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Concepts of Law in Integration Through Law  
(and the Price of Constitutional Pluralism)

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The Making of the European Polity* (Ashgate 2011)

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## **Abstract**

This paper explores the concept of law in European integration studies with a particular emphasis on the conception adopted in the Integration Through Law project which was based in the European University Institute in the 1980s. It argues that notwithstanding claims to the contrary, the conception of law adopted in the project was a legal positivist one and that this is evidenced in its conception of law as the ‘object’ and ‘instrument’ of integration. The first part of the paper develops this thesis by arguing, firstly, that characterizing EU law as the ‘object’ of integration entails a Razian conception of the authority of law which results in the integration of national legal systems, and then, secondly, that law as the ‘instrument’ of integration entails a functionalist conception of law which is necessarily positivist.

The second part of the paper goes on to highlight the tension between this positivist conception of EU law and the federal principle which was central to the ITL project, given that the former relies on the resolution of the question of ultimate authority (the sources thesis brand of positivism) whereas the latter tends towards its irresolution. It argues that the emerging literature on constitutional pluralism in the EU implicitly endorses the federal principle of the ITL project at the cost of the positivist conception of EU law and that this is evidenced by the shift in models of constitutional pluralism from legal positivist conceptions of law to a more Dworkinian ‘principled’ form as exemplified in the work of Mattias Kumm. However, the paper concludes that this shift comes at a price which is potentially problematic in a fragile political community such as the EU, where the stakes are much higher than that of the sovereign state.

## **Keywords**

European integration, integration through law, constitutionalism, constitutional theory, constitutionalisation, federalism, sovereignty, legal positivism, functionalism, constitutional pluralism

## 1. Introduction

Notwithstanding the centrality of law in the European integration experience, the law of European integration, that is to say European Union (EU) law, has been relatively neglected by legal philosophers and has remained a relatively unexplored aspect of European integration studies more generally.<sup>1</sup> Unlike International law, which is emerging from an ‘ontological’ crisis<sup>2</sup> into a ‘post-ontological’ phase in its theorisation,<sup>3</sup> EU legal studies has almost complacently accepted or reaffirmed the law-like status of the norms which are contained in the treaties which established the EU.<sup>4</sup> Where theorisation of the norms of EU law has taken place, it has tended to be focused on the first order question of what category of law it falls into, international or constitutional<sup>5</sup>—a debate which parallels debates in international relations regarding the intergovernmental or supranational nature of the EU as a political actor<sup>6</sup>—rather than the second order question of what constitutes law and whether the norms which emanate from the EU qualify.

The question of the nature of EU law has a significance beyond the ponderings of legal philosophers. It touches upon broader debates surrounding the EU, particularly its authority and legitimacy, most clearly expressed in debates about its democratic pedigree (or lack thereof).<sup>7</sup> Moreover, or perhaps because of, its unusual supranational setting, the question of the nature of EU law affects the question of the nature of the EU more generally as an *emerging polity*, and in this regard legal philosophy can contribute to debates in political philosophy which has recently turned its attention to the theorisation of the EU.<sup>8</sup>

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\* My thanks to Daniel Augenstein and Claudio Michelon for comments on a previous draft of this paper.

1 The notable exception to this is the work of Neil MacCormick, whose writings on the nature of EU law and sovereignty are contained in *Questioning Sovereignty*, (Oxford University Press, 1999).

2 J. Tasioulas, ‘The Legitimacy of International Law’ in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law*, (Oxford, 2010), 97.

3 T. Franck, *Fairness in International Law and Institutions*, (Oxford: 1995), 6 cited in Tasioulas (2010).

4 Given that the Lisbon reforms have simplified the EU’s institutional structure by creating a single EU, I will refer to ‘EU’ throughout, incorporating its predecessors the EEC/EC.

5 For an example of this debate see J. Weiler, *The Constitution of Europe*, (Cambridge: 1999), Chapter 9.

6 See T. Diez and A. Wiener, ‘Introducing the Mosaic of Integration Theory’ in A. Wiener and T. Diez, *European Integration Theory*, (Oxford: 2009).

7 See, for example, Andrew Moravcsik, ‘In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union’ (2002) 40(4) *Journal of Common Market Studies* 603 and A. Follesdal and S. Hix, ‘Why there is a Democratic Deficit in the EU’ (2006) 44(3) *Journal of Common Market Studies* 533-562.

8 H. Friese and P. Wagner, ‘The Nascent Political Philosophy of the European Polity’ (2002) 10(3) *The Journal of Political Philosophy*, 342-364; R. Bellamy and D. Castiglione, ‘Legitimizing the Euro-‘polity’ and its ‘Regime’: The Normative Turn in EU Studies’, (2003) 2(7) *European Journal of Political Theory*, 7-34.

Arguably, the most important factor influencing accounts of EU law was the development of the doctrines of direct effect and supremacy by the European Court of Justice<sup>9</sup> (ECJ) which distinguished the EU's legal order from 'classic' international law and provided the catalyst for EU constitutional discourse.<sup>10</sup> These doctrines, which defined the nature of the legal system established under the EU's founding treaties, have left an indelible mark on the concept of law which dominates EU legal studies, including that adopted in the influential Integration Through Law (ITL) project.<sup>11</sup> The significance of these doctrines with respect to a theory of EU law were that EU law was better theorised as a *domestic constitutional* legal system and *not* a species of international law.<sup>12</sup> Thus, from the point of view of legal philosophy, the most relevant theoretical accounts of law for the EU were those developed in the state context, such as that of Hobbes and Bentham, or more latterly Kelsen, Hart and Raz, than some sort of *ius gentium* entailing International law's deficiencies in respect of the hallmarks of legality.<sup>13</sup> On this constitutional reading, then, the EU treaty system was compatible with having a Kelsenian basic norm presupposed in relation to it,<sup>14</sup> or had prompted a change in the national rule of recognition where national laws were subordinate to conflicting provisions of EU law.<sup>15</sup>

That the domestic 'constitutional' premise informed the concept of law employed in the ITL project with respect to the EU context was clear from the introductory chapter to this important groundbreaking study.<sup>16</sup> The setting of the project within a federal and

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9 Case 26/62, *Van Gend en Loos* [1963] ECR 13; Case 6/64, *Costa v ENEL*, [1964] ECR 585.

10 For an overview of the various discourses in EU constitutionalism, see C. Mac Amhlaigh, 'The European Union's Constitutional Mosaic: Big 'C' or Small 'c', Is that the Question?' in N. Walker, J. Shaw and S. Tierney (eds.), *Europe's Constitutional Mosaic* (Hart, 2011).

11 M. Cappelletti, M. Seccombe and J.H.H. Weiler, *International Through Law: Europe and the American Federal Experience*/3 Vols. (Berlin/New York: de Gruyter, 1985). This study is very wide-ranging and covers a number of jurisdictions. In this contribution I will talk exclusively about the claims of the project which are relevant for the EU integration experience with a particular emphasis on the introductory chapter to the entire project which provides a comprehensive overview of the general approach taken in the study.

12 See Weiler, (1999), Chapter 9.

13 Tasioulas, (2010), 97.

14 For discussion in the EU context, see Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law' (1997) 16(4) *Law and Philosophy* 337.

15 Hart, *The Concept of Law*, (Clarendon, 1994), 94. For a discussion of this in the UK context, see P. Craig, 'Sovereignty of the United Kingdom after Factortame' (1991) 11 *Yearbook of European Law*, 221.

16 M. Cappelletti, M. Seccombe and J.H.H. Weiler, 'International Through Law: European and the American Federal Experience, A General Introduction' in M. Cappelletti, M. Seccombe and J.H.H. Weiler, *International Through Law: Europe and the American Federal Experience*/Vol. 1, Methods, tools, and institutions, (Berlin/New York: de Gruyter, 1985). Hereinafter ITLI.

constitutional framework<sup>17</sup> presaged the domestic jurisprudential setting within which the study was set. The comparison between the EU and other *constitutional* federal polities, entities such as the US, Canada, Australia, Germany and Switzerland,<sup>18</sup> simply served to emphasise the constitutional jurisprudential credentials of EU law. In this way, the federal-constitutional setting was distinguished from the relative anarchy of international law.<sup>19</sup>

In this contribution, the concept of law adopted in the ITL project will be interrogated. The following section will argue that, notwithstanding claims to the contrary in the project itself, that the concept of law adopted in ITL was a legal positivist one. This claim is pursued by analysing the characterisation of law in the project as the object and instrument of integration. The subsequent section argues that such a positivist conception of the law of European integration, with its emphasis on sources and unitariness,<sup>20</sup> is in tension with the constitutive frame of the ITL project; the federal principle.<sup>21</sup> This is explained by the fact that whereas the former insists on the resolution of the question of final authority vis-à-vis the EU and national legal systems, the latter tends towards its *irresolution*. In the ensuing section, it will be argued that until relatively recently, the positivist approach to EU law has dominated EU studies at the expense of the federal principle. This situation is changing with the advent of constitutional pluralism in EU legal studies, which militates in favour of the federal principle and the *irresolution* of the question of final authority in EU law. This development in turn raises questions regarding the continuing relevance of positive law in European integration and, by implication, the relevance of the ITL project to contemporary EU legal studies; themes which are briefly considered prior to the conclusion.

## **2. Supranational Legal Positivism: law as object and instrument**

In the introduction to the ITL project, the editors outlined the comparative method which was to constitute both the methodology and philosophy of the study.<sup>22</sup> This comparative method served to reveal ‘actual societal problems and needs, developments and trends, shared by

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17 ITLI, 6-10.

18 Cappelletti et al (1985).

19 ‘The distinction between an international and a federal system lies in the fact that in the federal system, the “central” authority partially replaces the state government in a direct governmental relationship with the people, and that within the areas of federal competence the states are no longer considered as sovereign subjects, but rather are subordinated to the federal authority’. ITLI, 27.

20 See below.

21 ITLI, 12.

22 ITLI, 5.

certain societies.<sup>23</sup> More strikingly from the point of view of legal philosophy, according to the authors, this historico-comparative method entailed a ‘third school of legal thinking’ which constituted a *via media* between legal positivism and natural law. As such it was ‘different both from mere positivism, for which law is a pure *datum* not subject to evaluation, and from evaluation of such *datum* based on abstract, airy inevitably subjective criteria such as “natural law” principles’.<sup>24</sup> Notwithstanding these claims, the jurisprudential implications of this ‘third school’ of legal thinking are not unpacked in the introduction. Rather, the emphasis is placed on extrapolating issues of federal theory and comparative politics.<sup>25</sup>

Whereas this comparative approach and the overall study itself were ground-breaking, particularly as means of shedding light on what was then (and is still to an extent now) a rather nebulous and almost wholly misunderstood EEC/EU, it is not clear, from the point of view of legal philosophy, how the ‘third school’ approach ploughed a new furrow between the traditional trenches of natural law and legal positivism. Indeed, it is the contention of this contribution that the conception of law adopted in the ITL project was, notwithstanding the claims to the contrary, a positivist one.

Perhaps one of the most well-known aspects of the ITL project was its characterisation of the role of law in the process of integration. It was set out quite clearly at the beginning of the study, that law was to constitute both the ‘object’ and ‘instrument’ of European integration.<sup>26</sup> This characterisation of law, far from forging a third way in legal philosophy puts the concept of law in the ITL project squarely within the domain of legal positivism.

Legal positivism is a broad area of scholarship in legal philosophy which deals with questions regarding the nature and existence conditions of law.<sup>27</sup> Perhaps at its most basic, the various strands of positivist thought converge with respect to their insistence on the

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23 ITLI, 5.

24 ITLI, 5.

25 ITLI, 5 et seq. This is supported by the fact that the approach to law seems to be based on a nebulous ‘federal vision’: ‘By eschewing the temptation both of a strict natural-law-type *a priori* affirmation of a particular model of integration ... and of the inward-looking positivistic visionless step-by-step approach ... one may actually remain with a vision—of federal integration—while examining critically, and objectively, the permutations of different federal arrangements.’ ITLI, 8.

26 ITLI, 15.

27 See generally L. Green, “Legal Positivism” in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, (2003), <http://plato.stanford.edu/entries/legal-positivism/>.

‘boundary’<sup>28</sup> or ‘demarcation’<sup>29</sup> question as to questions of legal validity; the ‘boundary’ itself relating to the extent to which, if at all, considerations of political morality are relevant to legal validity.<sup>30</sup> This basic premise regarding the relationship of morals to legal validity is developed to various degrees in positivist thinking in different precepts, such as that the criteria for establishing whether a norm constitutes valid law does not, or should not, depend on its moral content,<sup>31</sup> that morality may inform the sources of law but does not play any role in the formal recognition of legal validity,<sup>32</sup> or that the adjudicatory process entails a political morality which is external to the concept of law itself.<sup>33</sup> As will be illustrated, the characterisation of law as the object and instrument of integration each constitute a manifestation of legal positivism in that they rely on a ‘boundary’ between law and morals with regard to the validity of the law of European integration.

#### *A. Law as Object*

In positing law as the object of integration, the ITL project countenanced the ‘problems created by the interaction of several initially distinct legal systems under the umbrella of a central authority’.<sup>34</sup> In the EU context, the target of this integration, the ‘initially distinct legal systems’, were national legal orders. Central to the conception of law as the object of integration was the notion of a central *authority* which would coordinate and integrate these diverse national legal systems. This coordination and integration would itself occur through *law*, that is the norms of the EU legal system.<sup>35</sup>

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28 L. Murphy, ‘Concepts of Law’ (2005) 30 *Australian Journal of Legal Philosophy*, 1.

29 B. Leiter, ‘The Demarcation Problem in Jurisprudence: A New Case for Skepticism’ in J. Ferrer & J. Moreso (eds.), *Neutrality and the Theory of Law*, (Madrid, Marcial Pons: 2011).

30 For a classic account see H.L.A. Hart, ‘Positivism and the Separation of Law and Morals,’ (1958) 71 *Harvard Law Review* 593

31 Often referred to as ‘hard’ or ‘exclusive’ positivism.

32 Frequently referred to as ‘soft’ or ‘inclusive’ positivism.

33 For a discussion of this particular point, see R. Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1978), Chapter 2.

34 ITLI, 15.

35 The notion of law as the instrument or agent of EU integration (see below) can also be of relevance here in the sense that EU law as authoritative law can be seen as the agent propelling further integration. This is not the sense in which I mean law as instrument in this chapter which is further explained below. I would like to thank Daniel Augenstein for bringing this point to my attention.

This is explained by the fact that the integration of national legal systems could only occur through their simultaneous conforming to the provisions of (superior) EU law.<sup>36</sup> However, EU law could only play the role of the momentum behind the integration of national legal systems if it acted as a credible superior law. The building blocks for EU law as superior and authoritative law were put in place with the ECJ's insistence upon the *supremacy* of EU law.<sup>37</sup> Thus, the idea of law as the object of integration, instrumentalised through the supremacy doctrine, implied a conception of EU law as *authority*. It is argued that Raz's analytical account of the authority of law and legal norms best explains the idea of law as the object of integration through coordinating national legal systems under its own supremacy or authority.

Briefly, Raz's conception of authority and legal obligation is predicated on a distinction between first order and second order reasons for action in practical reasoning.<sup>38</sup> This distinction emerges from the fact that conflicts between first order reasons and first order and second order reasons are qualitatively different.<sup>39</sup> First order reasons entail making a decision based on the *preponderance of the balance of reasons*, considering the relative weight of competing reasons.<sup>40</sup> Secondary reasons are of a different nature, providing *exclusionary reasons* for action regardless of the preponderance of the balance of first order reasons.<sup>41</sup> That is, that second order reasons provide reasons for refraining from acting on the preponderance on the balance of first order reasons.<sup>42</sup> In this way, then, second order exclusionary reasons are *categorical and pre-emptive*,<sup>43</sup> in that their weight in practical reason does not rely on an assessment of their content through a process of rational

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36 It is the notion of EU law as superior law is one of the central tenets of EU constitutionalism. See Weiler, (1999), Mac Amhlaigh, (2010). On the specifically integrative function of constitutionalism, see D. Grimm, 'Integration by Constitution' (2005) 3(2-3) *International Journal of Constitutional Law* 193

37 *Costa* (1963).

38 J. Raz, *Practical Reason and Norms*, (Hutchinson, 1975), 36. Hereinafter PRN.

39 PRN, 36.

40 PRN, 36.

41 PRN, 39.

42 PRN, 39. In Raz's terminology: 'If p is a reason for x to  $\phi$  and q is an exclusionary reason for him not to act on p then p and q are not strictly conflicting reasons. q is not a reason for not  $\phi$ -ing. *It is a reason for not  $\phi$ -ing for the reason that p.* The conflict between p and q is a conflict between a first-order reason and a second-order exclusionary reason. Such conflicts are resolved not by the strength of the competing reasons but by a general principle of practical reason which determines that exclusionary reasons always prevail, when in conflict with first-order reasons.'

43 L. Green, 'Legal Obligation and Authority' in E. Zalta (ed.) *Stanford Encyclopedia of Philosophy*, (2003) p. 6; <http://plato.stanford.edu/entries/legal-obligation/>.

deliberation, but rather on their authoritative nature.<sup>44</sup> For Raz, certain norms must be regarded as second-order exclusionary reasons, in particular those which are issued by an authority justified by the need to secure coordination.<sup>45</sup> Legal norms therefore provide exclusionary second-order reasons for action independently of the content of the norm itself.

That this conception of law constitutes a form of legal positivism is clear from Raz's justification of authority based on its function of societal coordination.<sup>46</sup> One of the functions of authority is the provision of benefits to its subjects in the form of coordination and gives them reasons for following the dictates of the authority. However, this function of authority cannot be achieved unless the norms provide *content-independent* exclusionary reasons for action. If the decision of whether to follow a norm issued by an authority is open to deliberation as to its content, then it would cease to be authoritative and its purpose and utility would be thwarted.<sup>47</sup> Raz argues that given that we disagree as to what, precisely, can be morally justified, the authority of law in particular (entailing questions of legal validity) cannot be based on such contested moral precepts.<sup>48</sup> Thus, for law to constitute authority, its validity must be established independently of contested notions of morality.

In applying this scheme of authority to the EU context, and the authority of EU law in particular, the norms of EU law constitute second order exclusionary reasons as against *the norms of national law* which constitute first order reasons. The authoritative nature of EU law—which law as the object of integration entails—requires that national legal actors must view the norms of EU law as authoritative and therefore *as second order exclusionary reasons* for deciding cases. Thus, when a norm of EU law is applicable to a particular case, national courts must base a judicial decision on the categorical and pre-emptive authority of EU law and *emphatically not engage in a balancing exercise* on the relative merits of the EU norm vis-à-vis the national norm. Law as the object of integration implies that EU law is applied even if, on the balance of first order reasons the case would be decided differently,

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44 'Such conflicts are resolved not by the strength of the competing reasons but by a general principle of practical reasons which determines that exclusionary reasons always prevail, when in conflict with first-order reasons', PRN, 40.

45 PRN, 74. He notes elsewhere that '[t]o regard a person as having authority is to regard at least some of his orders or other expressions of his views as to what is to be done ... as authoritative instructions, and therefore as exclusionary reasons', PRN, 58-9

46 PRN, 74.

47 RPN, 79.

48 '[T]he subjects of any authority ... can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle'. Raz, *Ethics in the Public Domain*, (Oxford, 1995), 203.

due to the fact that, for example, a national provision protecting fundamental rights was at stake. To do otherwise would be to undermine the authority of EU law and would vitiate the role of EU law as the *object* of integration.

### *B. Law as Instrument*

The second characterisation of law in the ITL project, as the instrument or agent of integration, also entails a legal positivist conception of EU law. As the introduction to the project states, law as the instrument of integration implies that law is ‘but one of many social instruments harnessed to achieve a wider societal objective’.<sup>49</sup> Thus, in the EU context, law is the catalyst for the integration of other social spheres such as the economic through, for example, the establishment and development of the single market through the free movement of the factors of production and an open regime of competition.<sup>50</sup>

That the conception of law which underpins this idea is a positivist one is clear from the emphasis on law as a functional tool or ‘social technology’. On this account, law is a means to some (political) end<sup>51</sup> such as the alleviation of poverty, the maximisation of general welfare or, more abstractly, the maintenance and stabilisation of societal expectations despite disappointment.<sup>52</sup> Whereas the ends to which law can be put are, on the functionalist account, diverse,<sup>53</sup> the question of the validity of law on the functionalist account must be determined independently of political or moral considerations. Simply put, if law is to achieve an undefined array of aims in society, and therefore fulfil its functional promise, then the conditions for its existence as law cannot rely on evaluative criteria such as moral or political principles.<sup>54</sup> If the criteria for legal validity were ideologically loaded, then it would fail as a functional tool. Central to the functionalist account and its positivist character is law’s *neutrality* in the face of rival political and moral preferences. It is precisely the

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49 ITLI, 42.

50 See generally, Part Three of the Treaty on the Functioning of the European Union, O.J. 2007 C 306.

51 See Tamanaha, *Law as a Means to an End*, (Cambridge, 2006), Chapter 7.

52 N. Luhmann, *Law as Social System*, K. Ziegert trans. (Oxford: 2004), Chapter 3.

53 It is clear that there are limits to what law can achieve, even on a strongly functionalist account. However, for current purposes, the function of law is at least as broad as the various aims of government policy encapsulating both sides of the political divide. Thus, law can be used both to establish a strong social welfare state as well as defend a strongly neo-liberal political agenda. See Tamanaha (2006).

54 M. Loughlin, ‘Theory and Values in Public Law: An Interpretation’ (2005) *Public Law*, 48-66. For current purposes I am bracketing the broader critical challenge that the law itself, in terms of its methodology and procedure, entailing questions of standing and legal right, envisages a (politically biased) atomistic view of society. For discussion see XXX? I would like to thank Claudio Michelon for bringing this point to my attention.

separation between law and morals on questions of legal validity which secures law's *neutrality* (that is lack of moral or political bias) and thus ensures its versatility and functional capability as a tool of social engineering.<sup>55</sup> As Raz notes, 'it is of the essence of law to guide behaviour through rules and courts in charge of their application ... Like other instruments, the law has a specific virtue which is *morally neutral* in being neutral as to the end which the instrument is put'.<sup>56</sup> Thus, if law is simply a functional tool, the message which it carries, or the facts with which it engages, can be 'progressive or reactionary, just or unjust, moral or immoral',<sup>57</sup> but none of these factors affect in any way its status as law.

There is a strong affinity between the ITL project's characterisation of law as the instrument of integration and one of the predominant early political theories of European integration; namely neo-functionalism.<sup>58</sup> As a theory of European integration, neo-functionalism provided an explanation of the European integration process based on a 'spill-over' effect, which envisaged the 'spilling over' of one area of integration into another, in which law played a central role.<sup>59</sup> This is illustrated, for example, by reference to 'the spilling over of community legal regulation from the narrowly economic domain into areas dealing with issues such as occupational health and safety, social welfare, education, and even political participation rights'.<sup>60</sup> In this way, the gradual integration of a variety of social and political fields would be ensured as 'externalities' of the application of EU law. In the EU context in particular, a functionalist (and therefore positivist) conception of law was a particularly suitable medium to carry out this task, due to its politically neutral nature.<sup>61</sup> Filling the empty vessel of positive law with market-making and integrationist tendencies such as, for example, legal prohibitions on discriminatory taxes, would have effects not just in areas of taxation or economic policy but would also influence other areas affecting perhaps

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55 Loughlin, (2005).

56 J. Raz, 'The Rule of Law and its Virtue' in *The Authority of Law*, (Oxford: Clarendon, 1979), 225-6. *Emphasis Added*.

57 Loughlin, (2005), 53.

58 Generally associated with the work of Ernst Haas: E. Haas, *The Uniting of Europe*, (London: Stevens & Sons, 1958). See also A. Niemann & P. Schmitter, 'Neofunctionalism' in A. Wiener & T. Diez (eds.), *European Integration Theory*, (Oxford: OUP, 2009). On the role of law in neo-functionalist theory, see G. de Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 12(2) *Journal of European Public Policy*, 310-326.

59 de Búrca, (2005), 315.

60 A. Burely and W. Mattli, 'Europe before the Court: a political theory of legal integration' (1993) 47(1) *International Organization* 41-77, 43.

61 Although it didn't feature strongly in early neo-functionalist literature. de Búrca, (2005), 311.

more profound moral or political choices.<sup>62</sup> The ‘expansionary tendencies of law’<sup>63</sup> would advance the cause of integration in a way that other forms of social interaction, such as economics, religion or perhaps most importantly politics, could not.

### 3. Legal Positivism and European Integration

If the preceding argument that an account of law as the object and instrument of integration entails a legal positivist concept of law is sound, this has important implications for European integration more generally. Perhaps the most salient impact of a positivist conception of EU law on European integration is the subordination of national law to EU law, and national authority to the authority of the EU. This can be explained by legal positivism’s insistence on sources, and one source in particular, as the criteria for legal validity.<sup>64</sup> Moreover, the single source of law maintains the internal coherence and systemic nature of the legal system by ensuring that all the norms of the system cohere with the source of law which is in a hierarchical relationship to all the other norms of the system.<sup>65</sup>

Legal positivism, therefore, entails *a clear resolution of the question of ultimate authority* in a political system. The existence or claim that a legal system is one of positive law, therefore presupposes the resolution of the question of ultimate authority in favour of the source of that law. In a state setting, this point is relatively uncontroversial, where the question of ultimate authority is relatively settled in the notion of state sovereignty. However, in a more ambiguous legal context, such as that of the EU, the effect of a positivist conception of EU law is the creation of a *strong centripetal effect* towards unity and centralisation at the EU level, due to the reflexivity of law and politics.<sup>66</sup> Thus, the conception of EU law adopted in the ITL project entailed a bias towards *unity* and *hierarchy* and increased centralisation at the level of the EU.<sup>67</sup> In this regard it is hardly surprising that the orthodox view of legal integration was that law and integration were ‘naturally

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62 The classification of abortion as an economic service being a case in point. See Case C-159/90 *SPUC v Grogan* [1991] 3 *Common Market Law Review* 849.

63 de Búrca, (2005), 317.

64 This remains the case even in accounts of law which accept that morality may influence the source itself, so called ‘inclusive positivism’.

65 See H. Kelsen, *General Theory of Law and State*, (HUP, 1945).

66 At least as structurally coupled in the state setting, and, by analogy, the ‘constitutional’ EU setting. See G. Teubner, ‘Fragmented Foundations: Societal Constitutionalism beyond the Nation State’ in P. Dobner & M. Loughlin (eds.), *The Twilight of Constitutionalism*, (OUP, 2010).

67 This then raises questions regarding the value of the neutrality of the conception of integration adopted in the project. See ITLI, 12.

compatible<sup>68</sup> such that compliance and obedience to European law inevitably meant more integration.<sup>69</sup>

However, perhaps more significantly from the viewpoint of the ITL project, this positivist conception of law was in tension with the ‘federal vision’ which framed the study.<sup>70</sup> As the introduction makes clear, this federal frame was not to be confused with examples of federal states such as the US or Germany which, notwithstanding the federal tag, have actually evolved as centralised or unitary states.<sup>71</sup> Rather, the federal *principle* entailed the ‘entire frame and not merely a centre around which the periphery coalesces’.<sup>72</sup> This version of the federal idea is similar to what Morgan has called ‘genuine federalism’.<sup>73</sup> This account of federalism seeks the: ‘dispersal rather than concentration of power in a centralised political authority ... [and is] critical of the sovereignty principle and the modern nation-state, which [it] seek[s] to replace with a decentralised federal polity.’<sup>74</sup>

The ITL’s federal principle as opposed to a federal state, then entails an *elemental ambiguity with regard to the question of ultimate authority*, leaving it an open question as to whether ultimate authority lies with the centralised federal authority or at the level of the federal units. Thus, the federal principle signifies more than the mere existence of a two-tier system of government but rather, and more importantly, denotes the *irresolution* of the question of ultimate authority in the system. This federalist endorsement of the irresolution of the question of ultimate authority is therefore in clear tension with legal positivism’s insistence on its *resolution*.<sup>75</sup>

#### **4. Constitutional Pluralism and the Rise of the Federal Principle**

Notwithstanding the prominence of the federal principle in the ITL project, it is arguably no exaggeration that it was a positivist conception of law which dominated legal practice and

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68 J. Shaw, ‘European Union Legal Studies in Crisis? Towards a New Dynamic’ (1996) 16 *Oxford Journal of Legal Studies* 231, 233.

69 Shaw (1996), 237.

70 ILTI, 8.

71 ITLI, 13.

72 ITLI, 14.

73 G. Morgan, *The Idea of a European Superstate*, (Princeton, 2004) 12.

74 Morgan (2004).

75 A tension which was recognised by the authors of the ITL project. “[C]oncepts [of law from legal positivism] ... have constituted an essential and laudable foundation in the quest for unity within the federal equation; but they could also seem to suggest that if integration, as manifest in these concepts, were taken to its logical conclusion, it would not be consonant with the federal principle.” ITLI, 14.

academic scholarship in the early years of the integration experience, at the expense of the federal principle.<sup>76</sup> As noted above, the supremacy doctrine of the ECJ was the lynchpin of the EU-law-as-positive-law school of thought, attempting a definitive resolution of the question of ultimate authority by unambiguously asserting the superiority and authority of EU law and emphatically not encouraging the opening of the question of ultimately authority to contestation. Thus, when the project was undertaken, the editors of the ITL project could still claim, with some assurance that:<sup>77</sup>

‘On the legal level it would seem as if the major constitutional principles of the system—direct effect, supremacy and the rest—have reached a certain maturity. What is now being called into question, however, is the day-to-day implementation of Community law, the incorporation of directives, the compliance with Community law, the obedience to the system’

This perhaps slightly complacent but not wholly unwarranted observation was relevant to the times, when national constitutional courts, on the whole, applied European law (and those who did not had the good manners to keep reasonably quiet about it by simply ignoring EU law or refusing to make preliminary references). At least, that is, until national supreme courts started to become increasingly vocal in their opposition to the authority claims implicit in the supremacy of EU law and the centripetal tendencies of supranational legal positivism. These national courts, most notoriously perhaps the German Constitutional Court,<sup>78</sup> disputed the positivist premises of EU law with its resolution of the question of ultimate authority in the EU legal space. This counter-narrative to the positivist-inspired supremacy of EU law and its centripetal tendencies claimed that the final authority of the system lay with *their* constitutions and their interpretation by these courts.<sup>79</sup> Strictly speaking, this challenge from national constitutional courts did not constitute an assertion of the federal principle against the constitutional one, but rather pitted one legal positivism against another, the superiority of the EU system against the superiority of the national constitutional system. Therefore, rather than leaving the question of the final authority of the

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76 See Shaw, (1996).

77 ITLI, 11.

78 Initially in its *Brunner* but more recently its *Lisbon* judgments: *Brunner v. European Union Treaty*, [1994] CMLR, 57; *Lisbon Case*, BVerfG, 2BvE 2/08, Judgment of 30th June 2009.

79 *Brunner*, (1994).

EU legal system open, as the federal principle requires, national constitutional courts claimed that the question of final authority should be resolved *in their favour*.

Even if the rival claims from the ECJ regarding the supremacy of EU law, and national constitutional courts claiming national constitutional supremacy is essentially a restatement of rival positivisms, more recent theorisation of this conflict under the banner of constitutional pluralism can be interpreted as the rise of the federal principle at the cost of the purely positivist conception of EU law.

Constitutional Pluralism is a reasonably broad church which theorises the rival claims to ultimate authority between EU law and national constitutional law.<sup>80</sup> What defines constitutional pluralism as a distinct theory of constitutional conflict, is its insistence that the rival authority claims by national and supranational actors be taken seriously, and not dismissed as either an illegitimate ‘power grab’ by supranational judicial actors, nor judicial parochialism on the part of national judicial actors. Thus the resolution of ultimate authority cannot be resolved by definitional or judicial fiat. Rather, as Walker notes, constitutional pluralism entails a fundamental epistemic dimension. According to this aspect of constitutional pluralism:<sup>81</sup>

‘It is only possible to identify the different sites [of claims to authority] as different units if we already acknowledge that the underlying symbolic work involved in representing each of these sites as units—and so also as *unities*—requires a different way of knowing and ordering, a different epistemic starting point and perspective with regard to each unit(y); and that so long as these different unit(ies) continue to be plausibly represented as such, there is no neutral perspective from which their distinct representational claims can be reconciled.’

The claims by national constitutional actors and the theorisation of the ensuing situation in terms of Constitutional Pluralism therefore, does not allow for a clear and definitive resolution of the question of ultimate authority between national and supranational actors. In this way, constitutional pluralism and the federal principle of the ITL project, are ‘comfortable bedfellows’ in the sense that they both jettison a single and final resolution of the question of ultimate authority. However, if constitutional pluralism, like the federal

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80 The literature on constitutional pluralism is expanding exponentially. For an overview see M. Avbelj & J. Komárek (eds.), *Four Visions of Constitutional Pluralism*, (2008) *European Journal of Legal Studies*, 2(1) 325-370.

81 N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65:3 *Modern Law Review* 317, 338.

principle, is predicated on the irresolution of ultimate authority, then what role is left in contemporary EU legal studies for the positivist conception of EU law which is central to the ITL project? If the question of ultimate authority is to remain unresolved, then a sources-based conception of legal positivism is clearly incompatible with the newer federalist realities of European legal integration. The answer lies in a shift in constitutional pluralism approaches to EU legal integration from a legal positivist conception of EU law as contained in the ITL project to a broader concept of law which contains principles of political morality.

Kumm's model of constitutional pluralism for example, entitled *European Constitutionalism beyond the State (ECS)*, is a particularly salient example of this trend.<sup>82</sup> In devising principles of EU law to resolve constitutional conflicts, he identifies three scenarios when such conflicts may arise; cases where EU law runs the risk of violating fundamental rights protected in national constitutions,<sup>83</sup> cases involving disputes regarding *Kompetenz-Kompetenz*, that is which site, national or supranational, should patrol the jurisdictional boundaries in the EU constitutional space,<sup>84</sup> and finally cases which involve conflicts between EU law and constitutional provisions which do not entail fundamental rights and might otherwise be the subject of 'ordinary' law such as restrictions on service in the armed forces based on sex.<sup>85</sup>

To manage such conflicts Kumm enumerates a series of open-ended *framework principles* of European law applying to cases of constitutional conflicts between national and supranational law.<sup>86</sup> The first of these principles is the principle of legality, entailing a presumption in favour of the effective and uniform enforcement of EU law, even where it putatively conflicts with provisions of national constitutional law.<sup>87</sup> The presumption is rebuttable, however, by three sub-principles; fundamental rights protection, subsidiarity and democratic legitimacy.<sup>88</sup> Thus, where a national court considers that a provision of EU law

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82 M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) *European Law Journal* 262-307. (Hereinafter JCC)

83 JCC, 264.

84 JCC, 264..

85 JCC, 265.

86 Subject to a threshold question of 'fit'. JCC, 286.

87 JCC, 299.

88 JCC, 299-300.

fails to protect the aims of one of the three sub-principles, then it can set aside the provision of EU law in that particular legal controversy.

These principles provide a ‘structuring device’<sup>89</sup> for constitutional conflicts which ensures the optimisation of the uniform application of EU law, but not at the cost of compromising important values and principles of national constitutional law which may prevail in exceptional circumstances. Moreover, ECS is a resolutely constitutional pluralist approach in that it does not provide a ‘relatively hard and fast answer’<sup>90</sup> to the relationship between national and supranational courts. Thus, the question of ultimate authority in the EU legal order is left *unresolved*, the principles providing a framework for ‘mutual deliberative engagement’<sup>91</sup>.

Similarly, Maduro, in his thesis of ‘contrapuntal law’ develops principles which provide a ‘common basis for discourse’<sup>92</sup> between national and supranational legal actors engaged in resolving conflicts between the two systems. This model entails a commitment by all legal actors involved in the practice of EU law (both national and supranational) to this set of principles which are identified as the principles of pluralism;<sup>93</sup> consistency and vertical coherence;<sup>94</sup> universalisability,<sup>95</sup> and institutional choice.<sup>96</sup>

What is significant in this turn to principles of constitutional pluralism to manage constitutional conflicts regarding EU law contained in Kumm and Maduro’s models, is that, as noted, they expand the conception of law employed in EU legal studies from the positivist-inspired law of the ITL project to one in which principles of political morality (in this case principles of constitutional pluralism) are immanent in the concept of EU law itself and not excluded by rigid criteria of legal validity such as rules of recognition.<sup>97</sup> In this regard, such a principled concept of EU law does not insist on the strict boundary between legal rules and

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89 JCC, 300.

90 JCC, 300.

91 JCC, 301.

92 M. Maduro, ‘Contrapuntal Law: Europe’s Constitutional Pluralism in Action’ in N. Walker (ed.), *Sovereignty in Transition*, (Oxford, Hart, 2003), 524..

93 Maduro (2003), 526.

94 That is a commitment by national courts to the coherence of the EU legal order, Maduro (2003), 527.

95 That national court decisions should be susceptible to justification in universal terms, and notably according to the EU legal order, Maduro, (2003), 529.

96 That a variety of institutions can take part in managing constitutional conflicts, Maduro, (2003), 530.

97 See Hart, (1994).

moral principles and rule-based criteria for legal validity,<sup>98</sup> but offers a Dworkinian-inspired conception of law<sup>99</sup> where the boundary between law and morality is at least perforated if not completely dissolved. This shift in the concept of EU law is explicitly acknowledged by Kumm in his account of the law of ECS which:<sup>100</sup>

‘insists on the central role of principles of political morality—principles that are not only substantive, but also procedural and jurisdictional—as an integral part of any plausible conception of law in the liberal democratic constitutional tradition’

In terms of constitutional conflict then, as outlined above, the ‘principled’ conception of EU law presupposes the existence of political or moral principles which are embedded in the EU’s legal order. Moreover, such principled accounts of EU law are a vindication of the ITL’s federal principle where the answer to the question of the locus of ultimate authority through the application of EU law or national law, will vary from case to case and is ultimately contingent on the application of the framework principles of constitutional pluralism. Maduro’s metaphor of counter-point, the musical device where different voices follow an independent melody but remain in harmony with each other, provides a particularly graphic illustration of the open-ended nature of the principles of constitutional pluralism as one voice cannot dominate or drown out the others.

### **5. The Twilight of Integration Through (positive) Law?**

As was argued above, the ITL project entailed a positivist-inspired concept of law which was analogous to domestic positive law. Moreover, the supremacy doctrine was central to this EU-law-as-legal-positivism school of thought entailing the harmonisation and centralisation of national law under the authority of EU law. This assumption has been forcefully challenged in the past two decades, largely due to the assertion of national constitutional supremacy by national courts in cases of constitutional conflict with EU law. This, in turn, has given rise to a new paradigm of EU law, constitutional pluralism, which is predicated on a ‘principled account’ of EU law and therefore represents a shift away from positivist conceptions of law such as that contained in the ITL project. Moreover, the effect of this ‘principled turn’ in EU legal studies, is a diminution of a positivist conception of EU law and the augmentation of the federal principle, given that the former requires the resolution of the

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98 See generally Dworkin, (1978).

99 Dworkin (1978). and *Law’s Empire*, (London: Duckworth, 1986).

100 Kumm, JCC, 268

question of ultimate authority in the EU legal order, whereas the latter tends towards its irresolution.

Notwithstanding these developments, it would be foolhardy to exaggerate the significance of the EU's constitutional conflicts,<sup>101</sup> and perhaps more importantly the relevance or impact of theoretical accounts of EU law on the practice of EU law, whether at the national or supranational levels.<sup>102</sup> However, the evolution of constitutional pluralism and its principled conception of law raise questions as to the continuing relevance of law in European integration more generally. It is beyond the scope of this brief contribution to explore these issues in any detail, however, I would like to briefly sketch one potential problem with the development of constitutional pluralism and its principled conception of EU law which question the continuing predominance of law in the integration process. This problem reflects a 'Hobbesian objection' to the insertion of principles of political morality into a supranational conception of law. This Hobbesian objection is loosely based on Hobbes' justification of sovereignty and relates to the necessity of an over-arching sovereign decision maker to resolve societal disputes in order to ensure societal coordination.<sup>103</sup> For Hobbes, the state of nature was characterised by deep disagreement and potentially violent conflict which could be avoided by a mutual submission to sovereign authority. This sovereign was to be all powerful in order to avoid the re-emergence of the conflicts of the state of nature and required the unwavering respect and obedience of its subjects.<sup>104</sup> If the obedience to the sovereign was conditional, then the purpose of sovereignty in releasing individuals from the violence of the state of nature would be thwarted. In this way Hobbes warned against:

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101 For example, de Búrca characterises the German Federal Constitutional Court's decision as 'shots over the bow'. G. de Búrca, 'Sovereignty and the Supremacy Doctrine' in N. Walker (ed.), *Sovereignty in Transition*, (Oxford: Hart, 2003), 455. Kumm, moreover, notes that despite the curial posturing, no state has ever deliberately attempted to reassert national constitutional supremacy by legislating in explicit contravention of EU law, see JCC, 303.

102 Although, one the proponents of constitutional pluralism, Miguel Maduro, until recently an Advocate General of the European Court of Justice has referred to constitutional pluralism in his opinions. See, for example, Case C-402/05 and C-415/05, *Kadi and Al-Barakaat*, 2008.

103 See generally T. Hobbes, *Leviathan*[1651], R. Tuck (ed.), (Cambridge, 1997).

104 Although, the extent to which Hobbes' sovereign could be resisted is unclear. See G. Burgess, 'On Hobbesian Resistance Theory' (1994) *Political Studies*, XLII, 62-83.

‘the potential evils that might be expected to afflict societies whose members were unable to disentangle their judgments about what was required or permitted by the law of their society from their individual judgments about justice and morality’.<sup>105</sup>

This Hobbesian justification of authority translates into legal theory in terms of a sources-based positivist concept of law defended by, *inter alia*, Raz<sup>106</sup> and employed in the ITL project. The principled account of law in the constitutional pluralist literature, however, undermines this functionality by bringing such contestation into the concept of law itself.<sup>107</sup> In practice, what the insertion of principles of morality into the conception of EU law does is to undermine its authority. As noted above, according to a purely positivist conception of EU law as supported by the supremacy doctrine, when a national court is faced with resolving a legal problem which involves EU law, then the authority of EU law provides an *exclusionary reason* for not deciding the case on the balance of reasons involving national law. What the principles of constitutional pluralism elaborated by Kumm and Maduro require is that national courts now engage in a *balancing exercise* involving the ‘higher order’ or ‘framework’ principles of constitutional pluralism. Thus, EU law is deprived of its status as authority providing second order exclusionary reasons for deciding a case, and becomes merely a first order reason competing with other reasons (provisions of national law) which will be determined on the preponderance of the balance of reasons. This relegation of EU law norms to first order reasons therefore undermines the role of EU law in European integration such that its status as the object and instrument of integration is called into question.

This problem has been extensively explored in legal philosophy, particularly in response to Dworkin’s conception of law, and will not be examined in more detail here.<sup>108</sup> Rather, I wish to briefly consider the ‘Hobbesian objection’ to a principled account of law in respect of the characterisation of the EU legal order. Clearly, *any* account of law which attempts to perforate the strict boundary between legal validity and morality undermines this essential justification of authority in terms of positive law. However, it is argued that these concerns apply *a fortiori* in the EU context and can have particular unintended consequences

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105 See Waldron, “Legal and Political Philosophy” in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (Oxford: 2002), 369.

106 See above.

107 See Hart, ‘Postscript’ in Hart (1994), 251, 265.

108 Hart (1994), as well as the collection which emerged therefrom, J. Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law*, (Oxford, OUP, 2001).

given that, as the ITL project showcased, law had been so central to the creation of the EU as a *polity*, largely due to the fact that it lacked a pre-existing ‘political way of being’.<sup>109</sup>

Disagreement trails on the coat-tails of principles of political morality and therefore into the concept of EU law affecting its authoritative and pre-emptive nature. Given the deep disagreement surrounding the nature of the EU including its purpose and aims,<sup>110</sup> the identification of principles of constitutional pluralism are themselves contestable. Thus, while both Kumm and Maduro provide sophisticated justifications of the principles of constitutional pluralism which they elaborate, the very fact that they represent particular normative political standpoints means that they are not dispositive. Therefore, disagreement can thus emerge as to *what precisely the principles of constitutional pluralism are or should be*. A strong state-sovereigntist or constitutional nationalist viewing European integration in terms of a ‘Europe of sovereign states’, may disagree entirely with the principles of pluralism or universalisability highlighted by Maduro, and the presumption in favour of EU law as implicit in Kumm’s principle of legality. Should such an individual find themselves sitting on the bench of a national supreme or constitutional court, they would feel completely justified in disregarding them.<sup>111</sup>

Furthermore, even where a basic set of framework principles of Constitutional Pluralism could be agreed upon, the precise meaning of such principles could vary throughout the 27 jurisdictions of the EU, making the notion of principle as a uniform standard binding across all jurisdictions a chimera. This could also create a serious problem of free-riders, where national courts pay lip-service to the principles of constitutional pluralism thereby reaping the benefits of integration without surrendering decisional autonomy in sensitive matters of public policy. In sum, whereas the risks identified by Hobbesian objection to principled concepts of law apply to any legal system, in a precarious political setting such as the EU, they are particularly acute.

## 6. Conclusion

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109 Loughlin, ‘What is Constitutionalisation’ in Loughlin and Dobner (eds.), *The Twilight of Constitutionalism*, (OUP, 2010), 49.

110 Zenon Bańkowski and Emiliios Christodoulidis, ‘The European Union as an Essentially Contested Project’ in Zenon Bańkowski and Andrew Scott (eds), *The European Union and its Order* (Oxford, Blackwell, 1999).

111 For one such example involving the European Convention on Human Rights and the Irish Constitution, see *McD v. L & another*, [2007] IESC 81..

The ITL project highlighted the central role of *positive* law in European integration as an alternative way of managing international relations to traditional purely political methods such as balance of power politics. Law in this context provided reasons for action based on its own authority and not political preferences or strategic interests.

The emergence of constitutional conflict, constitutional pluralism and the principled conception of EU law in the decades after the ITL project, while clearly more ‘federalist friendly’, does call into question the future of law in the integration process at least as elaborated by the ITL project. The principled conception of law as elaborated primarily by Ronald Dworkin, was developed in respect of ‘communities of principle’ who enjoyed a ‘collective political morality’<sup>112</sup>, that is to say, the state setting where there is a reasonable level of agreement regarding certain questions of justice and fairness. The importation of such a principled account of law to a supranational ‘emerging polity’ such as the EU, whose dimensions and nature remain ‘highly fluid’<sup>113</sup>, is another matter, however.

It may be the case that the EU constitutional structure is now sufficiently robust to withstand the assimilation of (contested) principles of political morality into its conception of law. As the ITL project so effectively illustrated, law, specifically positive law, was central to the resilience of the constitutional structure. Should national and supranational judicial actors actively adopt the attitude to EU law endorsed by principled accounts of EU law in the constitutional pluralist literature, the resilience of this constitutional structure will surely be put to the test.

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112 Dworkin, (1978), 184.

113 See Shaw, (1996).