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Legal Theory and the European Union

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Abstract

This paper looks at the way in which the legal theory of the EU has evolved over the last half century. A major theme is the ongoing tension between continuity and change – between EU legal theory as continuous with national legal theory and EU legal theory as something new and *sui generis*. With both the reductive and the productive aspects of this tension in mind, the major themes of legal theory in the EU are examined, in particular the question of the unity and authority of the EU legal system and the increased burden of law in the process of legitimating a post-state polity.

Keywords

Supranationalism/ European Court of Justice/integration theory/ legitimacy /sectoral governance/ law

Legal Theory and the European Union*

Neil Walker

1. *The Elusive Novelty of EU Legal Theory*

What does the existing corpus of legal theory contribute to our understanding of the European Union? Does the European Union provide a new point of departure for legal theory, one that sets novel questions and requires new tools of analysis and forms of theory-building? If this pair of questions frames any inquiry into the relationship between legal theory and the EU, then two observations indicate the initial course such an inquiry should take. The first is that much work either assumes or elaborates a positive answer to the second question – that the specificity of the EU begets a need to develop new, or at least substantially altered tools for its analysis.[1] The second is that, despite this, the existing corpus of legal theory continues to exert a significant, if often somewhat attenuated influence over EU legal theory. If we define legal theory broadly as those forms of inquiry concerned to demonstrate how some feature or features of law in general or at least of categories (as opposed to specific instances) of law inform or are informed by various key matters of human co-existence – whether in historical and social dimensions the matter of how we have and might live together or in the moral dimension the matter of how we ought to live together[2] - then what is immediately striking is *both* the modest extent to which EU legal studies has consciously lifted its tools of analyses and explanatory and evaluative schemes 'off the shelf' of existing legal theory, and the strong legacy which existing legal theory has nevertheless provided.

If we begin with the first proposition – the assumption or conviction that the EU needs and possesses its own tools of analysis, there are two overlapping sets of reasons for this. A significant part of the explanation lies in a relatively uncontroversial and, indeed, familiar story of the legal academy, one which consigns theoretical inquiry to a secondary and largely parasitic role. European supranational law remains a relatively recent phenomenon, hardly 50 years old,[3] yet it is an area of law which has expanded and continues to expand exponentially. Both factors are important. Like any new branch of law, EU law and its precursors[4] generated from the outset a corresponding body of doctrinal analysis in the legal academic

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[1] A similar, and, as we shall see, connected story may be told of other disciplines such as political theory. See e.g., H. Friese and P. Wagner, "Survey Article: The Nascent Political Philosophy of the European Polity" (2002) 10 *The Journal of Political Philosophy*, 342.

[2] The definition is intentionally wide, meant to cover work by those in other disciplines who take law seriously as an object of analysis as well as work within 'legal theory' as pursued in law departments or faculties. Since there is much cross-fertilization between law and other social scientific disciplines in EU studies, a more narrow definition would be artificially restrictive - a point variously illustrated in Part 2 below.

[3] The EEC Treaty (Treaty of Rome) of 1957 is sometimes treated as the starting point, as is the earlier (1951) ECSC Treaty (Treaty of Paris).

[4] Strictly speaking, unless and until the ratification of the 2004 Constitutional Treaty, the EU, introduced under the TEU at Maastricht in 1991, remains a separate treaty alongside the EC (successor to EEC) and other Treaty systems, but the academic practice of describing the legal whole as the EU is now settled.

world of the various member states.[5] This new branch of doctrinal analysis tended to be pursued at the institutional level by academic lawyers versed in international or constitutional law and at the substantive level by academic lawyers versed in those areas of domestic substantive law of most direct relevance to the original market-making and anti-trust themes of EC law. As in other areas of legal education, which across all European jurisdictions remains greatly influenced by the demands of professional training and the production and dissemination of practical legal knowledge, the main task and first priority of these pioneers was one of exposition and textual analysis, and of the classification and ordering of legal materials in terms of the utility value of such schemes to the aspiring practitioner. Given the remorseless pace of development of the *acquis comunautaire*,[6] there has been no subsequent magic moment of doctrinal consolidation to follow the institutional innovations of the foundational phase. Rather, doctrinal analysis has strained to keep up with the flow of new law, and, not unsurprisingly, the effort required has restricted broad-ranging theoretical reflection to modest proportions.

This is reinforced by two more distinctive features of the academic division of labour in EU legal studies. First, with the progressive embedding of EU law in domestic systems and its expansion into ever new areas, including in recent years environmental law, public health law and criminal law and procedure, doctrinal analysis has also to some extent been 'redomiciled' in its relevant substantive disciplines.[7] Secondly, there remain as many versions of EU law as there are member states. This is not simply a legal-cultural imperative, or even a linguistic imperative,[8] but, perhaps even more significantly, a systemic imperative. For all the endless controversy about the precise terms on which EU law is received into national law, and the exact import of doctrines such as direct effect and supremacy,[9] the intensity of normative interlocking of EU law with national legal orders is in all cases and on all possible interpretations far greater than in the case of any previous merely 'international' as opposed to 'supranational' legal regime. The study of EU law at the point of national reception perforce becomes the study of a distinctive legal hybrid – a European law immediately contextualized and transformed by the distinctive normative order in which it is articulated.

Both of these axes of difference – sectoral and national – militate against the idea of EU law as a singular object of knowledge ripe for integrated theoretical treatment.[10] Rather,

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[5] See e.g., A, Von Bogdandy, "A Bird's Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective (2000) 6 ELJ, 208; J. Shaw, "The European Union: Discipline Building Meets Polity Building," in P. Cane and M. Tushnet (eds) *Oxford Handbook of Legal Studies* (2003) 326-352.

[6] Even if the production of primary legislation peaked in the early 1990s with the completion of the Single Market Programme, this has been more than compensated for in the expansion of secondary rule-making and other forms of bureaucratic governance. See R. Dehousse, "Beyond representative democracy: constitutionalism in a polycentric polity" In J.H.H. Weiler and M. Wind (eds) *European Constitutionalism Beyond the State* (2003) , 135-156.

[7] There is a clear analogy here with the trend in political science towards sectoral 'governance' studies in which the shape and existence of the European polity is increasingly treated as the taken-for-granted "independent variable." See M. Jachtenfuchs, "The Governance Approach to European Integration" (2001) 39 JCMS 245.

[8] Indeed, as English has consolidated its position as 'first second language' in most parts of the EU, the purely technical barrier that language poses to the development of a homogenous body of learning is less profound than it was, although any common monolingual intellectual discourse obviously remains highly circumscribed as regards both participants and objects of study. See e.g. Von Bogdandy, Shaw, n5 above on the reasons for and limitations of English ascendancy.

[9] See e.g., B. De Witte, "Direct Effect, Supremacy and the Nature of the Legal Order," in P. Craig and G de Burca (eds) *The Evolution of EU Law* (1999).

[10] In the case of national distinctiveness, this may be reinforced by the staggered reception of European law across five waves of enlargement, with the initial six now increased to twenty five, and the UK acceding as part of the first wave in 1973. As all academic national constituencies now affected by EU law did not undertake

they accentuate a tendency towards a reactive, event-driven and context-dependent approach to EU legal studies. On this view, even when theoretical concerns surface on a crowded academic agenda, they often tend to be shaped by highly specific, infra-systemic developments and thus to highlight the peculiarity of EU 'legal problems' rather than their continuity with problems which have stimulated theoretical reflection before or elsewhere. Three examples from recent years, taken from different level of the EU legal order – substantive, structural and institutional - serve to illustrate that tendency.

At the level of substantive legal doctrine, the jurisprudence of human rights is a case in point. While the arrival of a declaratory Charter of Fundamental Rights in 2001 may in time change the approach of European lawyers,[11] what is striking about the study of human rights development from the early initiatives of the ECJ from the late 1960s onwards,[12] is the extent to which it has failed to resonate with the typical concerns of theoretically oriented human rights lawyers working in other contexts. The abiding preoccupation in the EU context has not been with the classic questions of constitutional theory – the relationship between rights and democracy, or of international law theory – the tension between universalism and the recognition of the diversity of local conditions and requirements, or with other central concerns of rights-based normative legal theory such as the relative priority of negative first generation and positive second and third generation rights, or the definition of the core and basic purpose of particular nights individually and *inter se*. Rather, the concern of EU lawyers has been with how rights discourse contributes to an understanding of the relationship in terms of formal competence, practical efficacy and relative legitimacy between the new supranational order on the one hand and other overlapping legal orders on the other - whether they be nationally or, in the case of the Council of Europe's rights catalogue, internationally located.[13] More recent developments too, such as the growing interest in the mainstreaming of human rights within the legal order as a whole,[14] have continued to find analytical focus in the highly specific character of EU law, and in particular in the onus on the EU as a form of public power whose mechanism of individual and collective accountability have long been criticized as underdeveloped to remedy its rights deficit and to promote rights internally and externally in accordance with consistent standards. The most universal of legal discourses, in other words, has been analyzed primarily for its contribution to a very particular series of 'turf wars,' or insofar as inquiry has been concerned with normative development for its own sake, this has remained very closely informed by the institutional distinctiveness of the EU legal order.

At the level of structural principles, 'subsidiarity' provides an equally good example of introspection. Developed to address, or at least to capture the tension between the demands of decision-making economies of scale on the one hand and the concerns for the protection of national diversity on the other at the time of the Maastricht Treaty,[15] the subsequent career of this concept in EU studies is testament to the context- and practice-dependence of EU theorizing in at least two senses. First, there has been much concern with how to operationalize what was and remains an unpromisingly vague candidate for legal application

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their intellectual journeys simultaneously, this increases the likelihood of these journeys taking rather different courses.

[11] [2000] OJC364/1

[12] *Nold* v *Commission* [1974] ECR 491.

[13] As the treatment of fundamental rights in all the major EU law textbooks indicates.

[14] See e.g. P. Alston and J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights" in P. Alston (ed) *The EU ad Human Rights* (1999) 3-68.

[15] Art.3b(now 5) EC.

by the political institutions of the EU, still less for recognition as justiciable before the ECJ.[16] Secondly, though the concept may seem to bear a family resemblance to notions such as federalism, or devolution, or, more abstractly, decentralization, and thus to the question of the theorization of multi-centred authority within legal and political systems generally, the fit remains an awkward one, not least because the background concerns in response to which the 'subsidiarity' concept was developed and the broader institutional setting in which it is located are quite different from the paradigm state-based contexts of federalism or devolution.[17]

At the level of institutional design, a similar story can be told of the so-called New Modes of Governance, and in particular the recent intense interest in the Open Method of Co-ordination as a means of replacing or supplementing in certain policy areas the traditional command-and-control Community method of Commission proposal and parliamentary and Council disposal of legislation with a novel decision-making structure based on standard setting, voluntary national compliance and mutual learning.[18] Again there are interesting analogies in the internal administrative orders of member states, and in particular in the development of New Public Management methodologies which mark a trend away from the conception of centrally institutionalized administrative steering tied to a holistic conception of the public interest, but various distinctive features of the EU *problematique* – including the restrictions imposed by limited EU competence and the dispersed transnational framework for establishing standards and engineering compliance mean that the theoretical centre of gravity of such inquiry tends to be located elsewhere. The key comparators for purposes of evaluation in terms of norms of good governance are more likely to be other older forms of transnational governance, rather than prototypes or parallels in national or other jurisdictions. The focus tends to be on internal transformation – what EU law can learn from its past shortcomings or from changes its own jurisgenerative possibilities and policy challenges, rather than from the widest circumstances of administrative law and from administrative law theory more generally.[19]

These examples do more than demonstrate the simple fact of a branch of legal study responding to data overload by trimming its theoretical ambitions, or even the understandable emphasis, familiar from other branches of legal science, towards middle-range theorizing – the explanation or evaluation of internal features of the system in terms of the system itself. They also point to a second and deeper set of reasons why the theoretical concerns of EU law are assumed by its students to grow out of disciplinary concerns rather than frame them in advance. Simply put, this has to do with a fairly widespread belief or intuition as to the *sui generis*[20] quality of the EU legal order, and a sense that there is not much to be gained, and perhaps more to be distorted, by applying tools honed in other fields of inquiry, whether of domestic legal orders or international legal orders, to the "new legal

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16 See e.g. G. de Burca, 'Re-appraising Subsidiarity's Significance after Amsterdam' Harvard Jean Monnet Working Paper, no. 7/1999.

17 Although see, e.g., C. Coglianese and K. Nicolaides, "Securing Subsidiarity: The Institutional Design of Federalism in the United States and Europe" in K. Nicolaides and R. Howse (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (2001) 277-99; N. Barber, "The Limited Modesty of Subsidiarity" (2005) 11 ELJ 308.

18 See e.g. J. Scott and D.Trubek, :Mind the Gap: Law and New Approaches to Governance in the European Union" (2002) 8 ELJ 1; G. De Burca, "The Constitutional Challenge of New Governance in the European Union," (2003) 28 ELR 814.

19 But see e.g., C. Scott, "The Governance of the European Union: The Potential for Multi-Level Control" (2002)8 ELJ 59.

20 See e.g. A. Verhoeven, "The European Union in Search of a Democratic and Constitutional Theory" Parts I and II.

order"[21] of supranationalism. That is to say it is not – or not necessarily – a modesty of ambition born of practical constraints or of an unduly parochial sense of relevance that leads even the more theoretically inclined students of EU law to treat the EU system as their exclusive or key reference point when pondering various infra-systemic concerns, but a conviction that the EU even conceived of at its overall *systemic level* is in a class of one, and that methodologies which look for or assume like cases are as likely to mislead as to enlighten, as apt to divert as to focus understanding.

What explains this belief? In part, we may look to social and historical context. Many of the early converts to the European idea in the legal academy and in the institutions themselves – and here we should note the influence of key figures who cross over or retain a foot in both camps[22] - embraced their subject with something approaching a missionary zeal.[23] EU law was special first and foremost because the European supranational project was an indisputably good cause, a triumph of rationality over the passions, of common interest over national insularity, and perhaps most seductively for the legal academic, of law over politics. Less nobly, the claim to 'specialness' may have been associated with the competition for scarce symbolic capital that professional specialization in the academy always brings. A sense of the distinctive, and, for other than the long initiated and well practiced, inaccessible complexity of the EU legal structure and dynamics, as well perhaps as a feeling for the unusual centrality of law in the task of supranational polity-building,[24] encouraged some to view or project themselves as members of a highly select community of knowledge.[25] Yet, whatever and however noble its roots, faith is never particularly conducive to a spirit of sceptical inquiry and to a mode or scale of theoretical reflection that might undermine its founding certainties.

But it would be unfair to set too much store by the image of the 'oversocialized' academic. We must avoid reductionism and quickly acknowledge that in response to precisely the same sense of novelty of the EU system viewed in holistic terms, in many corners of the European legal academy, and, importantly, also in more theoretically predisposed disciplines where law was identified as an important aspect of European integration and thus as a fruitful subject of inquiry,[26] there did develop a practice and culture of theoretical reflection on European law.[27] One of the fruits of this has been a series of insights which provides a more articulate grounding for the doctrinalist's inchoate sense of the distinctive quality of EU law. The gist of the message was that if the EU, at least on most readings, had quickly outgrown its origins as a purely international legal order without making the quantum leap to statehood, then theoretical work which suggested otherwise, whose articulate or inarticulate basic premises were of the EU as something that can be compared to a traditional international order or to a state for purposes of explanation or

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[21] *Van Gend en Loos v. Nederlandse Administratie der Belastingen,* [1963] ECR 1, at 12

[22] See e.g., Von Bogdandy, n5 above, 212.

[23] J. Shaw, "European Union Legal Studies in Crisis? Towards a New Dynamic" (1996) 16 OJLS 231.

[24] See section 2(b) below.

[25] See Shaw, above n23, esp. 234-8.

[26] Se section 2(b) below.

[27] An important early English language work was F. Snyder, "New Directions in European Community Law," (1987) 14 *Journal of Law and Society* 167. See also J. Shaw and G. More (eds) *New Legal Dynamics of European Union* (1995). The development of new journals and of new editorial policies in existing journals has also been an important influence upon and indictor of a more theoretical turn; for example, the launching of the *European Law Journal* in 1995 – explicitly committed to a law-in-context approach, the support of the OJLS for theoretical study of EU law - especially in its review section, and the recent development of a more theoretical orientation in the *European Law Review*.

evaluation or at least can be see as one species of a universal 'polity' genus, must be viewed as fundamentally misconceived – as making a basic "category error."[28]

Yet, for all that it is at the level of the theorization of the whole that one is most likely to meet the self-conscious assertion of the need for EU legal studies to distance itself from the traditional premises and forms of legal theory, it is also precisely at the higher range system or polity level that EU legal theory encounters most difficulty in escaping the shadow of these traditions. The basic explanation of this is one of epistemic limits. For once we reach the level of the polity itself, the sorts of theoretical questions that face EU law, whether the range of explanatory questions around the (dis)unity of EU law or the explanation of the emergence and continued vitality of the EU order *qua* legal order, or the spectrum of evaluative and practical questions around the best justification, proper ambitions and expedient limits of EU law, cannot but draw upon an arsenal of concepts and theoretical mechanisms developed or refined in an older context in which the national and the international, with the former dominating, were the two sides and the key frames of the world order of states. In the nice phrase of Shaw and Wiener, "the often invisible touch of stateness"[29] is apt to compromise the understanding of post-state entities such as the EU. Under the sign of "methodological nationalism," [30] the state template remains the inescapable starting point for our reflections on why law is resorted to or how it coheres, as well as for the standards of, or deficits of " democracy, legitimacy, accountability, equality,…security"[31] and the like on the basis of which we seek to evaluate it.

The persistence of - and the persistent controversy over, the statist legacy, and to a lesser extent the internationalist legacy, and the problem of epistemic limits to which it speaks, is further compounded by what we might call the politics of EU jurisprudence. The inclination to account for or evaluate the system as a whole may lead to meta-reflections on the "problem of translation,"[32] but it is also bound up with different hopes and fears about the proper or likely trajectory of supranationalism. Adoption of certain theoretical premises, whether state-centred or international-centred or *sui generic*, may not be entirely politically innocent. This is as likely to lead to entrenchment of different positions, and indeed - as these large political questions resonate across all the human sciences - to the forming of various cross-disciplinary or inter-disciplinary theoretical alliances and oppositions,[33] as it is to the search for a common theoretical language *within* EU legal studies. For example, the promotion of a state-centred explanatory apparatus and developmental model may legitimate the view of the EU as a proto-state entity with state-like aspirations, or it may dramatize the implausibility and illegitimacy of such an ambition – most notably in the increasingly clamorous debate over EU constitutionalism.[34] Conversely, to hold the EU to certain state-like standards, as in the democratic deficit debate which is today as prevalent in law as in

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[28] G. Majone, *The Dilemmas of European Integration* (2005) 21.

[29] J. Shaw and A. Wiener, "The Paradox of the European Polity" in M. Green Cowles and M. Smith (eds) *State of the European Union 5: Risks, Reform, Resistance and Revival*(2000).

[30] [30] M. Zurn, "On the Conceptualization of Postnational Politics: The Limits of Methodological Nationalism." Paper presented to Workshop on Global Governance, Robert Schuman Centre, Florence, April 2001.

[31] Shaw and Wiener, above n29.

[32] J.H.H. Weiler, *The Constitution of Europe* (1999) 270; see also N. Walker, Postnational Constitutionalism and the Problem of Translation" In Weiler and Wind (eds) 27-54.

[33] Perhaps the best-known of which is the original, and tenacious, opposition between neofunctionalism and intergovernmentalism. See e.g. P. Craig, "The Nature of the Community: Integration, Democracy and Legitimacy" in Craig and De Burca (eds) 1-54.

[34] See section 2(b) below.

political science circles,[35] may be an effective, even convenient means to dramatize its deficiencies, just as criticism of the use of a state benchmark may be a convenient way of avoiding such judgment. Or. to revert to the other side of the Westphalian coin, to begin from the premise that the EU is merely an elaborately tailored international model, to be viewed in terms of realist or intergovernmentalist assumptions[36] or in terms of state delegation theory,[37] may amount to a self-vindicating narrowing of the horizons of what is conceivable in transnational law and politics, just as the criticism of this strain of traditional theorizing may conveniently gloss over many pertinent observations on the limits of the transformative potential of the EU. For their part, as they tend to be the critics of both internationalist and quasi-statist readings of the EU, those who advocate a *sui generic* third way are not immune from the charge of convenient dismissal of inconvenient criticism.

And while these various theoretical commitments and strategies help to keep the question of epistemic limits on the agenda, this is often in a somewhat negative register. The old tends to be criticized in terms of the mere possibility and claimed desirability of the new, and, conversely, the new may, with some justification, be dismissed by partisans of evolution rather than revolution for its unproductive navel-gazing tendencies, for merely repeating the mantra of theoretical innovation rather than putting it into practice. [38]

2. *The Dynamics of EU Legal Theory*

This is by no means to suggest, however, that at the systemic level EU legal theorizing is trapped in epistemic limbo, unable to move backwards or forwards, or that it is merely politics dressed up as theory. It appears to be an abiding feature of the attainment of theoretical self-consciousness in the human sciences at least, given the diverse value commitments of the 'scientists' and the limited scrutability of their object of study, that any aspiringly encompassing discourse it generates feeds a sense of its own impotence, of endless and circular contestability. Yet if we take a more 'bottom-up' approach, and one which is problem-centred rather than discipline-centred, and so embrace the inevitability of diversity 'all the way up' from methodological premises or presupposition through substantive theory-building to propositional outcomes, then we observe a different picture. For in a fundamental sense, like EU studies across the social sciences generally, EU legal studies even in its relatively mature doctrinal and disciplinary phase remains event-sensitive, with the sheer pace and variety of such events continually throwing up new problems and puzzles for those concerned with the EU law at the overall systemic level as much as for those concerned with particular sectoral developments. Engagement with these new problems, through diverse combination of old and new concepts and techniques, has been the occasion for much unapologetic innovation, not least because, at the legal systemic level as much as at the infra-systemic level, the recognition of the pressing nature of the practical concerns these problems announce (the inevitable accompaniment of which recognition is a particular and partial 'political' predisposition, however latent) provides a motivating factor which overrides, or at least postpones meta-theoretical angst.

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35 See e.g. P Craig and C. Harlow, (ed) *Law Making in the European Union* (1998); C. Harlow, *Accountability in the European Union* (2002); M. Everson, "Accountability and Law in Europe: Towards a New Public Legal Order? (2004) 67 MLR 124.

36 See e.g. A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998).

37 See e.g., P. Lindseth, "Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity" in" C. Joerges and R. Dehousse, (eds) *Good Governance in Europe's Integrated Market* (2002).

38 See e.g., Verhoeven above n20, esp. Pts I-III.

Perhaps the best way of identifying some of the key areas of bottom-up theoretical concern and innovation, is to start, from an intuitive but widely shared 'pre-theoretical' sense of problem-relevance, and trace how this leads to particular and diversely developed theoretical insights about the novelty or otherwise of the functions and uses of law in the supranational order - at which point, if often in subtly nuanced ways, the fault-lines between old and newer conceptual supports and frames of inquiry tend to re-emerge. A useful point of departure for these purposes remains the oft-quoted insight of Dehousse and Weiler that in the supranational context law is "both the object and agent of integration." [39] This immediately indicates two types of innovative theoretical challenge. First, as the *object*, law itself provides one relatively autonomous candidate domain of integration alongside those of politics, economics, culture etc, and, accordingly, the theoretical study of the problems of legal integration thus discretely conceived tends to be the province of those whose theoretical training and primary "knowledge-constitutive interests"[40] tend to be law-centred. On the one hand, as we have already noted, the degree of interpenetration of national and European legal orders implied by supranationalism means that the ways in which we normally conceive of the relationship between adjacent but presumptively separate legal orders, whether through the episodic 'conflicts' of private international law or the competing singular formulae for linking public international law to national law (monism versus dualism)[41] are inadequate to grasp the dense complexity of the relevant ties. On the other hand, the usual candidate solution where legal orders pass a certain threshold of density in their relations, whether through their fusion without remainder or the absorption or colonization of one by the other, namely the idea of a single monopolistic sovereign authority – does not seem adequate either. How, then, is this new kind of relationship, this new form of authority and coherence, best to be conceptualized?

Secondly, as the *agent* of integration, an even broader set of new challenges and opportunities are presented to law. Here, as first comprehensively portrayed by the 'integration through law' school of the 1980s, [42] law is posited as the "independent variable"[43] accounting for or influencing a number of other key dimensions of the integration process. What makes this more than the familiar legocentric tendency of the doctrinalist – and, indeed, an area of study which, unlike the 'law as object' literature attracts considerable interest from the other disciplines - are a number of peculiar features of the European project which do indeed suggest a special, and if taken together, perhaps unique prominence for law in the making and sustaining of a polity. First, there is the absence of the kinds of cultural supports that we normally associate both with the production of and compliance with law in a national or otherwise more cohesive polity, and the extra demands this places on law both in its self-legitimation and in the legitimation of the polity whole.[44] Secondly, and related, there is the relative fragmentation, fragility and volatility of the political dimension in the making of the European polity, and the compensatory pressures this places on law. Thirdly, there is the peculiarly 'scripted' nature of the EU polity.[45] Unlike a state, the EU does not possess

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[39] R Dehousse and J Weiler, "The Legal Dimension" in W. Wallace (ed) *The Dynamics of European Integration* (1990) 242-60, at 243.

[40] J. Habermas *Theory and Practice* (1974).

[41] However elaborately qualified, monism and dualism remain theories of recognition *based* on simple priority rules or presumptions. See e.g. R. Higgins, *Problems and Process: International Law and How We Use it*(1994)

[42] M.. Cappelleti, M. Seccombe and J. Weiler *Integration Through Law* (1986)

[43] G. de Burca, "Rethinking Law in neofunctionalist theory" (2005)12 *Journal of European Public Policy* 1-17, 5.

[44] See e.g. D. Grimm, 'Does Europe Need a Constitution',(1995) 1 ELJ 282.

[45] See, similarly, the depiction of the EU as a "print community" by A. Williams, "Mapping Human Rights, Reading the European Union," (2003) 9 ELJ, 659, 666.

theoretically unlimited competence to deal with all and any of the affairs of its citizens. It is restricted to certain purposes, however broadly these be prescribed. As well, as being a normatively incomplete polity, however, the EU is also normatively open-ended, in that unlike a classical international order, it is not presumptively confined to a determinate range of objectives.[46] Rather, its history, the range and depth of its mechanisms for norm-generation, and the unprecedented (short of the state) extent to which its actions have become embedded in a web of mutual expectations and commitments with citizens, civil society and other levels of government suggest that it has an as yet "unsaturated"[47] political and legal capacity, and, moreover, that the exploitation of this latent potential is peculiarly amenable to conscious design. The legal script, therefore, remains a key token and compass of progress, its drama of shifting purposes, values and ideals both an eloquent reflection of and an attempt to shape a narrative which is typically understood as complete in the legal order of a state and as less fluid in the legal order of an international organization. Fourthly, and to some extent as a corrective to the third point, the centrality of law also has to do with the fact that the EU is a polity in progress not only in normative terms but also in social terms. What makes law central, namely the weakness of its cultural supports and political steering mechanisms, also makes law precarious. What makes law a window of change and a key to innovation, namely the unfinished and shifting nature of the European journey,[48] also exposes law to overreach and disappointment.[49] More generally, the simple fact that the EU and EU law are works in progress has profound methodological implications. We lack both the confidence and the knowledge of retrospective wisdom. Not only are we faced with a situation in which law is asked to contribute perhaps in unprecedented ways to the making of a political community, but we do not how far or for how long it will succeed. We ask new questions of law's role in mobilizing and co-ordinating collective action without the luxury of knowing that it has already answered these questions elsewhere, thereby underscoring our uncertainty as to whether it *can* answer these questions.

Let us now, in the concluding sections of this essay, offer some schematic thoughts on how EU legal theory has developed research paradigms in response to these two clusters of problems – the authority and unity of a species of law whose internal code has conventionally been viewed as one of integration on the one hand, and the special challenge of law's contribution to integration more broadly conceived on the other.

(i) The authority and unity of EU law

If neither the traditional statist language of sovereignty nor the old language of international law is adequate fully to capture the complexity of the EU legal order, what theoretical tools, if any, are better equipped for the task? As noted above, these questions have tended to be thrown up or sharpened by events, and the development of two overlapping areas of contestation and theoretical innovation should be seen in this light. The first, as already noted, concerns the relationship between the EU and the member states, a debate initially fed by the ECJ's early claim to systemic autonomy and supremacy and by occasional national judicial reactions to this,[50] and subsequently more fully nourished by post-Maastricht controversies,

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[46] See e.g. M. Maduro, Where to Look for Legitimacy?" in E.O. Eriksen, J.E. Fossum and A.J. Menendez (eds.) *Constitution Making and Democratic Legitimacy* (Oslo: Arena) ARENA Report No.5/2002. 81

[47] G. Palombella, "Politics and Rights: The Near Future of the EU, Seen From Europe" (2005) 18 *Ratio Juris* 400.

[48] See e.g. Z. Bankowski and E. Christodoulidis, "The European Union as an Essentially Contested Project," in Z. Bankowski and A. Scott (eds), *The European Union and its Order: The Legal Theory of European Integration* (2000) 17-30.

[49] I. Ward "Beyond Constitutionalism: The Search for a European Political Imagination" (2001) 7 ELJ 24-40.

[50] See e.g. De Witte n9 above.

spreading to the political institutions and to public sites of debate, about the outer boundaries of an expanding EU and the strength and plausibility of the claim of states to continue to control or influence these boundaries.[51] A second issue, which also gained much momentum from Maastricht, and its introduction both of a new depth of "structural variability" in the form of the Three Pillar architecture of core EC law, Justice and Home Affairs and Common Foreign and Security Policy, and of new and significant forms of "jurisdictional variability"[52] in terms of a shift from the default presumption of unanimous and uniform member state involvement in areas such as Economic and Monetary Union and the Social Policy Protocol,[53] concerns the internal coherence of the EU order. In the light of these developments, were we not moving towards a more variegated legal architecture, and, if so, did the idea of 'differentiated integration' not pose an oxymoronic challenge to the very idea of unitary legal order? [54]

Both questions, that of inter-systemic coherence as well as that of intra-systemic coherence, clearly cast doubt on the plausibility of a traditional Kelsenian or Hartian notion of a legal order as a hierarchical structure of norms organized around a point of legally self-validating sovereignty assumed or claimed to be grounded in social or political authority. The theoretical response has been notably diverse. Aside from those who remain convinced that the old state sovereigntist understanding has no plausible rivals in meeting the new challenge,[55] some have sought to adapt the old concepts to the new, while others have sought to declare the old redundant.

Within the adaptation category, one body of work has endeavoured to retain the old idea of sovereign authority but to relocate it in a plural framework.[56] The hypothesis of a plurality of sovereign unities argues that the self-understanding of the diverse legal orders - both the various national orders and the EU order itself - situated in the supranational configuration remains tied to a sovereigntist logic, one in which final authority is always self-referential and self-determined, and that the coherence of the whole is always precarious and derivative - dependent upon the various bridging mechanism established between the different legal and political institutions of these diverse sites of sovereign authority and their capacity for harmonious mutual adjustment. On this view, there can be no final 'authority of authorities,' – no *uber*sovereign of the various sovereigns, and the point at which the various sovereign law-givers are unable to achieve normative convergence on the basis of their different validity claims is also the point at which we run out of legal solutions. The question of coherence then become one of whether and how the clash of final authorities can be deferred, and even if this can be done indefinitely, the integrity of the whole necessarily remains a contingent achievement rather than a normative premise or guarantee.

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51 See e.g. Weiler n32 above, esp. chs. 6 and 10.

52 R. Harmsen, "A European Union of Variable Geometry: Problems and Perspectives"(1994) 45 NILQ 109.

53 And while the differentiated arrangement on social policy did not survive the subsequent Treaty of Amsterdam, this later agreement underscored the theme of differentiation by introducing a much more complex model of variable geometry as regards the abolition of internal border controls and the establishment of compensatory security measures under the new area of Freedom, Security and Justice.

54 Se e.g. S Weatherill, "On the Depth and Breadth of European integration" (1997) 17 OJLS 536.

55 See e.g. O. Pfersmann "The New Revision of the Old Constitution" (2005) 3 ICON 383.

56 See e.g. C. Richmond, "Preserving the Identity Crisis: Autonomy , System and Sovereignty in European Law," (1997) 16 *Law and Philosophy* 377-420; M. Kumm, "Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice," (1999) 36 CMLR, 351-386, M. La Torre, "Legal Pluralism as an Evolutionary Achievement of Community Law," (1999) 12 *Ratio Juris* 182-95. N. Walker, "Late Sovereignty in the European Union" and H Lindahl, "Sovereignty and Representation in the European Union" both in N. Walker (ed) *Sovereignty in Transition* (2003) , at 3-32 and 87-114 respectively.

Another adaptation strategy is simultaneously less and more radical. It is less radical to the extent that unlike the pluralist approach, it seeks to retain the idea of the unity of the whole, even if it allows it a complex internal quality. Owing much to German and Dutch scholarship,[57] this approach often cuts across questions of external (with state orders) and internal coherence in seeking to reconcile the idea of a poly-centred structure of *political* authority with the regulatory ideal of an encompassing EU-wide or EU-and-state wide *legal* unity. This distinction indicates the sense in which the complex unity approach it is also more radical than the pluralist approach, in that it implies a downgrading of the importance of sovereignty, as the latter has traditionally implied the coincidence and mutual reinforcement of legal and political authority. To the extent that sovereignty remain in the conceptual frame, it appears as something no longer holistic and indivisible but now as composite and capable of disaggregation, as in the language of pooled, shared, divided split or partial sovereignty.[58] In its place, other 'sovereign independent' aspects of the idea of legal order are required to do much of the work of securing the necessary unity. As pursued in the following subsection, this may take the form of some claimed special quality or contingent advantage of law pertinent to the ends of integration and the teleology of supranationalism. Alternatively or additionally, it may invoke an old if newly contextualized universal, as in the idea of "multi-level constitutionalism"[59] – the notion that the EU is just one of many entangled and interwoven sites at which an increasingly universal or universalizable idea of constitutional principle provides the common steering mechanism and integrating ingredient for the whole.

If the pluralists retain sovereignty at the price of guaranteed unity, and the complex unitarians retain unity at the price of the relegation of sovereignty to minor and divisible key, another set of strategies seeks a more radical break from the sovereignty idea. Here again, however, we can identify two variations on the abolitionist or post-sovereign theme. One such approach seeks to retain the notion of unity and coherence, however complex, while the other is committed to the maintenance neither of sovereignty nor of a traditional idea of unity and coherence. The first post-sovereign approach, of which Neil MaCormick is an influential exponent,[60] remains closely related to the complex unitarian approach but presses harder in its efforts to move beyond sovereignty. On this view, law, conceived of generically as institutional or rule-based normative order, is not and was never conceptually tied to the state, and indeed the state is not and was never conceptually tied to a notion of indivisible sovereignty, even if there was a strong historical coincidence in the Westphalian world of the law-state.[61] The search for a harmony of legal relations within the European polity, therefore, need not start from the premise that the 'sovereignty ingredient' need be replaced or supplemented by a new 'x' factor, but from the appreciation that sovereignty was only ever one form of underpinning of the 'institutional' dimension of institutional normative order, and that its fading currency should be seen as a matter of (happy) political circumstance

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[57] See e.g. A. Von Bogdandy, "the European Union as a Supranational federation: A Conceptual Attempt in the Light of the Treaty of Amsterdam" (2000) 6 *Columbia Journal of International Law* 27-54; D. Curtin and I. Dekker, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise" in P. Craig and G de Burca (eds) *The Evolution of EU Law* (1999); "The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity" in P. Beaumont, C. Lyons and N. Walker (eds) *Convergence and Divergence in European Public Law* (2002) 59-78.

[58] See Walker, n56 above, 13-15.

[59] Strongly associated with Ingolf Pernice. For a recent statement, see I. Pernice, "Multilevel Constitutionalism in the European Union" (2002) 27 ELR 51.

[60] See in particular, *Questioning Sovereignty: Law, State and Practical Reason* (1999)

[61] *Ibid*. esp. chs.1-2.

rather than conceptual crisis[62]. To be sure, the strength of historical path-dependence upon state-sovereigntist forms of institutional normative order means that political imagination and political will is still required to bring about the necessary transformation to a more heterarchical system of authority and to fill the void left by sovereignty's departure. Yet this should not be thought of, as with the pluralists, as a necessarily self-defeating pursuit of 'law beyond law', but rather as the exploitation of the more general resources of the flexible human invention of institutional normative order beyond one of its particular state-centred manifestations.[63]

The other post-sovereigntist approach is more difficult to capture, precisely because it tends to start from the premise that neither sovereignty, nor its close historical-conceptual cousin, the idea of unity, is a key or even a desirable aspect of law, and so does not seek common terms of debate with the positions set out above. For example, in one influential version, the traditional preoccupation with sovereignty and unity is seen not so much as an epistemic challenge – as a way of viewing the world which may have become encrusted with outmoded assumptions but which still refers us to key prerequisites of collective legal and political capacity, but as an ideological barrier to be struck down – the legacy of a harmful obsession with the practice of "personification"[64] in constitutional thinking which treats the boundaries of the sovereign (or even post-sovereign) polity as the boundaries of political initiative and legal norm-generation, and is so doing permits dominant particular interests to masquerade as the general will. Instead, a new commitment to a bottom-up democratic experimentalism should be encouraged – one in which coherence is not a matter of the backward-looking fit of particular legal applications with a fixed system of norms, but of forward-looking mutual learning and synergy between different problem-solving micro-communities in which the norm-application distinction dissolves in a process of continuous reflection, adaptation and renegotiation.[65] The lack of a clear sovereigntist default structure of authority in the EU, in this view, is not a problem so much as an opportunity and occasion for a radically differentiated juridical framework to take hold.

What is implicit, and in some cases explicit, in all of these perspectives, and is also evident from their more or less radical incompatibility, is the impossibility of cordoning off questions of authority and coherence – the inner morality or structural integrity of law – from wider practical questions of what law might or should become in the EU. For in the final analysis, whether, to what extent and in what ways sovereignty and unity remain important and viable features of the supranational legal constellation are inseparable from the question of what model or models of law's European future are possible or desirable. This points us directly towards our final area of analysis.

(ii) Law's European *sonderweg*[66] and the constitutional (re)turn

Even more so than the study of the authority and coherence of EU law, the study of the special contribution of law to the making of a new type of polity has intensified in recent years, with much of it revolving around the current constitutional debate. We cannot appreciate this impulse however, without exploring some of the important theoretical innovations and insights of earlier phases. Again, German scholarship provided a particularly

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[62] *Ibid.* 126.

[63] For a detailed exploration along these lines, see M Maduro "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in N. Walker (ed) *Sovereignty in Transition* 501-538.

[64] O. Gerstenberg and C.F. Sabel "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?" in C. Joerges and R. Dehousse (eds).

[65] *Ibid*. See also J. Cohen and C. Sabel, "Directly Deliberative Polyarchy" (1997) 3 ELJ 313.

[66] See J.H.H. Weiler, "In Defence of the Status Quo: Europe's Constitutional *Sonderweg*, in Weiler and Wind (eds) 7-26.

fertile environment. What is remarkable about much of this work is its refusal to treat the original features of the supranational entity, in particular the lack of the robust social, political and cultural supports of the nation state, as leading to intractable legitimacy problems, but rather, first, to find in some special characteristic of law the way to quite distinctively 'third way' solutions, and secondly, in so doing to turn the source of the supposed 'problem' of legitimacy into the key to its solution. In their very different ways, for instance, both the ordoliberal tradition[67] and Hans Ipsen's idea of the EU as a special purpose association[68] saw supranational law as engaged in activities which could and should be shielded from direct political interference. For the ordoliberals, The Treaty of Rome supplied Europe with its own economic constitution, a supranational market–enhancing system of rights whose legitimacy depended precisely on the absence of democratically responsive will formation and consequential pressure towards market-interfering socio-economic legislation at the supranational level , a matter which should instead be left to the member states - and even there only insofar as compatible with the bedrock economic constitution. Ipsen's theory, to which Majone's work on the idea of a European "regulatory state"[69] is a notable successor, shares with ordoliberalism the idea that supranationalism transcends partisan politics, but here the invisible hand of the market is supplemented by the expert hand of the technocrat. The scope of European law is not restricted to negative integration – to the market-making removal of obstacles to wealth-enhancing free trade, but also extends to certain positive measures of an administrative nature. In Majone's elaborately developed model, these regulatory measures are concerned not with macro-politically sensitive questions of distribution, but with risk-regulation in matters such as product and environmental standards where expert knowledge is paramount, and where accountability is best served by administrative law measures aimed at transparency and enhanced participation in decision-making by interested and knowledgeable parties rather than the volatile preferences of broad representative institutions.

If these approaches emphasize law as a social technology with characteristics peculiarly suited to supranationalism, whether as a form of rights-insulation and guarantor of predictability and calculability in market relations, or as a tool for developing and refining forms of governance which counteract rather than track received models of broad representative government, other early narratives of law's contribution to supranationalism are less essentialist in nature. Instead they stress a looser affinity between the dynamic of law and of integration more generally, or are inclined to emphasize the situational character of law's prominence.

In the first category, we can place accounts of law which rely implicitly or explicitly upon neo-functionalist premises, or indeed upon other political science approaches which stress the broad institutional effects of law and the instrumental strategies of legal actors over detailed inquiry into its internal normative structure and reasoning.[70] Neo-functionalism, of course, is famous for its early pre-eminence in the general theory of European integration,

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[67] See e.g. E-J Mestmacker, "On the Legitimacy of European Law" (1994) *RabelsZ* 615; see also D. Chalmers, "The Single Market: From Prima Donna to Journeyman" in Shaw and More (eds) 55-72. On the continuities between the legal and political thought of the Weimar Republic and post-war thinking about supranationalism more generally, see C. Joerges and N.S. Ghaleigh (eds) *Darker Legacies of Law in Europe* (2003).

[68] H-P. Ipsen, "europaische Verfassung – Nationale Verfassung" (1987) EuR 195.

[69] G. Majone, "The Rise of the Regulatory State in Europe" (1994) *W.Eur.Pol* 77; see also n28 above. On the connections between Ipsen and Majone, see C. Joerges "'Good Governance' in the European Internal Market: An Essay in Honour of Claus-Dieter Ehlermann" EUI Working Papers, RSC No. 2001/29.

[70] On the links between the various and influential political science literatures on the ECJ and the legal literature, see de Burca, n43 above; see also K. Armstrong, "Legal Integration: Theorizing the Legal Dimension of European Integration," (1998) 36 JCMS 147.

arguing for a gradual spread or 'spillover' from a limited number of technically dense and relatively politically uncontroversial sectors in which there was a recognition of convergent, functional welfare-based needs into new policy domains on the basis; first, of the unintended or unanticipated external effects of earlier integration upon these other areas of interdependent activity; secondly, the instrumental behaviour of social actors and supranational organs in exploiting these unintended consequences; and, thirdly, the gradual upgrading of common interests and transfer of political expectations and loyalties which flows from increasing regional entanglement.[71] Yet for all its early prominence, the relationship between neo-functionalism and law was, and remains, somewhat paradoxical. On the one hand, neo-functionalism "has always had a particular resonance for lawyers, primarily because its central concept of spillover provides a useful metaphor for the expansionary tendencies of EU law"[72] On the other hand, attempts to construct a general account of law's contribution to a neo-functional understanding of supranational development are conspicuous by their absence.[73] In part, this may be due to the very strength of the metaphorical link, the vividness of the ostensive connection between an incremental perspective on legal integration and the image of a functionally evolving EU tending to obscure or downgrade the need for hard analysis (and so, incidentally, feeding and enforcing the preconceptions of those Eurojurists who would take law's centrality for granted). In part, however it is also linked to certain tensions and silences within neo-functionalism itself, in particular the 'original sin' of its founding fathers in failing to consider the particular causal efficacy of law,[74] and the more general weakness of neo-functionalism in failing to provide a compelling explanatory account - as opposed to a suggestive description and symptomatic overview - of the dynamics of integration of which that early failing was indicative. Accordingly, where neo-functional tools have been used to analyze the law, they have tended to focus on just those areas where the analogy between the general tenor of neo-functional theory and the effects of the workings of the law is most suggestive, as in those studies of the role of the Court of Justice that have stressed its importance as a strategic institutional actor at the supranational level with a discrete interest in encouraging integration, as well as its capacity to present politically significant developments in a technically specialist and apparently uncontroversial language.[75]

Yet for all the absence of a more encompassing grasp of the role of law in integration in this strain of research, the importance of its emphasis upon the judicial seat of European law-making in expressing, and perhaps in promoting the integrity of European law as an autonomous legal order is undeniable. A related body of work in which the contribution of Joseph Weiler is particularly prominent, has also set the contribution of the ECJ, and indeed the more general juridification of the EU, in a strategic political context, but in so doing has placed greater stress on the shifting dynamics of interaction between legal and political processes and the contingency of law's accomplishment. Insisting upon "the dual character of supranationalism,"[76] Weiler argued that the early prominence of legal or normative

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[71] See e.g. P. C. Schmitter, "Neo-Neofunctionalism" in A. Wiener and T. Diez (eds) *European Integration Theory* (2004) 45-74.

[72] De Burca, n43 above, 8.

[73] *Ibid*. 3.

[74] See E. B. Haas, *Beyond the Nation State: Functionalism and International Organization* (1964).

[75] See in particular A. Burley and W. Mattli, "Europe Before the Court: a political theory of European integration" (1993) 47 *International Organization* 41; W. Mattli and A. Slaughter, "Revisiting the European Court of Justice (1998) 52 I*nternational Organisation* 177. For a recent overview of the Court literature, see A. Stone Sweet *The Judicial Construction of Europe* (2004).

[76] "The Community System: The Dual Character of Supranationalism" (1981) *Yearbook of European Law* 267. See also n32 above ch.2.

supranationalism and the intrepid contribution of the ECJ to this was possible and explicable precisely because decisional or political supranationalism remained largely undeveloped, with the member states retaining a key *de jure* or *de facto* veto power in many areas of European policy-making. The sub-text of legal development, in other words, was its capacity to consolidate positive-sum intergovernmental bargains without threatening key national political prerogatives.

While some pursuing a similarly contextual approach have developed Weiler's insight into the 'necessary cunning' of the judicial branch by drawing upon constitutional process theory[77] or institutional choice theory[78] to indicate how the Court sought in a democratically-sensitive manner to correct for national representational deficiencies or to relieve supranational decision-making gridlock amidst the complexly overlapping *demoi* and institutional possibilities of transnational politics, and others, by contrast, have questioned how necessary or proportionate the Court's early cunning actually was,[79] recent years have witnessed an important change in the terms of trade between judicial and political branches that none can ignore. As Weiler argued, with the advent of the 1986 Single European Act and the spread, much accelerated in the 1990s by the Treaties of Maastricht and Amsterdam, of new competences and of majority voting, the earlier symbiosis of 'strong' legal supranationalism and 'weak' political supranationalism no longer held. Instead of providing a device for relieving or compensating for political gridlock, Europe's robust legal machinery now offered a (for some) dangerously or (for others) promisingly permissive framework for the deepening and widening of supranational authority by a newly empowered and re-invigorated European political class.

Indeed, for all their diversity of perspective, what is common to each of the approaches considered above is the tendency of the secular development of the EU towards a broader and deeper polity status to test the limits of their basic commitments and conclusions as to the proper role of law. Both the ordoliberal approach and the regulatory state approach have been criticized for drawing an artificial distinction between technical questions of market-making and standard-setting and politically sensitive questions of redistribution, and this tension becomes all the more evident as the EU takes on a greater range of tasks whose effective performance involves the distribution of politically salient resources and risks and which reduces the capacity of states themselves to perform these tasks. And while this has not deterred those who continue to hold that a distinctive characteristic of the EU is the extent to which its various sectoral policy horizons depend upon the contribution of special epistemic communities from seeking new and imaginative ways of combining democratic input and expertly informed policy output,[80] the "growing problem solving gap"[81] of an EU insufficiently trusted with the capacity to resolve collective action problems that, partly on account of its own development, lie increasingly beyond the steering capacity of the individual states, is not easily gainsaid. So also for the law-as-functional-to-integration scholars and for those who focused on the once productive asymmetry of legal and political supranationalism, the expanding political scope and visibility of the EU patently challenge law's earlier quiet ascendancy.

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[77] J. Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (2002).

[78] M. Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (1998).

[79] See e.g. H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986).

[80] See in particular the work of Joerges on 'deliberative supranationalism'; e.g. "'Deliberative Supranationalism': Two Defences" (2002) 8 ELJ 133.

[81] F. Scharpf, "Problem Solving Effectiveness and Democratic Accountability in the EU", (2003) *Max Planck Working Papers*

It is also precisely this emergent challenge to the various understandings of law's special position that has created the paradoxical conditions for the intensity of the present "constitutional turn"[82] in EU legal theory. Let us be clear. The constitutional turn is as event-sensitive as any other phase or aspect of EU legal theorizing. Yet while the particular series of contemporary events encompassing the EU's first documentary constitutional moment - the work of the Convention on the Future of Europe of 2002-3, the signing by the member states of a Constitutional Treaty at Rome in October 2004 and the rocky and probably abortive path of subsequent ratification - has undoubtedly had an amplifying effect, the tendency to conceptualize law's European problems and opportunities in a constitutional frame predated these events, and will doubtless outlast them. Why is this the case, and what fresh theoretical insights and challenges does the trend towards thinking in a constitutional register bring?

To address the first question, the post-Maastricht popular rebellions in the form of failed or close-run referendums in Denmark and France and strong political challenges elsewhere were but the first manifestation of a heightened public consciousness of the expanding EU polity beast and, on the strength of this, an emerging political critique of its role and aspirations. There followed significant new investment by the political actors and institutions of the EU in debates and initiatives concerning the democratic deficit, fundamental rights, the demarcation of competences between member states and Union, and, much influenced by the Enlargement project of the 90s to embrace the former Warsaw Pact countries, the adequacy of an institutional machinery designed for a much smaller and more cohesive group of states to continue to deliver an effective and responsive policy output. Yet in their explicit recognition and inevitably contentious answers to the problems of polity legitimacy and co-ordination, these political responses can also be seen as reinforcing causes. Once the polity 'genie' had escaped from the technocratic bottle, it could not be forced back in, and the political move to an explicit constitutional discourse in the early years of the new century can be seen as a further, and perhaps definitive raising of the stakes in the increasingly "breathless"[83] search for a new language and modality of legitimation.

For its part, the academic turn to constitutionally inflected modes of analysis in EU legal studies, and indeed the "normative turn"[84] in EU studies more generally, can be seen both as a response to these political developments and as a symptom of the same sense of the EU's having reached a historical watershed as had triggered (and has been reinforced by) the political developments. Perhaps more than ever before, theorists from other disciplines, in particular political science and normative political theory, have joined the community of EU legal studies in focusing on the legal-constitutional dimension of supranationalism. In part, as noted, this is simply a reaction to, and an attempt to account for, momentous events taking place on the political stage. In part, it amounts to a tactical acknowledgement that not to join the constitutional debate and contribute in a constitutional register at a point where it attracts so much attention and consumes so much energy is to risk ones views on the state and future of the EU being marginalized. Yet the 'scripted' quality of the EU referred to earlier, and the affinity between this view and the idea of law, and constitutional law in particular, as both index and steering mechanism of polity development, is also an important factor here. If the EU has reached a point where its institutional design and guiding purposes require renewal,

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82 A.Wiener, "Towards a Transnational Nomos: The Role of Institutions in the Process of Constitutionalization" Jean Monnet Working Papers 9/03.

83 U. Haltern, "Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination" (2003) 9 ELJ 14.

84 R. Bellamy and D. Castiglione, "Legitimizing the Euro-'Polity' and its 'Regime': The Normative Turn in EU Studies" (2003) 2 *European Journal of Political Theory* 7.

then the temptation of the constitutional register lies in its inheritance of a double-sided method of modeling[85] the polity - both an eloquent discourse for capturing emergent trends and a presumptively authoritative and open-ended means to frame new possibilities.[86]

But for all that this places constitutionalism squarely on the academic agenda, the more theoretically reflective of the new work, converging from a number of disciplines, has been as much if not more concerned with the second order question of the basis and terms on which the shift to a constitutional mode may or may not be appropriate as with the first order question of the ideal content of the constitutional blueprint. For in the move to constitutionalism the complex mix of problems and possibilities offered to law in the circumstances of insecure cultural supports, political contention over the very form and purpose of the EU, and its status as an incomplete and unprecedented social project, are thrown into particularly stark relief, and the question of the escapability or otherwise of law's statist legacy is confronted anew with the stakes raised higher than ever before. On the one hand, in a movement much influenced by the work of Jurgen Habermas,[87] many have emphasized the community-mobilizing potential of a constitutional process centred around but by no means confined to the set-piece events of the current political initiative. On this view, constitutionalism is the register of self-understanding in which any community – state or post-state - begins to realize itself as a community, and the constitutional document provides both an anchored reminder of that self-commitment and a series of guiding values and institutional forms in terms of which it may be pursued. On the other hand, however, whereas most are prepared to concede an immanent and highly particular tradition of informal or material constitutionalism for the EU,[88] some instead see in the new emphasis on documentary constitutionalism the crowning conceit and the terminal misapplication of a state-centred perspective. The symbolic power and organizing capacity of constitutionalism, on this view, is inextricably tied to its statist origins, and so offers a solution to the problems of supranationalism that is either too 'thin' or too 'thick.' Too 'thin' since to attempt to transfer the constitutional approach to the circumstances of a non-state polity may be doomed to quixotic failure, foundering on just the lack of cultural support, political agreement and social connectedness it seeks to overcome.[89] Alternatively, too 'thick' to the extent that European documentary constitutionalism threatens, regardless of the diverse intentions of its proponents, to endorse a central and unitarian logic and to impose a quasi-federal template that the developing political critique of the EU over the last 15 years – reaching new dramatic heights in the 'no" votes in the 2005 referendums on the Constitutional Treaty in France and the Netherlands - has denounced as an unacceptable infringement on national political identity, voice and capacity.[90] To recall the question of authority and unity, the enactment of a European Constitution, on this view, may be ineluctably drawn towards a one-dimensional epistemic code that emphasizes hierarchy, comprehensive control and self-containment - features inimical to a multi-level order in

[85] N. Walker "The EU as a Constitutional Project" Federal Trust Online Papers 19/04.

[86] The 'radiation effect' of constitutionalism means that, as a brief perusal of the recent contents of any of the relevant theoretically inclined journals demonstrates, it is increasingly the preferred normative language even for EU scholars who may be opposed to or indifferent towards the idea of a documentary constitution

[87] See e.g. J. Habermas, "Why Europe Needs A Constitution" (2001) *New Left Review* Sep-Oct (11), and various essays in his two collections *The Postnational Constellation* (trans. by M. Pensky) (2001) and *The Inclusion of the Other* (trans. by C. Cronin)(1998). Of many others who have pursued a Habermasian line, perhaps the most prolific and influential are those associated with the "Arena" Centre in Oslo, in particular E.O. Eriksen and , J.E. Fossum.

[88] See e.g. Weiler n32 above, ch.1.

[89] See e.g. Ward n49 above, Haltern, n83 above.

[90] N. Walker, "Europe's Constitutional Engagement" (2005) 18 *Ratio Juris* 385.

which negotiation and mutual "constitutional tolerance"[91], overlapping authority in the same territorial space and the interlocking normativity of different orders provide a more appropriate legal sensibility.

Contained in these oppositions are the abiding dilemmas of framing a new order in terms of the old. It remains an open and deeply contested question whether the documentary constitutional idea, or indeed the discourse of constitutionalism generally, is a ladder to new conceptions of legal and political community or a drag on their development. Tellingly, and soberingly, the critical view has been more incisive and articulate in its diagnosis and rejection of documentary constitutionalism's lingering affinity towards a limiting template of unitary authority than in its fleshing out in a alternative register of any of the newer visions of legal order and authority discussed earlier,[92] just as the affirmative perspective has struggled to convince that any such innovation is possible *within* a constitutional register. What the constitutional debate confirms, then, in its preoccupation with the past, is that the theorization of the new order is not just a problem of limited intellectual vision, but of the restricted horizons set by the "modern social imaginary"[93] on which that vision draws. What the same debate indicates for the future is that the reconnection of law and high politics which has marked the EU's maturing as a polity is here to stay, and that new theoretical thinking about EU law will find both its challenge and its opportunity in that intimate but uneasy tryst.

[91] Weiler, n66 above, 18 *et seq.*

[92] See section 2(a) above

[93] C. Taylor, *Modern Social Imaginaries* (2004).