Constructing and Deconstructing 'Constitutional' European Law: Some reflections on how to study the history of European law[1]

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Constructing 'Constitutional' European Law

On 25 March 1957 in a torrential rainfall, a member of the legal service of the European Coal and Steel Community (ECSC), Michel Gaudet, runs back from the signing ceremony of the Treaties of Rome at the Capitoline Hill to the Hotel de Ville in Rome. Here he hastily writes a short letter to his mentor Jean Monnet, whom he had just helped setting up the Action Committee for a United Europe. Gaudet assures Monnet of the importance of his contribution to this new phase of European integration. He also explains that to him: 'elle ouvre un avenir, et ne clôt pas une époque, cette signature. Il y a encore tant à faire!'[2]

Despite Gaudet's persistent engagement in the construction of a supranational Europe, he was not overly optimistic with regard to the consequences of the new Treaties. In a letter on the day before New Years Eve 1957-58 addressed to Donald Swatland, a major Wall Street lawyer and partner at Cravath, Swaine[3], he expressed his fear that the existence of three separate com-

[1] I would like to thank Alexandre Bernier, Rebekka Bybjerg, Bill Davies, Hjalte Rasmussen, Mikael Rask Madsen, Karen Alter and Anne Boerger-De Smedt for discussions that have inspired the thinking behind this article.

[2] Archive of Jean Monnet (AJM), Jean Monnet Foundation for Europe, Lausanne. AMK C 30/3 Michel Gaudet, Letter from Michel Gaudet to Jean Monnet, 25 March 1957.

[3] Donald Swatland was one of the most prominent lawyers on Wall Street from the inter-war period to his death in 1962. He functioned in the 1950s as lawyer for the High Authority in

munities would seriously undermine the endeavour to construct a coherent European legal order. Swatland had just visited the European institutions and did not understand why the Court of Justice had not done a 'statesmanlike job' in the ECSC. Rather than building its jurisprudence on a restricted interpretation of the exact letter of single articles, the Court of Justice should base it on the (federal) spirit of the Treaty of Paris. Gaudet completely agreed. Since 1954 the legal service of the High Authority had argued in favour of a federal interpretation of the spirit of the Treaty of Paris, but only with limited success.[4] Instead, the Court had behaved initially, in cases 1-4/54, in a conservative manner and focused on economic and legal technicalities.[5] The problem for Gaudet, as he explained to Swatland, was the lack of understanding in Europe of the nature of federal institutions and general opposition to a *gouvernement de juges*. Only recently had some progress been made.[6] In November 1956, in case 8/55, the General Advocate Maurice Lagrange had called the Treaty of Paris the charter of the Community, and the Court of Justice had discreetly acknowledged the implied powers of the High Authority and even used the term 'constitutionality' when discussing to what extent the regulations in question conformed with the provisions of the treaty.[7] Lagrange and the Court of Justice had thus followed the recommendations made by the legal service.[8]

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its relations with the United States. AJM.AMK C 30/3 Michel Gaudet, Note sur un voyage d'étude aux États-Unis, 19 June 1959.

[4] AJM.AMK 30/3 Michel Gaudet, Letter from Donald Swatland to Michel Gaudet, 29 December 1957 and Letter from Michel Gaudet to Donald Swatland, 31 December 1957.

[5] Gaudet did not find the methodology of comparative administrative law, which was favoured by Advocate General Maurice Lagrange, useful: '…I think, as I understand you do, that in order to mark out the rule of law to be applied in the Communities, the Court must usually start from the Treaties, their spirit and common sense, and not from an honest blend of the various national statues of the member states.' AJM.AMK 30/3 Letter from Michel Gaudet to Donald Swatland, 31 December 1957. For a new analysis of the legal philosophies of the two General Advocates of the ECSC Court of Justice see: Antonio Grilli, Aux origines du droit de l'Union Européenne: Le "ius commun" national dans les conclusions des avocats généraux Karl Roemer et Maurice Lagrange (1954-1964), *Revue d'Histoire du Droit*, vol. 76, 2008, pp. 155-172 and Antonio Grilli, *Le origini del diritto dell'Unione europea*, Il Mulino: Bologna, 2009.

[6] AJM.AMK 30/3 Michel Gaudet, Letter from Donald Swatland to Michel Gaudet, 29 December 1957.

[7] Werner Feld, *The Court of the European Communities: New Dimension in International Adjudication*, Martinus Nijhoff: The Hague, 1964, p. 37.

[8] See Historical Archive of the European Commission, Brussels (HAC). BAC 371/1991, No. 45-46 for the High Authority dossier of the case and the full details of these statements.

Both the Treaty of Paris and the EEC Treaty demonstrated the limitations of how the majority of member states perceived the Court of Justice and the European legal system. While the German delegation under Walter Hallstein's leadership had argued in favour of the establishment of a European Supreme Court comparable to the American model during the negotiations on the ECSC in 1950-1951, the result had been an administrative court based on the French *Conseil d'État*. Moreover, similar to classic international law, the national Courts would hold the exclusive competence over how to apply European law in the national context. Only the most timid constitutional or federal traits were included in the Treaty text. These included the principle of legality in article 3, a weak mechanism of preliminary preferences to ensure the uniformity of the interpretation of article 41, which only allowed the Court of Justice to give its opinion on the validity of a European act, and in article 33, although narrowly defined, the right for private parties to instigate proceedings before the Court in order to annul decisions by the High Authority.[9]

The negotiations on the EEC Treaty did not differ very much in this respect. As a matter of fact, the very existence of the Court was debated during the early part of the negotiations on the basis of a French proposal that a technical ad hoc tribunal would suffice to handle legal questions in the EEC.[10] With the general breakthrough of the negotiations assured by a French-German summit in November 1956, the French accepted that the Court of Justice should be adopted by the two new Communities without any significant changes to the nature of the Court. A European Supreme Court was completely out of the question, however. Nevertheless, the end result on balance was a strengthening of the European legal system.

This strengthening was subtle considering that major weaknesses were maintained and new ones added. In order to alleviate any fear of a *gouvernment de juges*, National Courts were still granted the exclusive competence to apply European law in the national context.[11] In addition, the new article 173 of the EEC Treaty limited the access of private individuals to annul European decisions and legislation, thereby reversing the liberal interpretation given by

[9] Anne Boerger-De Smedt, La Cour de Justice dans les négociations du traité de Paris instituant la CECA, *Journal of European Integration History*, vol. 14, no. 2, 2008, pp. 7-34.

[10] Anne Boerger-De Smedt, The Background of the Institutional Set Up of the European Court of Justice – Revisiting the negotiations on the ECSC and the EEC, unpublished paper presented at the Conference on the Historical Roots of European Legal Integration, University of Copenhagen, October 2007.

[11] Interview by Karen Alter with Michel Gaudet, 7 July 1994. I would like to thank Karen Alter for making this interview available.

the Court of Justice regarding the corresponding article 33 of the Treaty of Paris.[12]

What favoured a more dynamic development of the new legal system were first and foremost the broad nature of the objectives of the EEC and the fact that the new Community would operate on the basis of a framework Treaty to be filled in by quasi-legislative acts (article 189). In addition, a strengthened system of judicial review in the new article 177 offered the Court of Justice the competence to interpret not only the validity but also the general meaning of European law. Although the Court of Justice did not have the competence to comment on how European law should be applied in the member states, the somewhat artificial line between interpreting and applying European law meant that the Court of Justice potentially could influence how national courts applied European law indirectly. The ambiguity of the article reflected that several members of the *Groupe de rédaction*[13], responsible for the institutional clauses, favoured a European Supreme Court but worked under serious constraints in this respect. In the first draft of article 177, proposed by Nicola Catalano[14], the contours of a federal Supreme Court system of judicial review loomed large. Catalano thus proposed that the Court of Justice rulings were 'binding' on national courts.[15] After the internal debate over the wording of the article, this was eventually left out.[16] The result was a system that continued to have the contours of a federal Supreme Court system of judicial review, but would depend completely on the cooperation of national Courts in order to function. All in all, given this ambiguous and modest strengthening of the European legal system, only the most astute observers appreciated the significance of the changes made in the Treaties of Rome.[17]

[12] The Court of Justice had widened the access of private individuals to the Court of Justice outlined in article 33 in cases 3 and 4/54, 11 February 1955. Christian Pennera, The Court of Justice and its Role as a driving Force in European Integration, *Journal of European Integration History*, No. 1, vol. 1, 1995, pp. 111-128, p. 119.

[13] This committee included Michel Gaudet and such illustrious jurists as the later judges of the Court of Justice Nicola Catalano and Pierre Pescatore.

[14] It was inspired by a similar Italian system of judicial review introduced in 1953 (art. 23, law 87, 11 March 1953).

[15] Archive of the Council of Ministers (ACM).NEGO.CM.3.258. Groupe de rédaction. Projet de rédaction d'articles relatifs aux institutions de la Communauté pour le Marché Commun (Suite), Bruxelles le 13 décembre 1956.

[16] R. Schulze and T. Hoeren (eds.), *Dokumente zum Europäischen Recht. Band 2: Justiz (bis 1957)*, Springer, Berlin, Heidelberg, New York, 2000, pp. 402-404.

[17] Most observers did not consider the changes to be of significant importance. The French Foreign Ministry for example found that the role of the Court of Justice had been weakened due to the strengthening of the Council of Ministers and that the Court now resembled its in-

The opposition of a majority of governments to a European Supreme Court was also reflected among national judiciaries and legal academia. Thus, for example, at the large-scale conference in Stresa on the achievements of the ECSC in May-June 1957, the legal service's aspiration to get the support of the legal panel in favour of an understanding of the ECSC as an autonomous, supranational legal order in between international law and a federal state was severely disappointed.[18] Instead, the legal report concluded that European law essentially was a subset of international law, although of a peculiar kind.[19] Legal debates in Italy and Germany, for example, were still dominated by international jurists, who considered European law merely a new form of international law. European law only began to be taken seriously as a field of study in its own right from the mid-1960s onwards. And this only happened after a hard fought turf war.[20]

With the appointment of Walter Hallstein as President of the Commission in 1958, Gaudet must have become more optimistic about the future of European law. In the various negotiations on European Treaties during the 1950s, Hallstein had been the most ardent defender of a strong system of European law.[21] From the very beginning, the EEC Commission favoured Gaudet's policy of persuading the Court of Justice to assume the role of a Supreme Court and adopt, in Hallstein's words, not a narrow textual reading but an 'organic interpretation' determined also by the wide-reaching objective of the

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ternational cousin in The Hague. AJM. Anne Boerger-De Smedt, *The Background of the Institutional Set Up of the European Court of Justice – Revisiting the negotiations on the ECSC and the EEC*, unpublished paper presented at the Conference on the Historical Roots of European Legal Integration, University of Copenhagen, October 2007.

[18] HAC.CEAB.1031. Rapport de Visscher.20.12.1956. (comments by Michel Gaudet)

[19] Julie Bailleux, Comment l'Europe vint au droit. Le premier congré international d'études de la CECA (Milan-Stresa 1957), *Revue française de science politique*, vol. 60, no. 2, 2010, pp. 295-318, pp. 311-312.

[20] Antonio Grilli, *Le origini del diritto dell'Unione europea*, Il Mulino: Bologna, 2009, pp. 55-88, and Bill Davies, The Constitutionalisation of the European Communities: West Germany between Legal Sovereignty and European Integration 1949-1974, unpublished dissertation, King's College, 2007, pp. 43-89.

[21] Frank Bärenbrinker, Hallstein's Conception of Europe before Assuming Office in the Commission, in Wilfried Loth, William Wallace and Wolgang Wessels (eds.), *Walter Hallstein. The Forgotten European?*, Macmillan Press LTD, London 1998, pp. 82-94, p. 85, and Emile Noël, Walter Hallstein: A Personal Testimony, in Wilfried Loth, William Wallace and Wolgang Wessels (eds.), *Walter Hallstein. The Forgotten European?*, Macmillan Press LTD: London 1998, pp. 131-134, p. 133.

Common Market.[22] For Hallstein, the building of the Community and the construction of a European legal order were one and the same thing. At the *Universitá degli studi di Padua* in March 1962, Hallstein made clear that the EEC was a Community of Law (*Rechtgemeinschaft*) that went decisively beyond international law. This implied the Community was a system that created law, served as a source of law and constituted a legal order. The creation of law was central, because it meant the following: 'in den Beziehungen zwischen den Mitgliedestaaten werden Gewalt und politischer Druck durch die Herrschaft des Rechts ersetzt.'[23]

For the new legal service of the EEC Commission, headed by Gaudet, the nature of the European legal order was closely connected to the key objective of the EEC, namely the establishment of the Common Market. A true Common Market could only be established if European law provided legal security for the economic actors. The tools available to the Commission and Court of Justice were relatively weak, reflecting the degree of national control that, in particular, the French government had insisted on during the negotiations concerning the EEC Treaty over the gradual establishment of the Common Market.[24] Of the various legal tools to ensure a uniform application of European law, Gaudet prioritised the preliminary reference mechanism from the start. In contrast, he only considered the programme for harmonisation of national legislation relevant for the establishment of the Common Market (article 100) in the long term.[25]

In order to secure a steady stream of preliminary references from national courts, the legal service began more systematically trying to gain the cooperation of the national judiciaries in the application and development of Euro-

[22] Bundesarchiv. (BA) Nachlass Walter Hallstein, Koblenz, Bestand N 1266, 919, Speech by Walter Hallstein at Haus Rissen, Institut für Wirtschafts- und Sozialpolitik, Hamburg-Rissen, 29 July 1958.

[23] BA. Nachlass Walter Hallstein, Koblenz, Bestand N 1266, 396, Die europäische Wirtschaftsgemeinschaft ist eine Rechtgemeinschaft. Rede des Präsidenten der Kommission der Europäischen Wirtschaftsgemeinschaft. Professor Dr. Jur. Walter Hallstein vor der Universität in Padua am 12. März 1962.

[24] For a general argument of French wishes for a limited, controlled process of liberalisation in the framework of the EEC see: Laurent Warlouzet, France and the Treaty of Rome: Negotiation and Implementation (1956-74), in Michael Gehler (ed.), *Vom Gemeinsamen Markt Zur Europäischen Unionsbuldung. 50 Jahre Römische Verträge 1957-2007*, Böhlau Verlag: Köln, Weimar, 2009, pp. 541-557, pp. 543-544.

[25] Library of the Court of Justice, Luxembourg: Les problèmes juridiques. Conférence tenue par M. le Dr. Michel Gaudet. Directeur Général du Service Juridique des Communautés Européennes. 13 July 1959, in La Comunita Economica Europea, *Centro internazionale di studi e documentazione sulle comunita europee*, Universitá degli studi di Ferrara.

pean law. A prerequisite for achieving this was the establishment of an independent academic field of European law. The creation of national associations of European law[26], organised from 1961 onwards in a transnational umbrella organisation, the so-called *Fédération Internationale pour le Droit Européen* (FIDE), was the first important step in this direction, as we shall see below in more detail.[27] It was also this network that lurked behind the first round of what clearly were politically motivated test cases sent from Dutch courts to the Court of Justice. Among these was the Van Gend en Loos case in late 1962, in which a lower Dutch tax Court, the *Tariffcommissie*, asked the Court of Justice whether article 12 of the EEC Treaty on the standstill of tariffs had direct effect.[28]

[26] These associations, here listed in their chronological order, were created from 1954 onwards: Association Française des Juristes Européens (1954), Associazione Italiana dei Guiristi Europei, Association Belge pour le Droit Européen, Association Luxembourgeoise des Juristes Européens, Nederlandse Vereniging voor Europees Recht (1960) and Wissentschaftliche Gesellschaft für Europarecht (1961).

[27] FIDE was initiated by the French Association Française des Juristes Européens in 1960 in close cooperation with the legal service of the Commission. (Archive of Michel Gaudet (AMG), Jean Monnet Foundation for Europe, Lausanne. Chronos 1960, Letter from Michel Gaudet to Robert Krawielicki, 6 December 1960) A founding meeting was organised by the French and Belgian associations in September 1961 in Brussels. The main problem was the fact that no German association of European law existed. Asked by Gaudet, Hallstein made sure that the *Auswärtiges Amt* and the *Bundesjustizministerium* would actively support an initiative to create a German association. (AMG. Chronos 1961, Letter from Michel Gaudet to Walter Hallstein, 14 January 1960) Gaudet discussed the idea with German jurist Ernst Steindorff in March 1961, who then took the initiative at a meeting on 29 April at the Max-Planck-Institut in Hamburg. (Hans Peter Ipsen, ''Europarecht' – 25 Jahrgänge 1966-1990, *Europarecht*, vol. 4, 1990, pp. 323-339, p. 335.) In the first round of invitation to possible members of the new association, it was pointed out that the *Auswärtiges Amt* and the *Bundesjustizministerium* were behind the initiative and that a German association was necessary because similar associations existed in the other five member states. (Archive of Walter Strauss, Institut für Zeitgeschicht, München, Letter from Hans Peter Ibsen to Walter Strauss, 30 May 1961.).

[28] The Dutch association organised the second FIDE conference on the self-executing nature of the Treaties in The Hague in 1963. In order to prepare for this conference, a working group on the topic was established in November 1961. In this group we find a number of lawyers, among these L. F. D. Ter Kuile who together with Hans Stibbe defended the transport company Algemene Van Gend en Loos before the Tariffcommissie. *Deuxième colloque international de droit européen organisé par l'Association Néerlandaise pour le Droit Européen*. La Haye 24-26 October 1963, N.V.Uitgeversmaatschappij W.E.J. Tjeenk Willink, Zwolle, 1966, p. 49. See Antoine Vauchez, 'Integration-through-Law'. Contribution to a Socio-history of EU Political Commonsense, *EUI Working Papers*. RSCAS 2008/10, pp. 8-9 for more details on the background of the Dutch lawyers.

It was no coincidence that the first preliminary references came from Dutch courts. In 1952 the Dutch Parliament had granted international law supremacy vis-à-vis national law by the narrow majority of 46 to 40 in favour of the so-called Serrarens amendment to the Dutch Constitution. The amendment had been proposed on the basis of the interim report of the Van Schaik Constitutional Committee by the Christian Democratic leader of the Dutch European Movement, and later judge at the European Court of Justice, Petrus Serrarens[29]. The aim was explicitly to prepare the Dutch legal system for the new obligations of the ECSC-membership.[30] The Dutch government led by Willem Drees strongly opposed the amendment. The government was notoriously sceptical towards supranational integration[31] and considered it the responsibility of parliament to ensure that international treaties did not conflict with national statutes, in particular because Dutch courts under the Constitution were not allowed to review the constitutionality of statutes.[32] The government thus quickly countered the Serrarens amendment. A new constitutional committee, the Kranenburg Committee, was set up allegedly to address a number of purely technical questions related to the constitutional change. The committee soon, however, proposed a new amendment that would limit the supremacy of international law and thus avoid what the government considered to be serious repercussions for Dutch parliamentary sovereignty. The proposal, which was adopted by parliament in 1956, was to limit supremacy to international law of a self-executing nature, the latter implicitly being decided by national institutions, and thereby re-impose parliamentary control over international law addressed to the states.[33] With regard

[29] Petrus Serrarens was a schoolteacher who never received a university degree. From the early 1920s he was a prominent Catholic trade union leader heavily involved in international cooperation. He was the first secretary of the World Federation of Labour in the 1920s and remained a strong anti-communist and Europeanist. He promoted European integration in the Dutch parliament in 1948 with the motion Van der Goes van Naters-Serrarens on the Council of Europe. He would go on to become one of two Dutch judges at the European Court of Justice from 1953-1958. Annemarie van Heerikhuizen, *Pioniers van een verenigd Europa*, Bron. Dissertation Universiteit van Amsterdam 1998, DBNL 2007, pp. 99-116 and Jeroen J. C. Sprenger, *P. J. S. Serrarens*, Katholiek Decoumentatiecentrum, Neijmegen, BWSA 3 (1988), pp. 188-191.

[30] Leonard F. M. Besselink, De zaak-Metten: de Grondwet Voorbij, *Nederlands Juristenblad*, 1996, pp. 165-172, p. 166.

[31] Anjo Harryvan, In Pursuit of Influence. The Netherlands' European Policy during the Formative Years of the European Union, 1952-1973, Peter Lang: Brussels, 2009, p. 65-66.

[32] Monica Claes and Bruno de Witte, Report on the Netherlands, in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H.H. Weiler (eds.), *The European Courts & National Courts*, Hart Publishing: London, 1998, pp. 171-194, p. 190.

[33] Ibid., p. 191.

to the EC, the situation was somewhat unclear as to who would decide to what extent European law was self-executing. However, on 18 May 1962, the *Hoge Raad* finally clarified this question by allotting the task to the Court of Justice.[34] Interestingly, two out of the five judges that signed the ruling were founding members of the *Nederlandse Vereniging voor Europees Recht*.[35] As a result, a key question for the Dutch Courts was to determine to what extent European law was self-executing or, as somewhat clumsily formulated by the *Tariffcommissie*, would have 'direct effect'.[36] What followed was a steady stream of Dutch preliminary references to Luxembourg, where they numbered eight of the first eleven before 1964.

At the same time, in 1962, the balance inside the Court of Justice had changed. With Jacques Rueff needed at home in the French administration, Prime Minister Michel Debré and President Charles de Gaulle chose to nominate an old political friend of the centre right, the former minister of overseas territories in the Debré government who had just recently resigned in August 1961, Robert Lecourt.[37] Debré had unsuccesfully tried to secure a job for Lecourt at the top of one of the public insurance companies, which had been Lecourt's first choice. Instead, Debré ended up recommending the vacant spot in the Court of Justice, which Lecourt accepted. The nomination clearly testifies to the extent to which the French leadership did not consider the Court of Justice an important actor in the Communities.[38] Lecourt was after all a known pro-European and a prominent member of Monnet's Action Committee.[39]

[34] Hoge Raad, decision of 18 May 1962, De Geus en Uitenbogerd v. Robert Bosch GmbH, NJ, 1965, 115.

[35] The judges were Gerard Wiarda and C. J. J. M. Petit. Hoge Raad 18 May 1962, Robert Bosch GmbH et al. v. De Geus and Uitdenbogerd. Nederlandse Jurisprudentie 1965, no. 114-115, p. 437-445 and Notulen oprichtingsvergadering NVER 1960, a document kindly made available to me by the *Nederlandse Vereniging voor Europees Recht*.

[36] Ibid., p.178.

[37] Disparitions. Jacques Parini, *Robert Lecourt. Un homme d'apparence fragile, une œuvre de géant*. http://www.amicalemrp.org/images/doc/137.pdf (16.3.2010).

[38] Archives du Centre historique de Sciences Po, Archive of Michel Debré, 2 DE 11. Dossiers de personnes: Lecourt 1961-1962, Letter from Michel Debré to Charles de Gaulle, 1 December 1961, and Letter from Michel Debré to Robert Lecourt 1 March 1962. This new evidence lays the alternative interpretation of Lecourt's supposedly negative relationship with Charles de Gaulle and Michel Debré to rest. Pierre Pescatore has thus argued that Lecourt stepped down as minister in protest over the Euro-sceptical European Policy of Debré and de Gaulle. Pierre Pescatore, Robert Lecourt (1908–2004), *Eloge funèbre par Pierre Pescatore ancien Juge de la Cour, à l'audience solennelle du 7 mars 2005*, Revue trimestrielle de droit européen 3, 2005, pp. 589–796.

[39] On Lecourt's involvement with Jean Monnet see: AJM. AMK C 3/22 Robert Lecourt.

With Lecourt on the bench, the Court of Justice took a decisive step and interpreted the EEC Treaty in the teleological mode long recommended by the legal service. In 1963, the Court ruled in the so-called Van Gend en Loos case that article 12 had direct effect, with a narrow majority of four against three[40], and in 1964 it introduced supremacy of European law vis-à-vis conflicting national law in the Costa v. ENEL case.[41] It did so by applying what the President of the Court, André Donner, a couple of years later would call a 'constitutional' interpretation of the Treaties. The 'spirit, general scheme and wording of the treaty' justified the creation of the two new doctrines; the objectives of the Community thus determined the means.[42] This

[40] This narrow vote is documented primarily by two independent oral testimonies given to the author by Paolo Gori (April 2008 together with Antoine Vauchez) – the référendaire of Alberto Trabucchi – and Pierre Pescatore (January 2007). They agreed independently that the ruling was favoured by four judges – Trabucchi, Lecourt, Rino Rossi and Louis Delvaux, while three judges – André Donner, Otto Riese and Leon Hammers – opposed it. (See Paolo Gori, Quindici anni insieme ad Alberto Trabucchi alla Corte de Guistizia delle CE, in *La formazione del diritto europeo. Giornata di studio per Alberto Trabucchi nel centenario della nascit*a, Casa Editrice Dott. Antonio Milani, 2008, p. 71-83, for an interpretation that considers Trabucchi to be the key to the ruling; and Pierre Pescatore, Commission européenne, DG X 'Information, Communication, Culture, Audiovisuel', *40 ans des Traités de Rome—Colloque universitaire organisé à la mémoire d'Émile Noël—Actes du colloque de Rome 26–27 mars 1997* (Brussels, Bruylant), pp. 72–76 and pp. 108–109; and Pierre Pescatore, Robert Lecourt (1908–2004), Éloge funèbre par Pierre Pescatore ancien Juge de la Cour, à l'audience solennelle du 7 mars 2005, *Revue trimestrielle de droit européen* 3, 2005, pp. 589–796, in which Pescatore claims that Lecourt played the central role in the case.) Only one primary source has been found from inside the Court of Justice related to the case, namely an internal memorandum written by Alberto Trabucchi, which allegedly together with a memorandum by Robert Lecourt turned the Court around from the conservative solution proposed by Advocate General Karl Roemer and the *juge rapporteur*, Hammes, which would not grant direct effect to article 12. (The document is reproduced in Giuseppe Perini, Alberto Trabucchi Giurista Europeo. Alle radici del diritto in Europa: una testimonianza inedita, I *Quaderni delle Rivista di diritto civile*, 2009, pp. 145-187.) In the document, it is clear that Hammers probably was opposed to direct effect, but the document does not give us any definite evidence about the position of the other judges.

[41] For two recent analyses of these European Court of Justice rulings based on primary sources, conceptualising the two rulings as a legal revolution see: Morten Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, *Journal of European Integration History*, vol. 14, no. 2, 2008, pp. 77-98; and Morten Rasmussen, From Costa Vs. ENEL to the Treaties of Rome: A Brief History of a Legal Revolution, in Miguel Poiares Maduro and Loïc Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty,* Hart Publishing: Oxford, 2010. For an alternative analysis arguing that that the two rulings were only gradually given meaning and legitimised see: Antoine Vauchez, 'Integration-through-Law. Contribution to a Socio-history of EU Political Commonsense, *EUI Working Papers*. RSCAS 2008/10.

jectives of the Community thus determined the means.[42] This was exactly the type of interpretation that Swatland had recommended in 1957. The main consequences of the two rulings were to turn article 177 into an implementation mechanism for European law in the national legal orders and position the Court of Justice as a European Supreme Court guiding this mechanism. Despite this strengthening of European law, the ambiguities from the Treaties of Rome remained, as the new system still depended on the cooperation of national Courts.

Probably for good reasons, the Court of Justice was careful to avoid the vocabulary of the 1950s, such as 'federal', 'supranational' or 'constitutional', when describing the nature of the European legal system.[43] Instead, it first described European law in Van Gend en Loos as a 'new order of international law' and in Costa v. ENEL as merely a 'new legal order'.[44] In the public debate, however, judges and key commentators were less hesitant in describing the Treaties of Rome as the Constitution of the Communities and the nature of the latter as federal.[45] One of these commentators, Eric Stein, later in 1981, would coin the famous notion of how the Court of Justice had 'constitutionalised' the Treaties of Rome, which scientifically conceptualised what had happened, while indirectly legitimising the style of interpretation chosen by the Court of Justice.[46]

In order to get the member states, and in particular their courts, to accept the new European legal order, the Court, the Commission, the European Parliament and the FIDE together, from 1964 onwards, promoted the new doctrines of European law. This was done in various ways. One important

[42] André Donner, *The Role of the Lawyer in the European Communities*, The Rosenthal Lectures 1966, Edinburgh University Press, 1968, pp. 1-27.

[43] These were the concepts used by such authors as Louis Delvaux, Maurice Lagrange and the supranationalists at the Stresa conference in 1957. See Morten Rasmussen, The Origins of a Legal Revolution – The Early History of the European Court of Justice, *Journal of European Integration History*, vol. 14, no. 2, 2008, pp. 77-98.

[44] It was only in 1986 in Parti Ecologiste 'Les Vert' v. European Parliament that the Court itself explicitly adopted a constitutional rhetoric.

[45] See for example Pierre Pescatore, La Cour en tant que fédérale et constitutionelle, Rapport général par Pierre Pescatore, in *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, pp. 520-553. This was a contribution Michel Gaudet found particularly excellent. See AMG, Chronos 1963, Letter from Michel Gaudet to Pierre Pescatore 15 May 1963. For the general debate see Antoine Vauchez, 'Integration-through-Law. Contribution to a Socio-history of EU Political Commonsense, *EUI Working Papers*. RSCAS 2008/10.

[46] Eric Stein, Lawyers, Judges and the Making of a Transnational Constitution, *The American Journal of International Law*, 1 1981, pp. 1-27.

method was to disperse information about European law. Thus, the Court of Justice launched an information campaign, which was intensified when Lecourt became president in 1967, which increased the number of lawyers and judges invited to Luxembourg to an introduction to the court and European law. Moreover, the academic field of European law was rapidly consolidated in the 1960s. Driven by the members of the FIDE, and supported and partly financed by the legal service of the Commission, new university departments and centres of European Law were founded throughout the six member states, new journals dedicated to European law were launched and an increasing number of national and international conferences were held to discuss European law.[47] In contrast to the dismal results of the Stresa conference in 1957, the new European legal order was successfully promoted in the member states. In Germany, for example, the breakthrough happened in 1964-1965, when the opposition to embracing a 'constitutional' understanding of European law began to give in under the impression of the strides taken by the Court of Justice.[48] In addition to the spreading of information and the establishment of a new academic field, the Commission and the European Parliament in tandem also publicly promoted the new European law vis-à-vis the governments. Thus, the European Parliament's legal committee, under the leadership of Fernand Dehousse in cooperation with Gaudet, authored several reports on European law, promoting the new doctrines.[49] In the parliamentary debates on the legal reports, the Commission backed Parliament. This was for example the case in June 1964, when Hallstein made a high-profile speech in support of the supremacy of European law, before the Court of Justice had ruled in the Costa v. ENEL case.[50]

While the efforts to legitimise the new doctrines were substantive, it is still not clear to what extent they made a serious dent in the reticence of the broad majority of national judges, lawyers and legal academics towards European law, not to mention state administrations and national governments of the

[47] The journals were: Rivista di diritto europeo (1961), Common Market Law Review (1964), Cahiers de droit européen (1965), Revue trimestrielle de droit européen (1965) and Europarecht (1966).

[48] Bill Davies, The Constitutionalisation of the European Communities: West Germany between Legal Sovereignty and European Integration 1949-1974, unpublished dissertation, King's College, 2007, pp. 65-68.

[49] In relation to the report by the European Parliament on the supremacy of European law in 1965, for example, see The Historical Archive of the European Union, Florence, Archive of Fernand Dehousse, 494, La Primauté du Droit Communautaire, par Fernand Dehousse, 18 May 1965.

[50] Antoine Vauchez, 'Integration-through-Law. Contribution to a Socio-history of EU Political Commonsense', *EUI Working Papers*. RSCAS 2008/10, p. 22.

various member states.[51] Karen Alter has argued that national courts began to cooperate, spurred by what could be called inter-court competition and politics, the last bastion of resistance falling with the decision by the French *Conseil d'État* to accept supremacy in 1989. Her analysis, however, was limited to the interaction of courts without systematically placing these in their broader national contexts, and of course only covered the French and German cases. Despite Alter's groundbreaking research, and a steady increase in the number of preliminary references, we thus still know relatively little about the extent and consistency of national judiciaries' cooperation with the Court of Justice.[52] Moreover, despite the fact that national High Courts eventually accepted direct effect and supremacy in practise, the tendency seems to be, starting with the 1993 Maastricht decision of the German Federal Constitutional Court, that the High Courts are not ready to accept the supremacy of the treaty over national constitutions.[53] The battle over the 'constitutional' European law is thus far from over.

What does this short new history of the genesis of 'constitutional' European law teach us about how to understand the history of European law in general? Essentially, the story brings us into the machine room of law. The description by Michel Gaudet of the *métier* of the jurist, in a private letter from 1964 to his colleague from the High Authority, Edmond Wellenstein, sums up what arguably was the bottom line: *'Le juriste crée. Seul l'ingénieur trouve*.'[54] 'Constitutional' European law did not flow naturally from the Treaties of Rome; it was constructed and chosen over other plausible alternatives. Moreover, the story demonstrates how the 'constitutional' interpretation of the spirit of the Treaties by the Court of Justice was ideologically inspired, exemplified by key contributions from convinced Europeans, such as Hallstein, Serrarens, Gaudet and Lecourt, while at the same time constituting a re-

[51] An important first step is taken by Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds.), *The European Courts & National Courts*, Hart Publishing: London, 1998. The first historical country study is by Bill Davies, *The Constitutionalisation of the European Communities: West Germany between Legal Sovereignty and European Integration 1949-1974*, unpublished dissertation, King's College, 2007.

[52] One particularly interesting contribution demonstrating this lack of knowledge is Marlene Wind, Dorte Sindbjerg Martinsen and Gabriel Pons Rutger, The Uneven Legal Push for Europe. Questioning Variation when National Courts go to Europe, *European Union Politics*, Vol. 10(1), pp. 63-88.

[53] This includes the High Courts in Denmark, Italy and France. Karen Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford University Press. Oxford, 2001, p. 29.

[54] AMG, Chronos 1965, Letter from Michel Gaudet letter to Edmond Wellenstein. 14 January 1965.

sponse by the Commission and the Court to the challenges of creating a Common Market. By exploring the causal chains leading to the key rulings, it was clear that chance played a crucial role in the story. If de Gaulle and Debré had not nominated Lecourt, the Court of Justice would have most likely rejected direct effect. Finally, the story brings out the contested nature of the 'constitutional' solution. From the outset, European law was a battle ground over how the European institutions should function; and until 1963, proponents of the 'constitutional' interpretation were facing an uphill struggle, exemplified by the Stresa conference in 1957 and the negotiations of the Treaties of Rome. Van Gend en Loos changed the momentum in favour of the 'constitutionalists'. What is particularly striking in the early battle over the nature of European law was the degree to which the academic field of European law was a child of this struggle. The emergence of an academic field independent from international law represented an important victory for the 'constitutionalists' and the large majority of new scholars in European law would promote the 'constitutional' paradigm and use the jurisprudence of the Court of Justice in national debates as proof of their ideas.[55] The academic field of European law would play a key role in legitimising the jurisprudence of the Court of Justice.

Deconstructing legal and political science research in European law[56]

[55] Gaudet and the legal service functioned almost as an academic correction central for academic articles and books in the 1950s and 1960s. The first generation of European law academics submitted their manuscripts in order to obtain authoritative comments and corrections. Likewise, the Legal service generously helped out young academics interested in European law when they visited Luxembourg. See various files in the Archive of Michel Gaudet, Jean Monnet Foundation for Europe, Lausanne.

[56] This section is particularly inspired by Antoine Vauchez, 'Integration-through-Law'. Contribution to a Socio-history of EU Political Commonsense, *EUI working papers*, RSCAS 2008/10. Vauchez traces the historical roots of 'constitutional' European law. Here the argument will be taken beyond the 1960s. For insightful comments on how mainstream social science literature on the European Union is characterised by a blurred distinction between science and the political agenda of the union, and a brief comment on the 'constitutionalisation' thesis, see Niilo Kauppi and Mikael Rask Madsen, European Integration: Scientific Object and Political Agenda? *Praktiske grunde: Tidsskrift for kultur og samfundsvidenskab*, 2007, vol. 1, no. 1, pp. 28-31; and Niilo Kauppi and Mikael Rask Madsen, Institutions et acteurs: rationalité, réflexivité et analyse de l'UE, *Politique Européenne*, 2008, no. 25, pp. 87-113.

The authority and legitimacy of law is normally based on its claims to universality and the separation between law and politics. This effect is produced by a double move of censorship.[57] On the one hand, the broad transnational alliance supporting the new jurisprudence of the Court of Justice would continue to insist that the latter flowed directly from the Treaties, which should be considered the Constitution of the Communities. The Court, as former judge Pierre Pescatore claimed in an interview with the present author, was merely upholding the letter of the law.[58] It did so to save the Community from the onslaught of Charles de Gaulle in the 1960s and later from the general defections of the member states during the economic crisis in the 1970s. On the other hand, the Court of Justice, as well as most judges and jurists involved in the key decisions, systematically destroyed the relevant papers that would reveal the story just told.[59]

It is precisely this nature of law, i.e., how the genesis of the 'constitutionalised' European law was covered up by the promotion of what amounts to a foundational myth and the systematic destruction of sources, which makes the history of European law difficult to study. The new academic discipline of European law that had begun at a few French, Belgian and German universities in the early 1950s and gradually became more established in the 1960s and 1970s, with the financial and intellectual support of the Commission, would on the whole reproduce and support the foundational myth. The attitude of the Community of academics and practitioners by the late 1970s was well summed up by Martin Shapiro:

> …the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of correct implications of the constitutional text; and the constitutional court as a disembodied voice of right reason and constitutional theology.[60]

In such an academic climate, it could only be expected that the first serious critic, Danish law professor Hjalte Rasmussen, who in 1986 accused the Court of Justice of megalomania and pro-federalist policy making without a

[57] Julie Bailleux, Comment l'Europe vint au droit. Le premier congré international d'études de la CECA (Milan-Stresa 1957), *Revue française de science politique*, vol. 60, no. 2, 2010, pp. 295-318.

[58] Interview with Pierre Pescatore January 2007.

[59] To mention but two examples of this destructive philosophy, both Robert Lecourt and Pierre Pescatore had large personal archives, but made sure that everything was destroyed before they died.

[60] Martin Shapiro, Comparative Law and Comparative Politics, *Southern California Law Review*, 53, 1980, pp. 537-542, p. 538.

sufficient legal and political mandate, would be treated as a heretic and almost literally burned on the stake. After publishing his book *On Law and Policy in the European Court of Justice*[61], he was not invited to mainstream conferences on European law for more than a decade! The heresy of Rasmussen was his claim that the Court of Justice had mixed politics and law. This of course touched the very foundations of European law's legitimacy. Yet, Rasmussen arguably had more foresight than his critics in questioning the legitimacy of the Court of Justice and expressing his concerns, although accompanied by strong accusations that the Court actually did a disservice to the process of European integration.

While Rasmussen's impact in the field was surprisingly small, the new dynamics of the Community in the mid 1980s and early 1990s would lead to a heightened public awareness of the effects of European law and an increased 'politicization' of Court rulings. As a result, the academic field also changed.[62] A new focus on 'law in context' by legal researchers[63], spearheaded by Joseph Weiler in particular[64], colluded with a new political science literature on European law, with scholars such as Anne-Marie Slaughter, Alec Sweet Stone and Karen Alter.[65] While emphasising different aspects of the development and functioning of European law, they all considered the Court of Justice to be a strategic actor responding to a broader social, economic and political environment.

Notwithstanding the important achievements of this new contextual school, its scholars continued to conceptualise the development of European law in

[61] Hjalte Rasmussen, On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-Making, Martinus Nijhoff Publishers: Dordrecht, Boston and Lancaster, 1986.

[62] Harm Schepel, Reconstructing Constitutionalization: Law and Politics of the European Court of Justice, *Oxford Journal of Legal Studies*, Vol. 20, No. 3 (2000), pp. 457-468, p. 458.

[63] This trend was arguably launched in a famous article by Eric Stein (Eric Stein, Lawyers, Judges and the Making of a Transnational Constitution, *The American Journal of International Law*, 1 1981, pp. 1-27), in which he discussed the political process leading to the 'constitutionalisation' of European law. He ascribed a key role to the Commission and Michel Gaudet.

[64] See his most important articles collected in Joseph Weiler, *The Constitution of Europe. 'Do the new clothes have an emperor?' and other essays on European Integration*, Cambridge University Press: Cambridge, 1999.

[65] See in particular: Anne-Marie Slaughter and Walter Mattli, Law and Politics in the European Union: A Reply to Garret, *International Organization*, vol. 49, no. 1, 1995, pp. 183-190; Karen Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford University Press: Oxford, 2001 and Alec Sweet Stone, *The Judicial Construction of Europe*, Oxford University Press: Oxford, 2004.

the language used to legitimise the Court of Justice, thereby reproducing the foundational myth. The core of the contextual school, since the early 1980s, had been Weiler's 'integration through law' thesis.[66] Taking its starting point in the classical story of how the Court of Justice 'constitutionalised' the treaties and created a rule of law in Europe in order to defend European integration, the 'integration through law' thesis claimed that the judicial system had become a motor of integration. Through the Court's interpretation of article 177, direct effect and supremacy, an enforcement mechanism was constructed that had turned the treaties into a catalogue of rights of private citizens, which the latter could then have enforced by the Court of Justice through national courts. Arguably, the 'integration through law' thesis constitutes a claim that the 'constitutionalisation' of the treaties worked and created a European rule of law.

To this historian, the 'integration through law' thesis has two crucial deficiencies. Firstly, concerning methodology, it is highly problematic to adopt the language and conceptualisation of the object of study promoted by one side in what, from a historical perspective, has constituted a battle over what European law was and how it should develop. The danger is that researchers are caught by the normative assumptions underlying these conceptualisations and thus overlook the inconvenient facts the latter were designed to gloss over in the first place.

Secondly, the empirical foundations of the 'integration through law' thesis seem precarious. Recent political science research exploring 'integration through law' seems to suggest that the impact of European law is more uneven and less efficient than proclaimed. Lisa Conant, for example, has demonstrated what she calls the containment of justice by national administrations. Individual European Court of Justice rulings are likely to be obeyed, but the broader legal implications are often ignored. Only when broader societal and institutional mobilisation confronts national governments is it possible to break contained compliance.[67] At a first glance, Dorte Martinsen has demonstrated the opposite, namely that Europeanisation often does occur de-

[66] This thesis was launched in the so-called Florence integration project begun in 1981, with the aim to explore European law in context, with the American federal system as a reference point. See the publications edited by J. Weiler, M. Cappelletti and M. Seccombe, *Integration through Law. Europe and the American Federal Experience*, vol. I-V, Walter de Gruyter, 1986-1987.

[67] Lisa Conant, *Justice Contained. Law and Politics in the European Union*, Cornell University Press, Ithaca and London, 2002, pp. 214-215.

spite 'contained justice', although with a considerable time delay.[68] However, in this context, the fact that the implementation of European law, despite Court of Justice rulings, can be postponed, at times by decades, actually demonstrates the limitations of the 'integration through law' thesis. Emphasising the limitations and uneven nature of 'integration through law' does not necessarily retract from the fact that European law is much more effective than most international law, that it has developed what could be described as a constitutional practise[69], or that a profound process of juridification of the European administrative and political process has happened since 1958.[70]

How to write the History of European law

By now, historians have begun to write the first studies of the history of European law.[71] What lessons can be drawn from the initial analysis of the genesis of 'constitutional' European law and the effort to place the academic field of European law in a historical perspective? Beyond the empirical results presented above, the key insights are methodological. This article constitutes a first attempt to break with the double censorship applied by the jurists and other actors involved in what they called the 'constitutionalisation' of European law. This was achieved by the application of two distinct historical methodologies.

One methodology is best compared to the classic role of the detective reconstructing a crime that the perpetrator has tried to cover up. Although the Court of Justice and the jurists involved have done their best to cover up the

[68] For example, in Dorte Martinsen, The Europeanization of Gender Equality – Who Controls the Scope of Non-discrimination? *Journal of European Public Policy*, 14 (4), June 2007, pp. 544-562.

[69] J. H. H. Weiler and Ulrich R. Haltern, Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz, in Anne-Marie Slaughter, Alec Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts – Doctrines and Jurisprudence. Legal Change in Its Social Context*, Hart Publishing: Oxford 1998, pp. 331-365, here pp. 336-342.

[70] Renaud Dehousse, Integration Through Law Revisited: Some Thoughts on the Juridification of the European Political Process, in Francis Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, Hart Publishing: Oxford and Portland, Oregon, 2000, pp. 15-30.

[71] For a selection of these contributions, see *Journal of European Integration History*, vol. 14, no. 2, 2008, which has collected four articles presented at the first international conference on the topic, organised at the University of Copenhagen in October 2007. See also a new research network organised under the auspices of Réseau International de jeunes Chercheurs en Histoire de l'Intégration Européenne: http://www.europe-richie.org/Groupes/law/index-en.html (16.3.2010).

historical roots of 'constitutional' European law, it has been possible to dig up a significant body of primary sources that reveals what went on behind the closed doors in the member states, Commission and the Court of Justice. Moreover, the classical historical reconstruction, exploring the causal chains leading to the crucial rulings, has demonstrated its efficiency in explaining why and how 'constitutional' European law experienced a breakthrough in 1963-1964.

The second methodology applied was one of 'historization', whereby legal and social science research on European law were explored in its proper historical context in order to trace the intertwined nature of mainstream academic analysis and the legitimisation processes of 'constitutional' European law.[72] Caught by a certain theoretical and conceptual understanding of European law, mainstream legal and political science academics have not been able to define the research object in a manner that truly reflected the issues at stake in the development of European law. The result has been that both the legal and political science literature have continued to reproduce the legitimisation of a certain understanding of what European law is, has achieved and should become.

By removing the double censorship of European law, it is evident that a complete break is needed with the 'constitutional' understanding of European law and the 'integration through law' thesis. This is not the place to launch a new analysis of how to understand current European law, leaving the traditional concepts and theories behind. Recent research does, however, display new trends that demonstrate the acknowledgement that the 'constitutional' understanding of European law is problematic.

Inger Sand Johnsen, for example, has emphasised how European law is being continuously negotiated and interpreted by a large number of judicial, administrative and political actors. The consequence is a situation in which European law is characterised by fragmentation, a degree of unpredictability and beyond the stable patterns of the previous forms of nation states and rule of law regulations.[73] Arguably, from a historical perspective this would con-

[72] 'Historization' offers the researcher key insights into the pre-history and gradual construction of the research object under investigation and thus contributes with what in sociology is termed reflexivity. For an emphasis on the need for a reflexive approach (Bourdieu inspired) regarding the study of international and European law in order to ensure 'critical reflection on the pre-constructions that dominate a given subject area' and 'a self-critique as the means to considering one's own scientific and social assumptions of the subject-area', see Mikael Rask Madsen, Sociology of the Internationalisation of Law, *Retfærd*, no. 3/114, 2006, pp. 23-42, pp. 33-36.

[73] Inger-Johanne Sand, Fragmented Law - From Unitary to Pluralistic Legal Systems. A Socio-Legal Perspective of Post-National Legal Systems, *ARENA Working Papers*, WP 97/18.

stitute a return to the 'normal' state of affairs before the nation state managed to monopolise and centralise political, social, economic and legal power.[74]

Likewise, a new school of Bourdieu-inspired sociology of law has produced important theoretical and empirical insights into the history of European and international law.[75] One such key insight is the claim that the social authority of law depends not solely on the authoritative jurisprudence of a court but rather on a broader legitimisation of legal and non-legal actors. I have already analysed the battle over what shaped European law in the 1950s and 1960s, which involved the Commission, the Court, transnational networks of pro-European jurists as well as governments, national courts and national legal academics. The battlefield of European law would only widen as the European legal order consolidated and gradually became a reality in the member states. To understand the nature of the battle over the legitimisation of the European legal order and why the legitimacy of the Court of Justice has recently begun to unravel, we need a much broader and more empirically solid analysis; one that goes decisively beyond analysing the European law and the Court of Justice as merely a story of 'integration through law'.

Gaudet himself in fact had a keen eye for the broader dilemma of the Court of Justice. In a private letter from 1980 to his close friend, the American jurist Eric Stein, Gaudet expressed concerns about the development of European law in the 1970s, which sounded surprisingly like those of Hjalte Rasmussen:

> It is quite clear that this Community is not presently a Federal state and there are not yet signs that it will become one…The balance between the limited domain of the Community and the undisturbed powers of the National states is carefully even though not satisfactorily, laid down in the Treaties and in the additional political decisions issued either under art. 235

See also the more recent: Inger-Johanne Sand, (Re)Constructing the Boundaries of the Market: EU Law and Institutions Analysed through the Lens of Discontinuity, in Hanne Petersen, Anne Lise Kjær, Helle Krunke and Mikael Rask Madsen (eds.), *Paradoxes of European Legal Integration*, Ashgate: London 2008, pp. 89-110.

[74] For an interesting research programme that explores exactly the relationship between coherence and fragmentation in European law in various perspectives, including the historical one, see the Centre of Excellence 2008-2013, The Foundations of European Law and Polity, University of Helsinki. http://www.helsinki.fi/katti/foundations/ (16.3.2010).

[75] For example, Yves Dezalay and Mikael Rask Madsen, The Power of the Legal Field: Pierre Bourdieu and the Law, in Reza Banakar and Max Travers (eds.), *An Introduction to Law and Social Theory*. Oxford: Hart Publishing, 2002; Antonin Cohen, Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s-1960s). *Law & Society*, vol. 32. no. 1, 2007, pp. 109-135; and Antoine Vauchez, Embedded Law. Political Sociology of the European Community of Law. Elements of a renewed research agenda, *EUI working papers*, RSCAS 2007/23.

or by common consent of the Member States. That the Court sees the weaknesses and sometimes contradictions of the present frame should be welcome. That the Court favours interpretations reducing the scope of these imperfections is comforting. But I doubt whether it is wise to go beyond the clear provisions which have reflected political choices, however unfortunate these may be judged. As you know, Europeans do not recognize the power of the Courts to change what has been the decisions of Parliaments and Governments. '*Le gouvernement des juges*' is generally not accepted because it means after all allocating a supreme power to a non-democratically elected set of persons.

Therefore I am fully satisfied with Lütticke, Reyners and van Binsbergen, I am doubtful about ERTA which lacks a clear indication of the will of the Member States to transfer power, and I reject van Duyn which runs clearly against the features provided for by the directives (which features I have found confusing and disappointing ever since the 'recommendations' of the ECSC, but which cannot in my view be merely brushed aside by the Court).

As a lawyer I would not be afraid of a logical or even teleological interpretation digging out of an imperfect drafting of a clear, realistic and efficient rule. But building a European Community is a different matter to be decided by responsible policy-makers and not by independent judges. …Before taking a step not clearly implied by the Treaties and/or the Community law, the Court of Justice must therefore make a careful assessment of the chances of its decision being accepted. There is no evidence that such an assessment has been made before ERTA or van Duyn.

The Court, one of the institutions of the Community, must pace with the general evolution of the Community. It should certainly refuse to weaken the status of Community law provided for in the Treaty (direct effect and precedence). It should also refrain from going beyond the Treaty without sufficient agreement of the Member States. This delicate and cautious approach is part of the difficult effort to build up a Community in Europe. Any mistake from any institution weakens the whole concern. And the success of the Community is nowadays not only necessary for Europe, but also a contribution to solving other regional problems in this changing world.[76]

[76] AMG. Correspondence, Eric Stein 1960-1987, Letter from Gaudet to Stein, 30 July 1980.