Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993

Anne Boerger* & Morten Rasmussen**

European Court of Justice – The nature of European law – European Law Academia – *Costa* v. *E.N.E.L.* and *Van Gend & Loos* – Legal Service of the European Commission – How the constitutional discourse became dominant

Introduction

Today the European Court of Justice (ECJ) is widely considered to have 'constitutionalised' the Treaties of Rome, thereby establishing a legal order of a proto-federal character with direct effect and primacy *vis-à-vis* national law.[1] Despite increasing criticism from legal scholars and now also sociologists and historians,[2] the paradigmatic status of the constitutional discourse of European law remains

* Assistant Professor, University of Alberta. A first version of this article was presented at the conference 'Constitutionalisation in Question: Revisiting the Foundational Logics of European Integration by Law', at the University of Copenhagen in December 2011. We would like to thank all participants in the conference for their comments. In addition, we are grateful to: Monica Claes, Michal Bobek, Rebekka Byberg, Alexandre Bernier, Brigitte Leucht, Bill Davies, Karen Gram-Skjoldager, Vera Fritz, Karin van Leeuwen and Ann-Christina L. Knudsen for comments that considerably improved this article.

** Associate Professor, University of Copenhagen.

[1] ECJ 5 Feb. 1963, Case C-26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* and ECJ 15 July 1964, Case C-6/64, *Flaminio Costa* v. *E.N.E.L.*

[2] For a legal critique, consult P. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press 2010) and M. Avbelj, 'The Pitfalls of (Comparative) Constitutionalism for European Integration', 1 *Eric Stein Working Paper* (2008). A sociological critique can be found in N. Kauppi and M. Rask Madsen, 'Institutions et acteurs: rationalité, réflexivité et analyse de l'UE', 25 *Politique Européenne* (2008) p. 87. Finally, a historical critique can be read in: M. Rasmussen, 'Constructing and Deconstructing European "Constitutional" European Law. Some Reflections on How to Study the History of European Law', in H. Koch et al. (eds.), *Europe. The New Legal Realism* (DJØF Publishing 2010) p. 639.

European Constitutional Law Review, 10: 199–225, 2014
 doi:10.1017/S1574019614001163

largely intact.[3] This constitutional paradigm[4] has played a dual role since it achieved a breakthrough in the 1980s. On the one hand, it has functioned as an academic paradigm within the field of European Union (EU) law, structuring teaching curricula as well as research agendas. On the other hand, the ECJ itself openly embraced the notion in the '*Les Verts*' judgment in 1986,[5] and today the Court's self-understanding relies on the constitutional paradigm.[6] Given the extent to which the constitutional paradigm has offered both the ECJ and EU law academia a common narrative and ideology, the development of the constitutional discourse in EU law and its attainment of paradigmatic status constitute a fundamental research question in the new field of EU legal history.[7] Yet scholars have largely ignored it until now.[8]

In a first attempt to fill this historiographical gap, the present article explores the emergence of the constitutional discourse[9] in European law in a historical

[3] For two prominent examples of this scholarship see M. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998) or M. Claes, *The National Court's Mandate in the European Constitution* (Hart Publishing 2006). See also F. Bignami's interesting defence of the constitutional paradigm against the most recent historical criticism. F. Bignami, 'Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research', 28 *American University International Law Review* (2013) p. 1311.

[4] The term 'paradigm' is borrowed from T. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1962) and suggests that a relatively stable understanding of European law has conquered mainstream legal research, creating widely shared common assumptions about the nature of the research objective and consequently structuring possible research questions.

[5] ECJ 23 April 1986, Case C-294/83, *Parti écologiste 'Les Verts'* v. *European Parliament*.

[6] This was evident in the latest commemoration of the *Van Gend en Loos* judgment organised by the ECJ on 13 May 2013. See the conference here: <http://player.companywebcast.com/televicdevelopment/20130513_1/en/player>, visited 20 Dec. 2013.

[7] Key publications in this new field are the special issues of 14 *Journal of European Integration History* (2008); 21 *Contemporary European History* (2012); 28 *American University International Law Review* (2013); as well as Rasmussen, *supra* n. 3 and B. Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949-1979* (Cambridge University Press 2012). From 2013 to 2015 a collective research project: 'Towards a New History of European Public Law', based at the University of Copenhagen, brings together all historians of the new field in order to explore the history of European law from 1950 to 1986. Consult the homepage for the progressive results of the project: <http://europeanlaw.saxo.ku.dk>.

[8] The most important exceptions are two articles by Slovenian jurist Matej Avbejl, Avbejl, *supra* n. 2 and M. Avbejl, 'Questioning EU Constitutionalisms', 9 *German Law Journal* (2008) p. 1.

[9] In the period treated here, the 'constitutional discourse' was composed of multiple and often diverse conceptions of European law. It included divergent understandings of the very meaning of the terms 'constitution' and 'constitutional' due to different national and linguistic traditions. But in most cases it was linked to a federal understanding of the nature of the European project. To make the discourse more palatable and politically less contentious, alternative concepts were used interchangeably with 'constitutional'. These would include 'supranational' or 'autonomous' European law in the 1950s, or the concept of 'a new legal order' formulated by the ECJ in the *Van Gend en Loos* and *Costa* v. *E.N.E.L.* judgments in 1963-1964. We do not claim that these different

perspective and offers some preliminary observations as to why this discourse obtained paradigmatic status. It identifies the main protagonists behind the discourse, and it explores their motives as well as the means employed to promote their views. It argues that the development of ECJ case-law based on the notion of the 'special nature of European law' came about in close alliance with the academic constitutional discourse. Our historical analysis reveals the intertwined, sometimes overlapping, efforts by key protagonists in academia, the ECJ and the Commission in the development of the constitutional discourse. Finally, we demonstrate the extent to which Europeanist ideology, often mixed with institutional self-empowerment, constituted the primary driving force. While our ambition is to provide a reasonably coherent historical narrative, the topic covered here is so vast and complex that we can claim to offer but a first analytical template. Much needs to be done in terms of systematic empirical research to understand the nuances of how the constitutional discourse evolved over time and came to dominate European law academia.[10]

The article consists of three parts. In the first two sections we shall analyse the origins and development of the constitutional discourse in European law from 1950 to 1978. In the third part we will explore in some detail the history of its breakthrough to paradigmatic status from 1979 to the early 1990s.

In Search of the nature of European law, 1950 to 1963

The first decade in the history of European law was characterised by a search for the exact nature of European law, both by the European institutions and legal scholars. The need for such a quest arose from two factors.

The first factor was the ambiguous nature of the founding treaties. The negotiations that resulted in the Treaty of Paris (1951) and the Treaties of Rome (1957) did not define European law and the ECJ in any clear terms. Formally, the treaties were classical international treaties signed and ratified by contracting parties. Resorting to such conventional international agreements was a self-evident choice, as the idea of creating a European federal state based on a European constitution was neither politically viable nor wished for by the national governments. The Schuman Declaration mentioned a European federation as a distant goal, but the

concepts were identical in their legal implications. But they shared a willingness to conceive the legal (and political) nature of the ECSC or the EEC as going significantly beyond international co-operation in a proto-federal direction. In this article, we consequently define the constitutional discourse loosely, as constituted by texts that assume that European law belongs to the category of internal state law or public law rather than international law.

[10] Within the project 'Towards a New History of European Public Law' based at the University of Copenhagen, doctoral student Rebekka Byberg is currently writing a dissertation on this topic (<http://europeanlaw.saxo.ku.dk/members_projects/rebekka_byberg/>) from 2013 to 2015.

immediate objectives of the six countries engaged in the treaty negotiations differed substantially from this rhetoric. At the Paris Conference, only the German delegation came close to supporting a federal organisation of the European Coal and Steel Community (ECSC) based on something like a constitutional treaty.[11] The other delegations, despite accepting the French idea of a supranational European executive in the shape of the High Authority, were mostly focused on developing sufficient legal and political control of the latter. In the Treaties of Rome, all national governments, with the exception of the Dutch, moved away from the notion of a supranational executive institution heralded in the Treaty of Paris, preferring instead to give the Council of Ministers the main legislative role. A consensus, furthermore, existed to limit the competences of the institutions strictly to the functional tasks required to fulfil the objectives of the Treaties.[12] To all but one of the national governments signing the Treaties of Rome, therefore, the new Communities were a matter of international law and would not create a system of European public law.[13]

Yet, despite the understanding that the Treaties belonged to international law, their objectives and the policy matters they dealt with required legal techniques and tools that went beyond traditional international law. As a consequence, the Treaties included important elements of administrative law, inspired in particular by the French legal tradition, as well as elements from constitutional rule of law systems. In this light it is not surprising that pro-European jurists participating in

[11] Even the German delegation was split on the question, with a strong minority opposed to constitutional thinking. See B. Davies, 'From the Cell to the Courtroom: The Remarkable Career of European Jurist Walter Much', 1 *JLC Working Paper* (2013), <http://american.edu/spa/djls/working-papers-series.cfm>, visited on 1 April 2014. See also Anne Boerger-De Smedt, 'La Cour de Justice dans les négociations du Traité de Paris', 2 *Journal of European Integration History* (2008) p. 7.

[12] A. Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome', 21 *Contemporary European History* (2012) p. 339, at p. 350.

[13] See the speech of Luxembourg's Prime Minister, which well reflected the perception of national assemblies ratifying the Treaties of Rome. Discours de M. le Président du gouvernement (19 Nov. 1957) in *Le Grand-Duché de Luxembourg et la Communauté Économique Européenne*, Extrait du Bulletin de Documentation du Service Information et Presse (Ministère d'Etat, 12/1957) p. 149, at p. 154. The main exception to this trend can be found in the German parliamentary report, which claimed that the European Communities were constitutional in nature. However, in the German Government and administration, views differed substantially and both the Ministries of Justice and Economics subscribed to the view of European law as belonging to international law. Hallstein helped shape the German report to Parliament: 'Entwurf eines Gesetzes zu den Verträgen vom 25 März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft', (1953) Deutscher Bundestag, 2 Wahlperiode May 4, 1957 (Drucksache no. 3440). 2 Schriftlicher Bericht des 3. Sonderausschusses…Deutscher Bundestag, July 5, 1957, 224. Sitzung at 13.178-13.429.

the two sets of negotiations were able to strengthen the constitutional dimension of the Treaties despite their overall international law design. In the negotiations on the Treaty of Paris, the German delegation, led by law professor Walter Hallstein, and his right-hand man Carl Friedrich Ophüls, had in particular promoted a constitutional rule of law system for the European Coal and Steel Community (ECSC). Hallstein repeatedly argued that it would be highly beneficial if the ECJ were to be cast as a European 'supreme court'. Hallstein's views on European law were deeply inspired by American federalism, of which he had gained an intimate understanding in the late 1940s, and which also had a solid fingerprint on the new German constitution.[14] While his vision was largely rejected by the other governments, as discussed above, the German delegation managed to insert the right for private litigants to appeal against the decisions of the High Authority of the European institutions (Article 33, ECSC Treaty, maintained in a modified and more restricted form in Article 173, EEC Treaty). Likewise, during the negotiations on the Treaties of Rome, the so-called *groupe de rédaction*, which included important pro-European jurists such as Michel Gaudet (member of the Legal Service of the High Authority), Nicola Catalano (representing Italy and future ECJ judge from 1958 to 1962) and Pierre Pescatore (representing Luxembourg and future ECJ judge from 1967 to 1985) managed to insert a system of judicial review involving national courts that gave the ECJ exclusive competence to interpret European law (Article 177, EEC Treaty).[15] These two examples of elements of constitutional law were by no means the only ones inserted in the Treaties, and the result was a set of international treaties that were ambiguous enough to allow for different interpretations.[16]

The second factor was that the nature of European law continued to remain elusive until 1963-1964, because the European institutions did not manage to settle the question. We know that the Legal Service of the High Authority already championed a constitutional approach to the interpretation of European law in the mid-1950s. To one of its most influential members, Michel Gaudet, it was

[14] Hallstein had been a PoW in an American prison camp and a Visiting Professor at Georgetown University in 1948-1949. M. Schönwald, 'Hinter Stacheldraht – vor Studenten: Die "amerikanischen Jahre" Walter Hallsteins, 1944-1949', in R. Dietl and F. Knipping (eds.), *Begegnung zweier Kontinente. Die Vereinigten Staaten und Europa seit dem Ersten Weltkrieg* (WVT 1999) p. 31. See also B. Leucht, 'Expertise and the Creation of a Constitutional Order for Core Europe: Transatlantic Policy Networks in the Schuman Plan Negotiations', in W. Kaiser et al. (eds.), *Transnational Networks in Regional Integration. Governing Europe 1945-83* (Palgrave 2010) p. 18, and E. Spevack, *Allied Control and German Freedom: American Political and Ideological Influences on the Framing of the West German Basic Law (Grundgesetz)* (LIT Verlag 2001).

[15] Boerger-De Smedt, *supra* n. 12.

[16] For additional examples consult: Boerger-De Smedt, *supra* n. 12, p. 351-354.

crucial that the ECJ assumed a constitutional role in the ECSC by adopting a teleological interpretative method instead of the textual approach traditionally used in international public law at that time.[17] In several cases before the ECJ, the Legal Service representatives promoted this strategy, but with only limited success.[18] Similarly, the pre-eminent Advocate-General at the ECJ, Maurice Lagrange, also strongly endorsed the understanding that European law was partly constitutional in nature and closer to federal than to international law. He did so both before the ECJ and in his academic writings. Lagrange did not fully agree with the approach of the Legal Service, and preferred to emphasise comparative law as the main source of European law.[19] However, the ECJ did not heed the calls either from the Legal Service or from its own Advocate-General. Despite the presence on the bench of several judges with federalist inclinations, such as the Dutch judge Petrus Serrarens (1952-1958), the Belgian judge Louis Delvaux (1952-1967) and Nicola Catalano (1958-1962), the ECJ remained reluctant, in particular before 1958, to embrace the constitutional approach.[20] At the same time, however, the European judges also rejected the arguments, occasionally advanced by some governments, that the ECJ was merely an international court.[21] The ECJ gradually defined itself as mainly an administrative court with an international dimension

[17] Two revealing sources document this. Robert Eisenberg to Eric Stein, 18 April 1955. Eric Stein Papers, Bentley Historical Library, Ann Arbor, Michigan [hereafter ESP], Box 18. Here Eisenberg not only mentions that Gaudet was disappointed in the judgments of the Court of Justice in Cases 1-4/54, but also that he wanted the new Court to assume a role similar to that of the United States Supreme Court. The second source is: Michel Gaudet to Donald Swatland, 31 Dec. 1957. Archive of Jean Monnet [hereafter AJM], AMK 30/3, Fondation Jean Monnet pour l'Europe, Lausanne [hereafter FJM].

[18] See, for example, the very first High Authority position developed by Michel Gaudet and Jean Coutard before the ECJ in CJ 21 Dec. 1954, Case 1/54, *High Authority of the European Coal and Steel Community*. See Affaire 1/54, Mémoire en Défence, Historical Archive of the European Commission [hereafter HAC]. BAC371/1991.6.

[19] M. Lagrange, *Le caractère supranational des pouvoirs et leur articulation dans le cadre du Plan Schuman, Conférence prononcée devant la Tribune du jeune barreau de Luxembourg*, 23 mars 1954, (Library of the European Court of Justice 1954) p. 16; M. Lagrange, 'La Cour de Justice de la Communauté européenne du Charbon et de l'Acier', *Revue du Droit et de la Science politique en France et à l'étranger* (1954) p. 417, at p. 419; and most forcefully in M. Lagrange, 'L'ordre juridique de la C.E.C.A. vu à travers la jurisprudence de sa Cour de Justice', *Revue du Droit et de la Science politique en France et à l'étranger* (1958) p. 841. For a fuller treatment of Lagrange's views, consult A. Grilli, *Le origine del diritto dell'Unione europea* [*The origins of European Union Law*] (Il Mulino 2009).

[20] Michel Gaudet to Donald Swatland, 31 Dec. 1957. AJM, AMK 30/3.

[21] For example, CJ 21 March 1955, Case 6/54, *Netherlands* v. *ECSC High Authority*. G. Bebr, 'The Development of a Community Law by the Court of the European Coal and Steel Community', 42 *Minnesota Law Review* (1957-1958), p. 845, at p. 861.

and a discrete constitutional role.[22] It was only in February 1963, after two changes in its composition (namely the inclusion of French judge Robert Lecourt and Italian judge Alberto Trabucchi in 1962), that the ECJ finally adopted the constitutional interpretation of the Treaties promoted by the Legal Service, in the famous *Van Gend en Loos* case.[23]

The academic debate during this 1950-1963 period was primarily shaped by the uncertainty about the exact nature of European law. If it was not ordinary international law, what was it? The quandary of how to categorise European law did not facilitate the institutionalisation of a new academic field. Universities in the six original member states did start to include European studies, but Chairs, and courses, in European law were still few and far between by the early 1960s.[24] It would take the mobilisation of pro-European jurists, in cooperation with the Legal Service, to change this state of affairs. The early 1960s saw the establishment of European Law Associations in the Member States, and of an umbrella organisation, *Fédération internationale pour le droit européen* (FIDE), to facilitate contacts with the European institutions. The Legal Service played a crucial role in setting up FIDE and partly financed the network from 1964 onwards. The first FIDE conference was organised in Brussels in July 1961 on the competition policy of the EEC and would be followed by new major conferences every second year. These associations and FIDE helped build networks between the individual nations' academics and practitioners as well as with the European institutions. They also facilitated the dissemination of knowledge about European law. However, these various developments would only lead to the gradual establishment of a new, separate field of European law from the mid-1960s onwards.[25]

What kind of academic debate took place between 1950 and 1963, and who were the main protagonists? To what extent did a constitutional discourse develop

[22] This was the prediction of W. Riphagen already in 1955: W. Riphagen, 'The Case Law of the European Coal and Steel Community Court of Justice', *Nederlands Tijdschrift voor Internationaal Recht* [Dutch Journal of International Law] (1955), p. 384. See also M. Lagrange, *Le rôle de la Cour de Justice des Communautés Européennes*, Colloque des Facultés de droit (Library of the European Court of Justice 1959) and P. Pescatore, 'La Cour en tant que juridiction fédérale et constitutionnelle. Rapport général', *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Carl Heymanns Verlag KG 1965).

[23] M. Rasmussen, *supra* n. 2, p. 648-649.

[24] See, for example, new studies of how European law academia developed in Germany and France: 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 (1945-1990)* (Dalloz 2014).

[25] For a more detailed history see: M. Rasmussen, 'Establishing a Constitutional Practice: The Role of the European Law Associations', in W. Kaiser and J.-H. Meyer (eds.), *Societal Actors in European Integration. Polity-Building and Policy-Making, 1958-1992* (Palgrave Macmillan 2013) p. 173.

in support of the position of the Legal Service? An examination of the academic debate on the nature of European law leads to a double answer. On the one hand, a number of legal scholars and institutional practitioners promoted views very similar to those of Lagrange or of the Legal Service. On the other hand, these authors found themselves significantly outnumbered at national and international conferences by professors of international law and national legal academics at large, who favoured the view that the ECSC or EEC were merely a particular kind of international organisation and thus ruled by the principles of public international law.

Arguably a constitutional and federal reading of the Treaty of Paris had its roots in the German delegation's position during the negotiations. Thus, even though the German delegation was relatively unsuccessful in pushing the Treaty of Paris in the direction it wanted, the German report on the negotiations, as well as contemporary publications by Carl Friedrich Ophüls, emphasised that the Treaty of Paris, despite being formally an international treaty, was also a proper 'constitution' of the ECSC.[26] Based on an autonomous legal order with sovereign institutions, created by the fusion of competences of the Member States, the ECSC was – so Ophüls argued – in fact 'eine Art europäischer partielle Bundesstaat'.[27] Other important figures, such as Foreign Ministry official Wilhelm Grewe and the relevant Professors at the Universities of Hamburg and Heidelberg, Hans Peter Ipsen and Günther Jänicke respectively, shared this view.[28] After the ratification of the EEC Treaty, Ophüls (by then serving as the German Permanent Representative in Brussels) and Ipsen continued to press for a constitutional and federal understanding of European law. In their view the Communities had created a '*Durchgriff*' in national sovereignty, which meant that all European legal norms had direct ap-

[26] Deutscher Bundestag, 'Entwurf eines Gesetzes betreffend den Vertrag über die Gründung der Europäischen Gemeinschaft für Kohle und Stahl vom 18 April 1951', 2 June 1951 (Drucksache no. 2401), <dipbt.bundestag.de/doc/btd/01/024/0102401.pdf>, visited 30 March 2014. C.F. Ophüls, 'Gerichtbarkeit und Rechtsprechung im Schumanplan', 4 *Neue Juristische Wochenschrift* (1951) p. 693; C.F. Ophüls, 'Juristische Grundgedanken des Schumanplans', 4 *Neue Juristische Wochenschrift* (1951), p. 289; C.F. Ophüls, 'Europas partielle Bundesstaat', 14 *Die Gegenwart* (1951) p. 25 and W. Much, *Die Amtshaftung im Recht der E.G.K.S.* (Frankfurt 1952).

[27] Ophüls, *supra* n. 26, p. 289.

[28] G. Jänicke, 'Die Sicherung des übernationalen Charakters der Organe internationaler Organisation', XIV *Zeitschaft für ausländisches öffentliches Recht und Völkerrecht* (1951-1952), p. 46; *Begriff und Wesen des sozialen Rechtsstaates. Die auswärtige Gewalt der Bundesrepublik. Berichte und Aussprache zu den Berichten in den Verhandlungen der Tagung der Vereinigung der Deutschen Staatsrechtslehrer zu Bonn am 15. und 16. Oktober 1953*. Mit Beiträgen E. von Forsthoff, O. Bachof, W. Grewe, E. Menzel (De Gruyter 1954), and *Das Grundgesetz und die öffentliche Gewalt internationaler Staatsgemeinschaften. Der Plan als verwaltungsrechtliches Institut: Verhandlungen der Tagung der Vereinigung der Deutschen Staatsrechtslehrer zu Erlangen vom 7. bis 9. Oktober 1959*. Mit Beiträgen von G. Erler, W. Thieme, M. Imboden, Kl. Obermayer (De Gruyter 1960).

plicability and primacy in the fields in which Member States had agreed to surrender their competences.[29]

Outside Germany, several scholars and practitioners also backed the notion of '*fédération partielle*', or at least considered the legal order of the ECSC to be autonomous and based on a real transfer of sovereignty by the Member States. Their opinions varied greatly, however, on what was the precise nature of European law and did not have the coherent constitutional vision which characterised the German literature. Among these scholars were leading French law professor Paul Reuter, who had also been part of the French delegation during the negotiations for the Treaty of Paris,[30] and a number of Belgian and Dutch academics, such as George Van Hecke (Professor, University of Louvain) and E. van Raalte (Lecturer, University of Amsterdam).[31] Similarly, two ECJ employees, *attaché* Pierre Mathijsen, and *greffier* Albert van Houtte appeared to find it premature to decide whether the European law had a proto-federal nature.[32] They were nonetheless clearly sympathetic towards this view. Mathijsen found this perspective particularly useful to guide the work of the European institutions.[33] Prominent personalities such as the *Doyen* (Dean) of the Law Faculty of the University of Paris, Claude-Albert Colliard, and the Belgian ECJ judge, Louis Delvaux, also openly favoured a federal interpretation of the nature of the ECSC.[34] The latter published extensively on what he termed the supranational character of the ECSC, and claimed that the ECJ was '*l'embryon d'une Cour fédérale*'.[35] Likewise, Italian scholars such as Pietro Gasperri (Professor, University of Perugia) and Nicola Catalano took a similar stance on the federal nature of the ECSC and the EEC, although with a limited

[29] C.F. Ophüls, *Quellen und Aufbau des Europäischen Gemeinschaftsrechts* (N.J.W. 1963) p.1697-1698; H.P. Ipsen and G. Nicolaysen, 'Haager Kongreß für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts', 17 *Neue Juristische Wochenschrift* 17 (1964) p. 339; H.P. Ipsen, 'Rapports du droit des Communautés Européennes avec le droit national', 47 *Le droit et les affaires* (1964).

[30] For example, P. Reuter, 'La conception du pouvoir politique dans le Plan Schuman', 1 *Revue française de science politique* (1951) p. 256, at p. 258.

[31] G. Van Hecke, 'Scheiding en evenwicht van machten in de Europese Gemeenschap voor Kolen en Staal' [*Separation and balance of powers in the European Coal and Steel Community*], 31 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* [*Communications of the Dutch Society of International Law*] (1952) p. 29; E. Van Raalte, 'The Treaty Constituting the European Coal and Steel Community', 1 *The International and Comparative Law Quarterly* (1952) p. 73.

[32] A. van Houtte, *La Communauté Européenne du Charbon et de l'Acier. Communauté supranationale. Conférence faite à l'Université de Naples* (Library of the ECJ, 15 Dec. 1955) and P. Mathijsen, *Le droit de la CECA. Une étude des sources* (Martinus Nijhoff 1958).

[33] Mathijsen, *supra* n. 32, p. 155.

[34] C-A Colliard, *Institutions internationales* (Dalloz 1956) p. 392.

[35] For example, L. Delvaux, *La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier* (Librairie générale de droit et de jurisprudence 1956) p. 11.

set of competences.[36] As an ECJ judge from 1958-1962 and thereafter a law professor, Catalano continued to argue in favour of a more radical federalist interpretation of the nature of European law, with arguments very similar to Ophüls' and Ipsen's '*Durchgriff* thesis', but his voice remained relatively isolated in the Italian debate.[37]

The problem confronting the scholars and institutional actors who developed this new legal thinking on the nature of the ECSC and the EEC outside existing legal dogmas and categories, was that the large majority of scholars of international law, as well as the broad majority of national legal academics, dismissed what they widely considered fictitious legal analyses determined by politics. The lecture given in 1953 by Grewe at the *Deutsche Staatsrechtslehrer* Congress, the most prestigious public law forum in Germany, in which he argued that supranational law was separate from standard international public law, was for instance rejected by the large majority of the audience.[38] Similarly, a conference held in Naples in 1955 to discuss the nature of the ECSC resulted in the broad rejection of the 'supranational' point of view, presented by Albert van Houtte, by leading professors of international law from the University of Rome, such as Riccardo Monaco, who also worked as legal adviser to the Minister of Foreign Affairs and later became an ECJ judge from 1964-1976, Gaetano Morelli and Roberto Ago.[39]

An additional example of just how challenging it was for the few academics and practitioners who wanted a constitutional and federal interpretation of European law to become mainstream, was the failure of the Legal Service to secure the support of the committee of prominent international law professors supposed to determine the nature of European law at the large scale congress on the ECSC held in Stresa in July 1957. Gaudet and the Legal Service had hoped that the committee would characterise European law as autonomous and supranational and thus different from public international law, with its restrictive understanding of the competences of the international organisations. But, despite the tactical appointment of allegedly pro-European professors of international law to the committee, the final report, edited by Paul de Visscher, rejected the 'suprana-

[36] E. Greppi, 'A propos du caractère supranational de la C.E.C.A. – Récentes contributions scientifiques', I *Les cahiers de Bruges. Recherches européennes* (1956) p. 25, at p. 28-30 and N. Catalano, *La Comunità Economica Europea e l'Euratom* [*The European Economic Community and Euratom*] (Giuffrè 1957).

[37] N. Catalano, 'L'Inserimento Diritto della Normativa Comunitaria negli Ordinamenti Giuridici degli Stati Membri [*Insertion The Law of Community legislation in the legal systems of the Member States*], in F. Florio and N. Catalano, *Le Comunita Europea* [*The European Communities*] (Guiffrè 1961) p. 39. For a general analysis of the Italian legal debate see: P. Ruggeri Laderchi, 'Report on Italy', in A.-M. Slaughter et al. (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context* (Hart Publishing 1998) p. 147.

[38] *Begriff und Wesen* 1954, *supra* n. 28, p. 129-175.

[39] Greppi, *supra* n. 36.

tional thesis' outright. Instead, the legal system of the ECSC was termed one of international law, although of a peculiar kind.[40] Gaudet would later privately describe the Stresa Conference as a battle between federalists and internationalists.[41] Although the view of the latter dominated the report, the younger generation of those jurists attending, such as Léontin Constantinesco, Gérard Héraud, Jean de Soto, Paul Durand and René Roblot, was unmistakeably more open to the federal interpretation.[42]

With the Treaties of Rome, two new Communities – EURATOM and the EEC – were founded, and the realities of European law changed significantly. However, it was uncertain whether – and to what extent – the new Communities would weaken European law by the establishment of three different legal systems, or whether they represented an opportunity to go beyond the modest results achieved within the ECSC.[43] The position promoted by the small group of scholars and practitioners who argued in favour of a constitutional and proto-federal understanding of European law was unquestionably still on the fringe. Instead, the academic debate on European law from 1958 to 1962 remained dominated by great uncertainty about the nature of EEC law. Many scholars argued that the most dynamic field would be the projected harmonisation of national legislation related to the functioning of the Common Market (Article 100 EEC Treaty).[44] Alternatively, as even Gaudet tended to believe up to 1962, it was also assumed that the new infringement procedure led by the Commission (Article 169, EEC Treaty) would generate the core legal dynamic.[45] Eventually, the new preliminary reference mechanism of Article 177 provided the most important impetus to the development of ECJ case-law.[46] In 1963 and 1964 two preliminary references from Dutch and Italian courts, respectively, fundamentally changed the course of

[40] J. Bailleux, 'Comment l'Europe vint au droit. Le premier congrès international d'études de la CECA (Milan-Stresa 1957)', 60 *Revue française de science politique* (2010) p. 295. See also the legal discussions of the conference in *Actes officiels du congrès international d'études sur la Communauté Européenne du Charbon et de l'Acier*, *Milan-Stresa, 31 mai – 9 juin 1957* (Giuffrè 1958-1959), vols. II and III.

[41] Michel Gaudet to Eric Stein, 18 March 1958. ESP, 6, Gaudet.

[42] Note à Messieurs les membres de la Haute Autorité. Objet: Débat juridique au Congrès de Stresa. 3 juillet 1957. HAC.CEAB.1030.

[43] Michel Gaudet to Donald Swatland, 31 Dec. 1957. AJM, AMK 30/3.

[44] For example, R. Lecourt and R.-M. Chevallier, 'Chances et malchances de l'harmonisation des législations européennes', 43 *Recueil Dalloz* (1963) p. 273. Harmonisation of law was also Eric Stein's main research interest in the 1960s.

[45] Michel Gaudet to Jean Rey, 21 Jan. 1962. FJM, Archives Michel Gaudet [hereafter: AMG], Chronos 1961.

[46] This was a possiblity Gaudet also explored with great care in 1961-1962. See M. Rasmussen, 'Revolutionising European Law – A History of the *Van Gend en Loos* judgment', 12 *International Journal of Constitutional Law* (2014) p. 1.

European law and offered the legal service a chance to promote a constitutional interpretation of the nature of European law.

Legitimating the case-law of the European Court of Justice – European Law Academia, 1963-1978

With these two judgments – *Van Gend en Loos* (1963) and *Costa* v. *E.N.E.L.* (1964) – the ECJ finally took a decisive step towards defining and describing the nature of European law.[47] Avoiding politically contested notions such as 'constitutional' or 'federal', the Court nevertheless chose sides in the debate described above. Focusing on the question of European law enforcement of Article 12 (EEC Treaty) related to the *Van Gend en Loos* case, the Legal Service wanted the ECJ to address what it perceived as the two major weaknesses in the compliance of member states with international law. These were the lack of uniform application of international legal norms by national courts functioning in different legal and constitutional contexts; and the lack of primacy granted to international law in member states, in particular Germany and Italy. According to Gaudet, only the direct effect of European legal norms of sufficient clarity and their primacy *vis-à-vis* both prior and posterior national law could solve this. However, the possible direct effect and primacy of a European legal norm should in each instance be determined by the ECJ through the mechanism of preliminary references and not by the means of a general '*Durchgriff* thesis' as promoted by Ipsen, Ophüls and Catalano in the scholarly debate.[48] Finally, the legal basis for the introduction of direct effect and primacy was found in the EEC Treaty by the means of a teleological reading of the objectives of the latter and by pointing to those elements in treaty text, as well as in the institutional framework, that were 'constitutional' in nature.[49]

While the ECJ needed two judgments to follow the lead of the Legal Service, its core position was identical to that of the Legal Service. It was only adopted, however, with a narrow majority of four against three.[50] During the *delibéré*, the Italian judge Alberto Trabucchi, who supported the direct effect of Article 12, turned to the recent scholarship of international law, highlighting how new types of *Staatenverbindungen* (groupings of states) might waive their sovereignty in spe-

[47] For a full treatment of the *Van Gend en Loos* judgment, consult Rasmussen, *supra* n. 46.

[48] E. Stein, 'Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the *Costa* Case', 63 *Michigan Law Review* (1965) p. 491.

[49] While the Legal Service did not use the word 'constitutional' in the *Van Gend* position, it did so to describe the same Treaty elements in the *Bosch* case a year before (ECJ 6 April 1962, Case 13/61, *De Geus en Uitdenbogerd* v. *Bosch and others*).

[50] Rasmussen, *supra* n. 2, p. 648.

cific areas to supranational institutions to seek for the proper interpretation of the nature of European law.[51] Adopting a teleological methodology, the Court drew on exactly those 'constitutional law' elements that had been inserted by legal experts during the negotiations of the Treaties of Rome and argued that European law constituted 'a new legal order', which was autonomous *vis-à-vis* national legal orders, and directly concerned national citizens. It was probably merely a tactical choice not to adopt primacy at once, and as a consequence this would have to wait for the *Costa* v. *E.N.E.L.* judgment. All in all, the ECJ carved out a proto-federal enforcement mechanism that gave litigants the possibility of invoking European legal norms with direct effect and primacy *vis-à-vis* national law before national courts. Despite the revolutionary character of these two rulings, the ECJ acted with caution, attributing direct effect and primacy only to Treaty norms that constituted obligations on the Member States not to act (like Article 12 of the EEC Treaty), thereby lessening the concrete effects of the judgments.[52] The two judgments represented a major breakthrough for the Legal Service, which for years had encouraged the ECJ to assume what Gaudet privately had called 'a constitutional responsibility'.[53]

In the aftermath of the two judgments, the Commission and the European Parliament (EP) publicly promoted the 'new legal order' in a campaign in 1964-1965 which was well-orchestrated by the Legal Service. Commission President Walter Hallstein and leading members of the EP such as Fernand Dehousse hailed the new legal understanding of the Treaties of Rome, explicitly characterising it as constitutional, and emphasising how national citizens would now be able to invoke European rights before national courts.[54] FIDE did the same at the two major conferences in The Hague (1963) on direct effect, and in Paris (1965) on primacy.[55] The scholarly debate was also enhanced by a number of institutionally related authors, who promoted and explained the new judgments of the ECJ.

[51] The memorandum is reproduced in *La formazione del diritto europeo: Giornata di studio per Alberto Trabucchi nel centenario della nascita* [*The formation of European Law: Study Day for Alberto Trabucchi on the occasion of the centennial of his birth*] (CEDAM 2008) at p. 213-223. Trabucchi cited A.Verdross, *Völkerrecht* (Springer 1959) at p. 280: 'Durch die Errichtung solcher Staatenverbindungen verzichten die Vertragsstaaten auf die Ausübung ihrer Hoheitsrechte in ihrem eigenen Staatsgebiete in bestimmten Angelegenheiten, indem sie die Ausübung dieser Rechte übernationalem Organen übertragen, welche ihre Tätigkeit auf Grund einer eigenen, vertraglich, vereinbarten Rechtsordnung ausüben.'

[52] M. Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-65', 21 *Contemporary European History* (2012) p. 375.

[53] Michel Gaudet to Donald Swatland, 31 Dec. 1957. AJM, AMK 30/3.

[54] 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.

[55] Rasmussen, *supra* n. 52, p. 394-395.

Judges Lecourt and Trabucchi, Advocate-General Lagrange and *référendaire* Paolo Gori triumphantly declared that the rulings were landmarks and that a 'new legal order' had now been created, relevant to all citizens.[56] The narrow decision in the *collegium* of judges in the *Van Gend en Loos* judgment indicates, however, that other judges and their *référendaires* were far less enthusiastic.[57] In broader academic commentary, which was dominated by jurists who had for some time worked within the emerging field of European law, the judgments were generally well received.[58] In this wave of support, it was not easy to criticise the new doctrines. This was, for example, the experience of a young Belgian international law scholar from the *Université Libre de Bruxelles* (the Free University of Brussels), Michel Waelbroeck. While supporting the *Van Gend en Loos* judgment, he could not understand why the ECJ seemingly found it necessary to go beyond international public law to justify the doctrine of direct effect.[59] At the 1963 FIDE Conference, Waelbroeck was told by Gaudet and others that it was politically inopportune to insist on the importance of international public law. To Waelbroeck, but also to another Conference participant, Danish scholar Ole Lando, the extent to which politics mixed with law at the first FIDE conferences was striking, if not outright shocking.[60]

While the 'Empty Chair' crisis in 1965-1966 demonstrated that the EC was not about to develop into a European federation, it did not deter the ECJ from dramatically developing its case-law in the late 1960s and 1970s. In fact, the Court

[56] R. Lecourt, 'L'Europe dans le prétoire', *Le Monde*, 23 Feb. 1963, p.1; A. Trabucchi, 'Un nuovo diritto' [*A New Law*], IX *Rivista di diritto civile* [*Journal of Civil Law*] (1963) p. 259; M. Lagrange, 'L'organisation, le fonctionnement et le rôle de la Cour de justice des communautés européennes', 13-14 *Bulletin de l'Association des juristes européens* (1963) p. 5; and P. Gori, 'Una pietra miliare nella formazione del diritto europeo' [*A milestone in the formation of European law*], *Giurisprudenza italiana* [*Italian Jurisprudence*] (1963) IV Sez.4a Col.49-56.

[57] For more sceptical reflections on the judgments see: S. Neri, 'Sulla natura giuridica della Comunità europea' [*The legal nature of the European Community*], 47 *Rivista di diritto internazionale* [*Journal of International Law*] (1964) p. 231, at p. 235; and A.M. Donner, 'National Law and the Case Law of the Court of Justice of the European Communities', 1 *Common Market Law Review* (1963) p. 8, at p. 14.

[58] See, for example, P. Bülov, 'Zur unmittelbaren Wirkung von Stillhalterpflichtungen im EWG-Vertrag', *Aussenwirtschaftsdienst des Betriebsberates* (1963), p. 162; P. Hay, 'Federal Jurisdiction of the Common Market Court', 12 *American Journal of Comparative Law* (1963) p. 21, at p. 36; F. Jeantet, 'Observations', II *Jurisclass Per.* (1963) at p. 13177; S. Riesenfeld and M. Buxbaum, 'N.V. Algemene Transport- En Expeditie Onderneming Van Gend & Loos c. Administration Fiscale Néerlandaise: A Pioneering Decision of the Court of Justice of the European Communities', 58 *American Journal of International Law* (1964) p. 152; F. Rigaux, 'Observations', *Journal des Tribunaux* (1963) p. 190; I. Samkalden, 'Comment', 11 *Sociaal Economische Wetgeving* [*Social and Economic Legislation*] (1963) p. 227.

[59] Michel Waelbroeck, 'Contribution à l'étude de la nature juridique des Communautés européennes, in *Mélanges offerts à Henri Rolin: Problèmes de droit des gens* (Pedone 1964) p. 496.

[60] Interview with Michel Waelbroeck (2011) and interview with Ole Lando (2011).

became even more active after 1967, due to the rise of Lecourt to the position of President and to the addition of Pescatore to the Bench. From the late 1960s onwards, the Court further strengthened the enforcement mechanism through the preliminary reference system, by controversially introducing direct effect for certain types of Council directives.[61] It expanded its jurisprudence into the field of human rights.[62] It also consolidated the implied powers of the institutions into the field of foreign policy.[63] And, finally, it began earnestly to define a set of legal norms to underpin the Common Market.[64] The reaction came promptly from national high courts; and even national governments began to take a serious interest in European law.[65] In Germany, the *Solange* ruling of the Constitutional Court in 1974 was the result of prolonged public and legal debates about whether the development of the European legal order undermined the basic rights of German citizens.[66] Similarly, the direct effect of directives was disputed by the House of Lords, and rejected by the French *Conseil d'État* in the *Cohn-Bendit* case in 1979.[67] It even contributed in no small measure to the famous 1981 *Aurillac* amendment, in which the French National Assembly proposed that national courts apply European law only with the consent of the Foreign Ministry.[68]

In academic debates, such vehement criticism of the development of European law only rarely surfaced. From the mid-1960s onwards, a proper academic field of European law was taking roots in the wake of the creation of the European law associations and FIDE. A number of specialised journals appeared,[69] often launched

[61] ECJ 6 Oct. 1970, Case 9/70, *Franz Grad* v. *Finanzamt Traunstein* and ECJ 4 Dec. 1974, Case 41/74, *Van Duyn* v. *Home Office*. F. Bignami, 'Comparative Law and the Rise of the European Court of Justice' (Biennial Conference of the European Union Studies Association, 3-5 March 2011).

[62] ECJ 17 Dec. 1970, Case 11/70, *Internationale Handelsgesellschaft GmbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* and ECJ 14 May 1974, Case 04/73, *Nold* v. *Commission.* See also B. Davies, *Resisting the ECJ – Germany's Confrontation with European Law, 1949-1979*, (Cambridge University Press 2012).

[63] ECJ 31 March 1971, Case 22/70, *Commission of the European Communities* v. *Council of the European Communities*.

[64] ECJ 11 July 1974, Case 08/74, *Procureur du Roi* v. *Benoît and Gustave Dassonville*; ECJ 8 April 1976, Case 43/75, *Gabrielle Defrenne* v. *Société anonyme belge de navigation aérienne Sabena*; and ECJ 20 Feb. 1979, Case 120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein*.

[65] B. Davies and M. Rasmussen, *From International Law to a European Rechtsgemeinschaft: Towards a New History of European Law, 1950-1979*, Publications of the European Union Liaison Committee of Historians (2014 forthcoming).

[66] Davies, *supra* n. 62.

[67] Conseil d'Etat (France) 22 Dec. 1978, *Minister of Interior* v. *Daniel Cohn-Bendit.*

[68] Bignami, *supra* n. 61.

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

by members of the European law associations, and national universities began systematically to set up Chairs of European law and to teach courses on the subject, even if the latter rarely figured as mandatory components of the Masters of Law degrees.[70] In this new academic field, scholarly debate on European law primarily focused on doctrinal analysis, in line with the European tradition for legal formalism. A survey of the new European law journals and of the FIDE reports reveals that only a few articles dealt with the fundamental nature of European law or attempted to set its development in the broader political and societal context.[71] Likewise, conferences, seminars and official celebrations of European law were often carefully orchestrated in order to include excellent and 'balanced' academics, state and community officials.[72]

When the nature of European law was occasionally discussed, the position of ECJ judges and pro-European academics was defensive. Pierre Pescatore's assessment of the ECJ's first twenty years at the sixth FIDE Conference in Luxembourg in 1973 is a typical example. Unlike a decade earlier when, speaking in Cologne on the occasion of the tenth anniversary of the Court, he had emphasised the constitutional and pre-federal nature of the Community and the Court,[73] Pescatore hardly mentioned the word 'constitutional' this time. Instead, he explained how the ECJ had 'merely' played the crucial role assigned to it by the Treaties, i.e., the obligation to uphold the law (Article 31 ECSC Treaty and Article 164 EEC Treaty). This had been done through a reading of the Treaties that identified the underlying logic of the legal order and the institutional structure of the Community.[74] He then used the latter part of his contribution to defend the Court's teleological style of interpretation, as well as the recent tendency of the ECJ to 're-ignite' policy fields hitherto blocked by Council inaction. This, according to Pescatore, did not amount to a *gouvernement des juges,* as some critics would have it. The notion '*gouvernement des juges*', he argued, originally described a conservative court overstepping the borders between law and politics by blocking an activist legislator. In the community, the situation had been the reverse.[75] Two articles published by André Donner constitute another example of the efforts by the judges to tone

[70] Bailleux, *supra* n. 24 and Mangold, *supra* n. 24.

[71] We surveyed a selective sample of volumes from *Europarecht*, *Revue trimestrielle de droit européen*, *Rivista di Diritto Europeo* [*Journal of European Law*] and *Common Market Law Review*, as well as the FIDE reports until 1980.

[72] A remarkable exception was the performance by Cambridge legal scholar C. Hamson, in 1976: C. Hamson, 'Methods of Interpretation – A Critical Assessment of the Results, Court of Justice of the European Communities' (Judicial and Academic Conference, 27-28 Sept. 1976).

[73] Pescatore, *supra* n. 22

[74] P. Pescatore, 'Rôle et chance du droit et des juges dans la construction de l'Europe', in *La jurisprudence européenne après vingt ans d'expérience communautaire* (Carl Heymanns Verlag KG 1976) p. 9, at p. 14.

[75] Pescatore, *supra* n. 74, p. 15-17.

down what the Court had done. Here the ECJ judge downplayed the constitutional elements in European law, stating that they could hardly be compared to national legal orders. In addition, both articles were an outright defence of the Court's case-law in the first half of the 1970s. The ECJ had merely behaved in the same way as any national court would have done, simply upholding the law.[76]

Whether the character of legal debate from 1965 to 1978 was a defensive reaction on the part of the ECJ and of academia in order to defend the ECJ against criticism from national legal elites and courts can only be clarified by future systematic research. In any case, the European legal academic tradition of formalist analysis took over the new field once the ECJ had by 1963-1964 defined more explicitly what constituted the nature of European law. In contrast, the period from 1950 to 1963 had witnessed an extraordinary number of studies concerned with defining what European law was. It was only after a heavy American dose of law in context, as we shall see below, that the field of European law left its formalist paradigm.[77]

The breakthrough of the constitutional paradigm, 1978-1992

It was this academic `climate` of the field of European law in the late 1970s, but perhaps also deeper differences in legal culture, which American scholar Martin Shapiro described so famously in 1980, when reviewing an article by Ami Barav:

> (…) it represents a stage of constitutional scholarship out of which American constitutional law must have passed about seventy years ago (…) It is constitutional law without politics. Professor Barav presents the Community as a juristic idea; the written constitution (the treaty) as a sacred text: the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court (the ECJ) as the disembodied voice of right reason and constitutional teleology.[78]

However, the dominance of formalist analysis would soon come to an end, as the 'law in context' would emerge as the new leading approach in the 1980s. The

[76] A.M. Donner, 'The Constitutional Powers of the Court of Justice of the European Communities', 11 *Common Market Law Review* (1974) p. 127, and A.M. Donner, *The Court of Justice as a Constitutional Court of the Communities* (University of Exeter 1978) p. 11.

[77] For a comparative discussion of the change from formalism to law in context in the European and American context consult: A. Arnull, 'The Americanization of EU Law Scholarship', in A. Arnull et al., *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008) p. 415. Anthony Arnull emphasises the broader tradition of European doctrinal analysis.

[78] M. Shapiro, 'Comparative Law and Comparative Politics', 53 *Southern California Law Review* (1980) p. 537, at p. 538.

change came from the United States, more precisely from the University of Michigan Law School at Ann Arbor. It was indeed the renowned American scholar of European law, Eric Stein, who first coined the notion that the ECJ had constitutionalised the Treaties of Rome and created a proto-federal legal order.[79] To understand the deeper normative and legal inspiration behind what would emerge as a new academic paradigm in EU law, it is worth developing in some detail the personal background of Stein.[80]

Of Jewish origin, Stein had fled from his native Czechoslovakia to the United States in 1939 and, after obtaining a doctorate in Law (J.D.) at the University of Michigan in 1942, he fought during the war in the American army. Stein lost most of his family to the Holocaust and that traumatic experience prompted him to help shape a new post-war order built on international co-operation and law in order to secure peace. Working for the US State Department from 1946 to 1955, he advised the American representatives to the United Nations and to the International Court of Justice, but eventually became very disillusioned with these new international organisations' shortcomings.[81] While he was still working at the State Department, Stein became fascinated by the ECSC's new court, so much so that he devoted an article to its first rulings, the first ever written on the subject in English.[82] In 1955, he accepted an academic position at the University of Michigan Law School and, very quickly, European legal integration became his main research and teaching subject.

To Stein, the innovative developments in Europe offered a new hope of a world order united by the rule of law. In 1955 and on several subsequent trips to Europe, Stein became acquainted with a number of European jurists and decision-makers, including in particular Michel Gaudet, with whom he quickly developed a long-

[79] See, in particular, E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', 75 *American Journal of International Law* (1981) p. 1. While he provides no definitive answer as to why and how the breakthrough happened, Avbejl does not hesitate to identify American legal scholars Eric Stein and Joseph H.H. Weiler as the primary actors behind the breakthrough of the constitutional paradigm in the early 1980s (Avbejl, *supra* n. 8). Mainly based on Eric Stein's personal archives, our research confirms that Eric Stein and Joseph Weiler were indeed the key proponents of the breakthrough. Further empirical research on other legal scholars is, however, needed to produce a more accurate picture of how the constitutional paradigm gained momentum after that breakthrough.

[80] For a proper biography, see Anne Boerger, 'At the Cradle of Legal Scholarship on the European Union: The Life and Early Work of Eric Stein', 62 *American Journal of Comparative Law* (2014 forthcoming).

[81] See for example, E. Stein, 'Jake and I. A Story of a Collaboration', 24 *Michigan Journal of International Law* (2003) p. 1009, at p. 1010-1011.

[82] E. Stein, 'The European Coal and Steel Community: The Beginning of Its Judicial Process', 55 *Columbia Law Review* (1955) p. 985. Gaudet personally wrote to Stein to congratulate him on this article. Michel Gaudet to Eric Stein, 18 May 1955. ESP, 6, Gaudet. This was the first of over 280 letters exchanged by the two jurists during the period before 1999.

lasting friendship, but also Lagrange, Donner, Pescatore, and Reuter. In 1959, the American scholar organized a six-week trip for Gaudet across the United States and, in 1962-1963, he himself spent most of his sabbatical year in Europe, funded by a Simon Guggenheim Memorial grant.[83] Having secured an office desk at the Commission's Legal Service, Stein had the unique chance of witnessing firsthand the *Van Gend en Loos* case, as he was invited by Gaudet to sit in on the briefings with the jurists preparing the Commission's position.[84]

In fact, the *van Gend en Loos* case allegedly changed his mindset regarding European law. Whereas he had seen European law as a subset of public international law, Stein was struck by the constitutional interpretation developed by Gaudet and by his own compatriot (both Czech and American) Gerhard Bebr, who had been employed by the Legal Service since 1958.[85] In his own analysis of the *Costa* v. *E.N.E.L.* ruling, published in 1965, Stein argued that the ECJ had in fact interpreted the treaties as if they were a constitution and rejected 'public international law as rationale for its power'.[86] He clearly welcomed the doctrines of direct effect and supremacy, which in his view represented an important step towards creating a united Europe and a crucial development of international law with implications for processes of regional integration globally.

Due in part to his experience during the war, Stein considered that law should serve the greater purpose of promoting international, Western and European cooperation, and, through this, peace. As a result, his legal scholarship often had a normative edge and at times he showed little patience with legal scholars who did not perhaps share the same political zeal. He reacted sharply, for example, when in private correspondence Michel Waelbroeck found it outside the jurisdiction of the Court if the *Costa* v. *E.N.E.L.* ruling implied an attempt to change the constitutional arrangements of the Member States for inserting international law into the national legal order. Stein retorted that it was crucial that the younger generation of scholars support European law supremacy and not stay prisoner of 'their own national constitutional concepts grounded in German positivism'.[87] In another case, Danish scholar Hjalte Rasmussen, who would become the first serious critic of the ECJ from the mid-1980s onwards, published a controversial interpre-

[83] Boerger, *supra* n. 80.

[84] E. Stein, 'Reminiscences of the Embryonic EEC', 34 *Law Quadrangle Notes* (1989) p. 19. Reprinted in E. Stein, *Thoughts from a Bridge. A Retrospective of Writings on New Europe and American Federalism* (University of Michigan Press 2000) p. 471.

[85] Stein 2000, *supra* n. 84, p. 472.

[86] E. Stein, 'Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case', 63 *Michigan Law Review* (1965) p. 491, at p. 513.

[87] Michel Waelbroeck to Eric Stein, 16 Dec. 1965, and Eric Stein to Michel Waelbroeck, 8 Feb. 1966. ESP, 15, Waelbroeck.

tation of the ECJ's case-law on Article 173.[88] Contesting the analysis offered on the subject by Stein and Joseph Vining,[89] Rasmussen argued that the Court had limited the standing of individuals in order to transform itself into a court of appeal. Stein first checked with his friend André Donner whether such an interpretation was tenable; when the latter rejected it, Stein contemplated publishing a piece together with Vining in the *Michigan Law Review* rebuffing Rasmussen's analysis. When Donner asked him not to quote him as a source, Stein abandoned the idea of publicly correcting the Dane.[90]

It was in part Stein's ideological zeal that led him to his famous (re-)conceptualisation of the development of ECJ case-law. This took place essentially between 1978 and 1981. In April 1978, at the American Society of International Law's conference, he organised and chaired a panel entitled 'The Emerging European Constitution'. This name, as he unapologetically admitted himself, was 'unrealistic and Pollyannaish, if not outright propagandistic'.[91] He argued, however, that there was indeed an emerging European constitution resulting from the action of the nine ECJ judges. The following year, Stein published an article entitled 'Some current thoughts on Treaty-based Federalism'.[92] On both occasions, the American jurist claimed that the ECJ had fashioned a constitutional framework in a quasi-federal image. Obviously, Stein had a first-hand understanding of that logic from his contacts with insiders from the Legal Service and the Court. But what really distinguished his analysis was the use of the American historical experience as a comparative and heuristic device to understand the development of European case-law and distil its underlying logic.

In this respect, the ambitious Bellagio Conference, which Stein organised with Terrance Sandalow, Dean of the University of Michigan Law School, in July 1979, helped him to ground his comparative approach empirically as well as theoretically. After discussing the idea of organising a major comparative research project with Gaudet in 1976,[93] Stein secured a grant from the Ford Foundation[94] to

[88] H. Rasmussen, 'Why Is Article 183 Interpreted against Private Plaintiffs?', 5 *European Law Review* (1981) p. 112.

[89] E. Stein and G.J. Vining, 'Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context', 70 *American Journal of International Law* (1976) p. 219.

[90] Stein to Donner, 26 Oct. 1979; Donner to Stein, 12 Nov. 1979; Stein to Donner, 15 Jan. 1980; Donner to Stein, 28 Jan. 1980; Stein to Donner, May 16 1980. All in ESP, 4, Donner.

[91] E. Stein et al., 'The Emerging European Constitution', 72 *Proceedings of the Annual Meeting (American Society of International Law)* (1978) p. 166, at p. 166.

[92] E. Stein, 'Some Current Thoughts on Treaty-Based Federalism', 23 *Law Quadrangle Notes* (1979) p. 24. This is a modified version of his article 'Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at The Hague Academy', 127 *Pennsylvania Law Review* (1979) p. 887.

[93] Eric Stein to Michel Gaudet, 29 Oct. 1976. ESP, 3, Bellagio Conference, 1977-1979.

[94] ESP, 3, Bellagio Conference, 1977-1979. Additional funds were also provided by the European Commission and the Rockefeller Foundation.

lead a joint European-American study on the role of the judiciary in economic integration. By bringing together leading practitioners and legal scholars from both sides of the Atlantic, Stein intended to confront, for the first time, 'the American federalist experience with the incipient federal-type legal order that is in the process of evolution, due principally to the work of the European Court of Justice in Luxembourg'.[95] This study intended to provide Europeans with 'important insights' into the role that the ECJ could play in European integration.[96] The participants of the Conference were selected with great care, in order to assure prestige and top-level scholarship. Particularly important to Stein was the participation of judges (Donner, Pescatore and Justice Potter Stewart) and of strategic members of the Legal Service of the Commission (its new Director, Claus-Dieter Ehlermann and senior advisers Paul Leleux and Rolf Wägenbaur).

Views differed with regard to the political undercurrents of the Bellagio project. Pescatore, for example, used the introduction of the resulting book to legitimise what could be perceived as federal elements in the ECJ's case-law.[97] He claimed that the project had surprisingly demonstrated 'a discovery *posteriori*', namely that the ECJ had, without knowing it, developed core doctrines similar to those applied historically by the United States' Supreme Court. This, he argued with delight, proved that, when organising a community encompassing municipal and international levels, methods of federalism came about naturally.[98] Donner, on the contrary, disliked the 'American' approach promoted by Stein. In the preliminary draft of his introductory chapter of the book, Stein asserted that the Court had a 'pro-integrationist posture', compelling Donner quickly to respond that the European judges had 'simply applied the Treaty to the full'.[99] The Court, added the former judge, 'has not had a political bias but (…) has fulfilled its political role by limiting itself to read, interpret and apply the Treaty as the legal text […]. In doing so it has done no more and no less than any judge must do'.[100] Although he pointed out to Donner that the ECJ could have in key constitutional cases opted for other 'plausible interpretations', Stein accepted to tone down some of his bias.[101] There was consequently no consensus on the usefulness of Stein's new 'political' approach to analysing European Union law.

[95] Eric Stein to Susan Garfield, 5 Sept. 1979 (Report on the Bellagio Conference for the Rockefeller Foundation). ESP, 12, Rockefeller Foundation.

[96] ESP, 3, Bellagio Conference, 1977-1979.

[97] T. Sandalow and E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe* (Clarendon Press 1982) vol. 2.

[98] Foreword by P. Pescatore in Sandalow and Stein, *supra* n. 97, p. ix.

[99] André Donner to Eric Stein, 19 June 1980. ESP, 4, Donner.

[100] André Donner to Eric Stein, 19 June 1980. ESP, 4, Donner.

[101] Eric Stein to André Donner, 3 July 1980. ESP, 5, Ehlermann.

Nevertheless, Stein kept most of his sting intact in the article that would transcend the scholarship on European law: 'Lawyers, Judges, and the Making of a Transnational Constitution', published in 1981 as the leading article of the *American Journal of International Law*. In this famous piece, Stein highlighted how the Court had interpreted the Treaties of Rome in a 'constitutional mode' by the means of its case-law and had crafted 'a constitutional framework for a federal-type structure in Europe'.[102] He completed the first version of the article by April 1980 and sent it, among others, to Ehlermann, Gaudet, Bebr, Pescatore and Barav. As he explained to Gaudet, Stein felt that this piece would present 'little interest for European scholars but attracts Americans, steeped as they are in the doctrine of legal realism'.[103] At the time, it would have been difficult to predict that Stein's 1981 piece would gain the status of a classic within only a few years. It would actually take the interest of a young but promising PhD-student at the European University Institute (EUI) to help transform Stein's article into a veritable paradigm.

A former participant in the Bellagio Conference, Mauro Cappelletti, who was an Italian law professor at the EUI and at Stanford, convinced Stein to contribute to his vast research project on European legal integration based at the EUI, Integration through Law, also comparing the European and American experiences.[104] Stein agreed to write an article on European foreign policy. It did not take long before our young Ph.D.-student, Joseph Weiler, introduced himself to Stein.[105] Besides preparing his doctoral dissertation, Weiler had been an assistant to the Law Department at the EUI since October 1978 and was one of Cappelletti's associates working on the Integration through Law research project. In February 1981, Weiler contacted Stein and sent him a selection of documents potentially useful for his research as well as his own first draft of a paper on the Foreign Affairs Committee of the European Parliament.[106] Stein reciprocated by sending Weiler his 1981 article and, although he knew 'next to nothing about [Weiler's] background', he impulsively encouraged him to apply to the University of Michigan's

[102] Stein, *supra* n. 79, p. 1.

[103] Eric Stein to Michel Gaudet, 3 July 1980, and Eric Stein to Ami Barav, 3 July 1980. See also Eric Stein to André Donner, 3 July 1980. All in ESP, 5, Ehlermann.

[104] Mauro Cappelletti to Eric Stein, 30 July 1979. ESP, 12, Rockefeller Foundation. M. Cappelletti et al., *Integration through Law: Europe and the American Federal Experience* (de Gruyter 1985). Historical research is currently being conducted on this seminal work, and will contribute to deepening our understanding of the constitutional paradigm and the influence of American experience and scholars in the development of European law. For an analysis of the *Integration through Law* by legal scholars, see D. Augenstein (ed.), '*Integration through Law' Revisited. The Making of the European Polity* (Ashgate 2012).

[105] A South-African-born Israeli, Weiler studied law at Cambridge University before joining the European University Institute in 1978.

[106] Joseph Weiler to Eric Stein, 10 Feb. 1981. ESP, 15, Weiler.

graduate studies program or even for a position as a research scholar.[107] Weiler was not then able to accept Stein's invitation as his contract at the EUI had been extended for a fourth year, but Stein's 1981 article arrived at the right time. Relying on the proceedings of the panel of the American Society of International Law's 1978 Conference, Weiler had just finished his first article on normative and decisional supranationalism[108] and was very interested in the new piece by Stein, whom he credited with the concept of 'constitutionalisation' – although at the 1978 Conference 's panel the term was only used by Gerhard Casper to denounce it.[109]

Soon after this initial epistolary exchange, Weiler and Stein met at the 75th. meeting of ASIL in Washington in April 1981: this meeting only reinforced Stein's desire to bring the young Weiler to Ann Arbor, among other reasons to work with him.[110] Quite naturally, Weiler felt 'gratified' to be noticed by 'the most prominent American expert in European law'.[111] Despite Stein's insistence, Weiler could not leave the EUI but was determined to make his 'American debut' as soon as possible. In 1982, he finished his Ph.D. thesis[112] and Stein sat on his doctoral committee. The two men seem to have quickly developed a strong friendship, based on a mutual respect for their academic abilities.[113] In 1983, while Weiler was considered for an appointment at the University of Michigan Law School, Stein provided a very positive review of Weiler's article 'The Community system: The Dual Character of Supranationalism', which was 'a distillation' of his Ph.D. Here Weiler tried to combine both the development of European law with the political field, in an overall interpretation of European integration. 'Weiler's ideas, when applied as an analytical tool to the past and to the future of the Community, produce illuminating results […] not seen articulated by anyone else', noted Stein, who concluded that the article was 'one of the few genuinely novel contributions I have seen in the last 10-15 years'.[114] In 1983-1984, Weiler spent a first year at the University of Michigan Law School as a visiting professor. Finally in 1985,

[107] Eric Stein to Joseph Weiler, 17 March 1981. ESP, 15, Weiler.

[108] J.H.H. Weiler, 'The Community System: The Dual Character of Supranationalism', 1 *Yearbook of European Law* (1981) p. 267.

[109] Joseph Weiler to Eric Stein, 31 March 1981. ESP, 15, Weiler. In J.H.H. Weiler 'Community, Member States and European-Integration – Is the Law Relevant', 21 *Journal of Common Market Studies* (1982) p. 39, Weiler referred to and quoted Stein's 1981 article at p. 41, and used 'constitutionalisation' at p. 42.

[110] Eric Stein to Joseph Weiler, 10 July 1981. ESP, 15, Weiler.

[111] Joseph Weiler to Eric Stein, 20 Aug. 1982. ESP, 15, Weiler.

[112] J.H.H. Weiler, *Supranational Law and the Supranational System: Legal Structure and Political Process in the European Community* (EUI 1982).

[113] See, for example, Eric Stein to Peter Westen, 7 Sept. 1983. ESP, 15, Weiler.

[114] Eric Stein to Peter Westen, 24 Oct. 1983. ESP, 15, Weiler.

Weiler became a faculty member, which he remained until 1992, when he joined the Harvard Law School faculty.[115]

During these years at Ann Arbor, Weiler produced a number of important articles, leading onwards to his crowning achievement, 'The Transformation of Europe', published in *Yale Law Journal* in 1991, which to a large extent represented a fusing of Stein's 1981 argument and Weiler's original interest in interpreting European legal integration in parallel with the development of political integration. It was during these years that Weiler attained academic stardom. This was undoubtedly the result of his original work on European law, but certainly also caused by the new optimism and interest surrounding all dimensions of European integration following the 1986 Single European Act. With the coming of the European Single Market, the new dynamic of the Community, the end of the Cold War and the formation of the European Union, Weiler's (and Stein's) constitutional thesis about European law made sense not only as an argument of law, but also as a deeper argument about the nature of the European Community. In 1986 and 1991, the ECJ itself changed its politics of the 1970s, referred to the treaties' constitutional nature and described them as the constitutional charter of European law.[116] Likewise, judges such as Federico Mancini and Koen Lenaerts openly admitted that the Court had – successfully in their view – 'constitutionalised' the treaties and created a proto-federal legal order.[117]

With the 'tectonic plates' moving on the European continent in 1989-1990, with the end of the Cold War and the creation of the European Union on the basis of the Treaty of Maastricht, the study of European integration once again became fashionable in American social sciences. A group of young American political scientists, including Anne-Marie Slaughter, Karen Alter, Alec Stone Sweet, Daniel Kelemen and others became fascinated by the development of European law and the role of the Court of Justice. These young social scientists would read Weiler, meet him and use the constitutional paradigm as a reference. With its American comparative `take` on European law, it was not too difficult for this bright new generation of scholars to begin to spread the theory of constitutionalisation beyond the realms of European law. From there, the notion that the Court of Justice constitutionalised the Treaties of Rome and gained a constitutional role

[115] See 'Continental "Imports" Enrich Law School Faculty', 30 *Law Quadrangle Notes* (1986).

[116] ECJ 23 April 1986, Case C-294/83, *Parti écologiste 'Les Verts'* v. *European Parliament*.

[117] F. Mancini, 'The Making of a Constitution for Europe', 26 *Common Market Law Review* (1989) p. 595 and K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism, 38 *American Journal of Comparative Law* (1990) p. 205. Koen Lenaerts was also influenced by the 'American experience'. After studying law and public administration at Harvard in the late 1970s, he earned in 1982 a PhD. degree in Law from the Katholieke Universiteit Leuven (Catholic University of Louvain) with a thesis comparing the constitutional case-law of the European Court of Justice and the American Federal Supreme Court.

became a standard assumption not only in EU law, but in European studies in general.

Conclusion

The constitutional discourse was present in European law from the very beginning. In the negotiations for the Treaty of Paris and, later, for the Treaties of Rome, a constitutional approach to the construction of Europe was present among key negotiators, even if they failed to shape the treaties fundamentally. Instead, the latter remained based on international law, but with strong elements of administrative and even constitutional law present. As a result of the inability of European institutions, including the ECJ, to define more clearly the nature of the European legal order, early scholarly debate on the legal nature of the European construction remained diffuse and unsettled. In this early landscape of European Union law, the constitutional discourse emerged, most often promoted by institutional actors such as the Legal Service of the High Authority/Commission, arguing that the true nature of European Union law went beyond international law and was rather of a constitutional or federal nature. Perceived both by the community of international law professors and among national legal elites as primarily a political argument, the constitutional discourse made at first very little impact academically. The lack of an institutional infrastructure for a proper academic field before the mid-1960s did not help.

The constitutional discourse did not have much impact before 1963. However, this changed when the ECJ, inspired by the Legal Service's constitutional approach to European law as well as by the constitutional literature, issued first the *Van Gend en Loos* judgment and then the *Costa* v. *E.N.E.L.* judgment, in 1963 and 1964 respectively. Here the Court introduced the doctrines of direct effect and of the primacy of European Union law and, crucially, differentiated it from international public law. Probably to avoid political controversy, the ECJ conceptualised European law as a 'new legal order' (a concept used in *Costa* v. *E.N.E.L.*), and this understanding would serve as the core ideology of the new field of European law. From the mid1960s, a genuine academic field of European law began to take shape, with member states' universities more systematically beginning to offer teaching in the subject, the establishment of European law associations and the launching of new law journals dedicated to European Union law. In terms of debate, the tone changed significantly from the early period. Instead of explicit debates on the nature of European law, the new legal scholars of EU law took the framing of a 'new legal order' as a starting point and adopted a 'formalist' analysis of the Court's case-law. This positivist defence of the ECJ was probably deemed necessary in a historical period of European integration from 1963 to 1978, which not only

demonstrated a relative lack of political enthusiasm for further integration among national governments, but also a period where the ECJ, through audacious case-law, pushed the boundaries of European Union law to their limits.

The impetus to bring out into the open the constitutional nature of the 'new legal order' would come not from European institutional actors, but from the outside. Closely connected to the pro-European Union legal elite, influenced by the American federal experience, and driven by his personal background to consider European Union law with a normative edge, Eric Stein undeniably played a crucial role in the establishment of a constitutional discourse. Although elements of his constitutional analysis were already part of his earlier work, he ultimately articulated how the ECJ had 'fashioned a constitutional framework for a federal-type structure in Europe' in his famous 1981 article in the *American Journal of International Law*. Within months of publishing the article, Stein met Joseph Weiler, who himself was involved in a major project – *Integration through Law* – promoting a more contextual understanding of EU law. The immediate and strong intellectual bond between the two scholars largely contributed to the propagation of the constitutional discourse. At a time when the European political context from the mid1980s onwards triggered a revival of academic interest in European studies, Weiler built on Stein's work and produced very influential research, which helped to transform the constitutional discourse into the prevailing paradigm in EU law. Ultimately, their success was due not only to their academic prowess, but depended on the success of the European project more generally.

In conclusion, this article demonstrates the extent to which the constitutional discourse in European law originally came primarily from actors inside or closely associated with the European Union`s institutions (or with the German Foreign Ministry).[118] Taking the Legal Service of the Commission as perhaps the most prominent example, it promoted the constitutional discourse in its positions before the ECJ during court cases, in academic writings, but also by financing and promoting the establishment of a proper academic field of European law in the 1960s and 1970s and most probably continued to do so into the 1980s. With the *Van Gend en Loos* and *Costa* v. *E.N.E.L.* judgments, the ECJ clearly followed the lead of the Commission. Moreover, even if the Court may have been split on the nature of European Union law, prominent judges such as Robert Lecourt, Pierre Pescatore, Federico Mancini and Koen Lenaerts would, over time, promote a constitutional approach to European law. However, support for the constitutional discourse came

[118] We essentially confirm the analysis of H. Schepel and R. Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', 3 *European Law Journal* (1997) p. 165 but, crucially, add that institutional actors from the Commission and the ECJ tended to back the constitutional narrative throughout the period analysed. That appears to be so even if personal preference still played a role, as can be seen with the cautious and more reluctant position taken by Donner, for example.

also from actors inside the academic field. Key academics such as Eric Stein, for example, clearly pursued a constitutional interpretation of European law from the mid-1960s onwards. In fact, one may argue that the entire field of EU law as it developed from the early 1960s onwards was wedded to the ECJ's 'new legal order' definition of the nature of European Union law. It was this differentiation of EU law from international law that not only offered the field its core ideology, but also helped to define it as an independent field of law to be studied and organised.

Finally, the article demonstrates the mixture of motives that drove key protagonists. To institutional actors, the empowerment of the European Union's institutions played a key role. Without a solid European Union legal order, the Common Market, and thus the European 'project' would surely have been endangered, in the view of people like Michel Gaudet, for example. However, at the same time European ideology played a key role. This was, for example, the case with Stein, who would lecture the young Waelbroeck about the necessity of keeping a European perspective in the analysis of European law. What emerges from the article is the extent to which the constitutional discourse and later the constitutional paradigm in European law was politically and ideologically motivated, in order to strengthen the European Union's institutions and to promote the emergence of a European federation.