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## Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research

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# RETHINKING THE LEGAL FOUNDATIONS OF THE EUROPEAN CONSTITUTIONAL ORDER: THE LESSONS OF THE NEW HISTORICAL RESEARCH

FRANCESCA BIGNAMI\*

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## I. INTRODUCTION

What drives the choice of European law as a field of study and scholarship? For many, the answer rests in the puzzle of the emergence of a powerful rule of law in a political system that, for all intents and purposes, began in the anarchical international sphere.<sup>1</sup> Through the constitutionalization of the founding treaties, the politics of state power and national interest have been replaced by the rule-bound behavior and the equality, predictability, and stability of a conventional legal system. In other words, in the eyes of many, the European legal system has left behind the shortcomings of public international law—most importantly the suspicion that international law is not really law at all because the rules are the product of state power and mutual interest and, once they no longer serve such ends, can be broken with impunity—and has adopted the civilizing

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1. See generally Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981) (delivering the classic account of the development of European constitutional law).

principles of law in what approximates a federal legal order.<sup>2</sup> As this characterization suggests, at least part of the attraction of European law rests in the fact that constitutionalization presents an empirical puzzle with a strong moral dimension.

While constitutionalization has been at the heart of scholarship in law and political science for decades, it has only recently captured the attention of legal historians. With their distinct methods and sources, they have already contributed in fundamental ways to our understanding of the constitutional paradigm, and given the highly ambitious research programs of Morten Rasmussen, Bill Davies, and others, they will undoubtedly continue to do so. In this essay, I review some of their claims and findings from the perspective of the legal discipline. In Part II, I argue that historical research has uncovered a legal dimension of the constitutionalization process that has been missing from the dominant account and that implicitly draws on and sheds light upon concepts and theories that are central to the field of comparative law. In contrast with the conventional account in both the law and political science, which contains a fairly thin rendition of the legal process centered on a supranational court (the Court of Justice) interpreting a single supranational text (the Treaty of Rome), legal historians have documented the variety of legal actors and the multiplicity of domestic legal sources that combined, through a process of legal transplants, to fashion the supranational constitutional apparatus.<sup>3</sup> Pluralism and cross-national

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2. See generally Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 261–70 (2011) (providing an overview of the skepticism associated with international law).

3. See generally Stein, *supra* note 1 (analyzing the constitutional doctrines developed by the Court of Justice of the European Communities under the Treaty); Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References*, 5 J. EUR. PUB. POL'Y 66, 66 (1998) (postulating that European legal integration is the result of connections made between the European Court of Justice, national courts, and private litigants); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413–19 (1991) (noting that the “constitutionalization” of the European Community’s legal structure grew from the establishment of four doctrines by the European Court of Justice: the doctrine of *direct effect*, whereby Community law has direct effect in domestic legal systems; the doctrine of *supremacy*, whereby Community law “trumps” national law where the two conflict; the doctrine of *implied powers*, which provides the Community with powers to carry out the tasks given to it under the European Economic Community Treaty; and the doctrine of *human rights*, which establishes that the Court will review Community measures to ensure they

variation in the types of professionals and institutions responsible for crafting the law, as well as the migration of legal concepts between jurisdictions, are central themes in the field of comparative law, and historical research has revealed the importance of understanding such variation and transplantation in the relatively understudied domain of public and supranational law.

In Part III, I argue that the lessons that are sometimes drawn by legal historians for contemporary normative and philosophical debates on the nature of the European constitutional order are less persuasive. It is sometimes argued that, since the process that led to the rise of what is alternatively called the “constitutional narrative” or “constitutional practice” was more contested and contingent than is normally believed to be the case, the existence, today, of a quasi-federal constitutional order is questionable. To simplify somewhat, the claim is that constitutionalization is a story told by a small cadre of starry-eyed and ideologically motivated lawyers and that it does not reflect the current realities of the member states, which continue to privilege national over European law and to give effect to European law only sporadically.<sup>4</sup> Although there is some support for this view, I argue that there is significant countervailing evidence and that the constitutional paradigm therefore remains a useful framework for conceptualizing European law.

## II. EUROPEAN LEGAL HISTORY AND COMPARATIVE LAW

In the conventional account of how the doctrinal apparatus and the routine practice of the European constitutional order came to be established, the legal dimension, namely the institutions, actors, sources, and methods that combined to produce the law, is quite thin. As Morten Rasmussen narrates in far greater detail, the early legal scholarship explained constitutionalization as an authoritative process by which the European Court of Justice used the teleological method of interpretation to derive direct effect, supremacy, and a host of other important doctrines from the text of the Treaty.<sup>5</sup> The

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are consonant with fundamental human rights).

4. Morten Rasmussen, *Rewriting the History of European Public Law: The New Contribution of Historians*, 28 AM. U. INT'L L. REV. 1187 (2013).

5. *Id.* (providing a historical overview of legal scholarship on European law

principal legal actor was the Court, the main source of law was the written law of the Treaty, and the dominant interpretive technique was the teleological method. The political science scholarship that followed beginning in the early 1990s called attention to the shortcomings of this legal explanation of constitutionalization—most importantly the radical nature and disputed authority of the Court's judgments—and put forward a variety of other factors to explain the emergence of the European legal system, including the material incentives of market actors and the judiciary's institutional quest for greater power, both the Court of Justice and those national courts that allied themselves with the Court of Justice.<sup>6</sup> Their contribution was to enrich the legal account by including a series of actors—interest groups and economic actors—and incentives—institutional power and material advancement—external to the profession, reasoning, and rule-bound behavior of the law. The law and the process of fabricating the law, however, remained the same as in the earlier scholarship.

The recent historical research, by contrast, has expanded our understanding of the internal legal dynamics that gave rise to constitutionalization in two important ways. First, it has revealed a much broader network of legal professionals and legal institutions

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and explaining that early scholarship focused primarily on the contributions of the ECJ in interpreting the Treaty, by way of the direct effect and supremacy doctrines).

6. KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001) (explaining that mutual interest in “European integration, self-empowerment, greater efficiency, or the rule of law” motivated national governments to compromise sovereignty in favor of a European legal system); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 43 (1993) (adopting a neofunctionalist view of European Community integration, with legal integration as the dependent variable, and the self-interested actions of European Community institutions, state governments, and private actors as the independent variables); Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63, 63 (1998) (arguing for a theory of European legal integration that incorporates, “as interdependent causal factors, contracting among individuals, third-party dispute resolution, and the production of legal norms”); J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 512, 532–33 (1994) (postulating that acceptance of the constitutional order imposed by the European Court of Justice amounted to a “quiet revolution” and arguing that judicial empowerment was one reason for this acceptance).

involved in shaping the emerging constitutional order, which extends well beyond the judges on the European Court of Justice and collaborating national courts. Second, it has demonstrated that the domestic law of the member states served as a crucial springboard for the new law of the European Community, influencing a number of key features of the supranational legal order.

On the first point, recent historical research has shown the importance of three groups of legal elites that have been ignored in the prevailing account of constitutionalization: executive branch lawyers, legal scholars, and the organized bar. At the supranational level, Morten Rasmussen documents in fascinating detail how the Commission's Legal Service (the legal division of the European executive branch) promoted an ambitious, federal vision of European law with the teleological method of interpretation and how it ultimately persuaded the Court of Justice, with a few caveats, to adopt this approach.<sup>7</sup> Rasmussen, together with others, has also chronicled the Legal Service's efforts to sponsor a pro-integration bar and legal academy capable of diffusing and litigating European law through its financial and organizational support for national professional associations and specialized legal journals.<sup>8</sup> As they demonstrate, a number of the seminal cases decided by the Court of

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7. See Morten Rasmussen, *Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive 1952–65*, 21 *CONT. EUR. HIST.* 375 (2012).

8. See *id.* at 383–84 (explaining that the “professional and academic infrastructure . . . had been so sorely missing in the 1950s”); see also Antoine Vauchez, *The Transnational Politics of Judicialization: Van Gend en Loos and the Making of the EU Polity*, 16 *EUR. L.J.* 1, 9–10 (2010) (documenting the Legal Service's support of the *Fédération internationale pour le droit européen* (FIDE), the pan-European lawyers' association, particularly in analyzing which provisions of the European treaties were self-executing); Antoine Vauchez, *The Making of the European Union's Constitutional Foundations: The Brokering Role of Legal Entrepreneurs and Networks*, in *TRANSNATIONAL NETWORKS IN REGIONAL INTEGRATION: GOVERNING EUROPE 1945–83*, 108, 115–16 (Wolfram Kaiser et al. eds., 2010) (remarking that, while there is no direct evidence to suggest that the Legal Service created FIDE, Legal Service officials were active within it, ultimately fostering a legal network “located at the crossroads between the national and the European levels as much as in-between the various legal, political, economic and administrative sites of the EC polity”); 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 (2007) (providing an overview of the evolving role of legal professionals and elites in European legal integration).

Justice in the 1960s were brought by members of the Dutch European law association, and afterwards the judgments of the Court were disseminated and publicized through the publication of translations, case commentaries, and articles in the newly established specialized law journals.<sup>9</sup> Thus, at the supranational level, the impetus for some of the most important constitutional developments came not from the Court but executive branch lawyers, the organized bar, and the legal academy.

In Germany, Bill Davies demonstrates that a different constellation of legal elites and institutions was active in resisting and ultimately, through the jurisprudence of rights, shaping European law.<sup>10</sup> There, legal academics were the first to underline the failure of the European legal system to guarantee fundamental rights in line with the German Basic Law and to voice their opposition to legal integration based on the constitutional failures of supranational governance. This position was then espoused by the courts, most importantly, the Constitutional Court in the *Solange* case, and induced the Commission, Council, and Parliament to issue a joint political declaration in favor of rights, as well as to a marked change in the jurisprudence of the Court of Justice.<sup>11</sup> Although German executive branch lawyers, both in the Ministry of Justice and the Ministry of Foreign Affairs, were active in European affairs, they carried relatively little weight in the fundamental rights saga. Initially exponents of the pro-integration position of the German government, they mobilized in favor of rights only once the Constitutional Court had ruled and it was necessary to find a political compromise to

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9. See, e.g., Vachez, *supra* note 8, at 11–15 (explaining that, despite the “not irrelevant variations” in translations, the commentaries and the publication of articles by legal elites and parties involved in the case “turned the ambiguous *Van Gend en Loos* into a clear-cut and far-reaching *judicial fiat*”).

10. See BILL DAVIES, RESISTING THE EUROPEAN COURT OF JUSTICE: WEST GERMANY’S CONFRONTATION WITH EUROPEAN LAW, 1949–1979, 78–88 (2012) (describing the role of the Federal Constitutional Court of Germany (“FCC”) and legal academia in critiquing and arguing rulings and procedural decisions made by the FCC and the European Court of Justice “as to the relationship between national constitutional law and the European legal system”).

11. Bundersverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 29, 1974, INTERNATIONALE HANDELSGESELLSCHAFT (*Solange I*), 37 BVerfGE 271 (Ger.); Bundersverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 22, 1986, WÜNSCHE HANDELSGESELLSCHAFT (*Solange II*), 73 BVerfGE 339 (Ger.).

guarantee the cooperation of the German judicial branch.

France presents yet a different picture. Although there is still research to be done, Alexandre Bernier has examined the role of the French European law association in the larger context of the legal establishment.<sup>12</sup> He demonstrates that the pro-integration lawyers and academics who banded together in the European law association exerted very little influence and that instead the executive branch, under the fiercely sovereigntist General De Gaulle, was able to control the courts and preserve the largely national bent of French law.<sup>13</sup> The French courts, lacking the same independence from the government and the administration as existed in other member states, failed to ally themselves with the Court of Justice in promoting and applying European law as courts did elsewhere. Thus, at least in this preliminary account and in contrast with Germany, legal academics and members of the judiciary played a relatively inconsequential role in determining the French attitude toward European law; instead, the decisive player was the executive branch.

In exploring the wide range of legal elites involved in the constitutionalization process, together with the considerable variation that separated countries like France and Germany, legal historians have tapped into an important element of legal systems at the heart of the research agenda of comparative law. One of the guiding principles of comparative law is that knowledge of a foreign system cannot be gained solely by learning the legal rules and principles that govern different classes of disputes.<sup>14</sup> Not only is the quantity and frequency of change of specific rules and principles such that this form of knowledge is incomplete and quickly becomes obsolete, but

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12. See Alexandre Bernier, *Constructing and Legitimizing Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950–1970*, 21 *CONT. EUR. HIST.* 399, 407–14 (2012) (arguing that, although the French Association des juristes européens (AJE) succeeded in introducing European law to France, it had limited impact in promoting acceptance of European law in France due to political and legal constraints, including the Euroskeptic Gaullist French administration of the 1960s).

13. *Id.*

14. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 *AM. J. COMP. L.* 1, 21 (1991) (noting that most legal systems do not actually have one “legal rule” to govern each type of dispute and that comparative legal scholars must therefore look more broadly at the rule as stated in a statute or the constitution, the rule as interpreted by legal scholars, and the rule as enforced by courts).

their meaning differs radically depending on the legal sources, institutions, and the legal professionals that hold sway in the foreign system. A considerable portion, if not the bulk, of scholarship in comparative law has been dedicated to uncovering these more fundamental and persistent differences, and even though this work has been criticized for oversimplifying legal traditions, it continues to inform teaching and research on the world's legal systems.<sup>15</sup> Thus the common wisdom is that the primary source of law in civil law jurisdictions is written codes and in common law systems, judge-made precedent, and that modes of reasoning from these two types of sources range from the inductive reasoning of the common law, the conceptualist approach of the German and Italian systems, parsimonious deduction from the code in France, and the pragmatic approach of Scandinavian legal systems.<sup>16</sup> More to the point of the new historical research on European law, comparative law has sought to understand foreign legal systems by uncovering differences in the organization and status of the legal professionals called upon to interpret and develop the rules. In some systems, like the English common law, the judge occupies pride of place, while in other systems, like the German and Italian civil law, the key protagonist is

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15. See RENÉ DAVID & JOHN E.C. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 17–29 (2d ed., 1998) (reviewing the “three principal families of law existing in the contemporary world,” the Romano-Germanic, common law, and socialist legal systems, in addition to “other systems,” including the Muslim, Hindu, Jewish, Far East, and Sub-Saharan Africa legal families). See generally KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (3d ed., 1998) (discussing the aims, methods, functions, and history of comparative law; surveying the Roman, Germanic, Anglo-American, Nordic, socialist, and “other” legal families; and applying comparative law principles to private legal institutions); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (2d ed., 1985) (providing an overview of the civil legal systems of Western Europe, Latin America, and parts of Asia, Africa, and the Middle East); JOHN P. DAWSON, THE ORACLES OF THE LAW (1968) (analyzing the role of case law in shaping the legal systems of England, Rome, France, and Germany through examination of the relationships between judges and political rulers, the nature and frequency of social change, the importance of other legal spokespersons, and the methods for training lawyers, in addition to the judgments themselves).

16. ZWEIGERT & KÖTZ, *supra* note 15, at 63–339 (grouping the different styles of legal systems into six categories of legal families: Romanistic (France & Italy); Germanic (Germany, Austria, and Switzerland); Anglo-American (England and United States); Nordic (Scandinavia); socialist; and “other” (Far Eastern, Islamic, and Hindu law)).

the law professor.<sup>17</sup>

Historical research on European law complements this line of comparative research on the institutions and elites that wield the authority to give meaning to the law in different legal systems by shifting the focus from private to public law. For reasons that have been thoroughly rehearsed elsewhere, comparative law has traditionally been almost exclusively preoccupied with private law—the law of contracts, torts, property, and so on that governs disputes between private parties—and not public law—the law that applies to disputes between individuals and state actors such as legislatures and government administration.<sup>18</sup> The European Community law of the 1950s and 1960s, in contrast with the conventional focus of comparative law, consisted almost entirely of legal guarantees designed to curb protectionist state policies and to regulate the market in agricultural commodities. Thus, by necessity, the new historical research has focused on the legal elites and institutions involved in public, not private, law and, in doing so, has improved our broader understanding of European legal systems. So far, one of the principal contributions has been to illuminate the role of government lawyers who, through internal administrative circulars and government litigation, had an important part to play in crafting the law in the public domain. Taken together, the research discussed earlier shows that these government lawyers and civil servants were highly influential at the supranational level, and, it appears, in France, but less so in Germany. Another lesson that can be drawn from the cases explored by Rasmussen, Davies, and others is that some of the characteristic differences of private law carry over into public law, in particular the towering presence of the legal academy in the German system, in contrast with what appears to have been a less important role in France and the Netherlands.

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17. DAWSON, *supra* note 15, at xii–xiii.

18. See John Bell, *Comparative Public Law*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 235 (Andrew Harding & Esin Örcü eds., 2002) (providing a framework for comparative public law and remarking that “public law has a number of institutional features that make it a significantly different activity compared with private law”); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 *AM. J. COMP. L.* 671, 680 (2002) (noting that comparative law is often criticized for, among other reasons, its “obsession with private law”).

In addition to providing a more complex account of the legal actors involved in constitutionalization, historical research has laid bare an important source of law that fueled and shaped the new constitutional order and that has, until recently, received relatively little attention in the scholarly debates—the domestic law of the member states. As explained above, according to the early legal scholarship and political science research, the principal source that served to establish the legal authority of the emerging constitutional order was the text of the Treaty and interpretation of that text through the teleological method.<sup>19</sup> Recent historical research, however, has shown that members of the legal establishment, both at the national and supranational levels, drew not only on public international law, i.e. a treaty between sovereign states, but upon domestic sources of law to inspire their constitutional innovations. In exploring the origins of some of the key provisions on the design of the Court of Justice contained in the Treaty of Paris, and then the Treaty of Rome, Anne Boerger-de Smedt has shown that the drafters cut and pasted elements of French administrative law and German constitutional law in designing the heads of review, while they relied on Italian constitutional law in creating the preliminary reference system.<sup>20</sup> Karin van Leeuwen documents the importance of Dutch constitutional reforms that firmly established the Netherlands as a monist system of international law for fueling the critical early litigation before the Court of Justice, and I have argued elsewhere that these monist concepts shaped the supranational doctrines of direct effect and supremacy.<sup>21</sup> In his analysis of the German

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19. Rasmussen, *supra* note 4, at 1205–06.

20. Anne Boerger-de Smedt, *La Cour de Justice dans les négociations du traité de Paris instituant la CECA*, 14 J. EUR. INTEGRATION HIST. 7 (2008) [hereinafter Boerger-de Smedt, *La Cour de Justice*]; Anne Boerger-De Smedt, *Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome*, 21 CONT. EUR. HIST. 339, 346, 352 (2012) [hereinafter Boerger-de Smedt, *Negotiating the Foundations*] (noting the impact of Magistrate Maurice Lagrange, who used his French administrative law background to influence the determination of the Court's duties).

21. Karin van Leeuwen, *On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms "Towards" Europe*, 21 CONT. EUR. HIST. 357, 358 (2012) (demonstrating how Dutch constitutional reforms were instrumental in the development of European constitutional law because they established the primacy of international treaties and jurisprudence over national law, which ultimately paved the way for several Dutch preliminary references to

experience, Bill Davies shows in greater detail and far more persuasively than the earlier literature that the decision to incorporate fundamental rights, as well as the catalogue of such rights, was driven by the allegiance of German elites to their constitutional guarantees of fundamental rights.<sup>22</sup> As Rasmussen puts it: “[historical research] has begun to explore how the national constitutional systems and legal cultures provided a constitutive framework—a fixed variety of options—for the development of European public law.”<sup>23</sup>

This dimension of the new historical research contributes to yet another strand of comparative law scholarship, namely the study of legal transplants. The migration of law between jurisdictions has been a constant in legal history and is a pivotal theme in comparative scholarship, so much so that Alan Watson, in his seminal writing from the 1970s, calls it the only topic deserving of comparative research.<sup>24</sup> In history, classic examples are the spread of the Civil Code on the French or German mold to Latin American, African, and Asian legal systems and the piecemeal incorporation of Roman law rules on matters such as divorce and the transfer of real property into both common and civil law systems.<sup>25</sup> Comparative law has sought to demonstrate that legal systems are not hermetically sealed and self-

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the European Court of Justice, including the *Van Gend en Loos* case); Francesca Bignami, *Comparative Law and the Rise of the European Court of Justice* (Mar. 3, 2011) (unpublished paper for the biennial meeting of the European Union Studies Association) (on file with author).

22. DAVIES, *supra* note 10.

23. Rasmussen, *supra* note 4, at 1218.

24. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 9 (1974) (arguing that “boundaries of Comparative Law have been drawn too widely, and that they should define an area akin to that of comparative linguistics; that is, they should be concerned with similarities and differences in the context of a historical relationship”).

25. See Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 441, 445–51 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (documenting the diffusion, often by force, of Roman law and the civil codes of France, Germany, and Switzerland in Europe and the rest of the world); see also WATSON, *supra* note 24, at 22 (“The excerpts from the Civil Code of Spain showing basic contract rules equally valid in France, Chile, Columbia, Germany, Holland, Italy, Mexico, Portugal, and many other lands, and equally honored across eighteen or more centuries, offer a substantial challenge to the view that law reflects all the changes of changing economies and all the diversities of diverse civilizations.”).

contained and that, in addition to formally recognized sources of law, such as constitutions, statutes, and judicial precedent, it is necessary to include foreign law as a major and constant source of legal decisionmaking.

The literature on transplants, in addition to documenting the extent of the phenomenon, has tackled two distinct questions: what explains the decision to borrow from another jurisdiction and, once a rule or collection of rules has been borrowed, what impact does the transplant have on the new legal system? The latter question has triggered a ferocious debate on the possibility, as well as the desirability, of borrowing. Some are of the opinion that transplants can never operate as intended and that the integrity of national systems should be defended against foreign imports,<sup>26</sup> while others take a more sanguine view of what is seen to be an inevitable and creative mode of lawmaking and dispute resolution.<sup>27</sup> Yet others assume the middle position that the success of transplants depends on whether the local circumstances exist in which foreign rules are likely to be fully understood and mobilized.<sup>28</sup> On the first question concerning the causes of transplants, at least three pathways to legal transplants have been identified in the literature: imposition through military conquest or other forms of foreign domination; a relatively insular process, shielded from politics, of borrowing by legal

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26. Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. & COMP. L. 111, 122 (1997) (arguing that the theory that law can be transplanted or borrowed merely "reflects a faith in abstract universalism which is at odds with the observable decline of formal rationality and the correlative materialization of formal law characterized by the increasing prevalence of informative arguments of a sociological, economic, political, historical, cultural, epistemological or ethical, rather than conceptual nature").

27. See WATSON, *supra* note 24, at 21 (remarking that legal transplants have been a common reality of legal systems for as long as legal history has been recorded); Alan Watson, *Comparative Law and Legal Change*, 37 CAMB. L.J. 313, 315 (1978) (comparing laws to ideas, which will inevitably develop over time as they are transplanted into different societies); see also William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 491 (1995) (arguing in favor of Watson's theory of legal transplantation and noting that critics of his theory tend to misunderstand the structure of his argument).

28. See Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 189 (2003) (arguing that the process of lawmaking, rather than the substantive content of the laws transplanted, determines whether the laws adopted by a particular society will be effective).

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professionals seeking to solve problems authoritatively by drawing on the prestige of the foreign model; and the strategic adaptation by national governments to the legal rules advocated by international economic institutions in an effort to qualify for international loans, attract foreign capital, and participate in the global marketplace.<sup>29</sup>

The new historical research contributes to the transplant literature by documenting the phenomenon in the relatively novel domain of supranational law and by shedding some light on the causal question with evidence on the incentives and actors that prompted the transfer of elements of domestic law into supranational law. As suggested by the examples above, most of the research on transplants has examined the horizontal transfer of rules and models between national legal systems. To the extent that the literature considers the impact of international law, it has focused on the downwards transfer of law into national systems as a consequence of international agreements or other forms of international pressure and the extent to which reception has been successful or unsuccessful. Comparative law has generally neglected to analyze the upward transfer of domestic rules and models into the legal frameworks of regional and international systems of governance. The new historical research breaks ground by focusing on upward transplants and by demonstrating the importance of domestic legal rules in inspiring the institutional framework of the emerging supranational legal system of European governance. Moreover, with the globalization of law and politics, this form of transplantation can be expected to become increasingly common, and therefore historical research on the European case can be expected to have relevance for tracing the genesis of the numerous systems of international courts and lawmaking that have come afterwards.

Turning to the reasons for supranational transplants, perhaps not surprisingly given the different context, none of the three pathways identified in the comparative law literature appears to have been at work. Foreign domination and international economic institutions obviously have no explanatory purchase on the European experience. At first blush, an explanation that draws on legal problem-solving

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29. See Graziadei, *supra* note 25, at 456–61 (noting that discussing these factors is useful for comparative law to understand the uniformity of legal practices).

based on the prestige of certain foreign models and insulated from political pressure appears more promising. Yet at least the historical account of what motivated the design of the Court of Justice in the founding treaties, on which the archival records are relatively complete, does not support this explanation. Rather, it suggests that domestic legal rules served as a convenient toolbox from which supranational institutional designers could opportunistically pick and choose, depending on their political or ideological aims, without regard for the opinion of the legal community, domestic or otherwise, as to the prestige and authority of those transplanted rules.

Anne Boerger-de Smedt has thoroughly analyzed the historical background of the key provisions of the Court of Justice in the founding treaties.<sup>30</sup> In many respects, the Court of Justice mimics the principal French administrative court, the Council of State. Without knowing the history, one might speculate that once the drafters decided to create a supranational administration, they also felt the necessity of guaranteeing some form of judicial review, as existed in all the member states, at which point the legal experts tasked with drafting the specific treaty provisions copied the prestigious French model, which not only had a long and distinguished pedigree but also had been the object of earlier transplants in most of the other member states (Belgium, Italy, the Netherlands, and Luxembourg). One might also expect that the French delegation, given its origins, was the most convinced of the authority and prestige of the French model. However, perhaps because the legal experts responsible for drafting were under a tight leash from their political principals, this logic did not drive the negotiations.

As the historical evidence reviewed by Boerger-de Smedt reveals, the French delegation was the main opponent of judicial review, including many features of the French model. The French delegation initially opposed establishing any permanent court, for fear that full-fledged judicial review would undermine the powers and prerogatives of the High Authority.<sup>31</sup> Instead, the German and

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30. See generally Boerger-de Smedt, *La Cour de Justice*, supra note 20; Boerger-de Smedt, *Negotiating the Foundations*, supra note 20.

31. Boerger-de Smedt, *Negotiating the Foundations*, supra note 20, at 345–47 (explaining that Lagrange was appointed to make the Court resemble a “simple [French] administrative court” and that other countries strongly opposed Lagrange’s plans “because Lagrange’s proposals ignored previous compromises

Benelux delegations were the main proponents of a permanent court, the German delegation because of its federalist inclinations and the Benelux delegation because it sought to protect state sovereignty and national interests against an overly powerful High Authority. Moreover, even after the French model emerged as the compromise position, the delegations demonstrated a willingness to tinker with that model in line with their political preferences without much regard for the prestige of the French system. Most extraordinarily from a transplant perspective, the French delegation would have transposed only three out of the four heads of review that were routinely applied by their Council of State (error of form, misuse of power, and incompetence, but not violation of the law) in an attempt to preserve the High Authority's administrative discretion and limit the powers of the Court of Justice.<sup>32</sup> It was only on the prodding of the federalist German delegation, which sought to establish a supranational rule-of-law system, that the Court was also given the power to review administrative acts for violations of the law.

Later, in the Treaty of Rome, when the institutional framework of the Court of Justice was subject to renegotiation in light of the experience of the European Coal and Steel Community, the national legal experts on the drafting committee were again motivated by the political preferences of their governments. Because individual litigation was perceived as unduly interfering with the activities of the High Authority, the standing rule was narrowed to bar individual challenges to generally applicable regulations, representing another departure from the French model.<sup>33</sup> Moreover, on those issues on which the legal experts were allowed some leeway by their political principals, it appears that they were driven by a combination of federalist ideology and what was thought to be politically feasible rather than the prestige and authority of the national transplant. The prime example of this was the preliminary reference system. The

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and weakened the judicial protection”).

32. For a classic explanation of the French system of review for “excess of power” that existed at the time and the four principal heads of review covered by “excess of power,” see MAURICE HAURIU, *PRÉCIS DE DROIT ADMINISTRATIF ET DE DROIT PUBLIC* 439 (6th ed. 1907).

33. See also Michel Fromont, *L'influence du Droit Français et du Droit Allemand Sur Les Conditions de Recevabilité du Recours en Annulation Devant la Cour de Justice des Communautés Européennes*, 2 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 47, 61–64 (1966).

drafters copied the Italian system of lower-court referrals of constitutional questions to the Constitutional Court not because of any recognized superiority of the foreign model—the Italian Constitutional Court had just barely come into existence—but because it furthered the federalist ideology of certain legal experts on the drafting committee.

In sum, the legal history of the treaties suggests that national law served as a source of inspiration for European law more because of the limits of human imagination and the fact that national law presented a readily available set of options, rather than because the drafters held it in particularly high regard. The logic of convenience, as opposed to prestige and authority, is underscored by the willingness of the French delegation in the first instance to do without an administrative court entirely and, in the second instance, to omit some of the most important features of the French model. It may well be that the explanation for supranational transplants in the case law of the European Court of Justice, with legal principles such as fundamental rights, is different and is driven less by political expedience and more by the merits of the transplant in the eyes of the legal community. In contrast with treaty negotiations, which represent moments of high politics, the activity of courts is generally less politically salient and, by virtue of the principle of judicial independence, courts enjoy greater insulation than expert committees from politicians. Transplants in judge-made law, therefore, might very well adhere more closely to the authority explanation in the general transplant literature since judicial decisionmaking is likely to be driven more by standards internal to the law and the legal profession. The question of what motivates transplants in supranational courts remains a promising avenue for future research.

### III. EUROPEAN LEGAL HISTORY AND THE CONTEMPORARY LEGAL ORDER

Moving from past to present, Morten Rasmussen and Bill Davies have suggested that the recent historical research has implications for how the European legal order should be conceptualized today.<sup>34</sup> Although they are careful not to overstate their case, they suggest

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34. See Bill Davies & Morten Rasmussen, *Towards a New History of European Law*, 21 *CONT. EUR. HIST.* 305, 308–09 (2012); see also Rasmussen, *supra* note 4.

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that since the rise of a constitutional practice was more contested and contingent than originally believed, the foundations of the current legal order are insecure and the constitutional characterization, namely that it approximates a federal legal system, overblown. There is no doubt that legal historians have dispensed with the aura of inevitability that pervades much of the early legal scholarship and neo-functionalist theories of legal integration in political science.<sup>35</sup> By exposing how divided the Court was initially, how the constitutional turn depended on the strategic and concerted mobilization of a variety of legal and political actors, and how national elites opposed the supremacy of European law in the 1960s and the 1970s, historical research has demonstrated that constitutionalism was only one of many possible frames for European law and that the principal competing frame—public international law—was equally possible.

Whether today, however, the member states have accepted or rejected the constitutional revolution is another question. After all, the constitutions of many nation states were heavily contested at the time of their adoption and for decades thereafter, and nevertheless today their law is considered constitutional in the sense that it is recognized as binding and authoritative and is routinely applied by courts.<sup>36</sup> Although, as Rasmussen says, historical research has demonstrated that the constitutional revolution had a very limited impact on the member states in the 1960s and the 1970s, it does not indicate whether this is still true today. To assess this claim, therefore, I look outside of the history literature to explore some of the recent challenges to the constitutional paradigm and to consider the evidence that exists on the relative merits of the constitutional paradigm over the principal alternative, namely public international law.

To begin the discussion, it is fitting to repeat what is meant by constitutionalization in the literature on European integration. The term has not been used to claim that there is a foundational document, similar to the U.S. Constitution or the French Constitution, in which a European people has recognized that it

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35. See Rasmussen, *supra* note 4.

36. One example is the Constitution of the French Fifth Republic. See RENÉ RÉMOND, *LE RETOUR DE DE GAULLE* (1958).

constitutes a single, self-governing community and has set down the rules for the collective governance of their community. Rather, constitutionalization refers to the system that has emerged for the application and enforcement of European law. The claim is that this system has come to resemble more closely a federal legal order than one established under public international law by a treaty among sovereign states because the rules generated by the system do not simply bind nations in their dealings with one another but take effect within their legal systems: national courts routinely apply European law and, in the event of conflicts with national law, give precedence to European law, and disputes are regularly and authoritatively settled in the last instance by the European Court of Justice.

Constitutionalization includes both a doctrinal and empirical component. The Court of Justice has announced a number of legal doctrines that give rise to the duty to apply European law and submit to the jurisdiction of the Court of Justice. As Rasmussen explains, the most prominent ones are direct effect and supremacy, but they also include the law on the preliminary reference system and the obligation of national courts to refer questions to the Court of Justice, rights of access to national courts to litigate European law, and the remedies to be awarded by national courts should a violation of European law be found.<sup>37</sup> Empirically, constitutionalization asserts that practice followed doctrine and that national legal actors, principally courts, have come to routinely apply European law and recognize the jurisdiction of the European Court of Justice.

There have been two types of challenges to the constitutionalization claim: one is focused on the theoretical doctrinal architecture and the other on the legal practice. Over the past decade, a number of legal scholars have challenged the theoretical vision of the European constitutional order as a hierarchical system in which European law ranks above the law of the member states, i.e. direct effect and supremacy, and the Court of Justice is supreme and has the final word on any conflicts between national and European law, i.e. the preliminary reference system.<sup>38</sup>

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37. PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* (5th ed. 2011).

38. See, e.g., Daniel Halberstam, *Local, Global and Plural Constitutionalism: Europe Meets the World*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 150, 202 (J.H.H. Weiler & Grainne de Burca eds., 2012) (preferring primacy to

Constitutional pluralism, as this line of scholarship is generally known, posits a European constitutional order of multiple competing claims to final authority, between national constitutions and the founding treaties and between the European Court of Justice and national constitutional courts, and seeks to develop a set of normatively desirable legal principles and standards of reasoning that can legitimately be used by courts to manage and reconcile such conflicts. The empirical trigger for most of this literature is the Maastricht Judgment of 1992, in which the German Constitutional Court ruled that it, not the European Court of Justice, bore final responsibility for policing the boundaries between supranational and national competences and keeping the European Union within the limits of the powers conferred in founding treaties.<sup>39</sup> This case, similar to the earlier German resistance based on fundamental rights narrated by Bill Davies, has given rise to the very real possibility of constitutional conflicts between different hierarchies of norms and between national courts and the European Court of Justice. Constitutional pluralism takes on the challenge of developing a theory of constitutional law that can accommodate this system of competing legal authority, which flies in the face of conventional theories of law and hierarchy, and seeks to devise a principled normative framework capable of resolving the conflicts inherent in a system that lacks what legal positivists would call a single rule of

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supremacy, as it would allow legal perspectives from outside the European Union); see also Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 67, 68 (Matej Avbelj & Jan Komárek eds., 2012) (arguing that constitutional pluralism is better equipped to solve conflicts of authority than is the doctrine of supremacy); Matthias Kumm, *Rethinking Constitutional Authority*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 39, 39 (Matej Avbelj & Jan Komárek eds., 2012) (“It is widely recognized that European constitutional practice has a pluralist structure. The legal orders of Member States are not hierarchically integrated into the European legal orders. Instead, from the point of view of Member States’ highest courts, the status of European Union law is a matter to be determined with reference to national constitutional norms.”); Neil Walker, *Constitutionalism and Pluralism in Global Context*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 17, 17–19 (Matej Avbelj & Jan Komark eds., 2012) (explaining the impetus behind the rise of the pluralism argument to explain the transnational nature of law but to maintain the idea of distinct constitutional singularities).

39. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 12, 1993, 69(2) C.M.L.R. 57 (Ger.).

recognition and a single rule of adjudication.<sup>40</sup>

Although the possibility of a legal system without clear lines of authority is theoretically intriguing and represents one of the most vibrant areas of contemporary legal scholarship, it should be stressed that neither legal pluralists nor the national constitutional law from which they draw their inspiration reject all or indeed most of the features of the doctrinal architecture that has been progressively erected by the Court of Justice over the years. To give but one example, supremacy, direct effect, and the duty to refer interpretive questions to the Court of Justice are accepted in all cases in German constitutional law except for those instances in which there is a strong argument that there has been a violation of the Basic Law.<sup>41</sup> Pursuant to these principles, in the early 1980s, the German Constitutional Court scolded the highest German tax court for failing to give direct effect to a European Directive or, in the alternative, in the face of doubts over direct effect, for failing to refer the interpretive question to the European Court of Justice.<sup>42</sup>

In addition, what bothers constitutional pluralists is not the actual existence of constitutional conflict but the possibility of such conflicts between competing judicial and normative hierarchies and the implications of this possibility for theories of law and what it means to be a legal system. They do not take a position on whether national courts, as a matter of practice, routinely apply European law and heed the judgments of the Court of Justice. In fact, part of the fascination of the subject is that the European legal system can function, and conflicts can be avoided, without a definitive hierarchy of sources and institutions. Put somewhat differently, as the label of constitutional pluralism suggests, this line of scholarship generally takes the view that the European legal order is thicker than ordinary international law and therefore merits the designation of

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40. See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed., 1994) (describing rules of recognition as rules necessary to understand primary rules, and rules of adjudication as rules necessary for understanding if a rule has been breached and how to prescribe an enforceable remedy).

41. *Bundersverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 29, 1974, INTERNATIONALE HANDELSGESELLSCHAFT (Solange I)*, 37 BVerfGE 271 (Ger.).

42. *Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Apr. 8, 1987, 75 BVerfGE 223 (Ger.)*. This history is recounted in GEORGE BERMANN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 304–05 (2d ed. 2002).

“constitutional” but that the doctrinal architecture established by the Court of Justice is an incomplete and, in some respects, misleading account of how the legal system operates.

Indeed, looking at the actual practice of constitutional courts, the pluralist threat appears quite remote, as outright conflict with the European Court of Justice has been systematically averted. Although a number of constitutional courts have called into question the hierarchical nature of the European legal system, in the interest of brevity, this discussion will focus exclusively on the German case. Even though the German Constitutional Court signaled its opposition to the Court of Justice as far back as 1974, with the *Solange* judgment, it has never actually ruled a European measure to be in breach of the German Basic Law.<sup>43</sup> In some cases, it has avoided directly challenging the authority of European law by deliberately ruling on the legality of national implementing measures rather than the European legislation pursuant to which the implementing measure enacted. For instance, in a case challenging the EU Data Retention Directive, which required that telecommunications data be retained for law enforcement purposes, the Constitutional Court found that the German implementing law, not the Directive, breached the German right to informational self-determination by mandating an excessively long retention period and by failing to narrowly delineate the circumstances under which the police would have access to the data.<sup>44</sup>

In other cases, the Constitutional Court has upheld German ratification of European treaties, and therefore has allowed European cooperation to go forward, but has imposed conditions on how European law is to be interpreted in order to satisfy German constitutional requirements. For example, the Court recently was faced with a challenge to German ratification of the European Stability Mechanism Treaty, which established a permanent bailout fund to assist indebted Euro countries.<sup>45</sup> The Court rejected the

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43. Bundersverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 29, 1974, INTERNATIONALE HANDELSGESELLSCHAFT (*Solange I*), 37 BVerfGE 271 (Ger.).

44. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 2 Mar. 2010, 121 BVerfGE 1 (Ger.).

45. BVerfG, Extracts from the Decision of the Federal Constitutional Court of 12 September 2012, BUNDESVERFASSUNGSGERICHT (Ger.), available at

challenge but found that democratic rights and procedures guaranteed under the German Basic Law were implicated, and therefore it set down a number of conditions for the operation of the European Stability Mechanism, including a prohibition on borrowing directly from the European Central Bank.<sup>46</sup> Thus we see that the Constitutional Court has sought to shape European law without seeking to displace it, giving effect to European legal commitments at the same time as it vindicates German constitutional principles.

A second type of challenge to the constitutional paradigm points to the disconnect between the legal theory of direct effect, supremacy, and all the other pieces of the federalist legal architecture and the empirical realities of litigation and legal practice in the member states. Looking past constitutional courts to the mass of adjudication that occurs at the lower levels of the judiciary, Lisa Conant has documented the variable and patchy enforcement of European legal rules, together with a reluctance to submit to the jurisdiction of the Court of Justice through the preliminary reference procedure.<sup>47</sup> However, even though Conant points to significant shortcomings of the legal system, other evidence is more promising for the constitutional paradigm. The number of preliminary references reaching the Court of Justice has steadily increased over the years. Indeed, there has been talk of reforming the Court's procedure to reduce the burden of the preliminary reference caseload, something that was unthinkable in the early decades of legal integration, when the Court did everything possible to encourage recalcitrant national courts to submit to its jurisdiction.<sup>48</sup> Moreover, it is fairly clear that knowledge of European law is more diffuse than it was even two decades ago and that the legal establishment in most places is reasonably conversant with European law. This stands in marked contrast with the 1960s and 1970s, when, as the new historical research has shown, legal elites familiar with and supportive of

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[http://www.bundesverfassungsgericht.de/en/decisions/rs20120912\\_2bvr139012en.html](http://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html).

46. *Id.* at 149–51.

47. LISA CONANT, JUSTICE CONTAINED 15, 42 (2002).

48. EUROPEAN UNION COMMITTEE, THE WORKLOAD OF THE COURT OF JUSTICE OF THE EUROPEAN UNION, 2010-1, H.L. 128 ¶¶ 97–117 (U.K.) (encouraging national courts to adopt the policy but rejecting the idea of making the practice compulsory).

European integration were an embattled minority.<sup>49</sup>

The transmission of European law in the member states today takes many forms. While in the 1980s, the law of the then-European Communities was still an optional part of the university curriculum, today it is mandatory in most places.<sup>50</sup> The same is true of the specialized training for judges that in many countries follows university studies.<sup>51</sup> In each of the member states, there exists an ample array of textbooks, treatises, legal journals, and other professional publications that lay bare the field and track the most recent developments in European law. The judgments of the European Court of Justice are published and analyzed in a number of scholarly venues, and in those legal traditions in which codes and scholarly commentary are the principal source of law, there exist competing compilations of the European treaties, commented article by article by leading scholars.<sup>52</sup> The transnational networks of national lawyers and academics devoted to propagating and shaping European law have also proliferated and have become increasingly specialized, with different groups devoted to administrative procedure,<sup>53</sup> criminal justice,<sup>54</sup> immigration law,<sup>55</sup> and other topics. In

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49. See, e.g., Davies & Rasmussen, *supra* note 34, at 308–09, 313 (describing how pro-integration jurists faced serious resistance from Gaullist France).

50. See, e.g., Herbert Hausmaninger, *Austrian Legal Education*, 45 S. TEX. L. REV. 387, 393 (2002) (placing law of the European Union in the third semester of Austrian legal education); see also Marie-Luce Paris & Lawrence Donnelly, *Legal Education in Ireland: A Paradigm Shift to the Practical?*, 11 GERMAN L.J. 1067, 1074 (2010) (requiring students to take, among other courses, Law of the European Union for barristers to hold a degree in Irish law); Axel C. Filges, *Remarks at the Opening of the Symposium Celebrating the 10th Anniversary of the German Law Journal – German Federal Bar (BRAK)*, 10 GERMAN L.J. 1305, 1305 (2009) (stating that European law is mandatory in German legal education because European law “is nowadays almost seen as national law”).

51. See, e.g., Programme Pédagogique de la Promo 2012, ECOLE NATIONALE DE LA MAGISTRATURE, 46 available at <http://www.enm-justice.fr/formation-initiale/accueil.php>.

52. See, e.g., Commentaire article par article des Traités UE et CE sous la direction de Philippe Léger (2000).

53. See, e.g., RESEARCH NETWORK ON EU ADMINISTRATIVE LAW [RENEUAL], <http://www.reneual.eu> (last visited Mar. 29, 2013) (seeking to simplify and create further transparency for EU administrative law).

54. See, e.g., EUROPEAN CRIMINAL LAW ACADEMIC NETWORK [ECLAN], <http://www.eclan.eu> (last visited Mar. 29, 2013) (collecting research on EU criminal law).

55. See, e.g., The Academic Network for Legal Studies on Immigration and

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sum, there can be no doubt that the judges, civil servants, lawyers, and scholars who write ministerial circulars, law review articles, briefs, and judicial opinions have a better grasp of European law and therefore are more likely than their predecessors to invoke the rights and duties of European law.

In conclusion, once the constitutional critique is carefully analyzed and the countervailing evidence considered, the European constitutional order appears to be on fairly solid ground. The constitutional paradigm might not perfectly capture the theory and practice of European law, but neither does the main alternative paradigm of international law. The question is not whether the European legal system mimics a federal legal order but whether it approximates more closely a domestic or international legal system. Is the role of European law in domestic courts more analogous to, say, the application of articles of the Civil Code and the related jurisprudence or to the application of the provisions of the WTO's General Agreement on Tariffs and Trade and to national enforcement of judgments of the International Court of Justice? On the whole, it appears to come closer to the former model.

#### IV. CONCLUSION

Recent historical research on the origins of the European constitutional order has afforded numerous invaluable insights into the roots of what is the most highly developed supranational legal system in existence today. In particular, two achievements of the recent historiography stand out, both for their contribution to the theory of European legal integration and to the discipline of comparative law more generally speaking. First, recent historical research has demonstrated the importance of executive branch lawyers, legal academics, and the organized bar in creating the normative discourse of European law. Second, the new legal history of the treaties and the case law underscores the importance of national law as a crucial source of inspiration for European law. These two insights have significantly advanced our understanding of how the European legal system actually came into being, dispelling

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Asylum in Europe (Odysseus), INSTITUTE OF EUROPEAN STUDIES, <http://www.iee-ulb.eu/sitepages/view/58> (last visited Mar. 29, 2013) (compiling expertise on EU immigration and asylum law).

long-standing functionalist myths and hindsight-based narratives, and can inform the debates in the field of comparative law.

At the same time, stressing that the origins of important aspects of the constitutionalization of Europe were much more contested and contingent than originally believed does not in itself provide sufficient grounds for inferring that the current status of the European constitutional legal order is uncertain. Theoretically, there do not appear to be grounds for this claim: a large body of research on path dependence in economics,<sup>56</sup> sociology,<sup>57</sup> and political science<sup>58</sup> in the past quarter century has shown that many resilient institutional systems have been put on self-reinforcing paths by contingent events and highly contested beginnings. Although in principle *any* institutional arrangement is open to reversal, what this large literature shows is that institutional vulnerability does *not* depend on the degree of contestation at the origins. In the case of the European Union, the evidence is mixed, and the jury is out, but the supporters of a constitutionalist interpretation are probably closer to capturing the real nature of the European legal order than those who consider it just another version of international law.

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56. See, e.g., Paul David, Path Dependence, Its Critics and the Quest for “Historical Economics” (June 2000) (unpublished manuscript) (on file with All Souls Coll., Oxford Univ. & Stanford Univ.).

57. See, e.g., Jack A. Goldstone, *Initial Conditions, General Laws, Path Dependence, and Explanation in Historical Sociology*, 104 AM. J. SOC. 829, 841–43 (1998).

58. See, e.g., Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 263–66 (2000).