The Place of European Law

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Abstract
The essay initially offers a general method of characterizing polities in terms of their response to three core issues; namely, the form of collective agency they represent, the nature of their generative or mobilizing resources, and the type of basic social ontology they endorse. For each core issue we tend to frame our thinking in terms of a binary opposition—popular sovereignty versus other forms of political title, particularism versus universalism and collectivism versus individualism. In the Westphalian, state-centred worlds of high modernity the defining idea of collective agency is that of popular sovereignty, and this form of agency requires and enables both universalist-individualist and particularist-collectivist strands at the levels of generative resources and basic social ontology in order to survive and prosper. Moreover, in this Westphalian universe, the only major political form that accompanies the state is the inter-state or international form, itself largely parasitic upon the state, and contrasting in its characterization in terms of the three core issues. It lacks popular sovereignty, and is only weakly represented along both universalist-individualist and particularist-collectivist dimensions. Once we shift to the late modern world of increasingly transnationalized legal, political, economic and cultural relations we confront a more complex picture. The defining issues and tensions remain the same, but are written onto a configuration of legal and political space no longer organized in terms of a relationship of mutual exclusivity. The EU occupies a very distinctive place within this new tableau. It does not replicate nor does it replace either the state or the international. Rather, it stands between them, incorporates strains of each and interlocks with them both. To grasp the EU's situation in late modernity, therefore, requires that we map the defining issues of high modernity and their attendant tensions onto the more complex, deeply interpenetrated and shifting authority configuration of which the EU itself constitutes but one, if key, component. Thus we can begin to appreciate how and why the EU's interconnected capacities to address the three defining predicaments of modernity – the proper source of collective agency, the provenance of the resources of political community, and the balance between individualist and collectivist ontologies, is becoming ever more precarious as it enters its second half century. The EU's longstanding emphasis upon individualism aligned to a historically contingent form of peace–centred collectivism in response to the ontological question has both helped compensate for and (re)contributed to the difficulties it has encountered in the face of each of the other two questions; namely, its structural weakness in response to the resources question and its self-reinforcing reluctance and precariousness of common cause before the collective agency question. As the EU's emphasis upon individualism becomes less sustainable with the gradual expansion of its remit, reputation and self-understanding, the deficiencies in the EU's capacity to address the resources and agency questions become all the more evident and the need to treat them ever more urgent. In turn, this manifests itself as a profound challenge to the place of law within the EU—as a medium that both reflects and seeks to answer these problems. The essay concludes by offering some thoughts on how the EU, and in particular the EU in its legal and constitutional register, may respond to that predicament.

Keywords
Universalism, particularism, individualism, collectivism, sovereignty, EU, constitutionalism.

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1. The EU and Political Modernity

Studies of the EU across different disciplines tend to divide between those that start from an assumption of continuity and those that start from an assumption of discontinuity.[1] The point of departure for analyzing the EU's legal, political, social or economic character is either a familiar and historical-grounded set of accomplishments, aspirations, practices and concepts; or it is a *tabula rasa*, with no guarantee how or indeed whether any part of our existing heritage of achievements and ideas will be drawn into the new picture. The present study is emphatically located in the former category. It assumes, and seeks to substantiate the assumption that rather than signalling a break with the paradigm of political modernity centred upon the modern state and its legal and constitutional edifice, the EU reflects and contributes to a variation in the form of political modernity. More specifically, it claims that the deep issues that define, shape and challenge late political modernity in the era of the emergence of polities beyond the state such as the EU remain substantially the same deep issues as defined, shaped and challenged high political modernity in the age of the "state system"[2]. The central aim in what follows is to demonstrate how three such defining - and overlapping - issues, and the oppositions and tensions that they generated in politics and in law in the phase of high modernity, continue to frame our understanding of late modernity, so providing important insights into the conflicted role of the EU polity within the constellation of late modernity. In particular, they tell us something significant about the nature and extent of the EU's historical reliance upon law as a medium of

[1] 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; N. Walker "Legal Theory and the European Union: A 25th Anniversary Essay" (2005) 25 *Oxford Journal of Legal Studies* 581-601.

[2] R. Falk, The *Study of Future Worlds* (1975).

integration, about the dangers and limitations of such reliance, and also, finally, about whether and to what extent such dangers and limitations might be overcome *within* law itself.

The first and most basic issue that shapes our understanding of political modernity is the development of very idea of *collective agency* as the animating source and subject of political community. Indeed, the articulation and operationalization of an expansive notion of collective agency, it is argued, supplies *the* indispensable threshold condition of political modernity. The canonical modern form assumed by this core idea of collective agency has been 'the people',[3] - or popular sovereign - conceived of as a discrete state-centred and state-centring "unity of a manifold."[4] But the arrival of the idea of the people as sovereign leaves open and often contested a range of questions concerning both its internal limits and its external accompaniment. Internally, what kinds of difference and what divisions are consistent with the conception of the people as a single collective agency? Externally, what other political forms, and what, if any, other kinds of political community may emerge and subsist alongside the state conceived of under the sign of popular sovereignty?

The second defining issue of political modernity addresses not the sources but the *generative resources* of political community. The category of generative resources covers both the kinds of arguments and the kinds of affects – the reasons and the passions – that create and maintain the bonds of political community. In identifying and locating these, a fundamental question concerns the balance or trade-off between resources of universal provenance and resources of particular provenance, and so between polity-generic and polity-specific factors in

[3] See e.g. M. Canovan, *The People* (2005).

[4] H. Lindahl, "Sovereignty and the Institutionalization of Normative Order" (2001) 21 *Oxford Journal of Legal Studies,* 165-180, at 175.

the making and sustenance of a polity.[5] To what extent does the appeal to political community draw on reasons for collective action and other mobilizing cues that are peculiar to that political community, and to what extent does it draw upon grounds and affects that speak in a universal or at least more general register? How and to what extent can these two reservoirs of resources and the forms of appeal associated with them be reconciled? And does the emphasis or balance between universalism and particularism alter depending upon the answer to the first question, namely the kind of collective agency, if any, that holds or aspires to the title to political community?

The third issue that shapes political modernity is what we may call the question of "*political ontology*."[6] We are here concerned neither with the general subject - or agency - of political community nor with the distinctiveness or otherwise of the generative resources available to a political community. Rather, what is addressed is the basic model of the social world in the pursuit or fulfilment of which we might justify the design of *any* political community - whatever form its title takes and wherever it draws the energy to mobilize and sustain itself - or indeed any constellation of political communities. In particular, we are concerned with what kinds of entities can be said to exist or to possess basic value in society, and in what kind of hierarchy or other relationship *inter se*; and with how this ontological picture justifies this or that normative range and emphasis on the part of a political community or a combination of political communities. The basic tension or antinomy here is between what one writer calls "singularism" and "solidarism";[7] but which we may, with all due acknowledgment of

[5] On the relationship between universalism and particularism in political thought, see A. Vincent, *Nationalism and Particularity* (2002) esp. pp1-13.

[6] P. Pettit, "Rawls's Political Ontology" (2005) 4 *Politics, Philosophy and Economics* 157-174.

[7] *Ibid* 157-8.

the history of diverse and overuse of these terms, relabel collectivism and individualism. On the one hand, the social collectivity may be seen as the sole or primary unit of value within political life. On the other hand the individual may be seen as the sole or primary unit of value within political life. The question of 'where' to balance and 'how' to reconcile these two possibilities supplies the third key tension of political modernity.

As we shall see in Section Two below, these three core issues - the form of collective agency, the nature of its generative resources, and the type of basic ontology it endorses – and the contrasts they draw, the questions they raise and the dilemmas they pose – popular sovereignty versus other forms of political title, particularism versus universalism and collectivism versus individualism – assume a particular pattern in the state-centred world of high modernity. In this Westphalian universe, the only major political form that accompanies the state is the inter-state or international form, itself largely derivative of and parasitic upon the state. The fundamental distinctions of that world, then, tend to be binary ones, based on a mutually exclusive "inside/outside"[8] sovereignty-coded understanding and representation of legal and political space. There is the domain of internal state sovereignty – of relations *within* the self-contained totality of the sovereign polity. And there is the domain of external state sovereignty – of relations *between* sovereigns. In turn the three basic defining tensions of modernity, themselves binary in nature, can be mapped in a reasonably simple (if highly stylized) way onto that basic binary and mutually exclusive configuration.

As explained in Section Three, however, once we shift to the late modern world of increasingly transnationalized legal, political, economic and cultural relations and to the key

[8] R.B.J. Walker, *Inside/outside; International Relations as Political Theory* (1993).

position of the EU within that movement, we are faced with a more complex picture. The defining issues and the key tensions these issues harbour remain the same, but they are written onto a configuration of legal and political space that is no longer organized either in binary terms or in terms of a relationship of mutual exclusivity. The EU occupies a very distinctive place within this new tableau of authority. As a political and legal entity, it does not replicate nor does it replace either the state or the international. Rather, it stands between them, incorporates strains of each and interlocks with them both. To grasp the EU's situation in the political and juridical world of late modernity, therefore, requires that we map the defining issues of high modernity and their attendant tensions onto the more complex, deeply interpenetrated and ever shifting authority configuration of which the EU itself constitutes but one, if key, component.

In so doing, we can begin to appreciate how and why the EU's interconnected capacities to address, either in its own terms or in combination with the other sites of political authority, the three defining predicaments of modernity – the proper source of collective agency, the provenance of the resources of political community, and the balance between individualist and collectivist ontologies, is becoming ever more precarious as it enters its second half century. Historically, the EU's longstanding emphasis upon individualism aligned to a historically contingent form of collectivism in response to the ontological question has both helped compensate for and (re)contributed to the difficulties it has encountered in the face of each of the other two questions; that is to say, its structural weakness in response to the resources question and its self-reinforcing reluctance and precariousness of common cause before the collective agency question. What is more, this cluster of responses helps to explain the distinctive and diverse emphasis upon law within the EU. As the EU's emphasis upon individualism becomes less sustainable with the gradual expansion of its remit, reputation and self-understanding, it

follows that the deficiencies in the EU's capacity to address the resources and agency questions become all the more evident and the need to treat them ever more urgent. In turn, this manifests itself as a profound challenge to the place of law within the EU. We conclude by offering some thoughts on how the EU, and in particular the EU in its legal register, may respond to that predicament.

2. Shaping Political Modernity

Let us begin our substantive discussion by asking how the three defining issue of political modernity shaped both the state and the international realm, so placing the situation of the EU in some kind of historical context and comparative relief.

(a) The domain of the State

Above it was suggested that the very idea of the encompassing collective agency of a 'people' or popular sovereign is crucial to the emergence of political modernity. Indeed, one might go as far as to say that the idea of politics and of the political realm with which are familiar today only dates from the modern age and "the invention of the people"[9] as an active collective subject. Prior to the age of political modernity, whose first full constitutional flowering took place in France and North America at the end of the 18th century, there were various incipient notions of peoplehood descended from the Greek *demos* and the *populus Romanus*. But these lacked the mature characteristics of the later form in which the people assume a prior and constituent power over the polity and its governmental arrangements.[10] More specifically, only

[9] E.S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988).

[10] Bernard Yack makes a helpful double distinction between the modern notion of the people as popular sovereign, or *pouvoir constituant,* and the older ideas of the people either as select co-participants in a republican form of rule – as 'governmental sovereign' (30), or simply as the plebs or multitude of ordinary folks in any community.

with the arrival of the form of peoplehood associated with popular sovereignty do we find fully developed the notions of the abstractness, autonomy, comprehensiveness and self-constraint of authority that together provide the conditions of possibility of the modern political realm.

The idea of secular authority as located neither in a particular imperial or monarchical office nor in a concrete and highly exclusionary active constituency (such as the citizenry of the classical city state) but in an abstract transgenerational collective entity, is a gradual accomplishment of political modernity. So, too, is the detachment of title to rule from the sense of an inherent and inherited 'order of things' that such a process of abstraction achieves. Indeed, it is not until the writing of Jean-Jacques Rousseau that this development finds its first full theoretical expression.[11] Abstraction of such a thoroughgoing order also implies autonomy. For the first time the domain of politics, now framed by this abstract collective agency, is not in thrall either to an immanent or transcendental design or to some conception of propriety right and status relations reified by tradition. Rather, the content and operation of the political domain is self-determined and worldly, flowing from the general or popular will – even if at one remove the content and direction of that will continues to be influenced by the religious - and so other-worldly - belief systems of many of those who contribute to its formation.[12]

In turn, this removal of prior metaphysical or social constraint underlines the comprehensiveness of the political realm There stands no external limit to what can be done in the name of the sovereign order of the political, either in terms of its substance or of the

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"Nationalism, Popular Sovereignty and the Liberal Democratic State" in T.V. Paul, G.J. Ikenberry and J.A. Hall (eds) *The Nation-State in Question* (2003) pp. 29-50.

[11] J.J. Rousseau, *The Social Contract* (M. Cranston trans., 1968).

[12] See e.g. C.Taylor , *Modern Social Imaginaries* (2004) ch.4.

mechanisms necessary to its implementation and enforcement, other than the constraint imposed by the operation of other sovereign orders and apparent in the form of the boundaries set to the reach of the particular people, territory and system of government. Finally, however, there is a crucial dimension of auto-limitation, one with both procedural and substantive elements. Procedurally, what counts as an expression of an abstraction and artifice such as the popular will – just because it *is* an abstraction - depends upon certain institutionalized devices for the representation of the popular will, even if consistent with the absence of external authority these devices must themselves be deemed to rest on nothing other than the popular will.[13] Substantively, certain implicit or explicit checks flow from the expectation to act consistently with the very ethos underpinning the new idea of an autonomous and collectively self-authorized political domain; one that signals and reinforces the passing of and older "social imaginary"[14] that placed the idea of harmony and conformity with some external or natural order at the centre of collective existence. In a nutshell, this new ethos can be summed up in the twin notions of freedom and equality. The deep justification for the emerging order of collective agency lies in the novel ontological emphasis upon the equal worth of each individual and the respect consequentially due both to his or her freedom to choose and pursue a particular life-plan and to his or her contribution to the determination of the collective good. In turn, this lead to forms of collective self-conditioning that correspond to the two mutually supportive sides of Benjamin Constant's modern liberty;[15] on the one hand, the protection alongside the new comprehensive

[13] This is one of the so-called paradoxes of constituent power. For extended discussion. see the essays collected in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007).

[14] Taylor, n12 above.

[15] B. Constant "The Liberty of the Ancients Compared with that of the Moderns" in B. Constant *Political Writings* (1988) 307-328.

sphere of the political of a sphere of private autonomy through a Bill of Rights or other safeguard of civil liberties; on the other hand, the development of those forms of political freedom and voice that would eventually lead to a fully enfranchised system of representative democracy.[16]

What is the relationship between the universal and the particular in the development of this new form of collective agency? In the American and French revolutionary contexts the universal dimension undoubtedly provided a founding inspiration. In the settlement of the first French republic, the 'rights of (universal) man' precede the rights of Frenchmen.[17] Similarly, the 'self-evident' equality of the independent Americans of the 1776 Declaration of Independence is reduced to the unstated minor premise of a syllogism whose major premise holds that that 'all men are created equal.'[18] If we recall the humanist premises of the new popular sovereignty, the universalist strain is hardly surprising. If the idea of equal freedom is derived from the human condition itself, then entitlement to the relevant political benefits should not depend on accidents of geography.

Yet the idea of popular sovereignty is clearly a double-edged sword. It may be the vehicle for a universal ethics. But inevitably, and even more sharply, its situational logic demands that it speaks to and for a particular collectivity. Precisely because it is concerned with the conditions of political *agency*, the kind of collective identity that the idea of popular sovereignty invokes is an

[16] On the symbiosis of private and political autonomy, see e.g. J. Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles? (2001) 29 *Political Theory* 766-81.

[17] As famously celebrated by Tom Paine in his pamphlet, *Rights of Man*, first published in 1791.

[18] For background and texts, and a particularly acute reading of its intended and actual symbolic impact on the world beyond the emerging American polity, see D. Armitage *The Declaration of Independence: A Global History* (2007).

active and so reflexive or self-regarding one.[19] It follows that unless those who are deemed to be represented in and by that popular sovereignty perceive themselves as being included within that agency, they will experience any government supposedly in their name as illegitimate. It becomes clear, then, why popular sovereignty has inspired not only these many visions of the modern civic republic in which the virtue of political community is an abstract, universal and infinitely replicable good, but also various modern forms of nationalism in which the people are deemed to have an antecedent and unique unity of culture, history and language and a dedicated community of attachment. Historically, the Romantic nationalist movement of the first half of the 19th century, with its "Springtime of Peoples"[20] and its illusion that there could be an independent state for very nation, can be seen as the early product of the more particularistic appeal to popular sovereignty and as a reaction against the more universalist strain.[21] And while the extremes of national particularism have left an indelible dark mark on the 20th century history of the state,[22] no inventory of the modern state could fail to note the resilient rootedness of constitutional self-identification in particular reasons of state and particular themes and symbols of belonging and common commitment.[23]

It is just as important, however, to note the symbiotic relationship between universal and particular appeals to community at the state level as it is to acknowledge the dominance of the particularist strain. For in practice, the two types of generative resource inevitably co-exist, and

[19] See e.g. C. Taylor, "Religion and European Integration" in K. Michalski (ed) *Religion in the New Europe* (2006) pp. 1-22, at 3-6.

[20] C. Calhoun, *Nations Matter; Culture, History, and the Cosmopolitan Dream* (2007) 16.

[21] Yack, n10 above, 34-47.

[22] See e.g. E. Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914-1991* (1994)

[23] P.W. Kahn *Putting Liberalism in its Place* (2005).

indeed "often lie undistinguished in the rhetoric and imaginary of democratic societies"[24] As the contemporary debate over "constitutional patriotism" indicates, even the most avowedly universalist framework of self-government must draw from and reinvest in its own particular experience.[25] Conversely, the humanist gene in the idea of popular sovereignty means that even the most introverted, culturally monolithic and exclusionary national ideology will develop certain universalist themes. What is more, the two strains tend to be consciously mixed up in certain-types of nation-building projects, with quite distinctive patterns of results. A particular nationalism is often claimed to have been forged from universal roots, as in the French commitment to laïcité and the American culture of liberty. However, as the history of empire - both classical and 'lite'[26] - demonstrates, this kind of thinking and ideological projection often blurs into and justifies its opposite. For the development of imperial influence and control has often been fuelled by self-conscious efforts to sponsor one way of political life *as if* it were the only legitimate way – to universalize the particular, so to speak – so in effect offering the world the benefits, and demanding that it meet the requirements, of a particular national experience and character. [27]

At the level of political ontology, too, states tend to rely upon a combination of the two approaches – of both individualist and collectivist commitments. On the one hand, we have already remarked upon the deep and direct ethical connection between the rise of popular

[24] Taylor, n18 above, at 7.

[25] On the importance of the universalistic strain in the ideas of constitutional patriotism promoted by Jürgen Habermas and others, and on the unavoidable tensions between this strain and more particularistic dimensions of attachment to a place and its law, see J.W. Mueller, "A General Theory of Constitutional Patriotism" (2008) 6 *International Journal of Constitutional Law* 72-95.

[26] M. Ignatieff, *Empire Lite: Nation-Building in Bosnia, Kosovo and Afghanistan* (2003).

[27] See e.g. Calhoun n20 above, ch.6.

sovereignty and the advent, as a universal good, of modern individualism. Indeed, the fact that liberalism, with its core idea of constructing a political architecture in which individuals can act without interference in ways that reflect their understanding of what gives meaning and value to their lives, is often portrayed as *the* "dominant ideology"[28] of Western political modernity, testifies to the extensive and resilient power of the individualist stream. On the other hand, collectivism speaks to an older tradition of thinking in which the polity of the Greek city-state is seen as prior to the individual and as providing the deep purpose and end of individual action.[29] Yet it is a tradition that did not find the new conditions of political modernity inhospitable. For inasmuch as popular sovereignty, with its clear demarcation of political space into 'us' and 'them', demands a measure of recognition of the particularity of political community, acknowledgment of and reflexive engagement with that particularity is apt to retrieve or to generate some sense of a self-standing and non-disaggregable collective good of the community.

This collective dimension of the good life will typically (although, as the examples of universalizing the particular indicate, by no means exclusively) be understood as a value set particular to the community in question. That is to say, the goods that it speaks to will first and foremost be goods that are distinctive to that community. Beyond this, such collective goods will fall into different categories. To begin with, there will be those goods which, although not necessarily public goods of self-evident worth in the narrow and classical economic sense of providing something of added value to the community as whole under conditions of non-rivalness and non-excludability,[30] we can nevertheless label *manifest collective goods*. What we

[28] M. Freeden, *Ideologies and Political Theory: A Conceptual Approach* (1996) 139.

[29] See e.g. Aristotle, *Politics*, Book I, 1253a.

[30] See e.g. M. Olsen, *The Logic of Collective Action* (1971). Paradigm examples of public goods under the standard economic definition include clean air and street lighting.

are referring to here are those collective goods, such as peace or a sustainable environment, whose value is entirely or largely undisputed either because they are indispensable to the continued existence in a form valued by members of the community or its mutually implicated parts of the community or its mutually implicated parts, or because they speaks to an objective which has a clear and considerable positive-sum quality and from which, therefore, all may expect or at least hope to benefit. Alongside these manifest collective goods, there are other collective goods whose quality as such is bound up .with the fact that they are constructed and achieved *in common*. These common goods in turn can be both implicit and explicit in nature. *Implicit common goods* refer to those benefits inherent in the very idea of living together in stable community. These include the value of national (or other collective) solidarity – of an accomplished framework of mutual concern and support - , and the sense of social, economic and spiritual or "ontological security"[31] such solidarity brings to those who share in it. They also include a more general value associated with the development and preservation of a national (or other collective) culture, as well as the sense of belonging, of dignity, of posterity and of distinctiveness or "originality"[32] such a culture brings to those who share it. Moreover, in addition to such implicit common goods, and, indeed, building on the platform of capacities for common action provided by such implicit goods, communities may also determine and pursue certain other *explicit common goods*, such as economic egalitarianism (through redistribution) or an educated society, or a healthy society.

The ability to decide and realize such explicit common goods, which as we have already noted is itself the public expression of individualism, also requires the development of common

[31] A. Giddens, *The Constitution of Society* (1984) 375.

[32] J.H.H. Weiler, *The Constitution of Europe* (1999) 338. See also A.H. Smith, *National Identity* (1991) ch.1.

government institutions, including the institutions of representative democracy we find in most contemporary states. On the one hand, decision-making and executive institutions are procedurally and epistemically indispensable to the transformation of the *volonté de tous* into the explicit common goods identified as comprising the volonté *générale*, as well as to the effective pursuit of both these explicit common goods and the manifest collective goods. On the other hand, and from a sociological perspective, common institutions of government, especially common representative institutions of government, can also be important in a boot-strapping sense for the nurturing of just that sense of shared public life – or public sphere – necessary to supply the platform of implicit common goods on which rests the very legitimacy of these same common institutions of government and the explicit common goods that emanate from these.[33]

While the pursuit of a collectivist ontology clearly, then, involves a mutually supportive relationship between the various species of collective goods and inclusive institutions of government, the relationship between collectivism and individualism is also far from being merely antagonistic. Although the balance between individualism and collectivism will differ, and indeed the 20th century saw both deep ideological conflicts and sharp oscillations between the two poles, no modern state will entirely sacrifice either to the benefit of the other. No state has a public philosophy which reduces the good of community entirely to the aggregation of individual goods, just as no state has a public philosophy which attributes no value to the individual other than as an indivisible part of the collective and its common good. Rather, the ontological commitments of the modern state are always a blend of the two in ways that show the inextricability of the libertarian and communitarian impulses in the idea of popular

[33] See e.g. A. Mason *Community, Solidarity and Belonging: Levels of Community and Their Normative Significance* (200) esp. chs 4 and 5.

sovereignty. Indeed, at least at some minimal level of provision of each may be understood as the precondition of the other – individual autonomy and well being required to encourage the pursuit of collective goods and a solid basis of common interest being required to guarantee the protection of personal freedom.[34]

In summary then, we can see how the achievement of popular sovereignty at the state level pushes in two directions simultaneously. It pushes towards a universalist mode of justification and mobilization, and through that toward an individualist political ontology. At the same time, it pushes towards a particularist mode of justification and mobilization, and through that towards a collectivist political ontology. What is more, both of these oppositions – between universalism and particularism and between individualism and collectivism – conceal a symbiotic relationship. The idea of collective agency that lies at the heart of the modern state requires both the universalist-individualist and the particularist-collectivist strands in order to survive and prosper.

(b) The Domain of the International

The idea of popular sovereignty may have been unlike anything that preceded it, but its comprehensive scope also served to deter contemporary rivals. In creating the space for modern political relations as we conceive them, it proceeded to occupy that space jealously. As is apparent from the early history of the United States, even an idea as strongly co-implicated in the development of political modernity as federalism, with its conception of a clear divide between different spheres of governmental authority, could only with much difficulty and after great conflict be reconciled with the singularity of the legal and political order required of the model of

[34] See e.g. Habermas, n16 above.

popular sovereignty.[35] As we shall see, the terms of trade between compound arrangements such as those in the federal tradition on the one hand and the idea of sovereignty on the other have remained conflicted, and indeed have vividly resurfaced as an unresolved issue in the context of the EU.[36]

The only dimension of political authority that the idea of popular sovereignty did not seek to contain or absorb was that which *by its own terms* lay beyond it, as its remainder; namely the inter-state or international relations between sovereigns. However, just because of the state-centredness of this political imaginary, insofar as the international realm was at all viewed as a political realm – a domain of collective agency over common affairs – it was so largely in state-derivative terms. And while the international sphere nevertheless came to possess its own version of the quality of abstraction enjoyed by the state of popular sovereignty, in its classic early modern phase internationalism palpably lacked the autonomy, the comprehensiveness of remit and implementation capacity and the self-limitation of the sovereign state.

As regards the quality of abstraction, through the sponsorship of the very notion of an international order or system of states, with international law as its distinctive regulatory currency, understandings of the international domain moved beyond a purely realist template.[37] The basic idea of an international order as elaborated in the classic foundational texts of modern

[35] See e.g. D. Deudney, "The Philadelphian State System: Sovereignty, Arms Control and Balance of |Power in the American State System" (1995) 49 *International Organization* 191-229.

[36] With reference to the American/European comparison, see e.g. L. Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (2001); S.Fabbrini *Compound Democracies: Why the United States and Europe are Becoming Similar* (2009); A. Glencross, *What Makes the EU Viable? European Integration in the Light of the US Antebellum Experience* (2009).

[37] On how international law thinking has generally defined itself *against* realism, see A.M. Slaughter *International Law in a World of Liberal States* (1995) 6 *European Journal of International Law* 1-39.

internationalism, that is to say, already posited a detachment from the concrete holders and *de facto* balance of power at any time.[38] But in each of the other respects relevant to the construction of political community the international order was thinly conceived and state-parasitic. Crucially, the very units that made up the international domain – that constituted its relevant collective agency - were states rather than individuals, Unlike the state, therefore, the international domain was not an original and primary community, but a community made up of pre-existing political communities, and so of a secondary and heteronomous quality. Its remit was not comprehensive, but within the gift of the constituent states even within the realm of external and so putatively 'inter-national' affairs, while these states retained for themselves exclusive control over internal affairs.[39] In terms of implementation capacity, too, international authority was far from comprehensively self-contained, since the settlement of disputes and the enforcement of remedies in the international realm - and so the sharper edge of legal discipline, remained within the control of the states themselves. And while the gradual elaboration of general principles of international law spoke to some measure of self-limitation, this paled into insignificance alongside the cumulative effect of these various forms of external constraint.

The last century has witnessed some attempts to reimagine the international domain as a thicker and more autonomous form of political community. The use of the rhetoric of

[38] This would be true, for example, of such key foundational figures in the discipline of international law as Grotius, Pufendorf and Vattel. See H. Grotius *Law of War and of Peace* (1625); S von Pufendorf *Of the Law of Nature and Nations* (De Iure Naturae e Gentium) (1672); E. de Vattel, *The Law of Nations, or Principles of the Law of nature applied to the Conduct and Affairs of Nations and Sovereigns* (1758). In a broader non-legal register, it is also of course true of the work of Kant and his development of the idea of cosmopolitan order. See I. Kant *Perpetual Peace* (1795).

[39] On the loose coupling of internal and external dimensions of sovereignty in the history of international relations, see S. Krasner *Sovereignty: Organized Hypocrisy* (1999).

'international community', as pioneered in the work of Alfred Verdross and his followers,[40] is indicative of fledgling efforts to reconceive of the international order as a primary and no longer exclusively state-centred order. The budding contemporary language of international constitutionalism in self-conscious succession to the community approach amplifies this new way of understanding the authoritative foundations of international law.[41] In keeping with this new strand of discourse there has been some rudimentary filling out of both the normative and operating systems of international law. Through the development of obligations *erga omnes*, of peremptory norms or *ius cogens*, and of world order treaties such as the UN Charter, the notion of international law as a distinct and self-evolving system, and also in some measure a self-constraining system, has gained more support.[42] The exponential growth in the range of international law-making (and law-makers) both in the primary legislative form of treaties and in rule-making arrangements set up under or outside the authority of treaties speaks to the development of a more comprehensive remit,[43] to which breadth must be added the unprecedented depth reached by human rights and other regimes that pierce the veil of the state and claim direct applicability to its citizens and subjects. And the development by many of these regimes of their own adjudicatory, monitoring and enforcement mechanisms, from the International Court of Justice at the Hague to the extensive WTO dispute resolution procedures

[40] See A. Verdross, *Die Verfassung der Volkerrechtsgemeinschaft* (1926); See also B. Simma, "The Contribution of Alfred Verdross to the Theory of International Law" (1995) 6 *European Journal of International Law* 33.

[41] The literature is huge. For an overview, see B. Fassbender, "'We the Peoples of the United Nations': Constituent Power and Constitutional Form in International Law" in Loughlin and Walker (eds) n13 above, 270-90.

[42] See e.g., E. de Wet, (2006) 'The International Constitutional Order', (2006) 55 International and Comparative Law Quarterly. 51-76; A. Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, (2006) 19 *Leiden Journal of International Law*. 579-605.

[43] See generally, A. Boyle and C. Chinkin, *The Making of International Law* (2007) ch.1. Global Administrative Law scholars have been particularly active in charting non-Treaty forms of law-making; for an early manifesto, anticipating what is by now a vast literature, see B. Kingsbury, N. Krisch and R. Stewart "The Emergence of Global Administrative Law" *(*2005) 68 *Law and Contemporary Problems* 15-61.

and the new International Criminal Court, adds significant implementation capacity in certain functional domains.

Yet while these various developments modify the state-dependence of the international domain and of international law, they certainly do not remove it. Still less do they endow the international domain with a model of political agency remotely comparable in thickness to the model perfected by the state. Transnational law may have increased significantly in its density in the latest and ongoing age of globalization of the factors of production and communication, but this, as the recurrent tone of contemporary debates suggest,[44] it is as likely to lead to the fragmentation as to the intensification of any idea of international or global agency. As a form of political community based on collective authority, the international level remains, in terms of social identity and of systemic range, coherence and capacity, a quite different and much lesser creature than the state original.

Just as the situational logic of the state in terms of the resources of political community is predominantly particularistic, that of the international domain is universalistic. International law seeks to transcend the particularity of the state and the particular differences between states, and in so doing has developed two different registers of universalism.[45] In the early, classical age of modern international law, and indeed in many subsequent phases,[46] formal universalism was to the fore, whereas in the last 60 years there has been an explicit turn to a more substantive notion

[44] See e.g., M. Koskenniemi, "The Fate of International Law: between technique and politics" (2007) 70 *Modern Law Review* 1-30; G. Teubner and A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999; P.M. Dupuy, L'unité de l'ordre juridique international, Recueil des cours de l'Académie de droit international de La Haye, (2003) vol. 297.

[45] For an excellent overview, see E. Jouannet. "Universalism and Imperialism: The True-False Paradox of International Law?" (2007) 18 *European Journal of International Law* 379-407.

[46] For example, in the inter-war years.

of unity.[47] In formal terms, the international rule of law of the classical period invoked the promise of a society of states bound together by a 'thin' ethic of universal respect and recognition. Just like the classical international idea of collective agency, this was a highly state-derivative notion. The premise of the 'sovereignty' of the individual in the design of collective arrangements which came to be so influential at the state level was mirrored at the international level through the idea of the sovereignty of states with quite different interests whose commitment to the rule of law *inter se* was predicated upon liberal forbearance towards and support for their different collective self-interests. The point of international law in this formalist vision was one of coexistence and co-operation between political entities with different dominant values, objectives and conceptions of their common political goods. In contrast, the "turn to ethics"[48] in the post-war period - both the initial wave centred around the birth of the UN and the process of decolonization and the second post-Cold War wave from the 1990s - has signalled a new agenda of substantive common ground. The shape of this has already been indicated in our discussion of the cumulative moves towards a more communitarian and constitutional approach. Whether in the early development of new doctrinal foundations and institutional architecture for human rights promotion and protection at the UN and regional levels and the concomitant positing of the individual as an additional (to states) subject of international law, or in the contemporary development of new common substantive principles and application machinery in the context of criminal, humanitarian or environmental law, the ambitions of international law has moved beyond formal co-operation and co-existence.

[47] See e.g. Jouannet n45 above, 382-86.

[48] M. Koskenniemi, "'The Lady Doth protest Too Much' Kosovo and the Turn to Ethics in International Law" (2002) 65 *Modern Law Review* 159.

The emphasis on universalism is both a strength and weakness of international law. Moreover, the tension and oscillation between the formal and substantive streams of universalism both responds to and reinforces its mixed virtue. The strength of an international law based upon formal universalism lies in its modesty – in its prudently limited ambition. It accepts difference between states as deep-rooted and substantively unbridgeable and claims that it is just because of such difference that we need find and can find common resort to legal form and method. The strength of an international law based upon substantive universalism, in contrast, lies in its *lack* of modesty – in the audacity of its ambition. It claims that just because its morality is universal and so applies to common humanity, it must subsume and so prevail over (whether through incorporation or rejection) any more particular morality. Yet as the flipside of their contrasting strengths, formal universalism and substantive universalism in international law also reveal weaknesses that encourage, but cannot be fully cured by resort to the other. Each is frequently charged both with promising too much and with delivering too little.

The charge that international law in either of its universalist variants promises too much has deep roots. These lie in the history of Western imperialism, and relatedly in the development, shadowing the romantic nationalism of the early 19th century, of a more particularist strain in international law that began to stress the cultural specificity and superiority of certain (typically European) regional sources and forms.[49] The shadow of imperialism and expansionism, on this view, has not retreated even in the post-colonial era, but continues to reflect and reinforce the domination of the North over the South.[50] The point is more apparent as regards substantive universalism. The values of the international legal order, or at least the dominant interpretation of

[49] See e.g. Jouannet n45 above 380-2.

[50] See e.g., J. Tully, "The Imperialism of Modern Constitutional Democracy" in Loughlin and Walker (eds) n13 above 315-338

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the values of the international legal order, are often criticized as being in fact interest-bound and culture-bound, based on the prevailing mores of powerful western societies who are overrepresented historically, institutionally and reputationally, as well as through underlying economic and military power, in the global theatre of international law. What is more, the argument against a robustly substantive approach, whether this take the form of stretching the definition of humanitarian or self-defensive intervention or increasing the powers of the Security Council to take emergency measures against the supposedly common security threat of international terrorism,[51] is reinforced by the claim that, both through encroaching on the sovereign autonomy and 'liberal freedom' of the states and by doing so in accordance with a less general, visible and stable body of rules, it also serves to undermine the virtues of formal universalism.[52]

But the argument that in its universal ambition international law promises too much is also heard not infrequently at the formal level. Ideas of pluralism, tolerance and cosmopolitanism, together with a conviction of the importance of a stable framework of rules for facilitating international peace and the international circulation of goods, persons, services and communications, underwrite the case for formal universalism. And once again these ideas, whether by reason of their source (western liberal orthodoxy) or their effect (the lubrication of the existing framework of international relations with its prevailing asymmetries of power), may be criticized for being skewed in favour of a dominant configuration of states. In summary, both substantive universalism, and – perhaps even more insidiously on account of its modest façade –

[51] See e.g. K.L. Scheppele, "The Migration of Anti-Constitutional Ideas; the post 9/11 globalization of public law and the international state of emergency" in S. Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 347-73 350.

[52] See Jouannet n45 above, 386-92.

formal universalism, may be challenged finally, as bearing false witness – as highly particular views of the world masquerading as universal to hegemonic effect.

The flip-side of this criticism is the charge that international law's emphasis on universalism means that it achieves too little. Here, the argument is that if and to the extent that universalism is not simply a cover for an illegitimate selectivity of approach, then because of its state-derivative quality it is simply insufficiently robust to prosecute its own ambition. However benevolently intended, substantive universalism at the global level is vulnerable to the charge of hubris, of nurturing an ambition that underestimates the limits imposed by the resilient power and deep-rooted differences of state sovereigns. And if formal universalism, as we have seen, seeks to cut a more modest figure in the face of this deep sovereigntist structure, its hold also remains tenuous. It remains fragile both before the moralism of substantive universalism and before the arguments of legal exceptionalism and *realpolitik* that often emerge in the actual discourse and practice of international relations between uneven and unstably aligned powers.[53]

In either case – too thick and promising too much or too thin and delivering too little – what threatens to undermine universalism in international law is the shadow of particularism. Either international law stands accused of a closet particularism of its own, or it is frustrated by other more powerful particularist forces at the national or regional levels. International law's universalist emphasis, then, is both inescapable and indispensable but also inherently vulnerable, and like the secondary quality of its claim to collective agency and political community, this fragile standing is ultimately a function of its state-dependence.

If we turn, finally, to the question of political ontology, again the historical state-dependence of international law has coloured and limited what can be done in its name. As in the

[53] On this fragility, see e.g. M. Koskenniemi's discussion of "chastened formalism" in "International Law in Europe: Between Tradition and Renewal" (2005) 16 *European Journal of International Law* 113-124.

case of the state, we find a combination of collectivism and individualism, but in both cases the purchase of international law is relatively weak. On the one hand, the fact that the key units of international law are themselves collective subjects who bring their internally generated common goods to the international table means that the producers of international law each already articulates a collectivist ontology. But precisely because of the power of these collective producers, it is less likely that the *product* itself will constitute an independent collective good. Rather, to recall the message of liberal internationalism,[54] international agreements tend to be concerned with finding the optimal *ad hoc* balance amongst the enlightened self-interests of the various autonomously-conceived collective units. This does not mean that certain global concerns such as peace, environmental security and democracy are incapable of being recognized and settled upon as manifest collective goods rather than subject to continuous negotiation as merely concurrent or aggregative interests. However, any such development typically struggles against a strong state-centred gravitational force. What is more, as is attested to by the unevenness of voice, the existence of powerful veto rights, the marginalization of non-state constituencies and the low public visibility and interest associated even with the United Nations, despite its achievement as most powerful global institutional complex in the history of international relations, the state-centred bias is self-reinforcing to the extent that it militates against the development of just the kind of governance structures through which, by analogy with the internal governance structures of states, new implicit and explicit common goods at the global level might be nurtured.

In the case of individualism, the limits of international law were until recently even more palpable. Because states and not individuals were the recognized subjects of international law

[54] See e.g. M.W. Doyle, *Ways of War and Peace* (1997).

there was little scope for international law to generate individual legal entitlements and obligations, still less to require their direct applicati6n. Led by the development of global frameworks for the protection of human rights, this has changed somewhat since the second half of the twentieth century. Yet it remains the case that individuals are very much the secondary and residual subjects of international law and the individualist dimension of its political ontology remains relatively underdeveloped.

In summary, therefore, the international domain displays its state-parasitic quality across all three key issues of political modernity. The international community is at best a secondary political community whose constituent units are states. Its generative resources are restricted to the universal domain, and within that domain there has been a historical preponderance of formalism over substantivism in accordance with a situational logic in which only the state has legitimate access to more particular reasons and emotions. And, to complete the picture of historical subservience, the scope of both collectivist and individualist elements of its political ontology remains circumscribed by the dominant position of the state.

3. Situating the European Union

There is certainly nothing novel in the suggestion that, as a development of late political modernity, the EU lies somewhere "in-between"[55] the national and the international domains. But if this in-between placement is broadly acknowledged, it is quite diversely characterized. De Tocqueville once said that is easier to invent something new than to find a new word to describe

[55] On the resilience of this idea, see M. Wind, "The European Union as a Polycentric Polity: returning to a neo-medieval Europe?" in J.H.H. Weiler and M. Wind (eds) *European Constitutionalism Beyond the State* (2003) pp.103-31

it, and in that spirit many have been prepared to adopt and adapt the old languages either of statehood[56] or of internationalism[57] to account for the EU. A third group prefers to underline the EU's novelty, to stress the *sui generic* character[58] of its "unidentified political object".[59] This unidentified object may approximate to a compound democracy,[60] a transnational consociation,[61] a commonwealth,[62] a post-Hobbesian non-state,[63] a *Bund* ,[64] or a *federation d'états-nations*,[65] to name but a few of the candidate neologisms.

It is never clear, however, what or how much such definitional claims seek to accomplish, nor, it follows, precisely what is at stake in disputes between them. Either the labels are merely suggestive of certain important features of the supranational body politic but not intended to be exhaustive or mutually exclusive, in which case there is not much of moment in the choice and little to fight over. Or the labels are intended as strong descriptions and are meant to be mutually exclusive. But in that case the labels claim too much, for the proof of

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[56] See e.g. F. Mancini, "Europe: The Case for Statehood" (1998) 4 *European Law Journal* 29-42

[57] For an excellent overview of the resilience of internationalist language in the European supranational context, see B. De Witte, "The European Union as an International Legal Experiment" in the current volume.

[58] See e.g. D.N. MacCormick. *Who's Afraid of the European Constitution?* (1995).

[59] As described By Jacques Delors in 1985. For discussion, see H. Drake *Jacques Delores: Perspectives on a European Leader* (2000) 5.

[60] See Fabbrini n36 above

[61] See e.g. R. Dehousse, "European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?" (1998) 35 *Common Market Law Review*, 595,

[62] See e.g. D.N. MacCormick, *Questioning Sovereignty: law, State and Nation in the European Commonwealth* (1999).

[63] See P. Schmitter, "If the Nation-State Were to Wither away in Europe, What Might Replace It?, " in S.Gustavsson, and L. Lewin, (eds) (1996) , *The Future of the Nation State*.

[64] See M. Avbelj. *Theory of the European Bund*. (PhD thesis, European University Institute, 2009)

[65] See O. Beaud, *Théorie de la Fédération*, (2007).

distinctiveness demands greater detail and complexity of understanding than any mere label is capable of evoking. A purely nominal approach to the specificity of the EU, then, tends towards opposite errors; either towards the easy indulgence of conceptual window-shopping or towards gratuitous and ultimately sterile disagreement.

If, instead, we ask how the EU fares in terms of each of the three broad and closely interconnected key issues of political modernity - political agency, generative resources and political ontology - we move beyond the idea of a singular, terminologically reductive answer while keeping very much in the foreground the comparative example of these mainstays of political modernity - the state and the international. By so doing, we can come to appreciate how, considered singly and in combination, the answers the EU has provided to these questions – each of which is decidedly law-centred - has come under increasing strain as supranational Europe has completed its first half century

If we start once again with the question of collective agency, it is indisputable that the EU is not and never has been an exclusively individual-centred political community – and so cannot be a primary political community in the pure sense of the state. Equally, it is rarely claimed that it is an international organization *simpliciter*, that it is merely the creature of its member states without any special adornments. Rather, if we remind ourselves of the four measures of collective agency within a polity – abstraction, autonomy, comprehensiveness and self-constraint, the EU scores at intermediate points on the continuum between the poles of statehood and international organizational classically conceived.

The process of abstraction by which supranational Europe acquired an identity as a distinct political community has been a highly uneven and complex one. In the telling of this story, it is often, and with considerable substance, suggested that the EU is a project driven much

more by structural hardware than cultural software – by laws, institutions, political projects and administrative processes rather than by a strong community of attachment or sympathy.[66] Yet in structural terms the EU has displayed neither unity nor continuity. Its staggered origins between 1951 and 1957 were as three separate international organizations, and even when a Merger Treaty was agreed in 1965 this supplied common institutions rather than a single legal entity. The creation of the European Union in 1992 under the Treaty of Maastricht introduced a new complexity, as it merely supplemented the existing European Communities. Indeed, only with the implementation of the Treaty of Lisbon will all predecessor organizations be replaced and succeeded by the European Union, though even with the accomplishment of institutional unity the Treaty regime will remain a plural one. More generally, the "semi-permanent Treaty revision process" [67] in place since the passage of the Single European Act of 1987 and embracing major reforms at Maastricht, Amsterdam, Nice and now Lisbon, has meant that the EU has been far more structurally unsettled in the second quarter century of its life than in the first. And if we add to the mix the four waves of Enlargement that have transformed the original Western European club of six members to today's sprawling association of twenty seven, with the latest Central and Eastern Enlargement of the early years of the new century by far the largest and geographically most dispersed to date, we find a discontinuity in territorial focus to match that of institutional design.[68] What is more, internal non-fixity has from the outset been combined with external blurring. Supranational Europe has had to share a crowded institutional space with and has been required to negotiate close and complex relations other regionally specific or regionally

[66] See e.g. J. Shaw and A. Wiener "The Paradox of the 'European Polity'" in M Green Cowles and M Smith (eds) *The State of the European Union: Vol. 5* (2000) pp. 64-89.

[67] B. De Witte "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process" in P. Beaumont, C. Lyons and N. Walker (eds) Convergence and Divergence in European Public Law , (2002). 39-57.

[68] For extended analysis, see M. Cremona (ed) *The Enlargement of the European Union* (2003).

concentrated organizational innovations, most notably the North Atlantic Treaty Organisation and the Council of Europe.[69]

Yet for all the lack of clarity of the structural picture, it is undeniable that supranational Europe has nevertheless acquired some measure of collective identity, some abstract sense of itself as distinct from its shifting and variegated legal and institutional machinery, from its member states, and indeed from other regimes sharing the same regional space. For much of the EU's history, however, it has been quite possible, to account for this in ways that downplay the political dimension of that collective identity, and that suggest only a moderate return in terms of the other agency criteria of autonomy, comprehensiveness and self-constraint. Such an approach to the limitations of the EU as an original political form would typically stress two features.

In the first place, it would stress the importance of the institutional bureaucracy of the EU. It would emphasize the way in which a significant concentration of personnel across the various supranational institutions - in particular the Commission as official keepers of the generic EU interest but also the Council, Parliament and Courts - had created an unparalleled intensity of transnational administrative self-consciousness.[70] In this way there has emerged a truly European cadre of officials whose primary allegiance is to the European project and whose basic sense of political community lies with one another. On this view, collective European agency has a tangible but narrow cultural base. It is something that, in common understanding, takes place 'at' Brussels, Luxembourg etc., rather than 'in' Europe in a deeper, territorial sense -

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[69] See e.g. B. Laffin *Integration and Co-operation in Europe* (1992).

[70] There is an extensive political science and sociological literature on this. For a recent overview, see M. Cini *European Union Politics* (2nd ed., 2007) Part Three (Institutions and Actors).

the choice of preposition betraying a two- rather than a three-dimensional understanding of political community.[71]

In the second place, however, this sense of collective agency becomes extended and amplified through the robust legal persona of the EU. Writing in the early 1980s, before the Single European Act and the gradual development of qualified majority voting as the supranational norm, Joseph Weiler drew attention to the "the dual character of supranationalism." [72] as the defining frame of Supranational Europe's early evolution. At that stage, the highly developed character of legal or normative supranationalism in the core area of the internal market stood in stark contrast to a modestly conceived decisional or political supranationalism, but the two were closely related. Indeed, the early prominence of legal supranationalism, and the intrepid contribution of the European Court of Justice to this, was possible and explicable precisely *because* decisional or political supranationalism remained largely undeveloped, with the member states retaining a *de jure* or *de facto* veto power in many areas of European policy-making. The key to the attractiveness of law as the vehicle of supranational agency, then, had to do with its *instrumental* potential. It lay in its regulatory capacity to steer, consolidate and guarantee positive-sum intergovernmental bargains across wide-ranging aspects of economic integration and some more limited aspects of market-correcting regulation, without threatening key national political prerogatives.

At the heart of this instrumentally-grounded legal supranationalism was a strong assertion of the autonomy of the supranational legal order. In its early establishment of the doctrines of

[71] This continues to be how the EU is typically viewed from the mass-mediated outside. In American newspapers, for example, events take place 'at' the EU, in the form of the Commission headquarters in Brussels, much as events take place 'at' the United Nations, in the form of its headquarters in New York. See further, N. Walker, Europe at 50: A Midlife Crisis? Democratic Deficit and Sovereignty Surplus" (2008) 15 Irish *Journal of European Law*, 23-34.

[72] "The Community System: The Dual Character of Supranationalism" (1981) *Yearbook of European Law* 267.

primacy and direct effect, the Court elaborated a view of the juridical universe in which the supranational legal order was treated as independent of those of the states and as taking priority over state law in areas of overlap.[73] What is more, as guardian of the supranational legal order the Court understood itself to have competence over the limits of its own and the Community's jurisdiction. This has reinforced a sense of its autonomy, even if, unlike states for whom the two attributes automatically went together, the EU has claimed "autonomy *without*… exclusivity",[74] and so without comprehensiveness of jurisdiction over its territory and subject population. Yet the Court has conceived of its jurisdictional frontiers in highly open-ended terms, curtailed neither by express restrictions in the treaties nor by any recognition of the superior normative authority of any other legal site but only by the shifting boundaries of an increasingly "holistic"[75] conception of market integration. And as a further measure of legal self-assertion, the Court in various landmark decisions has sought to assume in a manner that pre-empts or repels external interference a more general role in policing its own boundaries. In its claim against the danger of encroachment of state constitutional law that respect for fundamental rights also forms an integral part of the general principles of Community law,[76] just as in its cultivation and stewardship of a small "c" constitutional identity in which all EU institution would be subject to internal judicial supervision[77] and upon which other transnational courts could not transgress,[78] the Court has sought to seal off its legal order from intrusive forms of external influence.

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[73] Se in particular *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR; *Costa v ENEL* [1964] ECR 585.

[74] N. Walker. "Late Sovereignty in the European Union" in N. Walker (ed) *Sovereignty in Transition* (2003) pp. 3-32, at 23

[75] On "market holism", see A. Somek *Individualism: An Essay on the Authority of the European Union* (2008).

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

[77] *Parti Ecologiste ('Les Verts') v European Parliament* [1986] ECR 1339; [1987] 2 CMLR 343

The assertion of such a robust legal persona has been the key to the capacity of the EU, operating from its narrow stronghold of institutional power, to exercise continental regulatory authority. It has made for a form of collective agency of unprecedented transnational reach and strength, yet without directly encroaching on the fuller political agency of the states themselves. Such an approach resonated very closely with many of the earliest economic justifications of the EU. In their very different ways, for instance, two of the most political influential of the early grand theories of integration, the German ordoliberal tradition[79] and Hans Ipsen's idea of the EU as a special purpose association,[80] were supported by legal-instrumentalist premises.. For the ordoliberals, the Treaty of Rome supplied Europe with its own economic constitution, a supranational market–enhancing system of rights whose legitimacy depended 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. Ordoliberal theory, then, provides a classic case in which the Rule of Law, through generating and ring-fencing a framework of economic exchange centred on the four freedoms, provides a platform for the efficient operation of a capitalist economic logic. Ipsen's theory, to which Giandomenico Majone's contemporary work on the idea of a European "regulatory

[78] Opinion 1/91(Draft Opinion on the EEA) [1991] ECR I-6079.

[79] 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 J. Shaw and G. More (eds) *New Legal Dynamics of European Union* (1996) pp. 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).

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

state"[81] is a notable successor, shares with ordoliberalism the idea that supranationalism should transcend partisan politics. Here, however, the instrumentality of law is extended so that 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 - one that has continued to capture the sensibility of a significant part of the Brussels elite - 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 deemed paramount, and where accountability, it is argued, 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.

However, the delicate balance achieved by centring the EU's collective agency within a narrow institutional framework aided by a strong legal instrumentalism could not hold indefinitely. As is well-known, the pursuit of the narrow economic objectives of the Union have increasingly spilled over into politically contentious areas of traditionally national jurisdiction such as working conditions, social discrimination, social security, health, education and internal security. This has occurred both negatively, through the expansion of the scope of application of EU economic law to include questions of the relationship between market objectives and wider market-correcting public policy considerations; and positively, through the incremental spread of EU competence into some of these areas, aided and abetted by the gradual increase in majority

[81] G. Majone, "The Rise of the Regulatory State in Europe" (1994) *West European Politics* 77; 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.

voting from the Single European Act onwards. As a result of this expansion, both the ordoliberal approach and the regulatory state approach have become increasingly vulnerable to the charge of drawing an artificial distinction between technical questions of market-making and standard-setting and deeply contested questions of value preference and transnational resource and risk allocation.[82]

Such a tension was in truth present from the very outset of the supranational project, but becomes all the more evident as the EU, either through its negative or its positive jurisdiction, makes more and more interventions that involve politically salient choices and reduce the capacity of states themselves to make these choice or to pursue them effectively. If the strong and centrally–guaranteed commitment to the juridical protection and perfection of the single market that lay at the heart of legal instrumentalism flourished in a context where market-making measures impinged only lightly on other social policy objectives, or at least where states retained the procedural means to veto politically controversial collective commitments in pursuit of these other social policy objectives - and therefore were slow to make such collective commitments in situations where there were obvious winners and losers -, so the expansion of the scope of negative integration and the concomitant growth of 'political supranationalism', with its shift towards a majoritarian logic, decisively changed the dynamic of integration. Inevitably, more and more controversial value choices began to be reflected onto the legal domain - thereby removing some of the objective, efficiency-maximising veneer from legal supranationalism. [83]

[82] See e.g. .A. Follesdal and S. Hix, " Why there is a democratic deficit in the EU: A Reply to Majone and Moravcsik" (2006) 44 *Journal of Common Market Studies* 533-562.

[83] See e.g. J.H.H.Weiler '""The Transformation of Europe" in *The Constitution of Europe* (1999) ch.2.

The danger, then, was that the very strength of the legal instrument in supplying "both the object and agent of integration."[84] – in providing the primary measure of the integration settlement as well as the means of arriving at that settlement, would become a liability. The threat was that the legal proofing of particular agreements against political reappraisal and the prevention of new supranational initiatives except through still highly consensual and only moderately democratically inclusive procedures, would become more a way of avoiding or excluding the legitimate expression of political choice and less a means of protection against free-riding or against ideologically inspired resistance to or fickleness towards positive-sum collective commitments. In response to this, as we shall see in due course, the question of collective agency has come to be revised through more expansive discourses of citizenship and constitutional democracy in a process which has further complicated the role of law. But for now let us simply record that in the early rise and long consolidation of supranational authority, the prominence of the institutional and legal-instrumental dimension offered both a vital channel and a limiting condition of its collective agency.

Let us turn now to the generative resources of the EU, and in particular to the question of whence its draws it reasons and its bonds of political community. Put simply, European law has traditionally been both (even) less well situated than broader sites of international law to draw upon one aspect of universalism – namely substantive universalism, and less well situated than national constitutional sites to draw upon particularist themes. Globally situated and directed forms of international law may, as we have seen, be highly vulnerable to the charge of imperialism - to the domination of Western interests under the label of universalism. But because they claim to draw no determinate boundaries over population or territory these global sites can

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

at least in principle make a direct claim to represent universal interests and values. In contrast, any such invocation of universalism by the EU cannot (any more than its invocation by states can) deny that its geographical boundaries and populations are not coterminous with the fullest jurisdiction of law considered as a substantive universal. Unlike the national constitutional level, moreover, the EU, as by far the most integrated and politically powerful of the regional free trade associations, cannot even draw upon a common and regularly reinforced supranational tradition as an intimation of incipient universalism.

Accordingly, the EU's attempts to bridge the gap between its boundaries and the frontiers of universalism have tended instead either towards assertiveness or towards deference – either a 'levelling up' *from* the European experience or a 'levelling down' *to* the European experience. Assertively, in pursuit of the levelling-up approach it may be proposed that the EU contribution to universal values is somehow *seminal,* often incorporating the quite literal claim that in Europe lies the historical seed of the very idea of universalism. This is seen, perhaps most famously in recent times, in the preamble to the Constitutional Treaty (and substantially retained in the successor Lisbon Treaty) where the 'special area of human hope' that is asserted to be Europe is also claimed as the seat of the 'cultural, religious and humanist inheritance' from which, it is further claimed, have developed 'the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'.[85] And if the assertive claims risks too much and raises the spectre of the incorrigible imperialism of the old world, the deferential claim instead may instead demand too little. When the EU treats itself as a mere local *reverberation* of a substantive principle that sounds universally, where for example it has been inclined to treat certain international treaty norms as automatically

[85] Treaty Establishing a Constitution for Europe, art. I-6, Dec. 16, 2004, 2004 O.J. (C 310/1)

incorporated into the EU legal order just because the broader international order seems more suited to the universal title, its own regional claim to authority can sound duly muffled.[86]

Equally, if we look in the other direction towards particularism, just because the EU already is a composite of national particulars, any claims of its own to particular identity and to a legitimacy derived from that particular identity have tended to suffer in comparison to these national particulars. Historically, there have been at least four routes to particularism sought by Supranational Europe, each engaged in its own artifice, and each encountering the limitations, obstacles or pitfalls associated with that artifice. A first is *aggregative particularism*. Following the logic of composition, the particularity of the EU may be defined in lowest common denominator terms, as the floor of things-held-in-common by the national units – as, for example, in the longstanding invocation of the language of 'common constitutional traditions' in the ECJ's human rights jurisprudence.[87] A second is what we might call *negative particularism*, where what Europe has in common is defined in terms of what *it is not* rather than what it affirmatively is. This is a theme which, for example, in the simultaneous moment of European constitutional drafting and global controversy over the legality of war with Iraq in 2001-3 threatened to harden into a rhetorical orthodoxy of anti-Americanism. It is also a theme which one finds in the dark side of European migration or security politics, as a reason not to welcome

[86] See, for example, from the earlier jurisprudence of the ECJ, *Haegeman v Belgium* (*Haegeman II*) [1974] ECR 449; *Bresciani* [1976] ECR 129; *Hauptzollamt Mainz v C.A. Kupferberg* [1982] ECR 3641. Arguably, the ECJ has become much more assertive in recent years against the universal claims of the international order, and this assertiveness has typically taken the form not of a regional particularism unconcerned with matters of universal significance, but (in an approach that is at least implicitly *seminal*) of the claim to a privileged perspective of its own from which to interpret presumptively universal norms. The much-discussed recent *Kadi* jurisprudence may be seen as a clear example of this tendency. See Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat* v *Commission and Council,* judgment of the Court (Grand Chamber) of 3 September 2008. For extended discussion, see G de Burca, "The ECJ and the International Legal Order: A Re-evaluation" in the present volume.

[87] Subsequently consolidated in Art. 6(2) TEU.

or not to trust those of a particular ethnicity, or territorial origin, or faith.[88] A third is what we might call *self-denying particularism*, a sense in which what is legally peculiar to the EU is itself a rejection of particularism - as summed up in the recently adopted EU motto, 'united in diversity'. A fourth is what we might call *cosmetic particularism*. This is the thin specificity of those attempts to create the bonds of a common Europe through ideological surfaces rather than the depths of common practice, to be found in any number of Commission inspired slogans and campaigns over the years. Most recently we find this in the litany of EU-specific flags, mottos, anthems and special anniversaries, all specifically mentioned in the aborted Constitution,[89] though now no longer accorded the dignity of Treaty recognition in the successor Lisbon Treaty. On one view, indeed, even the very idea of a documentary Constitution is itself just one more artefact of cosmetic particularism.

The point is not to be unduly critical of these approaches to the question of what is politically, and potentially juridically particular to the EU. They all contain a kernel of insight, and are not necessarily without generative capacity in norm-making or symbolic terms. Yet they clearly lack the solid and familiar situational grounding of their national counterparts

If neither substantive universalism nor a narrow particularism has been a promising source of generative resourced for the EU, different considerations apply to formal universalism. From the outset, the EU has sought to make a special virtue out of it adherence to the form of law, and to the ideas of universalism associated with this formalism. Here, the EU holds an advantage over classic international law in that the benefits of formalism can be seen to arise at two distinct levels. Not only is the traditional doctrine of *pacta sunt servanda* important in ensuring universal

[88] See e.g. European Union Agency for Fundamental Rights, *Annual Report 2009*

[89] Art I-8 CT

commitment amongst member states, but the reach of EU law into national systems and their subjects and citizens entails that formal universalism also has an application at the level of the individual legal actor. The specific contribution of formal universalism lies in its commitment to an ethic of formal equality both amongst states as otherwise unevenly powerful collective political and economic players and amongst their individuals as participants and 'factors of production' in the transnational marketplace. Formal universalism, then, speaks directly to those values of certainty, calculability and reciprocity that are closely aligned to the market-making and market-enhancing aims of the EU. Again the legal dimension is vital, as it is precisely the basic technology of law and of legal reasoning, with its commitment to and guarantee of universalisability, that generates the idea of formal equality and the reciprocal commitments necessary to make the implementation of a regime of formal equality credible.

Legal *universalism*, then, with its emphasis on formal equality of legal status and protection, speaks to a set of values that are different from but complementary to legal *instrumentalism*, which is concerned with the capacity to articulate and ensure the overall design capacity of supranationalism. What the prominence of legal universalist argument has also done is to reinforce the overall centrality of law to the situational ethics of the EU. Yet, as with instrumentalism and for reasons that spring from the same source, legal formalism has become an increasingly precarious virtue. Where the EU becomes more involved in compensatory social legislation, or in areas such as internal security and defence with a more distant link to the market place, and where the emphasis moves from judicially led negative integration to legislation-centred positive integration, the shape of the appropriate legal tools changes and

formal universalism becomes less suited to the regulatory tasks at hand.[90] The emphasis, then, begins to shifts away from formal universalism towards a more substantively committed attitude, whether universalist or particularist, and the question of how an 'in-between' entity such as the EU can legitimately draw upon either approach arises more sharply than ever.

If we turn, finally, to the question of political ontology, here we find a very distinctive balance between individualism and collectivism in the historical development of the EU. On the one side, there is a red line connecting formal universalism (at the inter-subjective rather than the inter-state level) to individualism. If the formal universalism of the Treaty framework, in a continental extension of Constant's "Freedom of the Moderns"[91], fashions a legally guaranteed system of negative freedom for all within the internal market area from state-sponsored barriers to economic activity, then this already places the individual and the pursuit of individual ends, whether as an expression of self-interest or as a vindication of moral autonomy and rationality,[92] in a privileged position. The ECJ, moreover, has from the outset underscored the individualist emphasis of the general scheme by adopting an explicitly *rights-centred* approach. It has construed the Treaty obligation to establish an internal market and the four freedoms "not as a programmatic goal to be realized through political legislation but as a set of directly enforceable individual rights."[93] In similar vein, the principle of non-discrimination on grounds of nationality

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[90] *T*his a theme, for example, of much of the literature on Comitology *(* see e.g. C. Joerges and E. Vos (eds) *EU* Com*mittees: Social Regulation. Law and Politics* (1999)) and on New Methods of Governance (see e.g. N. Walker and G de Búrca, "Reconceiving Law and New Governance" (2007) 13 *Columbia Journal of European Law* L 519.

[91] On the relevance of Constant's writings to the EU, see e.g. R. Bellamy, "The Liberty of the Post-Moderns? Market and Civic Freedom in the EU ' LEQS Paper 01/2009

[92] For discussion of the different Hobbesian and Kantian strands of individualism in the context of the EU. See F. Scharpf, "Legitimacy in the Multilevel European Polity" in P Dobner and M Loughlin (eds) *The Twilight of Constitutionalism?* (2009, forthcoming).

[93] Scharpf n 92 above.

and the economic aspects of the new post-Maastricht citizenship provisions have been transformed into a further set of rights to access the social benefits and public services of all member states.[94]

Such a rights-centred approach, therefore, adds to the existing emphases on legal instrumentalism and legal universalism to provided further reinforcement of the Union's legocentric posture. In so doing, it completes one historically dominant and, in its own terms, consistent orientation of the EU towards the key questions of political modernity. A narrowly conceived and largely depoliticized form of collective agency is joined to an emphasis upon formal universalism and philosophical individualism in pursuit of a vision of an expanded economic area in which the greater specialization and economies of scale thereby encouraged promotes a broader range of goods and services, lower per capita costs of public goods, higher productivity and increased employment and overall wealth.

This individualist emphasis, however, sits in increasingly uncomfortable balance with the more collectivist traditions and imperatives of the EU. As Joseph Weiler has long insisted, to concentrate only on the individualist dimension of the EU in its historical evolution and with reference to its record of accomplishment is to obscure the way in which this has developed in symbiosis with certain broader collective ideals.[95] In particular the collective goods of peace and general prosperity have figured large in the narrative of the EU. Certainly, both were closely connected to the emphasis on individual economic well-being. Post-war peace was a precondition of the social stability and economic confidence that brought a rise in individual

[94] See e.g., *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691; *Baumbast v Secretary of State for the Home Department* [2002] ECR I-7091. See also A.J. Menendez, "European Union Citizenship after *Martinez Sala* and *Baumbast*. Has European Law become more human but less social?" RECON Working Papers 2009/5.

[95] See Weiler n83 above, ch.10. see also his "Europe - Nous coalisons des Etats, nouse n'unissons pas des hommes" Unpublished Paper (2009).

standards of living, just as enhanced economic well-being, and the forms of economic co-operation[96] and exchange necessary to foster that well-being, rapidly reduced the prospects of any recurrence of hostilities across Western Europe. Even more obviously, an increase in the material well-being of individuals was necessary to collective prosperity. But there was also more to peace than the servicing of individual well-being, just as there was more to prosperity than the aggregation of such well-being. Peace also spoke, minimally, to the very survival of a community of national communities in a continental environment unprecedented in its geographical concentration and historical resilience of conflict. And maximally, it spoke to the overcoming of old hatreds in a spirit of mutual forgiveness and of the forging of a common commitment to a more harmonious way of negotiating differences. As for collective prosperity, this spoke to a shared recognition and celebration of the overcoming of poverty and its causes, consequences and attendant indignity, and also to the material and psychological benefits and solidaristic dividend that accrued from a common sense of economic wealth and security being commonly enjoyed.

Yet for all their significance to the European project, these collective goods suffer from two important limitations. One, again noted by Weiler, concerns their declining relevance over time, and the sense that here the EU has been the victim of its own early success. As the memory of war and the fear of its recurrence receded, peace ceased to offer such a tangible, mind-concentrating collective virtue. And as the era of post-war economic reconstruction, with its strong welfarist undertow came to an end, the relentlessness of the drive to prosperity provided a platform for the development in the 1980s and 90s of a more narrowly acquisitive strain of materialism. The dilution of the initial impact and transformation of the initial meaning of these

[96] E.g. the making of common economic cause over the traditional war-making industries in the original European Coal and Steel Community, established by the Treaty of Paris in 1951.

two foundational collective goods does not, of course, mean that they are irrelevant today. It does mean, however, that their place as mobilizing and defining values is less central, that they inevitably contribute less to the collectivist side of balance sheet in the construction of supranational political community.

A second limitation of peace and prosperity concerns the distinctiveness of their character as collective goods and the uniqueness of their fit with the broader circumstances of supranational Europe. Both peace and prosperity meet the criteria of what we earlier named manifest collective goods. That is to say, their value as collective goods is palpable and uncontested, in one case because the very survival of the supranational community and its constituent parts is dependent upon its achievement and maintenance and in the other because the realization of the good can be seen as something which in principle offer benefits to all. What is more, the pursuit of both of these goods clearly operates in symbiosis with the individualist pursuit of economic freedom. This is not to deny that peace and prosperity were genuinely endorsed as collective goods, nor that in the manner described above this endorsement produced certain self-reinforcing communitarian sentiments. Rather, it is to caution that as the attraction of these foundational goods has waned, we cannot assume that the other candidate collective goods that may be required to take their place will be so readily mobilized or so clearly compatible with the individualist core of the community.

In particular, as the power of the two foundational collective goods has faded, the collective dimension of community life will inevitably depend less on manifest value and prior or foundational purpose and more on the constructed goods of community. Yet we cannot assume that the EU is well placed to generate collective goods within the two sub-categories of such constructed goods, neither implicit nor explicit common goods. As regards the implicit

common goods – those, such as a general sense of mutual trust or solidarity or the possession of a common culture, that are part and parcel of the very value of living together in a common community - any suggestion that these may provide transnational benefits entirely begs the question of their plausibility at that level. As the problems encountered by the EU whenever and however it seeks to develop its own sense of particular justification demonstrate, to what extent the EU possesses the sociological wherewithal to generate implicit common goods is highly doubtful.

In turn, this doubt is intimately linked to the question of the viability of explicit common goods. The development of explicit common goods, to recall, requires institutions of government able and willing to take decisions that track all relevant interests as well as other institutions capable of implementing these decisions effectively. However, the generation of such institutional capacity itself depends upon the existence of a suitably strong motivation to put things in common, which in turn depends upon (and, in a circular process, reinforces) a prior platform of implicit public goods. What is more, in the EU not only, as we have argued, is the robustness of that prior platform of 'common sense' in doubt, but the bar is set particularly high in terms of what constitutes a suitably strong motivation to generate the requisite institutional capacity. This is so because such a motivation has to be sufficiently broadly and deeply held to overcome those formidable legal and political impediments to capacity-building that arise from pressures to protect the collective prerogatives of other and prior (national) political communities and, relatedly, to preserve the predominance of an individualist ontology within the EU.

An assessment of this high bar of legal and political impediments brings us back to the basic difficulties persistently faced by the EU as it tries to move beyond its market-making core. Legally, as already noted, the scope of application of EU law for the purposes of ensuring

negative integration against other national public policy considerations and the common goods associated with these is greater than its capacity to achieve positive integration at the supranational level in those same areas of public policy and common goods. This discrepancy is in some measure an unavoidable consequence of transnational economic freedom providing the jurisdictional core of the Union. But it is exacerbated by the asymmetric way in which the Court has traditionally treated and today continues to treat the relationship between those economic freedoms and competing public policy goals.[97] Economic liberties, and the rights in which they are encased, are typically accorded full value, while some competing national public goods and the institutional solutions associated with the promotion of these goods are subject to strict proportionality requirements,[98] and yet other national concerns of significant importance, typically budgetary concerns over the access to domestic welfare and social service resources by non-nationals, are disregarded completely.[99] And even when the discrepancy can in legal principle be overcome and it is possible for the EU to re-regulate for common market-correcting public goods at the European level, the highly consensual and multi-stage legislative requirements through Commission, Parliament and Council and the difficulty of generating in such a diffuse institutional framework the concerted political commitment required to develop

[97] See Scharpf n92 above; Menendez n94 above; Somek n75 above; L. Azoulai, "The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization" (2008) 45 *Common Market Law Review* 1335-1356.

[98] See e.g. the importance accorded to free movement of capital in the Golden Shares litigation (*Commission v Portugal (Golden Shares)* [2002] ECR I-4731; the expansion of the scope of Art. 95 as a market-making competence in the tobacco litigation (*Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419); and the elevation of freedom of establishment over collective socio-economic claims in recent labour law case-law (*Viking* C-438/05 11.12.2007; *Laval* C 341-05 18.12.2007).

[99] As in economic citizenship cases such as *Martinez Sala* and *Baumbast* , n94 above. See also Scharpf n92 above; Menendez n94 above.

ambitious and state-encroaching forms of transnational social regulation, means that this will often not take place.

In a nutshell, the early symbiosis of individualism and a certain type of manifest collective good has given way to a situation in which the structural ascendancy of individualism increasingly demands to be countered by just the kinds of collectivism that individualism itself resists and that are in any case difficult to generate in substitution for national common goods in the transnational arena. What we are left with, then, is a lop-sided structure in which law plays a central role for its instrumental, formal and rights-promoting attributes. In this way, a truncated form of collective agency enables a combination of universalism and individualism which matches one side of the nation-state narrative of political modernity. But despite a growing need for a counterbalance, the conditions remain underdeveloped for providing a complementary narrative line based upon the particularity of the transnational and the generation of common goods associated with that particularity.

3. The Place of law in the Supranational Future: Problem or Solution?

If law has always been central to the success of the European supranational project, in the ways set out above it has also set limits to that success. Its combination of instrumentalism, formal universalism and rights assertiveness has proved crucial to the establishment of a single economic area. But as this has threatened to become too singular and too narrow a goal, is not this same combination of law-centred mechanisms, in it very conduciveness to that narrow goal, not in danger of becoming part of the problem rather than part of the solution?

Any easy conclusion to that effect would be to reckon without the polyvalence of law and the basic flexibility of its medium. Ironically, just as supranational law's star may have lost some

of its internal lustre, its external appeal has become more prominent.[100] The initial 1993 Copenhagen criteria governing the Central and East European wave of Enlargement included a stipulation that applicant states should respect the Rule of Law, anticipating its formal specification as a condition of membership in the 1997 Treaty of Amsterdam.[101] A similar approach is taken today to the EU's 'new' near-neighbours under the Stabilization and Association Process in the Western Balkans and the broader European Neighbourhood Policy (ENP).[102] In these various processes the building of the institutional guarantees of legal rationality in the form of a well functioning court system and legally regulated and respectful state bureaucracy are seen not only as direct contributions to the 'civilisation' of the state, but also, in a strong echo of the formal and instrumental reasoning discussed above, as a further indirect contribution thereto by providing both the universalist ethic and the design framework of a successful (and effectively civilizing) market economy.

And it is with the promotion of the virtues of a juridically grounded formal rationality and instrumentalism that we approach the nub of the increasingly influential idea of Europe as a uniquely "normative power"[103] or civilian power, relying upon a combination of example and civil persuasion rather than the military might or threat offered by other regional actors. Increasingly, too, the modelling or exemplary aspect of this is treated more insistently and more

[100] See further, N. Walker, "The EU and the Rule of Law: Necessity's Mixed Virtue" in G. Palombella and N. Walker (eds) *Relocating the Rule of Law* (2008) pp.119-38.

[101] Art. 49 TEU.

[102] See *European Neighbourhood Policy*, European Commission 2004, 273. See also the European Security Strategy of the same period; *A Secure Europe in a Better World* (2003). See more generally, M. Cremona, "The European Neighbourhood Policy: Partnership, Security and the Rule of law" in A. Mayhew and N. Copsey (eds) *European Neighbourhood Policy and Ukraine* (2005) 25-54.

[103] See e.g. I. Manners, "Normative Power Europe: A Contradiction in Terms?" (2002) 40 *Journal of Common Market Studies*; E. Johansson-Nogues, "The (Non) Normative Power EU and the European Neighbourhood Policy: An Exceptional Policy for an Exceptional Actor" (2007) 7 *European Journal of Political Economy* 181-194.

holistically. It is not just that the European way offers lessons in polity-building, but, that, increasingly, it offers *itself* as paradigmatic. As Kleinfeld and Nicoladis put it, " (m)any in the EU believe that the Union's unique contribution to the world is its own process of "enmeshment," which is purported to have brought peace and prosperity to the continent. The EU's main model of change is its own integration process, whereby economic integration through trade liberalization is pursued on a reciprocal basis and underpinned by converging standards, harmonization and mutual recognition."[104] Here, then, the very 'in-between' situational logic which means that Europe cannot make the kinds of justificatory claims appropriate to the polar points of international law and state law works in its favour. On the one hand, its 'particular' experience as a self-contained polity or transnational regime means that, unlike international law, its persuasive authority can include an important exemplary component for other polities or transnational regimes. On the other hand, the thinness of its transnational model means that compared to the national case, its 'transfer value' is not undermined – or at least not so obviously undermined – by the cultural rootedness of that particular experience.

Be that as it may – and allowing that soft power of this sort is certainly not immune from charges of imperial overreach[105] - we must also acknowledge that the generally higher profile and impressive sheen of European law's external façade cannot cure its internal defects. The increased salience of external legal authority can ensure that the 'law brand' is not diminished overall in the supranational theatre – that there is no *general* ideological impediment to law's chances of success – but it cannot alter the *specific* structural conditions that make law, in the functional mix we have set out, progressively less

[104] See R. Kleinfeld and K.Nicolaidis Can a Post-Colonial Power Export the Rule of Law? Elements of a General Framework" in G. Palombella and N. Walker (eds) n100 above, pp.139-69, at 163. See also K. Nicolaidis 'Trusting the Poles? Constructing Europe through mutual recognition", (2007) 14 *Journal of European Public Policy*, 682-698.

[105] See Kleinfeld and Nicolaidis, n104 above.

adequate to the conditions of the European project. So can law, then, taking account of its resilient symbolic strength, be *remixed* in such a way that it promises again to become part of the European supranational solution again rather than stuck as part of the problem? This question brings us, in our concluding discussion, back to the foundational issue of political modernity – to the question of collective agency – and to the puzzle of how and whether law may contribute differently than it has to date in the treatment and resolution of the question of collective agency in the supranational context.

We may recall that the original settlement of the agency question in the EU context involved a very particular compromise. Put bluntly, political agency was retained by the states while legal agency was given to the EU, to be serviced by a powerful but numerically modest central cadre. Such a settlement rests on an implicit belief in the soundness of some combination of the two principles of delegation and demarcation.[106] Politically, the EU remains a secondary and derivative political community, much like any regime of international law, with original authority continuing to vest in and be delegated from the states. Legally, however, the scope and terms of the delegation are extensive and entrenched, and this is justified by the need to demarcate an area free from political horse-trading and the intrusion of inappropriate ideological considerations into formal and technical questions of market-making, market-perfecting and even market-correcting. However, as the management of Europe's economic area gradually and inexorably impinges upon broader public policy considerations, questions of political choice become unavoidable. And in response to this, alongside the intergovernmental Council, the directly-elected Parliament has begun to take on many of the more familiar characteristics of a politically representative national chamber, while the Commission and the

[106] For extended discussion, see Walker n71 above.

Court have also inevitably become more frequently and more deeply involved in political value judgments over competing individual and collective goods.

Politics, then, becomes more prominent within the governing discourses and institutional logics of the EU, but, importantly, this happens *after the fact*, in response to growing pressures upon a system not built with this kind of broader political debate in mind and lacking a conception of constituent power and of title – of ultimate collective agency – that is adequate to that politicization. Instead, the question of title remains both obscure and controversial. Obscure, because, beyond the false neatness of a combination of the opposites – of legal autonomy and political dependence - it is not clear what the collective agency of an 'in-between' entity of the unprecedented character of the EU might entail. Controversial, because whatever it might entail it is bound highlight differences and engender friction between those who are jealous of the political prerogatives of the states and those who would prefer a more expansive conception of supranational political community. Yet, arguably, unless the question of title is re-addressed and treated in candid recognition of the evolving circumstance of supranationalism, this combination of obscurity and controversy will continue to feed through into the quotidian dynamics of the Union. First-order debates over the proper balance of goods and interests within the EU or over the particular content of the EU's own sponsored collective goods will continue to be overshadowed by – and so confused with or disabled by – second-order debates over whether and to what extent the EU *in principle* possesses independent political title to balance different deep political values and to develop robust collective goods of its own.

The beginning of attempts to face this problem and to grapple with what political agency might mean beyond a purely state-derivative conception can be seen in a number of recent

initiatives in which law is allowed a more constitutive role in supranational affairs alongside its tried and tested triumvirate of instrumentalism, formal universalism and rights-recognition. To some extent, for example, this is true of the citizenship initiative at Maastricht, with its new understanding of membership of the supranational community. But a far more broadly receptive context for such a development was the documentary constitutional debate leading to the Constitutional Treaty of 2003. The subsequent failure of the Constitutional Treaty, of course, renders any discussion of its merits hypothetical, but arguably the Constitutional Treaty went some way towards addressing issues key to our concerns.

Typically, Constitutions serve four types of functions, and political pressure in favour of a constitutional initiative only mounts whenever the performance of one, or usually more, of these inter-related functions becomes attractive or urgent to a suitable coalition of important constituencies within a polity. These functions have to do with matters of form, content, process, and, of direct relevance to us, authorship. The adoption of the documentary constitutional form tends to have a highly symbolic value, involving a claim that the use of the big 'C' word is appropriate to the scale of the transformation or the nature of the polity setting in question. Content-based considerations concern the capacity of the constitutional instrument to deal with a range of fundamental questions about the institutions of government and the values and ends of the polity, and to do so in a holistic manner. Process-based considerations have to do with the way in which a typically wide-ranging constitution-making procedure can have both epistemic and motivational benefits – bringing a greater number of relevant considerations to the debate and helping to legitimate outcomes. Authorship-based considerations concern the choice or confirmation of who has basic title to political community

– in whose name resides the agreement called the Constitution and the whole system of law and institutional framework recognized and vindicated by that Constitution.

The arrival of Europe's constitutional moment was a tale of highly mixed motives, one in which we can see all four functional imperatives at work.[107] The formal and symbolic dimension was important on either side of the debate, with supporters claiming the Constitution as a sign of the polity's maturity – of the ripeness for settlement of its *finalité politique*, and opponents claiming that the constitutional label., steeped as it was in the history of the modern state, presumed too much. Content–wise, the Constitution offered an opportunity for wide-ranging Treaty reform, and did so against a backdrop where recent attempts at amendment by Treaty had increasingly appeared to lack the gravitas necessary for them to succeed against sceptical state parties.[108] The Convention process, too, was intended as a way of smoothing the passage of the instrument, as well as bringing a broader range of national political and civil society voices to the table.[109]

For all its importance, indeed partly *because* of its importance, the question of authorship was addressed much more obliquely. Partly, this was a practical matter. The initiation of the constitutional process depended on the states as the existing masters of the Treaties, and so it would have taken a more febrile political atmosphere than we saw in 2003 for them not to assume their familiar role as authors, and indeed in so doing to legislate for their own

[107] See e.g. N. Walker, "Europe's Constitutional Momentum and the Search for Polity Legitimacy" (2005) 3 *International Journal of Constitutional Law* 211 -238.

[108] See e.g. J.H.H. Weiler "On the Power of the Word: Europe's Constitutional Iconography" (2005) 3 *International Journal of Constitutional Law* 173-190.

[109] See e.g. C. Karlsson. "Deliberation at the European Convention: The Final Verdict" (2008) 14 *European Law Journal* 604-619.

continuing authority over any subsequent amendment to the Constitutional Treaty.[110] Partly, too, it was a conceptual matter. As we have seen, the very idea of a form of title that in the political last analysis does not rest either (for states) with 'the people' or (for the international domain) with the states themselves is unknown in modern politics, and the question of how to imagine something beyond pure intergovernmentalism without falling into the opposite error of contriving a single and irreducible people and popular sovereign of a new European superstate remains a vexed one.[111]

Yet we can at least begin to think of what a third way might look like. If, against the sceptic, it can be claimed that European constituent power is not merely derivative of national constituent power, we nevertheless must still acknowledge the national legacy of its foundations and, alongside the newer supranational dimension of authority, the resilience of the original national constituent powers. The collective 'people' of second-order supranational understanding, therefore, cannot simply replace the various first-order collective 'peoples', and so can never be just like the otherwise politically unencumbered and unmediated 'people' of our first-order state imaginary. The second-order people must instead describe a compound structure, incorporating but also augmenting the aggregate of first order collective peoples. .

If we are prepared to look, there is at last some intimation of these possibilities in the Constitutional Treaty debates, not least in the two-tier drafting process itself, with the new pan-European Convention preceding the familiar Intergovernmental Conference. Various formulations in and after the aborted Constitutional Treaty also hint at third way openings. In the Preamble and Art. 1 'the citizens [singular] and States' were referred to as the ultimate authors,

[110] CT Art. IV-443; Art IV-447.

[111] See Walker, n107 above.

but elsewhere in the Preamble the 'peoples [plural] of Europe' are also invoked. And in more recent official communications concerning the Constitution and the question of democratic renewal more generally, especially from the European Commission,[112] we often find the 'people' reduced to the singular alongside 'the States'. So what emerges is a vague sense of a dual constituent power, and indeed regular references in political discourse to 'dual legitimacy',[113] even if there is uncertainty as to the identity of its components, and an incomplete sense of the relationship between the two.

Of course, today the Constitution is yesterday's news, with the promoters of the successor Lisbon process working assiduously to eradicate all elements of the Constitutional Treaty's indulgence of constitutional form, process and authorship while retaining most of its content.[114] What, then, if anything, can be gained from resurrecting the half-formed ideas of an unsuccessful initiative? Does constitutional failure, and the hesitant nature of the initiative taken by the failed project over the question of collective agency, not suggest that this kind of approach is impractical, or undesirable, or both?

We need not draw such a negative conclusion. Perhaps the most telling fact about the constitutional initiative, even if this has been obscured by its failure and, indeed, by those so embarrassed by its failure that they have sought to eradicate the whole experience from common

[112] See, as just one of many examples,, the frequent slippage between plural and singular in *A Constitution for Europe: Presentation to Citizens*, an information document produced by the Commission in the wake of the signing of the CT in 2003: http://europa.eu.int/futurum

[113] Not least by the President of the Constitutional Convention: see, e.g., Valéry Giscard d'Estaing, '"The Convention and the Future of Europe: Issues and Goals" (2003) 1 *International Journal of Constitutional Law* 346.

[114] See e.g., N. Walker " Not the European Constitution" (2008) 15 *Maastricht Journal of European and Comparative Law* 135-141.

memory,[115] is not that it ran aground but that it was floated at all. That a set of issues suggesting the possible transformation of the basic form, constituent process, institutional content and authoritative source of the Union achieved the necessary salience to be the subject of a first constitutional initiative in a 50 year old polity is a tribute both to the objective importance and urgency of what was at stake and to the existence of sufficient commitment to put things in common at least to place them on the agenda for constitutional resolution. And even if, in the wake of constitutional failure, support for a self-styled constitutional solution has eroded, nothing has happened either to render the underlying issues in question less pressing nor, crucially, to suggest that there any better method of addressing them has been found than the constitutional way. Indeed, as the protracted tribulations of even the more modestly conceived Lisbon Treaty have shown, reversion to the normal Treaty process has done nothing to alleviate the problems that helped persuade Europe's leaders to seek a constitutional alternative in the first place.

In these circumstances, unlikely as its immediate prospects may be, a revival of the constitutional project cannot be ruled out, and with it a second and perhaps more considered opportunity to look at the key question of collective agency. Of course, even if this does happen, and even if some version of dual legitimacy is pursued as a new compound approach to supranational title, that will provide no magic solution to the problems of the unbalanced polity. As has frequently been pointed out, the constitutional crucible offers no copper-bottomed guarantee of more inclusive participation, no deliberative panacea and no promise of increased support by its citizens even to the extent that any such participatory and deliberative dividends

[115]See in particular the declaration of the June 2007 European Council that the "constitutional concept" that it had endorsed so enthusiastically only four years previously, on the occasion of receiving a draft of the Constitutional Treaty from the Convention on the Future of Europe, was to be summarily "abandoned". Presidency Conclusions, Brussels European Council (June 21-22, 2007).11177/1/07 Rev 1 Conc 2.

may be forthcoming.[116] Instead, the specification of a distinctive collective authorship and political agency that the constitutional self-attribution of title announces has a more limited purpose. Yet it is also a prior purpose. This is so because it speaks to a state of collective affairs in whose absence it is difficult to see how *any* attempts to pursue deeper political reforms and strengthen the institutional coherence, decision-making efficacy and common political culture of the EU - *regardless* of where and how these attempts strike the balance between expertise and voice, representation and participation, or majority will and minority veto - can be securely grounded. For the constitutional arena - and perhaps *only* the constitutional arena, offers the possibility that, as we bring down the curtain on an era of "permissive consensus"[117] that allowed first-order decision-making to proceed and its benefits to accrue substantially unaffected by second-order considerations of what and who the EU stood for other than a legally demarcated set of interests delegated by the constituent states, we might begin the process of overcoming increasingly disabling second-order differences over the basic character of the EU polity in and through the very act of recognizing and addressing such differences as *our* common predicament. More specifically, a documentary constitutional commitment to overcome that predicament may, in a self-reinforcing fashion, supply the platform for the generation of a reflexive awareness of such a common sense of authorship over time and for the gradual accumulation of a constitutional tradition that deepens and consolidates that common sense.[118]

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[116] Perhaps most effectively, and most trenchantly, by A. Moravcsik, see e.g. his " What Can We Learn from the Collapse of the European Constitutional Project? (2006) 47 *Politische Vierteljahresschrift* 2 ; K.H. Ladeur *"*We, the European People . . ." – Relâche*?* (2008) 14 *European Law Journal* , 147-67 (2008).

[117] See e.g. L. Hooghe and G. Marks " A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus" (2008) 39 *British Journal of Political Science* 1-23.

[118] See, e.g., J. Habermas, On Law and Disagreement: Some Comments on "Interpretative Pluralism," (2003) 16 *Ratio Juris* 187-199.

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And while it would, indeed, be an error to see this as any more than one modest element in the remaking of the European polity along lines which command general adherence, we should not fall in to the opposite error of underestimating its importance. As we have sought to demonstrate, a Constitution is always both trace and catalyst, and this applies as much to the earlier foundations of state constitutionalism, and also to the many contemporary proposals for the constitutional refounding or revamping of national polities, as it does to the new supranational polity. The written Constitution is an important trace in that its very promulgation, or even its threshold consideration, is already a sign, however modest, of the commitment and common understanding it seeks to encode. And the written Constitution is also a catalyst insofar as it provides a means by which and a context in which to stimulate the deepening of that commitment and common understanding. Indeed, it is precisely this Janus-faced quality - the backward-looking recollection of common resources and gathering of existing potential just in order to solve forward-looking collective action problems - that has given documentary constitutionalism its uniquely modern hue. For in its assumption that nothing is more apt than our own joint commitments to shape our common world, constitutionalism invokes a social technology that was unknown to pre-modern cultures.

I suggested at the beginning of this essay that the EU is best understood as a continuation of political modernity by other means rather than a clean break from the modern era. If that is indeed the case, then it may not announce a failure of our common imagination, but simply a reinvestment in it, to turn again to the legal techniques of documentary constitutionalism for new answers to old questions.