EXCHANGE

The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe

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Doctrine, although challenged from its very beginnings as scientifically unsound, politically conservative, or socially irresponsible, forms the heart of constitutional scholarship in Europe. This article presents the development of legal doctrine in the twentieth century among the various national systems; it focuses not only on the elements in common but also on the particularities and idiosyncrasies of the individual systems. The aim is to suggest a strategy for responding to three contemporary challenges to the national scholarly cultures: the project of a European research area; the rapid development of a European legal area now faced with an ever-greater number of issues of constitutional importance; and the low regard accorded to doctrine by leading U.S. institutions. In light of these challenges, the article proposes a more fully evolved version of the traditional understanding of doctrine, presented here under the rubric “doctrinal constructivism.” It is proposed that this become the focus of a yet-to-be-created discipline of European constitutional scholarship, which will define both its role and identity. Constitutional scholarship in the European legal area, thus, should reposition itself, focused on but not limited to doctrinal constructivism.

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1. Premises, object, and purposes

At least three major developments are challenging the established ways of undertaking constitutional scholarship in Europe. One is the European project of creating a European research area, which includes the humanities, social sciences, and legal scholarship. As the European research area is thought of mostly in analogy to the European market, the overwhelmingly national organization of constitutional scholarship will come under pressure. A second challenge stems from the rapid development of the European legal area with ever-more issues of constitutional importance, often tightly interlinked with international legal phenomena. This situation undermines established scholarship’s usual focus on a single source, namely, the national constitution. Whereas the constitution was formerly conceived of as creating a normative universe, it is now increasingly understood as part of a normative pluriverse. A third challenge is occasioned by leading US institutions. As varied as legal research is in these institutions, it almost always contrasts with the usual way of carrying out legal research in Europe. In a globalized system of legal research, the sheer prestige of these institutions, combined with the strong competition for winning the best minds and their influence abroad, calls for a stocktaking of constitutional scholarship in Europe. In light of these challenges, this article will recall some elements of the development of constitutional scholarship in Europe and will propose an evolved version of the traditional mode—presented here as “doctrinal constructivism”—as the focus of the discipline, defining its roles and identity.

When Ernest Gellner asserts that “[t]he foundation of the modern social order is not the executioner, but the professor,” this statement appears particularly suited for legal scholarship. Although not everyone would agree with this categorical assertion, no one would deny that legal scholars have a key role in the legal order of the member states of the European Union. Legal scholarship not only describes from an external point of view, it also shapes from within. One can even recognize the identity of a public law system as grounded in scholarship’s conceptual creations, illustrations of which are the concepts of Staatssouveränität for Germany, service public for France, or

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1 Presidency Conclusions, Barcelona European Council point 47 (Mar. 15 and 16, 2002).
2 The authors of IPE, supra note *; Vol. II part 1: Karl-Peter Sommermann, Catherine Haguenaumozard, Julia Iliopoulou-Strangas, Patrick Birkinshaw and Martina Künecke, Carlo Panara, Ramses A. Wessels and Wim E. van de Griendt, Christoph Grabenwarter, Stanislaw Biernat, Joakim Nergelius, Helen Keller, Antonio López Castillo, Pál Somnevend, Peter M. Huber.
3 PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (Oxford Univ. Press 1987); see, for the American perspective, STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 162–187 (Oxford Univ. Press 2000).
4 ERNEST GELLNER, NATIONS AND NATIONALISM 34 (Cornell Univ. Press 1983).
parliamentary sovereignty for Britain. This observation applies not only to domestic thought: the institution of the president of the French Fifth Republic, one of the great constitutional innovations of the twentieth century, was itself formed by René Capitant’s transfer of a German scholarly invention, the Schmittian Hüter der Verfassung (guardian of the constitution). Legal scholarship develops and often even devises fundamental concepts and structures, elucidates and legitimates the current law in light of general principles, inspires and criticizes legal developments, and shapes the next generation of jurists. Many legal scholars, often on the basis of scholarly reputation, also act directly as legal practitioners, namely, as legal experts, advisers, as counselors, or, in consummation of an academic career, as judges. A thorough understanding of a legal order hardly is conceivable without a familiarity with its legal scholarship.

While law professors generally do play such roles throughout Europe, significant differences exist, not least because of differences between national traditions. This is evident not only from such well-known and divergent concepts as Staatssouveränität, service public, or parliamentary sovereignty, but also from concepts such as indirizzo politico, regarding the central Italian issue of political leadership, or desconstitucionalización, regarding the key Spanish question of the territorial structure of the polity. If the premise of article 4 (2) of the Treaty on European Union, as amended by the Treaty of Lisbon, is correct, then national constitutional law enshrines the core of national identity. Since identity includes an element of particularity, corresponding scholarly differences can be presumed. Thus, modern constitutional studies in Germany cannot be properly understood without a grasp of the concept of Staatssouveränität or without understanding state legal positivism and the Weimar dispute over legal method. Similarly, in Britain one needs to know something of A. V. Dicey and the doctrine of parliamentary sovereignty; in France, of the reaction to German positivism and, later, to Maurice Duverger’s science politique; and, in Hungary or Poland, of the influence of socialist legal scholarship.

Considering the fundamental role of legal scholarship as well as the clear differences among the national approaches to constitutional scholarship, not only does comparative law need to be complemented by historical and sociological studies of academia but the study of European Union law should be similarly supplemented. A European legal area, in order to flourish, must be accompanied by a common system of European legal studies. Such an academic system will be formed by scholars from various national traditions, who

5 Jouanjan, Frankreich, in 1 IPE, supra note *, § 2 ¶28.
6 Consolidated version of the Treaty on European Union, May 9, 2008, 2008 O.J. (C 115/15) 6. The provision states: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”
(as the present article shows) cannot simply lay their heritages aside. Thus, the evolution of such a system will more likely flourish with reciprocal knowledge of academic backgrounds. Summing up: the emerging ius publicum europaeum calls for reflection on the various academic cultures in light of the common European legal area.

The preceding analysis suggests that legal scholarship is a science, at least in the sense of the German term Wissenschaft. However, for various reasons and especially with regard to legal doctrine, the use of the label “science” is problematic, especially regarding academic writing when presenting the law construed as legal doctrine. Distinctions between truth and falsity, here, have only limited relevance; there is only a rudimentary methodological reflection on how to construe doctrine; and the active participation of many legal scholars in legal practice hardly seems to represent scientific neutrality. It is certainly arguable that doctrinal analysis—the main field of legal scholarship in Europe—forms a part of legal practice rather than of the world of science. Tellingly, the terms Verfassungsrecht, diritto costituzionale, and “constitutional law” denote not only the object, the constitutional law in force, but also the corresponding scholarly discipline.

Nevertheless, this observation need not undermine the conception of legal scholarship as a science, a Wissenschaft. Legal scholars are members of institutions within the system of sciences, dedacting thought, lectures, and publications to the systematic exposition of public law, within a professionalized scheme and “unburdened” by the need to decide cases. So it comes as no surprise that legal scholarship is institutionalized at universities, as faculties and not as professional schools. Accordingly, it is covered by the constitutional guarantee of a “freedom of science,” and not only by the more general guarantee of freedom of speech. Indeed, historically, the law faculty, from the beginning, has been one of the basic elements of the (Continental) European university. Accordingly, most Continental constitutional scholars conceive

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7 The project of the European University Institute in Florence seeks to supply up-and-coming European law scholars with a primarily European socialization. After some initial difficulties, the institute appears to be increasingly successful in establishing itself; however, it remains to be seen whether this will become the basis for a European legal scholarship unhampered by “epistemic nationalism.”

8 See especially Niklas Luhmann, Rechtssystem und Rechtsdogmatik [Legal System and Legal Doctrine] 13 (Kohlhammer 1974).


of constitutional scholarship as a science, though few think of it as a “social science.”

11 Geisteswissenschaft or the stand-alone term “legal sciences” (the plural is due to the dualism of canon law and civil law) embodies the predominant understanding. This corresponds well with the importance of doctrinal constructivism.

An examination of legal scholarship should not limit itself to examining the research. In perhaps no other Wissenschaft are research and teaching so closely connected. In this respect, the establishment of public law as a separate discipline in seventeenth-century Germany is telling. It consisted of the identification of a scientific object within a set of positive norms, the identification of a specific scientific purpose in the formulation of structures and leading principles, and, on this basis, an orientation toward academic instruction, institutionally anchored in the universities. These have been and remain the standard bases on which the scientific nature of the discipline rests. Even in Britain, where the legal profession continues to be accessible without a university legal education, the legal education has become more academic. Thanks to this orientation, the development of adequate material for instruction and documentation constitutes one of the central tasks of research in legal science. Across Europe, practice-oriented genres of scholarly (scientific) literature—the leading treatises and textbooks, both the academic and the practitioners’ handbooks or encyclopedias, and the commentaries tailored to either judicial or attorney practice—receive significantly more scholarly attention than in most of the other academic disciplines.

In short, research on the basic structures of constitutional law in Europe and any proposal on how it can evolve in the European legal area cannot omit an inquiry into the nature of legal scholarship. At the same time, legal scholarship itself needs to reflect the developments in the context in which it evolves. That being the case, I will present historical and sociological data. What follows is not intended as a historical reconstruction of the developmental paths taken by the various systems of legal scholarship. The following is more an exploration of heuristic types in light of the challenges outlined above.

2. The evolutionary paths

A legal dispute necessarily relates back to the actions of a constitution maker, a lawmaker, or a court. Although this backward-looking dimension is an inherent aspect of law and legal scholarship, many scholars seem forgetful, nonetheless, of their discipline’s history. Seldom is a concept or doctrinal

11 I was surprised to find the School of Law of the University of Warwick in the Social Studies Building; a German law faculty would certainly resist such housing. A common understanding is to put social sciences and law side by side. In Spain for example, a widespread denomination is “Facultad de Ciencias Sociales y Jurídicas.”
proposition traced back to its originator and its original context. What seems to matter most is a concept’s acceptance in current legal discourse. This masking of the course of development need not cause alarm; forward-looking problem solving, based on established positions, is a hallmark of a self-confident science. However, such a stance does not eliminate the prior evolution; the historicity of all cultural and social phenomena, their “path dependency,” has been acknowledged since Vico, Montesquieu, and Romanticism. Not least for this reason, fundamental works of legal science distinguish themselves from other contributions by displaying a distinct familiarity with the path already taken.

2.1. The genesis of constitutional scholarship

2.1.1. Two tales of genesis

Every academic tradition recalls a series of developments, occurrences, and texts that are viewed and honored as the “beginning.” A basic distinction emerges when comparing responses to the question “In what context did this system of constitutional scholarship emerge?” The question may be answered either with reference to public law, in general, or with specific reference to constitutional law. Some authors view the genesis of constitutional law, as a discipline, as a part of public law, meaning the genesis of legal norms addressing political institutions; others treat the constitution, as document, as foundational. This is the first expression of a deep-seated divergence in understandings of the relationship between constitutional law and public law.

Narratives of origin focus either on a political struggle or on the enactment of a constitution as the primary occurrence leading to the formation of a legal science for the subset of public law that addresses political institutions. In non-unitary political associations, especially, the main catalyst is taken to be that of political struggle. It may be no mere coincidence that this usually occurs in political traditions related to the Holy Roman Empire of the German nation. Accordingly, public law and its scholarship evolved as a way of dealing with struggles that religion, civil law, and political philosophy could not subdue sufficiently. This occurs within the post-Reformation conflicts between emperor and imperial estates, in the context of the territorial formation of states, and in a disavowal of the idea of a sacred empire. Public law and scholarship derive, here, from multiple developments: the autonomization of the political sphere, with its own doctrines of sovereignty and raison d’état; the notion

12 In the United States the situation appears to differ as far as constitutional law is concerned due to the importance of originalism.

13 On the special role of *ius publicum* in Germany, see Michael Stolleis, Geschichte des öffentlichen Rechts in Deutschland [History of Public Law in Germany], Vol. 1 Reichspublizistik und Polizeiwissenschafter 1600–1800 [Public Law of the Holy Roman Empire and Science of Public Order 1600–1800] 49 (C.H. Beck 1988). Core authors were Hermann Conring (1606–1681) and Johann Jakob Moser (1701–1785).
of the sovereign as legislator; the voluntaristic definition of law; and the transformation of the personal association, based in feudal law, into a transpersonal association with defined territory and institutions. William Blackstone’s path-breaking *Commentaries on the Laws of England* (1765–1769) were meant to bring this Continental tradition of “science” to England, while exerting a profound influence on the United States.\(^{14}\)

Other accounts refer to political action as the beginning, be it a revolutionary constitutional assembly or the establishment of a state. In such accounts, constitutional scholarship’s ideological function appears to predominate. Here, constitutional scholarship serves mainly to bolster the new order, often also seeking to stabilize the historical compromise on which the order has been built.\(^{15}\) The practical function of legal scholarship, the resolution of disputes, dominant in the other narrative, is far less important here.

### 2.1.2. Sine qua non: Formal rule of law

Polish constitutional scholarship, during the century of Poland’s division, shows that this science can prosper even where the object of research, the constitutional text, lacks legal authority. However, this remarkable body of work can best be explained by Poland’s steadfast national will to survive; it serves as the exception proving the rule that constitutional scholarship only flourishes when the law in question binds the authorities. Constitutional scholarship does not require fundamental rights or democracy, but it does need the rule of law (in German, *formeller Rechtsstaat*).

Thus, constitutional scholarship flourished in the German empire, which tended toward authoritarianism but was based on the rule of law, whereas it withered away under totalitarian National Socialism. In socialist states, the discipline did not progress beyond ideology and timid, anxious exegesis; more far-reaching attempts to advance the discipline were part of efforts at reform.\(^{16}\) The same holds true for the Greek military dictatorships.\(^{17}\) Elsewhere, authoritarianism under both Napoleon Bonaparte and Napoleon III led to the suppression of the discipline, and Charles de Gaulle’s occasional extraconstitutional actions plunged the science into crisis.\(^{18}\) And Franco’s Spain cultivated the discipline of political law, an amorphous subject matter, whose elimination is now an important concern of democratic Spain’s new legal scholarship.\(^{19}\) The situation was different in fascist Italy.

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\(^{15}\) Fioravanti, 2 IPE, *supra* note *, § 31 ¶¶ 1–12.

\(^{16}\) Lipowicz, *id.* § 34 ¶¶ 30–52.

\(^{17}\) Pilafas, *id.* §29 ¶ 27.


\(^{19}\) García-Pechuán, *id.* § 37 ¶¶ 1–12.
Admittedly, public law scholarship, for the most part, did limit its scrutiny to administrative law, leaving the political field unattended. Nonetheless, a scientific mind-set permeated the phenomenon of power that eventually served as scholarly fundament for Italy’s republican constitution making. This may also explain why the positivist method is far more embattled when it comes to the study of international law; in the latter realm, the rule of law is far more precarious.

2.2. Stages of the discipline’s unfolding
In the development of Europe’s diverse systems of constitutional scholarship, one can distinguish between synchronous and asynchronous milestones. Certain milestones were reached simultaneously by most scholarly systems. The synchronous type includes, especially, those of the “positivist legal method.” Other milestones, of the asynchronous sort, signify similar substantial achievements with comparable consequences, although different legal orders reach them at different points in time. Examples include the scholarly developments triggered by the progression to a liberal and democratic constitution or by the establishment of a constitutional court or by Europeanization.

2.2.1. Establishment of the discipline by the way of the positivist legal method, or doctrinal constructivism
As to when the discipline of constitutional law began, the spectrum of possible starting points ranges from the early modern age to the late nineteenth century. The establishment of the discipline within a law faculty seems, on some occasions, to have been quite controversial. Largely unproblematic in certain countries, it met with tremendous political and disciplinary resistance (in particular, from private law) in others. The private law professors at the University of Paris even brought suit against the establishment of a constitutional law chair because they feared that its effects could only be unscientific, owing to its political nature, and that it might bring legal science, as a whole, into disrepute.20

2.2.2. The original agenda
However, these different narratives—as well as the European-wide discourse on natural law during the eighteenth and nineteenth centuries—seem, taken as a whole, merely a prehistory. The dominant view sees these diverse lines of development converging in the late nineteenth century with the emergence of a scholarly agenda that established the basis of the discipline we see today. Only the British chapters refer to an earlier founding figure, namely, Walter Bagehot, who wrote before this agenda took shape. He was not a legal

20 Heuschling, id. § 28 ¶ 12.
scholar; rather, he was a journalist who—read on and be amazed!—ascribed little significance to the law. This neatly expresses the uniqueness of British scholarship.

The establishment of constitutional scholarship as a discipline in the late nineteenth century may be variously framed: it may be seen as part of the stabilization of a historical compromise, for example, between citizenry and monarchy; as an element of societal differentiation in the context of industrialization; or as part of an ideological project to legitimize public authority. From all these approaches important insights into the functions of constitutional scholarship can be gained, not just in those days but for today as well. The following discussion seeks to adopt an internal scientific perspective, combined with an interest in the establishment of disciplinary autonomy and functional legitimacy. For sure, this is but one of several perspectives, and one that is not the most critical. Yet it seems to me the most appropriate for the purpose of discussing the challenges presented in the introduction.

In this reconstruction, the establishment of constitutional scholarship is to be understood in the context of the establishment of the individual sciences in the second half of the strongly positivistic nineteenth century. However, the search for a separate, recognized field particularly plagued public law scholarship insofar as it studied the law of political institutions. The discipline’s output was held in low esteem in the scientific community for various reasons. Either it was considered as merely exegetical and thus of limited substance; or it was viewed as being of a historiographical or natural law provenance and, thus, without any peculiar, essential characteristic among the disciplines of legal science; or it was shrugged off as political statements and thus more properly a part of political journalism. In intradisciplinary competition, constitutional scholarship was completely overshadowed by the culturally and academically dominant private law.

The recognition of constitutional scholarship as a separate discipline is almost always connected with German legal scholarship, in particular, the so-called positivist legal method of “state legal positivism” (der staatsrechtliche Positivismus). Personified by Carl Friedrich Wilhelm von Gerber and Paul Laband, this scholarly movement seeks to distinguish itself from political science, historical studies, and natural law scholarship, while also

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21 For a more detailed discussion, see Kennedy, supra note 14; Michael Stolleis, Wie entsteht ein Wissenschaftszeig? [How Does a Branch of Science Develop?], in Umwelt, Wirtschaft und Recht [Environment, Economy and Law] 1, 1–13 (Hartmut Bauer ed., Mohr Siebeck 2002).

seeking to transcend exclusively documentary, exegetical analysis.\(^{23}\) Thus, the movement attempts to lead the discipline of public law—and, by extension, constitutional scholarship—via a *proprium* (based, as it was, in academic culture) into “scholarly independence.”

The positivist legal method does not require, merely, that constitutional scholarship provide oversight of the body of positive law and guidance for interpreting a norm in case of conflict. Rather, its agenda aims primarily at a structuring of the law using autonomous concepts, following the legal-conceptual (*begriffsjuristisch*) path of the historical school of law. In order to accomplish such a structuring, law is detached from social reality and tied to legal instruments that flow from the sources of law.\(^ {24}\) From this foundation, the positive material is then transcended, not by way of political, historical, or philosophical reflection but through structure-giving concepts such as “state,” a “legal person,” “state will,” “sovereignty,” “individual rights in public law,” “person,” or “substantive” and “procedural law.” Even though these concepts, in retrospect, clearly have connotations in natural law,\(^ {25}\) they are conceived of as specifically legal and, thus, autonomous concepts, which, as a consequence, fall under the exclusive competence of legal science. The highest scientific goal of the positivist legal method is, in substance, to reconstruct and represent both public and private law as complexes of systematically coordinated concepts. The key scientific competencies thus become abstraction, the development of concepts, and the corresponding arrangement of the legal material.

In crafting such concepts, legal scholarship creates for itself an autonomous area of discourse and argumentation, a sort of middle level between natural law, which is primarily within the competence of philosophy and theology, and the concrete provisions of positive law, which fall within the direct purview of politics and the courts.\(^ {26}\) The functional legitimization of the discipline flows from its specific competence over these concepts and the structuring of the legal material that ensues. Such activity can provide some legitimization...


\(^{24}\) Excluding court judgments, administrative acts, and related communicative acts.


\(^{26}\) Using exactly this reasoning, von Kirchmann, *supra* note 22, at 29, argues the worthlessness of jurisprudence as a science.
according to the premise that only a body of law, ordered by autonomous legal concepts, fulfills essential requirements of rationality. With this agenda, public law scholarship develops its own profile, distinguishing itself in two ways; first, interdisciplinarily from philosophy, history, and the empirically oriented political sciences and sociology, and, second, intradisciplinarily from private law, as it focuses not on horizontal but vertical legal relationships. Yet, the doctrinal elaborations developed by constitutional scholars do not achieve the level of detail and authority of private law doctrine.

The development of this agenda in public law marks a turning point not only for German but for many other European legal sciences as well: for Greece, with Nikolaos N. Saripolos;28 for the Netherlands, with J. T. Buys;29 for Sweden, with Christian Naumann;30 and for Switzerland, with Walther Burckhardt.31 The fact that, in Italy, Vittorio Orlando12 makes reference to Friedrich Carl von Savigny and not to Laband may be due more to reasons of constitutional policy than of scholarly agenda. Laband’s political position was at odds with the compromise struck by the Italian Constitution, the preservation of which was one of the main purposes of Italian constitutional scholarship.33 The Italian constitutional settlement lies somewhere midway between Germany and France, and this is reflected in what kind of constitutional theory was embraced. Whatever the case may be, in each of these countries we find a person who authoritatively introduces this agenda; and with Kelsen’s pure theory of law, one might say that Austria offers its apotheosis.

32 Vittorio Emanuele Orlando, I criteri tecnici per la ricostruzione giuridica del diritto pubblico [The Technical Criteria for a Legal Reconstruction of Public Law], in Diritto pubblico generale [General Public Law] (photo. reprint 1954) (1940); on Orlando, see Maurizio Fioravanti, La scienza del diritto pubblico [The Science of Public Law] 23–24 (Giuffré 2001); Fulco Lancaster, Momenti e figure nel diritto costituzionale in Italia e in Germania [Moments and Forms in Constitutional Law in Italy and Germany] 323–325 (Giuffré 1994).
33 Orlando, supra note 32, at 3.
The situation is different in England and France. The English contributions make no mention of influence from German state legal positivism. But Dicey’s agenda resembles Laband’s; this shows that, independent of the individual scholar’s personality, the time was ripe for just such a scientific program as formulated by the “positivist legal method in public law.” On the basis of John Austin and utilitarian positivism, Dicey submits a highly effectual construction of constitutional law, resolving contradictions and ambiguities through clear conceptual lines. In that sense, his work parallels the program of German state legal positivism, even though greater emphasis is placed on constitutional practice and political ideas. Moreover, whereas courts hardly play a role in Laband’s construction, Dicey portrays the English constitution as “judge-made law.”

In France, the picture is more varied. Up to the end of the nineteenth century, the exegetical way in which private law deals with Napoleon’s Code Civil provides the dominant pattern of scholarship. This approach as well as the historicizing or politicizing interpretations of the constitution are increasingly viewed as unsatisfactory. Still, this does not result in a development similar to German state legal positivism; rather, the general conflict between the two countries as “traditional enemies” (Erbfeinde) leads to a critique of the German agenda—et ab hoste doceri. In the more liberal setting of the Third Republic, Adhémar Esmein declares “political freedom” to be the core concept but develops the topic in a less conceptual and more historic perspective. Leon Duguit develops the central French concept of service public, a liberal democracy’s answer to the central German concept of public authority, which was considered intrinsically linked to the authoritarian nature of the German state. Only Carré de Malberg reacts with a positive methodological reception. However, other approaches dominate in France: Maurice Hauriou argues for a Thomistic natural law approach, and Duguit, although sharply critical of natural law theory, develops a theory of “objective law” with strong undercurrents of theories closely related to natural law.

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2.2.3. The legacy of the positivist legal method: Doctrinal constructivism as the “normal science”

From a contemporary perspective, both the diffuseness and the continuing impact of the positivist legal method are remarkable. This is no contradiction; frequently, it is precisely the diffuse concepts that succeed, owing to their adaptability and versatility. The concept of “positivism” is fraught with problems. As a method of legal scholarship, serious shortcomings remain, as it hardly defines the actual method per se—that is, the precise scholarly procedure of comparison, abstraction, development of concepts, structuring, and arrangement of material—that forms the core of doctrinal work. Rather, the positivist legal method denotes a specific understanding of the law, a particular, autonomy-oriented self-understanding by legal scholars, and a corresponding, specific scholarly goal; however, it hardly gives precise instructions for scholarly study or how to achieve that. Kelsen’s program shows what would have been necessary to implement the positivist legal method on the level of the prevailing epistemology at the beginning of the twentieth century. Severe self-limitation on legal scholarship’s sphere of influence would have been necessary. Another aspect of this diffuseness is the fact that the newly achieved disciplinary autonomy can hardly be defined precisely.

Nonetheless (or, perhaps, therefore), the positivist legal method’s disciplinary approach still informs the research of most public law scholars in Europe; this holds true *cum grano salis* even in the United Kingdom. This approach aspires to provide a comprehensive survey of relevant legal material, to develop structuring legal concepts, and to arrange the material accordingly. At the same time, it needs to be noted that scholarship is not as it was one hundred years ago but has evolved on account of critiques and a changing context. For example, consequentialist reasoning and balancing of interests are far more important today. Without a doubt, the way a legal system, so called, is understood has also changed. Previously, such a system tended to be understood crypto-idealistically as inherent in the law, whereas today systems are more often (and correctly) seen as construed instruments for the ordering and managing of the law. Similarly, the role of the system has become less significant as the understanding of what a system can accomplish in the law, in general, and in legal practice, in particular, has changed. Still, this does not diminish the system-orientation of scholarship as such. Given the problems attaching to the concept of positivism and to this transformed and reduced understanding, *doctrinal constructivism* might be a more suitable terminology. This development has happened, however, within the discipline as it was founded at the time. The defining elements are the quest for systematicity through the development of general concepts and structures and the perception of these as internal to and operative within the legal system.

39 For conceptual clarification, see Norberto Bobbio, *IL POSITIVISMO GIURIDICO* (Legal Positivism) 129 (Giappichelli 1996).
Not every scholarly contribution presents a great doctrinal design. Much more common is a type of scholarship that—as a sort of “upkeep” and “tending” of constitutional law—systematizes new legislative or judicial decisions within the established scholarly schemes, that is, doctrine, and, in doing so, contributes to the preservation of the systemic nature of the law and the legal relevance of the great “teachings.” The constructive and the practical elements converge in a function of doctrinal constructivism that can be labeled “maintenance of the law as social infrastructure.” First of all, this refers to the creation and safeguarding of legal transparency. Furthermore, the infrastructure-maintenance function of legal scholarship is not static but demands participation in the development of the law to keep it in line with changing social relationships, interests, and beliefs. In this respect, legal principles can fulfill the function of gateways through which the legal order connects to the broader public discourse. Doctrinal work should not be restricted to the analysis of the positive law but also should aim at its development.

“Constitutional court positivism” (Verfassungsgerichtspositivismus)\(^{40}\) leads the agenda of the positivist legal method forward into a new era, characterized by constitutional courts’ fundamental rights decisions and the attendant materialization and expansion of constitutional law. This positivism systematizes constitutional jurisprudence and, thereby, upholds the original doctrinal agenda in times of balancing-happy constitutional courts. One drawback to this continuation of the original methodological program might be that no progress is made beyond the original understanding of the sources of law. The creative, lawmaking role of the judge, particularly on the constitutional courts, is not adequately conceptualized; tellingly, the term is “constitutional court positivism,” not, say, “case law positivism,” while judicial decisions are defined as “jurisprudence” (Rechtsprechung) and not as “case law” (Fallrecht), which would qualify judicial decisions as a source of law. The lack of a fitting theory is readily apparent from the long train of citations to supporting decisions regularly hitched onto an assertion rather than references to a specific lawmaking decision.

The general, pan-European success of this agenda in the early twentieth century did not lead to the total uniformity of academic practice; actually, the scope of the agenda’s implementation is quite varied. Strong evidence suggests that German scholarship has spun an exceptionally intricate web of autonomous doctrinal concepts, thus providing an exceptionally thick layer of constitutional doctrine—due, in no small part, to the German language’s peculiar and vast capacity to create new nouns and compound words. This comes with a price: abstraction and conceptual creativity tend

\(^{40}\) For this term, see Bernhard Schlink, Bemerkungen zum Stand der Methodendiskussion in der Verfassungsrechtswissenschaft, 19 DER STAAT 73, 89–92 (1980) (F.R.G.).
to obscure original context, a particular problem of German scholarship, as is especially apparent from an outside point of view. With such abstraction and conceptual creativity comes the risk that doctrines may detach from their thematic context and the problem for which they were developed. Sometimes that problem is solved by other means, but the originally developed doctrines, now functionless, can still haunt the lines of legal argumentation, like some doctrinal “undead.” Both the pride and the misery of German constitutional scholarship spring from the same source: its pride in a high level of autonomy, in system building, and in the development of concepts; its misery, over entanglements with abstraction that, at times, have lost their functionality.

International law provides a fine example of that problem for an international audience, namely, the concepts of monism and dualism. These concepts are, in international scholarship, perhaps, the proudest achievements of that positivist epoch and reveal the greatness and flaws of the classical paradigm. As often happens with its constructions, the context of the concepts’ origin has largely been forgotten. Yet, if one compares the contemporary situation with that of a hundred years ago, almost every relevant element has changed: the evolution of the nation-state with the process of globalization; the unfolding of international law; general constitutional adjudication; and, above all, positive constitutional provisions on the role of international law within the domestic system. As theories, monism and dualism are, today, unsatisfactory. Their argumentations are rather hermetic, and they are not linked with the contemporary theoretical debate. As doctrines, they are unsatisfactory since they do not help in solving legal issues. Monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. They are the zombies of another time and should be put to rest.

While the voices critical of the scientific understanding of the positivist legal method may be numerous, the criticism usually demands its development in light of other approaches, hardly ever the method’s elimination. The identity of European constitutional scholars may depend, largely, on the working profile of the positivist legal method, rather, of doctrinal constructivism. The realization—that the law should be grasped and handled not only as a set of given rules but also as the object and result of societal conflict—did not bring about an abandonment of the systematic working mode, anymore than did the discipline’s increasing sociotechnological dimension. This facet should not be
underestimated in terms of its significance for the possibility of a common, Europe-wide scholarship of law. This working profile also distinguishes European legal science from its United States counterpart, where the legal positivist or doctrinal approach has been mostly abandoned, at least in leading institutions, either because of the impact of so-called legal realism or as the result of ethical conceptions along the lines of Ronald Dworkin’s work.42 Although casuistry, or so-called case law, has become more important in Europe, nowhere does legal scholarship operate as though a case law—orientation could ever replace a conceptual-doctrinal orientation. One may also formulate this as an ethical argument: fostering and maintaining systematic coherence undergirds the ideas of legal certainty, equality, and, thereby, justice.

2.2.4. Expansion I: Reality, Theory, and Great Narratives

Most manifestations of the positivist agenda lead to a division of the normative from the empirical, a separation of the law from social reality. Many consider this division constitutive of the discipline’s autonomy; it is even conceived of as an ontological datum. However, some constitutional scholars worry that this division may leave them out of touch with reality and may prevent them from doing justice to the “life” that law and legal scholarship are supposed to serve.

It is precisely for this reason that the positivist project faced vehement criticism from the very beginning—though with a remarkable delay in Austria as the result of Kelsen’s overwhelming influence. In response to the establishment of the positivist agenda, the call for an integration of “reality” and “fundaments” into constitutional and public law studies rang out almost everywhere, albeit with significant variations in volume and pitch. These scholars claimed competence not only over legal matters but also over social reality; they claimed to have expertise on the law’s social function, or the social prerequisites of constitutional law, or the actual operation of political institutions, or to be specialists not only of legality but also of legitimacy. Many influential constitutional lawyers have dedicated their careers to this set of topics, bringing about a blossoming of theoretical approaches that still has effect today.

Thus, it comes as no surprise that most accounts of the development of constitutional scholarship, after identifying the key figures of the positivist legal method, proceed to present a second, purportedly antipositivist wave of legal scholars with a peak of creativity between the 1920s and 1940s, similar to the development of legal realism in the United States. In the discipline’s recollection, the significance of these scholars is in no way inferior to that of the founders of

the positivist profile: Ivor Jennings, Santi Romano, Carl Schmitt to name but a few. Some of these authors find inspiration in French scholarship (for instance, Jennings, Romano, and Schmitt look to Hauriou), which did not follow the positivist legal method’s programmatic agenda. In retrospect, this expansion in the ’20s and ’30s of the last century is most visible in the texts that refer to the societal crises of that period—crises that shook the foundations of previous thought on the state, politics, and constitutional law.

The disciplinary agenda—to integrate legal structures with social reality—expands the discipline of constitutional law into other areas once it is successfully established. This expansion permits the discipline to reflect on its own foundations and to exchange—and compete—with other disciplines, which also strive to analyze and interpret social reality. The expansion becomes ever more justifiable, the less weight one ascribes to the positivist distinction between law and fact; the more one understands law as a part of the societal whole, the better one can use legal expertise as the basis both for assertions about societal reality and for opinions on its development. Somek’s discussion of legal thinking in Austria makes this drastically clear: normative hierarchy and skepticism about balancing correspond to a stiffly hierarchical and socially isolated bureaucracy. Austrian legal positivism correlates with the reality of the Austrian state, and thus it presents a means of understanding it.

In contrast to the success of the agenda of the positivist legal method, the integration of social science approaches into legal scholarship and theoretical reflection fail to conjoin into a common disciplinary platform; here, in contrast with the doctrinal sphere, the relevant insights are often incommensurate. And so it should remain: the incorporation of “reality” and “theory” into legal scholarship is as heterogeneous and controversial today as it was eighty years ago.

Regardless of the often heated conflicts, one may observe the remarkably nondoctrinal traits of constitutional scholarship: although it is often scolded as “doctrinal” and thus “narrow,” it has proved to be broad and open. The discipline of constitutional law encompasses contributions that can only be understood as essayistic speculation, contributions that draw on established theories from the humanities or social sciences, as well as articles employing the quantitative methods of empirical social sciences. In retrospect, even despite the threat to the discipline’s identity, this extension has been advantageous; the French example shows what price a discipline pays for failing to undertake such an extension successfully. In the early decades of the twentieth century the abovementioned topics were taken over in France, under Maurice

Duverger’s intellectual leadership, by political science. French constitutional studies then reverted to the exegesis of the constitutional text—“an exegesis that is both intellectually barren and, at any rate, of little relevance to legal practice.” Often, it is this nondoctrinal scholarly output that is best received in the other sciences and even in the wider public. The receptivity for such work shows the resilience and persistence of the Western tradition of comprehending both the political and social spheres in legal categories, notwithstanding powerful competition, especially from the economic, social, and historical sciences. Some theories, which form part of these expansions to legal scholarship and add to its interpretive arsenal, have experienced broad resonance in the process of societal self-comprehension. In turn, this bolsters both the discipline’s social prestige and its functional legitimacy.

2.2.5. Expansion II: Seizing the crown

“Seizing the crown” refers to the expansion of constitutional scholarship with the intention of enthroning it as the supreme discipline among the ranks of various forms of legal scholarship. Constitutional scholarship tries to develop constitutional law’s formal supremacy into an overarching substantive confluence of constitutional arguments in legal discourse in general. The metaphor “seizing the crown” comprises diverse lines of development in both the legal order and constitutional scholarship over the past fifty years. Such developmental strands include, for example, the strengthening of fundamental and human rights, constitutional judicial review, constitutionalization of the legal order (that is, the orientation of the entire legal order toward constitutional principles), an accordant ethos among legal practitioners, the comprehension of constitutional principles as social values, and the perception of constitutional law as a vehicle for social integration.

Granted, I make the argument for this development not only from the perspective of constitutional law but, additionally, from a German point of view. For some systems of constitutional scholarship, an ascent to the supreme discipline is more wishful thinking than current praxis. The developmental strands listed above appear at different points in time and with varying intensity. Nonetheless, they occur in most legal orders in Europe, at times with the aid of European law. In this sense, article 4 (2) of the Treaty on European Union as amended by the Treaty of Lisbon even grounds the member states’ identities

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46 Maurice Duverger, Droit constitutionnel et institutions politiques [Constitutional Law and Political Institutions] (Presses Univ. de France 1955); for turning the priorities around from the fifth edition on, see Maurice Duverger, Institutions politiques et droit constitutionnel [Political Institutions and Constitutional Law] (5th ed., Presses Univ. de France 1960); point taken from Jouanjan, supra note 37.

47 Heuschling, supra note *, ¶ 22, 24, 50ff (translation my own).
in the basic features of the national constitutions. If the premises of this assumption are sound, then the constitution forms the core of the identity of the national legal order, which necessarily means it plays a role well beyond its merely formal supremacy. Article 4 (2) can also be seen as the expression of a political consensus on such an understanding of constitutional law among all member states; such a view is in line with the concept of “seizing the crown.” To put it another way, if there can be a supreme discipline within legal scholarship at all, then in Europe the crown can only belong to constitutional law.

The basis of this expansion consists of fundamental and human rights and constitutional judicial review; more conflict, more cases, more constitutional law. After the Second World War, European legal orders procedurally and substantively bolstered their fundamental rights, most importantly, by way of judicial review of statutes. In some instances, this took place directly and massively, as a reaction to authoritarian or even totalitarian experiences (Germany, Greece, Italy, Poland, Spain, or Hungary); in other instances, it was in the course of strengthening the rule of law (France, Great Britain, the Netherlands, Sweden, or Switzerland). In certain constitutional orders, international law played a crucial role in this latter line of development. In France, the Netherlands, Switzerland, and the United Kingdom, the ECHR’s human rights arrangements provide the foundation for this development; moreover, this includes Austria’s legal tradition, which is skeptical of balancing. Ultimately, constitutional scholarship succeeds in appropriating these rights as its own subject matter, even, as in the United Kingdom, under the assumed premise of a separation of constitutional law and human rights.

The strengthening of fundamental and human rights leads to a shift of scholarly attention away from state structure toward rights issues. This strengthens the type of scholarship intended to accompany the relevant judiciary. This shift in scholarly attention toward constitutional court judgments has famously been labeled “constitutional court positivism.”

The body of law that sets up the state’s structure is distinct from fundamental rights, inter alia, in that the former is a closed set. Fundamental

48 Supra note 6.


50 Schlink, *supra* note 40. For the same phenomenon in other countries, see Heuschling, 2 IPE *supra* note 4, § 28 ¶ 27; Fioravanti, 2 IPE *supra* note 4, § 31 ¶ 63.
rights, however, can become relevant in an unforeseeable number of conflict constellations, usually covered by statutes and other legal acts ranking below the constitution. This relevance triggers a constitutionalization of the legal order, which is to say, an orientation of the entire legal order toward paramount constitutional principles, which, in turn, leads to a corresponding preeminence for the science that deals with this material. In the process, constitutional law is elevated above the mere status of one subject matter among many.

In this expansion, constitutional court positivism takes a key role. Its exegetical variant proclaims the relevant innovations of its judgments to the entire legal community. Its analytical variant spells out in detail the legal implications for scholars and practitioners of lower-ranking law. Its structuring, systematizing variant shows how the coherence of the legal system can henceforth be promoted on the basis of constitutional law, instead of legislative codifications. Its critical variant presses for systematic coherence in a jurisprudence that is sometimes all too quick to follow ethical intuition or political expedience.

In Germany, up to the threshold of the ’90s, the constitutionalization, and thus the subordination, of administrative law was the dominant topic in public law. However, constitutional jurisprudence also superimposes the effects of fundamental rights onto private law, the traditional supreme discipline. The same holds true for criminal law and the various procedural codes. Parallel developments, though admittedly of lesser intensity, can be observed elsewhere. Even in Austria, a “total constitution” emerges, relevant in an infinite number of legal relationships. Constitutionalization is especially intensive where the legal order provides for the constitutional judicial review of judicial decisions, that is, the review of cases. Given the possibility of individual applications against court decisions under article 34 ECHR and the corresponding expansion of the case law of the European Court of Human Rights, the various developments are increasingly framed within the common legal framework of the ECHR. Constitutionalization leads, rather often, to significant conflict, as exemplified by the scandal between the Spanish Constitutional Court and the Spanish Supreme Court. Widely varying motives may underlie the struggle over constitutionalization—from the self-interests of certain disciplines and institutions to divergent conceptualizations of order and justice.

Another element in the expansion of constitutional law into the leading legal science is its formative influence on the future bar; this identity-shaping role is described more closely below. The constitution’s identity-shaping role can even be extrapolated onto society in its entirety, giving the constitution a role in maintaining cohesion in the whole of society. This thought emerges, for

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51 Somek, 2 IPE supra note *, § 33 ¶¶ 31, 33, 39.

52 On this conflict, see Guerrero, 1 IPE supra note *, § 11 ¶ 37; for a similar problem in Poland, see Tuleja, 1 IPE supra note * § 8 ¶¶ 42–45, 57.
the first time, following the French Revolution; in 1791, Talleyrand calls for a knowledge of the constitution among the people, so that the republic is planted in the hearts of all. Since then, much has been published on this role of the constitution and the ways to realize it. Two developments have bolstered this dimension over the last few decades: the pluralization of societies, often viewed as detrimental to traditional, integrationist mechanisms, with the result that the common constitution becomes more important as the “cement of society”; and the conceptualization of constitutional principles as an expression of social values, thereby linking them to the ethical convictions of the citizenry.

In both variations, constitutional scholarship can present itself as the science of the normative foundations of society. From here, it is just a short step to an understanding of the constitution as holding a master plan for society as a whole, as embodying a concept of a “good life,” as an object of constitutional patriotism, or even the object of a civic religion. The significance and self-image of constitutional studies grows accordingly. The view is widespread in constitutional scholarship—but also in politics and society in general—that market integration through private law only occurs on the foundation of a community defined and established through constitutional law. As a consequence, the various disciplines of legal science operate within a framework constructed or administered by constitutional scholarship.

3. The state of the discipline
3.1. The discipline’s internal structure
3.1.1. Degrees of disciplinary autonomy
Constitutional scholarship’s autonomy vis-à-vis the other disciplines of public law scholarship is well substantiated, thanks to the regular positioning of constitutional law above the rest of public law. The British exception proves the rule: where constitutional law lacks a special position in the legal hierarchy, the lines dividing the discipline from broader public law remain vague and blurred.

In Continental European legal orders, the prerequisites for disciplinary autonomy are largely identical because of constitutional law’s placement at the pinnacle of the normative hierarchy; nevertheless, the discipline’s autonomization within the sphere of public law differs. In some countries, particularly

53 Luc Heuschling points out that in modern-day France the question of the Constitution’s integrationist potential is hardly asked. Society and patriotism, Heuschling continues, are defined relative to the values liberté, égalité, fraternité, and laïcité; they have no legal, textual anchor other than the reference in the Déclaration of 1789, since the constitutional texts were too labile. The constitutions passed, while the nation and state (that is, republican values, political personnel, the administrative structures settled since Napoleon, and the social structures anchored in the Code Civil) remained. This “knowledge of the constitution among the people” applies only to the past, states Heuschling, which is part of the reason why one speaks in France not of “constitutional” but of “republican” values.
in Germany, the relationship between constitutional law (Verfassungsrecht) and the law of the state (Staatsrecht) has been the object of debate. This debate can be explained as the expression of a nineteenth-century compromise; namely, the struggle between those favoring popular sovereignty and those favoring the sovereignty of the monarch, which was resolved, finally, by attributing sovereignty to the state.\(^{54}\) The state as the core concept leads to the denomination Staatsrecht. Moreover, the denomination “constitutional law” was rather unattractive for both sides—for the monarch it was suggestive of limitations placed on him; for the liberals the constitutions lacked full legitimacy, being mostly granted by the monarchs. Today, the difference is largely semantic since both have, to a very great extent, the same object and analyze it, for the most part, with the same positivist legal method.\(^{55}\)

The relation to administrative law is more complicated. Certain scholarly traditions concentrate on specialization, while others seem to expect that the issues of constitutional law should be worked out in a wider context of governmental authority. In this sense, some academic traditions, such as the Dutch and Hungarian, have distinguished between chairs of administrative law and constitutional law; others, such as the German, have combined the respective fields and expect research and doctrine to follow suit; and in the United Kingdom, constitutional scholars are even expected to teach other topics, such as criminal law or tort law. The next generation of scholars will, most likely, develop a fitting profile, either focusing on constitutional law or working on a broader range of topics. The nature of legal journals is another indication; whereas the leading journals in the United Kingdom, the Netherlands, and Germany are of a general public law nature, in Greece, Spain, and Italy they are specific to constitutional law or administrative law. Academic organizations can also be highly informative; in only a few countries do the most important organizations combine constitutional law and administrative law.

It is difficult to give a reason why certain scientific traditions take one road, while others follow still another. The bifurcation under authoritarian regimes might flow from the concern for the rule of law: while the autonomy of legal thought can be established in the scientific study of administrative

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\(^{54}\) This conceptual innovation is attributed to Wilhelm Albrecht, *Rezension über Maurenbrechers Grundsätze des heutigen deutschen Staatsrechts* [Review of Maurenbrechers Principles of Contemporary German State Law], GöttinGenische Gelehrte Anzeigen, 1489. 1508 (1837) (F.R.G); Romeo Maurenbrecher, *Grundsätze des heutigen deutschen Staatsrechts [Main Features of the contemporary German State Law]* (Varentrapp 1837).

\(^{55}\) Today, the self-identification as either scholarship on the “law of the state” or, rather, as “constitutional law” scholarship may depend on whether a scholarly tradition draws its identity more from the constitutional ideas of the epoch between 1776 and 1848 or from the phenomenon of the state and public order. See Michael Stolleis, *Nationalität und Internationalität [Nationality and Internationality]* 23 (Steiner 1998).
law in a way that is not possible with constitutional law in authoritarian regimes. The intensity of this division (or combination) within a given legal tradition appears to be dynamic; Italian scholarship, for instance, began with an exegetical approach in constitutional studies, then developed into a comprehensive public law that employed the “positivist legal method,” continued after the Second World War with a largely autonomous constitutional law strictly distinct from administrative law, and, today, it displays scholarly tendencies toward overcoming this distinction.

The prestige of the respective disciplines varies as does the degree of disciplinary autonomy. The polar extremes in the relationship between constitutional law and administrative law are the United Kingdom and France. In the former, Dicey’s notion of constitutional law—drawn up as a defense against state privilege, in the sense of French droit administratif—kept administrative law from developing into a well-respected discipline for more than a half century. In contrast, administrative law in France, and in Sweden as well, argued to the imbalance in favor of the Conseil d’État over the Conseil Constitutionnel. The fact that these two centralized, Western European nation-states, which underwent comparable political and social developments in the first half of the twentieth century, display such divergent developments with respect to public law scholarship shows the relative autonomy of disciplinary development in relation to broader historical evolution.

Although considerable differences exist among the nations in their scholarship, it is remarkable, in the context of a European discourse on constitutional law, that none of these scholarly realms asserts that the autonomy of constitutional scholarship emerged as the result of a specific method. Only in British constitutional law is the inclusion of the practice considered necessary to a proper understanding, and such practice is considered inaccessible to the usual methods of legal scholarship. This, then, might explain the continued importance of Bagehot’s political study. In other legal orders, it is acknowledged, generally, that principles and balancing play an especially important role in constitutional law, though this does not distinguish constitutional law’s methodology from that of the rest of public law. Constitutional court positivism was a key factor in bringing the contemporary, court-based constitutional law within the horizon of the positivist legal method. Other conceptualizations, which, for example, attribute a reduced degree of normativity to constitutional law, are hardly advanced in contemporary European constitutional thought, apart from Great Britain.

56 Lipowicz, supra note *, § 34 ¶¶ 60–64.
57 Loughlin, 1 IPE supra note *, § 4 ¶¶ 4, 66.
58 Id. § 4 ¶¶ 4, 66.
3.1.2. A multiplicity of voices and the difficulty of mapping them

A science speaking with a single voice is a monotone science; a monolithic constitutional science is close to ideology. This insight follows from the constitutional scholarship seen under National Socialism or socialism. A multiplicity of voices is essential to productivity and to achieving a scholarly quality.

The multiplicity of voices in modern European constitutional scholarship flows primarily from dozens, possibly hundreds, of debates on the diverse topics in constitutional law. However, very few of the contributions to these debates follow or even discuss an explicit theoretical approach, in the sense of either a specific methodological strategy or a general conceptual blueprint for the object of research. This missing aspect greatly complicates an accurate mapping of the research landscape beyond individual topics. The research landscape in the U.S. shows that legal scholarship can be carried out differently—and with explicit theoretical associations. There, the best research is expected to proceed explicitly from a theoretical research paradigm, such as the economic analysis of law, legal realism, originalism, the cultural theory of law, or critical legal studies. 59

In contrast, the dominant understanding of legal scholarship is more practical in Europe, where it tends more toward doctrinal analysis, aiming to achieve and maintain and coherence in the law. Moreover, thanks to the widespread use of the positivist legal method, that is, doctrinal constructivism, a unity of method does exist in the sense of a set of established lines of possible topics and patterns of argumentation. This permits a problem-oriented multiplicity of voices within the doctrinal core of the discipline and a problem-oriented dialogue without requiring a preliminary debate on methodological issues. This further clarifies the positivist legal method’s role: while it does not compel specific results, it does provide for the secure communication of a legal assertion, including its argumentative framework. Other sciences show that this is by no means automatic. This theoretical abstinence serves the dominant scholarly purposes well, even though it complicates any mapping of the discursive landscape with its multiplicity of voices, as well as any dialogue across borders, as will be shown below.

Although few would still characterize constitutional law as merely political law, no one questions the notion that constitutional law’s object is primarily the actions of political institutions. In liberal democracies, this situation leads easily to involvement in political struggle: constitutional law is an instrument for the exercise of power for the ruling authority, and, for the opposition, it is an instrument of resistance. Constitutional scholarship is not unaffected by this state of affairs; in one way or another, most constitutional

59 For an overview of various constitutional theories in the U.S., see Modern Constitutional Theory: A Reader (John H. Garvey et al. eds., West 1999).
scholars are linked to the political currents of their given country, even in their scholarly output. Indeed, political positions often correspond strikingly with scholarly findings—with the remarkable exception of the positions taken on basic constitutional issues of the European Union. However, while political orientation is, for the most part, only an object of conversation (and perhaps of some decisions, as well), it is seldom a criterion of scholarly systemization in the sense of classification of constitutional law positions according to a right–left scheme.60

Yet, some ordering is possible. A rough ordering of works in constitutional scholarship, in terms of overarching orientation, reveals two poles. One draws to it those works that are more strictly oriented toward authoritative sources and are inclined to argue inductively from this material; the other pole collects those that reason more freely, more unreservedly, and tend to argue deductively from general principles. A well-known German colleague coined the division between Pinscher and Schwadroneure (roughly, little know-it-alls and old windbags). In the eighteenth century, public law scholarship in Germany already comprised, on one side, the so-called Reichspublizistik closely tied to the positive legal material and, on the other, the natural law schools with much freer, deductive argumentation from general principles. In France, the one side has Louis Favoreu’s “constitutional court positivist” school, and the other collects far-reaching approaches, informed largely by the humanities, including Stéphane Rials or the “Germanists.”61 These two fundamental mind-sets are not determined by political affiliation, neither in the past nor today; both deductive and inductive approaches can be used not only to justify established power but also to support critiques of that power and demands by the opposition.

Furthermore, in most legal orders, the approaches depicted above, when seen as stages of development, continue to be present as orientations in contemporary research: the debates continue over the proper method and the proprium of scholarly constitutional work; over the means and ends of incorporating reality and theory; and over the ambitions of constitutional scholarship to become a supreme discipline. In most other respects, the frameworks for discussion prove to be remarkably heterogeneous among the different legal orders. The diversity of European constitutional cultures expresses itself in barely compatible discussional landscapes. But progress has been made; no longer is there stockpiling along national borders. Dicey’s rejection of administrative law as a “French” discipline seems just as antiquated as the German-French scholarly enmity of the early twentieth century.

60 On the continuing persistence of this classification in the political sphere, see Norberto Bobbio, Destra e sinistra [Right and Left] 63 (Donzelli 1995).

61 Heuschling, 2 IPE supra note 6, § 28 ¶¶ 35–36.
3.2. The disciplinary infrastructure

3.2.1. Institutions: Universities, professors, and their associations

The fundamental entity on which the science of constitutional law rests in Europe is the university and, specifically, the public university. In contrast with many other sciences, the university’s primacy here has remained intact. This is in line with the close connection between research and teaching in legal academia. The overwhelming majority of works cited in this essay were conceived of and drafted at universities. Of course, sometimes other contributions, especially those penned by judges, have significant importance in scholarly discourse; however, their importance usually lies less in their innovative content than in the authority of the author behind the scholarly opinion. Almost without exception, the important contributions to constitutional scholarship—at least those that establish themselves within the scholarly discourse—come from the universities. One might conclude that achievement in constitutional scholarship is less reliant on practical experience than would be the case in, for example, administrative law.

If common ground in Europe can, in fact, be found here, then the exceptions may be said to express the cultural diversity among the European states, determined largely by their varying political histories. An alternative to the university is the academy of science, that is, a public research facility without teaching activity. In socialist states, such nonuniversity institutions did have scholarly importance. Thus, the Hungarian Academy of Sciences played the leading role in constitutional research, at least to the degree that this was possible for an institution that served the purposes of ideological surveillance more than anything else. It was downgraded, though not disbanded as part of the transition to democracy and the rule of law.

The Centro de Estudios Políticos y Constitucionales remains a notable non-university institution. Founded in 1939 under General Franco, its main task was the development of an ideology in step with the regime. This political agenda led to a connection, both legal and political, to the department of the Spanish prime minister—a connection that persists today. After the regime collapsed, the reestablished institute (renamed as the Centro de Estudios Constitucionales) took on an important role in the construction of a new constitutional scholarship under Francisco Rubio Llorente. Among other activities, leading foreign works were translated, important journals were published, and a series of academic volumes was founded. A program, unique in Europe, was established, bringing together the next generation of Spanish academics.

62 Even in countries with private universities, the important professors of constitutional law remain largely within the public universities. Neither the Bocconi nor the Luiss in Italy, neither Bucerius in Germany nor any of the private Spanish universities have yet achieved a noteworthy profile in this area.

63 See supra note *.
in public law, political science, and sociology for purposes of research. Yet the center does not carry out independent research. Instead of competing with university research, it has become an important complement.

With a similar goal of complementarity, the Max Planck Institute for Comparative Public Law and International Law is active in Germany. This nonuniversity institution was founded in 1924 under the auspices of the Kaiser Wilhelm Society for the political purpose of developing expertise in the areas of international and comparative law. This was to assist German interests in the implementation of the Versailles peace treaty. Since its reestablishment in 1949, German constitutional law has been one of the institute’s research focuses, albeit largely in connection with supra- or international legal phenomena or in the context of comparative law.

The French case is equally remarkable and extraordinary. Nonuniversity competition in constitutional law comes less from the legal studies departments of the Centre National de la Recherche Scientifique (CNRS) than from the Institut d’Études Politiques (Science po); this competition is explained by the uniqueness within Europe of the relation of French political science to constitutional scholarship.

If public institutions form the basis for constitutional scholarship’s operation, they do not alone sustain it. As part of the academic self-organization, private entities help to uphold and unfold the discipline. Their levels of organization vary widely; where such entities do not exist, as in Hungary, their absence may be taken as an indication of civil society’s lack of significant organizational force. On the other hand, the level of organization in the Association of German Public Law Scholars (Vereinigung der Deutschen Staatsrechtslehrer), founded in 1922, appears exceptionally high. As unrivaled as it is authoritative, this association comprises practically all the established representatives of the discipline and largely determines points of scholarly focus in its annual meetings. Europe seems to have no other scientific association with this level of organization and thematic influence.

If public universities across Europe make up the institutional foundation of constitutional research, then professors make up its human foundation. If this central role of the professor also represents European common ground, still, there is great diversity, not least in the qualifications and professional path to a professorial career in constitutional law. A glance at the United Kingdom shows that not even a dissertation is absolutely required in all places. At the other end of the spectrum, Germany, Austria, Poland, and Hungary require a second dissertation in the form of a Habilitation. Decentralized qualifying paths, such as the German one, contrast with centralized procedures, such as the French concours d’agrégation. A professor’s institutional resources range from an individually held chair with its own supporting academic and technical personnel, as in Germany, to chairs held in common by multiple professors, as in Hungary. The degree of remuneration
is also worth mentioning; compared with those of other similarly qualified jurists, the salaries of university professors in some academic systems seem so meager that lucrative side jobs are not infrequently preferred to research.

Summing up, the uniform title of “constitutional law professor” actually covers quite different professional realities. These realities do not fail to influence the social prestige of the profession and, by extension, the social standing of the discipline itself. It has been claimed that the professor stands at the center of the legal order in Germany, the judge in England, and the legislator in France. This seems grossly overstated, although it does hint at real differences in perception and self-understanding, working modes, and levels of influence.

3.2.2. Scholarship and practice, scholarship for practice
Throughout Europe, legal doctrine is an important—if not the primary—emphasis of constitutional scholarship. Much difficulty and controversy surrounds the issue of how to define legal-doctrinal statements scientifically; nonetheless, there is widespread agreement that such statements are directly relevant in the operation of the legal system, that is, in legal practice. Additionally, one of the central purposes of work with legal doctrine is the preservation of both legal certainty and the postulate of equality in the operation of the legal system. These two features underlie the understanding of legal scholarship as a practical science. This is also in line with the prominence of the literary genres—the handbook, commentary, and textbook (specifically, the German-style Lehrbuch). Practice-oriented output by professors signifies a shift in scholarly production; once a professor has established her- or himself professionally, the scholarly orientation often shifts away from scholarly innovation and toward the preservation and propagation of established doctrine.

Despite these commonalities, very distinct realities persist; this may be seen, for example, in the relevance and attention that legal practice gives to constitutional scholarship. From a scholarly point of view, an often desirable interaction is the candid debate we witness in judicial decisions. Along these lines, the German Federal Constitutional Court’s habit of citing scholarly legal literature is quite noteworthy. This citation practice exerts a strong influence on the direction of scholarly study; the reputational gain tied to such a citation further incites scholars to address current issues in such a way as may be of assistance in judicial practice, which, in turn, further strengthens the practical orientation of the discipline. In most other legal orders, however, judicial decisions seldom cite scholarly sources. Another intense form of dialogue takes place when professors represent parties as counsel before constitutional courts.

Even the British legal system, where law professors are only minimally active inside courtrooms, includes various forms of interaction between the judiciary and academia.

Another form of interaction between scholarship and practice is the human link, when constitutional scholars are appointed to a given judgeship. In many academic traditions, it is considered the pinnacle of an academic career. Even here, however, European traditions are diverse; certain constitutional courts, such as the German, Italian, Polish, and Spanish courts, regularly have scholars on their bench, often in considerable number, whereas other judiciaries seldom include professors, as in France, or almost never include them, as in Great Britain. This variation may contribute to the different levels of social prestige associated with each system of constitutional scholarship and the professors who compose it.

3.3. The teaching of constitutional law and the ethos of the bar

The next generation of jurists is not invariably instructed in constitutional law at a faculty of law. France shapes part its legal elite not in law schools but at the Institut d’Études Politiques. In the United Kingdom, all legal professions still remain accessible without a university legal education. In most legal orders, however, a university education is required. According to the legal curricula, the great majority of up-and-coming jurists will have had intensive constitutional instruction at a faculty of law. These faculties, with the exception of the German state examination, will also be responsible for verifying and certifying the students’ success.

The teaching of constitutional law significantly shapes constitutional law research. The various lines of research in comparative constitutional law display this vividly. Countries where the academic curriculum regularly includes courses in comparative constitutional law have a relatively more developed research landscape than do those where this is not the case. Institutionalizing a given area of law as a pedagogical subject steers professors’ production toward the respective educational literature. Potentially, this leads, in the form of some weighty treatise, to a fundamental text of the discipline.

The breadth of instruction in constitutional law reveals the importance constitutional law is given relative to other areas of legal studies. A subject matter’s share in the education as a whole affects the share of corresponding, specialized professors in the law faculty. This is why the extent to which a subject is taught indicates the share of constitutional research relative to legal

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66 Nonetheless, the current of “smaller” educational literature can be seen, from a scholarly point of view, as a wasted allocation of resources.
research as a whole. Further, a discipline’s share reflects its academic reputation at the faculty of law and in the state institutions that oversee educational policy. Last but not least, constitutional law’s share in a legal education indicates the role it plays in professional socialization, in the formation of an ethos.

In its basic structure, constitutional instruction in Europe is comparatively uniform; coursework, from the very beginning of studies, is usually divided into (a) the law on the state’s structure and institutions and (b) fundamental rights, and often an additional course in the procedure before the constitutional court. A French peculiarity is the delay in the study of fundamental rights until the third academic year. Without exception, constitutional law counts as a core subject. The fractional range that the subject can take in the United Kingdom also represents the poles of the European spectrum: at least a twelfth, at most a third of the total legal education.

Throughout Europe, constitutional expertise is a central legal qualification; however, there are vastly different ideas of what this implies. In the United Kingdom, it is expected that one can analyze cases by reasoning, *ratio decidendi*, and obiter dicta; distinguish them from one another; and evaluate their innovative (lawmaking) significance. On the Continent, as much weight is given to constitutional courts’ decisions, in terms of their influence on the concrete shape of constitutional law; yet an education like that in Britain certainly will not be found in the standard Continental program. In many states, a student can pass exams with flying colors and still never have analyzed a case in detail. In most instances, it is doctrine that students are expected to know. They are socialized accordingly and taught a mind-set and routine in which doctrinal academic writing plays an important role in practical legal reasoning.

Certain countries limit their educational objectives to the memorization and reproduction of abstract knowledge, leaving aside any application of constitutional norms to constellations of various conflicts. In Germany, however, education focuses on the resolution of controversies, of “hard cases.” Constitutional law’s radiation, as it were, into other legal material, particularly into administrative law, appears to be taught intensively to students in Germany—which, in turn, significantly supports the constitutionalization of the legal order. In France, there is the peculiarity of the teaching method known as *Droit constitutionnel et institutions politiques*, which aims at substantial knowledge of political science.

But practical significance cannot alone explain the proportion of constitutional law instruction in a curriculum. The degree to which constitutional law is present in a legal education can also be explained by its role as a foundational course intended to shape the self-conception and ethos of the future bar. The development of the European nations toward more diverse societies but also with broader access to legal careers has meant that legal education has taken on socializing tasks; for these tasks the constitution plays a crucial role. Accordingly, many educational narratives present the national constitution as culmination of national history, and, thus, constitutional law is taught with “the traditional aura of utmost importance to the integrity of the state.” Legal
education has a role in legitimating the legal and political order, and its mandate includes the dissemination of a common ethos. From this, one indeed might conclude that a Europeanization of the bar in Europe will require instruction in common constitutional principles. Such a rearrangement of the legal field is only one of the challenges of Europeanization.

4. Europeanization within the European legal area

4.1. Diagnosis: Crisis and opportunity

The opening of national legal orders to supra- and international law, especially the law of the European Union and also, perhaps, the European Convention on Human Rights, has triggered a process of change, not only in national constitutional law but also in the concomitant scholarship. Many believe that national constitutional law has even entered a new era.

This change is, first of all, of a thematic nature. New provisions in national constitutional law, such as integration clauses, have attracted the attention of constitutional scholars, and the traditional teachings on sovereignty or democracy, for example, have been rethought in light of the challenges of European law. The change is also structural, and here is where its true nature lies: thus, the discipline frees itself from exclusive linkage to a specific source of law, that is, the domestic constitution; it develops new perspectives; comparative law gains in importance; a European level for institutionalized scientific exchange, career, reputation, and publication unfolds; and a European area of constitutional scholarship appears on the horizon.

However, as definite as the existence of change may be, the diagnoses remain uncertain as to what exactly is changing, what recommendations should be made, and how one should react; moreover, the prognosis is unclear as to what gestalt will permit the discipline to restabilize within the European legal area. One can already observe changes in scholarly styles, distribution of attention, public and private institutions, the media, reputational dynamics, and career paths and, perhaps, even changes in both loyalties and scholarly, political, and social identities. One can state, with confidence, that the advent of a European legal area inspires innovative constitutional theories and strengthens interdisciplinarity.

Because, in principle, the law of the European Union has uniform effect in each member’s constitutional order, one can expect, here, to observe the most advanced Europeanization in constitutional scholarship. In fact, constitutional scholarship everywhere is aware of this challenge, and Union law has been integrated ubiquitously as part of the mandatory university coursework, whether under the title “European Law” or “European Community Law” or even—already—as “Law of the European Union.” Usually, EU law is not only offered in introductory specialized classes but is integrated as well in the teaching of the various bodies of law. It would be worthwhile to study whether this instruction in its present form fosters a European identity in the future bar.
In other respects, the reactions have been quite diverse. Some scholarly traditions, notably the German, attempt to grasp Union law using the existing academic organization. Thus, the *venia legendi* (authorization to lecture) for most younger professors includes both German and European public law. This authorization is usually based not merely on scholarly writings on the domestic aspects of Union law; rather, Union law, as such, is often addressed, frequently spanning the various legal levels. Other traditions, such as the Dutch, prefer the path of institutional differentiation, often establishing separate chairs. Sometimes, as in Italy and Poland, conflict rages as to whether the subject matter properly falls under constitutional law, administrative law, or international law. But the Europeanization of constitutional studies is by no means without exception; in the United Kingdom, a career in constitutional law is still possible “without writing about Europe at all,” and, in some countries, constitutional scholarship focuses, above all, on the domestic aspects of European law.

Many constitutional scholars have not been satisfied with merely retracing the developments. Instead, constitutional scholarship also provides a platform for many voices critical of Europeanization that seek a slowing or redirecting of the process. This fulfills both the discipline’s societal function of contemporary critic and its practical function of intervening in the law’s course of development. Often, categories of constitutional law, such as sovereignty or democracy, provide terminological points of reference for the public discourse on the implications of European integration. In some states, only constitutional law, delivered in scholarly articles, can enable, ultimately, the formation of a political opposition, which otherwise could find no voice in the political establishment. Disciplinary self-interest may, at times, explain scholarly opposition to Union law. In any event, in a pluralist democracy, this scholarly engagement confirms the public role of this body of scholarship, thereby strengthening its functional legitimacy.

The constitutional impact of the European Convention on Human Rights is quite different in its effect, for two main reasons. First, some states derive their domestic fundamental rights protections from the ECHR’s provisions, whereas in other countries the autonomous fundamental rights of the national constitution fulfill this role. Second, the legal status of the convention varies under different national constitutions: the ECHR does not—in contrast to Union law—determine its own status in domestic law. As a consequence, its role in research and university instruction among the member states is quite heterogeneous.

For example, the ECHR has had difficulty finding its place in Germany somewhere along the spectrum of scholarly attention, and it stands at the periphery of the required legal curriculum. Here, though, Germany appears to be rather the exception that proves the rule. Most domestic scholarship

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67 Tomkins, *supra* note *, 2 IPE § 30 ¶ 56.
incorporates the ECHR into constitutional doctrine relating to national fundamental rights. And this holds true, a fortiori, when the ECHR’s provisions substantively fulfill the role of constitutionally guaranteed fundamental rights. At that point, academic study of the ECHR is not reserved to international law scholarship but becomes one of the main objects of constitutional scholarship.

From the perspective of the European area of research and that of the European legal area, the question arises: Have the rights of the ECHR, the jurisprudence that deals with them (whether in the European Court of Human Rights, the European Court of Justice, or national courts), and the relevant legal scholarship begun to form a lingua franca for the discourse on fundamental rights in the European legal area? This, in turn, confronts domestic constitutional scholarship—wherever the ECHR does not yet have a leading role—with a crucial question: Should the domestic scholarship continue its specific path of conceptual, doctrinal, and terminological development, guarding its identity or, instead, join the European convoy for purposes of European cohesion, not least in order to gain a voice? Because fundamental rights have such a central role, the answer to this question will have deep implications for each and every part of constitutional law and the legal order in general.

At least as varied as the respective role of the ECHR is the role of comparative law in the national systems of constitutional scholarship. In German constitutional law after the Second World War, some of the most important works had recourse to the law of the United States of America. Otherwise, comparative legal study focused mostly on the law of socialist states up until the 1990s; for obvious reasons, this academic branch could not play any role in the progression of German constitutional law. Comparative law’s minimal influence may also be due, partially, to the occasionally held conviction that Germany’s constitutional law is the best in the world; were this the case, little could be learned from foreign law. It is no accident that only as late as 2005 was a German-language textbook

68 Comparative public law appears most developed in Italy with numerous professors dedicated to this topic; see, as an outstanding example, ALESSANDRO PIZZORUSO, IL PATRIMONIO COSTITUZIONALE EUROPEO [THE EUROPEAN CONSTITUTIONAL HERITAGE] (Il Mulino 2002). For Germany, see LÉONTIN-JEAN CONSTANTINESCO, RECHTSVERGLEICHUNG [COMPARATIVE LAW] (1971); PETER HäSSLE, EUROPÄISCHE RECHTSKULTUR [EUROPEAN JUDICIARY CULTURE] 9–32 (Suhrkamp 1997); the online public access catalogue (OPAC) of the Max Planck Institute for Comparative Public Law and International Law includes catalogues of monographs and volumes under the notations “Rvgl: IX Aa” through “Rvgl: IX Ae.” See http://www.mpil.de/inthome/ww/de/int/intranet/opac.cfm (last visited July 11, 2006). Bibliographic references for articles on comparative constitutional law are available in the articles catalogue under the notations “Rvgl 2.1” through “Rvgl 2.7.”; see http://www.mpil.de/ww/en/pub/library/catalogues_databases/doc_of_articles/comp_law.cfm (last visited July 11, 2006). When searching with these notations, the “Field to search” should be set to either “Notation (books)” or “Notation (articles).”
on comparative constitutional law published—and that having been penned by an Austrian!69 A parallel situation unfolded in the United Kingdom, where both of the fundamental texts celebrate British constitutional law as the world’s best: namely, the work of Bagehot, with respect to the Constitution of the United States, and that of Dicey, with French public law in mind. In Sweden, as well, right up to the threshold of EU membership, constitutional scholarship remained under the spell of the national constitution.

In the early ’90s, the situation began to alter. The so-called second phase of German public law saw an increase in the importance of intra-European comparative constitutionalism. Comparative law also made gains in the United Kingdom, albeit with less of a European connection than an interest in English-speaking common law countries. The Swedish accession to the EU even led to an international reorientation of Swedish public law, both as to content, for instance, in a new emphasis on separation of powers, and as to formal aspects, such as an increase in English-language publications.

In most other states, comparative law has, for a much longer period, played an important role in national constitutional studies, counting as an essential part of proper constitutional scholarship. Comparative law has been constitutive of both Greek and Polish public law since the early nineteenth century, with an accordingly strong academic emphasis. France’s new system of constitutional scholarship includes a comparative-law component, which facilitates a distancing from the dominant tradition of thought that has emphasized administrative law.70 Thus, an epoch of comparative law is dawning on the European legal area. In the intra-European competition for scholarly attention, this could presage a flourishing of scholarship in those countries that have already established traditions of comparative constitutional law. And this leads to the prognosis.

4.2. Prognosis: Prospects for a ius publicum europaeum

The above diagnoses permit the prognosis—that comparative constitutionalism in the European legal area will increase in importance and will increase in importance as a standard component of scholarship rather than as a separate discipline. It is more difficult to predict whether this will bring about a common public law, a *ius publicum europaeum*.

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69 Bernd Wieser, Vergleichendes Verfassungsrecht [Comparative Constitutional Law] (Springer 2005). This may also have much to do with the fact that other legal orders have a subject along the lines of comparative law, *droit comparé*, *diritto costituzionale comparato*, etc., whereas the German term Rechtsvergleichung refers, rather, to an activity, namely, “comparing,” than to a separate subject matter, which militates against its disciplinary establishment with separate textbooks. See Harold Cooke Gutteridge, Comparative Law 17 (Cambridge Univ. Press 1949).

70 See Grewe & Ruiz Fabri, supra note 49; Zoller, supra note 36; Elisabeth Zoller, Introduction to Public Law (Martinus Nijhoff 2008).
The prognosis that the European Union’s constitutional orders will not meld into a unitary system appears rather safe; rather, each constitutional order will integrate European influences into its existing lines of development, preserving its own respective gestalt, both formally and substantively. Yet this does not rule out a *ius publicum europaeum*. Such law will require, in accordance with the term’s dual meaning, first, a common constitutional law and, second, an integrated scholarship.

Historically, the term *ius publicum europaeum* describes both a common system of scholarship and a body of law assembled from diverse components, in particular, the law of the German Empire, the law of the emerging states (such as Bavaria, Brandenburg, Saxony), and a set of norms that would now be conceived of as international and natural law.71 In this sense, definite parallels can be drawn with the current legal situation in the European legal area, suggesting that reference back to the old Latin term *ius publicum* may prove useful.72 The European legal area emerges from multiple masses of law, conceptualized simultaneously as interwoven and independent. These include Union law, the ECHR, and the various corpora of national public law. In effect, there already is a *ius publicum europaeum*.

The situation is different in academia. The historical *ius publicum europaeum* implied an integrated scholarly culture. In nineteenth-century Germany, one even finds a public law discipline without an underlying, solid foundation of constitutional law,73 in many respects, similar to legal studies in nineteenth-century Poland.74 Today’s situation is almost the inverse. Europe shares two solidified layers of public law, each with constitutional elements: the law of the European Union and the law of the Human Rights Convention. But no European constitutional scholarship has similarly solidified in parallel. The systems of constitutional scholarship in Europe are still a long way from any common constitutional scholarship. The differences reflect the diversity of

71 For more detail, see Stolleis, supra note 55, 20–21.


73 On German state and public law, see generally Stolleis, supra note 55, at 20–21; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland [History of the Public Law in Germany]* 322–380 (Beck 1992).

74 Lipowicz, 2 IPE supra note 4, § 34 ¶¶ 10–15.
national scholarly styles and cultures.\textsuperscript{75} This evidences the obvious fact that a \textit{ius publicum europaeum}, in the sense of a solidified European context for discussion and reception, currently still exists only in fragments.

Should there be such an overarching scholarship at all? Against the backdrop of the discipline’s self-conception, as varied as its existing manifestations may be, the answer can hardly be anything but an affirmative. Such progress is beneficial beyond the discipline’s own interests: there is a close nexus between a well-developed constitutional scholarship and a strong democracy.

What might such a scholarly field look like? Very probably, the research landscape will be differentiated even further. Far from drying up, national constitutional scholarship on the various domestic constitutions would be nourished. It seems anything but certain that the area of research most promising for reputation and career will be that of the \textit{ius publicum europaeum}; one must be careful not to underestimate the resiliency of the national systems.

With respect to the discipline of a \textit{ius publicum europaeum}, one can expect the knowledge of its scholars to be fragmentary and heterogeneous. No one will know the law and the scholarly output in the European legal area to an extent similar to the degree of knowledge one may acquire in a national legal area. Yet a \textit{ius publicum europaeum} will demand more than occasional “irritation” (understood in terms of system theory) of national production. At the same time, the litmus test for a common European scholarship should not be the emergence of comprehensive doctrinal patterns. It appears to be quite possible to respond to the heterogeneity of the legal material with a strengthening of theoretical components, as shown by the U.S.’s research landscape, which encompasses fifty-one different legal systems. This could lead not only to greater recourse to the legal philosophers who are considered part of the common European heritage—from Aristotle and Hobbes to Norberto Bobbio, Jürgen Habermas and Neil MacCormick—but also to the formation of disparate and separate transnational scientific communities, engaging in specific discourses on legal theory. Still, the strong doctrinal component of most scholarly traditions in Europe makes a general substitution of doctrine by theory unlikely. The mind-set of a lawyer educated in the tradition of doctrinalism is very different from that of a lawyer thought to believe that doctrines are, more or less, an illusion. Accordingly, the various doctrines could evolve by thickening the comparative component. A European comparative doctrinal discourse could distill legal arguments that are of general use when construing constitutional law under the various constitutions. Of great importance along this path will be legal education; its Europeanization, in the sense of a \textit{ius publicum europaeum}, is still in a very early stage.

Can a project such as the \textit{ius publicum europaeum}, understood as a “thick” scholarly discourse, succeed? The road ahead is long, and the journey will be

\textsuperscript{75} A French saying remarks that the French style is elegant and well-ordered, the German dim and abstract, and the English empirical and concrete.
arduous: the language issue, the immensity of the research and publication landscape, and the myriad aspects of the European economic and legal area come immediately to mind. Nonetheless, in less than a century the discipline of constitutional scholarship has advanced from the periphery of the academic court to a leading role, perhaps even to the position of supreme discipline. In light of this successful legacy, one may dare to make the prognosis: constitutional scholarship in the European legal area can successfully reposition itself, focused on, but not limited to doctrinal constructivism.