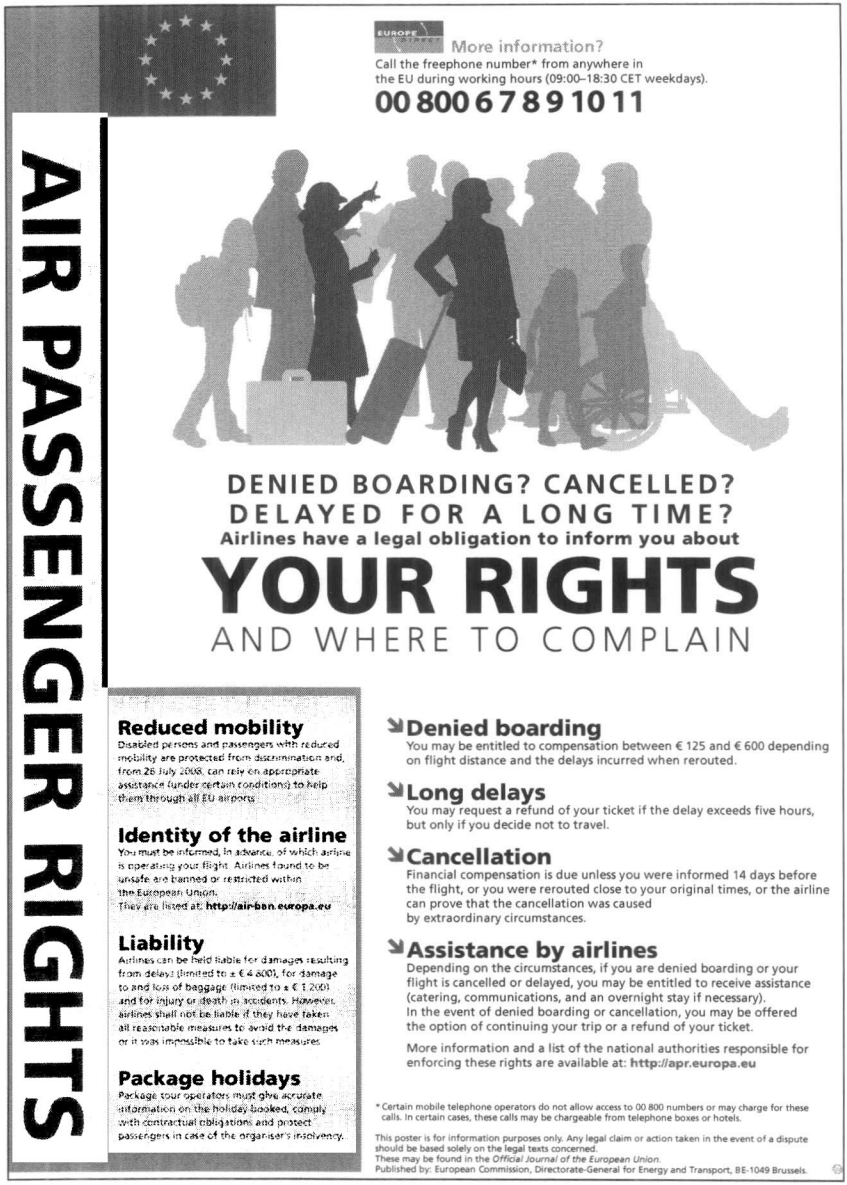

Figure 1.1. Air passenger rights poster sponsored by the European Commission.

express purpose of combating the passenger rights regulation. In a case of "legal turnabout is fair play," the airlines sought to have their own day in court. IATA and the newly created ELFAA challenged the UK's implementation of the EU regulation before the High Court of Justice of England and Wales (Queen's Bench Division). The airlines argued that the regulation was invalid on a number of grounds, including that its penalties were disproportionately high, that it violated the principle of "equal treatment" of different transport sectors, and that it violated the EU's international obligations under the Montreal Convention on air transport. As the airlines' challenge raised questions concerning the validity of the EU regulation, the High Court decided to invoke the EU's preliminary ruling procedure, whereby the court ordered a stay in its proceedings and referred a set of questions to the European Court of Justice (ECJ). Essentially, the High Court wanted the ECJ to rule on whether the airlines' arguments against the validity of the EU regulation were well founded. Ultimately, the ECJ rejected all of the airlines' arguments and upheld the new EU passenger rights established in the regulation.[2] The airline association IATA said that the ruling marked "a sad day for Europe," while the European Commission retorted that the ruling was "good news for consumers" (Minder 2006).

Meanwhile, the Commission continued its efforts to bring legal pressure to bear on reluctant member states—forcing them to strengthen their enforcement of the passenger rights regulation. Beginning in July 2005, the European Commission had initiated a number of infringement proceedings against member states (initially Austria, Belgium, Italy, Luxembourg, Malta, and Sweden and later the UK) for failure to meet all their obligations under the regulation (Commission 2005a), and the Commission filed formal infringement proceedings before the ECJ against Austria, Sweden, and Luxembourg in 2006.[3] In April 2007, the Commission issued a new report (Commission 2007a) criticizing member states for inadequate enforcement of EU passenger rights and threatened to initiate a new round of infringement proceedings after six months against any states that had not taken necessary steps to strengthen enforcement (Commission 2007b).

Meanwhile, disgruntled passengers have continued to pursue claims. A niche industry of passenger compensation–claim legal advisors has sprung up to assist passengers with claims. Firms such as Aviaclaim, EUclaim, and Ticketclaim advertise widely on the Web, soliciting clients

to bring compensation claims against airlines.[4] Aviaclaim advertises that they work on a "no-cure, no-pay" (in American parlance, no-win, no-fee) basis and charge only a modest 22 percent success fee. EUclaim, whose Web site claimed (as of December 2009) that over seventeen thousand passengers had used their services, also works on a no-win, no-fee basis, charging clients 27 percent, plus an administrative fee. EUclaim maintains an office in Amsterdam's Schiphol Airport, where passengers can stop by to make claims. After all, if their flights are canceled, they may have time on their hands.

National courts have continued to refer questions concerning the application of the regulation to the ECJ, with a total of eight references from national courts concerning the regulation reaching the ECJ by the end of 2009.[5] ECJ rulings have bolstered passenger rights. In December 2008, the ECJ ruled that technical problems with an aircraft are not covered by the concept of "extraordinary circumstances" that airlines could use to exonerate themselves from paying compensation for cancellations.[6] In a November 2009 ruling, the ECJ extended the compensation provisions dramatically. The regulation had provided for compensation payments (ranging from €250 to €600) for denied boarding and canceled flights, but for long flight delays the regulation had only required airlines to reimburse passengers tickets or reroute them and provide free food and accommodation. However, in its November 2009 ruling,[7] the ECJ held that because the damage sustained by air passengers in cases of long delays is comparable to the damage they sustain from cancellations, requiring compensation for cancellations but not for delayed flights would violate the fundamental principle of "equal treatment." Therefore, the Court concluded that when flights are delayed more than three hours, passengers have the right to compensation payments as outlined in the directive—up to €600 per passenger.

* * *

This chain of events would have been unimaginable thirty years ago. The European Union publicly calling on citizens to enforce their EU rights? Businesses forming pan-European interest groups to bring legal challenges against EU rights? The Commission threatening coercive legal action against member states that do not enforce consumer rights? Legal service firms springing up that widely advertise and solicit

clients to bring EU rights claims? Well into the 1980s, such practices would have seemed highly out of place in Europe. The emphasis on the language of rights—EU rights no less—and the courtroom battles between regulators and the regulated would have been out of step with the more cooperative and decidedly less judicialized approaches to regulation that prevailed across Europe. Indeed, the entire episode would have had a distinctly American air about it.

And yet, in today's Europe, the passenger rights saga chronicled above is hardly unusual. There are increasing indications that a European variant of American regulatory style is spreading across the European Union. Across policy areas ranging from employment discrimination to consumer protection to antitrust to securities regulation to the free movement rights of workers, students, and even medical patients, we can observe more coercive legal enforcement, more rights claims, and a growing judicial role in shaping policy. Such developments have not gone unnoticed in the European media, with major papers running articles with titles such as "Business Warns EU against Class Actions" (Parker, Buck, and Tait 2007), "Investors Win Powers to Sue" (Adams, Tait, and Jopson 2005), "Brussels Wins Right to Force EU Countries to Jail Polluters" (Watt 2005), "Watchdog Calls in Lawyers over Equality Directive" (Turner 2005), "France Fined €20 Million over Fish Stocks" (Minder 2005b), "Microsoft to Appeal against €900m EC Fine" (Tait 2008b), "European Court Paves Way for Health Tourism" (Laurance 2006), "ECJ Tax Ruling Threatens London Stock Markets" (Herman 2008), "European Student Had Right to UK Loan" (Rennie 2005), "Business Groups Hit Out at 'Compensation Culture'" (Brunsden 2009), "Les consommateurs favorables à l' 'action de groupe' à la française" (Consumers in Favor of Class Actions à la *française*) (*Le Monde* 2007)," "Furcht vor Sammelklagen und Erfolgshonoraren" (Fear of Group Actions and Success Fees)" (Jahn 2007), "Megaclaims in Holland: 'Hebzucht is toch prima?'" (Megaclaims in Holland: "Greed Is Good, Isn't It?") (Volkskrant 2005), "La UE concluye que una empresa puede jubilar de manera forzosa a los 65 años" (The EU Concludes That a Business Can Force 65-Year-Olds to Retire)" (Manzano 2007).

Seeking to make sense of such developments, an emerging literature explores the increasing role of lawyers, courts, and litigation in regulatory and administrative processes across Europe. Some scholars argue that this judicialization is pushing patterns of law and regulation

across Europe toward something akin to an "American legal style" (Wiegand 1991; Shapiro 1993; Trubek 1994; Galanter 1992; Shapiro and Stone 1994; Kelemen and Sibbitt 2004; Kelemen 2006, 2008; Van Waarden and Hildebrand 2009; Rehder 2009). Other scholars disagree, maintaining that entrenched national legal institutions and cultures will block such convergence (Kagan 1997, 2007, 2008; Van Waarden 1995; Legrand 1996; Cioffi 2009). Not all authors engaged in these debates mean precisely the same thing when they invoke the notion of American law or American legal and regulatory style. Some focus more on growing judicial power, others on adversarial relations between government and regulated entities, and still others on a growing proclivity to sue, or "compensation culture," among the public at large. While no concept can capture all of these understandings of American legal and regulatory style, Robert A. Kagan's notion of "adversarial legalism" comes close.[8]

In a series of publications and in his landmark book *Adversarial Legalism: The American Way of Law,* Kagan (2001) notes that between the 1970s and 1990s a substantial body of literature in the field of comparative law and public policy demonstrated that the predominant approach to regulation in the United States differed substantially from the approaches to regulation—or modes of governance—that prevailed across western Europe. Kagan labeled this distinctive American approach to governance "adversarial legalism." Distilling the findings of dozens of studies,[9] Kagan (2001, 2007) explains that compared with the approaches that prevailed across western Europe, American regulatory style was (and still is) characterized by (1) detailed, prescriptive rules often containing strict transparency and disclosure requirements, (2) legalistic and adversarial approaches to regulatory enforcement and dispute resolution, (3) costly legal contestation and multifaceted megalawyering techniques, (4) active judicial review of administrative decisions and practices, and frequent judicial intervention, (5) frequent private litigation concerning regulatory policies. Above all, American-style adversarial legalism is distinguished by its emphasis on enforcing legal norms through transparent legal rules and procedures and broad access to justice, empowering private actors to assert their legal rights (Kelemen and Sibbitt 2004, 2005). Importantly, it is a mistake simply to equate adversarial legalism with large volumes of litigation. As I discuss in Chapter 3, countries such as Germany, Sweden,

and Austria, where policymaking was not traditionally characterized by adversarial legalism, nevertheless have long had higher civil litigation rates than the United States. Adversarial legalism is a mode of governance that manifests itself in a variety of ways and not simply—and not necessarily—in more frequent litigation.

Compared with American-style adversarial legalism, the various approaches to regulation that long predominated across western Europe were more informal, cooperative, and opaque and relied less on the involvement of lawyers, courts, and private enforcement actions. As I discuss below, these systems typically relied on opaque networks of bureaucrats and regulated interests developing and implementing regulatory policies in close concertation. Regulators could rely on more flexible, informal means of achieving regulatory objectives, with courts rarely challenging regulators' decisions. As a result, while "regulation through litigation" (Viscusi 2002) was central to American regulatory governance and while the threat of potential litigation stimulated a wide range of behavioral changes among actors in the regulatory arena, these dynamics were largely absent in Europe.

Nor was American adversarial legalism something many Europeans hoped to import to their shores. Most Europeans have long viewed American legal and regulatory style with a mixture of amusement and horror—and perhaps a touch of Schadenfreude. Ambulance-chasing lawyers, class action lawsuits, massive punitive damage awards, and, more generally, adversarial, litigious relationships among government, industry, and interest groups were and still are viewed as part of the fabric of "American exceptionalism" (Lipset 1996)—symptoms of an American disease,[10] against which European countries were shielded, thankfully, by the Atlantic and by virtue of the sobriety of their legal cultures. And certainly most Europeans—even those who admire particular American laws or legal practices—would be horrified at the prospect of American-style adversarial legalism spreading across Europe. While most Europeans may continue to feel secure in their immunity to this "American disease," this book suggests that theirs is a false sense of security.

* * *

The central argument of this book is that the process of European integration is encouraging the spread of a European variant of adversarial

legalism, which we can call Eurolegalism. Eurolegalism shares the same defining characteristics as American-style adversarial legalism, but due to the moderating influence of entrenched national legal institutions and norms, the version of adversarial legalism that is spreading in Europe is more restrained and sedate than that found in America.[11] European integration is encouraging the spread of Eurolegalism as a mode of governance through two linked causal mechanisms, which I explore in greater detail in Chapter 2. The first mechanism involves the process of deregulation and juridical reregulation linked to the creation of the EU's single market. The economic liberalization associated with the creation of the single market has undermined traditionally cooperative, informal, and opaque approaches to regulation at the national level. Deregulation at the national level has been linked to reregulation at the European level, as national regulations that impeded the operation of the single market are replaced with pan-European frameworks. However, most new EU regulations do not resemble the national ones they replaced. The increased volume and diversity of players in the liberalized single market and the demands from market participants and governments alike to ensure a "level playing field" pressure EU policy makers to rely on a more formal, transparent approach to regulation backed by vigorous enforcement, often by private parties.

The second mechanism stems from the EU's fragmented institutional structure and its impact on EU policymaking. When policy makers seek to reregulate at the EU level, they do so in the context of a highly fragmented regulatory state with a powerful judicial system and a weak administrative apparatus. The vertical fragmentation between the EU and the member states and the horizontal fragmentation of power between institutions at the EU level (i.e., the Council, the Parliament, and the Commission) generate principal-agent problems that encourage the adoption of laws with strict, judicially enforceable goals, deadlines, and transparent procedural requirements. Also, given the EU's extremely limited implementation and enforcement capacities, EU lawmakers have an incentive to create justiciable rights and to empower private parties to serve as the enforcers of EU law. In the absence of a Eurocracy powerful enough to enforce EU law from Brussels (Kelemen 2005), the EU is encouraging the spread of adversarial legalism as a mode of governance that can harness private litigants and national courts for the decentralized enforcement of European law.

Eurolegalism is emerging as a quite unexpected—and in many circles unwanted—stepchild of European integration. Together, the EU's institutional structure and its ongoing project of market integration generate political incentives and functional pressures that have led policy makers to enact transparent, justiciable regulations backed by strict public enforcement and increased opportunities for private enforcement. In other words, adversarial legalism is emerging in Europe for much the same reason it emerged decades earlier in the United States. As Kagan has emphasized (2001, pp. 40–54), in the US case, the combination of "fragmented governmental authority" and "fragmented economic power" was crucial to the emergence of adversarial legalism. In the United States, regulation through litigation emerged as a tool of a weak, highly fragmented state attempting to regulate an expansive and highly liberalized economy. So too in Europe.

The argument set out above challenges prevailing orthodoxies concerning EU governance. EU policy makers regularly—one might say ritualistically—profess their commitment to adopting flexible, informal approaches to governance (Commission 2001a, p. 428; Kelemen and Menon 2007). Likewise, many scholars (Héritier 2002; Radaelli 2003; Trubek and Trubek 2002; Falkner et al. 2005) emphasize the EU's role in promoting new, flexible modes of governance that rely on voluntary agreements, framework directives, soft law, self-regulation, and the Open Method of Coordination. In contrast, this book suggests these flexible new modes of governance are red herring (Idema and Kelemen 2006). The impact of the EU's dalliance with such flexible new modes of governance is overshadowed by the EU's far more pervasive role in promoting the spread of Eurolegalism across a wide range of policy areas.[12]

My argument also challenges prominent arguments concerning the resilience of national legal styles and patterns of policy diffusion. A number of scholars have suggested that impediments to litigation entrenched in national institutions and legal cultures across the EU will block the spread of adversarial legalism in general (Kagan 1997) and of EU rights litigation specifically (Conant 2002; Harlow 1999; Alter and Vargas 2000, Burke 2004; Vanhala 2009a, 2009b; Slepcevic 2009). These arguments identify a variety of institutional impediments to litigation—such as restrictive rules of standing, inadequate financial support and incentives, the absence of class actions—and deeply embedded

norms concerning the role of law and lawyers that all seem to make Europe inhospitable terrain for the growth of adversarial legalism. I demonstrate that many of these barriers are gradually eroding as a result of pressures unleashed by European integration and that while these barriers will continue to channel and constrain the development of adversarial legalism in Europe, they will not halt it.

Importantly, my argument does not rely on the sorts of diffusion processes typically found in studies of the spread of regulatory norms or techniques across jurisdictions (Kelemen and Sibbitt 2005). Studies of policy diffusion typically emphasize the role of coercion, regulatory competition, learning, or emulation in spreading policies across jurisdictions (Simmons, Dobbin, and Garrett 2008). American influences have played some role in the spread of adversarial legalism to Europe, as I will discuss further below. The American legal system has become the most influential national legal system in the world, and many US legal norms have spread to other jurisdictions through a variety of diffusion processes (Mattei 1994; Wiegand 1991; De Lisle 1999; Lester 1988; Ajani 1995; Dezalay and Garth 1995; Kelemen and Sibbitt 2005; Garth 2008). US law firms active in the EU have also played an important role as transmission belts, accelerating the spread of models of US legal practice to jurisdictions across Europe (Kelemen and Sibbitt 2004, 2005). Certainly, American regulatory style provides a salient model that is familiar to EU policy makers and interest groups in many issue areas. However, American-style adversarial legalism typically is viewed with revulsion in Europe. US regulatory style is referred to far more often as an example of what must be avoided than as a model to be emulated. One of the central puzzles addressed by this study is why a legal style that almost no one explicitly advocates is spreading so widely. Ultimately, the primary underlying cause of the spread of adversarial legalism in the EU does not involve being coerced by, competing with, learning from, or emulating the United States. Rather, the explanation for the spread of adversarial legalism is to be found in shifts within the political economy of Europe.

* * *

I elaborate my argument and review opposing arguments in Chapter 2, but first it is important that I emphasize what I am *not* arguing. First, the argument here is not that we should expect European approaches

to governance to converge rapidly or completely on an American model. The rise of Eurolegalism involves an increasing reliance on formal law, lawyers, and litigation in policymaking and dispute resolution, not a complete convergence with American practices. Indeed, one could hardly expect total convergence when American regulatory style itself is a moving target—as evidenced by the alternating waves of tort reform, regulatory reform, and access-to-justice initiatives in the United States—and when US legal regulatory style varies substantially across policy areas and states. And more importantly, as Kagan and other scholars discussed below suggest, entrenched national legal institutions and norms will limit the spread of some American practices in Europe. While the existing institutional and cultural landscape of European legal systems will not block the spread of adversarial legalism, this landscape will surely channel and moderate these developments. Likewise, differences in national legal institutions and regulatory styles will modify the impact of adversarial legalism across member states. Thus, to say that something akin to American adversarial legalism is taking root in the EU is not to suggest that European jurisdictions will soon or ever experience the most notorious excesses, real or imagined, of the US legal system. For Europe, then, there will be no cavalcades of personal injury lawyers at accident scenes and no charmed circle of class action lawyers jurisdiction-hopping in their Learjets. The Eurolegalism that is spreading across the EU is a rather subdued variant of American adversarial legalism.

Second, the argument is not that every policy undertaken by the EU has the characteristics of adversarial legalism. To argue that adversarial legalism is emerging as a dominant mode of governance in the European Union is not to deny that the EU deploys other modes of governance. As Jeremy Richardson (1982) recognized, policy style can vary within a political system across different issue areas (see also Howlett and Ramesh 2003 and Pollack 2008). US experience is instructive in this regard. While scholars agree that US regulatory governance is dominated by adversarial legalism, the prevalence of adversarial legalism varies across policy areas and across states, and regulators frequently adopt rules and practices that do not fit the model of adversarial legalism.[13] The EU has a wide range of instruments and approaches in its regulatory repertoire and certainly does occasionally deploy flexible, informal approaches to regulation. Eurolegalism is not the EU's

only mode of governance, but it is emerging as its dominant mode of governance—a regulatory leitmotif to which the EU returns again and again across a wide range of policy areas.

Finally, forces associated with European integration are not the only causes of the spread of adversarial legalism. In the post–World War II era, democracies in Europe and around the world have experienced a profound, multifaceted judicialization of politics. For some sociologists and social theorists drawing on the work of Durkheim (1893/1964) or Weber (1914/1978), the judicialization of politics is a manifestation of the broader juridification of social relationships in increasingly complex, heterogenous modern societies (see Black 1976; Luhmann 1985; Habermas 1987, pp. 318–331, 359; Teubner 1987; Hirschl 2008, p. 121). An extensive literature in law and political science explores this judicialization of politics and identifies a number of factors that have encouraged it, including declining support for the principle of parliamentary sovereignty, increasing emphasis on citizens' rights, and the expanding scope of public regulation (Henkin 1990; Shapiro and Stone 1994; Tate and Vallinder 1995; Stone Sweet 2000; Guarnieri and Pederzoli 2001; Shapiro and Stone Sweet 2002; Ferejohn 2002; Ginsburg 2003; Hirschl 2004b, 2008b).

There is overlap between some of the arguments found in the judicialization literature and the argument developed in this book, for instance, arguments concerning the influence of political fragmentation on judicial power (Ginsburg 2003). However, while the shifts in approaches to regulation that are the focus of this book are related to the broader judicialization of politics, they are not synonymous with it. Most scholarly literature on judicialization has focused on the strengthening of courts' constitutional review powers (Holland 1991; Tate and Vallinder 1995; Stone 1992; Volcansek 1992; Shapiro and Stone 1994; Stone Sweet 2000; Ferejohn 2002; Guarnieri and Pederzoli 2001; Ginsburg 2003; Hirschl 2004b) or of the role of courts in what Ran Hirschl (2008a) terms "mega-politics." This book focuses on the less dramatic but equally important judicialization of day-to-day regulatory and administrative processes in the European Union. Polities can and do develop expansive constitutional review without adopting anything akin to adversarial legalism in the regulatory arena (Rose-Ackerman 1995; Blankenburg 1996, p. 303). Broader processes of the judicialization of politics have certainly supported the developments described in this