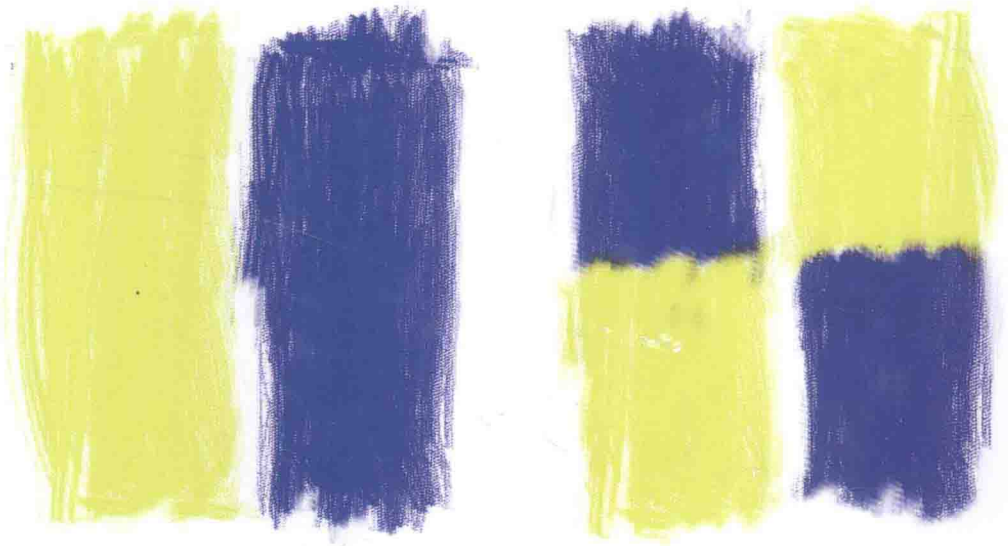


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From International to Federal Market

The Changing Structure of European Law



Robert Schütze

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ROBERT SCHÜTZE

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For Koen Lenaerts,

President of the European Court of Justice—in admiration.

PREFACE

This is the second volume of what will eventually become a trilogy on the ‘Changing Structure of European Law’. Dealing with the changing structure of *negative* integration in the past sixty years, it complements my analysis of the changing structure of *positive* integration explored in *From Dual to Cooperative Federalism*.¹ The two volumes should indeed be considered intellectual twins. For not only were they conceived at the same time; thematically, they are meant to form a unity-in-diversity as regards the federal elements within the *substantive* law of the European Union. The third volume will finally explore the formal—constitutional—aspects that have turned the European Union into a federation of States.² But considering that it has taken me another eight years to complete this second volume, and in light of the constitutional uncertainty following the British EU referendum, this third volume is again unlikely to be published swiftly in the next few years.³

¹ R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*.

² This third volume will be entitled *From International to Federal Union: The Changing Structure of European Law*. The publishing chronology of the three volumes is thematically inverted when compared to how they should finally be arranged. This ‘inversion’, while not ideal, results from my—methodological—belief that good constitutional law (and theory) must never start with some lofty ideal but ought to grow from a concrete constitutional ‘order’ on the ground.

³ This form of ‘slow’ publishing is becoming less and less common. Indeed: an ever-greater number of—even the brightest—young scholars feel compelled to publish as quickly (and as much) as possible. And while this may, sadly, be an increasingly necessary strategy in the competition to get a position or a promotion, the long-term effects of these fast-and-furious publications on the individual scholar and on scholarship in general are much less positive. For how can a not-yet-30-year-old scholar in EU law already have a hundred publications? How ‘deep’ and ‘critical’ will the analysis be if s/he produces, at this age, ten to twenty articles every year? How much past scholarship has s/he absorbed, reflected on, and criticized? How ‘thick’ will the intellectual plank be that is being drilled? For an excellent analysis of this dilemma for young scholars ‘these days’, see: J. Weiler, ‘Editorial: On My Way Out—Advice to Young Scholars II: Career Strategy and the Publication Trap’. One cannot today be as selective as Wittgenstein; but the vicious cycle of fast publishing particularly disadvantages, I think, those brilliant—younger—scholars that uncompromisingly insist on quality and a reflective and critical engagement with the past, including their own work. For what is wrong with allowing an article to ‘mature’ for at least as long as the dust engendered by the creating process has taken to settle? True, the fruits of slow publishing are less immediate than simply ‘combining’ existing authorities under

Unlike the first book, matters were slightly more entangled with regard to this second volume. For when finalizing the manuscript in the past two years, it became clear to me that since my views on the early jurisprudential period of Article 34 TFEU differ so fundamentally from the (absolutely) dominant view in academic circles, they needed a *very* special treatment. And having combed through the historical archives of the European Commission and those of the European Court, while also immersing myself in the academic journals of the time, the analysis became so long that it filled a monograph on its own! So, instead of integrating a detailed historical and contextual analysis of the jurisprudential period between *Dassonville* and *Cassis de Dijon* here,⁴ I have decided to dedicate a—separate—book to this period and the broader methodological question of the relationship between history and philosophy in European law.⁵ The concrete results of this ‘methodological’ project have of course found their way—directly or indirectly, actually or potentially—into Chapter 3. Yet I must nonetheless politely ask the reader for her credit and patience in the absence of a detailed study of the historical context of *Dassonville* and the original meaning of its famous ‘formula’.

Leaving these preliminaries aside, much of the first volume’s preface still holds true today. Early parts of this book were written in Brussels, Cambridge (United Kingdom), Durham, Florence, Luxembourg, and Zwickau; and I must now add Cambridge (United States), London, Oxford, and Rome. In each of these cities, I was—again—very fortunate to meet a remarkable number of remarkable people. For their advice and encouragement, particularly with regard to this second volume, I wish to single out and thank Karen Alter, Roberta Bassi, Graínne de Búrca, Maria Anna Corvaglia, Claus-Dieter Ehlermann, David Held, Sir Francis Jacobs, Christian Joerges, Camilla Kamrad, Brigitte Leucht, Nicola Lupo,

the fast-publishing mode, but in the long run—I hope and believe—only slow, critical, and matured arguments are likely to pass the test of time. That may however offer little or no consolation for non-tenured academics so long as the collective dynamics of having to compete against ‘cheap’ outputs are not collectively addressed in the academic world. False civility may here be the greatest enemy of creative and un-orthodox modes of thought. For only through constructive and—sometimes—destructive criticism can quality emerge and be protected.

⁴ See Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*; and Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

⁵ R. Schütze, *Framing Dassonville: Text and Context in European Law*.

Federico Ortino, Ernst-Ulrich Petersmann, Dieter and Isolde Schütze, Hanns Ullrich, and especially Damian Chalmers and Steve Weatherill.⁶ Thanks are due to BRILL, Oxford University Press as well as Sweet & Maxwell for allowing me to republish parts of my argument; and grateful acknowledgement is equally made to the European Research Council, whose generous support has allowed me, in the past few years, to reassess the ‘federal’ dimension behind ‘State coordination’ in the twenty-first century (EU Framework Programme 2007–13: ERC Grant Agreement No. 312 304).

In addition to the three ‘classic’ scholars of European constitutionalism that have shaped my early understanding of European law, I wish to warmly declare my admiration for Professor Koen Lenaerts, President of the European Court of Justice. To my mind, no one embodies the much-needed fusion between (academic) theory and (judicial) practice better today.

Durham, December 2016

⁶ Many years back, when exploring PhD programmes, both Damian and Steve kindly met me in person to discuss my original proposal (on what was to become this book); and, despite my not taking up the LSE and Oxford offers, both have been extremely supportive ever since—an act of academic generosity that I shall never forget.

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