EU Constitutionalisation Revisited

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Redressing a central assumption in European studies

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Abstract

The constitutionalisation of the European Union has since the early 1990s become a truism in European studies. This article revisits the constitutionalisation theory drawing on the insights from emerging historical research and new strands of political science research. We find that the conventional constitutional narrative is less convincing when confronted with the new evidence from historical and political science research. New historical research show that Member State governments, administrations and courts have generally been rather reluctant to embrace the constitutional project of the ECJ. Furthermore, at the level of European politics, the ECJ and its case law have far from judicialized European decision - making to the extent often claimed. Concluding, we reject the notion that the ECJ has successfully constitutionalised the EU, emphasising instead the inherent tensions in the process, which continue to complicate the efficiency of European law.

Introduction

Since the early 1990s, it has been a truism in European studies that the European Court of Justice (ECJ) successfully constitutionalised the European Union (EU). Through its case law, the ECJ transformed the Treaties of Rome into a proto-federal constitution, thereby turning law into a central dynamic of European integration. As a consequence, the EU has been thoroughly judicialised to the extent that European politics is framed and often decided by law.[3] This article fundamentally questions this truism and offers an alternative interpretation of how European law has developed from 1950 to the present, grounded in new empirical research by legal historians, sociologists and political

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[3] Recent and sophisticated examples of this trend are A. Vauchez, *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) and G. Davies, 'The European Legislature as an Agent of the European Court of Justice', (2016) 54, 4 *Journal of Common Market Studies*, 1-16.

scientists. Before we begin, however, let us briefly take a closer look at the key elements of the standard interpretation of the historical development of European law.

The notion that European law had been constitutionalised was originally launched in 1981 by the American legal scholar Eric Stein.[4] In the mid-1980s, a major research project at the Department of Law of the European University Institute (EUI) led by the Italian Professor Mauro Cappelletti, together with a young Joseph Weiler, further developed Stein's original idea into a broader explanation of 'integration through law'.[5] In his doctoral thesis and later publications, Weiler argued that constitutionalisation through ECJ case law from the mid-1960s had transformed European law into a binding legal order with directly effective legal norms, supported by strong enforcement mechanisms. National governments tacitly acquiesced to this development because there had been a certain balance between law and politics in the European Community (EC) ever since the Luxembourg compromise of 1966 had granted national governments an informal veto right in the legislative process. Weiler emphasised that there was no direct causal link between the two spheres of law and politics, but he nevertheless maintained that there was a nexus in which developments in one sphere influenced the other.[6] When the Single European Act (SEA) in 1986 introduced majority voting for Single Market legislation, Weiler wondered if the result would be that national governments would curb the competences of the ECJ and limit judicial influence on the integration process.[7] With the renewed success of European integration in the last half of the 1980s and early 1990s, Weiler's explanation of the role of European law in the integration process became mainstream in European studies. Therefore, it was only natural that a new young generation of American political scientists, fascinated by the revival of Europe at the end of the Cold War, would take Weiler and the 'integration through law' explanation as the starting point of their own inquiry into European law.[8]

Drawing on old disciplinary debates within political science, the new generation of American political scientists translated the notions of 'constitutionalisation' and 'integration through law' into a neo-functional theory, claiming that legal integration constituted a progressive and self-reinforcing

[4] E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 1-27. Eric Stein was close friends with one of the key actors behind the introduction of a constitutional interpretation of European law, Michel Gaudet, who was the director of the legal service of the Commission from 1958 to 1969. Stein was allegedly present in the offices of the legal service when the famous position of the legal service in the Van Gen den Loos case was discussed in 1963. For a biographical history of Stein and his relation with Gaudet, consult A. Boerger, 'At the Cradle of Legal Scholarship on the European Union. The Life and Early Work of Eric Stein' (2014) 62 *American Journal of Comparative Law*, 859-892.

[5] Weiler was the *de facto* manager of the 'Integration through Law' project. The project compared the American federal experience of legal integration with the EC and produced a multivolume publication. For the first historical analysis of the project based on unique primary sources drawn from the private archive of Cappelletti, see R. Byberg, 'The History of the Integration through Law Project. Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) 18, 6 *German Law Journal*, 1531-1556.

[6] J. B. Cruz, Joseph Weiler and the Experience of Law, in M. P. Maduro and M. Wind (eds.), *The Transformation of Europe. Twenty-Five Years On*, (Cambridge University Press, 2018), 193-205 and S. K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press, 2018), 135-148, here 142-143.

[7] J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal*, 2403-2483, here 2426-2430 and J. H. H. Weiler, 'A quiet revolution: The European Court of Justice and its interlocutors' (1994) 26,4 *Comparative political Studies,* 510-34.

[8] For an example of how Joseph Weiler and the 'Integration through Law' project inspired the new, young generation of American political scientists, see K. Alter, 'On Law and Policy in the European Court of Justice. An American Perspective', in H. Koch, H., K. Hagel-Sørensen, U. Haltern and J. H. H. Weiler (eds.), *Europe. The New Legal Realism* (DJØF, 2010), 1-11.

dynamic of European integration fuelled by economic and social interests.[9] Competing explanations offered a new degree of precision about just how 'integration through law' worked. Alec Stone Sweet and Thomas L. Brunell argued, based on large-scale quantitative research, that the litigation of firms seeking trade liberalisation developed into a virtuous circle of legal integration. The case law of the ECJ that generally favoured liberalisation was codified by Council legislation facilitating further liberalisation and in turn more litigation.[10] In contrast, Karen Alter focused on how lower national courts cooperated with the ECJ in developing the European legal order in a power struggle against national courts of last instance.[11] Political scientists, such as Stone Sweet and Kelemen, tended to dismiss Weiler's fear of a backlash of European law in the wake of the SEA. Instead, 'integration through law' empowered the ECJ to such a degree that it came to influence and even dominate European politics. 'Constitutionalisation' thus led to a most thorough judicialisation of European integration.[12] New sociological research has explored judicialisation in detail, focusing on how jurists and European law were crucial in empowering the supranational institutions. Constitutionalisation thus turned European law into the very backbone of the European polity, defining the very stage of European politics.[13] Recently scholars have even claimed that democratically elected institutions had insufficient legislative tools that could address the increasingly powerful role of the ECJ and the European legal order[14], whereas others posit that member states could have re-contracted their relationship with the ECJ but never did, and instead they adapted to both constitutionalisation and judicialisation.[15]

Legal scholars have generally not gone to the same extremes as political scientists in their assessment of the degree to which the EU has been judicialised. However, they still rely on Weiler's historical interpretation of how European law developed until the early 1990s, even if they are now much more critical about its normative implications.[16] Standard textbooks understand European law as constitutional in nature and quite naturally incorporate the notion of 'constitutionalisation' and 'integration through law' as key explanations of this state of affairs.[17] There are variations in how

[9] A.-M. Burley and W. Mattli, 'Europe before the Court: a political theory of legal integration' (1993) 47, 1 *International Organization*, 41-76.

[10] A. S. Sweet, A.S. and T. L. Brunell, 'Constructing a supranational constitution: Dispute resolution and governance in the European Community' (1998) 92,1 *American Political Science Review* 63-81; A. S. Sweet, *Governing with judges: constitutional politics in Europe* (Oxford University Press, 2000) and A. S. Sweet and T. L. Brunell, 'Constructing a Supranational Constitution', in A. S. Sweet (ed.), *The Judicial Construction of Europe* (Oxford University Press, 2004), 45-108.

[11] K. Alter, 'National Courts: Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in J. H. H. Weiler, A.-M. Slaughter and A. S. Sweet (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context*, (Hart Publishing, 1998), 227-252 and K. Alter, K. Alter, *Establishing the Supremacy of European Law* (Oxford University Pres, 2001).

[12] R. D. Kelemen and A. S. Sweet, Assessing the Transformation of Europe: A View from Political Science, in M. P. Maduro and M. Wind (eds.), *The Transformation of Europe. Twenty-Five Years On*, (Cambridge University Press, 2018), 193-205 and S. K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press, 2018).

[13] For the main example of this, see A. Vauchez, *Brokering Europe*, op.cit.

[14] D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) *European Law Journal* 21,4, 460-473, here 470-71 and G. Davies, 'The European Union legislature as an agent of the European Court of Justice' (2016) 54, 4 *Journal of Common Market Studies*, 846-61.

[15] A. S. Sweet, 'The European Court of Justice and the judicialization of EU governance' (2010) 5, 2 *Living Reviews in European Governance*, 15.

[16] See M. P. Maduro and M. Wind (eds.), *The Transformation of Europe. Twenty-Five Years On*, (Cambridge University Press, 2018).

[17] R. Dehousse, *The European Court of Justice. The Politics of Judicial Integration* (Macmillan Press LTD, 1998) and R. Schütze, *European Constitutional Law* (Cambridge University Press, 2016).

legal scholars understand the constitutional nature of the EU. In the reaction to the Maastricht Treaty and the famous Maastricht judgment of the German *Bundesverfassungsgericht* in 1993, which (as we shall see below) undermined the constitutional nature of the EU, legal scholars developed theories of 'constitutional dialogue' or 'constitutionalism beyond the state' to reflect the new reality in which a European constitution co-existed with national constitutions.[18] In parallel, numerous legal scholars began to question the constitutional nature of the EU more fundamentally. Peter Lindseth, for example, has highlighted the complexity of the legal sources of European law and emphasised their administrative nature[19], whereas Dieter Grimm has underlined that the EU is not yet fully constitutional because it has not yet experienced a constitutional moment that could secure popular legitimacy.[20] Despite these critical views, legal studies in the mainstream maintain that European law has been constitutionalised and subscribe to the 'integration through law' interpretation when explaining its history. As we shall see below, this is hardly surprising given the fact that the discipline of European law itself played a central role in producing a constitutional discourse in European law.

This article will revisit the mainstream interpretation of the history of European law based on a wide range of new empirical studies. Those studies include both new archive-based historical research that has come out in the last decade and new empirical research by political scientists on the most recent period. The article brings together these new empirical insights, and on this basis offers a new interpretation of the history of European law. To avoid misunderstandings, we emphasise that we are not providing a systematic, doctrinal history of European law, nor do we take a normative stance about whether European law should be considered constitutional, administrative or international in nature. What we have written is a legal history of the social practices of actors and institutions battling over how European law should develop; it is a history placed in the broader context of the process of European integration. As a result, the text has been given the shape of a chronological narrative that explores the factors, actors, contingencies, unintended consequences and contexts that shaped European law. It offers a new, empirically grounded, multi-causal explanation of how European law has developed since 1950, not a new political science theory.[21]

At the heart of the article is a reconceptualisation of the notion of 'constitutionalisation'. To improve analytical clarity, we employ the concept of 'constitutional practice'[22] to characterise the various activities of the ECJ, the Commission, the European Parliament and European legal academia that contributed to create a full-blown European constitutionalism. We contend that the constitutional practice included two key elements, namely, a constitutional interpretation of European law that was introduced in the early 1960s and later a legitimating constitutional discourse, which only fully developed in the 1980s.[23] The ultimate long-term aim of the constitutional practice of European law

[18] For the best overview of this new trend of research, see M. Avbejl, 'Questioning EU Constitutionalism' (2008) 9, 1 *German Law Journal*, 2-26.
[19] P. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press 2010).
[20] D. Grimm, 'The Democratic Costs of Constitutionalisation' op.cit.
[21] On the nature and advantages of a historical narrative vis-à-vis social science theory, see W. Kaiser, B. Leucht and M. Rasmussen, Origins of a European Poplity: A new research agenda for European Union history, in W. Kaiser, B. Leucht and M. Rasmussen, *The History of the European Union. Origins of a trans- and supranational poility 1950-72*, (Routledge 2008), 1-12, here 6-9.
[22] The concept of 'constitutional practice' was first launched as a key element in the history of European law in B. Davies and M. Rasmussen, 'Towards a New History of European Law' (2012) 21, 3 *Contemporary European History*, 305-318, at 309.
[23] We are well aware that the term 'constitutional' is ambiguous because it has always meant quite different things in different national traditions. In the context of European integration history, however, the term has generally been associated with European federalism and was openly used in this sense in the 1950s. As the federal ambition of the integration process began to look utopian from the late 1950s onwards, other more palatable and politically less

was to build the groundwork for a federal Europe, or at least to consolidate the autonomy of the supranational institutions. To achieve this, the codification of the constitutional ECJ case law in combination with federalist treaty reform was the objective. It is a key argument of the article that although the constitutional practice was successful in establishing a constitutional interpretation of European law and legitimating discourse, pushback from a majority of national governments blocked the road to codification and federalist treaty reform.[24] Similarly, although the constitutional legal order gave rise to processes of judicialisation from the 1980s onwards, our analysis demonstrates that in many instances these processes could be navigated and contained by the member states. Judicialisation did not overtake politics.

The article proceeds in the first section to explore how the failure of European federalism, to which European constitutionalism was intimately connected, created a mismatch between the political and legal sphere of the EC/EU. The second section then traces how a constitutional practice of European law emerged and gradually consolidated from 1960s to the early 1990s. In the third section we analyse how member states perceived and reacted to this development before 1993. Finally, we will explore how the constitutional practice and the various processes of judicialisation it created developed from 1993 to the present day.

European Federalism and State Power

The constitutional practice of European law has always been intimately connected with the history of European federalism. Not only did a constitutional interpretation of European law first emerge in the early 1960s because it was promoted by the supranational institutions with a federalist outlook, but the establishment of a constitutional legal order always assumed that the political step towards establishing a European federation would somehow follow later. To understand the historical context of European legal integration, we therefore briefly explore the history of European federalism, its influence on the European construction, and how member state power has continuously curbed and limited federalist influence.

European federalism emerged as an important and relatively potent political force in the wake of the Second World War. Between the late 1940s and the mid-1950s, there were two failed attempts to establish a constitutionally based European federation. The first proposal in 1949 aimed to establish a directly elected constituent European parliament within the framework of the Council of Europe, but was rejected by sceptical British and Scandinavian governments. With the acceleration of the process of European integration in the early 1950s, including the formation of the European Coal and

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contentious terms were used interchangeably with 'constitutional', such as 'supranational', 'autonomous', or indeed the term used by the ECJ from 1963 onwards, 'new legal order'. Clearly these alternative terms were not identical in their legal implications, but they reflected the wish to separate European law from international law and move it towards state law. In the 1980s, as we shall see below, a constitutional discourse re-emerged in academia to describe European law and was broadly adopted by the supranational institutions. Therefore, the reason we use 'constitutional' is that it best describes the broad aspirations of the alliance mentioned above and that it clarifies the various links to European federalism that the alternative terminology historically has attempted to hide. It is important to point out, however, that many of the actors that promoted a constitutional practice did not necessarily have the same objective with regard to the ultimate development of a unified Europe. Nevertheless, although a constitutional approach to European law did not always imply the full support to a European federal state, it did usually mean support for a politically strong and a legally and institutionally autonomous EC/EU.

[24] For a distinction between 'pushback' and 'backlash' against international courts, see M.R. Madsen, P. Cebulak and M. Wiebusch, 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14, 2 *International Journal of Law in Context*, 197-220.

Steel Community (ECSC) and the negotiations on the establishment of a European Defence Community (EDC), there was a new attempt to create a European Political Community (EPC). The EPC would include both a directly elected parliament, as part of a two-chamber system, and a European constitutional court. However, also this attempt failed when the French National Assembly rejected the EDC treaty in the summer of 1954.[25]

With the establishment of the European Communities (EC) in 1958, the integration process became decidedly more focused on economic integration. Compared to the ECSC and the plans for the EPC, national governments took centre stage in the EC and the powers of the supranational institutions were scaled back, at least to an extent. This did not deter the supranational institutions from pursuing federalist reform after 1958. The European Commission did so twice, first under the leadership of Commission president Walter Hallstein in the mid-1960s and second in the early 1990s, led by president Jacques Delors. Both presidents attempted to furnish the Commission with genuine political autonomy, proposing to grant it powers of taxation and a more independent role in the legislative and administrative process. Both these attempts were crushed by national governments, which instead strengthened their own individual and collective power with the introduction of the informal national veto right in the Luxembourg Compromise of 1966 and the pillar structure of the Maastricht Treaty of 1992 that limited the powers of the supranational institutions to the first pillar of the new EU. After the first direct elections had furnished it with popular legitimacy, the European Parliament also pushed for major institutional reform of the EC and proposed a Draft Treaty establishing a European Union in 1984. Again, a majority of national governments were not inclined to act on the proposal.[26]

The final attempt to move Europe in a federal direction was the Constitutional Treaty, which was rejected in the Dutch and French referenda of 2005. This treaty represented an earnest attempt by federalist politicians and the supranational institutions to develop a single constitutional framework for the EU and furnish it with popular legitimacy. It is true that the most openly federalist features of the Constitutional Treaty, such as the explicit mentioning of the federal objective of the union, was removed during the final intergovernmental conference. National governments also firmly maintained the *kompetenz-kompetenz* to make future treaty revisions. Nevertheless, the Constitutional Treaty represented a wholesale codification of the constitutional nature of the EU, including the title, a bill of rights and the codification of the primacy of European law. The Constitutional Treaty thus represented a unique chance to finally obtain a formal and popular endorsement of a constitutional framework for EU.[27]

With the rejection of the Constitutional Treaty, the federal dream once again ran asunder. Although the Treaty of Lisbon in 2009 picked up most of the planned institutional reforms, the new treaty did not constitute an independent constitutional document but merely amended existing treaties. Crucially, it represented a clear rejection of the constitutional nature of the EU, leaving out all constitutional vocabulary.[28] While European federalism may not have succeeded in taking the

[25] R. Griffiths, *Europe's First Constitution. The European Political Community, 1952-1954*, (Federal Trust, 2000), 165-170.

[26] P. Ludlow, European Integration in the 1980s: on the Way to Maastricht? (2013) 37 *Journal of European Integration History*, 11-23 and W. Loth, Negotiating the Maastricht Treaty (2013) *Journal of European Integration History*, 67-85.

[27] D. Beach, 'The Constitutional Treaty: The Failed Formal Constitutionalisation', in F. Laursen (ed.), *Designing the European Union*, (Palgrave, 2012), 217-243.

[28] J. Ziller, The Treaty of Lisbon: Constitutional Treaty, Episode II, in Finn Laursen (ed.), *Designing the European Union*, (Palgrave, 2012), 244-268, here 254-255 and J. C. Piris, *The Lisbon Treaty. A Legal and Political Analysis*, (Cambridge University Press, 2010), 48.

decisive step towards a European federal state, its influence is still significant, even if progress has been incremental and less high-profile. Apart from the constitutional practice in European law, which we will explore below, the introduction of direct elections for the European Parliament and the gradual expansion of latter's role in the legislative process from the Single European Act onwards was inspired by federalist thinking. However, such incremental developments did not fundamentally change the extent to which state power played and continues to play the central role in the European construction.

The role of state power was central from the very beginning of the process of European integration. The Treaty of Paris that established the ECSC used a federal template for the institutional setup, including an Assembly, a Council of Ministers (senate), a High Authority (government) and a European Court of Justice (ECJ). However, as the ECSC began its work in the 1950s, it turned out that the High Authority could do little without the support of national governments. The latter effectively blocked important objectives of the Treaty of Paris, such as competition policy, from becoming a reality.[29] This was a lesson learned when the Treaties of Rome were negotiated. The new approach to integration accepted that progress depended on the political will of the member states. The Council of Ministers thus became the legislative centre in the new Communities, while the Commission was granted the right of initiative. Likewise, the implementation and application of European legislation would almost exclusively rest with national administrations and courts, with only a limited role for the Commission and the ECJ. This did not mean that a long-term federalising potential was completely lost. During the transitional period (before 1970), the introduction of majority voting in the Council was planned. Moreover, there was an option to grant the Assembly direct elections. Finally, both the Commission and the ECJ maintained independent roles in the institutional machinery.[30]

In the end, the development of the EC resembled the experience of the ECSC. Although the Hallstein Commission endeavoured to gradually federalise the EC, the member states quickly increased their control. Not only was the introduction of majority voting delayed indefinitely with the introduction of the informal national veto in the Luxembourg compromise in 1966, the emergence of the COREPER from the early 1960s onwards demonstrated that national governments and administrations wanted to monitor and influence both the agenda setting of the Commission and its (limited) administrative functions.[31] Thus, by the 1960s the role of the Commission as the leading political force in the EC had already waned. Instead, the member states established the European Council in 1975 to set the general agenda of the EC.[32] It was the latter, albeit helped by a revitalised Commission under the leadership of Delors, that became the decision-making centre for the wave of reforms that reinvigorated European integration from 1985 to 1993.[33] As we saw above, the majority

[29] T. Witchske, *Gefahr für den Wettbewerb? Die Fusionskontrolle der Europäischen Gemeinschaft für Kohle und Stahl und die 'Rekonzentration' der Ruhrstahlindustri 1950-1963* (De Gruyter, 2009).
[30] A. Boerger, 'Negotiating the Foundations of European Law 1950-1957' (2012) 21, 3 *Contemporary European* History, 339-356 and M. Rasmussen, 'Revolutionizing European Law: A history of the Van Gen den Loos judgment' (2014) 12, 1 *International Journal of Constitutional Law*, 136-163.
[31] P. Ludlow, 'The European Commission and the rise of the COREPER: A controlled experiment', in W. Kaiser, B. Leucht and M. Rasmussen (eds.), *The History of the European Union. Origins of a trans- and supranational polity 1950-1972* (Routledge 2008), 189-205 and A.-C. Knudsen and M. Rasmussen, 'A European Political System in the Making, 1958-1970. The Relevance of Emerging Committee Structures' (2008) 14, 1 *Journal of European Integration History*, 51-68.
[32] E. Mourlon-Druol, 'Steering Europe. Explaining the rise of the European Council 1975-1986' (2016), 25, 3 *Contemporary European History*, 409-437.
[33] P. Ludlow, 'European Integration in the 1980s' op.cit.

of national governments rejected the proposal of the Delors Commission to take the Maastricht Treaty in a federal direction. The new EU was a composite construction that maintained the supranational elements of the EC in the first pillar but introduced a new intergovernmental mode of cooperation in the two new pillars and cemented the status of the European Council as the leading institution.[34] With the exception of the failed Constitutional Treaty, the dominance of state power in the Union has not been challenged, not even during the major crisis for the European Economic and Monetary Union (EMU) in the wake of the 2007 financial crisis. Solutions to the instability of the EMU, including the banking union, were created without building up the autonomous fiscal capacity of the EU, just as the opportunity to institutionalise European solidarity with a euro-bond was ignored. The locus of political power has remained with the national governments collectively, even as it is obvious that the gradual expansion of European integration to new policy fields has begun to seriously constrain the policy choices of individual member states.

The failure of European federalism traced above, along with the continued and arguably increasing prominence of the intergovernmental pillar, stand in clear contrast to the fact that a constitutional practice developed in European law. Before we explore how this happened, we briefly point out two fundamental ways in which the broader political context impacted the development of European law. On the one hand, federalist ideology deeply influenced the worldview and programme of the supranational institutions from 1951 onwards. This provided the key impetus for the development of a constitutional practice in European law. On the other hand, the general failure of European federalism explains why the European construction was based on treaties of international law and not a constitutional document. As a result, the political system that developed in the EC/EU would become deeply influenced by and enmeshed with the executive and administrative power of the member states. The EC did not develop a fully autonomous federal layer of institutions that ran European public policies; instead, member state power and representatives were present at every step of public policy making and administration.[35] As we shall see in the next two sections, the development of a constitutional practice in European law essentially created a mismatch between a constitutional and proto-federal European legal order and a European political system that was not fully autonomous or federal in character. This mismatch has not yet been fully resolved.

Establishment of a constitutional practice in European law before 1993

Given the failure of European federalism, it is quite a paradox that a constitutional practice in European law had become well entrenched in the European construction around 1990. The next two sections will offer an explanation of how this could happen. In the first section, we shall trace the emergence and development of a constitutional practice at the European level. The second section will both explain why the member states did not stop this development, but also demonstrate that widespread resistance among key national actors hindered the acceptance and codification of the new constitutional legal order.

[34] This has been reflected in recent political science literature on the EU. See C. J. Bickerton, D. Hodson and U. Puetter, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, (Oxford University Press, 2015).

[35] For an early understanding of this and a strong critique of how the federal and constitutional paradigm of European law misrepresented the realities of European integration by supposing a clear separation between the member states and the European layer of decision-making, see A. M. Donner, *The Role of the Lawyer in the European Communities*, (Northwestern University Press, 1968), 1-27.

It is now well documented that the historical roots of the constitutional interpretation of European law can be found in the federalist ideology of the 1950s, which became the household religion of both the High Authority under Jean Monnet (1952-1955) and the EEC Commission under Walter Hallstein (1958-1967). In particular, the Hallstein Commission worked hard during the first half of the 1960s to federalise the EC, and law was considered a crucial tool. It was not an easy task to determine how to convince the ECJ to approach the European treaties as the constitution of a future European federation. The Treaties of Rome had strengthened the role of the member states in the new EC at the expense of the supranational institutions.[36] There was also very little support for a constitutional interpretation among the most prominent professors of international law and the national legal elites in the 1950s and early 1960s.[37]

Despite these obstacles, a breakthrough for the constitutional interpretation of European law came in 1963-1964 with the ECJ's Van Gend en Loos and Costa v. E.N.E.L. judgments. This revolution was not the result of a momentous watershed in societal demand in favour of a stronger European legal order or a breakthrough for the legal service's constitutional interpretation among national legal elites or academics. Rather, several independent developments combined to produce the breakthrough. Firstly, Gaudet and the legal service developed a constitutional reading of the Treaties of Rome that involved a less explicit focus on the federal objective of the treaties. A constitutional interpretation of European law was now justified by the need to underpin the common market with a coherent and well enforced European legal order.[38] Secondly, Dutch courts brought the preliminary reference mechanism of article 177 (EEC Treaty) to life, sending 13 of the first 15 cases. This activism was caused by a combination of the unique constitutional reforms in the 1950s that gave primacy to self-executing international law in the Dutch legal order, the existence of large multi-national firms that decided to explore through litigation the extent to which the new legal framework of the Treaties of Rome could be used to liberalise the Dutch economy and a strong tradition of internationally oriented lawyers.[39] The third factor that helped bring about the legal revolution was the changes in the composition of the ECJ bench, with the addition in 1962 of two new judges, the former French minister and Christian democrat Robert Lecourt and the Italian professor of civil law Alberto Trabucchi. Both were nominated under highly peculiar and unique circumstances.[40]

With the two judgments, which introduced the direct effect and the primacy of European law, respectively, the ECJ established the foundational pillars of a proto-federal legal order and transformed the preliminary reference mechanism of article 177 into an enforcement system fuelled by private litigation.[41] The ECJ also emphasised the autonomous nature of European law and how the latter were to be interpreted in light of the objectives of the treaties. The Court was careful,

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[36] A. Boerger, 'Negotiating the Foundations of European Law 1950-1957' (2012) 21, 3 *Contemporary European History*, 339-356 and M. Rasmussen, 'Revolutionizing European Law' op. cit.

[37] M. Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-65' (2012) 21, 3 *Contemporary European History*, 375-397 and A. Boerger and M. Rasmussen, 'Transforming European Law. The Establishment of the Constitutional Discourse from 1950 to 1993' (2014) 10 *European Constitutional Law Review*, 199-225.

[38] M. Rasmussen, 'Revolutionizing European Law' op. cit.

[39] Karin van Leeuwen, 'Blazing a Trail. The Netherlands and European Law, 1950-1983', in B. Davies and M. Rasmussen (eds.), *The History of European Law, 1950-1993. The Battle over the constitutional practice*, forthcoming 2019.

[40] For the full story of the nominations, consult M. Rasmussen, 'Constructing and Deconstructing European Constitutional Law', in H. Koch, H., K. Hagel-Sørensen, U. Haltern and J. H. H. Weiler (eds.), *Europe. The New Legal Realism* (DJØF, 2010), 639-660.

[41] The original purpose of the preliminary reference system was to secure the uniform interpretation of European law. See, for example, the contemporary account given by the man who proposed article 177 during the negotiations on the Treaties of Rome. N. Catalano, *La Comunità Economica Europea e l'Euratom*. (Giuffré, 1957), 36-37.

however, not to shroud these doctrinal innovations in a constitutional language, instead characterising European law as constituting a 'new legal order'[42]. This terminology made it easier to gain support in favour of the new interpretation both inside the ECJ and in the broader community of lawyers and legal scholars because it left the exact nature of European law open. Most were probably still aware that the new terminology aside, the ECJ had embraced a constitutional understanding of European law, albeit one that was clearly adapted to the limitations of the EC.[43]

These two judgments were celebrated by the Hallstein Commission and the European Parliament as a major breakthrough for Europe. In a comment to the report of the European Parliament on the judgments, Hallstein argued that only the legal science could answer the 'big political issue'. [44] The establishment of the legal component of the federal agenda of Hallstein had been achieved. The Court had now taken sides in the battle over the political *finalité* of European integration.[45] The success of Hallstein's federal project proved short-lived. When the Commission attempted to push for the creation of autonomous financial resources and institutional reform in the spring of 1965, it ended in defeat when the French government boycotted the Council in the Empty Chair Crisis. In 1967, Hallstein was forced to resign and the heyday of Commission activism was over.

How was it possible after the defeat of Hallstein's project for the legal component to survive and even gradually develop into a broad constitutional practice by the early 1990s? Recent advances in historical research allow us to offer for the first time an empirically grounded explanation of this paradox. Let us begin by analysing how the first component of the constitutional practice, the constitutional and proto-federal European legal order, developed. Despite the demise of the Hallstein Commission, the supranational alliance that had crystallised in 1965 in support of a constitutional understanding of European law was maintained in the decades that followed. The legal service of the Commission continued to promote a constitutional interpretation of European law. The service was temporarily weakened after Gaudet stepped down in 1969. However, when Claus-Dieter Ehlermann stepped in from 1977 to 1986, efforts to develop a broad constitutional practice were accelerated. The legal committee of the European Parliament would also continue to promote and legitimise the case law of the ECJ. To both the Commission and the European Parliament, the constitutional interpretation of European law constituted an important source of self-empowerment in the institutional battles with the Council pillar of the EC. One way to use the constitutional case law in

[42] In the Van Gend en Loos judgment, the concept used by the ECJ was a 'new legal order of international law', something that Gaudet complained about to the Luxembourg diplomat and later ECJ judge Pierre Pescatore. Gaudet wanted to get rid of the word 'international' (Letter from Gaudet to Pierre Pescatore, 16 May 1963, Archive of Michel Gaudet, Fondation Jean Monnet, Lausanne, Chronos 1963). His wish was fulfilled by the ECJ in the Costa v. E.N.E.L judgment. From then on European law was just a 'new legal order'.

[43] Just a year before - in the Borsch case - the legal service had characterised the features that made the European legal order especially *constitutional*. (Case 13/61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, 1962, E.C.R. 45.) See Mémoire, Oct 25 1961, Historical Archive of the European Commission, BAC. 371/1991, 577-578). See also how both André Donner (judge of the ECJ) and Eric Stein considered the judgments a breakthrough for a constitutional and even a federal understanding of European law. A. Donner, National law and the case law of the Court of Justice of the European Communities, (1963) 1,1 *Common Market Law Review*, 8-16 and E. Stein, Towards Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case, (1965) 63, 3 *Michigan Law Review*, 491-518.

[44] A. Vauchez, *Brokering Europe* op.cit., 138ff.

[45] It was Piers Ludlow who first introduced the interpretation that the Treaties of Rome were fundamentally so ambiguous as to allow very different understandings of what the EC should become. A battle played out from 1958 to 1966 about whether the EC would be dominated by the national governments or whether it instead would become a first important step towards the gradual federalisation of Europe. P. Ludlow, *The European Community and the Crises of the 1960s*, (Routledge, 2006)

these institutional battles involved the notion of the *acquis communautaire*, the sum of all formal and informal decisions of the EC, which according to the Commission included the constitutional case law of the ECJ, even if it was not codified. Both the Commission and the European Parliament used the *acquis communautaire* as the starting point for talks on institutional reform from the 1970s onwards.[46] Another way went directly to the courtroom of the ECJ. The Court proved most willing to support other supranational institutions in key cases on institutional matters, such as *ERTA* in 1971 on the external competences of the EC and *Isoglucose* in 1980 on the right of the European Parliament to have a say in improved consultation on draft legislation accepted before the ECJ.[47]

There is no doubt that the continued support of two other supranational institutions was crucial to the ECJ. However, this does not explain how the Court, despite recurrent changes in its composition, maintained a coherent constitutional interpretation of European law from 1963 to the early 1990s. Here, the key was the continued nomination of judges with a constitutional outlook. Several of the judges entering the Court between 1967 and 1970 held federalist views, including Pierre Pescatore (L) and Hans Kutscher (G). Both Pescatore and Kutcher replaced judges who had been sceptical of the legal revolution of 1963-64, and they became prominent figures in the Court. With Lecourt as President from 1967 to 1976 and Kutscher as President from 1976 to 1980, the Court was ready for a highly activist period. We know from recent historical analysis of how ECJ judges have been nominated that domestic party politics, bureaucratic influence and personal connections dominated the process, not any clearly defined national interest in favour of or against the constitutional interpretation of European law.[48] The best explanation of why new judges and advocate generals generally shared the constitutional interpretation of European law is therefore that they reflected the pro-European views of the governmental coalitions that picked them. The only member states in which governments or governing coalitions occasionally did not hold pro-European views were Britain, France and Denmark. However, even French governments never seriously intended to jeopardise France's EC membership, and they nominated judges who were among the strongest supporters of the constitutional interpretation of European law, namely, Lecourt (1962-1976) and Adolphe Touffait (1976-1982). In addition to the nomination of judges with a pro-European outlook, socialisation inside the ECJ probably also played a role, particularly when the Court expanded as a result of the continued enlargements in the 1980s and 1990s.[49]

Another key factor behind the development of a constitutional and proto-federal legal order was the transformation of the system of preliminary references that the ECJ provoked in 1963-1964. Existing research, mirroring the legitimating discourse of the Court itself, has interpreted the gradual rise in the number of cases as proof of the progressive success of the ECJ in cooperating with national courts and tapping into societal demand for European law.[50] However, the number of preliminary references was very low until the late 1970s, although it gradually increased from single digits throughout most of the 1960s to three digits in 1978. The low number of cases reflected either a relative lack of societal

[46] The exact content of the acquis communautaire was contested between the Commission and the Council. A. Vauchez, *Brokering Europe*, op.cit., 175-185.

[47] Case 22/70 *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport* (1971) ECR 00263 and Case 138/79 *SA Roquette Frères v Council of the European Communities. Isoglucose - Production quotas* (1989) ECR 03333.

[48] V. Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972)*, (Kolstermann, 2018).

[49] On the socialisation of the judges and advocate generals of the Court, see the interesting analysis of A. Vauchez, *Brokering Europe*, op.cit., 151-171.

[50] K. Alter, *Establishing the Supremacy of European Law*, op.cit.; A. S. Sweet and T. L. Brunel, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92, 1 *American Political Science Review,* 63-81 and A. S. Sweet, *The Judicial Construction of Europe*, op.cit.

demand, a lack of cooperation from national courts, or a combination of the two. It was only with the Single European Act in 1986 that both societal demand for legal integration started to take off and national courts began to more actively engage with the Luxembourg Court. The lack of success of the preliminary reference system as an enforcement mechanism of European law forced Ehlermann and the legal service of the Commission to pursue a new initiative that built on a combination of detailed monitoring of how national administrations implemented European legislation and a significant ramping up of infringement charges by the Commission against member states.[51] However, despite this limited success, the preliminary reference mechanism still produced enough cases with pertinent questions about the nature of European law to allow the ECJ to expand its constitutional case law. This suggests that we should probably focus less on structural and institutional factors when attempting to explain the development of the preliminary reference mechanism before 1986.[52] Indeed, the central questions appear to be firstly what brought the preliminary reference mechanism to life and secondly how, without being ignited by societal demand or widespread support from national courts, it was possible to produce relevant cases that the ECJ could use to expand its constitutional doctrines.

Although the preliminary reference mechanism has not been studied systematically by historians, recent historical work contributes to a new understanding of how the mechanism developed. We have discussed above how the Netherlands brought the mechanism into life in the first half of the 1960s and how the ECJ could use questions sent from Dutch courts to re-shape the mechanism into one of enforcement through private litigation. That said, what factors drove the slowly increasing flow of preliminary references from other member states in the 1960s and 1970s? New political science and historical research on Italy and France provides new and interesting answers. Exploring the role of Italian courts and lawyers in the preliminary reference mechanism, Tom Pavone has recently demonstrated that Italian courts generally ignored European law until the 1990s.[53] Instead, the key impetus behind sending preliminary references came from a very small circle of lawyers who held strongly pro-European views. Of the first 89 Italian preliminary references sent from 1964 to 1980, 60 cases were produced by the same four lawyers, including former ECJ judge Nicola Catalano and former member of the legal service Wilma Viscardini. Moreover, it was not unusual for lawyers to formulate the preliminary references sent by the national judge.[54]

In France, as demonstrated by Alexandre Bernier, the use of the preliminary references system itself was the object of a hidden battle between two loose networks of Gaullist and Christian Democratic politicians and jurists who held very different views on how French courts should interact with the ECJ. In this battle, many of the most important preliminary references from French courts, along with prominent national cases on European law such as the famous Jacques Vabre case of the Cour de Cassation in 1975, were the result of pro-European lawyers and judges attempting to promote the influence of European law in France. To counter such moves, during extended periods in the 1960s and 1970s, the Gaullists managed to use their repeated control of governmental power to enforce a

[51] A. Vauchez, *Brokering Europe*, op.cit., 188-190.

[52] For a rejection of the structual argument developed by Alec Sweet Stone and Thomas Brunell that a virtous circle centred around trade and litigation developed, see M. Wind, D.S. Martinsen and G. P. Rotger, 'The Uneven Legal Push for Europe: Qustioning Variation when National Courts go to Europe' (2009) 10, 1 *European Union Politics*, 63-88, based on a similar quantitative methodology.

[53] For a similar conclusion on the role of Italian courts with regard to the preliminary reference mechanism, see A. Bartolini and A. Guerrieri, 'State Liability in the Italian Context', in B. Davies and F. Nicola (ed.), *EU law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017), 338-356, 340-341.

[54] T. Pavone, The Ghostwriters of European Integration: Eurolawyers and the Judicial Empowerment Thesis Revisited, paper presented at the 2017 European Union Studies Association (EUSA) conference, Miami, FL, 4-6 May, 1-55.

system in which preliminary references had to be sent to the foreign ministry for political control.[55] To the results of these two member state case studies we can add that not only did a number of the most prominent ECJ judgments come from test cases produced by pro-European lawyers, including Van Gend en Loos (1963), Costa v. E.N.E.L. (1964), the Defrenne cases (1971 and 1976) and Cassi di Dijon (1979), one of the most important and heralded breakthroughs for the reception of European law in the member states, the Le ski judgment by the Belgian Cour de Cassation judgment in 1971, owed much to the influence and ideas of a militant pro-European jurist, namely, Ganshof van der Meersch.[56]

In conclusion, it is increasingly well documented that the sending of preliminary references from 1958 to 1986 was not driven by societal demand or increasing cooperation from national courts. Rather, it was pro-European lawyers and judges who both quantitatively and qualitatively played a key role in sending preliminary references. Only in the 1980s did societal demand seriously kick in, and with the success of the SEA, national courts had to come to terms with European law more systematically. This new understanding of the early history of the preliminary reference mechanism does not mean that it was not important to the ECJ. Indeed, the mechanism proved crucial in the 1960s and 1970s because many of the preliminary references sent were key cases formulated by pro-European lawyers and judges, who knew just where ECJ case law needed to be further developed.

What, then, characterised the constitutional case law of the ECJ? The core of the interpretative repertoire was an emphasis of the *effet utile* of European legal norms in achieving the political (federal) and material objectives of the Treaties of Rome over alternative interpretations. This allowed the ECJ to carve a proto-federal legal order out of a disparate set of international treaties that hardly provided a coherent legal underpinning for a common market and a political community. The vision required the development of key doctrines such as primacy, basic rights, external identity, and state liability that were not explicitly mentioned in the treaties, and it included a generous interpretation of the general competences of the EC to empower the supranational institutions. By 1990, the ECJ had developed what it understood as an autonomous European legal order that had primacy over national law, including constitutions, in which treaty articles and legislation often had a direct effect (even if the ECJ had to limit the direct effect of Council directives because of resistance from national courts) in the national legal orders. The material part of the treaties was generally transformed from political objectives to be achieved through Council legislation to constitutional rights with direct effect that citizens could rely on before national courts. Transforming the core policies of the common market into the constitutional rights of the citizens arguably made later reform difficult. The legal order also guaranteed basic rights (here the ECJ responded to the critique by national courts that primacy endangered nationally guaranteed basic rights) and held states liable for wrongful or delayed implementation of European law. Finally, the legal order directly contributed to the building of a European polity both by systematically strengthening the external and internal competences of the EC and by improving the constitutional standing of the European Parliament vis-à-vis other institutions. Although it carefully listened to the critique from national courts, particularly with regard to the expansion of direct effect and the question of basic rights, the Court certainly did not hesitate

[55] A. Bernier, *La France et le droit communautaire 1958-1981: Histoire d'une reception et d'une co-production*, Ph.D. dissertation, University of Copenhagen, 2018.
[56] M. Rasmussen, At the Vanguard? Belgium and European law 1950 to 1993, in B. Davies and M. Rasmussen (eds.), *The History of European Law, 1950-1993. The Battle over the constitutional practice*, forthcoming 2019.

to draw the full constitutional logic of the initial revolution. Overall, the ECJ demonstrated a remarkable audacity in building a constitutional and proto-federal European legal order.[57]

As we have seen, since the ECJ had 1963-64 used the notion of a 'new legal order' to describe European law, avoiding explicit constitutional language. In the 1970s, ECJ judges had to conduct a rear-guard action in debates with national jurists and reject the widespread critique that the Court had overstretched its mandate and become a *gouvernement de juge*.[58] When and how, then, did the constitutional discourse that had been used openly in the 1950s return to European law? Essentially, it was the establishment of a transnational field of European legal scholars that laid the groundwork for a return of the constitutional discourse. The legal service of the Commission worked hard from the 1960s to the 1980s to consolidate a transnational field of European legal academia to link and shape the slowly emerging academic fields of European law in the member states. The result was the formation of the *Fédération internationale pour le droit Européen* (FIDE) in 1961, support for key academic journals such as the Common Market Law Review, where Ehlermann became editor in the 1970s, and close contacts with the Department of Law of the new European University Institute (EUI) from 1976 onwards.[59] It was exactly in the interface between academic research and the European institutions that a new scientific paradigm developed that relaunched a European constitutional discourse. At first (in the 1960s and 1970s), the discipline of European law seemingly colluded with the ECJ's efforts to reject accusations of activism by focusing scholarly energy on formalist analyses of European law, employing the terminology of the 'new legal order' and generally sidestepping discussions on the nature of European law. However, this would gradually change after Eric Stein, in a 1978 conference paper that was published in 1981, proposed the notion that the ECJ had built a constitutionalised European legal order.[60] This theory was used and substantiated in the huge Integration-Through-Law research project created by EUI Professor Mauro Cappelletti and led by a young doctoral student and soon to be professor, Joseph Weiler, in close cooperation with the legal service of the Commission. Not only did this project introduce a method of law in context, through comparisons with the US experience of legal integration, it also proclaimed that the ECJ had developed a proto-federal legal order that had to be analysed as a *de facto* constitution for Europe.[61]

The 1980s would generally see a mobilisation in favour of institutional reform of the EC. It was no coincidence that the Department of Law of the EUI was deeply involved when the European Parliament in 1984 launched a Draft Treaty establishing a European Union. The initiative was taken by the prominent Italian federalist, Altiero Spinelli, who worked closely with the Department of Law of the EUI to produce a proper European constitution that included a bill of rights (drafted by Joseph Weiler, Jean-Paul Jacqué and Meinhard Hilf). In the last half of the 1980s, the new constitutional paradigm gained credibility because the new dynamics of the integration process prompted by the SEA seemingly confirmed the viability of European federalism. In the end, even the ECJ embraced the constitutional language in the famous Les Verts judgment of 1986[62] and in the writings of key

[57] For the best introduction to the doctrinal history of European law analysed in context, see R. Dehousse, *The European Court of Justice. The Politics of Judicial Integration* (Macmillan Press LTD, 1998).
[58] A. Boerger and M. Rasmussen, 'Transforming European Law' op.cit.
[59] For an overall exploration of this, consult R. Byberg, *Academic Allies. The Key Transnational Institutions of the Academic Discipline of European Law and Their Role in the Development of the Constitutional Practice 1961-1993*, PhD dissertation, University of Copenhagen, 2017.
[60] A. Boerger and M. Rasmussen, 'Transforming European Law', op.cit.
[61] R. Byberg, 'The History of the Integration through Law Project', op.cit.
[62] A. Boerger and B. Davies, 'Imagining the Course of European Law? Pati Ecologiste 'Les Verts' v. Parliament as a Constitutional Milestone in EU Law', in F. Nicola and B. Davies (eds.), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press, 2016), 83-102.

judges in the late 1980s, who now openly admitted that the European legal order the Court had constructed was indeed of a constitutional nature.[63]

By 1990, a constitutional practice in European law had been established in the EC, including a proto-federal legal order and a legitimating constitutional discourse. The legal component of Hallstein's federal project had blossomed and was ready for a major reform of the EC that could codify the results achieved and finally secure formal popular acceptance. However, much to the disappointment of supranational institutions, federalists and pro-European lawyers, the majority of member states opposed this development and created a very different EU with the national governments in the drivers' seat. To explain this, we will take a closer look at how the Council and the member states reacted to the development of a constitutional practice in European law.

Reluctant responses to the constitutional practice in European law before Maastricht

Until now, legal scholars and political scientists have assumed that the Council and individual governments accepted the constitutional practice in European law relatively quickly. As a consequence, it was believed that national administrations and courts, despite some resistance[64], progressively began to implement and apply the lessons of ECJ case law. New historical research has revised this interpretation considerably. The Council, national governments, administrations and courts reacted much more critically than hitherto believed to the advances towards a constitutional practice in European law. Indeed, opposition ran deep in most member states in the 1960s and 1970s and laid the groundwork for the pushback against the plans of the Delors Commission to take a significant step towards a federal Europe in the negotiations on the Maastricht Treaty.

What were the general attitudes of the national governments to the advances of the constitutional practice in ECJ case law? Since the preliminary reference mechanism offered national governments an opportunity to present their opinions before the Court, we can map their views to the most important cases. Even if national governments were primarily driven by material concerns in court cases, the trend is clear; they almost consistently opposed major constitutional doctrines in the 1960s and 1970s.[65] However, if that was the case, why did they not intervene to curb the powers of the ECJ early on? This is explained by several intertwined factors.

At the European level, a divide emerged between the governments in the mid-1960s over the constitutional interpretation of European law launched by the ECJ. National governments and administrations were aware early on of the new direction of ECJ case law, but the legal, economic and political consequences at that time were negligible.[66] Despite this, France wanted to curb the Court by redesigning the preliminary references system, which it was believed had been manipulated by the ECJ. The opportunity to press for reform presented itself in the negotiations over the so-called Luxembourg protocol of the 1968 Brussels Convention on jurisdiction and the enforcement of

[63] F. Mancini, 'The Making of a Constitution for Europe', (1989) 24 *Common Market Law Review,* 595-614.
[64] J. H. H. Weiler, 'A quiet revolution' op.cit.. It was in particular the work of K. Alter that first emphasised the widespread resistance to the constitutional interpretation of European law. K. Alter, *Establishing Supremacy* op.cit.
[65] Eric Stein, 'Lawyers judges and the Making of a Transnational Constitution', op.cit.
[66] This often meant that the general policy of the government vis-à-vis the ECJ and the administrative positioning in concrete cases before the Court were not coordinated. For example, this was the case with the Netherlands in the 1960s; the governments of the last half of the 1960s received a sharp critique from the national parliament. The latter felt that Dutch governments had neglected to support the constitutional interpretation of European law and had allowed the administration to define Dutch positions for narrow material gains. K. v. Leeuwen, 'Blazing a Trail' op.cit.

judgments in civil and commercial matters that was negotiated from the mid-1960s to 1970. The Luxembourg protocol was supposed to confer jurisdiction on the ECJ in the Convention based on a preliminary reference system. During the negotiations it became clear that despite very vocal protests from the ECJ behind the scenes, the French, Belgian and German governments wanted to limit the use of preliminary references to national courts of last instance only. Much to the chagrin of the ECJ, the Luxembourg protocol was modelled on this position. However, when the French government attempted to use the protocol as a springboard to also reform the preliminary reference system inside the EC, the other five member states supported the status quo.[67]

Later attempts by France or Germany to discuss controversial judgments such as the Franz Grad case[68] or the ERTA case[69] in the Council were blocked by the Dutch and Luxembourg governments.[70] The enlargement of 1973 did not change the split in the Council, even though British governments supported French scepticism vis-à-vis the Court. When the Council decision of 1974 to establish a Court of First Instance was discussed in 1978, for example, the British government proposed to enhance the role of the national governments in court procedures, including the preliminary reference mechanism. This controversial proposal was met with a clear rejection from the Dutch and Belgian governments. Supported by several other member states, they pointed out that the establishment of a Court of First Instance should not be hijacked by more fundamental discussions concerning reform of the European legal system.[71] A final example of the division of the Council on European law came in 1979 during the annual meeting of the foreign ministers at the *Schloss Gymnich* in Erftstadt. The French government had asked for a debate on the ECJ in reaction to the Potatoes case and the recent ECJ decision not to allow member states individually to accede to the International Atomic Energy Agency.[72] At the meeting, the smaller states – including the new member state of Denmark – rallied to the defence of the Court and blocked any attempts at wider reform.[73]

Despite these episodic discussions about the ECJ by national governments in the 1960s and 1970s, it is quite clear that a comprehensive reform was never at the top of the agenda of any of the governments during this period. The only example of something resembling an outright rebellion against the ECJ came in 1979. In a unique move, the French National assembly approved the so-called Aurillac amendment, which obliged French courts to accept political control over how European law was applied in France. However, even though French President Giscard d'Estaing was highly dissatisfied with the ECJ in the late 1970s, the political consequences of an open break with European law were so serious that his administration made sure the French senate did not back the amendment.[74]

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[67] V. Fritz, 'The First Member State Rebellion? The European Court of Justice and the Negotiations of the 'Luxembourg Protocol' of 1971' (2015) 21, 5 *European Law Journal*, 680-699.
[68] Case 9/70 *Franz Grad v Finanzamt Traunstein* (1970), ECR 825.
[69] Case 22/70 Commission v. Council (ERTA) (1971), ECR 263.
[70] Belgian Foreign Ministry Archive, 6641.1.1, Réunion n° 577 du COREPER du 17 au 20 nov. 1970, XVII. Création d'un Groupe de travail pour examiner les répercussions de l'arrêt rendu par la Cour de Justice dans l'affaire 9/70.
[71] K. v. Leeuwen, 'Blazing a Trail', op.cit.
[72] Case 231/78 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. Potates* (1979) ECR 1447 and Case 1/78 *Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty - Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports* (1978)
[73] J. Pedersen, *Constructive Defiance - Denmark and the Effects of European Law, 1973-1993*, Ph.D. dissertation Aarhus University 2016, 142-145 and K. v. Leeuwen, 'Blazing a Trail', op.cit.
[74] M. Rasmussen, 'How to enforce European law? A new history of the battle over the direct effect of directives, 1958-1987' (2017) *European Law Journal* 23, 290-308.

The lack of urgency of ECJ reform among national governments was a direct result of the relative lack of impact that ECJ case law had on the member states. A few cases such as E.R.T.A had an immediate impact, but generally the resistance from national administrations and courts towards adapting to the European legal order meant that the effects of ECJ case law were contained at the national level. At the administrative level, the resistance to European law resulted from at least two factors. Firstly, the tradition of parliamentary sovereignty and lack of judicial review in member states such as the Netherlands, Belgium and Denmark went hand in hand with the tradition of legally flexible and 'pragmatic' solutions to political and economic problems, which national courts would generally hesitate to correct.[75] Thus ECJ case law was ignored or contained not only in member states that more openly disputed it, such as France, Britain and occasionally Germany and Italy, but also in several of the smaller member states that defended the ECJ against reform. Secondly, most member states considered the EC to belong to the realm of foreign policy at least until the 1980s. As a result, national administrations took significant liberties when dealing with legal doctrines in recent ECJ case law and generally adapted European rules so they fitted particular national circumstances and interests. Denmark, for example, systematically attempted to contain the impact of ECJ case law.[76]

How did national courts and legal elites respond to the constitutional interpretation of European law? This dimension of member state reception has been studied in great detail in the law and politics scholarship.[77] Again, recent historical research revises the established interpretations, at least to an extent. National courts were generally very reluctant to cooperate with the ECJ. This only changed when the new dynamics of European integration after the SEA forced national courts to take European law more seriously. National courts were generally conservative, steeped in the traditions of national constitutionalism and protective of their jurisdiction and central societal position. They seemed at first to regard European law as foreign and part of international law. Moreover, before the 1990s, national judges generally lacked the training necessary to fully understand and engage with European law.[78] Patterns of cooperation through the preliminary reference mechanism, which have been identified by researchers were – as we have seen above – typically driven by a limited circle of pro-European judges and lawyers, rather than courts more generally. In some countries, the use by national courts of the preliminary reference system was further constrained by national administrations through informal methods. In France in the 1970s, some governments even formally ordered national courts not to cooperate with the ECJ through the preliminary reference system.[79] The most important exception to this phenomenon was the Netherlands, where courts from early on cooperated with the ECJ through the preliminary reference mechanism.[80]

Supreme and Constitutional Courts in particular found it difficult to accept some of the key constitutional doctrines of the ECJ. The endangering of national fundamental rights caused by the primacy of European law moved the Italian Constitutional Court in *Frontini* (1973) and the German Constitutional Court in *Solange* (1974) to breach the proclaimed autonomy of European law. To the

[75] K. v. Leeuwen, 'Blazing a Trail' op.cit.; J. Pedersen, *Constructive* and M. Rasmussen, 'At the Vanguard? Belgium and European law 1950 to 1993', op.cit.
[76] J. Pedersen, *Constructive Defiance,* op.cit.
[77] Classics are A.-M. Slaughter, A. S. Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context* (Oxford University Press 1998) and K. Alter, *Establishing the Supremacy of European Law* (OUP, 2001).
[78] A. K. Mangold, *Gemeinschaftsrecht und deutsches Recht* – Die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht, (Mohr Siebeck, 2011) and J. Bailleux, *Penser l'Europe par le droit. L'Invention du droit communautaire en France*, (Dalloz, 2014).
[79] A. Bernier, *La France et le droit communautaire 1958-1981* op.cit.
[80] K. v. Leeuwen, 'Blazing a Trail', op.cit.

German Constitutional Court, the fundamental rights guaranteed by national constitutions had to be guarded until the day the EC guaranteed those same rights at the European level.[81] Consequently, the *Solange* judgment was the beginning of a long and difficult process whereby the EC was forced to respond and attempt to secure fundamental rights at the European level. The ECJ's contribution to a solution came with the Hauer judgment of 1979[82] and at the political level, the Council, Commission and the European Parliament, but not the Court, made a joint declaration in 1978 in which they voluntarily bound themselves to the European Convention of Human Rights.[83] Another example of the resistance of national Supreme and Constitutional Courts to the doctrinal innovation of the ECJ came when the latter expanded its direct effect to certain types of directives. This caused an uproar in the House of Lords in Britain, the *Conseil d'Etat* and the National Assembly in France and the *Bundesfinanzgericht* in Germany. In the end, guided by the legal service of the Commission, the ECJ chose to limit the direct effect of directives to exclude the horizontal effect, implying that private parties could not draw upon a directive against each other in court.[84] Also, the claim for the full autonomy of European law, the doctrine of primacy, was not readily accepted by Supreme and Constitutional Courts in Britain, Germany, France, Denmark and Italy.[85] However, despite this resistance of Supreme and Constitutional Courts to the constitutional case law of the ECJ, it is also clear that the former operated under serious constraints nationally. They could not completely break with European law because that would endanger the membership of the EC, which in most member states were backed by a broad parliamentary majority. Even in France, the political consensus for EC-membership was sufficiently strong to moderate the reactions of the *Conseil d'État* against the ECJ in 1979-1980. In Germany, the Solange judgment created enormous political pressure on the Constitutional Court by the government to find a solution that would not endanger German EC membership.[86]

What characterised the responses of the member states to the development of the constitutional practice from the 1960s to the early 1980s? Generally, it seems clear that the battle over the constitutional practice was only a sideshow in the European policy of the member states. National governments could not agree to reign the ECJ in, but the general resistance of national administrations and courts meant that the actual impact of its case law was fairly limited. The judicialisation of European politics was still very modest. The economic, social and political reality of European integration until the early 1980s, as has been noted by economic historians, was one of segmented national markets. Integration-through-law by means of the case law of the ECJ in the field of common market regulations, for example, had little concrete impact before the SEA.[87] Can we nevertheless

[81] P. Ruggeri Laderchi, 'Report on Italy', in A.-M. Slaughter, A. S. Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context* (Oxford University Press 1998) and K. Alter, *Establishing the Supremacy of European Law* (OUP, 2001), 147-170, here 162-166 and Bill Davies, *Resisting the ECJ - West Germany's Confrontation with European Law 1949-1979* (Cambridge University Press, 2012.)
[82] Case 44/79 Liselotte Hauer v. Land Rheinland-Pfalz (1979) ERC 032727.
[83] Bill Davies, *Resisting the ECJ* op.cit.
[84] M. Rasmussen, 'How to enforce European law?' op.cit.
[85] K. Alter, *Establishing the Supremacy of European Law* op.cit.
[86] In the end, the German *Bundesverfassungsgericht* accepted the solutions developed at the European level mentioned above and with the judgment of Solange II, it went farthest in its acceptance of the ECJ's claim to constitutional authority. The Maastricht judgment would later reverse this step, at least to an extent.
[87] The Cassis de Dijon judgment (Case 120/78 Rewe Zentral AG v Bundesmonopolverwalting für Branntwein (1979) ECR 00649) is a good example of this. Heralded as a key breakthrough in the establishment of the common market, its impact on national administration was limited. The latter generally did not apply the principle of mutual recognition and only a thin trickle of case law followed the principle in the 1980s. Instead, the most significant impact of the new doctrine came through the SEA program. K. Alter and S. Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 *Comparative Political Studies*, 535-561.

detect a progressive acceptance of European law by national courts? There was certainly a growing interaction between national courts and the ECJ in the 1970s; in particular, Dutch courts willingly co-operated with the Court in Luxembourg. In the other member states, important national courts such as the French *Cour de Cassation* and the Belgian *Cour de Cassation* came out in favour of the constitutional practice of the ECJ as a result of the actions of pro-European jurists. However, the picture was generally one of a lack of interaction and a general ignorance among national judges about European law. In addition, the dynamic development of the ECJ's constitutional case law in the 1970s provoked the Supreme and Constitutional Courts of Italy, Germany and France to open opposition. By 1979-1980, it looked for a brief moment as though the constitutional case law of the ECJ might even be opposed by a broad coalition of national courts across the EC.[88] However, with the new dynamics of European integration from 1986 onwards, the fortunes of European law changed.

After the SEA in 1986, the Single Market project quickly became a matter of the highest national interest for the member states. As a consequence, the European legal order was locked in as the indispensable legal foundation of the Single Market. To national administrations and courts, the political importance of the Single Market made it much more difficult to contain the effects of the European legal order and new ECJ case law. European integration was consequently judicialized to a much more significant extent than before, but without trumping politics. .In Denmark, for example, the long-standing tradition of containing the effects of ECJ case law had to adapt to the new reality in which infringement cases raised by the Commission and preliminary references sent by Danish courts threatened national solutions to socio-economic problems that were on the borderline of legality with respect to European law.[89] However, despite the new success of European integration, this momentum did not lead to the federal reform of the EC that the Delors Commission had hoped for, nor did it bring about a codification of the constitutional practice.

The reactions from the member states took different shapes. At the political level, the negotiations of the Maastricht Treaty from 1990 to 1991 saw a majority of national governments rejecting the plans for federalisation proposed by the Delors Committee. Instead, the Maastricht Treaty turned out to be a major defeat to European federalists and supranational institutions. The formal recognition of the European Council as the leading institution and the pillar structure that undermined the constitutional unity of the new EU constituted an unequivocal rejection of European federalism. In addition, national governments made it clear that they were willing to actively restrict the judicial independence of the ECJ by the strongest possible means of Treaty revision in the so-called Barber protocol that limited the retrospective impact of the controversial Barber judgment of 1988 on the early payment of retirement pensions.[90]

The political response to the new dynamics of European integration was accompanied by a legal response. Between 1989 and 1993, three Supreme or Constitutional courts from the largest member states, the Italian Constitutional Court (1989), the French *Conseil d'État* (1989) and the German Constitutional Court (1993), came out with judgments in which they attempted to adapt to the new dynamics of European integration while rejecting a constitutional interpretation of European law.[91]

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[88] This was something the legal service feared after the Cohn Bendit judgment of the French Conseil d'État on 22 December 1978. See M. Rasmussen, 'How to enforce European law?' op. cit., 303.

[89] J. Pedersen, *Constructive Defiance* op.cit.

[90] D. Wincott 'The Court of Justice and the European Policy Process', in J. Richardson (ed.), *European Union, Power and Policy-Making* (London: Routledge, 2001), 179–97.

[91] Corte Costituzionale, decision No. 232 of 21 April 1989, S.p.a. Fragd v. Amministrazione delle Finanze; Conseil d'État, 20 October 1989, Nicolo, Dalloz, 136; Bundesvervassungsgericht, October 1995, BverfGE 155, 1992 and Højesteret, 6

On the one hand, there was no way they could ignore the political importance of the Single Market. Consequently, they were forced to accept the proto-federal legal order the ECJ had built through its constitutional case law, including the most controversial doctrine of primacy. This implied that national court systems now had to contribute more actively to the functioning of the European legal order that underpinned the Single Market. On the other hand, these same judgments emphasised that the competences of the EU could not be regarded as autonomous (or constitutional); were instead delegated on the basis of national constitutions.

The message from the member states seemed clear. Even if the success of the Single Market meant that the legal order developed by the ECJ had been locked into the institutional and legal fabric of the new EU, the constitutional claim of the ECJ and the federal ambitions of the Delors Commission were both rejected. Overall, the Maastricht Treaty and the reaction by the most prominent national courts were the culmination of long-term national scepticism and resistance to the constitutional practice of the ECJ.

Continued reluctance to the constitutional practice of European law after Maastricht

With the ambiguous nature of the stand-off of the early 1990s, it was an open question how European law would develop in the following decades. What we have found is a continuation of the uneasy standoff of the Maastricht Treaty, albeit with no sign that the prominence of state power in the EU has been weakened. Firstly, the constitutional practice was continued by the supranational institutions and European legal scholars and played a key role in formulating and mobilising support for the Constitutional Treaty. However, European constitutionalism failed to achieve the codification of the constitutional nature of the EU or popular endorsement. Secondly, the trend towards the dominance of state power and intergovernmental cooperation unleashed by the Maastricht Treaty further developed in new policy fields and is now one of the central features of the EU. Reflecting this trend, the ECJ proved generally more responsive to pressure from national governments. Finally, although the locking in of the proto-federal legal order attributable to the Single Market constituted an important step towards judicialising European politics, a new pro-active judicial policy of the national governments both individually, and occasionally collectively in the Council, developed to mitigate and occasionally overturn the most controversial case law of the ECJ.

It is not surprising that the constitutional practice was continued after the Maastricht Treaty. Both the fact that the ECJ had developed a proto-federal legal order and the investments in the constitutional practice by the supranational institutions and EU law scholars made it difficult to find a suitable alternative. Moreover, the last word with regards to defining the nature of the new EU had not been expressed. While legal scholars indulged themselves in new types of constitutional theory, supranational institutions again began to promote a constitutional solution starting in the mid-1990s. The mobilisation of constitutional ideas and legal techniques was performed by actors such as the legal service of the Commission, joined by similar services from the European Parliament and the Council. In particular the legal service of the Council would have the main responsibility for treaty reform from the Maastricht Treaty onwards and became increasingly central. The justification used

April 1998, Treaty of Maastricht, Ugeskrift for Retsvæsen H 800, 1998. For a general treatment of these judgments consult: B. D. Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition', in A.-M. Slaughter, A. S. Sweet and J. H. H. Weiler, (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context* (Hart Publishing, 1998), 277-304. The Danish Højesteret followed the other three courts on 6 April 1998 with a similar judgment. Treaty of Maastricht, Ugeskrift for Retsvæsen H 800, 1998.

this time was technical. The constant treaty reforms of the 1990s with the Treaty of Amsterdam (1998) and the Treaty of Nice (2001), combined with the increasing patchwork of opt outs, enhanced cooperation and the pillar structure created a serious need for legal rationalisation. This depoliticised and technical claim went hand in hand with the underlying political and federal agenda of important segments of the European Parliament. The solutions offered were the same as those discussed from the 1970s onwards and their implications went well beyond technicalities. They included a simplified constitutional treaty, the legal personality of the Union, the codification of the ECJ case law, including supremacy, and the inclusion of a bill of fundamental rights. The belief was – because of the mindset of the legal experts and the pro-European politicians involved – that the simplification of the founding document of the EU and the bill of rights would increase the legitimacy of the EU. The problem was how to bring back the question of constitutional reform on the political agenda.

The opportunity presented itself between 2001 and 2004. The negative experience of the intergovernmental conference of Nice, combined with the pressure of the oncoming Eastern enlargement and arguably public pressure to increase the legitimacy of the EU, apparently persuaded national governments to find alternative ways to reform the EU.[92] The mandate given by the Laerken declaration in 2001 was relatively vague. However, the convention established to prepare the intergovernmental conference presented an opportunity for supranational institutions and federalist politicians to push for constitutional reform. Even though the national governments eventually renegotiated the constitutional treaty developed by the convention, this was a unique chance to codify the constitutional legal order developed by the ECJ and obtain a formal popular endorsement of the constitutional nature of the EU. The failed ratification process in which the voters of France and the Netherlands rejected the Constitutional Treaty signalled the end of the constitutional dream. Although the Treaty of Lisbon in 2008 picked up the pieces and introduced all the major institutional reforms of the failed Constitutional Treaty, it completely abandoned the constitutional language.[93]

With the failure of the Constitutional Treaty, the trend consolidated by the Maastricht Treaty towards a range of new methods of cooperation outside – or partially outside - the scope of the supranational institutions was not reversed. Such new methods mushroomed in the 1990s and the 2000s and included framework directives, soft law, economic instruments and the open method of coordination in which the Court had no role. In addition, differentiated integration with opt-ins, opt-outs, exemptions and enhanced cooperation brought significant diversity into the EU legal order.[94] This in turn limited the relative influence of the ECJ on the integration process during the post-Maastricht period.[95] The new reality of European integration apparently moved the Court to adopt a more conciliatory stance vis-à-vis the political interests of the member state. Perhaps the period was therefore marked by a lack of major new doctrinal developments of the magnitude of the period before

[92] The Belgian presidency that set a federalist agenda, the Commission and the European Parliament pushed for reform. D. Beach, 'The Constitutional Treaty' op.cit., 219.
[93] A. Vauchez, *Brokering Europe* op.cit., 198-229.
[94] M.-P. Granger 'The Court of Justice's Dilemma—Between 'More Europe' and 'Constitutional Mediation.', in C. Bickerton, D. Hodson and U. Puetter *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), 208-26. D. Leuffen, B. Rittberger and F. Schimmelfennig *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan, 2012).
[95] K. Armstrong 'The character of EU law and governance: from 'community method' to new modes of governance' (2011) 64 *Current Legal Problems*, 179-214; F. Terpan, 'Soft law in the European Union—the changing nature of EU law' (2015) 21 *European law journal*, 68-96. S. Saurugger and F. Terpan, *The Court of Justice of the European Union and the politics of law* (Palgrave Macmillan, 2016).

1990.[96] In addition, we see that in the central area of monetary and economic governance, the ECJ repeatedly demonstrated its new political sensitivity in judgments on monetary and economic governance, such as the Pringle[97] and the Outright Monetary Transactions[98] cases. Here we find legal reasoning that supported the political positions of EU institutions and national governments, with little attention paid to Treaty constraints.[99] Post-Maastricht 'high politics' were addressed beyond the realm of the Court.

When we turn to day-to-day politics post-Maastricht, the key question is the extent to which the judicialisation created by the locking in of the European legal order around 1990 now shaped European politics. It has been argued by recent research that it indeed structured the relationship between law and politics and foreclosed the range of political options available to national governments.[100] New ECJ case law is particularly difficult to handle in the EU, it is claimed, because the fragmentation of the EU political branches and the short-termism of elected politicians make it impossible to establish the political majorities required to rein in the Court.[101] Thus, pro-integrative rulings are effectively insulated from political override[102], and for this reason the EU legislature has become the agent of the Court.[103]

That said, the theoretical presentation of judicialisation relies on a dyadic view of potential political responses to law, being either *override*, i.e., reverse or overrule legal integration, or *codify* in which jurisprudence is accepted by the EU legislator and written into legislation. This dichotomous view of the interaction between law and politics disregards other types of responses through which politics effectively mark dissatisfaction with legal integration. New political science research shows that in reality, both override and codification are rare responses to pro-integrative rulings, as both responses face equally high thresholds in the EU political system.[104] For legal integration to be codified in the post-Maastricht period, three veto points have to be overcome: (1) the Commission must present a proposal to codify the case law of the Court, (2) the Council's common position must adopt this codification and mobilise a qualified majority among the member states, and (3) the European Parliament must adopt the codification of judicial decision making by a plenary majority.

[96] P. J. Cardwell and T. K. Hervey 'The roles of law in a new intergovernmentalist European Union' in C. Bickerton, D. Hodson and U. Puetter *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), 73-90.
[97] Case C-370/12 *Thomas Pringle v. Government of Ireland and Others* (2012).
[98] Case C-62/14 *Peter Gauweiler and Others v. Deutscher Bundestag* (2015).
[99] C.J. Bickerton, D. Hodson and U. Puetter, 'The new intergovernmentalism: European integration in the post‐Maastricht era' (2015) 53 *Journal of Common Market Studies*, 703-22; N. Scicluna 'Integration through the disintegration of law? The ECB and EU constitutionalism in the crisis' (2017) *Journal of European Public Policy*, 1882.
[100] A. S. Sweet 'The European Court of Justice and the Judicialization of EU' op.cit. and D. Kelemen 'Judicialisation, Democracy and European Integration' (2013) 49 *Representation*, 295-308.
[101] K. Alter 'Who are the 'Masters of the Treaty'? European Governments and the European Court of Justice' (1998) 52 *International Organization*, 121-47 and D. Kelemen *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011).
[102] A. S. Sweet and T. Brunell 'The European Court of Justice, state noncompliance, and the politics of override' (2012) 106 *American Political Science Review*, 204-13.
[103] G. Davies 'The European Union legislature as an agent of the European Court of Justice' (2016) *Journal of Common Market Studies*, 846-61.
[104] D.S. Martinsen, *An Ever More Powerful Court?* op.cit.

Empirical evidence presents a broader range of political responses to judicial integration through which the Court is pushed back[105], which have come to condition judicial influence on policy outputs. EU political actors can *modify* the implications of legal rulings through secondary law by inserting special clauses and allow for more national executive control.[106] In addition, *non-compliance* or *contained compliance* with ECJ decisions at the national level are typical responses to innovative ECJ rulings.[107] Whereas override is a rare outcome, a credible *threat* thereof has proven sufficient to make the Court readjust its position.[108]

These different types of responses manifest in the post-Maastricht period. The single market has been presented as a core example of judicialisation,[109], but here also we find strong political pushbacks. In a string of controversial judgments, the Court adopted an expansive interpretation, extending cross-border welfare to non-economically active EU migrants[110], applying Single Market provisions to the healthcare sector[111] and restricting the right to take collective action.[112] However, subsequent political responses show the limited effect of judicialisation.

In the wake of the severe politicisation of EU citizens' right to cross-border welfare, termed 'welfare tourism', the Court took a sharp turn in its case law.[113] Legal scholars have characterised this turn as an example of a restrictive judicial approach[114], a 'reactionary phase'[115] or even a 'pre-Rome' stage[116]. Likewise, in extending welfare rights across borders based on the Treaty's European citizenship, the politically adopted conditionalities in secondary legislation to access such rights now constitute the ECJ's new reference point.[117] In healthcare, the EU legislature adopted a much slimmer, and nationally manageable, directive on patients' rights than what a codification of Court jurisprudence would have implied.[118] This political compromise allowed for considerable national

[105] A. Hofmann, 'Resistance Against the Court of Justice of the European Union' (2018) 14 *International Journal of Law in Context, 258-274*.
[106] M. Ferrera, *The boundaries of welfare: European integration and the new spatial politics of social protection* (Oxford University Press, 2005); F. Wasserfallen 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' (2010) 17 *Journal of European Public Policy*, 1128-46 and D. S. Martinsen, *An Ever More Powerful Court?* op.cit.
[107] L. J. Conant, *Justice Contained, Law and Politics in the European Union*, (Cornell University Press, 2002) and A. Hofmann 'Resistance Against the Court of Justice' op.cit.
[108] O. Larsson and D. Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Impacts on the Court of Justice of the EU' (2016) 70 *International Organization*, 377-408.
[109] Gareth 2016 'The European Union legislature as an agent of the European Court of Justice' op.cit.
[110] Case C-85/96, *Sala* (1998); Case C-184/99, *Grzelczyk* (2001); Case C-413/99, *Baumbast* (2002); Case C-413/01, *Ninni-Orasche* (2003).
[111] Case C-158/98, *Kohll*, (1998); Case C-120/95, *Decker* (1998); Case C-157/99, *Smits-Peerbooms* (2001).
[112] Case C-438/05, *Viking* (2007); Case C-341/05, *Laval* (2007).
[113] M. Blauberger et al. 'ECJ judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence' (2018) 25 *Journal of European Public Policy*, 1422-1441.
[114] N.N. Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, (2015) 52 *Common Market Law Review*, 889-938. D. Thym 'The Elusive Limits of Solidarity: Residence Rights and Social Benefits for Economically Inactive Union Citizens' (2015) 52 *Common Market Law Review*, 17-50.
[115] E. Spaventa 'Earned Citizenship - Understanding Union Citizenship Through its Scope', in: D. Kochenov (ed.) *Citizenship and Federalism in the European Union: the Role of Rights*. (Oxford University Press, 2017), 204-225.
[116] C. O'Brien 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights ' (2016) 53 *Common Market Law Review*, 937–977. See 938.
[117] In the cases of C-333/13, *Dano* (2014); C-67/14, *Alimanovic* (2015); C-299/14, *García-Nieto* (2016); C-308/14, *European Commission v. United Kingdom* (2016).
[118] T. Hervey and J. McHale *European Union Health Law: Themes and Implications* (Cambridge University Press, 2015). See 196-198. R. Baeten and W. Palm 'The Compatibility of Health Care Capacity Planning Policies with EU Internal

control of when cross-border healthcare shall be authorised. Subsequent studies on the implementation of the national control measures show that member states have made extensive use thereof, limiting the impact of the Court's jurisprudence. So far, the Court has not challenged this legislative response. Instead it has turned to a more 'tempered' approach[119] and 'fine-tuned' its jurisprudence[120] in line with the position of the member states.[121] With regards to the right to take collective actions, which was challenged by the infamous Viking and Laval cases, new research has underlined the limited national impact of these judgments. Comparing the legal and legislative responses to these landmark rulings in eight member states, a real impact was only identified in Sweden and the UK, whereas in Poland, Italy, Greece, Germany, Estonia and Austria, the national systems did not really react to the rulings. In most of the examined countries, neither the national legislature nor the courts even discussed or cited the cases.[122] Also here more recent case-law of the Court is indeed more tempered and more in sync with the political and societal concerns expressed post-Laval.[123]

In conclusion, the post-Maastricht period is deeply shaped by the failure of the constitutional practice to take the decisive step towards formally codifying the constitutional nature of the EU and having it democratically endorsed. This meant that the central role of state power cemented in the Maastricht Treaty increasingly shaped the EU, which has led to a relative decline in the Court's influence on the integration process. New modes of governance were deliberately shielded from Court influence, and the latter adjusted its legal reasoning alongside political positions in relation to economic integration. Even inside what constituted the first pillar, the old resistance and containment characterising the member states' responses to constitutional practice before 1986 took a new shape in a pro-active judicial policy of the national governments both individually and collectively in the EU legislature to mitigate and sometimes overturn ECJ case law. As noted by Granger[124], it seems that the empirical evidence used to support a progressive narrative of European law limits itself to landmark cases, but when we bring in different cases or examine their ability to generate social change, a more nuanced picture emerges. The theoretical claims of an unrestrained Court – or the EU legislature as its agent – seem fundamentally wrong.

CONCLUSION

In conclusion, let us briefly summarise the new interpretation of the development of European law we have presented above and revisit the claim by the mainstream literature that European law has experienced a successful process of constitutionalisation. At the core of our article was a detailed exploration of the emergence and consolidation of what we called a constitutional practice composed of a constitutional interpretation of European law and a constitutional discourse to legitimise it. We

Market Rules', in: J.W. van de Gronden, E. Szyszczak, U. Neergaard and M. Krajewski (eds.), *Health Care and EU Law*. (T.M.C. Asser Press, 2013), 389-413. D. S. Martinsen, *An Ever More Powerful Court?* op.cit.

[119] Baeten and Palm 2013 op.cit; V. Hatzopoulos and T. Hervey 'Coming into line: the EU's Court softens on cross-border health care' (2013) 8 *Health Economics, Policy and Law*, 1-5.

[120] A. Obermaier 'The End of Territoriality? The Impact of ECJ Rulings on British, German and French Social Policy' (Ashgate, 2009).

[121] See case C-512/08, *Commission vs France* (2010); C-211/08, *Commission vs Spain* (2010); C-490/09, *Commission vs Luxembourg* (2011).

[122] M.R. Freedland and J. Prassl *Viking, Laval and beyond* (Bloomsbury Publishing, 2015) and A. Hofmann 'Resistance Against the Court of Justice' op.cit.

[123] See the cases C-396/13, *Elektrobudowa* (2015); C-115/14, *RegioPost* (2015); C-533/13 *AKT* (2015).

[124] M.-P. Granger 'The Court of Justice's Dilemma', op.cit.

discovered that from the outset, the constitutional practice was intimately connected with European federalism and the wish for self-empowerment on the part of supranational institutions. Launched under the Hallstein Commission in the early 1960s as part of its federalist agenda for developing the nascent EC, it was supported by a close alliance of the three supranational institutions in the decades that followed. In addition, the emerging field of European legal scholarship found its *rationale* as a subset of the legal discipline in the constitutional interpretation and would generally tend to legitimate the case law of the ECJ. Eventually, it was from the academic field, in close connection with the Commission and the ECJ, that a genuine constitutional discourse finally emerged in the 1980s. Societal demand for legal integration was diffuse and limited before the 1980s, so in general, the key interlocutors in the member states that helped drive the development of ECJ case law and the piece-meal acceptance of the constitutional practice of European law at the national level were a relatively small group of pro-European politicians, lawyers and judges who wanted to promote Europe. Overall, the constitutional practice constituted an important self-empowerment strategy of the supranational institutions that justified through law their political ambitions for European unification and federalisation.

This article also revealed the tension that the emergence and consolidation of the constitutional practice in European law created inside the EC/EU. The fact that European federalism never succeeded in taking the major political steps towards creating a fully autonomous and federally structured European political system was an underlying reason for this. We demonstrated that the member states only reluctantly came to terms with the constitutional practice of European law, with very deep-seated resistance existing both among certain national governments and more generally within national administrations and courts. The lack of reactions from national governments to the constitutional practice were caused early on by a split in the Council over the question. This split secured the ECJ against intervention, but it also meant that the Council could not agree to codify the constitutional doctrines of the new legal order. Instead of a progressive acceptance, it was the momentous economic and political dynamics created by the Single Market project in the last half of the 1980s that forced the member states to come to terms with the constitutional practice of European law. On the one hand, this led to a de facto acceptance by national administrations and courts of how the constitutionalised European legal order worked. On the other hand, national governments rejected federalism in the Maastricht Treaty and several of the most prominent national Constitutional and Supreme courts rejected the constitutional claim of the ECJ, leading to a new stalemate would shape legal integration after 1993.

In the post-Maastricht setting, the political actors of European integration continued to oppose unwanted jurisprudence and by creating new modes of governance beyond the judicial realm, they limited the scope and relative importance of the ECJ's constitutional practice. The failed attempt of the Constitutional Treaty did not change this trend. In addition, in the internal market in which the constitutional practice is otherwise found to be the strongest, the EU legislature has pushed back controversial legal decisions and modified their implications. We also see that the Court itself at times accepts and adjusts to political corrections. In day-to-day politics post-Maastricht, the dialogues between the ECJ and the EU legislature were central, but it was not the former shadowing and foreclosing the actions of the latter. Instead of theoretical claims of one being the agent of the other, empirics presents a different picture in which an inter-institutional dialogue unfolds over time and through which the scope and limits of European law are dynamically established. In this process, law does not present itself as the core factor in European politics. Instead, a more nuanced institutional dialogue shapes and directs the course of integration.

Let us finally revisit the mainstream interpretation of how European law developed from 1950 to the present day and compare it with the new results presented above. Even if it is relatively old, Weiler's interpretation of the development of European law from 1950 to 1990 still stands as the mainstream explanation in law and politics studies. Our account offers a mixture of revision and refinement of Weiler's famous work, which, it should be remembered, did not have the luxury of access to archival sources. Firstly, the new historical research gives a refined understanding of the actors and institutions promoting the constitutional practice in European law that goes beyond Court-centred explanations. Secondly, we describe in new empirical detail how member states reacted to the development of a constitutional practice both at the European and the state level. This allows us to understand the general lack of response at the Council level to the constitutional practice before the Maastricht Treaty due to the persistent split between national governments. It also gives us a new and more profound understanding of the nature of resistance and containment of the member states and how it was the Single Market that forced the latter to come to terms with the new proto-federal legal order the Court had developed. In our view, the rejection of the constitutional practice by the member states in the early 1990s was thus a result of persistent trends of resistance rather than the result of majority voting of the SEA, as theorised by Weiler.

Taking a closer look at the work of political scientists that further developed the constitutionalisation interpretation in the 1990s, the new evidence questions whether the consolidation of the constitutional practice occurred because of the economic and societal forces highlighted by Stone Sweet and Alter, respectively. New historical research on France and Italy suggests that pro-European lawyers and judges were a key factor behind what was still a relatively low number of preliminary references in the 1960s and 1970s. If litigation by transnational firms was significant, it was only in the last half of the 1980s that it really became a major dynamic producing ECJ case law. Alter's explanation that lower courts competed with courts of last instances for influence seems at best a partial explanation; indeed, many of the cases explored by Alter can better be explained by focusing on the pro-European ideology of the involved lawyers or judges. Likewise, recent sociological research that claims a prominent role for law and jurists in the European construction has, because of its focus on the supranational institutions, underestimated not only the role and influence of national actors but also the role of the Council in constraining and even resisting the impact of the constitutional practice. Finally, the work of Peter Lindseth demonstrates that the administrative sources of European law were prominent from the outset and shaped some of the institutional and legal solutions developed in the history of European integration. However, in light of our findings, the lack of attention given by Lindseth to the profound role of the battle over the constitutional practice in the history of European law means that the character of his work is more a legal scholar's analysis of the nature of European law through historical examples than a historian or social scientist's attempt to give a balanced empirical account of the overall development of European law.

Although we began this article by saying that we did not want to engage directly with the debate of legal scholars on the nature of European law, we cannot fully escape it, considering that our conclusion is that the EU has not been successfully constitutionalised. Legal scholars disagree about whether the legal basis of a political entity can obtain constitutional status gradually over time or whether it requires a constitutional moment in which the broader public endorses it.[125] If the latter is the criterion, the EU did not manage to pull it off in 2005. Depending on the yardstick applied, it is certainly arguable that the development of a constitutional practice in European law supported by supranational institutions and European legal scholars does indeed constitute a process of

[125] For two recent opposing views, consult K. Tuori, *European Constitutionalism* (Cambridge University Press, 2015) and D. Grimm, 'The Democratic Costs of Constitutionalisation:' op.cit.

constitutionalisation. However, there are two key reasons that we suggest this process has not been successful. Firstly, the constitutional practice was never fully accepted by the member states, and the role of state power and the new methods of intergovernmental cooperation that have developed in recent decades suggest that the EU has become a much more complex phenomenon, which constitutional theory eagerly attempts to fit within new categories. Secondly, notions of European constitutionalism have not yet attracted popular legitimacy across the EU. Maybe the deeper reason for this lack of impact on the popular imagination, compared to the relatively more successful national constitutional processes in the 19th and 20th centuries, is that a European Constitutional project today competes with well-entrenched national constitutional traditions, which are closely intertwined with the national identities of the member states.