EU Law Classics in the Making: Methodological Notes on Grands arrêts at the European Court of Justice

Antoine Vauchez

To a large extent, EU law is a history made of many judicial stories. It is hardly possible to conceive of a class, a seminar, not to mention a textbook, in EU law that would not draw extensively on the rather stable list of cases that are purported to have established this body of law into an autonomous discipline with a limited set of core constitutive principles.[1] The string of cases that forms the Pantheon of ECJ landmark decisions reads like a success story of a Court, the European Court of Justice (ECJ), that progressively secured its now firmly established authority over the law of the Union. And yet, after decades of exegesis, we still know surprisingly little about these *grands arrêts* that "shaped" EU law as we know it. As a result of the continuous efforts to summarize, aggregate, index, and order them, Europe's founding decisions have turned into a rather simplified set of principles: *Van Gend en Loos* equals "direct effect," *Costa* means "supremacy," *Defrennes* is "non-discrimination," *Cassis de Dijon* "mutual recognition," thereby forming an uninterrupted and consistent chain of cases that map out EU legal landscape. While these equivalences may prove useful as a memo board for teaching purposes, they have often led away from a thick description of these cases *as* political, legal, and social "events" that are fully part of the history of the European Union. With few remarkable exceptions,[2] most studies in law or political science have actually converged in viewing these landmark cases as sorts of black

1 I am grateful to the editors of this volume, to Rachna Kapur and to the students of American University in Washington for their useful comments on an earlier version of this essay.

2 In particular: *Eric Stein*, The Making of a Transnational Constitution, American Journal of International Law, 75, 1 (1981), p. 1–27; *Karen Alter and Sophie Meunier*, The New Constitutional Politics of Europe: European Integration and the Path-breaking Cassis de Dijon Decision, Comparative Political Studies, 26, 4 (1994), p. 535–561; *Kalipso Nikolaidis*, Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition, in: *Loïc Azoulai and Miguel Maduro* (eds.) The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, London 2010.

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boxes whose established meaning was somehow taken as a "given" and as a starting point for the analysis. While the dominant stream of legal scholarship has built sophisticated yet ahistorical and apolitical accounts of the progressive unfolding of ECJ jurisprudence, political scientists have accumulated large-n databases of hundreds of ECJ cases in search for the prevailing (State or transnational) interests that ultimately structured judicial outcomes. In both cases, what actually happened "around" the case has little importance, since the judicial outcome was ultimately determined either by the judges (as the "authentic interpreter" of the law) or by external (State or EU) interests (as the last instance determinant of the law). Research-wise, this means that there has been very few empirical inquiries that broke down cases into historical contexts, social constellation of actors, competing legal and political strategies, etc.[3] This chapter suggests that it is time to retrieve "cases" as historically and socially complex "moments" that cannot be reduced to mere steps in a developmentalist narrative, but need to be taken as an entry point into the deep entanglement between law, society, and politics in the EU context.[4]

Yet, over the past years, there has been a growing sense of frustration over this judicial *vulgate*. With its *parti pris* of combining views coming from different scholars, disciplines, and actors, the volume edited by Loïc Azoulai and Miguel Maduro, *Classics of EU Law*, confirmed that there was room for a promising research strand that would look at landmark cases, not just for what they have become after decades of celebration, but for what they have been *at the time*.[5] Despite the difficulties of accessing

3 But see recent work undertaken under the umbrella of iCourts: *Mikael Madsen and U. Sadl*, Becoming European (Legally): Unpacking the Self-Portrait of the EU Legal Order in the Pre- Accession Case-Law Dossiers, Columbia Journal of European Law, forthcoming; *Urska Sadl*, What Is a Leading Case in EU Law? An Empirical Analysis, European Law Journal, 40, 1 (2015), p. 15–34; and *Amalie Frese's* ongoing Ph.D at the University of Copenhagen and the Université Paris 1-Sorbonne on the fabric of nondiscrimination case law in both European courts; or *Billy Davies*, Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949–1979, Cambridge and New York 2012.

4 On this entanglement, see *Antoine Vauchez*, Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity, Cambridge 2015.

5 L*oïc Azoulai and Miguel Maduro* (eds.), The Past and Future of EU Law, op. cit. See also the recent editorial on The Critical Turn in EU Legal Studies, Common Market Law Review, 52 (2015), p. 881–888; and *Jean-Paul Jacqué*, Les 'communautaristes' sous le regard des politologues, Revue trimestrielle de droit européen 4 (2012), p. 737–741.

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archival documents from the European Court of Justice,[6] sociologists and historians have attempted to connect the micro-history of the courtroom dynamics to the broader political and legal dynamics of EU polity-building.[7] This surge of interest in ECJ cases has developed even more in the context of the recent fiftieth anniversary of *Van Gend en Loos* and *Costa* that resulted in a variety of publications,[8] conferences, and seminars.[9] It is not the least value of this scholarly turn that it allows to envision a renewed interdisciplinary dialogue across disciplines after years when the gap across methodologies and research puzzles had grown wider and wider.[10] By opening the judicial black box and following the social, political, and intellectual ramifications of legal practice, the thick description of cases has a potential to bridge *in concreto* disciplinary research traditions and insights. The present volume is testimony to the promises of this new terrain of study for EU law. Yet, as we collectively engage in this renewed research agenda, and as the European Court of Justice is (finally) opening

6 For a long time, the ECJ has not given any archives to the Historical Archives of the European Union in Florence. Recently, the HAEU has signed a deposit agreement with the ECJ for its historical archives to be transferred: it is still unclear what types of documents will be transmitted. On the many questions raised by judicial archives, see an interesting article in the New Yorker on the Supreme Court's papers: *Jill Lepore,* The Supreme Paper Caper, New Yorker, December 1 (2014).

7 On Van Gend en Loos, see *Antoine Vauchez*, Integration through law: Contribution to a socio- history of EU common sense, Working paper, European University Institute, Robert Schuman Center, 2008/10; *Billy Davies,* Resisting the European Court of Justice, op. cit.; *Morten Rasmussen,* Revolutionizing European Law: A History of the Van Gend en Loos Judgment, International Journal of Constitutional Law 12, 1 (2014), p. 136–163; and *Antoine Vauchez*, The Transnational Politics of Jurisprudence: Van Gend en Loos and the Making of EU Polity, European Law Journal 16, 1 (2010), p. 1–28.

8 See inter alia, on Van Gend en Loos, see the special issue by European Journal of Constitutional Law, 12, 1 (2014); on Costa, see the issue by the Revue de l'Union européenne, August 2015.

9 For example, Joseph Weiler has hosted a yearly seminar ever since his return to the European University Institute devoted to the study of Court's cases (e.g., in 2014–2015: When the Court gets it wrong. Reviewing the fundamentally wrong cases from the ECJ).

10 See *Christian Joerges*, Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration, European Law Journal, 2, 2 (1996), p. 105–135; *Grainne de Búrca*, Rethinking Law in Neofunctionalist Theory, Journal of European Public Policy 12, 2 (2005) p. 310–336; and *Jo Shaw*, The European Union: Discipline Building Meets Polity Building, in: *P. Cane and M. Tushnet* (eds.), Oxford Handbook of Legal Studies, Oxford 2003, p. 325–352.

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part of its archives, it might useful to think twice about possible unseen intellectual implicits and methodological implications of a case-centered narrative of EU law's history.

Searching (for) cases

While it might seem obvious to study cases when studying the law, this is without trappings if one does not question beforehand which cases are brought to light.[11] As aptly shown by French legal sociologist Evelyne Serverin,[12] "important" cases rarely surface naturally as the outcome of a spontaneous process of decantation. They are most often selected by courts and their legal community of reference through a variety of techniques and procedures that skim off the large amount of decisions delivered every year.[13] Recent methodological trends that investigate citations' networks allow now to show how some decisions become "hubs" and acquire "authority scores,"[14] while others are progressively sidelined.[15] What is taken as "raw (judicial) material" is therefore the *endpoint* of a long filtering process. One may end up studying only the "survivors" of this selection process, taking them as a proxy for what the case law *actually* is (leaving behind the unselected cases as "outliers" or "anomalies"). By "sampling on the dependent variable," as political scientists would say, one misses the

11 Quite tellingly, critical traditions of law, such as in Italy the so-called "giurisprudenza alternativa" quite diffused among left-wing lawyers in the 1970s, made a point of selecting non- canonized cases from lower-rank jurisdictions in domains such as labor law, with a view to reverse, to some degree, the pyramid of legitimacy within the legal field; on these attempts, see *Antoine Vauchez*, L'institution judiciaire remotivée. Le processus d'institutionnalisation d'une 'nouvelle justice' en Italie (1960–2004), LGDJ 2005.

12 *Evelyne Serverin,* De la jurisprudence en droit privé. Théorie d'une pratique, Lyon 1985.

13 *Antoine Vauchez,* Transnational Communities of Lawyers before International Courts, in *Karen Alter and Cesare Romano* (eds.), Handbook of International Adjudication, Oxford 2013.

14 *J. H. Fowler et al.*, Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents, Political Analysis, 2007, 15, p. 324.

15 Interestingly, the decisions that have the highest authority score are not always the ones that are mostly taught in law schools. *Yonathan Lupu and Erik Voeten,* Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights, British Journal of Political Science, 42, 2 (2013), p. 413–439.

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whole process that turns a multitude of cases into a handful of emblematic *grands arrêts*.

Of course, things would be easier if there was such a thing as a *common* understanding of what "landmark cases" refer to *in fact*. Alas, it proves impos- sible to craft an ontological definition of what a landmark case is (as opposed to non-landmark cases). Just like there is no *ex ante* definition of what a "classic" is in art or literature, there is no general and transhistorical notion of the intrinsic properties of a *grand arrêt* that does not eventually end up with tautological definitions of "greatness."

As a matter of fact, some cases promot- ing "great principles," like that of *Commission EEC v. Luxembourg and Belgium* of 13 November 1964 (the "dairy products" case), which stated quite bluntly an unprecedented breach to the reciprocity principle in the case of European treaties, have been somehow forgotten in the course of history (*forgotten landmark*).[16] Symmetrically, other cases that had a "foundational potential" because of their antecedence in affirming "great" legal principles have remained ignored: interestingly, a case like *Humblet v. Etat belge* (1960) never made it as a "landmark case" of the Court, although it was arguably the first one to state the principle of supremacy four years ahead of *Costa* (*ignored landmarks*).[17] Only a *historical* inquiry into the broad political and legal context of the case would explain why it was not pinpointed as such at the time. Last but not least, legal greatness cannot even be defined by the political or economic relevance, as many cases that were politically "famous" or "infamous" at one point of history (often because of conflicts between the ECJ and the Member States) never made it to the Pantheon of EU law, often because they were simply redundant in terms of legal principles.

With the lack of robust criteria for singling out *grands arrêts*, some may argue that the "I-know-it-when-I-see-it" test could apply. Yet, landmark cases often lack the "grandeur," the stylistic clarity, and the argumentation auda- city that we may expect from them with the hindsight: when reading landmark cases, it often appears that the legal solution in the case is limited to one specific situation and could not necessarily be reproduced or extended much beyond the specific circumstances.[18] The legal lexicon

16 On this, see *William Phelan*, Supremacy, direct effect and "dairy products" in the early history of European law, EUI Working paper, Law Department 11 (2014)

17 CJCE, 16 décembre 1960, Humblet v. État belge, aff. 6/60, Rec., p. 1125, n 7.

18 This is certainly related to how courts' prudentia in peddling new legal solutions while at the same time avoiding to appear as engaging judge-law making.

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used often seems still rather unsettled and changing,[19] and one can usually identify as much continuity as there is rupture in the text itself.[20] For example, it is hard to find traces of the "constitutional foundations" of the EU that the ECJ identified in *Van Gend en Loos* when it celebrated its fiftieth anniversary. More often than not, it is only with later decisions that the "spirit" of these cases is eventually manufactured in a clear and stylized manner, leaving aside the many ambiguities and the various possible futures that featured the initial decision.[21]

This difficulty is confirmed by the fact that the list of landmark cases is subject to some degree of change and disagreement over time, depending on the textbook, the institution, etc. While there are certainly some *passages obligés*, scholars, judges, or *jurisconsultes* do not necessarily value the same cases, identify the same turning points, and formalize the same string of cases out of the 9,500 judgments issued by the ECJ over its sixty years of existence. It is not the place here to make a full historical survey of these changes. This would require one to dig into the history of EU law textbooks and track their successive editions as they are among the main ordering devices for the Court's case law. Although this remains pretty much a research program, it may be interesting to mention some of the early formalizations, such as that of ECJ judge and law professor Pescatore in his famous 1979 article on the "jurisprudential *acquis*," who selected only four "constitutional" cases: "everything starts with four cases: *Commission vs. Luxembourg et Belgium (Pain d'Epice)*, *Van Gend en Loos*, *Costa vs. ENEL, and Consten Grundig.*"[22] The Court itself has suggested its own string of cases when it translated a selection of cases for the new Member States from Eastern and Central Europe, fifty-seven decisions published and translated on its website that make up its "historical case-law" starting with *Van Gend en Loos*, followed by *Plaumann*, *Costa*, *Grundig*, *AETR*,

19 In the case of Van Gend en Loos, both judges and legal scholars still had a variety of words to label the principle affirmed in the case: effets immédiats, effet direct, self-executing, etc., and it is only later that the notion of "direct effect" emerged as canonical.

20 On the many continuities in the Costa case, see the seminal paper by *Bruno de Witte, Retour à Costa,* La primauté du droit communautaire à la lumière du droit international, Revue trimestrielle de droit européen, 20, 3 (1984), p. 425–454.

21 On this process, see *Antoine Vauchez*, The Transnational Politics of Jurisprudence, op. cit.

22 *Pierre Pescatore,* Aspects judiciaires de l'acquis judiciaire, Revue trimestrielle de droit européen (1981), p. 617–651.

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and others.[23] More recently, scholars Loïc Azoulai and Miguel Maduro edited a volume on *The Classics of EU Law* that identified a select group of founding cases starting with *Van Gend en Loos* (1963), *Costa* (1964), *Inter- national Handelsgesellschaft* (1970), *ERTA* (1971), *Defrennes I* (1971), *Dassonville* (1974), and *Cassis de Dijon*, each one of them prompting a number of sequels: *ERTA, Les Verts, Francovich, Sommenthal, and Bosman,* also depending on the various branches of EU law (institutional matters, free movement of goods, competion policy, etc. As the list of landmark cases proves changing, highly contingent historically, and often reversible, there is no possibility of crafting a generalizable concept of what a landmark case ought to look like.

Landmark cases as a genre

Although there is no objective and ahistorical definition of legal greatness, landmark cases can still be recognized sociologically, i.e., not so much for what they are in nature, but for how they are constructed and narrated in situation. Hereafter, I describe two essential features of "judicial classics."

The Matthew Effect

The first specific feature of landmark cases is that they are granted a foundational role in autonomizing new branches of law. Just like the "case-method" famously invented in the late nineteenth century at Harvard Law School is the (oft-mythicized) starting point of US legal academia,[24] the formation of French administrative law is grounded in legal scholars' systematization of what was, up to then, essentially a series of important cases from the *Conseil d'Etat* into one consistent body of *principes généraux du droit*. The existence of landmark cases are somehow proof to the relative autonomy of the law from its initial political creators, be they "constituants," treaty-makers, or legislators. Famously, the rebirth of French constitutional law as a legitimate and authen- tically *legal* domain is in large part due to the 1971 symbolic coup of the Conseil constitutionnel

23 For an interested study of these fifty-seven cases, see *Mikael Madsen, U. Sadl,* Becoming European (Legally), art. cit.

24 *Alfred Konefski and John Schledgel,* Mirror, Mirror on the Wall: Histories of American Law Schools, Harvard Law Review (1982), p. 833–851.

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claiming for itself the possibility to review legislation in light of the 1789 *Déclaration des droits de l'homme et du citoyen* and of the 1946 *Préambule*, thereby competing with what had been so far a political stronghold: the interpretation of the Constitution.[25] Similarly, the *Van Gend en Loos* and *Costa* decisions have been integral for the autonomization of the ECJ from the High contracting parties that created it few years earlier in the founding treaties.[26]

As foundational myths for the different branches of the law, landmark cases tend to obscure the rest of the case law. What Robert Merton famously coined as the "Matthew effect"[27] – that is, the propensity of early scientific discoveries to reduce all subsequent innovations to the role of mere specifications or ramifications of the initial finding – can be tracked in case law as well. *Post hoc, ergo propter hoc* aptly summarizes this tendency to turn new cases into late developments of the initial breakthrough. This "Matthew effect" is par- ticularly visible in the case of ECJ jurisprudence that has been shaped consistently as a progressive jurisprudence, which excludes any substantial "*revirement de jurisprudence.*"[28] This sense of progressivity was certainly very strong among the first generations of Euro-lawyers.[29] Suffice it to quote the introduction to the first edition of the *Grands arrêts de la jurisprudence communautaire* (1974), the little brother to the prestigious *Grands arrêts de la jurisprudence administrative*,[30] co-edited

25 *Bastien François*, Le Conseil constitutionnel et la Ve République. Réflexions sur l'émergence et les effets du contrôle de constitutionnalité en France, Revue française de science politique, 47, 3–4 1997, p. 377–404; and *Alec Stone,* The Birth of Judicial Politics, Oxford 1992.

26 *Antoine Vauchez*, Keeping the Dream Alive: The European Court of Justice and the Social Fabric of Integrationist Jurisprudence, European Political Science Review (2012), p. 51–71.

27 The notion was named by Robert Merton after a verset of the biblical Gospel of Matthew that says: "For unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken even that which he hath." Cf. *Robert Merton*, The Matthew Effect, Science 159 (1968), p. 56–63.

28 See *Rostane Mehdi,* Le revirement jurisprudentiel en droit communautaire, dans L'intégration européenne au 21e siècle. Mélanges en hommage à Jacques Bourrinet. Paris: La Documentation française (2004), p. 113–136.

29 Yet it is still very strong today: cf. *Daniel Kelemen and Susan Schmidt*, The European Court of Justice and Legal Integration: a Perpetual Momentum? Journal of European Public Policy, 19, 1 (2012), p. 1–7.

30 First published in the 1950s, the Grands Arrêts de la Jurisprudence Administrative, better known by generations of law students in France as the GAJA, is the legal commentary co- produced by administrative judges and law professors of the most influential cases of the Conseil d'Etat ever since its creation.

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by Roger-Michel Chevallier, a long- time clerk of former ECJ president and long-time judge, Robert Lecourt: "Even on the most important matters, the ECJ jurisprudence seems more like a progressive construction, built by touches successives from case to case through which the judge has been able to specify, from detail to detail, most of its doctrine."[31] This progressive narrative of EU case law therefore views subsequent decisions as the mere logical and incremental unfolding that goes from the more general statements of the revolutionary years to the many sector-specific ramifications of the present days. In a sort of retrospective telelology, one narrates the far-reaching consequences of VGL to a point that has become almost impossible to imagine "what EU law would have been without the decisions of 1963 and 1964."[32]

EU Law's Conception of Wealth and Worth

What can also help identify "landmark cases" is the particular way in which these cases are narrated. In other words, they can also be identified as a particular *genre* of legal commentary and a rather stable discursive formation.[33] It might be useful to compare the genre of "legal greatness" to that of artistic greatness. In an interesting study on the "glory of Van Gogh,"[34] Nathalie Hienich shows how the narration of the Dutch painter as "*artiste maudit*" (lost, forgotten, half-mad genius) contributed to define a new model of wealth and worth for artists.[35] Landmark cases are a particular *genre* too that can be traced inter alia in the rich commemorative material produced by the European Court of Justice, from the fifteenth anniversary of the creation of the court in 1968 up to the recent celebration of the sixtieth anniversary of *Van Gend en Loos* in Luxembourg. In EU law,

31 *Jean Boulouis et Roger-Michel Chevallier*, Les grands arrêts de la jurisprudence de la Cour de justice des Communautés européennes, Dalloz 1974, p. xi.

32 *Robert Lecourt*, Qu'eut été le droit des Communautés sans les arrêts de 1963 et 1964?, *Mélanges Jean Boulouis*, L'Europe et le droit, Paris, Dalloz 1991, p. 349–361, p. 351.

33 On modes of narrating the law, see also *Renata Uitz*, Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication, Budapest 2005.

34 *Nathalie Heinich*, The Glory of Van Gogh: An Anthropology of Admiration, Princeton 1996.

35 On the various types of social worth, see *Luc Boltanski and Laurent Thévenot*, On Justification: Economies of Worth, Princeton 2006 (1991).

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just like in the Western legal tradition in general,[36] the most established model of *greatness* relates to autonomy and ahistoricity of the law.

This can be traced in three distinctive elements that are considered when it comes to describe how *grands arrêts* differ from the *vulgum pecus* of daily case law. First of all, landmark cases tend to be presented as *turning points* that cut the court off from its prior legal and institutional trajectory, thereby marking a new beginning. This idea of historical bifurcation goes along with a certain *ex post* romanticisation of cases' dramatic and agonistic dynamics that points at the bravery of plaintiffs, the foresight of lawyers, and the audacity of judges. The verdict issued by the court appears like a *judicial fiat*, creating by the very virtue of its delivering a fresh starting point and a new interpretative path.[37] Second, landmark cases are presented as the product of an *isolated author*, thereby viewing "the court" as a sort of self-contained and self-sufficient arena. Third, they are viewed as self-explanatory and self-evident texts whose mean- ing is just waiting to be unearthed on future judicial occasions.

In other words, landmark cases do not merely come to us as raw and genuine judicial material. Typically, they are embedded in a dense web of meanings regarding law's most relevant actors (e.g., the European Court of Justice), most important moments (e.g., *Van Gend en Loos*), and most mean- ingful principles (e.g., "direct effect" and "supremacy"). These rich interpretative stata obscure our understanding of the case as it emerged historically. Worse, they somehow tend to pre-define the research puzzles that we are able to raise. In this light, studying legal change may become merely a matter of identifying the "smoking guns" or "swing judges" behind law's turning points.[38] In the case of EU law, such a positivistic legal history leads to a search for who made the majority in the *Van Gend en Loos* decision (which was famously a tight decision). Against this decisionist historiography, it should be said that the meaning of a "case" is never settled simply by virtue of a judge's decision. The delivering of a

36 On the properties of the legal field, see *Pierre Bourdieu,* The Field of Law: Toward of Sociology of the Juridical Field, Hastings Law Journal 38 (1987), p. 805–853.

37 *Alec Stone,* The Juridical Coup d'État and the Problem of Authority, German Law Review 8, 10 (2007), p. 915–928.

38 This search for the factor or the person that changed the course of history has been famously mocked by US scholars as "breakfast jurisprudence" (where landmark decisions are ultimately a function of what judges had over breakfast), leading to endless speculations about what is really "dans le ventre des juges" that determined one particular judicial outcome. Cf. *Willard King*, A Breakfast Theory of Jurisprudence, Dicta 14 (1936–1937), p. 143–147.

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"verdict" does not close down legal and political battles that existed before their issuing; rather, it partly redirects them towards interpretative battles over the nature, meaning, and scope of the said decision. Far from being transparent and self-explanatory, cases form a terrain of contention and trigger a collective, and at times conflictual, process of meaning-building that takes place in a variety of arenas from courts to learned societies, law schools, or EU institutions. The research question therefore changes: rather than considering cases as "events," one should therefore consider them as a continuous process and study *how* specific decisions actually survived and were transformed *into* landmark cases with long-lasting jurisprudential value.

From caseload to case law: the politics of jurisprudence

To fully grasp this transformative process, one therefore needs to suspend the taken-for-granted meaning of landmark cases and track the multi-faceted process of selection, aggregation, and canonization. For that matter, we need a sociological understanding of "jurisprudence," not just as the result of a spontaneous process of decantation, but rather as a *social fabric* whereby a particular vision of case law prevails and is maintained over time.

Investigating Hermeneutic Spaces

This process is best grasped through the concept of "hermeneutic space" as it makes justice of the variety of actors and spaces interested in the case as well as of the types of discourses produced around one particular case.[39] This notion allows to build a research program that engages in a *thick description* not just of the cases' legal interactions but also of the multifaceted ways through which jurisprudence is crafted and consolidated. That is what I have being trying to do when studying *Van Gend en Loos* – tracing the collective yet uncoordin- ated process that elevated a specific case to the status of radical break from international law's tradition and

39 The notion was initially developed by Nathalie Heinich for the study of Van Gogh post- mortem glory: *Nathalie Heinich,* The Glory of Van Gogh, op. cit.

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starting point of a new legal order.[40] This is what Julie Bailleux did when pointing out the entrepreneurial role of Michel Gaudet, director of the Commission's Legal service from 1952 to 1969, in the formation of ECJ jurisprudence.[41] This is also what Jens Arnoltz did recently, mapping out a variety of trade unionists, legal scholars, and politicians that got involved in the heated political and scholarly debate over the nature of Europe, turning the *Viking*, *Laval*, *and Rueffert* cases into one "Laval quar- tet."[42] And this is what Emmanuel Rosas is currently doing in his PhD on the formation of Brussels' nondiscrimination milieu and the making of the *Defresne* case.[43]

While it may be tempting for the researcher to establish *a priori* boundaries where the "hermeneutic space" of cases starts and ends, it may prove more heuristic to just "follow the actors" as they move across sectors and levels and identify *l'espace social total* in which a case has been debated and framed. Instead of looking at cases as one single and isolated incident, separated from social context, this new research approach allows one to grasp the thick political and legal layers that make up landmark cases via legal commentaries, academic conferences, parliamentary hearings, and public debates. In line with this stream of research, there is no reason to privilege *offi*cial sources of law; all sorts of material including sources to which legal scholars rarely turn to like eulogies, *Festschriften*, but also scholarly conference proceedings, case commentaries, parliamentary debates, parties' submissions, and memos, can be used to establish a web of references to the particular case under study. This means that apocryphal interpretations should be considered with equal inter- est as the canonized ones. Similarly, un-"authentic interpreters" (politicians, high civil servants, litigants, etc.) are to be considered as they are often more influential in meaning-making processes than the courts themselves are, particularly in the initial context of the Rome treaties whereby there was no clear idea as to whom was to become the authentic interpreter of the founding treaties

40 *Antoine Vauchez,* The Transnational Politics of Jurisprudence, Van Gend en Loos and the Making of EU Polity, European Law Journal 16, 1 (2010), p. 1–28.

41 *Julie Bailleux,* Michel Gaudet a law entrepreneur: the role of the legal service of the European executives in the invention of EC Law, Common Market Law Review, Vol. 50, No. 2 (2013), p. 359–367.

42 For very rich sociological perspective on this type, see *Jens Arnholtz*, A 'legal revolution' in the European field of posting? Narratives of uncertainty, politics and extraordinary events, Ph.D. in sociology, Univ. of Copenhagen, Sept. 2013.

43 *Emmanuel Rosas*, Enjeux et formes des lutte de classement entre les causes au sein du champ transnational de l'anti-discrimination et pour l'égalité à Bruxelles, Ph.D. candidate, Université Paris 1-Sorbonne, work in progress.

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(heads of state, national supreme courts, the ECJ, the Commission through its legal service, etc.).

Drawing on extensive bibliographical and archival research, one can hope to identify individual or collective entrepreneurs as they produce new rhetorical formulations and seize "windows of opportunities" to forge epistemic alliances around specific cases, thereby bringing together groups of actors (civil servants, diplomats, legal advisors, scholars, etc.) with disparate interests.[44] Such fine-grained qualitative analysis can allow one to grasp the social process through which some exegesis ultimately prevailed – without, however, ignoring the ones that were at some point considered and were ultimately shelved.

A Plea for "Thick Description"

This research program in the making of jurisprudence should also take into consideration the instruments, legal *and* non-legal, that shape cases into lines of cases and ultimately into a consolidated jurisprudence. Too often we concentrate on legal ideas, as if they were free-floating, but underestimate the *constitutive* role of tools that may turn legal theories into standard operat- ing procedures. One could certainly argue that there is no such thing as a "jurisprudence" without equipment that can help the court maintain a stable set of legal principles despite the ever increasing and heterogeneous caseload. At the European Court of Justice, the issue of maintaining "jurisprudence" did not come up as critical until the 1970s when the enlargement to the United Kingdom and the departure of most judges and most *référendaires* from the "revolutionary period" ignited the fear of a dismantling of the judicial *acquis*. Judges such as Monaco, Trabucchi, and former presidents Andreas Donner and Robert Lecourt left, respectively, in 1976 and 1980. Their référendaires Gori, Neri, and Chevallier had also left the court soon after. A new period opens at the Court featured by an increasing turnover of judges and référendaires, after an initial period in which most judges and référendaires stayed for one to two decades (*Lecourt*: 17 ans, Donner, idem, etc.).[45] In reaction to these

44 On the field of EU law, see *Antoine Vauchez and Bruno de Witte*, eds., Lawyering Europe: European Law as a Transnational Social Field, Oxford 2013.

45 Judges such as Monaco, Trabucchi, and former presidents Andreas Donner and Robert Lecourt left, respectively, in 1976 and 1980. Their référendaires Gori, Neri, and Chevallier had also left the court soon after. A new period opens at the Court featured by an increasing turnover of judges and référendaires, after an initial

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centrifugal tendencies, a number of instruments were crafted to select, compile, and polish ECJ case law (via textbooks, judicial compendia or databases, *Recueils*, thesaurus, statistical inventories, etc.). From the scholarly point of view, these volumes may be seen as modest pieces, yet they prove to be critical devices in aggregating the several hundreds of decisions produced by the ECJ each year into one consistent legal tradition.In 1974, the first edition of the *Grands arrêts de la Cour de justice des Communautés européennes* was published, co-authored by ECJ *référendaire* Roger-Michel Chevallier and EU law professor Jean Boulouis, and many other similar volumes later emerged in other Community languages, often co- produced by ECJ lawyers.[46] Within the Court, a number of writing devices were edited that pushed for a normalization. A special mention should be made here to Pierre Pescatore who in 1976 wrote a highly important *Judicial Compendia*, an internal document of the Court that has been made public only very recently.[47] The book is intended as a guide to define the Court's judicial style of writing and arguing (preventing "défauts de fabrication" and "dispersion sémantique"). More importantly, he calls for a rational building of "jurisprudence," giving a list of "relevant articles" of the EEC treaty to be quoted when it comes to building "general principles," inciting *référendaires* to use a number of "formules types"[48] and inviting judges to frame their new decisions within the framework of the formerly established principles. Particu- larly interesting is his insistence on the importance creating "chains of deci- sions": "When a decision confirms, specifies or develops a previous jurisprudence, we recommend to always explicitly quote the previous deci- sions to which it refers in order to avoid any rupture in the jurisprudential chain."[49] Beyond these compendia, we still need to understand how the judicial decision-making process became increasingly centralized. From the late 1970s, *greffiers*, ECJ presidents, and a small number of senior judges have felt compelled to address the increas-

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period in which most judges and référendaires stayed for one to two decades (*Lecourt*: 17 ans, Donner, idem, etc.).

46 In 2012, ECJ judge Tizzano published: I grands arrêts della giurisprudenza europea, Turin, Giappecchelli.

47 *Pierre Pescatore*, Vade-mecum. Recueil de formules et de conseils pratiques à l'usage des rédacteurs d'arrêts, Bruxelles 2007.

48 For example, Pierre Pescatore indicates the 1974 Dassonville formula on "trade measures or trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, into community trade as measures having and effect equivalent to quantitative restrictions" as I quote – the "clé passé-partout" for judges in their decisions.

49 Ibid.

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ing diversity of the Court, in particular in preparation of the periods of enlargement that have raised great fears over the potential weakening of the institution's capacity to maintain both the quality of its decisions and the consistency of its jurisprudence. New instruments have been conceived within the court, such as internal standard operating proced- ures, legal compendia, and decisions' databases that help connect the Court with the keywords of the Celex databases. New structures have been created such as the *Cellule des lecteurs d'arrêts*, whose official role is precisely to polish and discipline the increasing heterogeneity within the court and among judges. One should also mention the documents produced by the translation directorate whose role has increased dramatically over the past two decades and contributes in turn to the stabilization of the Court's lexicon.[50]

On the whole, "case law" cannot be taken as a given, even less as a "primary source"; it is not spontaneously formed and transformed into a "body of law" through a self-sustaining process of accretion and continuous purification (decantation). EU jurisprudence is not just a *surface phenomenon*, or the outcome of a natural and logical accumulation of decisions over time: it is the product of a whole range of people and tools specialized into publicizing, ordering, filing, archiving, and processing "EU case law," thereby delineating a transnational politics of judicial law-making that is still waiting for systematic exploration.

50 [Karen McAuliffe, Behind the Scenes at the Court of Justice: Drafting EU Law Stories, in Fernanda Nicola and Bill Davies (eds.), EU Law Stories, Cambridge 2017.]

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Antoine Vauchez

My iCourts experience

The scene takes place in Miami, on a beautifullly sunny day in late May 2000, more than twenty years ago... We are at the foot of the Loews Miami Beach Hotel, South Beach, a few steps from the pool where a bunch of lazy scholars are sipping a cocktail instead of attending panels of the Law and Society association... There, two young Ph.D. candidates from the "old continent", bit lost in the midst of the effervescent US academic crowd, bump into each other, discover surprisingly strong intellectual affinities, and end up spending the whole conference together... A rather banal anecdote of the academic life circuit that risks appearing as a veteran's memory perhaps... But at the same time quite a revealer of a state of a field of research in which apprentice sociologists of law or socio-legal scholars had to go through Miami, Chicago or Berkeley to establish their best European ties... In the years that followed, Mikael and I have wandered around a lot, exploring the rare havens of peace for a sociology of law that never fully institutionalized on the European continent: the European University Institute, the International Institute of Sociology of Law of Onati, and our own caravan of friends and colleagues, under the mentorship of Yves Dezalay, zigzagging across congresses and disciplines in an uninterrupted transnational conversation on the sociology of European legal fields.

Ten years later or so, iCourts research center was born, in a place that appeared (at first sight!) as less warm and festive than Miami beach but which managed in a very short time to become an incredibly welcoming and international home base for all sorts of encounters between law and social sciences, in an old continent that has very few. It certainly took a certain audacity for our young legal sociologist, freshly trained at the Bourdieusian school in Paris, to come back home and build, in the heart of the law faculty, such an academic hub that brings together critical sociology, law in context, political science, legal theory, etc. Yet not everything is down to the talent of one person! Let's remember that iCourts was born at the core of a "Danish zeitgeist" as part of an much-praised ecology of innovation: to a certain extent, iCourts has been to academia what Nordic cuisine and Noma have been to fooding or *Borgen* or *The Killing* to the world of series! Or so it felt at least when the little team of the first iCourt-ians would gather in the charming old building of the law school at the time located in the historical city center… In effect, iCourts did manage to embody in one single place the "polycentric" quality of

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Danish academia which, maybe by virtue of having for long renounced to the chimera of autarchy and self-sufficiency, is open to all intellectual winds, whether they come from Germany, France, the United States, or elsewhere etc. And while many academic websites are more Potemkine villages with a lot on the digital façade but little intellectual life on the ground, the long list of men and women who have lent a hand to iCourts (researchers of course but also the administrative team led by Henrik Stampe) have managed to maintain all along the years a surprisingly lively spirit of community. For that special mayonnaise to take off, it certainly took a particularly crafted "double agent", Dezalay-style, capable at one and the same time to convince our fellow lawyers to take an interest in the virtues of historical and sociological investigation, even of the most advanced forms of quantification that were turning the most venerated landmark cases into mere dots and numbers… but also (which is no easier) to persuade sociologists and political scientists to take the autonomy of law and legal reasoning seriously, and engage in reading the austere prose of law journals... For sure, not everything has succeeded at iCourts, but even the setbacks have not had a bitter taste. I don't think Mikael would mind me mentioning this project of article of ours (or was it a book or may two?!) that we have kept taken up, corrected, and crossed out all along the years of iCourts, for almost a decade now... At each of my numerous visits to Copenhagen, we would fill in the Mikael's blackboard with tables, notes, ideas, and people passing by would look intrigued... To no avail! Each time we would start all over the again. And while the bits and pieces of this paper still lie today at the bottom of our computers, they are just in wait, I believe, for our next encounter! Ad multos annos!

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