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**Towards a More European European Union:
The Constitutive Relationship between EU
Law and the Cultures of Member States and
its Implications for EU Governance and
Legitimacy**

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Abstract

Despite its limited formal competencies in the cultural arena, the European Union (EU) has had a profound impact on the cultures of its Members States. Its influence is visible in areas as diverse as architecture, theatre, and archaeology. This paper will consider the constitutive relationship between EU law and the cultures of EU Member States. Specifically, it will explore the ways in which European Union's regulation of the manufacture, marketing and distribution of food shapes the contours of EU citizens' habitus in extensive and substantial ways. Through this analysis, this paper will argue that despite the EU's lack of explicit legal competencies in the cultural arena, EU policies that streamline and homogenize economic, labor, and health regulations also function to homogenize the cultures of EU Member States, and in doing so facilitate EU governance and legitimization by contributing to the development of a Europe that is more unified not just economically, but also culturally.

TOWARDS A MORE EUROPEAN EUROPEAN UNION: THE CONSTITUTIVE RELATIONSHIP BETWEEN EU LAW AND THE CULTURES OF MEMBER STATES AND ITS IMPLICATIONS FOR EU GOVERNANCE AND LEGITIMACY

1. Introduction

Though the European Union (EU) does not have substantial formal competencies in the cultural arena, evidence of its impact on culture is visible in areas as diverse as theatre, architecture,¹ and archaeology.² Further, despite its roots as a set of economic agreements and its status as a supranational organization, the EU has come to be recognized as a synecdoche for Europe more generally.³ This paper will explore the constitutive relationship between EU directives and opinions, and the cultures of Member States. Analogizing off of theoretical understandings of the relationship between law and culture in the context of the nation state, this paper will use the example of two EU policies that impact the manufacture and distribution of food within the EU to suggest that the legal infrastructures of the EU shape the contours of EU citizens' habitus in extensive and substantial ways. In this way, this paper will show how despite the EU's lack of explicit legal competencies in the cultural arena, EU policies that streamline and homogenize economic, labor, and health regulations also function to homogenize the cultures of EU Member States, and in doing so facilitate EU governance and legitimization by contributing to the development of a Europe that is more unified not just economically, but also

¹ In addition to regulating the professional qualifications that make someone eligible to work as an architect in any EU Member State in Article 46 of Directive 2005/36/EC the EU sponsors the Mies van der Rohe award, an annual prize in contemporary architecture.

² The EU sponsors numerous projects aimed at promoting trans-European archaeology. Recent projects include the Discovery the Archaeologists of Europe project and the Archaeology, Authority, and Community project.

³ See e.g. Jozsef Borocz, *Goodness is Elsewhere: The Rule of European Difference*, *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 48:1 110, 122-23 (2006)(noting that the EU "is made to stand for...an idea of "Europe" depicted as a trans-historical, invariable ideal.").

culturally.

This paper will begin with a discussion of the theoretical background underlying its analysis. After summarizing scholarly perspectives on the constitutive relationship between law and culture in the nation-state context, it will briefly touch on the literature discussing food and cuisine as central elements of culture. This paper will then turn to discussing the limited legal competencies of the EU in the cultural sphere, touching on Article 167 of the Treaty of the Functioning of the European Union and EU law authorizing EU activities tangentially related to culture. Next, this paper will summarize two of the sets of EU laws that impact the production and distribution of food throughout the European Union: those dealing with the protection of the free movement of goods and those dealing with the protection of geographic indicators. Then, by highlighting a sampling of ethnographic research within Member States, this paper will show how these laws, which explicitly pertain to economic and agricultural practices, shape the cultural behaviors and identities of EU citizens. Finally, this paper will explore the ways in which the reification of a unified European cultural identity through legal apparatuses that are not explicitly cultural may be an expedient way to facilitate the EU governance and legitimacy. In doing so, this paper will contribute to ongoing discussions in the literature about the theoretical relationship between law and culture by demonstrating the applicability and utility of theories that have traditionally been used in national contexts in the relatively novel context of the supranational organization.

2. Theoretical Background

There are two assumptions implicit in this paper's assertion that the cultural habits and attitudes of EU citizens surrounding food can shed light on larger cultural shifts occurring within the European Union: 1) there is a mutually constitutive

relationship between law and culture; and 2) food preparation and consumption are fundamentally cultural acts. I will discuss the validity of each of these assertions in turn.

a. There is a mutually constitutive relationship between law and culture.

Unpacking the mutually constitutive relationship between law and culture requires describing two distinct, though not independent, dynamics. First, one must look at the impact of cultural and social norms on the substance and implementation of legal regimes. Second, and more importantly for this paper, one must look at the mechanisms through which laws, policies, and administrative apparatuses impact culture and in doing so shape the social identities of the citizens they govern.

The idea that a nation's culture shapes and impacts its laws is not a new one. Legal scholar Hernández-Truyol asserts that idea that legal systems “reflect what is happening in their own societies... [and] assume the shape of these societies, like a glove that molds itself to the shape of a person's hand” is as old as most Western legal thought.⁴ This approach did not come into widespread use, however, until the mid-nineteenth century,⁵ when the historical school in German law began advocating for an understanding of law as an ossification of culture.⁶ This notion of laws as “codified forms of the customs and habits of the societies in which they originate”⁷ presupposes that there is a unified national culture that gives birth to its legal structures. As Mezey notes, this simplistic conception of consistent culture is overly-reductionist even within

⁴ Berta E. Hernández-Truyol, *Glocalizing Law and Culture: Towards a Cross-Constitutive Paradigm*, 67 ALB. L. REV. 617, 619 (2003).

⁵ Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 845 (2011).

⁶ *Id.* at 845-48.

⁷ Hernández-Truyol, *supra* note 4, at 619.

the context of a single nation-state.⁸ Applying this theoretical framework in the context of the EU is an even more complicated proposition because there is very clearly not a one-to-one correlation between law and culture: there is a single body of EU law that is created collaboratively by 28 Member States, each of which is home to its own numerous cultural contradictions and inconsistencies. Despite the fact that it is not a fully comprehensive explanatory model in the context of the European Union, the “mirror thesis,” or this idea that law mirrors culture and society⁹ is a useful analytical lens for examining EU law because of its potential to shed light on the ways that European legal structures reflect shared European cultural assumptions and values.

Culture does not just shape and influence law: cultural behaviors, norms, and frameworks are also constituted through citizens’ experiences within their legal structures.¹⁰ Starting in the 1980s, many legal academics began advocating for, and doing, legal scholarship with, an awareness of this constitutive relationship between law and culture. These scholars informed their legal arguments with references to the work of anthropologists like Clifford Geertz and sociologists like Pierre Bourdieu.¹¹ Though Geertz and Bourdieu approached the law from a social science perspective, their work in many ways privileged the place of the law as a driving social force. For example, Bourdieu asserted, “law is the quintessential form of ‘active’ discourse, able by its own operation to produce effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.”¹² Once one accepts this perspective, legal doctrines become not just the code by which society is governed, but also the part of the DNA through which society

⁸ Naomi Mezey, *Law As Culture*, 13 YALE J.L. & HUMAN. 35,43 (2001).

⁹ Hernández-Truyol, *supra* note 4, at 619.

¹⁰ See e.g. Cass R. Sunstein, *Social Norms And Social Roles*, 96 COLUM. L. REV. 903 (1996).

¹¹ Cf. Mautner, *supra* note 5, at 848-850.

¹² Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 814, 839 (1987).

reproduces itself. In other words, “to recognize that law has meaning-making power, then, is to see that social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them.”¹³ Though most of the legal scholarship using this “law as constitutive of culture” approach has done so within the context of the nation state and national culture, this theoretical framework is not “nation-bound:” there is no substantive reason that it will not also be useful in the context of a supranational organization such as the EU.

b. Food is cultural.

The second assertion implicit in this paper’s argument is that human attitudes, behaviors, and preferences surrounding the production and consumption of food are fundamentally part of the cultural milieu which is both shaping, and shaped by, the law. This is not a particularly controversial assertion, numerous authors have written about food as a cultural category,¹⁴ but it is a necessary building block in understanding this paper’s argument that changes in food consumption behaviors are indicative not only of dietary differences but also of large-scale changes that impact the cultural identities of EU citizens.

Scholarly work looking at the anthropology of food has shown the importance of food to both individual and community conceptions of self. French sociologist Claude Fischler describes these important roles of food by noting that “any given human being is constructed, biologically, psychologically and socially by the food

¹³ Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE* 1, 10 (Austin Sarat & Thomas R. Kerns, eds., 1998) .

¹⁴ See e.g. *FOOD AND CULTURE: A READER* (Carole Counihan and Penny Van Esterik, eds., 2012); *LINDA CIVITELLO, FOOD AND CULTURE: A HISTORY OF FOOD AND PEOPLE* (2011).

he/she chooses to incorporate.”¹⁵ Fischler also described the cultural importance of food on the group level by asserting that “the way any human group eats helps it assert its diversity, hierarchy and organization, and at the same time, both its oneness and the otherness of whoever eats differently.”¹⁶ In these ways, food is not just necessary for human life biologically; it is also necessary for human life socially and culturally.

Anthropologists have employed analyses of the rhetoric and practices surrounding food to analyze a wide range of topics including everything from colonialism and food imperialism in India,¹⁷ to the maintenance and reification of a specifically Belizean national identity in the Caribbean¹⁸ and gendered power dynamics surrounding food in North America.¹⁹ Though these examples are drawn from cultural contexts far outside the EU, they illustrate that because of its semiotic malleability and its cross-cultural importance, food can be a useful proxy for studying cultural phenomena that are not facially related to cuisine.

3. Legal and Factual Background Information

Understanding the significance of the ways in which EU law indirectly constitutes EU culture, and in doing so creates more easily governed EU citizens, requires a familiarity with the very limited competencies of the EU in the cultural area. In other words, the profound impact of EU food policies on the cultures of EU citizens and Member States is most meaningful, notable, and significant when understood in the context of the EU’s relative impotence when it comes to regulating and meddling in areas that are more traditionally thought of as “cultural.” In this section, I will first

¹⁵ Claude Fischler, *Food, self and identity*, 27(2) SOCIAL SCIENCE INFORMATION 275, 275 (1998).

¹⁶ *Id.*

¹⁷ See Uma Narayan, *Eating Cultures: Incorporations, Identity and Indian Food*, 1(1) SOCIAL IDENTITIES 63 (1995).

¹⁸ See Richard Wilk, “*Real Belizean Food*”: *Building Local Identity in the Transnational Caribbean*, 101(2) AMERICAN ANTHROPOLOGIST 244 (1999).

¹⁹ See Carole Counihan, *Food as Mediating Voice and Oppositional Consciousness for Chicanas in Colorado’s San Luis Valley*, in *MEDIATING CHICANA/O CULTURE: MULTICULTURAL AMERICAN VERNACULAR* 70 (Scott Baugh, ed., 2006).

summarize the minimal ways that the EU has directly contributed to the shaping of law and policy related to specifically cultural issues in Member States. Then, I will turn to summarizing the EU laws pertaining to the free movement of goods within the community and the protections of geographic indicators, two of the many types of EU economic regulations that impact the manufacture, distribution, and sale of food in the EU.

a. The EU is not heavily explicitly involved in the cultural sphere.

i. Article 167 of the Treaty on the Functioning of the European Union.

The EU began as a purely economic community and it did not explicitly engage with cultural issues or affairs until the 1992 passage of the Treaty of Maastricht. The EU's official delineation of its role in promoting Member States' cultures is now enshrined in Article 167 of the Treaty on the Functioning of the European Union.²⁰ Paragraph 1 of the Article charged the EU with contributing "to the

²⁰ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 167, Oct. 26, 2012, 2012 O.J. (C326/01). This article reads as follows:

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
 - improvement of the knowledge and dissemination of the culture and history of the European peoples,
 - conservation and safeguarding of cultural heritage of European significance,
 - non-commercial cultural exchanges,
 - artistic and literary creation, including in the audiovisual sector.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

flowering of the cultures of the Member States, while respecting their national and regional diversity.”²¹ The second paragraph of the Article charged the EU with helping Member States promote the preservation, creation, and awareness of “cultural heritage of Europe.”²² The third paragraph of Article 167 deals with the promotion of international collaboration on issues relating to culture.²³ The fourth paragraph of the Article instructs the Community to “take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.”²⁴ Finally, the fifth paragraph sets out the methods that the Council may use to implement the goals laid out in the four paragraphs that precede it by limiting the Council to employing incentives and recommendations, both of which must be unanimously supported.²⁵

Though the vague language of Article 167 and the expansive potential meanings of words like “cultural” and “heritage” mean that Article 167 could potentially be the basis for extensive EU involvement in a multiplicity of Member States’ cultural activities, in reality, the Commission has not extensively relied on the competencies granted to it by Article 167. Relatively few recommendations or incentives have come out of Article 167 or its predecessor Article 151 of the Treaty of

5. In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,

- the Council, on a proposal from the Commission, shall adopt recommendations

²¹ TFEU Treaty art. 167.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See Evangelia Psychogiopoulou, *The Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?*, 12 EUROPEAN LAW JOURNAL 5 575, 582-83 (2006).

Maastricht and a report on the consideration of cultural aspects in European

Community Action concluded by noting that:

[a]lthough considerable means are devoted to cultural activities or activities with a cultural dimension, the operations implemented are not, or are rarely, covered by a specific policy which is a response to the tasks assigned to the Community in the cultural field. They do not correspond to a cultural project and have few or no Community cultural objectives.²⁶

Further, in adjudicating a dispute between the European Parliament and the Council of the European Union the European Court of Justice specifically circumscribed the relevance of Article 167. The dispute centered on the European Parliament's action for the annulment of Council Decision 96/664/EC.²⁷ The decision set up programs to stimulate linguistic diversity in the European Union. The Council had justified its Decision through reference to Article 157 (ex-Article 130) which authorized EU activities aimed at promoting commercial competitiveness within the EU. The European Parliament argued that the Decision should also have been based on Article 151(2) because linguistic diversity is a type of cultural heritage. The European Court of Justice rejected this argument and in doing so noted that "not every description of the cultural aspects of Community action necessarily implies that recourse must be had to Article 128 as the legal basis, where culture does not constitute an essential and indissociable component of the other component on which the action in question is based but is merely incidental or secondary to it."²⁸

This lack of heavy dependence on Article 167 is not surprising in light of some authors' suggestions that Article 167's precursor, Article 151, was intended by Member States to be as much a circumscription of EU power as a grant of it. For

²⁶ *1st Report on the Consideration of Cultural Aspects in European Community Action*, at 91, COM (96) 160 final (April 17 1996), available at

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0160:FIN:EN:PDF>

²⁷ Case T-42/97, *European Parliament v. Council of the European Union*, 1999 E.C.R. I-869.

²⁸ *Id.*

example, Cunningham suggests that the legislative history of the article reveals Member States' hesitancy about handing over extensive powers in the cultural arena to the EU. The original draft of Article 151 included contributing to the "education and training of high quality and to the flower of European culture in all its forms"²⁹ among the encouraged functions of the EU, a much broader and more pan-European phrase than that in the enacted article.³⁰ This interpretation is in line with other scholars' readings of Member States' motivations in enacting Article 151. Littoz-Monnet describes the "Maastricht approach" as designed to "provide safeguards for national autonomy,"³¹ and Craufurd Smith sees Article 128 as "answering member states concerns about the Community's capacity to disturb longstanding cultural practices."³²

Though Article 167 has not been interpreted as granting expansive competencies to the European Union, its implementation has resulted in the distribution of substantial funds to Member States for projects related to culture. Kaufman and Raunig attribute this state of affairs to the simultaneous controversiality and centrality of the concept of a "European" culture within the EU.

This difficult situation is largely due to the fact that culture is bound to a relatively limited legal framework at EU level and a more than modest budget is allocated to it ... Because it is of minor importance and yet ideologically highly charged at the same time, culture is considered a controversial issue – especially when it comes to discussing the division of competencies between the EU and its member states.³³

A 1999 Commission working document titled "Application of Article 151(4) of the EC

²⁹ Luxembourg Presidency "Non-Paper": Draft Treaty with Articles With a View to Achieving a Political Union, tit. XV(1) art. 3(p), at 276. (Apr. 12, 1991).

³⁰ See Collette B. Cunningham, Note, *In Defense of Member States: The unrealized Potential of Article 151(4) of the EC Treaty and the Consequences for EC Cultural Policy*, 34 CORNELL INT'L L.J., 135 (2001).

³¹ ANNABELLE LITTOZ-MONNET. *THE EUROPEAN UNION AND CULTURE* 58 (2007).

³² Rachel Craufurd Smith. *European Community intervention in the cultural field: continuity or change?* In *CULTURE AND EUROPEAN UNION LAW* (Rachel Craufurd Smith, ed., 2004).

³³ Therese Kaufmann and Gerald Raunig, *Position Paper on European Cultural Policies*, ANTICIPATING EUROPEAN CULTURAL POLICIES (November 2002), available at <http://eipcp.net/policies/aecp/kaufmannraunig/en> (last accessed April 8, 2013).

Treaty: use of the Structural Funds in the field of culture during the period 1994-1999”³⁴ summarizes the ways in which the “more than modest budget” allocated to culture within the EU has been put to use. Among the awards granted were 1 008 000 € to Luxembourg for a project devoted to “rediscovering countryside paths,”³⁵ 2 201 000 € to Greece for the restoration of monuments in Mystras,³⁶ and 762 511 € to France for the restoration of cultivation terraces.³⁷

ii. Decisions and other official actions dealing with culture.

In addition to the aspects of treaty law discussed above, European Union law has directly engaged with cultural issues through several decisions of the European Parliament and Council. The most prominent of these is Decision 508/2000/EC,³⁸

³⁴ *Application of Article 151(4) of the EC Treaty: use of the Structural Funds in the field of culture during the period 1994-1999*, (February 2004), available at http://ec.europa.eu/regional_policy/sources/docoffic/working/doc/culture_en.pdf (last accessed April 8, 2013).

³⁵ *Id.* at 6-7.

³⁶ *Id.* at 6.

³⁷ *Id.* at 8.

³⁸ Article 1 of Decision 508/2000/EC, which sets out the duration and objectives of the Culture 2000 program reads as follows:

A single financing and programming instrument for cultural cooperation, hereinafter referred to as the “Culture 2000 programme”, is hereby established for the period from 1 January 2000 to 31 December 2004.

The Culture 2000 programme shall contribute to the promotion of a cultural area common to the European peoples. In this context, it shall support cooperation between creative artists, cultural operators, private and public promoters, the activities of the cultural networks, and other partners as well as the cultural institutions of the Member States and of the other participant States in order to attain the following objectives:

- (a) promotion of cultural dialogue and of mutual knowledge of the culture and history of the European peoples;
- (b) promotion of creativity and the transnational dissemination of culture and the movement of artists, creators and other cultural operators and professionals and their works, with a strong emphasis on young and socially disadvantaged people and on cultural diversity;
- (c) the highlighting of cultural diversity and the development of new forms of cultural expression;
- (d) sharing and highlighting, at the European level, the common cultural heritage of European significance; disseminating know-how and promoting good practices concerning its conservation and safeguarding;

which established the Culture 2000 program. The program had numerous objectives, but most of them centered around promoting and celebrating intercultural dialogue among the Member States. The primary mechanism through which these objectives were advanced was through the funding of projects: in its six years of operation Culture 2000 supported more than 1500 projects. Though there had been three European Union sponsored programs operating before the institution of Culture 2000,³⁹ at the time of its introduction Culture 2000 was the largest EU sponsored program ever and no program has eclipsed it since. The final 2008 external evaluation of the first iteration of the Culture 2000 program is interesting in that though the evaluators found that the program failed to fully meet several of its enumerated objectives,⁴⁰ it did bring about at least one outcome that was not among the goals officially enumerated for the program: the evaluation found that “Culture 2000 has changed the mindset of many cultural operators to make them more focused on

(e) taking into account the role of culture in socioeconomic development;

(f) the fostering of intercultural dialogue and mutual exchange between European and non-European cultures;

(g) explicit recognition of culture as an economic factor and as a factor in social integration and citizenship;

(h) improved access to and participation in culture in the European Union for as many citizens as possible.

The Culture 2000 programme shall further an effective linkage with measures implemented under other Community policies which have cultural implications.

³⁹ These programs were: Kaléidoscope, which was authorized by Decision No. 719/96/EC of the European Parliament and of the Council of 29 March 1996 and funded European cultural activities between 1996 and 1999; Ariane which was established by Decision No 2085/97/EC of the European Parliament and of the Council of 6 October 1997 and supported cultural heritage initiatives between 1997 and 1999; and Raphaël which was established by Decision No 2228/97/EC of the European Parliament and of the Council of 13 October 1997 and funded projects related to literature, translation, and reading between 1997 and 1999.

⁴⁰ On page v, the report found that “Culture 2000 has achieved all its objectives to some extent” but then went on to note on page 100 that “Culture 2000 has not increased the exchange of information or good practice among participating countries” and that “Culture 2000’s role as a source of information and best practice examples for intercultural policy has been limited.” ECOTEC, *Final External Evaluation of the Culture 2000 Program (2000-2006)*, (January 2008), available at http://ec.europa.eu/dgs/education_culture/evalreports/culture/2007/report2000_en.pdf (Last accessed April 14, 2013).

intercultural cooperation activities and in doing so, has *contributed to the development of a single European cultural sphere*” [emphasis added].⁴¹ This finding illustrates how even programs that are officially oriented towards “the highlighting of cultural diversity” among Member States can result in the consolidation of a single European cultural sphere when they are authorized and sponsored by the centralized European Union.

b. The EU has multiple competencies that enable it to exert control over the production, distribution, and consumption of food.

There are many EU competencies that have implications for the production, distribution, and consumption of food. The General Food Law⁴² of the EU deals the most explicitly with food related issues, but a variety of EU laws that are not specific to the food context have substantial impacts on the food available to EU consumers. In this section, I will summarize three sets of such EU policies: 1) those dealing with the free movement of goods; 2) those dealing with geographical indicators; and 3) those dealing with genetically modified foods.

i. The EU’s Free Movement of Goods Regulations Impact the Production, Distribution, and Consumption of Foodstuffs throughout EU Member States.

The Treaty on the Functioning of the European Union provisions designed to ensure the free movement of goods throughout the European Union directly impact the variety and presentation of food that is available to consumers in Member States. In this section, I will discuss the key treaty provisions and case law relating to the free movement of goods in the EU, briefly summarize their high-level implications for the production and distribution of foodstuffs in the EU, and then use a series of cases dealing with Italian food to illustrate how these laws directly interface with, and shape,

⁴¹ *Id.* at 102.

⁴² Commission Regulation 178/2002, 2002 O.J. (L 31).

the culinary cultures of Member States.

Article 34 TFEU prohibits “quantitative restrictions on imports and all measures having equivalent effect” between Member States. The Commission elaborated on the responsibilities this article places on Member States in Commission Directive 1970/50,⁴³ which enumerates actions of Member States that are likely to be illegal under Article 34. Article 35 is almost the inverse of Article 34. It prohibits Member States from adopting restrictions on exports and measures having equivalent effect. Although Article 36 allows for exceptions, for example in the cases of public morality, public policy, or public security, it also notes that “[s]uch prohibitions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

The wording of these provisions begs the question what does it mean for a measure to have an “equivalent effect” to a quantitative restriction on the import or export of goods? The European Court of Justice took up this question in *Procureur du Roi v. Dassonville*.⁴⁴ In *Dassonville*, the Court considered whether a Belgian law mandating that Scotch whiskey imported into Belgium be accompanied by a certificate of origin was a measure that had an equivalent effect to a quantitative restriction on trade. The Court found that applying this law to Scotch whiskey that had been legally imported to France and then exported to Belgium had an equivalent effect as a quantitative restriction. In doing so, the Court specified that “measures of equivalent effect” were “all trading rules enacted by Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.”⁴⁵

The Court further clarified its interpretation of Article 34 in *Rewe-Zentral AG v*

⁴³ Commission Directive 1970/50, 1970 O. J. (L 013) 29.

⁴⁴ Case 8/74, *Procureur du Roi v. Dassonville*, E.C.R. 837 (1974); *see also* Case 52/77, *Cayroll v. Rivoira*, E.C.R. 2261 (1977).

⁴⁵ *Id.*

Bundesmonopolverwaltung für Branntwein,⁴⁶ or the *Cassis de Dijon* case. In *Cassis*, the Court ruled that a German law that made it illegal to market black currant liqueur in Germany that had less than 25% alcohol was discriminatory and that “the requirements relating to the minimum content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of free movement of goods, which constitutes one of the fundamental rules of the Community.”⁴⁷ This ruling dramatically changed the legal landscape in the European Union by creating a playing field where “national standards must always be reduced to the lowest level acceptable in any one of the Member States in order to comply with the interpretation of Article 34. If even one Member State has no standard set in domestic law for the production and/or marketing of a particular product then no other Member State can have any such standard either.”⁴⁸ *Cassis* also impacted later case law dealing with restrictions on food imports through its dismissive treatment of Germany’s public health arguments.⁴⁹ This treatment foreshadowed the relatively minimal role for the public morality, policy, and security exceptions in free movement of goods litigation.

These treaty provisions dealing with the free movement of goods and the case law interpreting them have substantially impacted a wide range of practices involved in the production, distribution, and sale of foodstuffs in the European Union.

O’Rourke’s comprehensive list of the activities that are seen as measures with effects equivalent to quantitative restrictions illustrates the extent of the ramifications of the

⁴⁶ Case 120/78, *Zentral AG v Bundesmonopolverwaltung für Branntwein*, E.C.R. 649 (1979).

⁴⁷ *Id.*

⁴⁸ Caoimhin MacMaolain, *EU Food Law: Protecting Consumers and Health in a Common Market* 23 (2007).

⁴⁹ Germany argued that its law should be exempt as a restriction necessary for public health because if black currant liqueur were available with a wide range of alcohol contents then consumers might routinely underestimate the amount of alcohol they were consuming when drinking liqueur and routinely over-imbibe

European Court of Justice's interpretations of Article 36. Among the measures O'Rourke lists are: requirements that importers obtain import licenses; requirements that importers provide declarations of origin; some import inspections; requirements that importers have a representative or agent operating in the Member State in order to import into the Member State; advertising restrictions that unreasonably disproportionately impact imported products; and total bans on the sales of certain goods.⁵⁰

ii. The EU Legal Construct of Geographical Indicators Impact the Production, Distribution, and Consumption of Foodstuffs throughout EU Member States.

A second area of EU law that has had substantial effects on food practices within Member States are the regulations regarding which products can and cannot be labeled using protected geographic indications and designators of origin. Though first articulated in Regulation 2081/1992, the current iteration of these rules is Regulation 510/2006.⁵¹ Regulation 510/2006 provides that "groups" (associations of agricultural producers who produce or manufacture the same foodstuff) may submit an application to the Commission to register a food name as a protected designation of origin (PDO)⁵² or as a protected geographical indication (PGI).⁵³ Successful applications must not only describe the product and group, but must also describe "the link between the product and the geographical environment or geographical origin referred to in Article

⁵⁰ See RAYMOND O'ROURKE, EUROPEAN FOOD LAW 11-14 (2005).

⁵¹ Council Regulation 510/2006, 2006 O.J. (L 93) 21 (EC).

⁵² Article 2(1)(a) of Regulation 510/2006 defines a designation of origin as "the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff: originating in that region, specific place or country, the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area[.]"

⁵³ Article 2(1)(b) of Regulation 510/2006 defines a geographical indication as "geographical indication" means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff: originating in that region, specific place or country, and which possesses a specific quality, reputation or other characteristics attributable to that geographical origin, and the production and/or processing and/or preparation of which take place in the defined geographical area."

2(1)(a) or (b), as the case may be, including, where appropriate, the specific elements of the product description or production method justifying the link.”⁵⁴ Though the language of “culture,” “tradition,” and “habitus” is not explicitly used in this Regulation, and though environmental factors such as climate or rainfall also contribute to shaping regional specialties, social variables, such as culture and habitus, are a central part of any “link” between a region and a tradition of production or agricultural specialization. This broad anthropological statement is supported by the applications of groups for PGIs or PDOs, which routinely reference cultural factors in order to establish a link between their region and the product for which they seek protection. For example, the application for protection of Messara olive oil notes that “[o]live cultivation is inextricably linked to the history and culture of Crete” and goes on to describe “the link between the olive tree and olive products and religious rituals.”⁵⁵ Similarly, the application for protection of the term “Fal Oyster” references historical records describing oystering within the Truoro Port Fishery dating back to the 1800s⁵⁶ and “evidence that the vessels used have been passed down through generations”⁵⁷ in its discussion of the link between Fal Oysters and the proposed geographical area. A food name is not eligible for PGI or PDO status if it is considered “generic,” such as “bread,” or “cheese.” Courts make the determination of whether or not a specific term is generic by looking to the common usage of the word in the European Union.

Once a PGI or PDO is granted, producers whose goods do not meet the

⁵⁴ Council Regulation 510/2006, art. 5(3)(c)(2), 2006 O.J. (L 93) 21 (EC).

⁵⁵ Publication of an application pursuant to Article 6(2) of Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 2012 O.J. (L 396) 10.

⁵⁶ Publication of an application pursuant to Article 6(2) of Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 2012 O.J. (L 384) 15.

⁵⁷ *Id.*

regional or manufacturing specifications associated with that particular PGI or PDO are not allowed to: directly or indirectly commercially use a registered name;⁵⁸ imitate or evoke the style of the registered product;⁵⁹ use any other packaging or advertising to mislead consumers about the provenance of their products;⁶⁰ or engage in “any other practice liable to mislead the public as to the true origin of the product.”⁶¹

4. These EU laws shape Member State cultures and the cultural and social identities of their citizens.

The dialectic between European Union regulations protecting the free movement of goods and geographic indicators and the cultures of Member States provides numerous examples of both aspects of the mutually constitutive relationship between law and culture. The influence of culture upon law, for example, is illustrated by the dependency of a classification as a PGI or PDO on a “link” between a region and a food product in that a product name’s legal recognition as a PGI or PDO is often contingent on the applying group’s ability to demonstrate a longstanding cultural connection between a particular region and a specialized mode of craft production. Similarly, culture also shapes EU law in the context of determinations of whether a PDO or PGI is “generic.” For example, in upholding Regulation 1829/2002,⁶² which established “feta” as a regional term the ECJ relied on survey data detailing EU citizens’ perceptions of the connotations of the word “feta.” These effects of culture on the form of law are only half of the constitutive regulates. This section will use ethnographic examples to illustrate how the two legislative and juridical bodies of discourse outlined above, EU regulations protecting the free movement of goods and those protecting geographical indicators have changed the cultures of Member States,

⁵⁸ Council Regulation 510/2006, art. 13, 2006 O.J. (L 93) 21 (EC).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Commission Regulation 1829/2002, 2002 O.J. (L 277) 10 (EC).

and with them the cultural identities of EU citizens.

a. EU law safeguarding the free movement of foodstuffs throughout the EU shape the cultural landscape they regulate.

This section will describe some of the ways in which the European Union's legal protections for the free movement of goods have changed the cultures of the Member States through which the goods are moving. Litigation surrounding Italian laws struck down as equivalent to quantitative restrictions on trade will be discussed as examples of this constitutive relationship. Then, a cursory summary of other ethnographic and sociological work will be provided to further illustrate the broad range of ways in which laws designed to promote and open market within the European Union inadvertently shape the cultural reality in Member States.

In the case of Italian wine vinegar, European Union law against measures having equivalent effects to quantitative restrictions on trade literally reshaped the semiotic backdrop against which Italians live their daily lives. Traditional Italian vinegar, or *aceto*, is wine-based and has been described as part of Italy's "flowering culture."⁶³ In *Commission v. Italy*, the ECJ struck down an Italian law that limited the use of the name "vinegar" to products that were wine-based.⁶⁴ The Italian government argued that "[restricting the term 'vinegar' to wine-vinegars] is necessary to protect consumers who in Italy 'by time-honoured tradition' treat all 'vinegars' as wine-vinegar owing to the semantic value of the word 'aceto' (vinegar)."⁶⁵ Benedict reports that even though Italian dictionaries defined the word *aceto* as implying the use of wine, the ECJ rejected the Italian government's argument on the grounds that "that the term 'vinegar,' as used in the European Community as a whole, was not limited to

⁶³ Michael Benedict, Note, *Souring La Dolce Vita? Has European Union Legislation Ruined Italian Cuisine or is there Hope Yet For Traditional Products*, 21 B.U. INT'L L.J. 373, 377 (2003).

⁶⁴ *Id.* at 378.

⁶⁵ *Id.* (citations omitted).

wine vinegar alone.”⁶⁶ As a result of this ruling, Italy’s language, an integral part of its culture,⁶⁷ was reshaped and *aceto* that was made of apples, not the traditional wine, found its way onto Italian grocery market shelves.

Commission v. Italy is not the only instance in which an ECJ ruling pertaining to the free movement of goods has had a radical impact on Italian culture. In *3 Glocken v. USL Centro-Sud*, (“*Glocken*”)⁶⁸ the ECJ considered whether Italian law requiring that all dry pasta sold in Italy be made of only 100% durum wheat was an infringement of EU law because it was a measure equivalent to a quantitative restriction on trade. Italy argued that the restriction was justified because without it durum wheat growers, whose product was suitable only for pasta production, would “abandon their land in central Italy because their land does not allow for other kinds of crops.”⁶⁹ Further, Italy argued, “[t]his exodus from the land... would be followed by emigration and grave social and environmental consequences.”⁷⁰ The ECJ determined that the Italian law was an infringement of EU law and without contesting the Italian government’s representation of the massive cultural changes that would be wrought by the free movement of non-durum pasta in Italy, noted “it is for the Community and not for the Member State to seek a solution to the problem described above.”⁷¹ With this ruling, the ECJ changed not only the gustatory experience of Italian consumers who purchase pasta, but also the habitus of Italy’s durum wheat producers whose livelihoods were arguably tied to their monopoly over dry Italian pasta.

⁶⁶ *Id.* at 378-79.

⁶⁷ The importance of the relationship between language and culture cannot be underestimated. Brown describes this relationship well when he notes that “A language is a part of a culture and a culture is a part of a language; the two are intricately interwoven so that one cannot separate the two without losing the significance of either language or culture. In a word, culture and language are inseparable.” H.D. BROWN, *PRINCIPLES OF LANGUAGE LEARNING AND TEACHING* 165 (1994).

⁶⁸ *3 Glocken GmbH v. USL Centro-Sud*, H-407/85, 1988 E.C.R. 4233.

⁶⁹ Benedict, *supra* note 63, at 380.

⁷⁰ *Id.*

⁷¹ *Id.* at 382.

European Union legislation outlawing restrictions on the free movement of goods have had impacts on the cultures of many Member States besides Italy. For example, Raento has documented an increase in the branding of Finnish food products as a result of an influx of foodstuffs from other areas of the European Union.⁷² Further, if true, von Heydebrand's assertion that "[t]he attitude of the Court of Justice towards food standards makes it de facto impossible for the people of a Member State to enforce requirements about the quality, composition, designation and presentation of their food when their views are not shared by the people in the Member State of export"⁷³ suggests that any Member State whose national identity was facilitated through the national manipulation of food markets has experienced shifts in cuisine and diet, and by extension culture, as a result of the application of the EU's free movement of goods laws.

b. EU law protecting geographical indicators and designations of origin shape the cultural landscape they regulate.

Though the mechanisms through which the EU protection of geographical indicators change Member States' cultures are multiple and multifaceted, this section will highlight the ethnographic work of one anthropologist in Poland as a case study to demonstrate the ways in which the EU registration process for geographic indicators has helped change the cultures of the landscapes it regulates. This section will then provide a cursory summary of other anthropological work that has reflected similar findings about the role of EU regulations surrounding the protection of geographic indicators in shaping culture and the cultural identities of EU citizens.

⁷² See Paulina Raento, *Stomaching change: Finns, food, and boundaries in the European Union*, 92(4) *GEOGRAGISKA ANNALER: SERIES B, HUMAN GEOGRAPHY* 297 (2010).

⁷³ See Hans-Christoph von Heydebrand u.d. Lasa, *Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice Got It Wrong?*, 16 *EUR. L. REV.* 391, 413 (1991)(cited in Benedict, *supra* note 63, at 379 n. 34).

Olivia Margit Hall's research on the identification of local food traditions and in particular the emergence of traditional Polish plum jam, or Powidła Śliwkowe, from the Lower Vistula Valley (LVV) as a traditional local food⁷⁴ provides an excellent example of the ways in which EU PDO and PGI designations can shape the rhetoric of identity and authenticity that define communities and individuals in the EU. Hall titles a section of her dissertation "hunting for traditional foods in Poland"⁷⁵ and details the ways in which the prestige and economic benefits associated with registering PDOs and PGIs catalyze both government-sponsored public awareness campaigns and citizen-led competitions encouraging communities to reconceptualize their local cuisines as "traditional" and "authentic," in short, as suitable candidates for PDO or PGI designations.⁷⁶

Hall's ethnography then turns to the specific example of Powidła from LVV. In this context, she chronicles how the EU PDO and PGI system "disciplines tradition" by transforming plum jam from "masses of boiling plums in people's backyards into a newly conceived "product."⁷⁷ Since the EU promises consumers that "[p]urchasing an EU quality labeled product guarantees not only its quality but its authenticity...,"⁷⁸ regional groups of traditional product producer must achieve some sort of consensus about what version of the local product is most authentic and what versions are by implication less authentic in order to submit a successful application for PGI or PDO status. Hall describes how the process of attempting to achieve consensus among all those who produced plum jam as to what the "official" plum jam recipe of the region is led to some families' recipes being seen as derivative or "less authentic" than others. In short, by necessitating that a

⁷⁴ Olivia Margit Hall, *Stirring the Pot in Poland: Traditional Plum Jam, Regional Identity, and Rural Development in the Lower Vistula Valley* (August 2002) (unpublished Ph.D. dissertation, Cornell University).

⁷⁵ *Id.* at 112.

⁷⁶ *Id.* at 96-138.

⁷⁷ *Id.* at 116.

⁷⁸ *Id.* at 117 (citations omitted).

traditional recipe and method of production for plum jam be identified the EU regulations dealing with the protection of geographic indicators led to the transformation of some group member's recipes (those that included cloves; those with added sweeteners) into less authentic "imitations" of newly established "authentic" versions of Powidła Śliwkowe.⁷⁹

The literature abounds with other instances of the EU registration of geographic indicators catalyzing transformations in the cultures of the regions whose foodstuffs are protected. Though a thorough discussion of these examples is beyond the scope of this paper, their range and number advance this paper's argument by illustrating the variety and numerosity of the ways in which geographic indicator laws in the EU have shaped culture. Some relevant examples include: Brian Libery and Moya Kneafsey's finding that producers in England "have formed 'groups of convenience' to qualify for PDO or PGI status (eg Whitstable Oysters, Herefordshire, Worcestershire and Gloucestershire Cider and Perry makers), [] [while] continuing to work individually;"⁸⁰ Marescotti's work on the effects of PDO & PGI registration in rural contexts;⁸¹ Kees de Roest and Menghi's work on the impact of the Parmigiano Reggiano Cheese supply chain;⁸² and Libery and Kneafsey's observations about the ways in which linking product and place can create a "double commodity fetish."⁸³

5. In modifying the social landscape on which EU law is enacted, EU laws protecting the free movement of goods and geographic indicators have profound implications for EU governance and legitimacy.

⁷⁹ *Id.*

⁸⁰ Brian Libery and Moya Kneafsey, *Protecting and promoting regional specialty food and drink products in the European Union*, 29(1) OUTLOOK ON AGRICULTURE 31 (2000).

⁸¹ Andrea Marescotti, *Typical Products and Rural Development: Who Benefits from PDO/PGI Recognition?*, Paper, 83rd EAAE Seminar "Food Quality Products in the Advent of the 21st Century: Production, Demand and Public Policy." Chania, Greece, September 4-7, 2003 (noting that "in some situations the activation of the application procedure may alter social cohesion and cause conflicts among producers in the construction of the Code of Practice.") (cited in Hall, *supra* note 74 at 148).

⁸² See Kees de Roest and Alberto Menghi, *Reconsidering 'Traditional' Food: The Case of Parmigian Reggiano Cheese*, 40(4) SOCIOLOGIA RURALIS 439 (2000).

⁸³ Brian Libery and Moya Kneafsey, *Product and Place: Promoting Quality Products and Services in the Lagging Rural Regions of the European Union*, 5 EUROPEAN URBAN AND REGIONAL STUDIES (1995).

Almost since its inception, the EU has been plagued by critics who allege suffers from a democratic deficiency⁸⁴ or that it is the product of an “elite consensus” but does not necessarily reflect the will of the hoi polloi who live under its governance.⁸⁵ Some argue that extent of these legitimacy problems will grow along with the roster of EU member states.⁸⁶ Further, as the EU gains increasing legal competencies, and becomes less like a supranational organization and more like a federated nation state, these concerns are likely to become more pronounced since expansions in the EU's legal competencies will likely mean a more involved role for the organization and its policies in the lives of EU citizens.

Increased cultural cohesions among the citizens and nations of the EU may lend increased legitimacy to the EU as an institution and facilitate EU governance by standardizing the cultural landscape on which EU laws are implemented. Cultural homogeneity plays a substantial role in many scholars' understandings of nationalism and undergirded the majority 20th century understanding of national legitimacy.⁸⁷ Further, the rhetoric of “shared European values” is already quite frequently used to bolster the validity of the European Union.⁸⁸ If the political power of the EU continues to expand and it begins to enter the legal space traditionally occupied by the nation state, a shared identification as “Europeans” and “EU Citizens” will become increasingly important. This growing need for

⁸⁴ See e.g. Andreas Follesdal and Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to*

Majone and Moravcsiki, 44(3) *JCMS: JOURNAL OF COMMON MARKET STUDIES* 533 (2006).

⁸⁵ Cf. Marco Steenbergen, Erica Edwards, and Catherine de Vries, *Who's Cueing Whom? Mass-Elite Linkages and the Future of European Integration*, 8(1) *EUROPEAN UNION POLITICS* 13 (2007).

⁸⁶ Cf. Helene Sjursen, *Why Expand?: The Question of Legitimacy and Justification in the EU's Enlargement Policy*, 40(3) *JCMS: JOURNAL OF COMMON MARKET STUDIES* 491 (2002).

⁸⁷ See e.g. ANTHONY SMITH, *NATIONS AND NATIONALISM IN A GLOBAL ERA* (1995); AVIEL ROSHWALD, *THE ENDURANCE OF NATIONALISM: ANCIENT ROOTS AND MODERN DILEMMAS* (2006).

⁸⁸ See Brigid Laffan, *The Politics of Identity and Political Order in Europe*, 34(1) *JCMS: JOURNAL OF COMMON MARKET STUDIES* 81 (1996).

increased cultural cohesion in the EU is reflected in the comment of the then President of the European Commission José Manuel Barroso who noted that “The EU has reached a stage of its history where its cultural dimension can no longer be ignored. It would be a mistake to pretend that culture and economy are two totally separate worlds. Without proper attention to knowledge, science and culture, our societies at large, our economies, cannot prosper.”⁸⁹ However, despite this increasing importance cultural cohesion among the nations and citizens of the European Union, the direct involvement of the EU in the cultivation of “European culture” remains a politically unpopular proposition.⁹⁰

The unfeasibility of explicit EU involvement in the culturally policy of Member States is why the indirect effects of EU policies on cultural practices and attitudes are so significant. Though not as efficient at catalyzing community identity as the explicitly nationalistic cultural policies and laws adopted by nation states, the indirect effects of EU economic policies on culture can help foster a shift away from nationalist identifiers and towards continental ones among EU citizens. This shift in primary cultural identification may ameliorate some of the logistical and legitimacy complications encountered when a single government entity exerts legal control over the daily lives of millions of citizens with disparate languages, cultures, folk traditions, and ethnic identity.

This paper illustrates the mechanisms through which EU economic policies can catalyze cultural change among EU citizens in the context of laws that impact food consumption. As a result of the relationship between cuisine and culture, food has historically played a significant role in the construction of national identities. DeSoucey has coined the term “gastronationalism” to describe the ways in which “food

⁸⁹ Cited in ANTHONY EVERITT, *EUROPE: UNITED OR DIVIDED BY CULTURE?* (2008) at 90.

⁹⁰ See Crauford Smith, *supra* note 32.

production, distribution, and consumption [are used] to demarcate and sustain the emotive power of national attachment, as well as the use of nationalist sentiments to produce and market food.”⁹¹ Gastronationalism, DeSoucey asserts, “meshes the power and resources of cultural, political, and economic identities they shape and are shaped by institutional protections.”⁹² This paper’s findings suggest that EU regulations dealing with the protection of the free movement of goods and the protection of geographic indicators not only erode Member States’ ability to use national laws to promote gastronationalism, but also promote shared European understandings of food and cuisine: Italians now using the word “vinegar” to refer to the same set of products that Spaniards or Estonians refer to when they say “vinegar,” and as a result of membership in the European Union, Finns now encounter many of the same foodstuffs at the grocery store that Belgians encounter at the corner market.

6. Conclusion.

The above discussion has demonstrated that though the European Union does not have explicit competencies in the area of culture, it does have profound effects on the culture of its Member States. This discussion is relevant and timely not only because it contributes to the body of scholarship addressing the constitutive relationship between law and culture, but also because of its implications for EU governance and legitimacy. As the membership and political importance of the EU continues to expand, the tertiary effects of EU economic policies on cultural practices will be more pronounced and experienced by a greater number of people, potentially including those far outside of the EU. For this reason, it is important to understand the mechanisms through which changes in EU laws, such as those

⁹¹ Michaela DeSoucey, *Gastronationalism: Food Traditions and Authenticity Politics in the European Union*, 75 *AMERICAN SOCIOLOGICAL REVIEW* 432, 33 (2010).

⁹² *Id.* at 448.

dealing with the free movement of goods and the protection of geographic indicators, can result in profound changes in the lived social experiences and cultural identities of EU citizens.