

# THE NEW EU LEGAL HISTORY: WHAT'S NEW, WHAT'S MISSING?

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For decades following its establishment in the 1951 Treaty of Paris, the European Court of Justice (“ECJ”) was studied largely, indeed almost exclusively, by legal scholars.<sup>1</sup> During these years,

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1. *See generally* Treaty Establishing the European Coal and Steel Community art. 7, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter Treaty of Paris] (establishing the European Court of Justice as one of the four institutions of the European Coal and Steel Community).

lawyers both participated in and chronicled the development of ECJ jurisprudence, culminating in the so-called “constitutionalization” of the treaties and the establishment of a new legal order that permeated those of the individual Member States. More recently, drawing inspiration in part from legal scholarship and in part from the revival of the European integration process in the late 1980s, political science scholars “discovered” the ECJ and the process of European legal integration in the 1990s. This discovery produced a sort of golden age of law-and-politics research on the ECJ, its behavior, its interactions with Member governments and with national courts, and its role in the process of European integration broadly conceived.<sup>2</sup> Along the way, political scientists adopted some basic assumptions that informed nearly all of their analyses, engaged in theoretical debates that posed important causal questions and sharpened their respective analytical frameworks, and reached at least tentative empirical conclusions about the nature of the ECJ and its role in the European Union (“EU”) political system.<sup>3</sup>

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2. The legal scholarship on the ECJ is, of course, too voluminous to cite. *See generally, e.g.*, PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* (5th ed. 2011) (providing an overview of ECJ jurisprudence and EU legal scholarship); THE EUROPEAN COURT AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE (Anne-Marie Slaughter et al. eds., 1998) [hereinafter THE EUROPEAN COURT AND NATIONAL COURTS] (reviewing the dynamic between the European Court and Member State Courts); G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 597 (1989) (arguing that national courts in Europe are indirectly responsible for the “boldest” decisions that the ECJ has ever made); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981) (studying “the positions of the Commission [of the European Communities], the member governments and the Advocates General before the Court, and . . . the opinions of the Court itself”); J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510 (1994) [hereinafter Weiler, *Quiet Revolution*] (examining the ECJ’s role in European integration); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (positing that the ECJ’s interpretation of treaties has created an entity more closely resembling a federal state).

3. *See generally* Karen J. Alter, *The European Court and Legal Integration: An Exceptional Story or Harbinger of the Future?*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 209 (Keith E. Whittington et al. eds., 2008) [hereinafter Alter, *The European Court and Legal Integration*] (assessing the legislative narrative, the international relations narrative, and the comparative politics narrative about the ECJ’s role in European integration); Lisa Conant, *Review Article: The Politics of Legal Integration*, 45 J. COMMON MKT. STUD. 45 (2007) (placing legal integration in the context of legal scholarship, political science, and comparative politics);

Historians, in turn, “discovered” the EU and its history several decades ago, looking back at the origins of the Union, the negotiation of its founding treaties, and the political debates of its early years.<sup>4</sup> Yet, as Bill Davies and Morten Rasmussen have pointed out, this first wave of EU history focused almost exclusively on political and economic factors, and said little about the legal side of European integration or the role of the ECJ.<sup>5</sup> The early years of EU legal integration, including such pivotal cases as *Van Gend en Loos* (1963)<sup>6</sup> and *Costa v. ENEL* (1964),<sup>7</sup> were therefore studied initially not by historians but by legal scholars, practitioners, and political scientists, who put forward compelling accounts but did not generally avail themselves of the type of archival resources consulted by historians of the EU.<sup>8</sup>

That oversight has now been—or is starting to be—rectified, with the emergence of what I will call the New EU Legal History. In works like the August 2012 special issue of *Contemporary European History* titled “Towards a New History of European Law,”<sup>9</sup> and in other recent works,<sup>10</sup> a growing number of historians have turned

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Alec Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, 5 LIVING REVS. EUR. GOVERNANCE 1 (2010) (taking the position that, as a trustee of the treaty system, the ECJ has instigated a Europeanization of Member States’ national law).

4. Primary-source historical research on the early history of European integration has grown dramatically over the past two decades, starting with the pioneering work of Alan Milward. See ALAN S. MILWARD, *THE EUROPEAN RESCUE OF THE NATION-STATE* (1992); ALAN S. MILWARD ET AL., *THE FRONTIER OF NATIONAL SOVEREIGNTY* (1993); see also, e.g., FRANCES M. B. LYNCH, *FRANCE AND THE INTERNATIONAL ECONOMY* (1997); *THE HISTORY OF THE EUROPEAN UNION: ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950-72* (Wolfram Kaiser et al. eds., 2011); *ORIGINS AND EVOLUTION OF THE EUROPEAN UNION* (Desmond Dinan ed., 2006).

5. Bill Davies & Morten Rasmussen, *Towards a New History of European Law*, 21 CONTEMP. EUR. HIST. 305, 310 (2012).

6. Case C-26/62, *Van Gend en Loos v. Administratie der Belastingen*, 1963 E.C.R. 1.

7. Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585.

8. See, e.g., Alter, *The European Court and Legal Integration*, *supra* note 3, at 211–24; Stein, *supra* note 2, at 3 (admitting that the author consulted a “small sampling” of cases when constructing an account of European legal integration).

9. 21 CONTEMP. EUR. HIST. 305–505.

10. E.g., BILL DAVIES, *RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY’S CONFRONTATION WITH EUROPEAN LAW, 1949-1979* (2012); PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-*

their attention to the archival record of the early years of European *legal* integration. This new historical focus has generated novel questions and provided important insights about long-standing disputes about the initial design of the Court by the Member States; about the nature and preferences of the Court and its judges; about the independence of those judges from the Member governments of the Union; about the allied yet ambivalent relationship between the Court and its counterparts in national legal systems; and more generally about the process of “constitutionalization” in which the EU created what Rasmussen calls “constitutional practice.”<sup>11</sup> In a parallel development, a group of political sociologists led by Antonin Cohen and Antoine Vauchez has looked back at some of these same events, employing archives and other contemporary sources in an effort to re-create the social world of the Court, its judges, and its various interlocutors in the transnational European legal community.<sup>12</sup>

My aim in this article is not to summarize this New EU Legal History in its entirety, but rather to ask, from the perspective of a political scientist, what is *new*—what value-added insights have emerged about the early Court vis-à-vis existing political science and legal scholarship—as well as what is still *missing*—namely, what important questions remain to be addressed by EU legal historians. The article, accordingly, is organized in four parts. First, I provide a brief summary of some of the primary themes of recent political science scholarship on the ECJ, identifying four primary questions and debates from that literature. Second, I look to the New EU Legal History, asking what genuinely new insights, if any, this historical scholarship has generated with respect to each of these four

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STATE (2010).

11. Morten Rasmussen, *Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65*, 21 CONTEMP. EUR. HIST. 375, 395–96 (2012) [hereinafter Rasmussen, *Establishing a Constitutional Practice of European Law*] (describing the development of a “constitutional practice” instigated by the landmark ECJ decisions *Van Gend en Loos* and *Costa v. E.N.E.L.* as a progression toward a federalist legal structure stronger than any international organization).

12. See Antonin Cohen & Antoine Vauchez, *Introduction: Law, Lawyers, and Transnational Politics in the Production of Europe*, 32 LAW & SOC. INQUIRY 75 (2007); Antonin Cohen & Antoine Vauchez, *The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited*, 7 ANN. REV. L. & SOC. SCI. 417 (2011).

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questions. I argue that EU legal historians have indeed challenged some widely held assumptions in the political science literature and also helped to adjudicate among long-standing, and competing, theories of judicial politics and European integration. Third, I identify a series of potentially interesting and important questions that remain underexplored by legal historians, and I issue a plea for historians to engage these questions as well. A brief fourth section concludes.

## I. POLITICAL SCIENCE: RECEIVED WISDOM AND ONGOING DEBATES

The political science literature about the ECJ over the past two decades is vast, theoretically and methodologically diverse, and in some instances riven by serious debates and divides among scholars about issues like the independence of the Court from the Member governments, or the nature of the Court's relationship with national courts. The content of this literature has been well examined elsewhere,<sup>13</sup> and so I focus selectively here on political scientists' theoretical arguments and empirical findings on just four key questions: (1) the nature and preferences of the Court; (2) the independence of the Court from the Member States; (3) the relationship between the Court and its national counterparts; and (4) the process of constitutionalization of the treaties. My aim here is not to do justice to the complexity of the literature, but to establish a baseline of political science arguments and evidence against which we can assess the contribution of the new EU legal historians.

### A. THE NATURE AND PREFERENCES OF THE COURT

The first of these questions, the nature and the preferences of the Court, is in some ways the most fundamental: What kind of actor is the European Court of Justice, and what does it want? Interestingly, however, neither of these questions has been a primary focus of empirical research for political science scholars, who, with a very

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13. See, e.g., Alter, *The European Court and Legal Integration*, *supra* note 3, at 212 (examining legalist, international relations, and comparative politics scholarship relating to the ECJ and its position within the EU); Conant, *supra* note 3, at 46–58 (providing a broad overview of legal and political scholarship relating to the EU's legal system).

few exceptions, have contented themselves with untested *assumptions* about each of these two key points.

With respect to the Court's nature, nearly all political science analyses of the Court—whether qualitative or quantitative, neofunctionalist or intergovernmentalist, rationalist or constructivist—adopt the convenient and parsimonious assumption of treating the Court as a unitary actor, ignoring any potential differences among the judges.<sup>14</sup> This is not a trivial assumption. It is of course well known to scholars of U.S. law and courts that individual judges often vote in strikingly and systematically different ways,<sup>15</sup> and the ECJ itself has grown and become ever more diverse in recent decades,<sup>16</sup> yet political science scholars have generally followed legal scholars in treating the ECJ as a unitary body.<sup>17</sup> The reason for this is relatively straightforward: throughout its entire history, the ECJ has followed the lead of most European civil-law courts, deliberating in secret and issuing only a single *per curiam* decision of the Court, with no dissenting or concurring opinions and no indication of which judges voted in favor of or against the majority decision of the Court.<sup>18</sup> Furthermore, individual judges have

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14. See Antoine Vauchez, *Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, 4 EUR. POL. SCI. REV. 51, 52 (2012) [hereinafter Vauchez, *Keeping the Dream Alive*] (questioning the lack of “accounts as to how such a diverse group of 27 judges from different European countries with distinct legal traditions and professional backgrounds would spontaneously and continuously converge on what a ‘rational’ judicial decision means”).

15. See, e.g., M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283 (2007) (analyzing the use of dissents in U.S. Supreme Court cases).

16. Presentation of the Members, COURT OF JUSTICE OF THE EUROPEAN UNION, [http://curia.europa.eu/jcms/jcms/Jo2\\_7026/](http://curia.europa.eu/jcms/jcms/Jo2_7026/) (last visited Apr. 5, 2013).

17. As Vauchez writes, scholars “in the realm of political science have, so far, taken ‘the Court’ as their basic unit of analysis without ever questioning its very existence as one cohesive entity . . . . Although they may disagree about whether the ECJ is an agent of the Member States or a more independent and strategic actor, they assume the existence of a Court, analyzed in an anthropomorphic manner, that is, as a unitary and trans-historical collective with a clear-cut idea of its own interests in EU politics . . . .” Vauchez, *Keeping the Dream Alive*, *supra* 14, at 52.

18. See Treaty Establishing the European Coal and Steel Community, Protocol on the Statute of the Court of Justice, art. 2, 29, Apr. 18, 1951, 261 U.N.T.S. 140 (requiring that deliberations occur in secret and that judges take an oath to preserve the secrecy of deliberations); *id.* art. 30 (requiring that judgments include the

strictly observed the formal and informal norm of deliberating in secret, providing scholars with few, if any, glimpses into the Court's internal deliberations, the possible differences of opinion among the judges, or the degree of division or consensus among the judges on any given decision.<sup>19</sup> Faced with such a closed court, both legal and political science scholars have made a virtue of necessity, treating the Court as a single body, ignoring the diversity of backgrounds and views of its judges, and imputing preferences to the Court as a whole.<sup>20</sup>

This brings us to the question of the substantive or policy preferences of the Court. Here again, both legal and political science scholars are nearly unanimous in adopting a simple, parsimonious assumption about what the court *wants*. Specifically, most political scientists have adopted the assumptions of game theorists who posit a one-dimensional political space, bounded at one extreme by

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names of judges who deliberated but not requiring that their votes be recorded).

19. The EU legal system does feature another civil-law institution, that of the Advocate-General charged with preparing a draft opinion for the Court, from which the members of the Court (or, in contemporary practice, a significantly smaller panel of judges) are free to depart in their own ruling. The institution of the Advocate-General does arguably serve as a rough functional equivalent to a dissenting or concurring opinion, insofar as the Court may diverge openly from the suggestions of the Advocate-General, but it still leaves the observer guessing as to the size and identity of the deciding majority and dissenting minority, as well as the arguments and voting behavior of the judges during deliberation. NOREEN BURROWS & ROSA GREAVES, *preface* to *THE ADVOCATE GENERAL AND EC LAW* (2007); Michal Bobek, *A Fourth in the Court: Why Are the Advocates-General in the Court of Justice?*, 14 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* (2012); Kirsten Borgsmid, *The Advocate General at the European Court of Justice: A Comparative Study*, 3 *EUR. L. REV.* 106, 107 (1988); Alan A. Dashwood, *The Advocate General in the Court of Justice of the European Communities*, 2 *LEGAL STUD.* 202, 202 (1982); Cyril Ritter, *A New Look at the Role and Impact of Advocates-General—Collectively and Individually*, 12 *COLUM. J. EUR. L.* 751, 757 (2006) (“The overall message is that the AG is not an entity ‘outside the Court’ but rather a Member of the court itself who offers his opinion in order that his colleagues arrive at the best legal solution.”).

20. As Vauchez writes,

accessing the internal functioning of the Court . . . remains a far remote perspective in Luxembourg. The ECJ has not only remained strikingly silent about its decision-making process (absence of dissenting opinions, non-publication of reports of hearings, etc.), but has also more generally maintained a strenuous secrecy concerning its internal functioning (non-disclosure of archive). It takes some shrewdness on the part of the researcher to circumvent such lack of access.

Vauchez, *Keeping the Dream Alive*, *supra* note 14, at 58.

national sovereignty and at the other by supranational centralization of authority at the European level. The Court, like the supranational European Commission and European Parliament, is assumed to have preferences toward the supranational end of the scale.<sup>21</sup> Put simply, legal and political science scholars have treated all of the EU's supranational institutions as favoring "more Europe," which implies both a transfer of power from the national to the European level and an augmentation of the institution's own powers.<sup>22</sup>

Among rational-choice scholars in political science, this assumption is deductive, posited as the premise of a model, but not subject to empirical testing. In the legal literature, by contrast, the claim that the Court is pro-integrationist is inductive, based on an extensive reading of the Court's decisions and the off-the-bench writings of judges like Pierre Pescatore, who famously referred to the Court as having "*une certaine idée de l'Europe*."<sup>23</sup> Trevor C. Hartley summarizes much of this literature when he writes that:

One of the distinctive characteristics of the European Court is the extent to which its decision-making is based on policy. By policy is meant the values and attitudes of the judges—the objectives they wish to promote. The policies of the European Court are basically the following:

1. Strengthening the Community (and especially the federal elements in it);
2. Increasing the scope and effectiveness of Community law;
3. Enlarging the powers of Community institutions.

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21. See Antoine Vauchez, *The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU Polity*, 16 EUR. L.J. 1, 15–16 (2010) [hereinafter Vauchez, *The Transnational Politics of Judicialization*] (highlighting the view that *Van Gend en Loos* became "the first arch of a bridge meant to entirely overcome the barrier between the sovereignties of the different Member States" (internal quotation marks and citation omitted)).

22. See Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149, 155 (1998) (depicting the court as a sophisticated strategic actor, with "a clear institutional interest in extending the scope of Community law and its authority to interpret it"); see also George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INT'L ORG. 357, 361–65 (2001) (reviewing studies on the role of supranational institutions in the creation of "more Europe").

23. Pierre Pescatore, *The Doctrine of Direct Effect: An Infant Disease of Community Law*, 8 EURO L. REV. 155, 157 (1983).



These may be summed up in one phrase: the promotion of European integration.<sup>24</sup>

Other legal scholars concur, with both advocates and critics of the Court painting a picture of an institution that has produced, from the early 1960s to the present, a consistently pro-integrationist body of jurisprudence.<sup>25</sup> In short, a virtual consensus exists among otherwise diverse disciplines and otherwise hostile schools of thought that the Court should be studied as a unitary actor with a consistent, decades-long preference for European integration. This consensus breaks down, however, when we turn to our next question, namely whether the Court is able to follow its preferences in the face of Member State opposition.

#### B. JUDICIAL INDEPENDENCE: COMPETING VIEWS

For political scientists interested in explaining a policy outcome like the progress of European integration, the nature and preferences of the ECJ are of interest primarily insofar as the Court enjoys the ability to act on those preferences and advance the cause of integration beyond what the Member States would otherwise agree to undertake. This ability, in turn, relies on the Court's independence from Member governments, for it was the Member governments that created the Court through the treaties, that appoint and reappoint the Court's judges for renewable six-year terms, and that can overrule judicial decisions through new treaties or legislative acts.<sup>26</sup> On this

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24. "A certain idea of Europe." T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 77 (2d ed. 1988).

25. See, e.g., HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING* 3 (1986) (arguing that "the Court has, almost whenever possible, given priority to the necessity for a coherent and comprehensive European legal, social, economic and political order"); Pierre Pescatore, *Les Travaux du "Groupe Juridique" dans la Négociation des Traités de Rome*, 34 *STUDIA DIPLOMATICA* 159, 177-78 (1981) ("When, with a distance of 20, almost 25 years, we try today to take stock of what the Treaties of Rome have proven to be and how it has brought to life the European Community, we see that the practice has progressed and still progresses today by a small number of provisions: on one hand, the basic rules on free movement, non-discrimination, competition . . . on the other hand the institutional apparatus, the legal system, the judicial system.").

26. See Treaty of Paris, *supra* note 1, art. 32b\* ("[The judges] shall be appointed by common accord of the Governments of the Member States for a term of six years."); Garrett et al., *supra* note 22, at 150 ("[Governments] can also press

question of judicial independence, political science scholars have been deeply divided, with three primary schools of thought.

The first of these schools is the intergovernmentalist approach, associated primarily with Geoffrey Garrett and his co-authors.<sup>27</sup> The essential intergovernmentalist claim is that the ECJ is profoundly constrained by pressure from EU Member governments, who have the option to push back against the court in a variety of ways, including most notably the threat of unilateral non-compliance or legislative overruling of adverse ECJ opinions.<sup>28</sup> These Member States, Garrett argued, had established the ECJ as a means to solve problems of incomplete contracting and monitoring compliance with EU obligations, and they rationally accepted ECJ jurisprudence, even when rulings went against them, because of their longer-term interest in the enforcement of EU law.<sup>29</sup> In such a setting, the ECJ might identify “constructed focal points” among multiple equilibrium outcomes, but the Court was unlikely to rule against—and indeed was profoundly sensitive to—the preferences of powerful EU Member States.<sup>30</sup> Carrubba, Gabel, and Hankla recently advocated this view, undertaking a quantitative analysis of ECJ decisions from several decades and positing that the threat of noncompliance and legislative overruling exerts a powerful constraint on the Court’s jurisprudence.<sup>31</sup>

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for the passage of new secondary EU legislation . . . or even revision of the EU treaty base . . .”).

27. See, e.g., Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173 (Judith Goldstein & Robert O. Keohane eds., 1993); Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 INT'L ORG. 533 (1992) [hereinafter Garrett, *International Cooperation*]; Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995) [hereinafter Garrett, *Politics of Legal Integration*]; Garrett et al., *supra* note 22.

28. Garrett et al., *supra* note 22, at 150.

29. *Id.*

30. See Garrett & Weingast, *supra* note 27, at 181–85 (describing “constructed focal points” as institutions “that might provide the basis of a shared belief system”).

31. Clifford J. Carrubba et al., *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 435, 440–50 (2008). *But see* Alec Stone Sweet & Thomas Brunell, *The European Court of Justice, State Noncompliance, and the Politics of Override*, 106 AM. POL. SCI.

A second view, at the other theoretical extreme, is offered by neofunctionalist theorists and by many legal scholars, who argue that the Court, *as a legal body*, is profoundly independent and largely unconstrained by EU member governments, which have generally been reduced to largely ineffective reactions against adverse (integrationist) legal rulings. In their neofunctionalist account of European legal integration, Anne-Marie Burley and Walter Mattli argued that the Court's language of the law acted as both as a "mask" for the policy implications of the Court's doctrinal interventions—which were not immediately evident to the Member States—and as a "shield" against political attacks.<sup>32</sup> In this view, landmark rulings like *Van Gend, Costa*, and the later *Cassis de Dijon*<sup>33</sup> were the audacious acts of a highly independent court, to which Member States were largely powerless to respond.<sup>34</sup>

In the most extreme articulation of this view of an unconstrained Court, Karen Alter has argued that the ECJ, as well as other international courts, should be thought of as the "trustees" of their Member States.<sup>35</sup> Because the ECJ is a legal body, Alter argues,

the venue and deliberative style in which interpretive politics takes place is very different from the negotiating table dominated by state actors. Courtroom politics take place in an environment highly constrained by law and legal procedure, where judges have a privileged position because they get to ask the questions, decide what is and is not relevant, and determine the outcome.<sup>36</sup>

Under such conditions, efforts by governments to influence courts

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REV. 204 (2012) (arguing that Carrubba, Gabel, and Hankla's data cannot support the claim that legislative overrule is a serious threat to the Court's rulings).

32. Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 72–73 (1993). For neofunctionalists, the ECJ was also protected against Member State retaliation through its alliance with national courts, a point to which we shall return presently. See *infra* notes 52–54 and accompanying text.

33. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649.

34. See Burley & Mattli, *supra* note 32, at 51 (noting that, in these decisions, the Court followed the lead of the Commission by pushing the Member States toward maximum integration, rather than following the positions of the Member States themselves).

35. Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT'L REL. 33 (2008) [hereinafter Alter, *Agents or Trustees?*].

36. *Id.* at 47.

through political pressure will be ineffective. Instead, states seeking to influence court decisions will be channeled toward either “rhetorical politics,” in which actors attempt to persuade judicial actors in the language of the law, or “legitimacy politics,” in which actors attempt to influence the public perception of the legitimacy of a court’s decision, or indeed of the court itself.<sup>37</sup>

A third view, located between these two extremes, is that of principal-agent analysis, which conceives of the Court, and other supranational bodies such as the Commission, as the “agent” of Member State “principals.” Principal-agent scholars, like intergovernmentalists, see the Court as a creature of the Member States, which have delegated (and in some areas, such as criminal justice and foreign affairs, withheld) the authority to interpret EU law and to rule on member states’ compliance with it.<sup>38</sup> The independence or discretion of the Court, in this view, is a function of the powers delegated to it, mitigated by the various control mechanisms available to the Member States, including the power of judicial appointment and reappointment, the possibility of legislative overruling of court decisions through new legislation or treaty revision, and ultimately the threat of noncompliance with Court decisions.<sup>39</sup>

Principal-agent scholars have argued that the Court does indeed possess remarkable authority—at least within the traditional European Community “pillar” of the Union—and that the various control mechanisms available to the Member States are all difficult and costly to use.<sup>40</sup> For example, the power of judicial appointment and reappointment provides Member States with potential influence over their own nominees to the Court, particularly because judges are susceptible to reappointment following their six-year terms. The EU

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37. *Id.* at 35–36.

38. *E.g.*, MARK A. POLLACK, *THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY AND AGENDA SETTING IN THE EU* 155–202 (2003) (examining the patterns of delegation of authority to the ECJ and the Court’s exercise of discretion).

39. *E.g.*, *id.* at 156 (regarding the ECJ “as the *object* of the delegation rather than as a *subject* attempting to make use of its relatively large discretion to pursue its own agenda” (emphasis in original)).

40. *See generally id.* at 155–202 (analyzing the jurisdiction afforded the ECJ as well as the control mechanisms Member States can employ, namely appointment, legislative overruling, and unilateral non-compliance).

judicial appointment process is, however, radically decentralized, leaving each Member government the power to influence only the choice of its own nominee.<sup>41</sup> ECJ judges, moreover, have guarded against the threat of Member State retaliation for adverse votes by adopting a strict rule of deliberating in secrecy and issuing only *per curiam* rulings with no dissenting votes or opinions. As for the threat of legislative overruling, principal-agent scholars point out that the barriers to such action are high, requiring either a qualified majority vote to adopt new secondary legislation or a unanimous vote and national ratification to adopt changes to the treaties.<sup>42</sup> Noncompliance, finally, remains a theoretical option for individual Member States unhappy with Court rulings, but it comes with reputational costs and can establish a harmful precedent for other Member States.<sup>43</sup> The principal-agent view thus aligns with the trustee view in that both hold the Court up as an example of a remarkably powerful judicial body. The principal-agent approach sees the Court as not entirely unconstrained, however, because at the extremes the Court and its judges remain vulnerable to Member State pressures in response to its more audacious rulings.<sup>44</sup>

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41. *Id.* at 166 (pointing out that, with this power, Member governments could appoint nationalist judges who are more opposed to integration, but surprisingly Member governments rarely exercise this option).

42. *Id.* at 172–74 (citing Tsebelis & Garrett, *supra* note 22, at 376–83).

43. *Id.* at 176–78 (explaining, for example, that even though the Court may not levy financial penalties for noncompliance, other political and reputational costs discourage noncompliance).

44. In addition to these control mechanisms, Lisa Conant has argued in her landmark book that Member governments can and frequently do *contain* the effects of ECJ decisions in various ways. Indeed, Conant argues that the national policy responses most often discussed by students of the ECJ (namely, overt non-compliance, legislative overruling, and complete application of new legal rules as policy) are in fact the *least* common policy responses by Member governments. In addition to these three responses, Conant identifies three other possibilities that more accurately capture the individual and collective responses of Member governments to ECJ decisions: (1) “contained compliance,” which occurs when Member governments interpret ECJ rulings narrowly; “neglecting the policy implications of judicial decisions while simultaneously respecting individual judgments”; (2) restrictive application, which occurs when Member governments place limits and exceptions on judicial principles in domestic or European Community legislation; and (3) pre-emption, which occurs when Member governments “carefully construct European or domestic law to avoid *future* judicial interference in particular areas.” LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 15–49 (2002) [hereinafter CONANT,

The debate among these three theoretical perspectives on judicial dependence remains contentious, in large part because the internal workings of the Court are unclear and hence scholars need to rely on circumstantial evidence of Member State influence (or lack thereof) over the Court's jurisprudence. To the extent that historical research helps to open the "black box" of the Court's internal workings, it may help to adjudicate among these competing perspectives.

### C. THE ECJ AND NATIONAL COURTS

We have thus far considered the Court only in relation to the EU's Member governments, but the Court also enjoys a relationship with its other major interlocutors, namely national courts. The original Article 177 of the European Community Treaty, renumbered Article 267 following the Lisbon Treaty, creates a "preliminary reference" procedure whereby national courts and tribunals, when faced with a question of European Community law, can request a preliminary ruling from the Court regarding (1) the interpretation of the Treaty, (2) the validity or interpretation of the acts of the Community institutions, and (3) the interpretation of the statutes of bodies created by the Council, where those statutes so provide.<sup>45</sup> Any domestic Member State court *may* submit questions of European law to the ECJ for a preliminary ruling "if it considers that a decision on the question is necessary to enable it to give a judgment" on the case before it.<sup>46</sup> Lower courts are not required to request preliminary rulings from the ECJ, but they are entitled to do so, and in practice the bulk of references comes from such lower courts.<sup>47</sup> By contrast, where a question of European Community law is raised before a national court against which there is no possibility of appeal, that court *must* submit the question for a preliminary ruling by the ECJ.<sup>48</sup>

The preliminary reference procedure is vital, as many of the Court's landmark rulings—including *Van Gend* and *Costa*, which

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JUSTICE CONTAINED] (emphasis added).

45. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Sep. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; Treaty Establishing the European Economic Community art. 177, Mar. 25, 1957, 298 U.N.T.S. 3.

46. TFEU, *supra* note 45, art. 267.

47. POLLACK, *supra* note 38, at 162.

48. TFEU, *supra* note 45, art. 267.

established the direct effect and supremacy of European Union law—originated as preliminary references from lower courts in the Member States.<sup>49</sup> Furthermore, once the principles of direct effect and supremacy had been established, national courts continued to request preliminary rulings regarding the compatibility of national laws and regulations with the European Community and were willing to apply the ECJ decisions in specific cases. As Karen Alter points out, “the ECJ was asking national courts for nothing short of a legal revolution,” in which the latter would have to accept the supremacy of the European Economic Community Treaty over national laws and even national constitutions.<sup>50</sup> Judicial review of national laws for conformity to European Community law would challenge longstanding notions of parliamentary sovereignty, and the established hierarchy of higher and lower courts would be disturbed by the addition of the ECJ as the authoritative interpreter of European Community law.<sup>51</sup>

This raises an important question as to how national courts came to accept both the ECJ’s assertions of supremacy and direct effect and the Court’s subsequent tide of judicial rulings on a wide range of issues. Responses to this question again fall into three broad camps within the political science literature: the neofunctionalist “judicial empowerment view,” a related “inter-court competition” model, and what I will call the “sustained resistance” view.

For neofunctionalists, the national courts’ willingness to accept ECJ jurisdiction and jurisprudence can be explained in terms of the extent to which ECJ rulings “empowered” national courts within their own domestic political and legal systems.<sup>52</sup> In this view, national courts from European countries with weak or nonexistent traditions of judicial review benefitted from ECJ decisions that allowed such national courts to rule on the compatibility of national

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49. Case 26/62, *Van Gend en Loos v. Administratie der Belastingen*, 1963 E.C.R. 1 (direct effect); Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585 (supremacy).

50. Karen J. Alter, *The European Court’s Political Power*, 19 W. EUR. POL. 458, 462 (1996) [hereinafter Alter, *The European Court’s Political Power*].

51. *Id.*

52. See THE EUROPEAN COURT AND NATIONAL COURTS, *supra* note 2, at xii; Burley & Mattli, *supra* note 32, at 63; Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT’L ORG. 177, 190 (1998); Weiler, *Quiet Revolution*, *supra* note 2, at 523.

laws with the supreme European Community law.<sup>53</sup> Alternatively, judges with specific policy preferences would have an incentive to refer cases to the ECJ when they expected the resulting decision to be more in line with their preferences under European Community law than under the provisions of their own national laws.<sup>54</sup>

In a subtle variant of the neofunctionalist account, Karen Alter examined the effects of inter-court competition on the acceptance of ECJ jurisdiction. She demonstrated that lower courts, whose judges stood to gain in various ways from a direct relationship with the ECJ, readily accepted the preliminary reference procedure and used it ambitiously.<sup>55</sup> By contrast, Alter showed, national high courts in key countries such as France and Germany proved reluctant to refer questions of European Community law to the ECJ, notwithstanding their legal obligation to do so, and in some instances even attempted to quash lower-court references to the ECJ.<sup>56</sup> Over time, however, ECJ doctrine filtered into the national legal orders through lower-court decisions, and high courts were forced to accept the doctrines and the authority of the ECJ.<sup>57</sup> National courts—once a significant constraint on the Court's rulings—emerged as crucial partners of the

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53. See, e.g., Weiler, *Quiet Revolution*, *supra* note 2, at 523 (“Institutionally, for courts at all levels in all Member States, the constitutional architecture with the ECJ signature meant an overall strengthening of the judicial branch vis-a-vis the other branches of government.”)

54. See, e.g., Jonathan Golub, *The Politics of Judicial Discretion: Rethinking the Interaction Between National Courts and the European Court of Justice*, 19 W. EUR. POL. 360 (1996) (examining how “the discretion to make or withhold references bestows on national judges the power to hasten or retard the pace of integration as well as to influence specific policy outcomes”).

55. Alter, *The European Court's Political Power*, *supra* note 50, at 466 (noting that “[b]eing courts of first instance, lower-court judges were used to having another court hierarchically above them, and to having their judgments re-written by courts above” and that ECJ review allowed them to “circumvent jurisprudence of higher courts, and to re-open legal debates which had been closed, and thus to try for legal outcomes of their preference for policy or legal reasons”).

56. *Id.* at 465 (noting further that “high-court referrals to the ECJ are much more likely to be narrow technical questions about EC law—questions which do not allow the ECJ to expand the reach or scope of its jurisprudence”).

57. KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 55 (2001) [hereinafter ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW] (“In the few cases where high courts were able to quash a referral to the ECJ, it was because the decision to refer had been appealed to them. But usually the decision to refer a case to the ECJ is not appealed.”).



ECJ as the courts submitted an ever-growing number of cases to Luxembourg, allowing the Court to expand its jurisprudence. Member State courts' acceptance of ECJ rulings also raised the costs of non-compliance for Member governments, which would defy not only the ECJ but their own national courts in the event of noncompliance with a Court decision.<sup>58</sup>

Over the past decade, a third view has emerged in the political science literature, which one might call the "sustained resistance" view, in which national courts in various Member States do not accept ECJ jurisprudence and withhold submission of preliminary references to Luxembourg. Perhaps the best-known example of such national-court resistance is the decades-old judicial dialogue between the ECJ and the German *Bundesverfassungsgericht* (Federal Constitutional Court) regarding the ECJ's protection of individual rights, as well as its right to interpret authoritatively the EU's legal competence vis-à-vis national constitutional orders. In the 1974 *Internationale Handelsgesellschaft*, or *Solange I*, case,<sup>59</sup> the Federal Constitutional Court indicated that, so long as adequate protection of human rights was not guaranteed by European Community law, it would reserve to itself the right to scrutinize European Community legislation for conformity to principles of fundamental rights enshrined in the German Basic Law.<sup>60</sup> Responding at least in part to the reservations expressed by the Federal Constitutional Court, the ECJ subsequently developed its own legal doctrine applying the fundamental human rights common to the Member States to its judicial review of Community activities.<sup>61</sup>

Following the development of this new ECJ jurisprudence, the German Court agreed in a second ruling, *Solange II*,<sup>62</sup> to accept ECJ

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58. *See id.* at 21–22.

59. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 271, 1974 (Ger.).

60. *Id.* at 275.

61. *See* Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3729, 3744–45 (recognizing that, in order for the Court to effectively safeguard fundamental rights, it must base decisions on the common traditions of its Member States); DAVIES, *supra* note 10, at 197–98 (explaining that external criticism of the Court encouraged the ECJ to focus on fundamental rights in a community framework).

62. Oct. 22, 1986, BVerfGE 340, 1986.

decisions on fundamental rights without further review.<sup>63</sup> Later, in the 1993 *Maastricht* decision,<sup>64</sup> the Federal Constitutional Court again proclaimed its concerns about ECJ jurisprudence, this time regarding the extent of European Community competences, indicating that it reserved the right to review ECJ decisions for conformity to the provisions of the Basic Law.<sup>65</sup> The debate over the compatibility of EU treaties with the German Basic Law has continued with additional challenges to the Lisbon Treaty<sup>66</sup> and the recent Fiscal Pact.<sup>67</sup>

Refusal to accept ECJ rulings, moreover, is not the only means at the disposal of national courts to resist unwelcome ECJ doctrines. In addition to overt resistance of the type seen in *Solange I* and *Maastricht*, national courts may also avoid unwelcome ECJ decisions by refusing to submit preliminary references to the Court, relying instead on previous ECJ decisions or on their own interpretation of the treaty provisions under the so-called *acte clair* doctrine.<sup>68</sup> Finally, even where national courts agree to send

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63. *Id.* at 387.

64. Oct. 12, 1993, BVerfGE 155, 1993.

65. *Id.* at 181, 191. See generally Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union,"* 31 COMMON MKT. L. REV. 235, 235–36 (1994) (documenting the broad-reaching implications of the Maastricht decision).

66. See Armin Steinbach, *The Lisbon Judgment of the German Federal Constitutional Court—New Guidance on the Limits of European Integration*, 11 GERMAN L.J. 367, 367, 389–90 (2010) (arguing that “gradual expansion of competencies to the EU, culminating in the Lisbon Treaty, induced the FCC—for the first time—to specify the core state functions that could not be handed over” and concluding that the “judgment clarifies the limitations of the transfer of competencies, even though the criteria used by the FCC cannot claim to produce the set of inalienable sovereign powers that were recognized as such throughout the Union”).

67. See Roland Nelles & Severin Weiland, *A Setback for Germany's Euroskeptics*, SPIEGELONLINE (Sept. 12, 2012, 3:21 PM), [www.spiegel.de/international/europe/constitutional-court-ruling-a-setback-for-germany-s-euroskeptics-a-855413-druck.html](http://www.spiegel.de/international/europe/constitutional-court-ruling-a-setback-for-germany-s-euroskeptics-a-855413-druck.html) (noting that, although the German Federal Constitutional Court ruled against the opponents of the Euro, it placed conditions on the fiscal pact and European Stability Mechanism, such as capping Germany's liability at €190 billion).

68. As the ECJ has defined the *acte claire* doctrine:

[T]he correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other

preliminary references to the ECJ and accept its rulings, national courts still retain discretionary power to circumvent broader practical effects of ECJ case law by narrowly limiting application of ECJ decisions only to the particular case at hand.<sup>69</sup> In all of these ways, the ECJ's relationship with national courts, typically depicted as a vital resource for the Court in its conflicts with Member governments, serves as a constraint as well, limiting the Court's ability to impose unwelcome judicial doctrines on reluctant national judges. Some of the best political science scholarship on the ECJ has focused on these tensions.

#### D. THE ECJ AND CONSTITUTIONALIZATION

Finally, political scientists as well as lawyers have taken a deep interest in the Court's "constitutionalization" of the treaties and the apparently docile acceptance of this "judicial coup" by the Member governments. On this point, political science scholars have largely agreed amongst themselves, and with legal scholars, on the significance of the constitutional revolution of the 1960s, which in turn laid the groundwork for a series of additional integrative decisions by the Court in subsequent decades, and on the apparent passive acceptance of these revolutionary decisions among the Member States. Their *interpretation* of these events, however, has varied, most notably between neofunctionalist and intergovernmentalist scholars.

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Member States and to the court of justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

Case 283/81, *CILFIT v. Ministry of Health*, 1982 E.C.R. 3415, 3430; *see also, e.g.*, Damian Chalmers, *The Application of Community Law in the United Kingdom, 1994–1998*, 37 COMMON MKT. L. REV. 83, 103–04 (2000) (arguing that "British courts have not applied the doctrine as strictly as the Court of Justice suggested in *CILFIT*"); Golub, *supra* note 54, at 368–69, 379–80 (highlighting the use of *acte clair* doctrine by British judges to interpret environmental directives and recognizing that the doctrine of *acte clair* has the ability to empower national courts); Jens Elo Rytter & Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 INT'L J. CONST. L. 470, 491 n.83, 492 n.91 (2011) (elaborating on the frequent use of the *acte clair* doctrine by Danish and Swedish courts).

69. *See* CONANT, JUSTICE CONTAINED, *supra* note 44, at 79–94, 94 (discussing the enforceability of ECJ case law in national courts and concluding that "particularized" ECJ decisions have "narrowly confine[d] rights and obligations defined in the case law").

For neofunctionalists, “the move to supremacy and direct effect must be understood as audacious acts of agency” by the Court,<sup>70</sup> and the Member States’ failure to ignore or overturn landmark decisions to which they objected reflects the inherent difficulties of overturning the Court in its capacity as the authoritative interpreter of the treaties.<sup>71</sup> For intergovernmentalists like Garrett, by contrast, the failure of the EU’s Member governments to overturn decisions like *Van Gend, Costa*, and the 1979 *Cassis de Dijon* ruling, establishing the principle of mutual recognition of standards, indicates that these rulings ultimately served the long-term interests of the EU’s most powerful Member States.<sup>72</sup> Even where governments publicly contested the Court’s decision, intergovernmentalists argue, such contention may have been manufactured for domestic consumption by influential interest groups, concealing governments’ private satisfaction with the aggregate-welfare-enhancing effects of the increasingly effective European internal market.<sup>73</sup>

Distinguishing between these two interpretations requires close primary-source research into the private motivations of national government officials. While political scientists have in many instances engaged in such research, they have typically relied on publicly available sources and not on archival sources documenting the internal, private actions and reactions of national government

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70. E.g., Alec Stone Sweet & James A. Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration*, in EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE 92, 105 (Wayne Sandholtz & Alec Stone Sweet eds., 1998).

71. Stein, for example, conducted a survey of eleven landmark rulings of the ECJ during the heroic years of the 1960s and early 1970s. In ten of the eleven cases, he found, at least one Member government, and in some cases several governments or the Council as a whole, lodged a brief arguing against the constitutional extension being contemplated, while only a single case featured interventions by Member governments in favor of such an extension. Nevertheless, Stein found that the Court ruled in favor of an expansive reading of the treaty in all eleven cases. Stein, *supra* note 2, at 24–26.

72. See, e.g., Garrett, *Politics of Legal Integration*, *supra* note 27, at 172–73.

73. E.g., Garrett, *International Cooperation*, *supra* note 27, at 559 (noting the benefits that the *Cassis de Dijon* ruling provided for France and Germany). *But see* Karen J. Alter & Sophie Meunier-Aitsahalia, *Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision*, 26 COMP. POL. STUD. 535, 542–45 (1994) (offering considerable evidence of the extent of opposition to the decision among French and German government officials).

officials to landmark ECJ rulings.<sup>74</sup> Here again is an area where the New EU Legal History promises to shed light on decades-old debates. It is to this new historical scholarship that we now turn.

## II. WHAT'S NEW IN THE NEW EU LEGAL HISTORY?

The New EU Legal History is genuinely new, with a handful of scholars producing path-breaking historical research into the early history of EU legal integration only in the past few years. As historians, these scholars have aimed primarily to recapture, as far as archival sources allow, the deliberations and rulings of the ECJ in its social and institutional context. Particular areas of focus include the supranational European Commission and its Legal Service pressing consistently for an expansive, teleological reading of the treaties; an emerging community of European legal scholars superimposed on top of long-standing national legal professions; the national courts, which both sent preliminary references to and received and applied rulings from the Court; and the Member governments, which both delegated powers to the Court and were subsequently subject to its rulings.

In some cases, these historical scholars have couched their narratives explicitly in terms of the hypotheses and claims put forward by legal and political science scholarship. In other cases, historians have simply presented a narrative of events of the formative years of European legal integration, eschewing any effort to test political science theories. Even here, however, the findings of their careful archival studies have the potential to inform, if not definitively test, the assumptions and hypotheses of political science scholarship reviewed in the previous section. We cannot claim too much for these studies in terms of hypothesis-testing, since in most cases the authors have engaged in analyses of particularly interesting or important episodes in EU legal history, rather than a representative sample of ECJ decisions or of Member State or national-court responses. Nevertheless, to the extent that they offer

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74. Many political scientists have offered fine-grained analysis of the reception of particular ECJ decisions. *See, e.g.*, ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 57; CONANT, JUSTICE CONTAINED, *supra* note 44; Alter, *The European Court's Political Power*, *supra* note 50.

new, reliable, and qualitatively rich information about the internal workings of the Court and its interaction with its various interlocutors, these historical studies offer at least tentative tests allowing us to adjudicate among competing hypotheses, and propose new hypotheses, inductively informed by the Court's historical practice. In this section, therefore, I engage in a selective, and opportunistic, effort to mine the New EU Legal History for lessons, asking how well existing political science claims hold up under the microscope of careful archival scholarship. I proceed thematically, looking at historians' findings with respect to the four questions identified in the previous section. I begin with the very nature and preferences of the Court itself.

A. THE NATURE AND PREFERENCES OF THE COURT:  
ASSUMPTIONS QUALIFIED

Perhaps the most fundamental question to ask about the Court is the nature of the beast, yet the closed character of the Court, its absence of dissent and its secret deliberations, make this perhaps the most difficult question to answer, both for historians as for legal scholars and political scientists. Indeed, it is for this reason that both political scientists and lawyers fall back on the simplifying, and unrealistic, assumption that the Court is a unitary actor with a consistent preference for greater integration. EU legal historians have not been able to wave a magic wand at these problems, since the official archives of the Court remain closed to scholars, yet through careful sifting of personal and government papers from the period, Rasmussen and other legal historians have been able to shed some light on the nature of the early Court in particular. They have also been able to, if not falsify, then certainly qualify the two core assumptions at the heart of much political science and legal scholarship: the unitary nature of the court and its preference for European integration.

First, with respect to the assumption of the ECJ as a *unitary actor*, Rasmussen's scholarship in particular reveals that the unity of the early Court was in fact an illusion—but a useful one, from the perspective of a young institution. Second, in terms of the *preferences* of the Court, new scholarship leads us to question the assumption of a consistently integrationist Court. The scholarship demonstrates that the social construction, and reproduction, of an

integrationist Court employing a constitutional and teleological interpretive stance was not a foregone conclusion but required both time and effort to take hold.

More specifically, new historical research has demonstrated that the origins of the ECJ's revolutionary jurisprudence—namely, treating the Treaties of Paris and Rome not as traditional international treaties governed by traditional international law, but as the constitutional foundations of a new, federal legal order—can be traced to actors both before the establishment of, and external to, the newly established ECJ of the 1950s.<sup>75</sup> Specifically, Rasmussen identifies as the key entrepreneur of this new conception of the EU legal order the Legal Service of the European Coal and Steel Community (“ECSC”) and later the European Economic Community (“EEC”), headed by its director, Michel Gaudet, during the crucial years of the 1950s and 1960s.<sup>76</sup> Breaking with both the model of a traditional international court, and with that of a French administrative court that was most familiar to him, Gaudet explained as early as 1956:

that he wanted the ECJ to assume a constitutional role similar to that of the US Supreme Court. This should be done by a teleological methodology of interpretation. Instead of relying on narrow textual interpretation in the tradition of international law, the ECJ should interpret the single treaty stipulations in light of the supposedly federal aims and spirit of the Treaty of Paris. This amounted to interpreting the treaty as if it were a constitution. To Gaudet, winning single cases was less important than convincing the ECJ to adopt this approach.<sup>77</sup>

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75. See Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 376–77 (citing as an example the actions of Jean Monnet and Walter Hallstein in shaping the negotiation of the Treaty of Paris to include elements of a federal legal order).

76. *Id.* at 377 (stating that Gaudet served as the director of the Legal Service of the ECSC from 1958–1967 and director of the Legal Service of the EEC from 1967–1970).

77. *Id.* at 379 (citing letter from Michel Gaudet to Donald Swatland (Dec. 31, 1957) (on file with the Fondation Jean Monnet pour l'Europe, Lausanne)); see also Morten Rasmussen, *The Origins of a Legal Revolution — The Early History of the European Court of Justice*, 14 J. EUR. INTEGRATION HIST. 77, 85–86 (2008) [hereinafter Rasmussen, *The Origins of a Legal Revolution*] (recognizing that this kind of use of the Treaty of Paris served to strengthen the constitutional features of the ECJ, but also noting that the judicial tools available in the Treaty of Paris were too weak).

In the years that followed, Gaudet's Legal Service would become the primary champion of what would in time become the ECJ's signature teleological method of legal interpretation. It would also be, in the language of legal realism, the ultimate "repeat player" before the Court, consistently pressing, in case after case, a revolutionary new conception on a potentially reluctant Court.<sup>78</sup>

A long-term, patient approach from the Legal Service would, moreover, be required, since the early Court of the 1950s was slow to take up a teleological, constitutional approach, as was the mainstream of the European legal community.<sup>79</sup> Rasmussen identifies the "breakthrough" period as that between 1958 and 1965, when he argues that the Legal Service undertook a "double strategy."<sup>80</sup> First, it encouraged the development of national European law associations, which were brought together under Legal Service auspices in 1961 as the *Fédération Internationale pour le Droit Européen* ("FIDE").<sup>81</sup> FIDE would play an important role in facilitating test cases in the national courts, legitimizing decisions from the ECJ, and informing national legal communities of Community law developments.<sup>82</sup> Second, the Legal Service determined, through its submissions regarding cases before the Court (and, after 1961, including preliminary references from national

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78. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–103 (1975) (documenting nine major advantages that "repeat players" have over "one-shotters"); see also CONANT, JUSTICE CONTAINED, *supra* note 44, at 17–18 (extending Marc Galanter's notion of repeat players to ECJ jurisprudence).

79. See Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 380–82 (highlighting the obstacles faced by the Legal Service in trying to push a constitutional approach both inside the ECJ and before legislative bodies).

80. *Id.* at 383 (noting that Gaudet felt more optimistic given the new composition of the ECJ during this time period).

81. *Id.* at 384.

82. *Id.* (describing the importance of FIDE in the "double strategy"); see also Antonin Cohen, *Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)*, 32 LAW & SOC. INQUIRY 109, 130–31 (2007) (attributing the success of these international laws to the use of national agents). See generally Alexandre Bernier, *Constructing and Legitimizing: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950–70*, 21 CONTEMP. EUR. HIST. 399, 404–07 (2012) (detailing the foundation and development of FIDE).



courts) to “prod” the ECJ toward a constitutional or teleological interpretation of the treaties.<sup>83</sup>

Hence, when the *Van Gend en Loos* case was referred to the ECJ by a Dutch customs court asking whether Article 12 of the EEC Treaty enjoyed internal effect in the Dutch legal system, Gaudet’s Legal Service understood the potential constitutional significance of the case and presented an “audacious” position to the Court, arguing that “the legal nature of the Communities went beyond international law, and instead constituted a proper *droit communautaire*.”<sup>84</sup> The provisions of the treaties, it continued, should therefore be addressed not simply to states, but should be given internal effect in the domestic law of the Member States, where they should enjoy primacy over contradictory national law.<sup>85</sup> As a corollary of these new doctrines, the preliminary reference procedure of Article 177 would be transformed, contrary to the clear intent of the Member governments, into a new mechanism whereby individuals could challenge the actions of their governments that ran counter to European law.<sup>86</sup> Put simply, the Legal Service, supported by the College of Commissioners, was putting forward the essential positions for which not only *Van Gend en Loos* but also *Costa v. ENEL* would later become famous.

In *Van Gend en Loos*, moreover, the Commission was asking the Court to rule against the explicit preferences of the Member governments, including two—Belgium and the Netherlands—which held that the ECJ had no jurisdiction in the case, and another—Germany—which had previously been the great champion of the ECJ as a federal court but opposed in this case a new doctrine of

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83. Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 383–84.

84. *Id.* at 387.

85. *Id.* at 388 (recognizing the importance of such a principle for the legal security of the citizens of each nation).

86. *Id.* (mentioning that such a new mechanism for enforcing European legal norms “crucially would supplement the infringement procedures articles 169–71”); *see also* Rasmussen, *The Origins of a Legal Revolution*, *supra* note 77, at 77 (stating that this expansive reading of article 177 of the EEC treaty managed to ease access to European law for private litigants); Vauchez, *The Transnational Politics of Judicialization*, *supra* note 21, at 10–11 (analyzing Gaudet and FIDE’s extensive role in pushing for the broader interpretation of Article 177).

direct effect.<sup>87</sup> Despite these objections, the Court went on to rule that the EEC was indeed a new type of legal order, and that Article 12 of the Treaty was directly effective and created legally enforceable rights in the Member States.<sup>88</sup>

Rasmussen's research, however, suggests that the resulting decision of "the Court" was far from unanimous and was indeed swung toward the Commission's position by the arrival at the Court of two new judges, the Frenchman Robert Lecourt and the Italian Alberto Trabucchi.<sup>89</sup> In Rasmussen's telling:

During the deliberations the seven judges were split, voting narrowly (4 against 3) in favor of granting Article 12 internal effects. The *rapporteur* of the case, Charles-Léon Hammers, promoted a ruling along the lines of international law, emphasizing the contractual nature of the treaty, a position apparently supported by [Judges] Riese and Donner. However, just when the ECJ seemed about to side with the member state position, the two new judges Trabucchi and Lecourt managed to turn the tide with two memoranda, which both favoured granting Article 12 direct effects. Trabucchi and Lecourt managed to bring Rino Rossi and Louis Delvaux to their side.<sup>90</sup>

The *Van Gend* decision is of course only one episode, albeit a crucial one, in the history of the ECJ, and we lack similar information about the internal deliberation and voting in other landmark decisions like *Costa* and *Cassis*, among many others. At a minimum, however, Rasmussen's revisionist history of *Van Gend* signals two very significant revisions to the existing assumptions about both the unity of the court and its specific preferences.

On the question of unity, Rasmussen's account does more than simply reveal that the court was not unanimous in its landmark *Van Gend* ruling. It also reveals the critical importance of the early decision—written into the Court's statute and supported by subsequent practice—to issue only *per curiam* rulings and suppress all signs of dissent. We know from the history of the U.S. Supreme Court that, when handing down history-making decisions like

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87. Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 388.

88. *See id.* at 390 (dissecting the two core elements of the Court's holding).

89. *Id.* at 389–90.

90. *Id.* at 389.

*Marbury v. Madison*<sup>91</sup> and *Brown v. Board of Education*,<sup>92</sup> it has striven for, and sometimes reached, a unanimous decision in the belief that the unanimity of the justices lent greater weight and conferred greater legitimacy on these landmark rulings in the face of predictable opposition from the other branches of government or from public opinion.<sup>93</sup> By contrast, important decisions adopted by a divided vote are often seen as weakening the legitimacy of both the ruling and the Court as a whole. In the words of Judge Learned Hand, a dissenting opinion in such a case “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”<sup>94</sup> For this reason, chief justices from John Marshall to John Roberts have sought unanimity wherever possible, particularly for important decisions.<sup>95</sup>

In issuing *Van Gend*, and indeed all its other rulings, as a *per curiam* decision of the entire Court, the judges presented the *façade* of unanimity by suppressing all evidence of internal dissent and lent the Court’s ruling greater weight and legitimacy. It thereby reduced or eliminated the prospect that Member States would be able to single out individual judges for retribution (through non-renewal of their six-year terms) for taking bold integrationist decisions. Counterfactually, it is instructive to ask how *Van Gend* and other critical rulings might have been received in national capitals had it

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91. 5 U.S. 137 (1801).

92. 347 U.S. 483 (1954).

93. See generally M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283 (2007) (discussing the value of dissenting opinions and the “common refrain in American constitutional history” that the Supreme Court is “more efficient at deciding cases and making law, if it spoke with one voice”).

94. LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958).

95. The relationship between unanimous rulings, dissent, and judicial legitimacy is a complicated one. See generally William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 438, 673 (1986) (discussing the constructive role of dissents and concluding that voicing a dissent is an “obligation that all of us, as American citizens have, and that judges, as adjudicators, particularly feel, is to speak up when we are convinced that the fundamental law of our Constitution requires a given result”); Henderson, *supra* note 93, at 337–38 (reasoning that unanimity and the use of dissents can both be tools to achieve public acceptance); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1380–82 (2001) (explaining that unanimity resembles the autonomous model of law, while allowing dissents within the Court is more similar to the responsive model).

been known that this weightiest of rulings had been adopted by a bare majority over the objections of a sizable minority of judges—that a single vote had started a legal revolution and undermined national sovereignty for decades to come. And it is provocative to ask—although we may never know the answer—which other landmark ECJ rulings were, behind the closed doors of the Kirchberg Plateau, equally split decisions. What is clear is that the unity of the Court in this case was indeed an illusion, but a useful one, which arguably lent greater authority and weight to the decisions of a new and little-known court at a critical juncture.

Second, with respect to the substantive preferences of the judges, Rasmussen as well as other scholars like Cohen and Vauchez—who have undertaken systematic research into the professional backgrounds of the early judges—demonstrate that the early Court was far from uniformly integrationist.<sup>96</sup> A majority of the early Court, indeed, conceived of the treaties essentially as an international legal contract binding only upon its Member State parties, to be read in a close textual fashion rather than a broad teleological one, and in which the Court was to serve primarily as an administrative rather than constitutional organ.<sup>97</sup> The establishment of an integrationist majority—willing to adopt a new teleological interpretation of the Court, to treat the treaties as a *de facto* constitution, and to put in place the key doctrines of direct effect and supremacy—took time and active encouragement from outside the Court. Furthermore, Vauchez has argued, the integrationist views of the judges have not perpetuated themselves automatically but required active efforts on the part of insiders to indoctrinate future members of the Court and the broader European legal profession and thereby reproduce its

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96. See, e.g., Cohen, *supra* note 82, at 128 (pointing out that “as a group, in fact, the judges were relatively heterogeneous—their professional background ranging from national judiciaries, judicial administration, private legal practice, banking, politics, trade-unionism, and the law faculty”); Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 388–89 (arguing that the composition of the judges changed the trajectory of European jurisprudence); see Vauchez, *Keeping the Dream Alive*, *supra* note 14, at 52–53 (attributing the ability of such a diverse group of judges to reach consensus to professional socialization and the creation of a “transnational judicial *esprit de corps*”).

97. See Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 380 (noting Advocate-General Lagrange’s view of the “character of the ECJ as an administrative court, responsible for securing the rights and freedom of citizens in the face of administrative power”).

fundamental tenets.<sup>98</sup>

None of this is to say that the simplifying assumptions about the Court as a unitary body with pro-integrationist preferences have not been useful as a tool for theory construction. The ECJ, after all, has issued single, *per curiam* opinions for more than six decades, and the consistent line of its decisions since the mid-1960s has been overwhelmingly integrationist. In the absence of detailed knowledge about the Court's internal workings, it arguably made sense to adopt what Max Weber called "as if" assumptions, adopted not because they were realistic, but because they facilitated the creation of parsimonious theories generating testable hypotheses.<sup>99</sup> What is clear, however, is that neither assumption seems to be supported empirically with respect to the early Court, which was both more divided and less securely integrationist than previous scholarship suggested.<sup>100</sup> It also suggests that the judges' tradition of maintaining strict secrecy regarding the internal deliberations of the Court may have significantly enhanced its independence vis-à-vis the Member governments, the subject to which we now turn.

#### B. JUDICIAL INDEPENDENCE: MEMBER STATE INTENTIONS AND JUDICIAL PREOCCUPATIONS

Looking beyond the internal workings of the Court, we come to the first of several *relational* questions, namely the Court's relationship with, and independence from, the Member governments that both created the Court and appointed its judges. As we have seen, there are multiple views on this question in political science and law. On one end of the spectrum is the purely intergovernmental view, which sees the court as an obedient servant of the Member States (or the least of the most powerful States), imputing no agency or causal importance to the Court. On the other end of the spectrum are the neofunctionalist and "trustee" views, which hold the Court to be almost entirely independent of the Member governments, which

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98. Vauchez, *Keeping the Dream Alive*, *supra* note 14, at 67–68 (explaining how "jointly social and cognitive processes form a continuous socialization process," which drove the development of the Court's core beliefs).

99. See generally MAX WEBER, *SOCIOLOGICAL WRITINGS* (Wolf Heydebrand ed., 1994).

100. See Vauchez, *Keeping the Dream Alive*, *supra* note 14, at 58 (admitting the difficulty created by a lack of access, which offers few empirical options).

are left to respond ineffectively to the Court's audacious rulings. In between these two extremes is the principal-agent view, which regards the Court as possessing wide-ranging delegated powers and subject to Member State control mechanisms that, while difficult to use, do provide at least some limits on judicial discretion. Historical work promises to inform, and indeed already has informed, these debates with new findings on two key questions: first, the intent of the founders with respect to the Court and its future behavior, and second, the Court's sensitivity (or lack thereof) to Member State preferences in issuing its landmark rulings.

The first of these questions concerns the *original intent of the founders*, often invoked by participants in the scholarly debate (with little evidence either way) as: Did the founding Member governments *intend* for the ECJ to proceed as it did, consistent with a strong intergovernmentalist approach, or did they instead intend to design a traditional and deferential international court, which later escaped unexpectedly from their control? In her archival research into the negotiations of the founding Treaties of Paris (1951, establishing the ECSC) and Rome (1957, establishing the EEC and Euratom), Anne Boerger-de Smedt has revealed what were in fact highly variable intentions among the founders, resulting in a Court that combined strong elements of a traditional international or administrative court with some elements of a constitutional court.<sup>101</sup>

For example, Boerger-de Smedt reveals a wide diversity of preferences among the Member States negotiating the first Court of the ECSC, with the French delegation (headed by Jean Monnet) seeking a weak court or even an ad hoc arbitration process to minimize potential interference with his prized supranational High

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101. See Anne Boerger-De Smedt, *La Cour de Justice dans les Négociations du Traité de Paris Instaurant la CECA*, 14 J. EUR. INTEGRATION HIST. 7, 30–33 (2008) [hereinafter Boerger-De Smedt, *La Cour de Justice*] (concluding that the final composition of the Court arose from an “uneasy compromise” between distinct positions held by negotiators of the treaties); Anne Boerger-De Smedt, *Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome*, 21 CONTEMP. EUR. HIST. 339, 355 (2012) [hereinafter Boerger-De Smedt, *Negotiating the Foundations*] (positing that in compromising the different perspectives in negotiations “jurists, without any master-plan in mind or even foreseeing how these provisions would play out in the future, introduced small measures towards [a constitutional court] wherever it seemed possible”).

Authority.<sup>102</sup> The Benelux delegations, by contrast, sought a strong court precisely to limit High Authority discretion, but with access to the Court limited to governments, with no standing for private citizens.<sup>103</sup> The German delegation (headed by Walter Hallstein) sought a federal-style constitutional court able to rule on the legality of Council as well as High Authority actions, with standing for private individuals as well as Member governments.<sup>104</sup> The Court created by the Treaty of Paris represented a compromise among these positions, appearing primarily as a French-style administrative court tasked with ruling on the legality of High Authority decisions but with a modest “constitutional” element insofar as, for example, private individuals enjoyed limited access to the Court.<sup>105</sup>

When the Member States convened again five years later to design the institutions of the more ambitious EEC, Member State positions were again diverse, with the French having hardened their position against supranationalism, the Germans remaining bent on establishing strong federal-style institutions, and the Benelux and Italian delegations somewhere in between.<sup>106</sup> The details of the new ECJ were worked out primarily by a *groupe de rédaction* composed of legal experts, many of them committed federalists, acting under a mandate from their political principals.<sup>107</sup> Interestingly, given the debacle of the rejection of the European Defense Community just two years earlier, all delegates were acutely aware of the limits imposed by the requirement of national ratification, and “[a]ll recognised that an institutional scheme too similar to the ECSC

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102. Boerger-De Smedt, *Negotiating the Foundations*, *supra* note 101, at 340–45 (detailing the tensions among the French, Benelux, and German camps and how they unfolded throughout the negotiations).

103. *Id.*

104. *Id.*

105. See Boerger-De Smedt, *La Cour de Justice*, *supra* note 101, at 27–28 (recounting the debate over whether to allow private individuals access to the Court); Boerger-De Smedt, *Negotiating the Foundations*, *supra* note 101, at 346–47 (showing that all three delegations, the French, the Benelux, and the German, had wins in terms of shaping the legal process).

106. Boerger-De Smedt, *Negotiating the Foundations*, *supra* note 101, at 348–49.

107. See *id.* at 350–51 (highlighting the group’s integral role in deciding key points of tension and, compared with the Paris negotiations, their increased independence from direct political involvement).

would meet the same fate.”<sup>108</sup>

Within the group, most of the small nucleus of pro-integration jurists, famously depicted in participant Pierre Pescatore’s account, favored a strong constitutional court but were limited by the political realities imposed by skeptical publics and parliaments and by the demands of ratification.<sup>109</sup> Even so, Boerger-de Smedt argues, “the jurists carried just enough weight to inject a small dose of constitutionalism into the treaty’s legislative and jurisdictional system . . . .”<sup>110</sup>

With respect to the famous Article 177 preliminary reference procedure, for example, Boerger-de Smedt shows how the Member governments sought to address the challenge of conflicting interpretations of EEC law by national courts and considered two options: a federal-style constitutional court, preferred by the German delegation, and a preliminary ruling mechanism inspired by the Italian constitutional system.<sup>111</sup> The first of these options was “rejected since a federal system stood no chance of acceptance at the political level,” and the resulting system had the “contours of a federal supreme court system of judicial review, but would depend completely on the co-operation of national courts in order to function.”<sup>112</sup> Like other scholars, Boerger-de Smedt finds no evidence that the Member States intended Article 177 and the preliminary reference procedure as a means for private citizens to challenge the legality of their own governments’ actions with respect to European law.<sup>113</sup>

Other provisions reflected similar compromises among diverse positions. For example, while acknowledging that the introduction of

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108. *Id.* at 350.

109. *See* Pescatore, *supra* note 25, at 172–73 (describing how the “judicial group created the conditions in which the jurisprudence of the court could make the extraordinary development” seen through, for example, Article 177’s preliminary reference procedure).

110. Boerger-De Smedt, *Negotiating the Foundations*, *supra* note 101, at 351.

111. *Id.* at 351–52.

112. *Id.* at 352 (noting that two key elements of the Italian-inspired system were left out of the final Court provision: “the stipulation that the ECJ’s rulings would be ‘binding’ on the national courts and the fact that the Court could also render preliminary rulings concerning the *application* of the treaty” (emphasis in original)).

113. *Id.* at 353.



Article 173 of the Treaty of Rome empowered the ECJ to rule on the legality of Council as well as Commission actions, Boerger-de Smedt points out:

The second paragraph of Article 173 introduced a serious weakening of the Court, however, in that the new text severely restricted direct access to the Court by private parties against Community measures. This change was also intentional and resulted from the group's desire to reverse the Court's practice of widening its access to private persons.<sup>114</sup>

Interestingly, this narrowing of the ECJ's jurisdiction represents not only the limits to supranationalism imposed by the need for ratification; it also represents a new, and as far as I know the earliest, effort by Member governments to respond to ECJ activism by "clipping the wings" of the Court in subsequent treaties.<sup>115</sup>

More generally, Boerger-de Smedt's historical scholarship both supports and refutes distinct elements of the intergovernmentalist position on the Court of Justice, its mandate, and its independence. On the one hand, she makes clear, the text of the ECSC and EEC Treaties represent at best "timid" progress toward a constitutional court and reflect difficult compromises between nationalist and

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114. Boerger-De Smedt, *Negotiating the Foundations*, *supra* note 101, at 353. The pertinent paragraphs of Article 173 read:

The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission. For this purpose, it shall be competent to give judgment on appeals by a Member State, the Council or the Commission on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power.

Any natural or legal person may, under the same conditions, appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him.

Treaty Establishing the European Economic Community, *supra* note 45, art. 173; *see also* TFEU, *supra* note 45, art. 263 (implementing much of the language of the original Article 173).

115. The Member governments did, in the Maastricht Treaty, dramatically restrict the ECJ's jurisdiction with respect to the two new "pillars" of common foreign and security policy, and justice and home affairs, respectively, as well as limiting the impact of a previous ECJ ruling on occupational pensions in the so-called "Barber Protocol." *See* POLLACK, *supra* note 38, at 172 (mentioning the "Barber Protocol" as one of a few instances of constitutional revisions to ECJ rulings). These are often depicted as exceptions to the general difficulty—indeed, near impossibility—of Member States punishing the Court for activism in its interpretation of the treaties, but Boerger-De Smedt's finding about Article 173 appears to represent a new and much earlier instance.

federalist preferences among the original six, as an intergovernmentalist theory of international negotiation would suggest.<sup>116</sup> On the other hand, the existence of support for a strong federalist court among multiple delegations to both the Paris and Rome negotiations clearly falsifies the early intergovernmentalist view of national governments as the consistent and jealous defenders of national sovereignty. National preferences were more complex than such an image might imply, reflecting both the differing constraints under which the various delegations labored, as well as the sharply varying individual legal and ideological views held by the leaders of each delegation and their legal advisors in the *groupe de redaction*.<sup>117</sup>

More broadly, Boerger-de Smedt's analysis also makes clear that the resulting compromise, a mix of classic international law, administrative law, and constitutional features, makes it difficult, if not impossible, to attribute any coherent "intentions" to the diverse founders of the treaty—a point often made by critics of originalism in the United States.<sup>118</sup> In large part because of the pro-integration "original intentions" of *some*—but not all—of the founders, the resulting treaties left considerable, though far from unlimited, latitude for the new Court to engage in judicial activism:

The option of transforming the ECJ into a constitutional court, although earnestly considered at various points during the negotiations of the Paris and Rome treaties, was ultimately pushed aside. Instead, the jurists,

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116. See Boerger-De Smedt, *Negotiating the Foundations*, *supra* note 101, at 354–55 (recognizing, however, that some constitutional traits were pushed forward and attributing this reticence to the fact that the conference that drafted these articles was much more diverse than their predecessors).

117. In this sense, Boerger-De Smedt's findings can be read as evidence of the superiority of liberal intergovernmentalism, which posits that national preferences will vary across Member States as a function of domestic political, legal, and ideological factors, over the more parsimonious but misleading intergovernmentalist theories of the 1960s and 1970s. See generally ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* (1998) (postulating that European integration was the result of rational choices made by national leaders pursuing political economic interests "that evolved slowly in response to structural incentives in the global economy").

118. See generally Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989) (providing background on the original-intent debate and its current status in the United States).

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without any master-plan in mind or even foreseeing how these provisions would play out in the future, introduced small measures towards that end wherever it seemed possible. The compromise empirically achieved between two opposing trends led to equivocal outcomes that could later be used by proponents to construe the legal order according to their views on the European integration. Because of these ambiguities, the further development of European law was left to the individuals who would apply the treaties and use the legal tools provided to advance European integration . . . . The treaty's provisions alone could not automatically have produced this outcome by themselves, but they did ultimately make it possible.<sup>119</sup>

This finding in turn raises a second set of questions about the independence of the court and the judges themselves. Were the judges of the new court slavishly obedient to Member State preferences as per a purely intergovernmentalist view? Were they entirely independent of Member governments, able to pursue their preferences and/or their conception of the law without fear of retribution as per a trustee account? Or were the judges instead strategic agents of the Member States, pursuing their aims with a degree of discretion that was substantial but bounded by the real possibility of backlash from either the Member governments or national courts as per a principal-agent approach? Here, the answer seems unambiguous: neither a strong intergovernmentalist nor a strong trustee approach survive an encounter with the archives, which depict a Court that was profoundly conscious of strongly held national preferences and a possible Member State backlash, and strategically tailored its rulings during the early years to what it believed the Member States would tolerate.

Here again, we can look to Rasmussen's archival research on the Court's decision in *Van Gend*, where he finds that the substance of the decision was attributable not only to the law of the treaties or to the Court's own preferences, but also and importantly to the judges' acute awareness of the political context of their decision and the potential for backlash against it.<sup>120</sup> The judges tempered their decision, and parted company with the strongly integrationist

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119. Boerger-De Smedt, *Negotiating the Foundations*, *supra* note 101, at 355.

120. Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 391 (describing how the ECJ moved forward cautiously with its decision in *Van Gend*).

Commission Legal Service, in at least two ways. First, in declaring the direct effect doctrine, the Court interpreted that doctrine to include “only treaty articles placing negative obligations on the member states.”<sup>121</sup> Only in subsequent years would the Court make clear that the doctrine of direct effect applied to other treaty articles and to secondary legislation, and that direct effect operated “horizontally” in relations among private actors as well as “vertically” between private actors and Member governments.<sup>122</sup>

Just as importantly, the Court in *Van Gend* did not follow the Commission’s advice to declare outright the primacy of European law. Here, Rasmussen cites an internal memorandum by Trabucchi, who noted the difficulties that such a doctrine would pose in the legal systems of Italy and Germany:

Consequently, Trabucchi recommended “for now” (*pour le moment*) that the Court respect the national jurisdiction with regard to primacy . . . . To Trabucchi—and probably the majority behind the ruling with him—this caution with regard to the primacy of European law was clearly politically motivated and intended to be temporary.<sup>123</sup>

The Court’s caution was indeed temporary, and it would take the next logical step of declaring primacy the following year in its *Costa v. ENEL* decision.<sup>124</sup>

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121. *Id.* at 390.

122. *See, e.g.*, Case C-43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455 (applying the direct effect doctrine to the principle of equal pay for men and women as established in TFEU Article 157, as well as beginning the process of differentiating the “horizontal” and “vertical” direct effect doctrines).

123. *Id.*; Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 390–91 (explaining that Trabucchi observed that Germany’s and Italy’s dualist constitutions meant that they had to implement international law only by first acting through parliament). On the relative caution, and ambiguity, of the *Van Gend* ruling relative to Gaudet’s Legal Service brief, *see also* Vauchez, *The Transnational Politics of Judicialization*, *supra* note 21, at 11–12. Vauchez emphasizes and chronicles the post-decision speeches and writings of integrationist judges and other legal figures that:

turned the ambiguous *Van Gend en Loos* into a clear-cut and far-reaching *judicial fiat*.

On the whole, it all occurred as if a kind of second judicial deliberation had been initiated, one that would fabricate the overall reach of *Van Gend en Loos* by extending in manifold ways the sense and the validity of its ‘message’ well above and beyond the relatively prudent and balanced considerations of the (original) decision itself.

Vauchez, *The Transnational Politics of Judicialization*, *supra* note 21, at 14.

124. On the significance of the Court’s decision in *Costa*, including the key role

Rasmussen's research is thus far unusual in that it provides a window into the internal deliberations of the Court, which otherwise remain largely opaque. Other scholars have nevertheless noted the caution of the Court in these early decisions, which frequently declared major constitutional principles in cases where the substantive impact of the ruling on Member State interests was minimal. As Alter points out, "the ECJ expanded its jurisdictional authority by establishing legal principles but not applying the principles to the cases at hand."<sup>125</sup> In the *Costa* ruling, for example, the judges declared the supremacy of European Community law over national law but "found that the Italian law . . . did not violate EC law."<sup>126</sup> Bill Davies' account of the constitutional dialogue between the ECJ and the German Federal Constitutional Court similarly depicts ECJ judges who were acutely aware of the reception of their rulings by national courts as well as by Member governments, and more generally to "a much more timid set of European institutions than we have come to expect, afraid of . . . recalcitrance and willing to reach important compromises in order to save face and garner support."<sup>127</sup> It is to Davies' account, and more generally to the question of ECJ relations with national courts, that we turn next.

### C. THE ECJ AND NATIONAL COURTS

One of the central topics of political science scholarship on the ECJ has been the Court's relationship with national courts. On this question, work by political scientists and legal scholars over the past decade has considerably nuanced the early "empowerment" thesis whereby acceptance of the ECJ and EU law brought new powers to national courts able to draw upon a new body of law and to engage in *de facto* judicial review of the conduct of the executive and legislative branches.

Drawing on careful and meticulous readings of the judicial dialogue between the ECJ and national courts, Alter was able to

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of Advocate General Maurice Lagrange, *see* Cohen, *supra* note 82, at 125–27 (emphasizing the role played by Lagrange's opinion that the Treaty of Rome had "the nature of a real constitution").

125. Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121, 131 (1998).

126. *Id.*

127. DAVIES, *supra* note 10, at 7.

demonstrate a consistent distinction between lower courts, which were far more likely to experience empowerment and hence embrace the preliminary reference procedure, and national high courts, which accepted only reluctantly, conditionally, and after considerable delay.<sup>128</sup> Later work provided evidence of an even more fundamental and widespread resistance to ECJ jurisprudence among both high and lower courts. Among high courts, Peter Lindseth's landmark book explores "the limits of strong deference" to the ECJ among high courts in Germany, Italy, Denmark, and the Czech Republic, which have insisted on their right to rule on the compatibility of the EU and its activities with national constitutional provisions regarding human rights, democratic accountability, and the separation of powers.<sup>129</sup> Even among lower courts, a growing number of scholars have documented the strategies whereby national courts either resisted sending preliminary references to the ECJ—primarily through invocation of the *acte clair* doctrine—and/or found ways to "contain" unwelcome impacts of the Court's jurisprudence.<sup>130</sup> In short, this new scholarship demonstrated that national courts, often depicted as the ECJ's co-opted allies against recalcitrant Member States in early neofunctionalist scholarship, were in fact both allies *and* a source of resistance and restraint on the Court's discretion.

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128. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 57, at 48–49 (observing that the contrast may be due to higher courts' greater concern for the overall coherence of national law, and lower courts' greater focus on the immediate cases before them); *see also*, *supra* notes 55–58 and accompanying text.

129. *See* LINDSETH, *supra* note 10, at 165 ("By the end of the 1990s . . . several leading national high courts had given a much clearer sense of the points at which they too could no longer defer to the ECJ, consistent with their obligation under the postwar constitutional settlement."). In particular, the German Constitutional Court, in its Maastricht and Lisbon Treaty decisions, as well as other constitutional courts considering those same treaty provisions, expressed concern about the potentially uncontrolled transfer of sovereignty that might undermine constitutional guarantees of democratic accountability, and—in light of the ECJ's failure to delineate the boundaries of Community competence—claimed for themselves the ultimate right of *Kompetenz-Kompetenz*. *Id.* at 185. *See generally id.* at 133–187 (discussing supranational delegation, national judicial review, and the limits on deference).

130. *See, e.g.*, Chalmers, *supra* note 68, at 103–04 (noting that British courts have not applied *acte clair* as narrowly as the House of Lords intended); Golub, *supra* note 54, at 368–69 (noting that British courts invoked *acte clair* to interpret environmental directives themselves); Rytter & Wind, *supra* note 68, at 482–83 (finding that Danish judges tend to read ambiguities in favor of national laws).

The historical scholarship on the relationship between the ECJ and national courts—what Davies calls “reception studies”—strongly supports this more nuanced view of national courts in relation to the ECJ.<sup>131</sup> In brief, these historical studies show that national court resistance to ECJ jurisprudence was real and sustained, at least in some countries, and that variation in the reception of EU law and ECJ rulings has taken place not only between high and lower courts, but also cross-nationally as a consequence of systematic differences in cultural, political, and legal traditions. In Davies’ formulation,

At the center of the concept of a reception study is the idea that each Member State represents a distinctive set of contextual, cultural, and legal circumstances that determine the willingness and the conditions under which a particular Member State’s government and judiciary will submit to the primacy of European law. These factors include elite perceptions of national interest, varying domestic institutional constellations, and oscillating streams of public and intellectual opinion toward the ECJ and European integration.<sup>132</sup>

Because these factors vary across Member States, Davies continues,

Resistance and response to legal integration have therefore led to nonlinear acceptance of the ECJ’s jurisprudence by national actors across time and across geography. What exists across Europe is a patchwork, contingent judicial settlement, in which different Member States impose differing conditions on the acceptance of legal primacy, dependent on the broader reception of the ECJ, European integration, and European law at that given time.<sup>133</sup>

Reception studies of the kind advocated by Davies are by no means absent in political science scholarship: indeed, some of the landmark political science works cited above fit Davies’ description of reception studies quite well.<sup>134</sup> What historical scholarship can add

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131. DAVIES, *supra* note 10, at 4 (asserting that “the enigma of the ECJ’s expansion can only be explained by looking at how the Member States ‘received’ the ECJ’s decisions, not only within the courtroom, but, much more crucially, among the public and academia and within the government machinery itself”).

132. *Id.* at 4–5.

133. *Id.* at 7.

134. For multi-country studies, *see, e.g.*, ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 57 (demonstrating how the debate between proponents and opponents of the European supremacy molded the

to these previous works is not only the use of archival sources but also the close attention to nationally specific, contextual factors that might help to explain cross-national differences in reception. The existing political science scholarship has not been blind to these national differences, but the emphasis in early neofunctionalist scholarship was on identifying integration mechanisms *common* to multiple Member States, such as judicial empowerment and inter-court competition hypotheses, rather than explaining the *differences* in reception of ECJ jurisprudence across Member States.

In addition, historical studies also demonstrate that national differences in the receptivity of domestic courts to European law not only responded to, but also helped to shape, the history of EU legal integration. First, in a recent article, Karin van Leeuwen examines the Dutch constitutional tradition and the constitutional reforms of the 1950s, regarding the relationship between domestic and international law in The Netherlands.<sup>135</sup> National courts' reception of ECJ jurisprudence, she argues, is likely to be conditioned very substantially by the constitutional structure of a given Member State, in subtle ways that are not likely to be captured by simple dichotomies such as the difference between formally monist and dualist systems.<sup>136</sup> Specifically, van Leeuwen argues that the Dutch tradition of acceptance of international law, together with a postwar political culture that was strongly favorable to European integration, predisposed judges in that country to be open to accepting the

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European jurisprudence); CONANT, JUSTICE CONTAINED, *supra* note 44 (arguing that implementation of ECJ interpretations depends on the actors that engage on the legal questions); THE EUROPEAN COURT AND NATIONAL COURTS, *supra* note 2 (exploring constitutionalization of EU law as a conversation between the European and national courts). For country-specific studies, *see, e.g.*, Chalmers, *supra* note 68 (surveying trends in the UK's application of EU law); Golub, *supra* note 54 (researching how domestic political considerations in Britain hindered national judges from referencing EU law); Rytter & Wind, *supra* note 68 (examining the reluctance of Danish courts to interpret EU law and the implications this will have on their influence in European jurisprudence).

135. Karen van Leeuwen, *On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms "Towards" Europe*, 21 CONTEMP. EUR. HIST. 357 (2012) (finding that this relationship between national and European jurisprudence sculpted the nature of the Netherlands' membership in the EU and pushed for European law's supremacy over national law).

136. *Id.* at 357–58 (criticizing the emphasis on simple dualities as reductive, and arguing that the Dutch example demonstrates the complexity of national reception).



jurisdiction of the ECJ and to use the preliminary reference procedure of Article 177.<sup>137</sup> Just as importantly, she reviews the constitutional reforms adopted by the Dutch Parliament between 1953 and 1956, which allowed for internal effects of international law but imposed conditions—such as the self-executing nature of the international laws—that were inherently ambiguous.<sup>138</sup> Indeed, she argues, it is this constitutional framework that helps explain the pattern whereby eight of the first eleven preliminary references to the ECJ, including the request in *Van Gend*, originated in Dutch courts.<sup>139</sup>

By far the most detailed historical “reception study” of an EU Member State is Davies’ meticulously detailed study of the resistance to the ECJ by the German Federal Constitutional Court, centering around the domestic origins and European response to the FCC’s famous *Solange I* decision in 1974.<sup>140</sup> Constituting the most direct challenge to the ECJ’s authority in the history of EU legal integration, the *Solange I* case has been studied previously by other scholars, and the “constitutional dialogue” between the FCC and the ECJ features prominently in many EU law casebooks. Davies’ careful archival research, however, together with an ambitious law-in-context approach, provides substantial new insights into both the origins of the German challenge and the response by the ECJ and other European institutions.

With respect to the origins of the decision, Davies poses the puzzle of how the Federal Constitutional Court, having been the first national high court to accept (albeit grudgingly) the ECJ’s doctrines of direct effect and legal supremacy and coming from arguably the

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137. *See id.* at 358–59 (observing that this predisposition allowed Dutch judges to view the European community as an international sovereignty of its own).

138. *Id.* at 366–72 (arguing that, while these reforms did place limits on the primacy of European law, they still greatly encouraged European law’s development).

139. *Id.* at 358–59; *see also* Vachez, *The Transnational Politics of Judicialization*, *supra* note 21, at 10 (emphasizing not only the Dutch constitutional system but also the activities of the Dutch section of FIDE, which “launched a working group in charge of identifying which dispositions of the Treaty establishing the EC are self-executing” (internal quotation marks omitted)). In this context, Vachez argues, “the recourse to this [preliminary reference] procedure before the ECJ soon became a distinctively Dutch phenomenon spearheaded by FIDE members.” *Id.*

140. DAVIES, *supra* note 10.

most consistently pro-integration Member State, became—and would remain—the most fundamental challenger to the ECJ in its authoritative interpretation of European law.<sup>141</sup> The 1974 *Solange I* decision, in which the Federal Constitutional Court questioned the adequacy of the ECJ's protection of human rights guaranteed under the German Basic Law, and reserved to itself the right to determine whether European Community actions were compatible with such rights, seemed to many observers to be a surprising power-grab by the Court.

Through careful research, however, Davies reveals that the Court was in fact giving voice to a set of concerns that had arisen within the West German legal academy over the previous two decades and had eventually spread to a wider public.<sup>142</sup> Put simply, by the 1960s West German legal scholars, and the general public, had become attached to the Basic Law's guarantees of human rights and democracy, and had grown concerned that the European Community's lack of explicit human rights guarantees and its persistent democratic deficit made it incompatible with the German constitutional order.<sup>143</sup> Yet these concerns had not been taken up and espoused at the European level by the West German government, which remained reflexively pro-integration under the leadership of a relatively small and stable group of supranationalist leaders.<sup>144</sup> Into this breach stepped the Constitutional Court, which in its decision implicitly invited European Community institutions—including, but not limited to, the ECJ—to provide the sorts of guaranteed human rights protections already present in the Basic Law.<sup>145</sup>

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141. *Id.* at 10–11 (describing this constitutional paradox as a problem whereby Germany needed both its submission to European primacy as well as consistently democratic jurisprudence within the country).

142. *Id.* at 184–85 (explaining that the Federal Constitutional Court decision was about “increasing congruence . . . not an attempt to grab power back from the ECJ”).

143. *Id.* at 42–44 (explaining how the German concern was not that the European Court made radical steps but that it had not gone far enough in protecting rights).

144. *Id.* at 45 (noting that these pro-integration voices were focused in the Foreign and Economics Ministries, increasingly sidelining the views of the Interior and Justice Ministries).

145. *Id.* at 184–85 (noting that the president of the German Federal Constitutional Court confirmed after the case that the court sought to pressure the ECJ to improve its protection of rights).

The *Solange I* ruling proved to be the first volley in a true constitutional dialogue, challenging European Community institutions to deliver convincing human rights guarantees to satisfy the Federal Constitutional Court's concerns. The decision, Davies vividly recounts, prompted alarm in the European Commission in Brussels, which was concerned about the prospect of contagion if other Member States' courts similarly moved to challenge the supremacy of the ECJ and the EU legal order.<sup>146</sup> The decision was also a source of severe embarrassment to the West German government, which sought to defend its reputation as a staunchly pro-integration Member State and avoid the possible opening of infringement proceedings against the country.<sup>147</sup>

Indeed, the alarm felt in Brussels and Bonn was aggravated by the economic and political crises of the early 1970s, which had left the European Community looking decidedly fragile, and Davies reconstructs the frantic, behind-the-scenes efforts by the Commission, the West German government, and its EU counterparts, as well as the European Parliament, to quickly put in place some statement of human rights guarantees at the European level to satisfy the Federal Constitutional Court.<sup>148</sup> Several of these efforts focused on the political branches of the European Community, including most famously a joint declaration on human rights adopted by the Commission, the Council, and the European Parliament in 1977.<sup>149</sup> But the ECJ itself also responded, with a series of decisions in which it first invoked—in the 1974 *Nold* decision<sup>150</sup>—and later relied upon—in the 1975 *Rutili* case<sup>151</sup>—rights enumerated in the European

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146. *Id.* at 185–86 (recalling concerns that the decision would open a “Pandora’s Box”).

147. *Id.* at 186.

148. *Id.* at 192–98.

149. Joint Declaration 1977 O.J. (C 103) 1 (EC); see also DAVIES, *supra* note 10, at 180–96 (observing that the European Parliament was credited with proposing the Declaration in order to add legitimacy to the Declaration, even though it did not begin in Parliament).

150. Case 4/73, *J. Nold, Kohlen- und Baustoffgrosshandlung v. Comm’n*, 1974 E.C.R. 491, 501–02 (referring to the Convention’s protection of property rights as an example of that protection in public international law).

151. Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. 1220, 1232 (finding that limitations on a Member State’s control of aliens derive from the Convention’s prohibition on national security restrictions that interfere with certain rights).

Convention on Human Rights.<sup>152</sup> By 1979, the Court went further in its *Hauer* decision,<sup>153</sup> ruling that:

[F]undamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding those rights, the latter is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community. International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can also supply guidelines which should be followed within the framework of Community law.<sup>154</sup>

The Court's gradual move to incorporate fundamental human rights provisions from the European Convention on Human Rights and the constitutional traditions of the Member States, despite the absence of any reference to these in the treaties, did eventually satisfy the Federal Constitutional Court, which in its 1986 *Solange II* decision rescinded the conditions it had placed in the way of its acceptance of European Community law.<sup>155</sup>

Through careful, new archival research, Davies provides a far deeper understanding of a crucial episode in the history of EU legal integration. In so doing, Davies insists on the need for political science and legal scholars to test hypotheses through careful archival research.<sup>156</sup> To historians, he insists that "legal history is more than just the law,"<sup>157</sup> and that only a contextual approach, which places legal decisions and doctrinal debates in their social and political context, will generate a clear understanding of the past.<sup>158</sup> Such social

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152. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

153. Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3729.

154. *Id.* at 3744–45.

155. BVerfG, Oct. 22, 1986, BVerfGE 340, 387, 1986; DAVIES, *supra* note 10, at 198 (emphasizing that the decisions in *Nold* and *Hauer* were crucial for the German Federal Constitutional Court's change in view).

156. DAVIES, *supra* note 10, at 3 (arguing that the arguments of legal integration scholars, while thought-provoking, remain incomplete until they survive "empirically grounded historical scrutiny").

157. *Id.* at 216.

158. *Id.* at 210 ("Legal integration did not occur in a specialist vacuum, and the ECJ, particularly in the early formative years, could not rely on its decisions being unnoticed and misunderstood by uneducated and disinterested populations. The legal autonomy suggested by the legalist perspective is only partially in evidence.

forces, he argues, help to explain the Federal Constitutional Court's historic—and ongoing—challenge to the ECJ, as well as the Court's response to it.<sup>159</sup>

Perhaps most strikingly to a social scientist, Davies emphasizes the specific, contingent constellation of social forces in post-war West Germany that gave rise to the Federal Constitutional Court's challenge:

Clearly then, of the new research being undertaken by historians of the EU's legal system, reception studies of European law within the Member States are some of the most important. Such analyses face the complexity of coming to grips with the national idiosyncrasies of the Member States. In the case reviewed here, we must first locate the dynamics of reception within the unique political culture of the FRG [Federal Republic of Germany]. Its willingness to "sacrifice" national interests and financial aid in the name of an ever closer union is a product of an exceptional set of circumstances that the FRG found itself in at its founding in 1949 . . . . Without these factors in place in our narrative, it is impossible to explain accurately why the *Solange* case came about and why it was the FCC and not the FRG government that resisted the ECJ. Focus on the national, on the particular, is crucial in explaining the formation of European law, even if our instincts point us toward the ECJ, the Legal Service, and other supra- or transnational elements of the system.<sup>160</sup>

For Davies, as a historian attempting to do justice to the details of this particularly significant episode in the history of EU legal integration, attention to the particularities and idiosyncrasies of the West German case is indeed appropriate. From the perspective of the social sciences, however, the imperative is just the opposite, namely to move from the specific to the general, to explain comparatively why it is that national courts in some countries (like The Netherlands) have readily accepted the ECJ and its rulings, while others (like Germany) have displayed ambivalence, and still others (like Denmark) have resisted sending preliminary reference requests at all.

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The law cannot be completely independent of broader social forces.”)

159. *Id.* (noting that the Court was aware of the social discourse and was also aware of the Court's effect on that discourse).

160. *Id.* at 206–07.

#### D. THE ECJ AND CONSTITUTIONALIZATION

Finally, on the question of explaining the constitutionalization of the treaties, or the emergence of “constitutional practice,” the cumulative evidence of historical scholarship reviewed in the previous three sections points to a constitutionalization process that was more contingent, and more contested, than the heroic account put forward by legal scholars and by the early neofunctionalist literature. As a result of new historical scholarship, we see that the founding Member States, far from being united in their strict defense of national sovereignty, were in fact divided on the question whether the new Community would be a federal body with a constitutional court or an international treaty with an administrative court. The inelegant compromises reached in the Treaties of Paris and Rome yielded a Community and a Court characterized by discrete constitutional *elements* that could be used by future judges to construct an integrationist jurisprudence.

With respect to the Court itself, we have seen that the essential decisions—to adopt a teleological approach to legal interpretation that conceived of the treaties as a *de facto* constitution creating a new type of legal order, and to subsequently proclaim the core doctrines of direct effect and supremacy—were reached only gradually by judges on the early court, who remained far more cautious and far more divided during these early years than both scholars and the general public had been led to believe. Furthermore, while the resulting legal revolution can indeed be interpreted as a bold, audacious act of agency on the part of the Court, we see that the judges were indeed aware of the political constraints on their actions: proceeding cautiously, tailoring their decisions to the limits of the politically acceptable, expanding the scope of their decisions gradually over time, and reacting in clear ways to direct challenges like the German Constitutional Court’s *Solange I* decision.

Finally, the research undertaken by scholars like Davies and Rasmussen suggests that the law did not, in fact, serve significantly as a “mask and shield” for the ECJ during these early years. Instead, we get a picture of a European Community in which national governments, national courts, and national legal communities were generally aware of the cases coming before the ECJ and understood their significance, and in which national governments, national

courts, and other actors accepted or resisted the Court's legal revolution to different extents, in different ways, and for different reasons.<sup>161</sup>

### III. WHAT'S MISSING

The New EU Legal History, then, has already shed light on some of the core questions that have preoccupied legal and political science scholars for decades. Still, the scholars who have undertaken this research have not been driven exclusively by a desire to test political scientists' theories, and even where they have, such scholarship remains in its infancy, and subject to the "small-*n*" concern that the findings of these individual historical studies may not be generalizable beyond the immediate subject of the study. We can and no doubt will learn more in time as historical scholars move to study the Court's actions in additional cases, as well as the reception of those cases among a wider group of Member States. In addition to this general desire for more studies and a larger *n* of cases from which to learn, we can also identify some additional questions crying out for answers by historical scholars who have neglected them until now. Specifically, I identify four questions to which political scientists might look to their historian colleagues for answers, or at least clues, to perennial questions about the Court and the process of EU legal integration.

#### A. THE MEMBER STATES, THE TREATIES, AND JUDICIAL INDEPENDENCE

Perhaps an obvious question with which to begin has to do with Member State preferences and negotiations in the EU's founding treaties with respect to the independence of the EU judiciary. To be sure, Boerger-de Smedt has examined the negotiation of the Treaties of Paris and Rome, with a primary focus on the fundamental nature of the court—administrative or constitutional, federal or international—as well as the nature of the court's jurisdiction, the standing of private parties, and the relationship between the ECJ and national courts through the preliminary reference procedure.<sup>162</sup> In

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161. DAVIES, *supra* note 10, at 7.

162. See Boerger-De Smedt, *Negotiating the Foundations*, *supra* note 101 (arguing that a few European politicians inserted into the treaties the potential for

creating the Court, however, Member States also made several important decisions about provisions that are widely seen to influence the *independence* of the judiciary, which is largely absent from Boerger-de Smedt's analysis. For example, the treaties established a system in which judges are appointed by common accord for a six-year, renewable term. In so doing, the Member States created judges who, unlike members of the U.S. Supreme Court, enjoy only short terms and must be re-nominated (de facto by their respective Member governments) and reappointed (by common accord of the Member States) thereafter if they seek to retain their positions. This feature of the Court is important because we know that many of the early judges did serve for multiple terms, in some cases for decades, being re-nominated and reappointed multiple times. It also arguably reduced the judges' independence compared with other potential schemes characterized by either longer terms or nonrenewable terms.

As it happens, however, the Member governments designed additional features in the Court's Statute—adopted as a protocol to the treaty—which held that, “The deliberations of the Court of Justice shall be and shall remain secret.”<sup>163</sup> This provision, which has been widely interpreted as an effort by the judges to decrease their vulnerability to Member State pressure and thereby to counteract the effects of short, renewable terms, was in fact inserted by the Member State governments themselves. This, however, raises important questions for historians of the period: Why did the Member States design a judicial appointment system with short, renewable terms? Were they seeking to limit the judges' independence? Why, then, did they commit the judges to deliberate in secret, and hence insulate judges against attacks for their individual votes in contentious cases? Were they simply following familiar templates of civil-law procedure from their own domestic experience? Or were these decisions a deliberate federalist effort to shelter a new and vulnerable supranational court from criticism and controversy by forcing it to rule as a collective body? These are important questions for those who seek to understand the intentions of the founders and the early

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the ECJ to develop a constitutional interpretation, even though most governments did not prefer European supremacy).

163. Protocol on the Statute of the Court of Justice, *supra* note 18, art. 35.



years of the Court, and yet answers are thus far elusive. The dual questions of judicial appointment and judicial dissent would also remain relevant beyond the design stage and into the early life of the Court, as we shall see presently.

### B. THE EARLY COURT AND ITS PROCEDURES

A second, closely related question has to do with the early Court of the 1950s and early 1960s, as it sought to establish the rules of procedure and the *modus operandi* of a young and self-consciously new kind of court. Based on the work of legal scholars, we know that the ECJ, from its early years, adopted *rules of procedure* that reinforced the strict secrecy of the Court's deliberations.<sup>164</sup> We also know that the early Court vacillated in its style of *legal interpretation*, which drew alternately on the plain language of the treaty (text), on the intent of the founding Member States (intent), and eventually, to a growing extent, on the objectives set down in the treaty (object, or the teleological approach).<sup>165</sup> We also know that the early Court settled upon a particular *literary style* for its decisions, modeled apparently after the French judicial style of terse, *per curiam* decisions with relatively little reference to either legal precedent or academic commentary.<sup>166</sup> Yet we know very little—indeed, virtually nothing—about the motivations of the founding judges and their reasons for adopting these rules of procedure, strategies of interpretation, or the style of their decisions. The procedural and literary decisions taken at this early stage would produce lasting impacts on the Court's jurisprudence, and previous accounts have been at best brief and anecdotal

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164. See, e.g., Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, art. 3, 1991 O.J. (L 176) 7 (requiring judges to “swear that I will preserve the secrecy of the deliberations of the Court”); *id.* art. 27 (mandating that deliberations occur in closed sessions and that “[o]nly Judges who were present at the oral proceedings, and the Assistant Rapporteur, if any, entrusted with the consideration of the case may take part in the deliberations”).

165. See generally, e.g., Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 657 (1997) (enunciating “the essential elements of the Court's approach to legal interpretation”).

166. See generally, e.g., Giuseppe Federico Mancini & David T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 COLUM. J. EUR. L. 397, 397–98 (1995) (analyzing the multilingual nature of the Court and noting that French, the working language of the Court, is a “rigorous and terse language which puts a penalty on the florid and twisted”).

regarding judicial decisions at this early, critical juncture.<sup>167</sup>

### C. JUDICIAL APPOINTMENTS

A third question has to do with the perennial question of judicial appointments and reappointments. By the mid-1960s, if not earlier, it was clear to EEC Member State governments that the Court was a highly consequential body, which Member governments could influence, in principle, by either selecting judicial nominees with views similar to their own or potentially by second-guessing other states' nominations when it came time for the Members to appoint the judges by "common accord."<sup>168</sup> This is indeed what political principals have done with respect to other courts, both domestic<sup>169</sup> and international,<sup>170</sup> and one might expect that, with the adoption of important, adverse decisions, Member governments would use their judicial appointment powers to influence, even at the margins, the "endogenous preferences" of the judges on the Court.

Thus far, however, scholarship seems to support Alter's contention that EU Member governments do not seem to use their nomination powers to promote like-minded judges, nor do they question the nominations of other Member States, whose nominations are invariably rubber-stamped by the other Members.<sup>171</sup> Rasmussen's research lends at least anecdotal credence to this view, noting as it

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167. See, e.g., Mancini, *supra* note 2 (providing the perspective of a former judge of the ECJ).

168. Note that the Court's practice of deliberating in secret and not revealing the votes or opinions of individual judges arguably protects serving judges against retaliation for unpopular votes when it comes time to reappoint them. However, this should not prevent Member governments from nominating and appointing first-time judges whose views on European integration or on specific questions likely to come before the Court are broadly consistent with their own.

169. See generally, e.g., Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999) (describing the complex "nomination game" played by U.S. presidents and senators in the appointment of federal judges).

170. See generally, e.g., Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 19 EUR. J. INT'L REL. (forthcoming 2013) (detailing the politicization of judicial nominations and appointments to the World Trade Organization's Appellate Body).

171. Alter, *Agents or Trustees?*, *supra* note 35, at 35 (observing that international judge appointments are less politicized because such appointments require cooperation from multiple Member States).

does French President Charles de Gaulle's puzzling and highly consequential nomination of the federalist Robert Lecourt, but even here Rasmussen could argue that the true influence of the Court was not, at that stage, clear to the General.<sup>172</sup> What could seem an understandable oversight in 1962, however, would become puzzling after 1963 and 1964, when the true stakes of European judicial appointments had become clear. Is it indeed the case that EU Member States have deliberately eschewed the opportunity to influence the preferences of the Court through the appointment process, opting instead to use judicial appointments for relatively trivial ends such as patronage appointments? Or have at least some Member States made concerted efforts to use the appointment process to introduce particular judicial views or temperaments—pro-integration, anti-integration, or otherwise—into the Court? Once again, this is a subject about which we know too little, and where historians could fill the gap.

#### D. THE POLITICS OF JUDICIAL DISSENT

A final question has to do with the internal life of the Court and, in particular, with the lack of any openly dissenting votes or opinions by judges of the ECJ or of the contemporary General Court (previously, the Court of First Instance). Among scholars of European legal integration, it is often taken as a given that an international court of uncertain legitimacy should stifle dissent and present a unified face to the world to protect the judges' independence and the Court's legitimacy.<sup>173</sup> However, as Jeffrey Dunoff and I have discovered in an ongoing comparative study of

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172. Rasmussen, *Establishing a Constitutional Practice of European Law*, *supra* note 11, at 389 (observing that the Lecourt's nomination was a "personal favour to a friend . . . but also reflects how little influence the . . . French leaders believed the ECJ to have").

173. *See, e.g.*, DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 125 (2007) (noting that in the context of international criminal courts, allowing dissent threatens the perception that the accused was guilty beyond reasonable doubt); Julia Laffranque, *Dissenting Opinion in the European Court of Justice — Estonia's Possible Contribution to the Democratisation of the European Union Judicial System*, 9 *JURIDICA INT'L* 14, 16–17 (2004) (noting that the tradition of *per curiam* decisions without dissent is embedded in continental European law, unlike British legal traditions); Mattli & Slaughter, *supra* note 52, at 181–82 (observing that a dissent-free practice conceals the reasoning of individual judges).

international judicial dissent, the ECJ is an outlier among international courts in this regard: most other international courts both allow and regularly engage in dissents, with judges voting openly and issuing both concurring and dissenting opinions alongside the judgment of the Court.<sup>174</sup>

Among existing international courts, the Appellate Body of the World Trade Organization (“WTO”) initially followed the lead of the ECJ in suppressing dissents, not least because the WTO’s Dispute Settlement Understanding provides explicitly that votes of the Appellate Body shall be anonymous.<sup>175</sup> The Appellate Body’s Working Procedures discourage even internal dissents, calling upon its members to make “every effort to take their decisions by consensus,” even where decisions can be taken by a majority vote.<sup>176</sup> Over the course of its first decade and a half of operation, however, the Appellate Body has gradually departed from this norm, engaging in a small number of anonymous dissents on individual points within the body of Appellate Body decisions.<sup>177</sup> This practice has been controversial among observers of the WTO, but proponents argue that after fifteen years the Court is now sufficiently well established and legitimate to allow for public dissent.<sup>178</sup> The case for dissents is

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174. Jeffrey A. Dunoff & Mark A. Pollack, *International Judicial Dissent: Causes and Consequences* 19–20 (Oct. 19–20, 2012) (unpublished manuscript presented at the Princeton University Conference on Judicial Institutions: Courts in Domestic & International Affairs) (on file with the *American University International Law Review* and the author); see also Mark A. Pollack, *Research Frontiers in International Judicial Independence: Judicial Appointment and Dissent*, in *COURTS, SOCIAL CHANGE, AND JUDICIAL INDEPENDENCE* 57, 59–60 (Adriana Silvia Dreyzin de Klor et al. eds., 2012) (comparing the lack of dissents in the ECJ to other international courts such as the International Court of Justice and the European Court on Human Rights, which have taken to issuing concurring and dissenting opinions).

175. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (“Opinions expressed in the panel report by individual panelists shall be anonymous.”).

176. *Id.* art. 3.2.

177. See Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT’L ECON. L. 895, 895 (2006) (noting that “[f]ewer than 5% of panel reports and 2% of Appellate Body reports contain separate opinions of any kind” and arguing that dissents have value and their use should be increased).

178. See *id.* at 930 (arguing there is a “benefit from having serious differences of opinion or interpretation made transparent. Members would then have the opportunity to consider the competing views and to determine whether the

further strengthened by the practice of another European court, the European Court of Human Rights (“ECtHR”), whose widespread use of concurring and dissenting opinions is widely seen as consistent with both judicial independence and a high level of legitimacy—although here it is striking that the Member States of the ECtHR have reformed the court to provide for nine-year, non-renewable terms of office for ECtHR judges, who had previously served renewable six-year terms like their ECJ counterparts.<sup>179</sup>

As with so many other questions about the internal workings of the Court, we know very little about dissent in the ECJ, including how frequently the judges are able to achieve consensus as opposed to deciding by majority vote, as well as whether the judges have ever seriously considered engaging in public dissents similar to the anonymous dissents of the WTO Appellate Body. Given the strict norms of secrecy about the deliberations of the Court, it is unlikely that serving members of the ECJ or other European Courts can or will shed any light on this question with respect to today’s Court, but we can hope that archival materials from the early years of the ECJ may shed light on these and other questions.

#### IV. CONCLUSIONS

In this essay, I cannot claim to have comprehensively reviewed the findings of the New EU Legal History. Instead, I have pursued a more parochial aim, to establish the “value added” of this new scholarship, assessing what is new and what it still missing in this work, measured against the baseline of sophisticated existing literatures in political science and law. Having identified four major questions that have informed the political science scholarship on the

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majority interpretation is the preferred outcome”). *But see* James Flett, *Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence*, 13 J. INT’L ECON. L. 287, 320 (2010) (preferring the “view that the system can and should generally expect individual panelists to find common ground, just as the negotiators must have managed to find common ground when they framed the treaty”).

179. Pollack, *supra* note 174, at 60; *see also* Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 418–421 (2008) (remarking that the adoption of nine-year terms would likely boost judicial independence and impartiality by addressing the “possibility of removal combined with the dependence on national governments for other prestigious positions”).

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ECJ—the nature and preferences of the court, its independence from its Member States, its relationship with national Courts, and its role in the “constitutionalization” of the treaties—I have indeed found significant value-added in the findings of EU legal historians, who have qualified existing assumptions and provided evidence to help adjudicate long-standing debates about the ECJ among political scientists and legal scholars.

In terms of the nature of the Court and its preferences, historians have challenged the complacent assumptions about the unity and the pro-integration preferences of the Court, showing us instead an early Court that was divided in its views and whose judges were far from consistently “constitutional” in their preferences. With respect to the independence of the Court, we have seen that ECJ judges did indeed pursue a gradual process of “constitutionalizing” the treaties against the expressed will of several Member States, counter to the predictions of a simple intergovernmentalist model, although we have also seen that they were more cautious, and more acutely aware of the potential for backlash, than a strong “trusteeship” image might imply. In terms of the Court’s relations with national courts, historical studies have reinforced the findings of recent political science scholarship, which finds numerous examples of consistent, sustained resistance to the ECJ from some national courts, whose reception in the Member States’ legal orders is indeed the “patchwork” depicted by Davies. Finally, all of these findings taken together yield a picture of an ECJ whose constitutionalization of the treaties was indeed an act of agency, but a more contingent and more contested act than the heroic accounts of this period have suggested until now.

There remain, to be sure, many questions still to be answered about the Court, and I have identified above only a handful of such questions that are particularly interesting to me as a political scientist. Happily, the New EU Legal History remains in its infancy, and we can therefore look forward to the Court surrendering more of its secrets under the sustained gaze of a new generation of legal historians.