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## ARTICLES

### REWRITING THE HISTORY OF EUROPEAN PUBLIC LAW: THE NEW CONTRIBUTION OF HISTORIANS\*

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#### I. INTRODUCTION

In contemporary Europe, the Court of Justice of the European Union (“ECJ”) functions as a uniquely authoritative international court. Its key doctrines—direct effect and supremacy—ensure a relatively effective enforcement of European legislation compared to standard international organizations. Likewise, the system of

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\* This article is based on a lecture given in November 2012 at The American University Washington College of Law, Washington, DC. I would like to thank Bill Davies and Fernanda Nicola for organizing the event and giving me the chance to present the new historical research on European public law. I would also like to take the opportunity to thank the two commentators at the event, Mark Pollack and Francesca Bignami, as well as Fernanda Nicola, Bill Davies, and Michelle Egan for all the insightful comments that helped sharpen this article.

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preliminary references sent from national courts to the ECJ has given voice to private litigants across Europe to pursue the rights given them by the European treaties and legislation. In fact, the ECJ has today become so central in the EU that sympathetic academic observers claim it has become a European Supreme Court of sorts and that it has built a constitutional, proto-federal legal order.<sup>1</sup> How did this happen? How could a set of international treaties—the Treaties of Rome (1957)—albeit of a somewhat unusual nature, gradually attain the status of a constitution or at least lead to what might be termed a “constitutional practice”?<sup>2</sup>

This has been the key question of a new emerging field of legal history focusing on the foundation and development of European public law. Drawing on new evidence from available private, state, and European archives, the new historical research goes behind the scenes to unveil the world in which European public law was created. The result is a more complex and deeper understanding of the social, institutional, legal, and ideological roots of European

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1. See ROBERT LECOURT, *L'EUROPE DES JUGES* (1976) (asserting ECJ is a higher court penetrating the rule of everyday life of member states); Olivier Audéoud, *L'acquis Communautaire, du "Mythe" à la Pratique*, 33 *REVUE D'ÉTUDES COMPARATIVES EST-OUEST* 67 (2002); G. Frederico Mancini, *The Making of a Constitutional Europe*, 26 *COMMON MKT. L. REV.* 595 (1989) (proposing that the EJC has created a federal-type structure in Europe). See generally JOSEPH WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 *AM. J. INT'L L.* 1 (1981).

2. See generally Stein, *supra* note 1 (supporting the notion that the “constitutional practice” concept is preferred to the standard mainstream concept of “constitutionalization” because the latter implies that the ECJ successfully transformed the Treaties of Rome into a sort of proto-federal European constitution). I do not dispute that the ECJ has tried to achieve this objective, but by employing the concept “constitutional practice” instead, we avoid any premature assumptions about the nature of the outcome. See generally JOHN ERIK FOSSUM & AGUSTÍN JOSÉ MENÉNDEZ, *THE CONSTITUTION'S GIFT: A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION* (2001) (providing an interesting attempt to conceptualize alternative processes of “constitutionalization” based on a comparative historical approach). This article will argue that the constitutional practice of the European institutions—in partial agreement with Fossum and Menéndez—has not decisively put the EU on the path of constitutionalization. See Part VI for a fuller discussion on this point. See Treaty of Rome, Apr. 24, 1958, 294 *U.N.T.S.* 4300 [hereinafter Treaty of Rome] (establishing the European Economic Community, which later became the European Union).

public law.<sup>3</sup> This article will discuss the results of this new field of research and how it contributes to the overall understanding of the development and nature of European public law. This will be done in three steps. First, Part II shall take a brief look at the legal and social sciences research on the European public law in a historical perspective. Second, Parts III, IV, and V shall go through three particular dimensions to which the new historical literature contributes. Finally, Part VI shall discuss to what extent the new historical literature offers a revisionist account to the mainstream understanding of the history of European public law in law and the social sciences.

## II. EXPLAINING EUROPEAN PUBLIC LAW— A BRIEF HISTORY OF AN INTERDISCIPLINARY FIELD

Today, the field of EU legal studies is a particularly varied and deeply interdisciplinary subfield of broader European studies. However, until the late 1970s, the major contributions to the analysis of European public law came mainly from jurists, both academic and professional.<sup>4</sup> In the aftermath of the key ECJ judgments of *Van Gend en Loos* (1963) and *Costa v. E.N.E.L.* (1964), which introduced direct effect and primacy of European law, a separate field of EU legal academia emerged.<sup>5</sup> The main occupation of legal writers in the

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3. See generally BILL DAVIES, *RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY'S CONFRONTATION WITH EUROPEAN LAW, 1949-1979* ix (2012) (noting that most scholars have failed to examine the process of legal integration in the European Union in the historical context of the time in which integration was occurring); Morten Rasmussen, *Constructing and Deconstructing 'Constitutional' European Law: Some Reflections on How to Study the History of European Law*, in *EUROPE: THE NEW LEGAL REALISM* 639 (Henning Koch et al. eds., 2010) [hereinafter Rasmussen, *Constructing and Deconstructing 'Constitutional' European Law*] (providing an overview of the history of European "constitutional" law); 21 *CONT. EUR. HIST.* (Special Issue No. 3) (2012) (containing publications concerning European public law); 14 *J. EUR. INTEGRATION HIST.* (2008) (containing key publications relating to the study of European public law).

4. See Harm Schepel & Rein Wesseling, *The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3 *EUR. L.J.* 165, 171–76 (1997) (stressing that European legal doctrine is written by an unusually high percentage of staff from administrative and judicial institutions compared to writers of national public law and national economic law journals).

5. See Case C-6/64, *Costa v. E.N.E.L.*, 1964 *E.C.R.* 587 (establishing supremacy of European law over the laws of the individual member states); Case

first decades was doctrinal commentary employing what could be characterized as an apolitical reading of the development of European public law.<sup>6</sup> According to this scholarship, the ECJ had simply applied the rules of the Treaties of Rome in a systematic, legally authoritative manner. If certain judgments were considered controversial by governments or the general public, this was by no means evidence of court activism; rather, it was an expression of the wavering political will of the member states to fulfill the obligations of the treaties they had ratified.<sup>7</sup> The high quality of ECJ case law, it was argued, also constituted a key factor behind what, in this literature, was argued to be the gradual acceptance by national judiciaries of European public law doctrines and practices.<sup>8</sup> In fact, the process of developing European public law was mainly one of legal argument and persuasion. While various discussions about the nature of European public law, particularly in the 1950s and early 1960s, touched upon whether it was merely a subset of international law or alternatively of a constitutional nature,<sup>9</sup> from the mid-1960s onwards, ECJ judges were generally keen to sidestep such politically fraught debates and maintain a formalist position.<sup>10</sup>

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C-26/62 *Van Gend en Loos v. Administratie der Belastingen*, 1963 E.C.R. 1 (establishing that certain provisions of the EEC Treaty create individual rights that must be protected by national courts).

6. See Martin Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537, 538 (1980) (offering the classic description of this supposedly apolitical EU law field).

7. Cf. *id.* at 541–42 (asserting that the goal was to move toward European internationalism but, in reality, a “growing complexity and diversity of political loyalties” has manifested).

8. See *id.* at 538 (describing the idealistic view of European case law as simply discovering the true interpretation of European law).

9. See, e.g., 6 ACTES OFFICIELS DU CONGRÈS INTERNATIONAL D'ÉTUDES SUR LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER (A. Giuffrè ed., 1958); Gerhard Bebr, *The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis*, 58 COLUM. L. REV. 767 (1958) (discussing the conflicts between member state constitutions and the treaty, but not referring to the treaty itself as a sort of constitution); Pierre Pescatore, *Rapport General*, in ZEHN JAHRE RECHTSPRECHUNG DES GERICHTSHOFS DER EUROPÄISCHEN GEMEINSCHAFTEN 520, 520 (1963) (representing interesting examples of discussions concerning the nature of European public law in the early period).

10. See, e.g., André M. Donner, *The Constitutional Powers of the Court of Justice of the European Communities*, 11 COMMON MKT. L. REV. 128 (1974) (arguing that, in using these documents, judges are “exercising a substantial

From the late 1970s, legal scholarship was fundamentally transformed and moved away from the original apolitical reading. Two scholars—the most prominent American-based expert, Eric Stein from Ann Arbor, and a young Joseph H. H. Weiler, then a Ph.D. candidate from the European University Institute in Florence—formulated, at first independently, and later to some extent in mutual inspiration, what would in a decade develop into the new scientific paradigm.<sup>11</sup> While pursuing different arguments, they agreed that the ECJ had made an active choice in favor of integration. By interpreting the Treaties of Rome as if they amounted to a constitution, the ECJ had built a proto-federal legal order; to use Stein’s famous conceptualization, the ECJ “constitutionalized” the treaties.<sup>12</sup> Stein added—based on his intimate personal contacts in the European institutions—that the Commission’s Legal Service had played a key role in promoting and legitimating this choice.<sup>13</sup> Weiler’s original contribution was to put the development of European public law in a comparative perspective with the political dimension of the integration process. He argued that when the ECJ strengthened enforcement in the legal sphere, a parallel—if not necessarily causally linked—strengthening happened of national executive power due to the introduction of the veto right in 1966.<sup>14</sup>

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constitutional power” but are not at all “legislating nor constitution-making”); Pierre Pescatore, *Rôle et Chance du Droit et des Juges dans La Construction d’Europe*, 26 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 5 (1974) (discussing the formation of European public law through a stable constitution, treaties, legislative power, and communal judicial power).

11. See generally Anne Boerger-De Smedt & Morten Rasmussen, *Legitimizing the European Court of Justice? The History of the Constitutionalisation Paradigm, 1950-1992* (Dec. 2011) (unpublished conference paper, University of Copenhagen) (describing the process of Stein and Weiler’s development of their constitution-making theory).

12. See Stein, *supra* note 1, at 24–25 (stating that the “court has been led by the Commission in the inexorable progression toward more legal integration”).

13. See ERIC STEIN, *THOUGHTS FROM A BRIDGE: A RETROSPECTIVE OF WRITINGS ON NEW EUROPE AND AMERICAN FEDERALISM* 472 (2000) (recounting how instrumental Michel Gaudet, the first Director General of the Legal Service of the European Commission, was to his witnessing the preliminary efforts of the service in the *Van Gend and Loos* case); Stein, *supra* note 1, at 24–25 (explaining how the Commission’s Legal Service developed an argument that allowed the Commission to deal with the treaty as a constitution).

14. See JOSEPH WEILER, *SUPRANATIONAL LAW AND THE SUPRANATIONAL SYSTEM: LEGAL STRUCTURE AND POLITICAL PROCESS IN THE EUROPEAN COMMUNITY* (1982); Joseph Weiler, *The Community System: The Dual Character*

The introduction of the national veto right over new policy development meant that national governments could tolerate the hardening of the enforcement of the legal order. What motivated national courts to do so—beyond the assumption that they were convinced by the ECJ's legal argument due to the strength of formalism among European judiciaries—was the enhancement of court power in general that cooperation with the ECJ spurred. The renewed dynamic of the EC connected with the adoption of the Single European Act (1986), which reformed the legislative system by introducing majority voting in the Council and threatened to break the balance on which the “constitutional practice” had rested.<sup>15</sup> However, by 1994 Weiler concluded that the constitutional project had not only survived but succeeded and that the member states, including national courts, had accepted the “quiet revolution.”

Inspired by the new dynamics of European integration and the end of the Cold War in 1989, a new generation of American political scientists were ready to embark on studies of legal integration, which had until then generally been overlooked in most political science studies of European integration and which seemingly had been so successful.<sup>16</sup> Young scholars such as Alec Stone Sweet, Karen Alter, Anne-Marie Slaughter, Geoffrey Garret, and Daniel Kelemen began to study European public law, write doctoral dissertations, and publish important articles and monographs in the 1990s and early

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*of Supranationalism*, in YEARBOOK OF EUROPEAN LAW I 267, 268 (F.G. Jacobs ed., 1981) (examining the development of the interplay between the constituent States of the European Community and the Community's supranational organs); Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2428–29 (1990) (suggesting that, without the veto power, the member states may not have agreed with the “constitutionalization” that the ECJ was implementing).

15. Joseph Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991); Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267–306 (1981); Joseph Weiler, *Supranational Law and the Supranational System: Legal Structure and Political Process in the European Community* (1982) (unpublished Ph.D. thesis, European University Institute).

16. *But see* Ernst B. Haas, *Foreword* to STUART A. SCHEINGOLD, *THE LAW IN POLITICAL INTEGRATION: THE EVOLUTION AND INTEGRATIVE IMPLICATIONS OF REGIONAL LEGAL PROCESSES IN THE EUROPEAN COMMUNITY* (1971) (noting that, rather than increasing compliance on the national level, European regional law has given national executives more flexibility); STUART A. SCHEINGOLD, *THE RULE OF LAW IN EUROPEAN INTEGRATION: THE PATH OF THE SCHUMAN PLAN* (1965) (containing a discussion of European integration).

2000s.<sup>17</sup> At first this new generation of American political scientists repeated the traditional—and less than fruitful—American debate of whether realism or neofunctionalism best explained the development of European public law.<sup>18</sup> However, after meeting people like Weiler and ECJ Judge Federico Mancini, who trumpeted the achievements of the new European rule of law,<sup>19</sup> these scholars began to work within the confines of the constitutional paradigm, exploring the various dimensions that needed to be fleshed out. The originality of this new political science literature on European public law came from the fact that these young political scientists brought their discipline’s conceptual and theoretical tools and analyzed the ECJ as a “normal” institutional and political actor.<sup>20</sup> From this approach emerged an acute sensibility of how the ECJ had managed to empower both itself and the other supranational institutions through its case law, which deepened the insights already brought forth by

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17. See, e.g., KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001) [hereinafter ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW*] (explaining national support for European law and its effects on European politics); R. DANIEL KELEMEN, *THE RULES OF FEDERALISM: INSTITUTIONS AND REGULATORY POLITICS* (2004) (taking the position that “the development of EU regulatory policy can best be understood by viewing the EU as a federal system”); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000) (explaining the foundational changes that occurred in governance that proceeded from the establishment of enforceable constitutions in Europe).

18. See, e.g., Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993) (arguing “that the legal integration of the community corresponds remarkably closely to the original neofunctionalist model . . .”); Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT’L ORG. 171, 171–72 (1995) (discussing the development of the EU and analyzing behavior of the national governments and the Court of Justice in order to develop a theory of legal integration); Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT’L ORG. 149, 175 (1998) (suggesting that debating labels, such as “neofunctionalism” and “intergovernmentalism,” is unproductive “with respect to scholarship on European integration”).

19. See Karen J. Alter, *On Law and Policy in the European Court of Justice: An American Perspective*, in *EUROPE: THE NEW LEGAL REALISM*, *supra* note 3, at 1, 1–2 (recounting the influence Judge Federico Mancini had in increasing the author’s interest in the ECJ); Mancini, *supra* note 1 (discussing the achievements of the ECJ in “constitutionalizing” the treaty).

20. Cf. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW*, *supra* note 17, at 5–8 (noting that the role of the ECJ in the European political process has changed as the European legal system has developed).

Weiler and Stein.<sup>21</sup> In addition, two alternative explanations of how the constitutional practice had become accepted by national judiciaries and governments emerged.<sup>22</sup>

In a string of publications, Alec Stone Sweet argued that EC trade liberalization gave rise to private litigation through the mechanism of preliminary references from national courts to the ECJ, which in turn resulted in case law that furthered the building of a strong legal order and furthered trade liberalization.<sup>23</sup> A virtual circle of legal integration was created beyond the reach of the member states' governments.<sup>24</sup> Karen Alter alternatively argued that the reception process of ECJ case law was more contentious in the member states than hitherto assumed.<sup>25</sup> Studying the cases of France and Germany, she found widespread resistance among national judiciaries to the constitutional practice. The exact shape of European public law was consequently a negotiated compromise between the ECJ and national courts. The constitutional practice was eventually accepted because lower national courts for reasons of self-empowerment helped promote European doctrines by the means of the preliminary reference mechanism, but also because the dynamics of European integration in the 1980s forced the last resistance in national high

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21. *See id.* at 1 (arguing that the ECJ took its new rule-making authority to ensure that member states "respect their European legal obligations").

22. *See generally* THE EUROPEAN COURT AND NATIONAL COURTS — DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter et al. eds., 1997) (containing an excellent set of national receptions studies focusing on courts and to some extent on legal culture); STONE SWEET, *supra* note 17.

23. *See* Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary Reference, 1961–95*, 5 J. EUR. PUB. POL'Y 66, 72 (1998) [hereinafter Stone Sweet & Brunell, *The European Court and the National Courts*] (arguing that, as the "ECJ's rulings stabilize expectations about the meaning of EC law," barriers to international trade will break down).

24. *See, e.g.*, Alec Stone Sweet & Thomas Brunell, *Constructing a Supranational Constitution*, in THE JUDICIAL CONSTRUCTION OF EUROPE 45, 49 (2004) [hereinafter Stone Sweet & Brunell, *Constructing a Supranational Constitution*] (remarking that negative integration driven by the proposed Common Market created voids for European Community laws to fill); *see also* Marlene Wind et al., *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*, 10 EUR. UNION POL. 63 (2009) (providing a discussion and critique of Stone Sweet's work on preliminary references).

25. *See* ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 17, at 1 (noting that prior work did not address why ECJ case law was accepted).

courts to bow to the new realities of the European Union.<sup>26</sup> While the new political literature brought about crucial new insights, it was still written within the constitutional paradigm developed by Stein and Weiler. As a consequence, the core narrative remained a progressive story of successful constitutionalization.

Ironically, considering the emergence of the new political science literature, the legal scholars of the field had already begun by the mid-1990s to reconsider the constitutional paradigm, if not the core historical narrative underlying it. This major change of perspective was prompted partly by the design of the Maastricht Treaty, which kept the ECJ out of two of the three pillars, and by the famous Maastricht judgment<sup>27</sup> of the German Constitutional Court. In the latter, the German Supreme Court may have accepted the enforcement system of European law *de facto*, but it seriously questioned the autonomy and constitutional nature of European law.<sup>28</sup> European public law, it was argued, was the result of delegation from the national level and in this sense subordinated to national constitutions and their guardians—the national supreme courts.<sup>29</sup> This reminder of persistent national resistance to the European constitutional practice caused a serious reassessment among EU law scholars of the nature of European law. Wanting for ideological reasons to stick with the constitutional denominator, scholars continued to develop European constitutionalism.<sup>30</sup> A host of new theories and conceptualizations emerged, among these attempts to provide the European constitutional legal order with a

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26. *See id.* at 38 (explaining that national courts accepted the supremacy of European law because “a compromise is better than legal anarchy”). *See generally* KAREN ALTER, *THE EUROPEAN COURT’S POLITICAL POWER* (2009) (containing a number of articles in which Alter reflects on her earlier research).

27. Bundesverfassungsgericht [Bverfg] [Federal Constitutional Court] Oct. 12, 1993, BverfGE 155, 1992 (Ger.).

28. *See* PETER LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* 183–87 (2010) (noting how the decision questioned a number of factors including the “EU’s lack of autonomous democratic legitimacy”).

29. *Cf. id.* at 166–89 (providing a fresh perspective on the Maastricht judgment).

30. *See generally* Matej Avbelj, *Questioning EU Constitutionalisms*, 9 GERMAN L.J. 1 (2008) (analyzing the diversification of European constitutional theory from the 1990s onwards).

stronger normative dimension,<sup>31</sup> accepting constitutional pluralism, and portraying contention as deliberation<sup>32</sup> or reconceptualizing European constitutionalism as a new legal form beyond the Westphalian paradigm of national sovereignty.<sup>33</sup>

The apparent crisis of the constitutional paradigm became full blown when recently a number of different studies began to question its core assumptions as well as key empirical conclusions. American political scientist Lisa Conant questioned the notion that national judiciaries and member states had accepted the new European rule of law by documenting the extent to which they “contained justice.”<sup>34</sup> American legal scholar Peter Lindseth found that European constitutionalism, both in the shape of ECJ case law as well as academic analysis, represented a detour from the deeper and more legitimate legal roots of European integration that he argued instead rested on administrative delegation from national institutions.<sup>35</sup> Finally, a new Bourdieu-based sociological literature emerged, exploring for the first time systematically the role of jurists in the European construction.<sup>36</sup> Scholars such as Mikael Rask Madsen and Antoine Vauchez argued that European constitutionalism, including the academic variant, merely constituted an attempt of self-empowerment of jurists and in fact was no more than an ordinary

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31. See, e.g., Joseph Weiler, *The Reformation of European Constitutionalism*, 35 J. COMMON MKT. STUD. 97 (1997) (noting that a normative discussion is a “hallmark” of the reformed discussion of constitutionalism).

32. See, e.g., Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, 11 EUR. L.J. 262 (2005) (asserting that, in European law, the particular type of pluralism is one that can “avoid conflict in practice”).

33. See, e.g., Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002) (“Constitutional pluralism recognises that in the post-Westphalian world there exists a range of different constitutional sites and processes configured in a heterarchical rather than a hierarchical pattern . . .”).

34. See LISA CONANT, *JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION* 3 (2002) (defining “contained justice” as the phenomenon in which EU member states obey particular judgments of the European Court of Justice while simultaneously ignoring the judgments’ greater implications).

35. See LINDSETH, *supra* note 28, at 168–69 (asserting that the most important aspect of the Maastricht ruling was the parliament’s delegation of power to Community institutions).

36. See generally SCHEINGOLD, *THE RULE OF LAW IN EUROPEAN INTEGRATION*, *supra* note 16 (representing the most important predecessor to also focus on the role of jurists); Schepel & Wesseling, *supra* note 4, at 165–88 (providing the first Bourdieu analysis of the role of jurists in the European Union).

process of juridification.<sup>37</sup>

The new historical analyses of the roots and nature of European public law are part of this last wave of critical studies.<sup>38</sup> Historians are latecomers to the field and are undoubtedly inspired by theoretical elements in existing explanations. Nevertheless, it is important to point out that the methodology of the discipline of history is fundamentally different from either law or the social sciences. The focus of historians is less to promote an explicit theoretical approach. Rather, it is to identify the best possible documentary and oral evidence to analyze the historical processes that shaped European public law. Archival sources are crucial because most of the events that shaped this history actually took place behind closed doors, in personal networks or at events that were little covered by contemporary press. The new historical research has made the first systematic effort to utilize recently opened archives, track personal archives, and conduct interviews.<sup>39</sup> As a result, it offers empirically better-founded narratives about the social world in which European public law was shaped than most

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37. E.g., Niilo Kauppi & Mikael Rask Madsen, *Institutions et Acteurs: Rationalité, Réflexivité et Analyse de l'UE*, 25 *POLITIQUE EUROPÉENNE* 87 (2008) (providing a sociological perspective on the EU as opposed to economics, law, or political science); Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, 2 *INT'L POL. SOC.* 128 (2008) (considering the socio-historical and sociological factors that shaped European integration).

38. See generally Rasmussen, *Constructing and Deconstructing 'Constitutional' European Law*, *supra* note 3 (providing a description of a historical approach to the study of European public law).

39. Recent sociological literature has also employed archives although coupled with a strong theoretical bend. See, e.g., Julie Bailleux, *Comment l'Europe Vint au Droit: Le Premier Congrès International d'études de la CECA (Milan-Stresa 1957)*, 60 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 295 (2010); Antonin Cohen, *Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe*, 32 *L. & SOC. INQUIRY* 109 (2007) (citing to a number of archival documents to show that the history of European integration is crucial to understanding issues related to the sociology of law); Antoine Vauchez, *The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU Polity*, 16 *EUR. L.J.* 1 (2010) [hereinafter Vauchez, *The Transnational Politics of Judicialization*] (arguing “that the debate over the [*Van Gend en Loos* and *Costa*] decisions opened up an opportunity for legal experts and these gentlemen-politicians of law to reframe EC polity in a manner more suitable to their professional and political ambitions — that is in judicial terms”).

legal and social science literature and, in this way, crucially contributes to attempts of generalization and theory building.<sup>40</sup>

Although historical inquiry into the foundation and development of European public law is still in its infancy, it is now possible to summarize the new insights it offers. As we shall see, the historical account emerging is a revisionist one that in fundamental ways changes our understanding of what shaped European public law, who were the key actors, and how the historical processes under investigation might be more accurately conceptualized. The next three sections highlight the contributions of historical research to our understanding of which actors mattered, how to understand what historians have termed the constitutional practice in European public law, and, finally, how the member states of the EU received European law.

### III. WHICH ACTORS SHAPED EUROPEAN PUBLIC LAW?

With regard to identifying which actors mattered to the development of European public law, historical research confirms but also deepens recent trends. The tendency in existing literature has been to go from focusing mainly on courts—the ECJ and national courts—to increasingly include new categories of actors in the analysis. In his famous 1981 article, Stein added the legal advisors of the Commission, the Council, and the member states, as well as EU academia to the field.<sup>41</sup> Alter and Stone Sweet later added the private litigants to the mix as well.<sup>42</sup> Lately, research by scholars such as Lisa Conant has explored how various social actors such as trade unions, women's movements, and environmental movements can be

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40. See THE HISTORY OF THE EUROPEAN UNION: ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950–72 6–8 (Wolfram Kaiser et al. eds., 2009) (providing a more general discussion of the use of historical methodology in European studies).

41. See Stein, *supra* note 1 (looking at eleven different cases and categorically analyzing the roles that various actors played in the constitutional issues).

42. See Stone Sweet & Brunell, *The European Court and the National Courts*, *supra* note 23, at 66–97 (recognizing that legal integration involves “intimate connections” between private litigants, national judiciaries, and the ECJ); see also ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 17, *preface* (noting that allowing private litigants to bring cases to the ECJ distinguishes the EU legal system from other international legal systems).

crucial in politicizing ECJ case law against recalcitrant national courts, administrations, and governments.<sup>43</sup> Finally, Bourdieu-inspired sociologists have focused on jurists as a particular social group of professionals, with their own distinctive habitus and interests.<sup>44</sup>

Historical research confirms the importance of the various actors already investigated by existing research, but it also adds several new types of actors, which have been relatively overlooked until now. At the European level, historical research, as well as the Bourdieu-inspired sociological studies mentioned above, has made significant strides in understanding how transnational networks of professional jurists and academics in and around the Fédération Internationale pour le droit Européen (“FIDE”) promoted and legitimized ECJ case law and the constitutional practice from the early 1960s onwards.<sup>45</sup> It has clearly demonstrated how the academic discipline of EU law played a key role in the history of European public law. Finally, the role of the legal committee of the European Parliament has until recently remained unexplored, but it was clearly an important part of

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43. CONANT, *supra* note 34.

44. See Antoine Vauchez, *How to Become a Transnational Elite: Lawyers’ Politics at the Genesis of the European Communities (1950–1970)*, in PARADOXES OF EUROPEAN LEGAL INTEGRATION 129 (Hanne Paterson et al. eds., 2008) (providing the most accessible presentation of this theory).

45. See Karen Alter, *Jurist Advocacy Movements in Europe: The Role of Euro-law Associations in European Integration*, in THE EUROPEAN COURT’S POLITICAL POWER, *supra* note 27, at 63 [hereinafter Alter, *Jurist Advocacy Movements in Europe*] (discussing how various parties and individuals worked to promote legal integration and Euro-law); Antoine Vauchez, *The Making of the European Union’s Constitutional Foundations: The Brokering Role of Legal Entrepreneurs and Networks*, in TRANSNATIONAL NETWORKS IN REGIONAL INTEGRATION: GOVERNING EUROPE 1945–83 108 (Wolfram Kaiser et al. eds., 2010) (describing a 1964 case where two FIDE members made bold assertions in support of integration); Morten Rasmussen, *Establishing a Constitutional Practice: The Role of the European Law Associations*, in SOCIETAL ACTORS IN EUROPEAN INTEGRATION: POLITY-BUILDING AND POLICY-MAKING 1958–1992 173 (Wolfram Kaiser & Jan-Henrik Meyer eds., 2013) [hereinafter Rasmussen, *The Role of the European Law Associations*] (suggesting that the importance of FIDE in establishing an understanding of the rising constitutionalization has been overstated yet should still be recognized as a relevant factor); Alexandre Bernier, *Constructing and Legitimizing: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law*, 21 CONTEMP. EUR. HIST. 399, 406 (2012) (listing the important benefits FIDE had in the development of European Law).

the coordinated attempt by European institutions to support and legitimize the ECJ's constitutional practice.<sup>46</sup>

At the national level, historical research suggests that we have to go beyond the classical legal advisors in the foreign ministries.<sup>47</sup> European public law mattered and was followed by several ministries from the very outset. Officials both in the Ministries of Justice and Foreign Affairs played an important role in how European law was perceived and received by each member state. Taking a look at the archives of national ministries one can often follow a systematic and sophisticated debate about European case law.<sup>48</sup> At times national administrations attempted to control the process of reception, as in the case of Denmark, where the Ministry of Justice informally coordinated a response with the judiciary and directly controlled how many (that is, very few) and which preliminary references Danish courts would send to the ECJ.<sup>49</sup> In addition, the battle over the status of European law among national law academics seriously delayed the establishment of genuine study programs of European public law at the Law Faculties of the member states.<sup>50</sup> We consequently need a very broad analysis of the formation of an independent academic field of EU law to properly understand how European public law was received and shaped by legal academia.<sup>51</sup> Finally, there are reasons to believe that the general

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46. See generally Guillaume Sacriste, *L'Europe est-elle un État comme les Autres? Retour sur la Distinction Public/privé au Sein de la Commission Juridique du Parlement Européen des Années 1960*, 2012 CULTURES & CONFLICTS 35 (2012) (providing a sociological study of the legal committee of the European Parliament). A new historical study by Ann-Christina Lauring Knudsen is currently being conducted in the framework of a new collective research project, "Towards a New History of European Public Law," directed by the present author (<http://europeanlaw.saxo.ku.dk>).

47. Cf. Stein, *supra* note 1, at 1–2 (listing lawyers in foreign ministries as a "dominant group" in the European judicial process).

48. For examples, consult the collections of the French archives of the Ministry of Justice (Archive Nationales, Fontainebleau) or the Foreign Ministry (La Courneuve).

49. Peter Pagh, *Præjudicelle forelæggelser og Juridisk Specialudvalg*, 41 UGESKRIFT FOR RETSVÆSEN 305 (2004).

50. For initial analysis of how FIDE did not very successfully affect the member states, see Bernier, *supra* note 45, and Rasmussen, *The Role of the European Law Associations*, *supra* note 45.

51. A successful attempt to do this with the German cases has recently been published. See ANNA KATHARINA MANGOLD, *GEMEINSCHAFTSRECHT UND*

public opinion, shaped by newspaper and media coverage, occasionally played an important role in defining the stance of national courts in key judgments of ECJ case law, such as recently demonstrated with regard to the famous German Constitutional Court *Solange* judgment from 1974.<sup>52</sup>

Historical research finally provides us with a better understanding of the precise roles of the different actors. Focusing until now in particular on the first three decades of European public law, historical research has been able to document how some of the most crucial developments took place outside the courtrooms of the ECJ and national courts. One example is the constitutional reforms of the Netherlands in 1953 and 1956 that introduced the concept of international law supremacy in the Dutch legal order and as a consequence set the scene for the establishment of a constitutional practice in European public law in 1963 and 1964.<sup>53</sup> These reforms were part of a broad legal and political battle in the Netherlands over the role of international law in the country but also concerned the role of the executive and national parliaments vis-à-vis the judiciary in a country, where constitutional review was considered illegal.<sup>54</sup> Another example is the role played by the Legal Service of the High Authority/European Commission in developing and promoting the constitutional practice in European public law.<sup>55</sup> A further example

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DEUTSCHES RECHT. DIE EUROPÄISIERUNG DER DEUTSCHEN RECHTSORDNUNG IN HISTORISCH-EMPIRISCHER SICHT (2011). A general study of the constitutional practice in EU law academia will be undertaken in the next three years by doctoral student Rebekka Byberg at the University of Copenhagen in the framework of the “Towards a New History of European Public Law” project at University of Copenhagen. See *supra* note 46 and accompanying text.

52. DAVIES, *supra* note 3.

53. Karin Van Leeuwen, *On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms ‘Towards’ Europe*, 21 CONTEMP. EUR. HIST. (Special Issue No. 3) 357 (2012) (analyzing the Dutch constitutional reforms in the early 1950s to offer a different view about the nature of the development of European law) (explaining that the Dutch reforms not only defined the conditions of Dutch membership in supranational organizations but also introduced the idea that international law should have priority over conflicting national legislation).

54. *Id.* (2012) (analyzing the Dutch constitutional reforms in the early 1950s to offer a different view about the nature of the development of European law).

55. Morten Rasmussen, *Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65* 21 CONTEMP. EUR. HIST. (Special Issue No. 3) 375, 381 (2012) [hereinafter

and completely unknown until recently is the extent to which the German administration and government at the highest level were part of handling the fallout to the German Constitutional Court's *Solange* decision.<sup>56</sup>

To conclude, recent historical research suggests that we need a very broad understanding of the actors and societal forces that shaped the development of European public law, but it also provides precise evidence pertaining to which exact actor influenced key events and processes in European public law.

#### IV. THE CONSTITUTIONAL PRACTICE OF EUROPEAN PUBLIC LAW— THE TRANSNATIONAL LEVEL

One of the most important contributions provided by the new historical research concerns perhaps the most important set of questions in the history of European public law: how and why a constitutional practice was established and to what extent national governments, administrations, and courts accepted it. According to the classic, mainstream narrative, discussed in the first section, the key actor was the ECJ. Through its case law, the court built a constitutionalized, proto-federal legal order for Europe.<sup>57</sup> The ECJ successfully managed to persuade national courts to act as European courts, so by the early 1990s a genuine federalized rule of law existed in the new European Union.

Historical research cannot yet give us the full picture of how the constitutional practice of European public law developed from the mid-1950s to the present day. However, even if only offering a partial account, recent historical analyses add both new important empirical details as well as what amounts to a revisionist interpretation of the nature of the constitutional practice. In this section, we shall focus on the processes taking place at the European

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Rasmussen, *Establishing a Constitutional Practice of European Law*] (noting the hesitance of most European legal scholars at the time to view the developing law through a constitutional lens).

56. DAVIES, *supra* note 3.

57. *Cf.* KELEMEN, *supra* note 17, at 4–6 (addressing how the link between the ECJ and national courts was not intentional, leading one to question whether member state control really exists).

level, in the supranational institutions and various transnational networks, where the constitutional practice arguably originated. In the next section, we shall explore how the politics and law of the member states provided a constitutive frame for the development of European public law, while at the same time a variety of national actors resisted and undermined the constitutional practice.

With regard to the establishment of the constitutional practice, recent historical research has given us a much clearer understanding of what drove the process.<sup>58</sup> The constitutional vision of European law had its roots in the various movements for European unity in the immediate post-war period favoring a federal model for European reconstruction that would fundamentally break with what was perceived as the dangerous nationalist past of the continent.<sup>59</sup> National governments never fully adopted the federal visions.<sup>60</sup> Plans for a federal union in the framework of the Council of Europe in the late 1940s and plans for the European Defence Community and a European Political Community in the early 1950s all faltered. However, the notion that European integration ought to be based on a foundation of constitutional law and include a European supreme court was present in influential political and legal circles.<sup>61</sup>

The European treaties that founded the ECSC in 1951 and the EEC/Euratom in 1957 were formally of international law and controlled by the contracting parties. They included classical features of international law, most strikingly in the EEC Treaty, according to which national courts were given exclusive competence to apply European law in the national legal orders.<sup>62</sup> The EEC Treaty, which

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58. *See generally* 21 CONTEMP. EUR. HIST. (Special Issue No. 3) (2012).

59. *See* Cohen, *supra* note 39, at 113–20.

60. *See id.* at 109–35 (arguing that federalism emerged as a tool to encourage European unity following World War II but was not fully implemented by the different European states).

61. *See id.* at 115–23 (suggesting that the idea of a European Constitution drew the attention of important law professors and practitioners); Morten Rasmussen, *The Origins of a Legal Revolution – The Early History of the European Court of Justice*, 14 J. EUR. INTEGRATION HIST. 77, 80–81 (2008) (discussing that, in the early 1950s, influential political groups took the initiative to draft a constitution for the European Political Community and to institute a European supreme court based on the U.S. Supreme Court).

62. *See, e.g.*, Treaty of Rome, *supra* note 2, art. 215 (stating that the legal principles common to the laws of the European member states shall apply in cases of non-contractual liability).

would be the central foundational document after 1958, essentially created a Community in which member state governments (together) would legislate and where national administrations and courts would respectively implement and apply European law in the member states. The Commission merely took the initiative to legislative acts, performed a monitoring task whether member states fulfilled their obligations (aided by the relatively weak infringement procedure before the ECJ outlined in article 169), and to some extent and at a general level advised how national administrations would apply European law. Considering that the purpose of the EEC was to set up a common market of major importance to the social and economic stability of the member states, it is understandable that governments created a Community system in which national states both at the political and administrative level were deeply involved in European policy making. What was designed was not a federal polity, despite the existence of a seemingly proto-federal institutional structure including a court and an assembly, but rather a system in which national governments attempted to control the decision-making, application, and administration of European public policies.<sup>63</sup> The rise of the Council of Minister's Permanent Representatives ("COREPER") and their sub-committees, and consequently the extension of national administrations into a European administrative space in the 1960s, can be seen as an expression of the same trend.<sup>64</sup> The regulatory nature of European integration was clearly an extension of what Peter Lindseth has termed the post-war administrative state into a new European space.<sup>65</sup>

However, despite the general design of the EEC Treaty and the deeper trends involved in the transformation of the post-war

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63. See generally ANDRE M. DONNER, *THE ROLE OF THE LAWYER IN THE EUROPEAN COMMUNITIES* (1968) (providing a nuanced legal assessment of the ways national powers were completely intertwined with all dimensions of the Community and rejecting the notion that European law could be autonomous). Because the EEC did not have two separate levels of policy making or administration, a federal legal order would not correspond to the actual social, administrative, and political practice.

64. See generally Ann-Christina L. Knudsen & Morten Rasmussen, *A European Political System in the Making 1958–1970: The Relevance of Emerging Committee Structures*, 14 J. EUR. INTEGRATION HIST. 51 (2008) (discussing, *inter alia*, the background of COREPER and its role in the origins of the European system).

65. LINDSETH, *supra* note 28, at 180–87.

European states to cope with the regulatory demands of welfare states and modern economies, discrete federalist elements were at the same time inserted in the legal fabric of the treaties. The federalist vision was first promoted by the German delegation in 1951 in the Treaty of Paris and later by a committee of legal experts in the EEC Treaty in 1957.<sup>66</sup> Among the constitutional or federalist elements were the core objective of the Court to uphold the law, implying that a European rule of law, or in German “*Rechtsgemeinschaft*,” should be developed (article 164 in the EEC Treaty), and also the mechanism of preliminary reference, which would eventually play an instrumental role in allowing the ECJ to develop its case law (article 177 in the EEC Treaty).<sup>67</sup>

Most national administrations believed they were dealing with ordinary international treaties, but in the High Authority of the ECSC and later the European Commission, the Legal Service and its director Michel Gaudet had a different idea. Inspired by federal ideas, Gaudet believed that the ECJ should not interpret the letter of the law, protecting the sovereignty of the contracting parties, as was supposedly the tradition under international law.<sup>68</sup> Instead, the court should focus on the federal objectives of the treaties and, by means of a teleological method, develop the competences of the Communities in order to allow the High Authority or the Commission to conduct the necessary policies to achieve the objectives of the treaties.<sup>69</sup> The belief that the legal nature of the ECSC and the EEC went beyond international law was rejected not

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66. Anne Boerger-De Smedt, *La Cour de Justice dans les Négociations du Traité de Paris Instituant la CECA*, 14 J. EUR. INTEGRATION HISTORY 7, 28–29 (2008) [hereinafter Boerger-De Smedt, *La Cour de Justice*].

67. See Treaty of Rome, *supra* note 2, arts. 164, 177 (stating that the Court shall ensure that the Treaty be applied in accordance with the law and that it has jurisdiction to give preliminary rulings); Boerger-De Smedt, *La Cour de Justice*, *supra* note 66 (stating that, during the Treaty of Rome negotiations, the jurists—in particular, the German ones—emphasized the importance of developing a uniform European jurisprudence in which the ECJ would act as the main judicial body with regards to the interpretation of the Treaty); Anne Boerger-De Smedt, *Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome*, 21 CONTEMP. EUR. HIST. 339 (Special Issue No. 3) (2012) [hereinafter Boerger-De Smedt, *Negotiating the Foundations of European Law*].

68. Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 55.

69. *Id.*

only in national legal debates, such as at the most famous venue of German public law, the *Deutsche Staatsrechtslehrer* congresses in 1953 and 1959,<sup>70</sup> but also by scholars of international law who considered the ECSC merely a subset of international law.<sup>71</sup> Finally, before 1958 the ECJ did not follow the lead of the Legal Service and generally abstained from entering too much into doctrinal territory in its case law, probably due to the composition of the judges on the bench.<sup>72</sup>

This changed with the foundation of the EEC in 1958. Because the legal tools of the EEC treaty were modest and could be construed as insufficient to match the grand objective of creating a full common market, the Legal Service's teleological argument made much better sense than it had with regard to the ECSC. After all, a common market was of great future importance to the societies of the member states, matching much better the implicit federalist assumptions underlying the teleological method of interpretation. In contrast, the ECSC had, after the fall of the EDC/EPC in July 1954, merely constituted a narrow coal and steel community with a doubtful political future. Then it mattered less that the purpose of the design of the EEC Treaty had been exactly to keep the political and administrative control in the hands of national institutions.

Several factors contributed to what amounted to a general breakthrough for the legal philosophy of the Legal Service in the first half of the 1960s. Firstly, the constitutional reforms of the Netherlands in 1953 and 1956 introduced the notion that

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70. *Begriff und Wesen des sozialen Rechtsstaates. Die auswärtige Gewalt der Bundesrepublik Berichte und Aussprache zu den Berichten in den Verhandlungen der Tagung der Vereinigung der Deutschen Staatsrechtslehrer zu Bonn am 15. und 16. Oktober 1953* (Nachdr. d. Ausg. 1954); *Das Grundgesetz und die öffentliche Gewalt internationaler Staatsgemeinschaften. Der Plan als verwaltungsrechtliches Institut Verhandlungen der Tagung der Vereinigung der Deutschen Staatsrechtslehrer zu Erlangen vom 7. bis 9. Oktober 1959* (Nachdr. d. Ausg. 1960), 1968. See DAVIES, *supra* note 3 (discussing the importance and implications of these debates for the German reception).

71. See, e.g., Eugenio Greppi, A propos du caractère supranational de la C.E.C.A.: Récentes contributions scientifiques, *Les cahiers du Bruges, Recherches européennes*, 1956, Quaterly I, 25–39; Bailleux, *supra* note 39 (asserting that the ECSC is governed by supranational principles of law).

72. Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 55 (noting the change in the composition of the ECJ in 1958 and a move toward constitutional interpretation of European law).

international law was supreme vis-à-vis national law if it was “binding on anyone” or, with a somewhat ambiguous expression, self-executing.<sup>73</sup> Decided by parliament, at first in opposition to the Dutch government in 1952, these reforms were explicitly referring to the new system of European public law as a justification of the new far-reaching clause, which were unique in international law.<sup>74</sup> With the introduction of the system of preliminary references in the EEC Treaty, Dutch lawyers—organized by the Dutch association of European law—saw an opportunity to strengthen enforcement of European law in the Netherlands and throughout the EC. The question was to what extent European public law, including the treaties, was “self-executing.”<sup>75</sup> Such clauses would automatically be attributed supremacy in the Dutch constitutional context but would also most likely force a position either in the other member states or in Luxembourg on the question of European law supremacy. Dutch courts raised this question several times and in general drove the development of the mechanism of preliminary references in the first half of the 1960s, sending fifteen out of the first eighteen cases.<sup>76</sup>

Secondly, European law movements in the member states were established. The French *Association des Juristes Européens* was the first in 1954 and was followed between 1958 and 1961 by similar associations in the other member states. In 1961 an umbrella organization, the FIDE, was founded.<sup>77</sup> The European law associations provided a crucial link between the emerging academic and professional field of EU law and the European institutions and would play an important role in legitimating and promoting the ECJ doctrines to national governments, administrations, judiciaries, firms, and legal academics. Moreover, they occasionally mobilized

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73. *Id.*

74. Van Leeuwen, *supra* note 53.

75. See Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 55 (noting the debate over whether article 12 of the EEC Treaty was self-executing and to what extent it created “rights for citizens applicable before national courts”).

76. *Id.*

77. See FIDE, FÉDÉRATION INTERNATIONALE POUR LE DROIT EUROPÉEN, <http://www.fide2012.eu/FIDE/id/81/> (last visited Mar. 24, 2013) (stating that FIDE is an organization that “focuses on research and analysis of European Union law and EU institutions, and their interaction with the legal systems of the member states”).

important cases through the system of preliminary references, as was the case in *Van Gend en Loos*.<sup>78</sup> Finally, the balance inside the ECJ more or less accidentally changed in a pro-federal direction with the nomination of two new judges, Frenchman Robert Lecourt and Italian Alberto Trabucchi.<sup>79</sup> Taken together, these factors provided the legal case and changed the attitude of the ECJ to the legal philosophy of the Legal Service.

As a result, the ECJ in two seminal judgments—*Van Gend en Loos* in 1963<sup>80</sup> and *Costa v. E.N.E.L.* in 1964<sup>81</sup>—accepted the legal philosophy of the Legal Service with regard to the enforcement of European law. European legal norms—even treaty articles—could have direct effect and supremacy over conflicting national law. The ECJ made the final call based on preliminary references from national courts. The reasoning underlying the judgments was teleological by necessity. The Treaties of Rome did not include direct effect and supremacy of European law as general principles.<sup>82</sup> In fact, not even the legal committee of experts—federally inclined as they were—had during the negotiations on the EEC Treaty planned for the mechanism of preliminary reference to become an alternative enforcement mechanism protecting the individual citizens against the lack of implementation by the member states’

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78. Alter, *Jurist Advocacy Movements in Europe*, *supra* note 45, at 69–79; see Rasmussen, *The Role of the European Law Associations*, *supra* note 45, at 173–74 (explaining the importance of legal associations like FIDE in shaping EU law through their influence with the ECJ); Vauchez, *The Transnational Politics of Judicialization*, *supra* note 39, at 116–18 (describing how FIDE elevated the importance of *Van Gend en Loos* prior to the ECJ’s decision).

79. See generally Rasmussen, *Constructing and Deconstructing ‘Constitutional’ European Law*, *supra* note 3, at 9–15 (discussing the impact that Lecourt and Trabucchi had on the ECJ).

80. See generally Case C-26/62, *Van Gen en Loos v. Administratie der Belastingen*, 1963 E.C.R. 1.

81. See generally Case C-6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 587.

82. See Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 55. Council regulations were directly applicable, but their supremacy depended on national constitutional requirements at least until the *Costa v. E.N.E.L.* judgment. Council directives were framework decisions, which national administrations could apply independently, choosing the means they saw fit. With regard to treaty articles, there was seemingly an agreement that articles 85 and 86 of the EEC Treaty had direct effect, even if national case law in 1960 and 1961 did not agree.

administrations of their European obligations.<sup>83</sup> However, while the doctrines introduced to strengthen the enforcement of the treaties may have been controversial and surprising to the member states—Belgium, the Netherlands, and Germany, alongside the Court’s own Advocate General, had opposed the principle of direct effect at the *Van Gend en Loos* case—the practical consequences were limited.<sup>84</sup> At first, the ECJ cautiously limited the doctrines to treaty articles that constituted negative obligations, i.e., clauses on member states not to act, as was the case in *Van Gend en Loos*, finding that member states must not increase tariffs in the process of dismantling them (article 12 of the EEC Treaty).<sup>85</sup> The ECJ would later first expand the doctrines to additional treaty articles and eventually in the 1970s also controversially, and only partly successfully, attempt to declare certain types of Council directives directly effective.<sup>86</sup>

From the *Van Gend en Loos* case onwards, the European institutions and FIDE mobilized in support of the new revolutionary ECJ doctrines. Commission President Walter Hallstein already came out in support of supremacy of European law in a public speech to the European Parliament before the *Costa v. E.N.E.L.* judgment had passed. Likewise, a pamphlet was published in which Hallstein and former Judge Nicola Catalano explained how European law by necessity rested on the core principles of direct effect and supremacy. Following the *Costa v. E.N.E.L.* judgment, the legal committee of the European Parliament, guided by Gaudet, authored a

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83. See Boerger-De Smedt, *Negotiating the Foundations of European Law*, *supra* note 67, at 353–54. The *Groupe de rédaction* believed the Commission and national governments would protect individual interests by the means of the infringement procedure (article 169 for the Commission and article 171 for the national governments). *Id.*

84. Vauchez, *The Transnational Politics of Judicialization*, *supra* note 39, at 12.

85. Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 55, at 391–94. See generally Treaty of Rome, *supra* note 2, art. 12 (declaring that “Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect”).

86. Francesca Bignami, Conference Report, Biennial Conference of the European Union Studies Association, Comparative Law and the Rise of the European Court of Justice (Mar. 3–5, 2011), at 21, available at <http://www.eustudies.org/files/2011%20program%20final.pdf> (describing the reticence of all parties involved to give direct effect to Council directives and the series of ECJ cases that established the rule).

report, which endorsed the new doctrines of European law and recommended that the member states accept the binding nature of European public law. FIDE likewise endorsed direct effect in a public statement at the second FIDE congress in The Hague, in October 1963, and at the national level, seminars and conferences were organized to explain and promote the new doctrines to national audiences and legal elites. All in all, quite a massive campaign endorsing the new doctrines of the ECJ consequently took place in 1964 and 1965.<sup>87</sup> To the emerging field of EU law academia, the new doctrines would define European law as a new legal field separate from both international law and domestic law and worth studying on its own terms. EU law was already taught at a few European studies centers in the six member states. Now an increasing number of universities began to establish chairs in European law, and a number of EU law journals were established. The way the constitutional practice of the ECJ shaped the early academic field of EU law and the early role of FIDE as advocates of ECJ case law would leave a strong mark on scholarly analysis.

What drove the establishment of a constitutional practice in European public law? The new history presented above suggests that the breakthrough of the constitutional practice was not the result of functional pressures or the result of a clear legal logic flowing from the Treaties of Rome. Indeed, the legal and political forces seem overwhelmingly to have disfavored a constitutional interpretation of the Treaties of Rome. That it nevertheless happened could be traced to the combination and contingency of a complex set of factors and the element of chance. The evidence furthermore brings out just how important the Legal Service of the High Authority/the Commission was to the early development of European law and identified the federalist ideology and institutional interests that motivated the service. Finally, the story demonstrated how a mobilization of European institutions and transnational networks attempted to

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87. See generally Vauchez, *The Transnational Politics of Judicialization*, *supra* note 39 (explaining in detail that this mobilization in support of the new revolutionary ECJ doctrines came about after the *Van Gend en Loos* and *Costa* rulings); see also, Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 55, at 394–96 (noting that the second and third FIDE conferences dealt with direct effect and primacy, and thus provided additional support for the new doctrines).

legitimize and promote the constitutional practice. The breakthrough was consequently far from the work alone of the ECJ.

What was the nature of the process? These conclusions suggest that only a weak coalition of European institutions and transnationally networked pro-European jurists supported the constitutional practice. In European venues such as the European Parliament or at the biannual FIDE congresses, the breakthrough may have been felt as a momentous development. However, in the member states, national administrative and legal elites held very different views on the legal nature of European integration and generally did not necessarily share the enthusiasm. The constitutional revolution would have a very limited impact on the member states before the mid-1980s, as we shall see below.

## V. THE CONSTITUTIONAL PRACTICE OF EUROPEAN PUBLIC LAW—THE ROLE OF THE MEMBER STATES

The reception of European public law in the member states has until recently been a field dominated by the interpretation offered by the constitutional paradigm. The assumption has been that member states progressively accepted European public law and that by the early 1990s a European rule of law existed.<sup>88</sup> This conclusion was drawn from the relative lack of government action to curb the influence of the ECJ and was reinforced by analyses of how the dialogue between national courts and the ECJ developed. By 1991, national high courts seemingly all had accepted *de facto* the constitutional practice.<sup>89</sup> However, the design of the Maastricht Treaty and the German Constitutional Court's Maastricht judgment

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88. *See, e.g.*, ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 17, at 27–33 (explaining the establishment of a European rule of law); Joseph Weiler, *A Quiet Revolution: The ECJ and Its Interlocutors*, 26 *COMP. POL. STUD.* 510, 510–17 (1994) (asserting that certain proponents of this constitutional paradigm found that the effect of the European constitutional doctrine was to limit national autonomy by acquiescing to the principles of European public law).

89. *See, e.g.*, Case C-213/89, *Regina v. Sec. of State for Transp.*, 1991 E.C.R. 603 (holding that, in interpreting Community law, a national court must “consider that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule”); *see also* Raoul Georges Nicolo & Another, [1990]1 *CMLR* 173 (Conseil d’Etat, Ass., Oct. 20, 1989) (Council of State, Assembly) (applying the EEC Treaty to the Republic of France).

suggested that these conclusions were premature even when only considering the “high politics” of European public law.<sup>90</sup> Recent research now suggests that in most member states national courts and administrations did not necessarily apply European law systematically, and if they did there was no guarantee that they take the ECJ case law into account.<sup>91</sup> No systematic empirical analysis yet exists of how national courts generally applied European law across member states. As Michal Bobek has recently argued, we cannot assume that the silence on the side of national courts necessarily means that European law is applied in all the relevant cases; rather, the general evidence suggests that this is not the case.<sup>92</sup> Likewise, recent social science research has uncovered how the administrative practices of member states often ignored, or even consciously limited, the legal and practical consequences of ECJ case law.<sup>93</sup> Although the historical research on the reception of European law by the member states is still in its infancy, preliminary results confirm this more skeptical take on to what extent member states accepted the constitutional practice of European public law. It should be pointed out that the new historical literature focuses on the period before 1986.

The historical analyses of the negotiations of the Treaties of Paris and Rome have revealed the extent to which most national governments and diplomats conceived these treaties and the ECJ as

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90. See generally Bundesverfassungsgericht [Bverfg] [Federal Constitutional Court] Oct. 12, 1993, BverfGE 155, 1992 (Ger.) (reiterating that the law of the EU must be supported by the parliaments and people of the member states).

91. See generally Michal Bobek, *Of Feasibility and Silent Elephants: Legitimacy of the Court of Justice and National Courts*, in *JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF CASE LAW OF THE EUROPEAN COURT OF JUSTICE EXAMINED* (Maurice Adams et al. eds., 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2129683](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129683) (arguing that the discrepancy between the number of cases involving European law in national courts and the very low number of preliminary references clearly suggests that national courts probably disregard or lack knowledge about European law).

92. *Id.*

93. See, e.g., CONANT, *supra* note 34, at 3 (noting the role that member states and administrative practices play in the interpretation of European public law); see also Dorte Sindbjerg Martinsen, *Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion*, 18 J. EUR. PUB. POLICY 944 (2011) (pointing out that national executives have numerous means at their disposal to counter ECJ directives).

belonging to international law.<sup>94</sup> This attitude was clearly reflected in the way national *jurisconsultes* defended their governments before the ECJ in the 1950s and 1960s. Here, national governments repeatedly objected to the construction of constitutional doctrines, most famously when Belgium, Germany, and the Netherlands rejected the notion that article 12 (EEC treaty) could create individual rights for citizens before national courts at the *Van Gend en Loos* case.<sup>95</sup>

When the ECJ carried through its legal revolution with the *Van Gend en Loos* and *Costa v. E.N.E.L.* judgments, considering the attitude of national governments, administrations, and courts, it probably wisely chose to limit the concrete effects in terms of enforcement at first. National governments, administrators, and high courts immediately took notice when, in 1967, the ECJ stepped up its game, after changes on the bench had brought in influential federalist judges such as Pierre Pescatore.<sup>96</sup> The ECJ developed European public law in a number of directions in the 1970s, but it was perhaps the questions of enforcement and human rights that provoked the sharpest national responses.<sup>97</sup> With regard to the strengthening of enforcement, the ECJ took the highly controversial step to declare certain types of directives directly effective. Directives were by definition of the treaties (article 189)<sup>98</sup> and in the member states believed to be framework decisions that national administrations would be empowered to implement by means of their own choice. In particular the British House of Lords and the French Conseil d'État

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94. See Boerger-De Smedt, *La Cour de Justice*, *supra* note 66 (recognizing an advancement of European integration through the constitutionalization of the founding treaties); Boerger-De Smedt, *Negotiating the Foundations of European Law*, *supra* note 67, at 354 (discussing the creation of Community Law, which functioned like international law).

95. See Stein, *supra* note 1, at 25 (listing a number of government positions of key doctrinal cases from 1954 to 1980).

96. See Bill Davies & Morten Rasmussen, *From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950–1979*, PUBLICATIONS EUR. UNION HISTORIANS (forthcoming 2013) (noting that the new judges provided a generational shift in the judiciary as well as a doctrinal one).

97. See, e.g., Case C-9/70 *Grad v. Finanzamt Traunstein*, 1970 E.C.R. 826. See generally Bignami, *supra* note 86 (analyzing *Grad* in depth).

98. Treaty of Rome, *supra* note 2, art. 189.

reacted sharply to the ECJ case law.<sup>99</sup> In France the national assembly introduced the so-called Aurillac amendment in 1980, stating that French courts should not apply European law independently from the Foreign Ministry.<sup>100</sup> Even if the French Senate did not heed this call, the ECJ had now been warned and eventually moderated its case law on directives.<sup>101</sup> In the field of human rights, the ECJ case law likewise provoked a most serious national rebuke. The core pillar of the constitutional practice, primacy, touched the very core of German identity in post-war Europe, namely basic rights. What happened to the sacrosanct catalogue of fundamental human rights if European law trumped the German constitution in the areas where sovereignty had been surrendered to the EC? The response of the German Constitutional Court was not merely a question of *kompetenz-kompetenz* as it has often been portrayed; it was a genuine response to serious worries expressed in the national legal elite and public about the undermining of basic rights caused by European institutions, which had not yet reached a genuine democratic stage of development.<sup>102</sup>

So in the 1970s, the ECJ's strides of strengthening and deepening the constitutional practice quickly developed into a conflict of legal "high politics." Moreover, the legal "low politics" of how, if at all, national courts applied the case law of the ECJ or European legislation in general was far from settled. Unfortunately, neither law, the social sciences, or history has, until now, systematically explored to what extent national courts actually applied or continue to apply European law in the national legal orders. However, recent historical research on the development of the Common Market from the 1960s to the mid-1980s implies that national administrations and courts to a large degree must have sidestepped or ignored European

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99. See, e.g., ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 17, at 153 (discussing France's challenges to the ECJ's expanding authority).

100. *Id.* at 151–57.

101. See Bignami, *supra* note 86, at 25–26 (noting that the ECJ shifted its application of direct effect to a "ricochet" theory that made directives only binding against states and could therefore no longer be used against individuals in court); see, e.g., Case C-152/84 *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 737 (holding, in part, that a directive "may be relied on against a State authority acting in its capacity as an employer").

102. DAVIES, *supra* note 3.

law. Until the Single European Act (“SEA”) in 1986, member states continued to conduct what can best be characterized as a policy of segmented national markets to protect national socio-economic compromises against the potential negative consequences of liberalization.<sup>103</sup> Efforts by the European institutions to establish the four freedoms met very serious obstacles and, if at all, occurred at best in a piecemeal and delayed fashion.<sup>104</sup> Legal and social science research on the role of ECJ case law in the construction of the Common Market has told a very different story—one where ECJ doctrines gradually strip away singular and discriminatory administrative practices of the member states.<sup>105</sup> However, the narrow focus of such research on ECJ case law and the responses given by governments in the courtroom or collectively in the Council of Ministers means that the potentially discriminatory practices of national administrations and courts have not been taken sufficiently into account. Future research is needed to uncover exactly what role ECJ case law played in the construction of the Common Market and the SEA reform and provide us with a better understanding of the extent to which national administrations and courts actually heeded to the ECJ’s case law.<sup>106</sup> All in all, current historiography at the very least suggests that national resistance to the constitutional practice of

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103. See *Introduction* to DIRK SPIERENBURG & RAYMOND POIDEVIN, *THE HISTORY OF THE HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY: SUPRANATIONALITY IN OPERATION* (1994), 1, 3–4 (alluding that socio-economic reasons led to the segmentation of national markets, which in turn prevented European unity); EUR. COMM’N, *THE EUROPEAN COMMISSION, 1958–1972: HISTORY AND MEMORIES* (Michael Dumoulin ed., 2007) [hereinafter *THE EUROPEAN COMMISSION, 1958-1972: HISTORY AND MEMORIES*]; TOBIAS WITSCHKE, *GEFAHR FÜR DEN WETTBEWERB?: DIE FUSIONSKONTROLLE DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL UND DIE “REKONZENTRATION” DER RUHRSTAHLINDUSTRIE 1950–1963* (2009).

104. See SPIERENBURG & POIDEVIN, *supra* note 103, at 1–5 (describing the obstacles created by the national legal orders, which were skeptical about the process of liberalization and the application of European law); WITSCHKE, *supra* note 103; *THE EUROPEAN COMMISSION, 1958-1972: HISTORY AND MEMORIES*, *supra* note 103.

105. See Margaret MacCown, *The Free Movement of Goods*, in *THE JUDICIAL CONSTRUCTION OF EUROPE* 109, 109 (2004) (concluding the ECJ imposed its vision of the Common Market).

106. The role of ECJ case law in the establishment of the Common Market from 1958 to 1986 will be explored by Brigitte Leucht in the framework of the “Towards a New History of European Public Law” project at University of Copenhagen, directed by the present author (<http://europeanlaw.saxo.ku.dk>).

the ECJ ran much deeper than hitherto assumed. This resistance continued into the 1980s and possibly beyond.

In addition, the new historical research offers key methodological insights. The member states did not only act as recipients of European public law; they were in a number of respects providing the constitutive frame in terms of legal theory and practice from which a European public law could develop. This has for some time been acknowledged in existing research, particularly in the case of the German Constitutional Court's *Solange* jurisprudence, which deeply influenced ECJ case law.<sup>107</sup> Consequently, national judiciaries have certainly been able to shape the direction of how European public law developed through the mechanism of preliminary references, in particular if they embraced the basic tenets of the constitutional practice.<sup>108</sup> What historical research demonstrates is that national constitutional systems have influenced and framed how European public law could develop beyond the single responses of national courts to ECJ case law. Legal culture and practice of the member states in general have in fundamental ways shaped the history of European law. Peter Lindseth's historical analysis of the negotiations of the Treaties of Paris and Rome is striking because it demonstrates how intimately connected the various legal tools chosen for European integration were with the post-war development of administrative law in the national contexts was with the various legal tools chosen for European integration.<sup>109</sup> Karin van Leeuwen's path-breaking analysis of Dutch constitutional reforms similarly demonstrates just how the way the Dutch constitutional system was designed to incorporate international law set the scene for the development of European public law after 1958.<sup>110</sup> In fact the very

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107. See ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 17, at 64–123.

108. See *generally id.* at 33–182 (discussing French and German judicial acceptance of European law supremacy and how this has shaped the development of European public law).

109. See LINDSETH, *supra* note 28, at 91–119 (explaining the connection between post-war national administrative law and European public law).

110. Van Leeuwen, *supra* note 54, at 357; see Bruno de Witte & Monica Claes, *Report on the Netherlands*, in THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINES AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 171, 178 (Anne-Marie Slaughter et al. eds., 1998) (affirming that the “manner by which the European Court's views were formulated may bear the stamp of Dutch influence”).

design of the doctrines of direct effect and supremacy by the ECJ was deeply influenced by the Dutch model, granting only supremacy to European legal norms that had direct effect, thereby emulating the Dutch constitutional condition for international law supremacy, namely that it is “binding on anyone.”<sup>111</sup> To conclude, the constitutive nature of how national constitutional systems and legal cultures have influenced and shaped European public law constitutes an exiting new field of research, which certainly will help refine the general interpretation of the historical development of European public law.

Finally, there is no doubt that historical analyses of the role of the member states in the development of European public law have uncovered a more complex reality than portrayed in existing legal and social science research. In the first systematic historical study of member state reception recently published by Bill Davies, it is demonstrated that the reception of European public law cannot simply be reduced to concern mainly the relationship between the ECJ and the German courts.<sup>112</sup> From the 1950s onwards, it systematically involved politicians, a number of ministries, the large German legal academic elite, and the general public. The development of a constitutional practice by the European institutions consequently touched upon not only the competences of national courts, but also deep-seated political interests, questions of legal culture, and national identity. Early and partial results from historical studies of France and the Netherlands confirm the broad implications of European public law on national life and consequently suggest that we need to approach the role of the member states with much more comprehensive studies.<sup>113</sup>

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111. Bignami, *supra* note 86, at 20–21; *see also* De Witte & Claes, *supra* note 110, at 178 (asserting that the “Netherlands have been an important testing-ground in the course of the 1950s . . . for the principles of direct effect and supremacy as they were formulated by the European Court in the 1960s”).

112. DAVIES, *supra* note 3.

113. Doctoral students Alexandre Bernier (University of Copenhagen) and Karin Van Leeuwen (University of Amsterdam) prepared large case studies on France and the Netherlands, respectively. Likewise, doctoral student Jonas Pedersen (Aarhus University) will conduct a case study on Denmark in the next three years. All projects are part of the “Towards a New History of European Public Law” project at University of Copenhagen, directed by the present author (<http://europeanlaw.saxo.ku.dk>).

All in all, historical research has begun to demonstrate that the member states played a more complex role than hitherto assumed, it has confirmed recent social science and legal research of how contestation over the constitutional practice seemingly has been a lasting feature of the history of European public law, and, finally, it has begun to explore how the national constitutional systems and legal cultures provided a constitutive framework—a fixed variety of options—for the development of European public law. Taken together with the section on how the constitutional practice first evolved, this section suggests that the classical historical narrative of the constitutional paradigm needs to be replaced with a new history of European public law—a history that reveals the deeper legal, social, and political nature of the constitutional practice and a history that does not assume that member states progressively accepted the constitutional practice and a European rule of law.

## VI. TOWARD A NEW HISTORY OF EUROPEAN PUBLIC LAW

Let me finish this article by emphasizing that historical research in European public law is still very much in its infancy. There are still many questions and even entire subfields that remain unexplored. In this sense, this article merely constitutes a preliminary attempt to offer an assessment of what historians can tell us about the development and nature of European public law. It is also important to underline that the arguments presented primarily concern the history of European law from 1950 to 1986. Let me briefly summarize the key contributions that current historical writings offer.

Historical research firmly contextualizes the establishment and development of European public law in the broader social-economic, legal, and political development of the member states and European institutions. Historical analyses have demonstrated that we need to include a wider range of actors to understand the development of European public law.<sup>114</sup> Focusing merely on the ECJ and national courts is not enough. Historical analyses have crucially offered a distinct and revisionist account of both the emergence and development of the constitutional practice and how that practice was

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114. See generally Boerger-De Smedt, *La Cour de Justice*, *supra* note 66.

received by the member states.

The constitutional practice was caused by a combination of historical factors, most importantly the agency of the Legal Service of the Commission. It was promoted by a transnational alliance involving the European institutions and a transnational network of pro-European jurists. While the constitutional practice shaped the case law of the ECJ from 1963 onwards, the impact on the member states was relatively limited. Until the mid-1980s, member states continued to run the Community largely in the manner they had intended with the EEC Treaty. Member state control over decision-making, administration, and the application of European law were the prominent features. A key reason for this continued state of affairs, beyond the initial cautiousness of the ECJ itself before 1967, was the widespread resistance toward the doctrines of the constitutional practice from national administrations, courts, and legal elites in general. Historical research has demonstrated how complex member state reception of European law actually was. Not only did it involve a larger number of domestic actors than hitherto assumed, but member state legal norms and practice also very much influenced the development of European public law. Member states thus did not only receive ECJ case law; they also played a constitutive role for the general development of European public law.

As an overall interpretation of the history of European public law, focusing on the period from 1950 to the mid-1980s, the new historical research rejects key assumptions of the constitutional paradigm, which still holds such a grip on the academic field of EU law today. It argues that the ECJ did not manage to “constitutionalize” the Treaties of Rome, even if the discourse in EU law increasingly claimed this to be the case in the 1980s. Rather, the court had promoted, together with the Commission and the European Parliament as well as transnational networks of pro-European jurists, a constitutional practice in European public law—one the member states did not, as claimed, progressively accept. Instead, the constitutional practice was subject to continued contestation and resistance by important national administrative and legal elites, which largely contained the impact of ECJ case law in key member states.

Some might argue, as Alec Stone Sweet and Thomas Brunell have

done, that contestation and resistance by national administrations and courts should not surprise us.<sup>115</sup> It may be that the European legal order in terms of administrative implementation and national court application looks fragmented, but this does not differ very much from other federal polities such as Canada or the United States.<sup>116</sup> The comparison of the European legal order with its North Atlantic neighbors certainly brings out the federal elements in ECJ case law and, in this sense, easily lends itself to the conclusion that the European Union has undergone comparable processes of constitutionalization and federalization.<sup>117</sup>

I think this conclusion is premature until we have a much more detailed history of what factors and processes actually shaped the history of European law. While the argument can certainly be made that ECJ case law contains important federal doctrines,<sup>118</sup> it does not follow that the administrative practices nor the role of law in the European Communities/European Union have been of a federal

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115. See generally Stone Sweet & Brunell, *Constructing a Supranational Constitution*, *supra* note 24.

116. *Id.* at 100.

117. See David M. Trubek, *Consumer Law, Common Markets and Federalism: Introduction and General Concepts*, in 3 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, 14, 14–26 (Mauro Cappelletti et al. eds., 1987) (comparing consumer protection measures taken in the U.S. federal system and the European Community); Boerger-De Smedt & Rasmussen, *supra* note 11, at 9–10 (outlining the process Stein undertook to establish his comparative study of European and American law). Compare Vincent Blasi, *Constitutional Limitations on the Power of States to Regulate the Movement of Goods in Interstate Commerce*, in 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 174 (Terrance Sandalow & Eric Stein eds., 1982) (discussing constitutionalization of the United States in the context of interstate commerce), with Henry G. Schermers, *The Role of the European Court of Justice in the Free Movement of Goods*, in 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE, *supra*, at 222 (analyzing the federalization of the European Union “with respect to freedom of movement of goods”). The normative implication of making the comparison must have been obvious to the authors. We know it was to Eric Stein, who organized the Bellagio conference of 1977, which brought together the authors of the first book mentioned.

118. See Giuseppe Martinico, *Reading the Others: American Legal Scholars and the Unfolding European Integration*, 11 EUR. J.L. REFORM 35, 35–50 (2009) (indicating that the federal principles that the ECJ employs are inspired by U.S. legal scholars). *But see* T. Sandalow & E. Stein, *On the Two Systems: An Overview*, in 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE, 9–15 (arguing that the U.S. federal experience did not influence the ECJ).

nature. Indeed, future research will determine whether ECJ case law constituted a high-profile and successful attempt to federalize and constitutionalize the European Union, or whether the court has largely failed in its endeavor. The concepts such as European constitution and “constitutionalization” were always deeply normative attempts to legitimize and strengthen the case law of the ECJ. We need to reopen the history of European public law by leaving behind the notion that it has developed or necessarily will develop into a European constitution. Only by doing this will we be able to discern the extent to which the constitutional practice was contested and even more crucially empirically trace the way European public law was *actually* practiced in the Community/Union and the member states. This critique applies just as well to current attempts to save the concept of constitution in relation to European public law. Note that such an understanding of the history of European public law does not deny that the ECJ did indeed promote a constitutional practice or that such a practice permeated ECJ case law and EU law academically. Also, it does not imply a rejection of the notion that the ECJ might to some extent successfully manage to strengthen the federal traits of the European institutions through its case law. Nor does it exclude the possibility that the European electorate will eventually pass a European constitution by referendum.

What it does is replace normative attempts to legitimize the ECJ through the constitutional claim with a more accurate understanding of the driving forces behind the development of European public law. Only by critically and accurately understanding its own history can the EU today begin to address the persistent crisis of legitimacy that haunts it and seriously jeopardizes current attempts to save the euro and, with it, the Single European Market and the union itself.