An Archaeology of EU Legal Discourse: The Legal Imagination Between Continuity and Discontinuity

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Abstract

This Article uses *70 Years of EU Law – A Union for Its Citizens* to illustrate how different positionalities in the present lead to divergent (re-) constructions of the past of European Union (EU) law. This, in turn, configures different imaginations of EU law's future. In order to show this, the paper puts the Legal Service's book in conversation with the academic literature. It shows a disconnect between the book's imagination of the future of EU law and the corresponding scholarly debates: while the former is focused on procedural reforms, the latter predominantly problematise matters of substance. The paper relates this mismatch to the respective, divergent postures towards EU law's past. In order to do so, it proposes an analytical

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framework which, building on Gerschenkron, understands 'continuity' and 'discontinuity' as possible modalities of (constructive) diachronic 'change'. The paper subsequently deploys Foucault's 'archaeological' analytical framework to further flesh out the conceptual contours of 'continuity' and 'discontinuity'. In this framework, 'continuity' describes change which takes place in harmony with 'foundations' assumed to remain stable. 'Discontinuity', on its part, denotes change which introduces new 'foundations' altogether. Against this background, the Legal Service's book interprets the history of EU law as one of continuity with European integration's mythical origins. On the other hand, the scholarly literature is much readier to understand EU law's path as discontinuous with the vision of the 'founders'. The paper understands such different attitudes towards EU law's past as (co-) responsible for configuring those different imaginations of its future. In turn, both such postures can be traced back to different claims to present-day authority. The paper thus calls for reflection on how EU law's temporality is constructed to legitimise different legal-political projects.

> '[F]or Europe, the memory of our past has always framed our future. And that is all the more important at a time when the unthinkable has returned to our continent. Russia's flagrant attempts to redraw maps and to rewrite even the most tragic parts of our history have reminded us of the dangers of losing our grip on both our past and our future. Of living in a perpetual present and thinking that things can never be different. […] But this Conference has shown us that Europeans are determined not to make this mistake. You have told us that you want to build a better future by living up to the most enduring promises of the past. Promises of peace and prosperity, fairness and progress; of a Europe that is social and sustainable, that is caring and daring.'
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> Ursula von der Leyen, 'Speech by President von der Leyen at the Closing Event of the Conference on the Future of Europe' (Strasbourg, 9th May 2022)[1]

Keywords

70 Years of EU Law – EU Law – Archeology – Narratives – Discourse

[1] Available at: <https://ec.europa.eu/commission/presscorner/detail/sl/speech_22_2944>, last access 10 October 2025.

I. Introduction: the Past, Present, and Future of EU Law

In European modernity, the categories of 'past', 'present', and 'future' are placed in a dialectical relationship.[2] For one, as most lucidly theorised by Max Weber, claims to authority in the present can be legitimised as the propagation of a mythical, 'traditional' past.[3] However, legitimising the present by reference to the past can also come in a confrontational shape. In fact, a defining feature of European modernity has been its claim to overcome a past of obscurity and oppression.[4] In this case, authority is legitimised not so much to the extent that it reproduces past arrangements, but rather insofar as it breaks away with them. Beyond the apparent juxtaposition of these two postures, however, lies a structural commonality. In fact, in both instances, past events are invoked as instrumental to present action. Present-day claims to authority are thus formulated by way of a dialectical relationship to the past – whether this dialectic takes the form of an appropriation or of a rejection. Furthermore, a key feature of European modernity has also been a projection into the future. Concurrently with the relationship to the past, claims to authority in the here-and-now have thus been grounded on the promise of realising a state of affairs different from that prevailing at the time when the claim was advanced. This promised future generally exhibited the features of progress, and individual as well as collective emancipation.[5] In modern temporality, the present thus emerges as the interlocking juncture between past and future.[6] In other words, the past and the future are mobilised to serve the purposes of the present, which constitutes itself in a dialectical relationship with both.

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2 The present Article admittedly reproduces the linear temporality which is characteristic of European modernity. I do so for analytical purposes, deeming EU law to be firmly embedded in European modernity's categories. However, I am mindful of the cultural contingency and problematic implications of this construction of temporality. For recent critiques with an overview of the relevant literature, see Eliana Cusato, 'Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity', HJIL 84 (2024), 865-893 (866-876); Moritz Vinken, A Geology of International Law 2.0 – Time, Structures and Struggle (May 29, 2025). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2025-09, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5274030 (1-5).

3 Max Weber, *Wirtschaft und Gesellschaft – Teilband 4: Herrschaft* (Edith Hanke and Thomas Kroll eds, Mohr Siebeck 2005), 729-734.

4 Jürgen Habermas, *Der philosophische Diskurs der Moderne: Zwölf Vorlesungen* (Suhrkamp 1983), 13 f.

5 Habermas (n. 4), 14-16.

6 See, although with different accents, Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought* (The Viking Press 1961), 6-15.

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So much being said, the relationship between past, present, and future in European modernity is more appropriately understood as *co*-constitutive. That is to say, the 'past' and the 'future' are a far cry from being a mechanical succession of 'facts', aseptically reconstructed or foreseen by the observer in the 'present'. Rather, they are the contingent construct of situated material conditions. To start with, past events are not epistemologically separable from their indirect reconstruction by the historian.[7] In turn, this constructive nature makes them indissociable from the situated perspective of the subject undertaking the reconstructive enterprise. The positionality of that subject and the motives underlying their undertaking shape which events are to be recollected, which events are ignored, and the way in which the overall narrative is constructed.[8] At the same time, one's projected future cannot but reflect the cleavages and aspirations arising out of present-day circumstances.[9] Precisely because the future promised by modernity is juxtaposed with a dissatisfactory present, its concrete shape is inherently relational: the world to come defines itself in opposition to the world it promises to change. In other words, as eminently intellectual constructs, both the past and the future are influenced and shaped by the situated conditions which lead the subject to construct them. Past, present, and future are thus mutually co-constitutive. While appeals to the past and to the future ground (or undermine) claims to authority in the present, they also are a projection of the situated conditions of that present.

This dialectical interplay of the three temporal planes ubiquitously pervades the discourse on the EU and its law. Weiler thus famously described the political ethos of the EU as 'political messianism': European integration derived its *present* legitimacy from its promised *future* of peace and prosperity, juxtaposed to a *past* of violence and domination epitomised by WWII.[10]

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7 See only Marc Bloch, *Apologie pour l'histoire ou métier d'historien* [1949] (Dunod 2024), 99-107.

8 See Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021), particularly 253-257 and 285-287. For seminal elaboration on the way in which this plays out for Weber's traditional mode of legitimisation, see Eric Hobsbawm, 'Introduction: Inventing Traditions' in: Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1983).

9 Niklas Luhmann, 'The Future Cannot Begin: Temporal Structures in Modern Society', Social Research 43 (1976), 130-152 (139-145).

10 See, for the argument's several iterations, Joseph H. H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay', I.CON 9 (2011), 678-694 (682-686); Joseph H. H. Weiler, 'Europe in Crisis: On "Political Messianism", "Legitimacy", and the "Rule of Law"', SJLS (2012), 248-268 (256-260); Joseph H. H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration', Journal of European Integration 34 (2012), 825-841 (832-837); Joseph H. H. Weiler, 'Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay' in: Julie

Against this background, the interlocking of past, present, and future can be observed in what has by now become established practice: the (re-)narration of EU law's diachronic development on the occasion of symbolical anniversaries.[11] These periodic reconstructions are not just aseptic updates, covering the most recent nitty-gritty of EU legislation and case law. Rather, they ostensibly bear the mark of the shifting intellectual climates, cultural cleavages, and political struggles of the period which produced them. A quick perusal of this memorial practice vividly illustrates the point. In 1983, the European Commission promoted the publication of a book on *30 Years of Community Law*.[12] Over twenty-one Chapters, the book identified general principles and lines of development in both the EU's constitutional structure and its substantive policies. The underlying effort was one, first and foremost, at doctrinal systematisation. This insistence on law and its ordering potential strongly resonates with the contemporaneous 'integration through law' project[13] – which, uncoincidentally, was strongly backed by the Commission itself.[14] Between 2009 and 2010, two high-profile edited volumes then commemorated '50 years' of the integration process. The books engaged in a more reflexive and critical exercise.[15] Once again, it is tempting to see this

Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012), 137-158 (144-158). For a recent endorsement and further development, see Toni Marzal, 'Between Integration and the Rule of Law: EU Law's Culture of Lawful Messianism', GLJ 24 (2023), 718-734 (723-729). For critique, see Alexander Somek and Jakob Rendl, 'Messianism, Exodus, and the Empty Signifier of European Integration' in: Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023), 147-159.

11 More broadly on anniversaries in EU law, see Antoine Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence', European Political Science Review 4 (2012), 51-71.

12 European Commission, *Thirty Years of Community Law* (Publications Office of the European Union 1983).

13 As conceptualised in Mauro Cappelletti, Monica Seccombe, and Joseph H. H. Weiler, 'Integration Through Law: Europe and the American Federal Experience – A General Introduction' in: Mauro Cappelletti, Monica Seccombe, and Joseph H. H. Weiler (eds), *Integration Through Law: Europe and the American Federal Experience – Volume 1: Methods, Tools and Institutions – Book 1: A Political, Legal and Economic Overview* (de Gruyter 1986), 3-68. For an insightful retrospective, see Loïc Azoulai, '"Integration Through Law" and Us'. I.CON 14 (2016), 449-463.

14 Rebekka Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe', GLJ 18 (2017), 1531-1556 (1545-1555).

15 Incidentally, it is interesting to notice that these works also explicitly drew a connection between EU law's 'past' and its 'future', in the vein of the remarks formulated above. See Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2009); Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

approach as aligned with the sober optimism, coupled with a latent sense of *malaise*, which accompanied the 'rescue' of the Constitutional Treaty by the Lisbon Treaty.[16] The pattern is completed by another publication which, in 2019, celebrated '60 years' of the Rome Treaty. This time, the book adopted an interdisciplinary perspective on the 'challenges' faced by the EU at the end of the 2010s.[17] This framing is strongly aligned with the narrative of 'crisis' which dominated the EU's political and scholarly debates over the 2010s.[18] Further, the move away from a strictly legal analysis seems to reflect the 'contest' between law and other disciplines in providing the epistemic frame of reference for EU integration.[19]

70 Years of EU Law, the book to which this Special Issue is devoted (hereinafter: 'the book'), can be understood as the latest iteration of this tradition.[20] Throughout sixteen Chapters, the Legal Service of the Commission tells a story of EU law's development over time. This diachronic perspective is applied to several areas of EU substantive and institutional law. The book presents the developments occurred over the '70 years of EU law' spanning from the entry into force of the Treaty of Paris in 1952 to today.[21]

16 Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press 2010), 20-25.

17 Luisa Antoniolli, Luigi Bonatti, and Carlo Ruzza (eds), *Highs and Lows of European Integration: Sixty Years after the Treaty of Rome* (Springer 2019).

18 From a rich literature, see Agustín José Menéndez, 'The Existential Crisis of the European Union', GLJ 14 (2013), 453-526; Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-Between" Democracy and Authoritarianism', I.CON 13 (2015), 219-245; Kelly M. Greenhill, 'Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis', ELJ 22 (2016), 317-332. Over the 2010s 'crises' were often presented as a threat to the integration process. More recently, however, a different framing has taken hold. The manifold crises faced by the EU are now often portrayed as having rather provided opportunities for resilient progress: see John van Oudenaren, *Crisis and Renewal: An Introduction to the European Union* (Rowman & Littlefield 2022), 8-27 (in political science); Armin von Bogdandy and Jürgen Bast, 'Die Systematik des Verfassungsrechts der europäischen Gesellschaft' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht: Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (Nomos 2025), 39-65 (39-40) (from legal scholarship).

19 Antoine Vauchez, 'Introduction. Euro-Lawyering, Transnational Social Fields and European Polity-Building' in: Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013), 1-17 (15-17); Christian Joerges, 'Introduction: The Contest of Disciplines in the Study of European Integration' in: Christian Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart 2022), 11 f. Also see Jacob van de Beeten, 'Festschrift or Fiction' Ommissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196.

20 European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023).

21 See Roberta Metsola, 'Guest Contribution' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 8-10 (8).

Its declared intent is to reconstruct 'the journey leading from the original essentially economic-based Communities to a union for its citizens, which now spreads its action to a vast number of fields increasingly relevant to all Europeans'.[22] In other words, the book essentially undertakes to illustrate how, in the most varied areas of socio-economic life, the EU has delivered beneficial outcomes 'for its citizens' by means of its law. Its overall purpose is hence to advance a renewed claim of 'output legitimacy' for European integration, understanding EU law as its key driver.[23] The other contributions in this Special Issue address in detail several of the book's Chapters. The present article rather focuses on the book's overarching intellectual framework. In order to do so, it takes as a starting point the book's concluding Chapter, devoted to 'The Future of European Union Law' (hereinafter: 'the Chapter').[24] My main contention is that the Chapter's vision for 'the future of EU law' is impervious to several prominent lines of debate to be found in the scholarly discourse on the same issue. I thus interrogate the reasons for this divarication, building on the intertwinement between 'past', 'present', and 'future' highlighted above. I thus try to uncover the extent to which the reconstructions of EU law's 'past' and the imaginations of its 'future', respectively undertaken by the book and the broader scholarly discourse, are instrumental to different projects pursued in the 'present'.

With a view to this, the Article proceeds as follows. Section II identifies the main lines of the Chapter's proposals concerning the future of EU law, understanding them as mostly devoted to questions of procedure. It then contrasts them with some key topics discussed in the recent scholarly literature, which primarily concern questions of substance. The Section resorts to the concept of 'legal imagination' to conceptualise the hiatus so identified.

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22 Daniel Calleja and Tim M. Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 15-32 (28).

23 For influential theorisation, see Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999), particularly Chapter 1. For a similar reading of the book's overall motive, see Päivi Leino-Sandberg, '"70 Years of EU Law" – The Politics of a Professional Language', HJIL 86 (2026), 59-83; Aitor Navarro, 'The EU as a Catalyst for Tax Harmonisation – Triumphs and Challenges in an Asymmetric Cooperation Model', HJIL 86 (2026), 357-378, and van de Beeten (n. 19); implicitly also Johan Meeusen, 'Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship', HJIL 86 (2026), 261-297, as well as Christian Thönnes, 'Invisible Infringements: On the AFSJ's Under-Constitutionalisation', HJIL 86 (2026), 299-330. For a different take, see however Armin von Bogdandy, 'The Republican Thrust of *70 Years of EU Law*: Theorizing "A Union for Its Citizens"', HJIL 86 (2026), 379-408.

24 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 381-392.

This lays the foundations for the enterprise subsequently undertaken: investigating the extent to which the respective approaches to EU law's past concur in configuring those different imaginations. With a view to this, Section III introduces the analytical lens used to decipher such approaches. Drawing on Gerschenkron and Foucault, the Section thus introduces the concepts of 'continuity' and 'discontinuity' as possible modalities of diachronic 'change'. Section IV shows that the book generally exhibits a tendency towards interpreting EU law's past as a story of continuity. Legal scholarship, on the other hand, is much more comfortable in reconstructing that past as marked by discontinuity. The article thus interprets the mismatch between different legal imaginations highlighted in Section II as the manifestation of deeper divergences on how to interpret the current state of EU law, as well as its relation to its past. In a nutshell, I thus contend that the Chapter's emphasis on procedure is the forward-looking projection of the overall paradigm of continuity which animates the book's reconstruction of EU law's past. By contrast, the literature's emphasis on substance can be understood as a call to replicate the discontinuities which the scholarly discourse more readily finds in EU law's past. These postures are in turn instrumental to the present-day projects respectively undertaken: legitimising EU law based on the outputs to which it is conducive (for the book) and critically reflecting on EU law (in the literature's case).[25] Section V concludes, offering preliminary reflections on the impact of narratives of legal change over one's legal imagination.

II. Imagining the Future of EU Law: Procedure or Substance?

In order to identify trends in the debate on 'the future of EU law', I adopt the well-established conceptual dichotomy between 'procedure' and 'sub-

25 To be sure, this framing contains a gross oversimplification. 'The literature' is far from being a monolithic discursive camp, and the projects pursued therein are extremely varied in turn. Furthermore, contentions directly opposite to mine also exist. Leino-Sandberg thus recently submitted that, on balance, EU legal academia is highly complacent *vis-à-vis* 'official' narratives: see Päivi Leino-Sandberg, 'Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?', European Law Open 1 (2022), 231-256. Still, I share de Witte's assessment that the overall attitude in the field (and especially in the segments of it which are intellectually hegemonic in the English-speaking literature) has actually grown increasingly critical: see Bruno de Witte, 'Editorial Note: How Much Critical Distance in the Academic Study of European Law?', Croatian Yearbook of European Law and Policy 18 (2022), VII-XIII (XI-XIII). Against this background, I make the latter simplifying assumption to illustrate my broader theoretical point.

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stance'.[26] For this purpose, I understand 'procedure' as law which mandates that certain activities be performed in a specific manner or sequence – chiefly, with a view to taking a decision on the course of action to be taken under given circumstances. Such prescription structures decision-making processes independently of, and antecedently to, the actual content of the decision. Importantly, I understand this to encompass not only the decision-making process *stricto sensu*, but also questions concerning the institutional design of the actors participating in the decision (e. g. in respect of both the composition of institutions and their organs, as well as their respective competences). On the other hand, by 'substance' I denote norms which take courses of action as the object of legal regulation in and of themselves. Here, law lays down a detailed rule of conduct (e. g. in the form of a right or obligation), or embodies a principle which structures the axiological horizon within which decisions are to be taken. In the context of EU law, therefore, I understand questions of procedure as pertaining to the vertical (between the EU and its Member States) and horizontal (between different EU institutions, bodies, offices, and/or agencies) allocation of competences in law- and (executive) decision-making procedures. I also include therein the regulation by EU law of the implications for institutional design attendant to those procedures. Conversely, I understand matters of substance to concern the distribution of material and ideational values and social goods by and through EU law.[27]

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26 For an overview of the meaning and uses of this dichotomy, see Jutta Brunnée, 'Procedure and Substance in International Environmental Law', RdC 405 (2019), 75-240 (92-114). By emphasising the juxtaposition of 'procedure' and 'substance', I distance myself from another familiar dichotomy: that between 'form' and 'substance'. On the one hand, both dyads have ostensible commonalities. In this sense, 'procedure' and 'form' are both differentiated from substance because of their principled indifference to the concrete objects to which they apply – that is, 'substance' itself. On the other hand, in (EU) legal discourse, the concept of 'form' has tended to take on tones which mostly address the structural features of (EU) legal norms (e. g. their generality or 'pedigree') and their relationship to other forms of normativity (primarily focusing, in the case of EU law, on the relationship between EU and national law). For uses of the form/substance dichotomy along these lines, see Duncan Kennedy, 'Form and Substance in Private Law Adjudication', Harv. L. Rev. 89 (1976), 1685-1778 (1687-1694, 1710-1713, and 1737-1766); Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', P. L. (1997), 467-487; Mark Dawson, 'The Changing Substance of European Law', Eu Const. L. Rev. 20 (2024), 451-481 (454-459).

27 This definition presupposes a supranational perspective: the distinction between procedure and substance, being eminently relational, pertains to different norms to be found *within the EU legal order itself*. Bringing norms from other legal systems into the picture potentially alters the relationship. In fact, I hereby characterise the norms pertaining to EU constraints on the rule of law and democracy at the national level as substantive for purposes of the EU legal system. However, they obviously have implications of an eminently procedural nature as far as the institutional systems of the EU Member States are concerned: see n. 72-78 below and accompanying text.

There is no denying that this dichotomy is elusive.[28] In many instances, the procedural or substantive character of a norm will lie in the eye of the beholder. Further, even where a distinction can neatly be drawn, the two planes are intimately intertwined. This is so, first and foremost, at a descriptive level. For one, the regulation of procedures contributes to skewing decision-making procedures towards particular substantive outcomes.[29] On the other hand, substantive norms also concur in structuring decision-making procedures.[30] Both phenomena give expression to the deeper normative intertwinement between the two poles of the dyad. The regulation of procedures often reflects substantive preferences. Consequently, procedure's influence on substance is ultimately a reproduction of those underlying preferences. Conversely, some substantive outcomes are legitimised exclusively by virtue of the procedural arrangements of which they are the product.[31] However, for all such intertwinements, the dichotomy retains heuristic value.[32] Against this background, I aim at showing the disconnect between the Chapter and scholarly discourse on the future of EU law. Whereas the Chapter is predominantly focused on questions of procedure (Section II. 1.), prominent lines of debate in the academic literature rather deal with questions of substance (Section II. 2.). A helpful way to conceptualise this misalignment is then to understand the Chapter and the scholarly debate as embodiments of diverging 'legal imaginations' (Section II. 3.).

1. The Chapter's Vision for EU Law's Future: a Procedural Question

The Chapter disambiguates its overall horizon at the very outset, by setting out three key notions. First, the Chapter subscribes to the interlocking between (constructed) past and (projected) future by '[l]ooking back at 70 years

28 See generally, with ample references to the debate in legal theory, David Dyzenhaus, 'Process and Substance as Aspects of the Public Law Form', C. L. J. 74 (2015), 284-306.

29 E. g. because the procedure attributes priority to the decision of an actor which institutionally bears a specific interest, leading the final decision to primarily reflect that interest. See Brunnée (n. 26), 226-230.

30 E. g. because they introduce a rule-exception scheme, forcing decision-makers to address the rule before tackling the exception. This argument was forcefully made by the 'New Haven School' of international law: see e. g. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994), 1-11.

31 See Ofer Malcai and Ronit Levine-Schnur, 'Which Came First, the Procedure or the Substance? Justificational Priority and the Substance-Procedure Distinction', Oxford J. Legal Stud. 34 (2014), 1-19 (5-10).

32 Malcai and Levine-Schnur (n. 31), 2-3 and 5.

of EU law' to offer 'some reflections on how [its] future could look like'.[33] Second, such retrospective shows that 'the "community method"' has allowed the EU to develop 'from a purely economic organisation towards a "Union for its citizens"'.[34] This emphasis on the 'community method' is complemented by pointing out the progressive democratisation of the method itself.[35] Third, the Chapter reviews the 'Conference on the Future of Europe' as an exercise in such democratisation, and takes note of the proposals formulated therein.[36] The Chapter then submits that several of the Conference's proposals can be implemented *à droit constant*, mobilising the Treaties' 'untapped potential'.[37] It is thus the coordinates of such 'untapped potential' that express the Chapter's key vision on 'the future of EU law'. And it is here that the emphasis on procedure emerges most forcefully. The Chapter sets out seven proposals for the future of EU law. Of these, three are clearly devoted to questions of procedure, while four are (potentially) devoted to substantive matters. However, the argumentative imbalance in developing the two clusters of proposals makes readily apparent that the Chapter is overwhelmingly focused on the procedural ones. It should also be noted that, when concretising its analysis, the Chapter abandons the Conference's outcome as the reference point. This makes it impossible to argue that the Chapter's focus on procedure flows from a need to follow the Conference's pre-determination of key areas of reform. In fact, many of the procedural reforms envisaged by the Chapter do indeed follow in the footsteps of the Conference's proposals. However, the latter also include several ideas of a substantive nature, to which the Chapter is conspicuously unreceptive.[38] The Chapter's vision thus seems to be an intellectual construct peculiar to the Chapter itself.

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33 Calleja and Ladenburger (n. 24), 381.

34 Calleja and Ladenburger (n. 24), 381.

35 Calleja and Ladenburger (n. 24), 381-382.

36 Calleja and Ladenburger (n. 24), 382-383. The 'Report on the Final Outcome of the Conference on the Future of Europe' is available at: <https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf>, last access 10 October 2025. For background on the Conference and analysis of the proposals emerging therefrom, see Federico Fabbrini, Legal and Constitutional Reflections on the Conference on the Future of Europe (December 2024). REGROUP Focus Paper No. 1-2024, available at: <https://www.cidob.org/sites/default/files/2025-01/D.7.2.%20REGROUP%20focus%20paper%20no.%201.pdf>, last access 10 October 2025.

37 Calleja and Ladenburger (n. 24), 383 f. This reiterates the Commission's previous political stance on the Conference's follow-up: see European Commission, 'Conference on the Future of Europe: Putting Vision into Concrete Action', 17 June 2022 (COM(2022) 404 final), 4-5. For broader analysis of the EU institutions' response to the Conference, see Editorial Comments, 'From Conference to Convention? Ideas and Prospects for Reform of the EU Treaties', CML Rev. 59 (2022), 1583-1596.

38 See the overview of the Conference's proposals provided in Fabbrini (n. 36), 6-9.

The common thread running through the Chapter's procedural proposals is a project of deepened supranationalisation and democratisation of EU decision-making. For one, the Chapter provides a detailed overview of the various 'passerelle clauses' currently envisaged by the Treaties. As is well-known, passerelle clauses allow for decision-making in the Council by qualified majority voting (QMV) where the Treaties otherwise envisage unanimity, and/or resort to the ordinary legislative procedure where a special legislative procedure is generally prescribed. The authors propose extensive use of those clauses, with a view to overcoming national veto powers and/or enhancing the European Parliament's involvement in EU law-making.[39] Second, the Chapter proposes to 'strengthen external action'. According to the authors, this would entail bringing 'optional mixity' to an end, and thickening the EU's unitary representation in multilateral organisations.[40] Optional mixity arises where the political institutions opt for mixed ratification of an international agreement by both the EU and its Member States (MS), in a context where the Treaty framework would allow for EU-only ratification.[41] This effectively allows individual MS to veto Europe-wide ratification of international agreements, in cases where the Treaties do not constitutionally guarantee such veto. On its part, EU representation in multilateral organisations is regulated by a complex framework which reflects the internal distribution of competences in the relevant subject matter.[42] This framework often leads to both the EU and the MS representing European interests in multilateral fora, potentially resulting in decision paralysis when disagreement arises. In both cases, therefore, the Chapter's proposals aim at reducing the capacity of the MS to stall international negotiations of interest to the whole of the Union. Finally, the Chapter articulates several proposals to further supranationalise the EU's political system by means of 'constitutional practice'. The most

39 Calleja and Ladenburger (n. 24), 384-387. The Treaties currently envisage five sectoral passerelle clauses: Art. 81(3) TFEU (on family law with cross-border implications), Art. 153(2) TFEU (in the field of social policy), Art. 192(2) TFEU (regarding environmental policy), Art. 312(2) TFEU (on the multiannual financial framework), and Art. 31(3) TEU (for the CFSP). Further, they also contain two cross-cutting passerelles: Art. 48(7) TEU (generally allowing for the switch to both QMV and the ordinary legislative procedure) and Art. 333 TFEU (allowing again for both options in the context of enhanced cooperations). For an overview, see Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010), 107-109.

40 Calleja and Ladenburger (n. 24), 388-389.

41 See Allan Rosas, 'Mixity Past, Present and Future: Some Observations' in: Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill 2020), 8-18 (14).

42 For an overview, see Christine Kaddous, 'The European Union in International Organisations: Principles and Rules for Good Governance' in: Christine Kaddous and Frank Hoffmeister (eds), *EU Diplomacy in Multilateral Fora* (Hart 2025), 1-26.

prominent are the strengthening of the *Spitzenkandidaten* system, the introduction of transnational lists for the European Parliament's elections, and the bolstering of the right of legislative initiative of the European Parliament and the Council.[43] These ideas have indeed long formed part of the playbook of European federalists and transnational democrats.[44] By putting forward these proposals, the Chapter thus takes one further step in the direction of supranationalising and democratising the EU's decision-making.

While these proposals are quite well-articulated, the ideas possibly going to points of substance are remarkably underdeveloped. This underdevelopment also makes categorisation of some of these ideas quite uncertain. In fact, although I understand them to be directed to substantive matters, their generic formulation would actually also be compatible with a characterisation thereof as procedural. In this vein, the first idea is to 'amend certain protocols', highlighting that '[p]olitically, the most significant example is the possibility of amending Protocol 12 on the excessive deficit procedure'.[45] The Chapter then simply mentions that '[o]ther protocols amendable […] are those establishing the statutes of the Court of Justice, the European Central Bank and the European Investment Bank'.[46] However, the Chapter is not clear as to the changes it envisions, nor on the underlying motives. Consequently, the only unambiguously substantive proposal is the one concerning Protocol 12, which sets out the reference values for the excessive deficit procedure. In the other cases, the emphasis on Protocols concerning institutional design indeed seems to allude to more procedural reforms. A partially more detailed proposal is, second, that to bring about 'changes to internal policies' by activating simplified Treaty amendment procedures. In the Chap-

43 Calleja and Ladenburger (n. 24), 391 f. The Chapter further proposes to unify the posts of the President of the Eurogroup and of the Vice President of the European Commission, and to allow 'citizens' panels' to 'formulate recommendations before key legislative initiatives are proposed'.

44 See e. g. Jürgen Habermas, 'Democracy in Europe: Why the Development of the EU Into a Transnational Democracy Is Necessary and How It Is Possible', ELJ 21 (2015), 546-557; Carlino Antpöhler, 'Enhancing European Democracy in Times of Crisis? The Proposal to Politicise the Election of the European Commission's President' in: Federico Fabbrini, Ernst Hirsch Ballin, and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart 2015), 217-232. For a soberer appraisal, see however Marco Goldoni, 'Politicising EU Lawmaking? The *Spitzenkandidaten* Experiment as a Cautionary Tale', ELJ 22 (2016), 279-295.

45 Calleja and Ladenburger (n. 24), 387. On the excessive deficit procedure as the 'corrective arm' of EU budgetary discipline, see Jean-Paul Keppenne, 'EU Fiscal Governance on the Member States: The Stability and Growth Pact and Beyond' in: Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), 813-849 (827-836).

46 Calleja and Ladenburger (n. 24), 387.

ter's account, this can be done either by means of 'the general clause in Article 48(6) TEU' or through 'some specific provisions in the TFEU'.[47] The Chapter offers some elaboration on the changes envisaged through the 'specific provisions in the TFEU', which admittedly go to points of substance. However, these largely amount to a mere repetition of the amendments which the legal bases themselves expressly (and exclusively) authorise.[48] On the other hand, the Chapter fails altogether to specify possible changes under Art. 48(6) TEU. Consequently, once again, it cannot be unambiguously assumed that the Chapter envisions use of that provision to revise the substance of EU primary law. Third, at the lowest level of specification is the proposal of 'creating a common defence for the Union' under Art. 42(2) TEU. In fact, the Chapter simply mentions the availability of that possibility.[49] To be sure, this would entail several institutional and procedural changes. However, these are but a consequence of an underlying fundamental reorientation of the substantive purposes and principles of European integration.[50] While this proposal would then clearly entail substantive changes, it is thus disappointing (if understandable, precisely in light of the question's politically heated character) that the Chapter fails to take a stance on the hard choices inherent in developing a common European defence. Finally, the Chapter mentions the availability of Art. 352 TFEU's 'flexibility clause'.[51] However, the only concrete proposal is to use it to incorporate the European Stability Mechanism (ESM) into EU law.[52] On the one hand, the very open-endedness of Art. 352 TFEU certainly suggests that the authors may conceive of it as a tool for reorienting the substance of EU law. However, as also underlined by the authors, substantive operationalisation thereof is in large

47 Calleja and Ladenburger (n. 24), 387 f.

48 Calleja and Ladenburger (n. 24), 388. The proposed changes are: broadening the rights attached to EU citizenship under Art. 25(2) TFEU; adding new serious crimes with a cross-border element amenable to EU legislation under Art. 83(1) TFEU; and increasing the powers and mandate of the European Public Prosecutor's Office under Art. 86(4) TFEU.

49 Calleja and Ladenburger (n. 24), 390.

50 See only Carolyn Moser, 'The Impact of the War in Ukraine on the EU's Common Security and Defence Policy' in: Stefan Kadelbach and Rainer Hofmann (eds), *The Common Security and Defence Policy of the EU* (Nomos 2024), 23-54.

51 Art. 352 TFEU notoriously allows the adoption of measures at the EU level where 'action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers'. See Manuel Kellerbauer and Marcus Klamert, 'Article 352 TFEU' in: Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edn, Oxford University Press 2024), 2072-2079.

52 Calleja and Ladenburger (n. 24), 390. On the ESM as an *extra ordinem* revision of EMU law, see Francesco Martucci, 'Non-EU Legal Instruments (EFSF, ESM, and Fiscal Compact)' in: Amtenbrink and Herrmann (eds) *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), 293-325 (301-317).

part redundant because of the wide competences bestowed upon the EU by the current Treaty framework.[53] Coupled with the ESM-focused concretisation of the proposal, this might suggest that this proposal is also ultimately oriented towards institutional design.[54]

The Chapter thus emerges as overwhelmingly preoccupied with questions of procedure. The red thread running through these detailed reform proposals is the authors' preference for suprationalisation and democratisation of EU decision-making. By contrast, the scant proposals concerning substance fail to articulate any coherent vision for the future of EU law. Avenues for substantive change are sometimes indicated, but no thick principles are offered as to the direction such change should take. At least in part, this move implicitly proceduralises even the Chapter's substantive proposals. Looked at from the angle of the relationship with scholarly discourse, the emphasis on procedure is reminiscent of the debate held throughout the 1990s.[55] This is strikingly out

53 Calleja and Ladenburger (n. 24), 390. See, however, the post-Lisbon practice surveyed in Kellerbauer and Klamert (n. 51), 2728-2731.

54 Although the controversy surrounding the ESM's location outside EU law largely derives from the ensuing insulation of its operation from several of EU law's substantive constitutional guarantees: see Martucci (n. 52), 310-317.

55 The discussion in this period revolved around four main bones of contention. First, the overall democratic legitimacy of the EU's institutional structure was questioned. In particular, the broadening of EU competences brought about by the SEA and the Maastricht Treaty revamped long-lasting criticism of the limited involvement of the European Parliament in EU law-making. This was all the more acute because of the broadening of QMV, held to have also weakened the Council's indirect democratic legitimisation through control by national parliaments. Reinforcing this predicament was, second, the concern that the political dynamics of QMV itself had been altered over time. Many quarters submitted that small countries had come to be over-represented under the weighting of votes which had emerged from the successive enlargement rounds. Third, these issues were compounded by the planned enlargement of the EU to the Central and Eastern European (CEE) countries. Here, the key concern was with the increased socio-economic heterogeneity this would bring about within the EU. In this connection, commentators feared that enlargement could result into either the unilateral imposition of the preferences of one group of countries over another, or EU decision-making being unworkable altogether. Finally, the institutional fragmentation chiefly (but not exclusively) resulting from the 'pillars' structure was also criticised. This fragmentation, so the argument went, was conducive to institutional confusion and piecemeal applicability of key constitutional principles. For diagnosis of these problems, see Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483 (2453-2483); Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', CML Rev. 30 (1993), 17-69 (22-30, 38-39, and 44-66); Anthony L. Teasdale, 'The Politics of Majority Voting in Europe', Pol. Q. 67 (1996), 101-115 (106-109 and 114-115). On the debate addressing these issues see, from a rich literature, Jo Shaw, 'The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy', ELJ 4 (1998), 63-86 (79-86); Gráinne de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (1st edn, Oxford University Press 1999), 55-81 (64-79); Armin von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization Within a Single Legal System', CML Rev. 36 (1999), 887-910 (909 f.).

of sync with the general trends in the EU legal scholarship produced since the Lisbon Treaty's entry into force. Here, discussions on the future of EU law have, by and large, rather focused on questions of substance.

2. Scholarly Debates on the Future of EU Law: Cleavages on Substance

In fact, a brief overview of the scholarly debate on the future of EU law held in the last fifteen years reveals a picture which is quite different from that conjured by the Chapter. What tends to get discussed in the post-Lisbon literature is not so much how to design procedures and institutions attuned towards any particular project (in the Chapter's case: supranational democracy).[56] Rather, several strands of legal scholarship express variegated concerns at the substantive values, principles, and norms contained in EU law. This literature problematises the societal model envisioned by EU law, the concrete behavioural patterns it incentivises or discourages, and the subjectivities it (re)produces or represses.

One prominent theme concerns the question of EU law's 'over-constitutionalisation'. A seminal 2015 paper by Grimm famously posited that '[d]ifferent from national constitutions, the [EU] treaties […] are full of provisions that would be ordinary law in the Member States'.[57] According to Grimm, this insulates from political contestation matters which do not warrant elevation to such fundamental status. Based on this diagnosis, Grimm called for a future development of EU law in the direction of 're-politicisation'. This was to be effected by downgrading the most detailed Treaty provisions to the rank of secondary law, thus allowing for the EU's political organs to decide anew upon them.[58] While Grimm's predicament had general import, it was visibly most influenced by his dissatisfaction, specifically, with EU economic law.[59] An almost contemporaneous paper by Davies made very similar points.[60] Davies pointed out that EU legislation is often constitutionally bound to pursue pre-determined purposes, articulating the EU's legislative powers according to a paradigm of 'purposive compe-

56 Subject to several qualifications: see below, n. 87-90 and n. 192 and surrounding text.

57 Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', ELJ 21 (2015), 460-473 (470). Grimm's thesis is however starting to be subjected to criticism. See Robert Schütze, '"Integration-Through-Law": Grand Theory, Revisionist History', European Law Open 4 (2025), 162-200 (186-188); Luke D. Spieker, 'Was Grimm Wrong? Putting the Over-Constitutionalization of EU Law to the Test', GLJ 26 (2025), 1-33 (11-24).

58 Grimm (n. 57), 473.

59 Grimm (n. 57), 467-469.

60 Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', ELJ 21 (2015), 2-22.

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tence'. Davies' key concern was with internal market legislation under Art. 114 TFEU, purposively tied to the establishment of a Europe-wide market and the streamlining of competition therein.[61] Davies underlined that this pre-determination was detrimental to democratic dialectics: European politics was thereby reduced to deliberating on the means to implement a project already decided upon, and insulated from political contestation. Similar to Grimm, Davies thus called for 'a fundamental rethinking of what exactly it is that we need the EU to do'.[62]

In fact, the (im)possibility to politically contest EU economic law's substantive principles have been a recurring theme. Most variants of this debate revolved, one way or another, around EU law's neoliberal bias. Often, authors explicitly adopted the de-constitutionalisation framework. They hence criticised in this vein both the EU's 'microeconomic constitution' and its 'macroeconomic constitution'.[63] On the microeconomic side, Snell called for it allows to develop an 'agnostic' development of EU law in terms of the varieties of capitalism it is to structure.[64] Building on his work on the asymmetry between negative and positive integration,[65] Scharpf further ad-

61 Davies (n. 60), 7-11. However, Art. 114 TFEU's purposiveness has reportedly been tempered in practice. See Bruno de Witte, 'A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation' in: Phil Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012), 25-46. The trend was only deepened in recent years: see Bruno de Witte, 'Editorial: Internal Market Legislation as European Public Policy', Revista de Derecho Comunitario Europeo 80 (2025), 11-17.

62 Davies, 'Democracy and Legitimacy' (n. 60), 22.

63 For this terminology, see Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014), particularly Chapter 2. According to Tuori and Tuori's influential framework, the EU's microeconomic constitution primarily consists of free movement law and competition law (16-18). The macroeconomic constitution is enshrined in the law on economic and monetary union (EMU) (26-28). For a further development of this framework, which differentiates competition law as a 'mesoeconomic constitution' from free movement law as the microeconomic constitution proper, see however Guillaume Grégoire, 'The EU's Neoliberal Constitutionalism(s)', European Law Open 3 (2024), 705-745 (719-743).

64 Jukka Snell, 'Varieties of Capitalism and the Limits of European Economic Integration', Cambridge Yearbook of European Legal Studies 13 (2011), 415-434 (430-432). For a similar argument which, however, moves to the microeconomic constitution only after a lengthy discussion of the macroeconomic one, see Alexander Somek, 'What Is Political Union?', GLJ 14 (2013), 561-580 (577-579).

65 Fritz W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', Pub. Adm. 66 (1988), 239-278; Fritz W. Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in: Gary Marks et al. (eds), *Governance in the European Union* (Sage 1996), 15-39; Scharpf, *Governing in Europe* (n. 23), particularly Chapters 2-3. As with Grimm's overconstitutionalisation (n. 57), the asymmetry thesis has recently been challenged. See Martijn van den Brink, Mark Dawson, and Jan Zglinski, 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU', Journal of European Public Policy 32 (2025), 209-234; Schütze (n. 57), 191-194.

vocated a de-constitutionalisation of the economic rights and liberties laid down in EU law.[66] Pulling together the threads of decade-long debates on this matter, Höpner and Schmidt also suggested a whole range of options to achieve de-constitutionalisation in this area.[67] Perhaps even more fiercely, however, the future of EU law was discussed in the context of the macro-economic constitution. This followed the widespread criticism of the EU's response to the financial crisis as an instantiation of 'authoritarian liberalism'.[68] The de-constitutionalisation thesis was thus vocally applied by Dani to plead for freeing EU law from the neoliberal principles enshrined in the constitutional framework of Economic and Monetary Union (EMU).[69] Alongside other prominent scholars, the same author had already argued in favour of 'either […] aligning EMU to democratic and social ends or […] unravelling it in a coordinated fashion to restore democratic and social constitutionalism at the national level'.[70] However, the centrality of economic governance and political struggle over its shape did not only feature in the openly normative (and mostly left-leaning) camp surveyed so far. For instance, Zilioli and Ioannidis penned a sophisticated analysis of the rules governing the mandate(s) of the European Central Bank (ECB), concluding on the legal acceptability, and general desirability, of incorporating environmental considerations in the ECB's monetary policy.[71]

Another site of sharp contention has been the mobilisation of EU law to confront the backsliding of liberal democracy and the rule of law at the national level.[72] The central question here was the extent to which EU law

66 Fritz W. Scharpf, 'De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe', ELJ 23 (2017), 315-334 (321-322). However, Scharpf was skeptical as to the practical feasibility of such proposal: see n. 90 below.

67 Martin Höpner and Susanne K. Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review', Cambridge Yearbook of European Legal Studies 22 (2020), 182-204 (196-204).

68 Groundbreakingly Michael A. Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', GLJ 14 (2013), 527-560 (547-551). For the most recent and comprehensive presentation of the argument, see Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021), particularly Part IV.

69 Marco Dani, 'Openness, Purposiveness, and the Realignment of the EU and the Democratic and Social Constitutional State', GLJ 24 (2023), 1099-1126 (1123-1126).

70 Marco Dani et al., '"It's the Political Economy …!" A Moment of Truth for the Eurozone and the EU', I.CON 19 (2021), 309-327 (324-327).

71 Chiara Zilioli and Michael Ioannidis, 'Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies', CML Rev. 59 (2022), 363-394 (393 f.).

72 For a seminal reconstruction, see Luke D. Spieker, *EU Values before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023), particularly 19-32.

can and should impose enforceable constitutional standards on national polities. For one, Scheppele, Kochenov, and Grabowska-Moroz welcomed developments in this direction. In a much-publicised piece, they called upon the EU to become a full-fledged 'militant democracy'.[73] However, several authors cautioned against over-enthusiasm. Many thus pointed out this turn's potential drawbacks in the EU's composite constitutional panorama.[74] Radical critique came from Guazzarotti, who alleged that these developments amounted, essentially, to yet another instance of authoritarian liberalism.[75] In less uncompromising terms (and from the opposite end of the political spectrum), Schorkopf had already criticised EU law's turn to 'value constitutionalism' as devoid of legal and societal legitimacy. Accordingly, he strongly urged the European Court of Justice (ECJ) to exercise self-restraint in inferring detailed constitutional prescriptions from the abstract values contained in Art. 2 TEU.[76] Even sympathetic commentators such as Baraggia, von Bogdandy, Bonelli, and Spieker acknowledged that the turn to values in EU law potentially raises constitutional problems.[77] While favouring it in principle, these authors hence formulated a whole range of suggestions to set limits on EU law's constitutional homogenisation effects.[78]

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73 Kim L. Scheppele, Dimitry V. Kochenov, and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union', YBEL 39 (2020), 3-121 (10-11).

74 On which see Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union', M. L. R. 84 (2021), 477-502.

75 See Andrea Guazzarotti, *Neoliberismo e difesa dello Stato di diritto in Europa: riflessioni critiche sulla costituzione materiale dell'UE* (Franco Angeli 2023), 35-84 and 178-191.

76 Frank Schorkopf, 'Value Constitutionalism in the European Union', GLJ 21 (2020), 956-967 (963-967). Similarly, see the more recent Martin Nettesheim, 'European "Frankenstein Constitutionalism": TEU Article 2 as a Federal Homogeneity Clause', AJIL Unbound 118 (2024), 167-171.

77 A background to much of this line of argument has arguably been provided by Weiler's notion of 'constitutional tolerance'. See Joseph H. H. Weiler, 'Federalism Without Constitutionalism: Europe's *Sonderweg*' in: Kalypso Nicolaïdis and Robert L. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001), 54-70 (65-70).

78 Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States', CML Rev. 57 (2020), 705-740 (713-715 and 732-738); Matteo Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice', Eu Const. L. Rev. 18 (2022), 30-58 (47-58); Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges', GLJ 23 (2022), 131-156 (152-156); Spieker, *EU Values* (n. 72), Chapters 12-13.

One last prominent area of debate is the broad discourse which Azoulai has termed an 'anti-transcendental perspective on EU law'.[79] This denotes a renewed concern with 'both the forms of people's life that EU law itself tends to support and promote and the ones that it tends to overlook or suppress'.[80] This multifaceted strand of literature combines a fundamental historical-materialist posture with culturalist nuances.[81] This is done in order to analyse and critique the material subjectivities, as well as the ideational representations thereof, which EU law contributes to (re)producing and marginalising. In this vein, de Witte, as well as Davies, called for a re-interpretation of EU free movement law capable of accommodating diverse forms of life and their essentially non-economic logic.[82] Both authors, alongside for instance O'Brien and Barbou des Places, also participated in more traditional debates on the balancing of individual and collective perspectives in EU free movement law. These revolved around the exclusionary effect of economic and cultural factors on the concrete enjoyment of mobility, or the threats allegedly posed by mobility itself to the cohesion of the communities of arrival.[83] Lastly, an exciting line of work engages with the legacy of colonialism and coloniality in EU law.[84] Spearheaded by Bhambra, Silga, Solanke, and Eklund, this literature confronts

79 Loïc Azoulai, 'Reconnecting EU Legal Studies to European Societies', Verfassungsblog, 19 March 2024, doi: 10.59704/506091b2c1b6b18a. With further references to this literature, see Marc Steiert, 'Telling (Social) Europe Differently: Fractures, Discontinuities, and Alternative Trajectories in 70 Years of EU Law', HJIL 86 (2026), 331-356 as well as van de Beeten (n. 19).

80 Loïc Azoulai, 'The Law of European Society', CML Rev. 59 (2022), 203-214 (207).

81 This is how I interpret the texts by key authors of this movement, such as Floris de Witte, 'Here Be Dragons: Legal Geography and EU Law', European Law Open 1 (2022), 113-125; Loïc Azoulai, 'Living with EU Law', European Law Open 1 (2022), 140-143.

82 Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law', CML Rev. 50 (2013), 1545-1578 (1566-1577); Gareth Davies, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests' in: Panos Koutrakos, Niamh Nic Shuibhne, and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart 2016), 218-239 (238 f.); Floris de Witte, 'You Are What You Ate: Food Heritage and the EU's Internal Market', E. L. Rev. 47 (2022), 647-665 (663-665).

83 See, from a rich literature, Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights', CML Rev. 53 (2016), 937-977 (961-966 and 973-977); Ségolène Barbou des Places, 'The Integrated Person in EU Law' in: Loïc Azoulai, Ségolène Barbou des Places, and Étienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016), 179-202 (195-202); Floris de Witte, 'The Liminal European: Subject to the EU Legal Order', YBEL 40 (2021), 56-81 (72-80). Most controversially, Gareth Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans', European Papers 4 (2019), 675-694; for the subsequent debate, see Loïc Azoulai, 'On Dubious Parallels: The Transnational Europeans and the Jews. A Note on Gareth Davies' *Article*', European Papers 5 (2020), 279-282; Gareth Davies, 'How Citizenship Divides: A Response to Loïc Azoulai', European Papers 5 (2020), 283-286.

84 On the difference between colonialism and coloniality see, with further references, Walter Mignolo, 'Coloniality and Globalization: A Decolonial Take', Globalizations 18 (2021), 720-737 (722-725).

the EU's colonial roots to reimagine the future of such diverse areas of EU law as anti-discrimination, migration, and free movement law.[85]

Undoubtedly, the overview of EU legal scholarship presented above is dramatically selective. Like all selections, it is clearly shaped by my own interests, preferences, and predispositions. *Inter alia*, it is admittedly centred around the discourse on EU constitutionalism, and leaves much of the work on sectoral EU law out of the picture.[86] However, it still gives a sense of several lines of debate which find no echo in the Chapter. As suggested above, the overarching theme hereby identified is a fundamental hiatus. While academic debates on the future of EU law predominantly focus on questions of substance, the Chapter primarily occupies itself with questions of procedure. To be sure, just as the conceptual dichotomy between procedure and substance itself, this is arguably a heuristic overstatement.[87] Recent scholarly work explicitly concerned with the future of EU law admittedly addresses both substantive and procedural questions.[88] What is

85 Gurminder K. Bhambra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism', ELJ 23 (2017), 395-405 (404-405); Janine Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?', UCLA Journal of International Law and Foreign Affairs 24 (2020), 163-200 (199-200); Iyiola Solanke, 'Conclusion: Embedding Decoloniality in Empirical EU Studies' in: Mikael Rask Madsen, Fernanda Nicola, and Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022), 343-353 (346-350); Hanna Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome', EJIL 34 (2023), 831-854 (853-854); Jeffrey Miller and Fernanda G. Nicola, 'The Failure to Grapple with Racial Capitalism in European Constitutionalism' in: Jan Komárek (ed.) *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023), 320-339 (320-322 and 334-339); most extensively now, Hanna Eklund (ed.), *Colonialism and the EU Legal Order* (Cambridge University Press 2025). Important work by other authors has also reconstructed the colonial roots of European integration. However, it did not take the further step of reckoning with this past to re-imagine EU law's future. See Daniela Caruso and Joanna Geneve, '*Melki* in Context: Algeria and European Legal Integration' in: Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017), 506-527 (516-527); Signe Rehling Larsen, 'European Public Law after Empires', European Law Open 1 (2022), 6-25.

86 Thanks to one of the reviewers and to Robert Stendel for alerting me of this implicit limitation in my study.

87 See n. 28-32 above and surrounding text.

88 See Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart 2019), where the Chapters authored by Neyer, Craig, and Butler primarily concern questions of competences and institutional design, whereas other Chapters by, *inter alia*, Groussot and Zemskova, Jonsson Cornell, and Jakab tackle issues of fundamental rights, security, and the rule of law. In a similar vein, see Matej Avbelj (ed.), *The Future of EU Constitutionalism* (Hart 2023). On the one hand, a large majority of the Chapters deal with the questions of substance already highlighted above (see e. g. Avbelj's Chapter on values and Fabbrini's contribution on EMU). However, Garben's Chapter addresses both the balance between economic and social aims in EU substantive law and the persistent democracy deficit of EU governance and institutional design.

more, both predicaments with procedure and substance ultimately bear on one and the same question: allowing for a maximum of individual and collective self-government within the EU.[89] Several amongst the authors hereby presented as substance-focused admittedly took note of this interrelationship, and also formulated proposals which largely concern questions of procedure.[90] However, the Chapter itself falls substantially short of making any such explicit connection between procedure and substance. The implicit assumption is thus to refrain from radically questioning the substantive principles and ends of EU law. Questions of procedure thus emerge as a mere tinkering exercise, which aims at streamlining the implementation of those principles and the pursuance of those ends.[91] In so doing, the Chapter seems strongly out of sync which the rich academic discourse hereby surveyed. This rather problematises both those principles and those ends.

3. Conclusion: Diverging Legal Imaginations

The analysis above shows that the Chapter and the scholarly literature diverge sharply in constructing proposals for the future of EU law. The divarication is so marked that it can hardly be thought of as a simple matter of preferences. Rather, it signals an altogether different intellectual space within which the respective treatments take place. To this extent, the Chapter and the scholarly debate can be understood to embody contrasting 'legal imagina-

89 This is a familiar theme in contemporary democratic and constitutional theory. See e. g. Joshua Cohen, 'Procedure and Substance in Deliberative Democracy' in: Seyla Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996), 95-119 (95-97 and 102-108).

90 See e. g. Floris de Witte, 'EU Law, Politics, and the Social Question', GLJ 14 (2013), 581-611. De Witte outlines at 587-595 how EU law's substantive commitment to neoliberalism undermined individual and collective capacity for self-determination. Based on this analysis, he then proposes at 595-610 'three ways to reappropriate the social question' which incorporate manifold procedural reforms. In a similar vein, Scharpf, 'De-Constitutionalisation' (n. 66), at 325-332 deemed his preferred de-constitutionalisation solution unlikely to work in practice. He thus proposed to bring about deliberative majority voting, coupled with expanded possibilities at opt-outs, as a second-best solution to the problems he diagnosed. Von Bogdandy, 'Principles' (n. 78), at 724-731 also joined his substantive proposals to avoid overreach by the EU's turn to values with several corrections of a procedural nature. These would allow for the substantive contestation on Art. 2 TEU values to be legitimately reflected in the process of reaching a decision upon their application in individual cases. Most extensively, see Mark Dawson and Floris de Witte, 'From Balance to Conflict: A New Constitution for the EU', ELJ 22 (2016), 204-224, advocating at 208-214 and 221-223 substantive conflict over the societal goals of European integration as key, and articulating at 214-221 detailed arrangements to 'institutionalise conflict' in EU decision-making.

91 This is reminiscent of Koskenniemi's notion of 'managerialism'. See Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', M. L. R. 70 (2007), 1-30.

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tions'.[92] The legal imagination is 'the worldview […] in which our ideas about [the law's] purposes and limits [take] shape',[93] or 'the image of common life in which the law is set'.[94] The legal imagination thus expresses the legal component of a 'social imaginary', understood in turn as 'the largely unstructured and inarticulate understanding of our whole situation, within which particular features of our world show up for us in the sense they have'.[95] In this sense, the legal imagination expresses the set of presuppositions under which thinking about the law takes place. It conveys a 'specific way of thinking about [a given legal problem], regardless of […] concrete proposals'.[96] In other words, the legal imagination is the ensemble of notions, principles, and assumptions, of both a legal and non-legal nature, which underlie and nurture legal thinking. This concerns not only and not so much the application of technical-legal conceptual toolkits to concrete circumstances. Much more crucially, it regards the very choice to understand a given problem as 'legal' in nature, and the range of options to legally regulate a problem which are assumed to be possible.[97] In so

92 I first encountered this concept in Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford University Press 2021). In turn, Perrone draws on Jedediah Purdy, *The Meaning of Property: Freedom, Community, and the Legal Imagination* (Yale University Press 2010). Purdy's concept as articulated below seems largely coincident with the concept of 'constitutional imaginary' recently propounded by Jan Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies, and the Other', in: Komárek (ed.) *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023), 1-17. In fact, Komárek himself appears to deem the notions of (constitutional) 'imagination' and 'imaginary' largely interchangeable (2).

93 Purdy (n. 92), 4.

94 Purdy (n. 92), 5. However, this is not the only available conceptualisation of 'legal imagination': see n. 97 below.

95 Purdy (n. 92), 11-12. Purdy takes the definition of 'social imaginary' from Charles Taylor, *A Secular Age* (Harvard University Press 2007), 177 (which he quotes verbatim).

96 Perrone (n. 92), 5.

97 So understood, the concept of 'legal imagination' has a key *de iure condendo* orientation. This is apparent, for instance, in the unconceptualised use of the term as it transpires from Alan Watson, *Failures of the Legal Imagination* (Scottish Academic Press 1988): see e. g. 27 and 35-36. However, the first sustained use of the term of which I am aware understands the concept in a much more *de iure condito* fashion: James B. White, *The Legal Imagination* [1973] (45th anniversary edn, Wolters Kluwer 2018). In White's account, the legal imagination mostly captures the imaginative aspect entailed by creatively applying the existing law, rather than the imagination of an altogether different legal world: see e. g. xlii-xliv, 8-9, and 758-760 (although, at 760, White also hints at the legal reform dimension hereby referred to). This understanding also underlies the recent and prominent use of 'legal imagination' by Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870* (Cambridge University Press 2021), of which see in particular 1-8 and 952-953. For a broader overview of deployments of the concept of 'legal imagination', see Mark Antaki, 'The Turn to Imagination in Legal Theory: The Re-Enchantment of the World?', Law & Critique 23 (2012), 1-20 (8-15). Antaki identifies four ideal-types of the legal imagination: the theoretical, the progressive, the transformative, and the nostalgic. Roughly, the theoretical, progressive, and nostalgic ideal-types are more aligned with White's concept, whereas the transformative is more akin to the meaning used here.

doing, the legal imagination pre-determines the set of possible directions for legal change, as well as the language within which they can be conveyed.[98]

Against this background, the legal imaginations respectively underlying the Chapter and the literature differ dramatically. The future of EU law imagined by the Chapter is one where the substantive socio-political project pursued by that law is not questioned. Rather, the procedural-institutional machinery of EU law should be streamlined with a view to smoothing the realisation of that project. By contrast, several strands of EU legal scholarship fundamentally question that project in the first place. They imagine a future for EU law which reconfigures its current socio-economic arrangements and their cultural elaboration. Otherwise put, the Chapter and the literature discussed respectively assign an altogether different role to law within European integration. The Chapter understands EU law as a purely functional and apolitical tool to pursue the substantive ends of European integration. In turn, the latter are deferred to determination 'elsewhere'. The literature, on its part, views EU law as the carrier of a politically contestable project on its own right.[99] The difference could thus not be more fundamental. This very fact calls for further reflection on the factors which shape those legal imaginations in such radically different ways.

III. Change, Continuity, Discontinuity: an Archaeological Analytical Framework

How, then, can we make sense of such fundamentally different legal imaginations? As mentioned in the Introduction, I contend that the different imaginations of EU law's future surveyed in the preceding Section are the product of different attitudes towards its very present. I further submit that this different configuration is evident in the approaches which the book at large and the majority of legal scholarship respectively take *vis-à-vis* EU law's past. To substantiate this statement, I now turn to different paradigms available to reconstruct the past of EU law. These are the concepts of 'continuity' and 'discontinuity', which I take from Foucault's 'archaeology'. To set the ground for this exercise, however, I first draw on Gerschenkron. I thus juxtapose the dyad of 'continuity' and 'discontinuity' to the misleading dichotomy of 'continuity' and 'change' often used in legal scholarship. Sec-

98 For further reflection on this matter, although with a different conceptual framing, see Leino-Sandberg, '70 Years of EU Law' (n. 23).

99 Thanks to the reviewers and Floris de Witte for underlining, with different accents, the importance of this point.

tion IV below will then show how these paradigms can illuminate our understanding of the divarication hereby diagnosed.

As alluded to, several works devoted to diachronic analyses of EU law adopt the dyad of 'continuity and change' as the cognitive frame for their inquiries.[100] This dichotomy is hardly peculiar to EU law. It can be found in the neighbouring disciplines of national public law[101] and public international law.[102] More generally, the conceptual pair also features in the intellectual weaponry of historians,[103] including those especially concerned with legal materials.[104] However, despite pervasive resort thereto, conceptual elaboration on these terms is scarce. Some of the authors who deploy them simply do not offer any explanation as to the meaning they attach to each concept.[105]

100 See e. g. Christoph Demmke and Christian Engel (eds), *Continuity and Change in the European Integration Process: Essays in Honour of Günther F. Schäfer* (European Institute of Public Administration 2003); Anthony Arnull, Piet Eeckhout, and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008); Francis Snyder and Imelda Maher (eds), *The Evolution of the European Courts: Institutional Change and Continuity/L'évolution des juridictions européennes: changements et continuité* (Bruylant 2009); ECB, *Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow – ECB Legal Conference 2021* (ECB 2022); Anna Södersten, 'Explaining Continuity and Change: The Case of the Euratom Treaty', I.CON 20 (2022), 788-817.

101 See e. g. Afroditi Marketou, *Local Meanings of Proportionality* (Cambridge University Press 2021), devoting Chapter 3 to 'Proportionality in English Public Law: *Continuity and Change*'. The emphasis is in the original, and intended to acknowledge the author's borrowing from John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press 2007), as well as Matt Qvortrup (ed.), *The British Constitution: Continuity and Change – A Festschrift for Vernon Bogdanor* (Hart 2013).

102 See e. g. Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011); Tomoaki Nishimura, 'The Paris Agreement: Continuity and Change within the Climate Regime' in: Neil Craik et al. (eds), *Global Environmental Change and Innovation in International Law* (Cambridge University Press 2018), 42-58; Olivier de Frouville, *From Cosmopolitanism to Human Rights* (Hart 2021), Chapter 9.1 of which is titled 'Change or Continuity: Has the Establishment of the [Human Rights] Council Really Changed Anything in the Universal System of Human Rights Protection?'.

103 To the point of having inspired the name of a prominent journal: 'Continuity and Change: A Journal of Social Structure, Law and Demography in Past Societies', published with Cambridge University Press since 1986.

104 See e. g. Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', BYIL 73 (2002), 103-139; Sarah B. Snyder, 'Continuity and Change in US Human Rights Policy' in: Jean Quataert and Lora Wildenthal (eds), *The Routledge History of Human Rights* (Routledge 2019), 316-333.

105 See e. g. Francis Snyder and Imelda Maher, 'Introduction' in: Francis Snyder and Imelda Maher (eds), *The Evolution of the European Courts: Institutional Change and Continuity/L'évolution des juridictions européennes: changements et continuité* (Bruylant 2009), 9-14; Joseph Jaconelli, 'Continuity and Change in Constitutional Conventions' in: Matt Qvortrup (ed.), *The British Constitution: Continuity and Change – A Festschrift for Vernon Bogdanor* (Hart 2013), 121-140; Snyder (n. 104); Nishimura (n. 102); de Frouville (n. 102).

Still, by the mere fact of this juxtaposition, these authors appear to characterise them as opposite lenses to diachronically analyse legal materials. Against this background, 'change' seems to rest on its ordinary meaning of qualitative or quantitative modification in the ontology of those materials. At the opposite pole, 'continuity' would then emerge as the absence of such modification over time. In fact, a characterisation along these lines is undertaken in slightly clearer fashion by others, although again without offering much thought about this move's implications.[106] Most explicit along these lines is Södersten, who deploys the framework of historical institutionalism.[107] In fact, within historical institutionalism, the dichotomy is well-established, although a closer reading reveals a subtler understanding than a blunt juxtaposition.[108]

Indeed, the all-or-nothing nature of this dichotomy is misleading. By juxtaposing 'continuity' and 'change', this framing suggests an undifferentiated notion of the latter. All modifications of the *status quo* are regarded as equivalent by the mere fact of amounting to such a modification. In so doing, the dichotomy lacks analytical sharpness. In fact, it misses the crucial point that 'change' can be not only quantitatively (which the continuity/change dichotomy is arguably still in a position to capture), but also qualitatively differentiated. This point was aptly made in 1962 by the economic historian, Alexander Gerschenkron.[109] Finding the concept of 'continuity' to be largely used by historians, Gerschenkron elected to elucidate its meaning. Gerschenkron thus noted that '[t]here is the customary contrast between "change" and "continu-

106 See Christoph Demmke and Christian Engel, 'Foreword' in: Demmke and Engel (eds), *Continuity and Change in the European Integration Process: Essays in Honour of Günther F. Schäfer* (European Institute of Public Administration 2003), ix-xii (x-xii); Allison (n. 101), 1-5; Anthony Arnull, Piet Eeckhout, and Takis Tridimas, 'Preface' in: Anthony Arnull, Piet Eeckhout, and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008), vii-x (viii); Christine Lagarde, 'Change and Continuity in Law – Keynote Speech' in: ECB, *Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow – ECB Legal Conference 2021* (ECB 2022), 13-19 (14).

107 See Södersten (n. 100), 791-792, 800-802, and 803-804. For a concise introduction to historical institutionalism, see Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, 'Historical Institutionalism in Political Science' in: Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press 2016), 3-28.

108 See, above all, Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in: Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economy* (Oxford University Press 2005), 1-39 (4-9). In fact, Streeck and Thelen *prima facie* juxtapose 'continuity' to 'change' (see 5-6). However, they ultimately make clear that 'change' can result in both 'continuity' and 'discontinuity' (see 8-9). As will be argued just below, the present paper indeed regards a framing along these lines as the most appropriate.

109 Alexander Gerschenkron, 'On the Concept of Continuity in History', Proceedings of the American Philosophical Society 106 (1962), 195-209.

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ity"', whereby 'continuity appears to mean no more than absence of change, i. e., stability'.[110] However, he continued:

> 'It does not require long semantic expeditions through the current usage of *the term continuity* to discover that it *denotes a good deal more than stability*. Confused and inconsistent as that usage is, unmistakably *it refers time and again to the nature of change rather than to its absence*. *Hence the phrase "continuous change" is by no means a contradiction in terms; by the same token, the phrase "discontinuous change" need not be pleonastic at all*. It is precisely because *continuity and discontinuity can relate to a certain kind of change* that the two concepts may be expected to prove useful in historical research'.[111]

In this passage, Gerschenkron alerts us to two crucial points. On the one hand, one can indeed profitably juxtapose 'stability' and 'change'. When reconstructing the diachronic dynamics of human experiences, one can thus analyse the interplay between stable elements and those which undergo some form of modification. On the other hand, however, 'continuity' is more appropriately juxtaposed to 'discontinuity', both concepts amounting to different modalities of 'change'. In other words, once one has satisfied themselves that, in a particular domain, 'change' has taken place while other elements have remained 'stable', the analysis can then move to whether that change can be characterised as 'continuous' or 'discontinuous'. 'Continuity' is thus not the opposite of 'change'. Rather, alongside 'discontinuity', it is a *species* to the *genus* of 'change'.

The next question is thus what 'continuity' and 'discontinuity' amount to. Gerschenkron proposes five conceptualisations of 'continuity', reversing which one can derive the corresponding notions of 'discontinuity':[112]

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110 Gerschenkron (n. 109), 195. The stability/change dichotomy is sometimes also used in legal scholarship, although, again, without much elaboration: see Antonio Cassese and Joseph H. H. Weiler (eds), *Change and Stability in International Law-Making* (de Gruyter 1988). Historical institutionalists also occasionally conflate 'continuity' and 'stability': see Streeck and Thelen (n. 108), 6; Södersten (n. 100), 792 and 801-802. This conflation occurs primarily in passages which use 'continuity' as opposed to 'change'. As argued in n. 108 above, however, this is not the most conceptually refined understanding of 'continuity' available within this scholarly tradition.

111 Gerschenkron (n. 109), 195 (footnote omitted, emphasis added). Admittedly, Gerschenkron aims at deciphering what the 'real' meaning of 'continuity' is, even when juxtaposed to 'change'. I trust Gerschenkron's appraisal that this was indeed the meaning one could infer from the state of professional historiography in the 1960s. However, in legal discourse, the dichotomy is used in a very different sense (see n. 100-108 and surrounding text). This difference warrants the reconceptualisation hereby called for.

112 Gerschenkron also analyses a 'mathematical' concept of '(dis)continuity' which, however, he ultimately dismisses as unhelpful in the historical domain: see Gerschenkron (n. 109), 196-199.

1) 'Constancy of direction', understood as 'the evolution of a historical phenomenon' which 'start[s] with hardly perceptible origins' and 'pursue[s] the process of growth and expansion to its culmination';[113]
2) 'Periodicity of events', denoting the 'periodic recurrence over time' of historical events as posited by circular conceptions of history;[114]
3) 'Endogenous change', conceptualised as change which is induced by 'a homogeneous set of factors';[115]
4) 'Length of causal regress', understood as a decision to 'single out a certain occurrence as the "beginning" of the causal chain' which leads to a given historical development, where the 'beginning' is identified at a point in time which significantly predates the outcome;[116] and finally,
5) 'Stability of the rate of change', fleshed out more concretely as 'gradualness of change'.[117]

Importantly for present purposes, Gerschenkron also highlights that 'continuity must be regarded as a set of tools forged by the historian rather than as something inherently and invariantly contained in the historical matter'.[118] Gerschenkron thus acknowledges that regarding a process of change as 'continuous' or 'discontinuous' does not entail simply taking note of any inherent feature of the phenomena analysed. Rather, it involves the historian's hermeneutics. In other words, any given change can be interpreted as continuous or discontinuous by different observers.

Admittedly, focused on professional historiography as they are, not all of Gerschenkron's concepts of '(dis)continuity' are equally helpful for present purposes. A most fruitful fertilisation can thus come from pairing Gerschenkron's reflection with that of Michel Foucault. In fact, Foucault's seminal *L'archéologie*

113 Gerschenkron (n. 109), 200. The reverse concept of discontinuity would thus encompass changes which entail a reorientation in direction; that is, the establishment of a different 'origin' to be 'expanded' by subsequent change.

114 Gerschenkron (n. 109), 200-203. Within this framework, discontinuity is thus conceptualised as a pattern of change deviating from the cycle (e. g. a change which has never taken place beforehand).

115 Gerschenkron (n. 109), 203 f. In this context, discontinuity would then be defined as change induced by an 'exogenous' factor, inhomogeneous with the set of factors otherwise inducing change.

116 Gerschenkron (n. 109), 204 f. In this sense, discontinuity thus emerges as change induced by factors irreducible to a long-standing causal chain.

117 Gerschenkron (n. 109), 205-208. Discontinuity would here describe change which occurs abruptly, marking an interruption in the gradualness of the rate of change. While this is not the meaning of '(dis)continuity' I focus upon, also this understanding can have potent implications in shaping one's understanding of EU law's path over time. See, although with the different framing of 'evolution', Giulia La Torre, 'The Formation of the EU Legal System', HJIL 86 (2026), 133-166.

118 Gerschenkron (n. 109), 208.

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du savoir (1969) was essentially preoccupied with the dichotomy between continuity and discontinuity.[119] In this work, Foucault outlined the essential tenets of 'archaeology'. Foucault understands archaeology as an approach to the history of knowledge devoted to 'marginalising the subject' and exposing the discursive structures which underlie human cognition.[120] With a view to such marginalisation, Foucault characterised archaeology as a method of analysis juxtaposed to the traditional history of ideas along several fundamental axes.[121] However, underlying all these axes is the project of analysing systems of knowledge insisting on the discontinuities marking their development over time.Obversely, according to Foucault, both the history of ideas as traditionally practiced and general historiography are premised on the fundamental ideas of reconstructing discourses around the idea of continuity.[122]

In Foucault's archaeology, 'continuity' means 'the prolongation of the foundations', whereas 'discontinuity' describes 'transformations which act as founding moments and renewals of the foundations'.[123] This conceptualisation resonates with Gerschenkron's first meaning of continuity: the idea of 'constancy of direction' in change.[124] In fact, change which takes place continuously prolongs the phenomenon concerned in the same direction set by the foundations. On the other hand, discontinuity introduces new foundations which set a different direction also for future changes. Against this background, the concept of discontinuity in Foucault crucially takes a critical tone. In fact, according to Foucault, adopting continuity as an *a priori* ordering paradigm comes with two interrelated, yet tacit assumptions. First, the notion that 'it is never possible to identify, in the order of discourse, the irruption of a veritable event; that beyond all apparent beginning, there always is a secret origin – so secret and so original that it is never possible to apprehend it in and of itself'.[125] Second, the stance that 'all manifest discourses secretly rest upon an already-said; and that this already-said is not simply a sentence which was already pronounced, a text which was already written, but a "never-said"'.[126] According to Foucault, these assumptions de-historicise human affairs, turning historical analysis into an infinite regress. By always positing an inaccessible foundation for any concept or idea, continuity insulates human action from historical determination.[127] Against this back-

119 Michel Foucault, *L'archéologie du savoir* (Gallimard 1969).

120 For a concise overview, see Gary Gutting, *Foucault: A Very Short Introduction* (2nd edn, Oxford University Press 2019), 31-40.

121 Foucault, *L'archéologie* (n. 119), 183-190.

122 Foucault, *L'archéologie* (n. 119), 9-26.

123 Foucault, *L'archéologie* (n. 119), 12-13.

124 See n. 113 above and surrounding text.

125 Foucault, *L'archéologie* (n. 119), 38.

126 Foucault, *L'archéologie* (n. 119), 38-39.

127 Foucault, *L'archéologie* (n. 119), 39.

ground, a reconstruction centred on discontinuities brings to the fore the genuinely new foundations introduced, at a given point in time, in a discursive camp. And, as importantly, it understands those foundations in light of their historical situatedness.[128]

Such historicising reconstruction has enormous critical potential.[129] This can be illustrated by a comparison with Foucault's later turn to 'genealogy'.[130] Foucault understands genealogy as an anti-metaphysical mode of analysis, electing to demystify the 'beginnings' of human phenomena. In fact, even more explicitly than archaeology, genealogy understands human experiences as the contingent product of concrete material conditions. The key concern here is not so much with evidencing discontinuities in the diachronic elaboration of discourses. Rather, it is with underlining that the foundations of present-day discourses are essentially shaped by the historical circumstances in which they were developed. Against this background, genealogy focuses on the power constellations which prevailed at the time when a specific discursive utterance was first propounded. Every discourse is thereby understood as both the embodiment of power structures and as key to their sustenance and reproduction. Genealogical analysis thereby uncovers discourses as the ideological product of particular conditions. The overarching aim is to undermine claims to universal alethic validity, showing the contingent situatedness of those claims' discursive structures. Through such demystification, genealogy paves the way for critique of hegemonic discourses as complicit with the power dynamics in connection with which they emerged as dominant.

Through its emphasis on situated 'beginnings', genealogical analysis resonates with a well-established mode of critique developed in critical legal studies (CLS): the notion of 'false necessity'.[131] In fact, a crucial aim of the

128 Foucault, *L'archéologie* (n. 119), 39.

129 For some nuance see, however, n. 196 below and surrounding text.

130 On the concepts of 'genealogy', 'archaeology', and 'critique' in Foucault, as well as on their interrelationships, see Michel Foucault, *Nietzsche, la généalogie, l'histoire* in: Suzanne Bachelard (ed.), Hommage à Jean Hyppolite (Presses Universitaires de France 1971), 145-172 (148-158); Michel Foucault, 'Qu'est-ce que la critique ? Critique et *Aufklärung*' [1978], Bulletin de la Société française de philosophie 84 (1990), 35-63 (36-39, 45-52). For a succinct treatment, see Gutting (n. 120), at 43-50.

131 See, for extensive theorisation, Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (2nd edn, Verso 2001), particularly Chapter 1. Although with different accents, read in this light Foucault, 'Nietzsche, la généalogie, l'histoire' (n. 130), 154-158. Elaborating on the connection between genealogy and false necessity, see Kate Purcell, 'On the Uses and Advantages of Genealogy for International Law', LJIL 33 (2020), 13-35 (13-15). Arguing that the relationship might be more ambiguous, see however Samuel Moyn, 'From Situated Freedoms to Plausible Worlds' in: Ingo Venzke and Kevin J. Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), 517-526 (521-522).

CLS movement was precisely to re-open spaces for the political contestation of legal discourses by showing their contingency. Whatever is not necessitated and therefore contingent is, by this very fact, amenable to change. Applied to legal history, this has led to reconstructions of diachronic legal developments questioning the necessity of the path taken. Importantly, this is not a purely retrospective exercise. CLS authors have highlighted the constraining effect which narratives of the past have on the imagination of alternative legal futures. Critical scholars hence undertook to reconstruct legal history as a radically contingent development, which for this very fact was contestable and reversible in the here-and-now.[132] Crucially, this approach has percolated into EU law, in the context of the 'critical turn in EU legal studies'.[133] Against this background, several authors have questioned the 'false necessities' of conventional narratives of EU law's diachronic evolution.[134] This literature has dovetailed with the blossoming work by EU legal historians and socio-legal scholars of EU law. The latter uncovered abstract changes in the state of EU law as the product of struggles moved by concrete interests, patterns of socialisation, and political activism. In so doing, it exposed those changes as the radically non-necessitated outcome of situated confrontations over the interpretation of indeterminate EU legal norms.[135]

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132 See, seminally, Robert W. Gordon, 'Critical Legal Histories', Stanford L. Rev. 36 (1984), 57-125 (70-71, 81-87, 96-102, and 112-116). Most extensively, see the essays collected in Venzke and Heller (eds) (n. 131), particularly in Part III. For general theoretical elaboration, see Ingo Venzke, 'Situating Contingency in the Path of International Law' in: Ingo Venzke and Kevin J. Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), 3-20 (5-15).

133 Editorial Comments, 'The Critical Turn in EU Legal Studies: Loneliness of the European Lawyer', CML Rev. 52 (2015), 881-888; presciently, Anthony Arnull, 'The Americanization of EU Law Scholarship' in: Anthony Arnull, Piet Eeckhout, and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008), 415-431. For an overview which, however, also evidences the methodological underdevelopment of much of this literature, see Päivi J. Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?', European Law Open 1 (2022), 60-88.

134 See Mark Gilbert, 'Narrating the Process: Questioning the Progressive Story of European Integration', J. Common Mkt. Stud. 46 (2008), 641-662 (646-659); Marco Dani and Agustín José Menéndez, 'European Constitutional Imagination: A Whig Interpretation of the Process of European Integration?' in: Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023), 44-74 (54-73). With less critical *élan*, also see Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (2nd edn, Routledge 2023), 63.

135 For the key texts, see Bill Davies and Morten Rasmussen, 'Towards a New History of European Law', Contemporary European History 21 (2012), 305-318; Antoine Vauchez, *Brokering Europe: Euro-Laywers and the Making of a Transnational Polity* (Cambridge University Press 2015); Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press 2022). On this literature, see van de Beeten (n. 19).

(Quasi-)genealogical projects historicising changes in EU law by highlighting their contingency have thus been underway for a while now. However, archaeological enterprises insisting on discontinuity can bring about a different kind of critical historicisation. This is underlined by Foucault's drawing of a distinction between archaeology and genealogy in the first place. In other words, much untapped critical potential can be realised by complementing a genealogical critique of EU law with archaeological thinking. This is because a change in the state of EU law may well be entirely contingent, in the sense of being only one amongst competing avenues for change which imposed itself as dominant at the outcome of a process of struggle. This might still not tell us whether the change so introduced is aligned with a continuity paradigm (in terms of further developing unquestioned foundations) or a discontinuity one (in terms of introducing new foundations altogether).[136] In this sense, appealing to Foucault's archaeology can complement the anti-necessitarian critique of EU law's diachronic development.[137] This approach would ask the scholar to determine whether a given change in the state of EU law can be predicated to introduce a new foundational logic (discontinuity), or rather to amount to a further actuation of unchanged foundations (continuity). Analysing changes in terms of their impact on the foundational logic of their area of law creates space for critical inquiry. It invites one to question what interests and values the changed panorama promotes. Likewise, it calls for a scrutiny of the democratic credentials of the underlying process of change. More generally, through its historicising pull, archaeology rejects the notion that EU law possesses a self-sustaining and imma-

136 The point can be illustrated by an ever-green in social theory: the alleged determinism of the Marxian theory of revolutions. Revolutions in Marx are clearly discontinuous in the Foucauldian sense. They substitute one mode of production for the previous one, thereby introducing new foundations in the economic base of society. However, at least if one accedes to the determinist interpretation of Marx's writings, this discontinuity is theorised as the product of necessitarian economic forces. For all the critical potential inherent in reading changes in the economic base as discontinuous, this can disempower critical thinking. In fact, contingent political decisions to continuously reproduce the economic base of society risk being thereby insulated from contestation, since no alternative would be available until the moment discontinuous change becomes historically necessitated. For an overview of this debate, see Umut Özsu, 'The Necessity of Contingency: Method and Marxism in International Law' in: Ingo Venzke and Kevin J. Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), 60-76.

137 For a similar point on the interplay between discontinuity and contingency in enabling critical histories of international law, see David Kennedy and Martti Koskenniemi, *Of Law and the World: Critical Conversations on Power, History, and Political Economy* (Harvard University Press 2023), 181-183.

nent logic. In so doing, this approach interrogates whether, and by implication why, when, and how, that logic has undergone fundamental recalibrations. As shown by the anti-necessitarian reading of EU law's history and by the CLS movement, this reaches far beyond a refined understanding of EU law's past. Rather, it has crucial implications for present and future struggles. For one, this approach allows one to critically scrutinise presently unfolding processes of change, along the same lines as those hereby outlined for a reconstruction of the past. Crucially, however, showing that discontinuities already happened in the past creates space for imagining further discontinuities in the future. The presently unfolding project of anti-necessitarian analysis of EU law's history can thus be profitably complemented with a scrutiny informed by a sensitivity for discontinuity.

The present article thus pleads to substitute for the commonplace dichotomy between 'continuity' and 'change' the more fine-grained dichotomy between 'continuity' and 'discontinuity'.[138] This is conceptualised as attendant to an underlying dichotomy between 'change' and 'stability'. To be sure, some contributions in the fields hereby surveyed (EU law, national public law, public international law) already *prima facie* deploy the continuity/discontinuity framing.[139] Unfortunately, conceptual elaboration is lacking also here. It is accordingly mostly unclear whether the dichotomy is understood in the same sense as in the present article, or rather as a paraphrasis of

138 This approach has a seminal precedent in Pier G. Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"', Hastings L. J. 51 (2000), 479-555 (506-513). However, this piece was primarily received in the circles of the theory of comparative law and legal history. Furthermore, Monateri himself sometimes conflates the continuity/discontinuity dichotomy with the continuity/change one; see e. g. 509.

139 See Christian Joerges, 'Continuities and Discontinuities in German Legal Thought', Law & Critique 14 (2003), 297-308; James Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in: Christina Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009), 801-817; Gabriela Drăgan, 'Continuity versus Discontinuity in the 2014-2020 EU Cohesion Policy' in: Gabriela C. Pascariu and Maria A. Pedrosa Da Silva Duarte (eds), *Core-Periphery Patterns Across the European Union: Case Studies and Lessons from Eastern and Southern Europe* (Emerald 2017), 291-335. Another pairing which seems to enjoy some currency is that between 'continuity' and 'rupture'. See e. g. Christian Joerges, Europe a *Großraum*? Rupture, Continuity and Re-Configuration in the Legal Conceptualisation of the Integration Project (2002). EUI Working Paper LAW No. 2002/2, available at: <https://cadmus.eui.eu/entities/publication/30083a2f-58b1-52ef-be3b-1152be36cd55>, last access 10 October 2025; Ntina Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures', AJIL Unbound 109 (2016), 266-270.

the continuity/change dichotomy.[140] I thus submit that, drawing on Gerschenkron and Foucault, much critical benefit can be reaped. Continuity and discontinuity can thus be understood as different lenses through which to critically analyse the changes undergone by EU law over time.

IV. Constructing Change in EU Law: Continuity and Discontinuity

With the help of this analytical framework, I can now better sketch out my hypothesis: that different imaginations of EU law's future reflect different positionalities in the present, which in turn play out in different reconstructions of EU law's past. My contention can thus be reformulated as follows. The Chapter's insistence on procedure, divorced from related questions of substance, is but the forward-looking projection of the book's reconstruction of EU law's past development as a process of change marked by continuity. In fact, throughout the book, one encounters a recurring opinion. This holds that the changes in EU law occurred over its '70 years' have been but a function of the foundations laid down in the 1950s. To be sure, the book thus acknowledges that changes have indeed taken place. However, it downplays the extent to which those changes have marked a discontinuity with the

140 Joerges, 'Continuities and Discontinuities' (n. 139) does not define the concepts, but seems somehow to suggest that 'continuities in German legal thought' amount to a persistence of theoretical and practical questions posed to legal thinking by the Nazi era (see 298 and 300). In so doing, Joerges somehow leans towards conflating, in turn, the pairs of continuity/change and continuity/discontinuity. A similar pattern emerges in Joerges, Europe a *Großraum*? (n. 139), although, as mentioned, 'discontinuities' here are substituted by 'ruptures' (see 7-11 for 'ruptures' and 26-33 for 'continuities'). Drăgan (n. 139) also fails to define the concepts. Interestingly, however, the pairing of 'continuity' and 'discontinuity' in the title gives way to the juxtaposition of 'continuity' and 'innovation' throughout the paper (see 294 and 299). This use also seems to strongly suggest that Drăgan understands 'continuity' as lack of change. Clearly understanding 'discontinuities' as generic 'changes' is, on the other hand, Crawford (n. 139), 809-817. On her part, Lagarde (n. 106) makes an unexpected move at 19. She thus superimposes a new dichotomy between continuity and discontinuity upon the previously-employed dichotomy between continuity and change. This new dyad seems to swing between the Gerschenkron/Foucault conceptualisation and the more traditional one. Ambiguity is also to be found in Lesaffer (n. 104), at 137, where the dichotomy between 'continuity' and 'change' is first suggested in the mainstream sense, but then a partial opening to the idea that continuity might be a modality of change is implied. On the other hand, Tzouvala (n. 139), while referring to 'ruptures' rather than 'discontinuities', implicitly suggests that both 'continuities' and 'ruptures' are actually modalities of 'change' (see 269-270).

prescient vision of the 'founders' of Europe.[141] This framework then constrains the Chapter's imagination of EU law's future: in fact, addressing matters of substance would introduce the more radical discontinuities advocated by the literature. In other words, it is precisely because the Chapter assumes (past and future) continuity in the substantive ends and principles of European integration that it can portray incremental procedural tinkering as the way forward for EU law. By contrast, the literature's insistence on proposing changes in EU law's substance, and discontinuous ones at that, reflects a general predisposition in the scholarly debate to read the development of EU law as already marked by discontinuity in the past. This reconstruction of EU law's diachronicity configures a legal imagination which is readier to call for substantive changes in EU law's future as well.

Importantly, these different attitudes towards the past and the future ultimately reflect different positionalities in the present. The book is an outspoken attempt at providing output legitimation for the integration project in its current outlook.[142] Understanding EU law's history through a continuity paradigm is instrumental to this enterprise. It reconstructs the benefits of integration currently enjoyed by EU citizens as the tangible results of the founders' forward-looking vision. This appeal to the founders adds a further layer of legitimisation: the Weberian-traditional legitimacy coming from the messianic foundational moment.[143] Further, the book presents the current output of integration as the product of a logic unchanged for 70 years. In so doing, the book entrenches that logic as key to enabling the continued production of that output in the future. If the concrete benefits currently accruing to EU citizens are ultimately attributable to the Treaties' foundational project (complemented by a modicum of input legitimacy emerged over the years), why change those foundations? Should these rather not keep on being incrementally streamlined through procedural supranationalisation? By contrast, the scholarly debate in recent years is marked by an increasingly

141 I use the language of 'founders' in an attempt to analytically acknowledge the entrenched use of the rhetorical figure of the 'founding fathers' of European integration, while seeking to problematise the concept's gendered dimension. At the same time, the very idea of 'founders' should also be questioned as the bearer of a deeper, problematic reconstruction centred on agency which downplays structure. See Agnieszka K. Cianciara, 'Why Have There Been No Founding Mothers of Europe?', Sprawy Między 75 (2022), 61-82.

142 See n. 23 above and surrounding text.

143 See n. 3 and n. 10 above and surrounding text. In fact, Weiler's theorisation of the EU's 'messianism' arose precisely out of a diagnosis that the EU traditionally relied on output legitimacy in the face of weak democratic credentials, but also that the EU's capacity to deliver that output had been compromised by the financial crisis. See Weiler, 'The Political and Legal Culture' (n. 10), 682-683; Weiler, 'Europe in Crisis' (n. 10), 254-255; Weiler, 'In the Face of Crisis' (n. 10), 831-832; Weiler, 'Deciphering the Political and Legal DNA' (n. 10), 144-145.

critical attitude towards the legal dynamics of European integration.[144] If the aim of the enterprise is to deconstruct and criticise EU law (whether internally or externally), a discontinuity paradigm seems more promising. Here, no idealised *moment constituant* needs to be posited to stabilise the present state of affairs. Rather, highlighting deviations from the arrangements of the 1950s can show that precarious equilibria have been undermined without introducing compensatory measures. A discontinuity paradigm can otherwise underline that dissatisfactory states of affairs have been overcome after hard-fought battles, while still needing full realisation. In other words, the value ascribed to the foundational Treaties may differ sharply, depending on the project pursued by examining their subsequent permutations. It is thus fruitful to read differing imaginations of EU law's future as a function of pre-existing assumptions on EU law's past. More fundamentally still, however, both the appeal to the past and the promise of the future are shaped by one's positionality in the present.

Against this background, the book's adherence to a continuity paradigm surfaces in several Chapters. For instance, Chapter 1 reconstructs the evolutionary path of Art. 2 TEU's values 'from principles to legal obligations'.[145] In so doing, the authors claim that EU law's turn to axiology is not a recent development. Rather, it is just the coherent unfolding of the 'ideals' upon which '[t]he cradle of the supranational law that became modern EU law was based'.[146] In this account, '[t]he integration of markets has notably been the outer form of the EU, whereas ideals have been the inner driver'.[147] The authors then characterise the process of European integration as having 'brought the inner idealistic heart of the EU into the daylight'. They hence reconstruct the emergence of the value agenda in EU law as a '"stone by stone" approach', which led to current Art. 2 TEU by building on the 'textual […] roots in the Treaties of Rome and Paris'.[148] In the authors' submission, therefore, recent developments are visibly configured as the 'already-said' that is at the same time a 'never-said', through which Foucault characterises continuity.[149] A further example is provided in Chapter 6, deal-

144 See n. 25 and n. 133 above and surrounding text.

145 Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 34-57. Critically on this Chapter, see Maciej Krogel, 'Is It Enough to Say "Common Values" When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order', HJIL 86 (2026), 225-244.

146 Erlbacher and Herrmann (n. 145), 34.

147 Erlbacher and Herrmann (n. 145), 34.

148 Erlbacher and Herrmann (n. 145), 34-37.

149 See n. 126 above and surrounding text.

ing with several iterations of the EU's transition 'from an economic community to a Union for its citizens'.[150] To be sure, the authors of this Chapter understand this to have been a journey 'from the unthinkable to tangible rights, and beyond'.[151] However, they subsequently make clear that this 'unthinkable' has 'become a reality because the European Economic Community, and subsequently the EU, has increasingly placed the citizen at the heart of the "process of creating an ever closer union among the peoples of Europe"'.[152] This reference to the open finality set for the integration process since the latter's very outset reveals the continuity paradigm underlying the reconstruction.[153] The significant changes in Europeans' lives surveyed in Chapter 6 are thus presented as the progressive realisation of the forward-looking vision of the founders, updated to cope with 'a changing world' and 'the evolution of European society'.[154] Against this background, a significant part of Chapter 6 is devoted to three interrelated developments. The authors identify one *fil rouge* threading across them: The shift 'from a perspective of treating persons as economic resources to considering them persons with a right to work with dignity'.[155] The authors trace this evolution in the broadening of the free movement of workers to protection against one's home MS after having exercised mobility; the prevalence of the principles of aggregation and export of benefits in social security coordination; and the introduction and progressive 'socialisation' of EU rules concerning collective lay-offs.[156] In all these cases, they underline how the progressive 'humanisation' of the original Treaties' economy-centred provisions merely developed the

150 Isabel Galindo Martín et al., 'From an Economic Community to a Union for Its Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 133-156. Critically on this Chapter, see Steiert (n. 79).

151 Galindo Martín et al. (n. 150), 133.

152 Galindo Martín et al. (n. 150), 134.

153 See the first Recital of the Preamble to the Traité instituant la Communauté Économique Européenne (1957). On its historical and present-day significance see Jürgen Bast and Armin von Bogdandy, 'Geltung, Telos und Hierarchie des Unionsverfassungsrechts' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht: Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (Nomos 2025), 67-121 (87-100).

154 Galindo Martín et al. (n. 150), 155 f.

155 Galindo Martín et al. (n. 150), 155. The shift in perspective is summed up at 134 as having led 'from workforce to European Union citizens'. Despite hinting at it, the authors do not pick up on the issue of citizenship. This is probably because the matter is addressed separately in Chapter 4 of the book: Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: In the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 96-114. Critically on Chapter 4, see Meeusen (n. 23).

156 Galindo Martín et al. (n. 150), 134-140.

latter's in-built principles.[157] In so doing, the authors read the current state of EU law as an uninterrupted lineage which developed foundations always (if latently) present in the Treaties.

Chapter 8 of the book, on its part, addresses the evolution of the Common Agricultural Policy (CAP) and of the Common Fisheries Policy (CFP).[158] The Chapter devotes significant effort to showing that both policies have significantly broadened their objectives. From initial emphasis on food security and support to domestic production, they have incorporated, *inter alia*, aspects of social and environmental sustainability, as well as animal welfare.[159] However, the authors also caution that 'the substance' of the Treaty provisions 'has not changed since 1957'.[160] Rather, the policies' several objectives 'have been developed gradually over the last 60 years'.[161] In other words, 'the fundamental objectives of food security and market stabilisation are still central, and require ongoing rebalancing in the light of the current circumstances'.[162] Far from entailing a radical break with the original Treaty framework, these developments show that 'EU law can move with the times and adapt to changing circumstances and challenges, both of today and of the future'.[163] Chapter 8 thus suggests that this process of adaptation can occur without fundamentally altering EU law's 70-year-old foundations. In a similar vein, Chapter 13 addresses the infringement procedure as 'a key driver of the development of European Union law'.[164] As far as the historical profile is

157 See Galindo Martín et al. (n. 150), 134, underlining that the first development was made possible by the TEEC provisions on the free movement of workers, which 'remained, in essence, unchanged until the [TFEU] enshrined, in Article 45, the principle as it stands today'; 136, highlighting that social security coordination had already been addressed before the start of European integration in 'an international convention that was incorporated into what was only the third regulation to be adopted after the entry into force of the original EEC Treaty', based on Art. 51 TEEC; 138, positing that, despite the lack of a power to adopt legally binding acts, Art. 118 TEEC already made 'labour law and working conditions' a matter of supranational concern. However, for a different reading on the extent to which the Chapter posits such continuity, see Steiert (n. 79).

158 Jacqueline Aquilina et al., 'Of Farms, Fish and Forks: Towards Safe, Sustainable and High-Quality Farming and Fishing in the EU' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 179-206.

159 Aquilina et al. (n. 158), 181-182 (on the CAP) and 190-191 (on the CFP).

160 Aquilina et al. (n. 158), 179.

161 Aquilina et al. (n. 158), 180.

162 Aquilina et al. (n. 158), 206.

163 Aquilina et al. (n. 158), 206.

164 Karen Banks and Gregor von Rintelen, 'The Infringement Procedure: A Key Driver of the Development of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 296-310.

concerned, Chapter 13 mostly highlights how Treaty amendments and re-interpretations by both the European Court of Justice (ECJ) and the Commission have 'increased the effectiveness of the infringement procedure'. Key in this process were the introduction of sanctions and interim measures.[165] Similarly, the authors show that the Commission's embracement of a discretionary approach in setting enforcement priorities has streamlined the procedure's potential as a 'policy tool'.[166] However, such developments do not call into question the fact that the core provisions of Arts 258 and 260(1) TFEU 'have remained unchanged since the Treaty of Rome'.[167] Consequently, the infringement procedure, through its changes, has 'evolved and become more effective'.[168] The insistence on 'effectiveness' as a concept with an intrinsic means-end focus suggests that, over the years, the infringement procedure has simply come to better serve its always-intended purpose: ensuring the seamless efficacy of EU law. Chapter 14 further complements this picture. It reflects on several technical facets of the interplay between regulatory and competition law, skilfully tinkered by the European Commission as 'the clock master' of the EU's internal market.[169] This interplay's key pivot is identified in the liberalisation of monopolistic network markets effected by EU law throughout the 1980s and the 1990s. This is understood as an exercise which mixed concerns at maximising economic efficiency with the pursuance of ulterior 'legitimate public interests' of a non-economic nature.[170] In the authors' account, these developments are to be seen in the context of the Schuman Declaration's 'functionalist approach', which '[s]ince the creation of the European Communities' has led to 'the accomplishment of the four fundamental freedoms […] with different intensity depending on the focus […] the sector and the period'.[171] Viewed in this light, the phenomena described in Chapter 14 show that '[t]here is continuity in the regulation of the internal market, but also adaptation to changed circumstances and challenges, the internal market being a living instrument characterised by

165 Banks and von Rintelen (n. 164), 300-304.

166 Banks and von Rintelen (n. 164), 305-307. The authors refer to the important Communication: European Commission, 'EU Law: Better Results Through Better Application' (C/2016/8600) [2017] EU OJ C18/10.

167 Banks and von Rintelen (n. 164), 296.

168 Banks and von Rintelen (n. 164), 310.

169 Dimitrios Triantafyllou and Luigi Malferrari, 'The European Commission: The Clock Master of the European Union Internal Market' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 311-334.

170 Triantafyllou and Malferrari (n. 169), 312-326.

171 Triantafyllou and Malferrari (n. 169), 311.

dynamism'.[172] Such dynamic adaptation is thus once again framed as a wise accomplishment of the founding Treaties. In this framing, Schuman's functionalism laid the foundations for a common market ever since 1950. This unchanged project has gradually adjusted its likewise unchanged core to respond to the challenges posed by 70 years of European integration.

Overall, the picture above can be strongly characterised in the sense of continuity proposed in Section III above. Several of the book's Chapters do not deny that 'change' has taken place in EU law: much less so, change is at the very heart of the story they tell. The authors of the several Chapters rather underline, on the one hand, that such change has taken place to respond to new circumstances. On the other hand, they stress that this has not questioned the 70-year-old foundations originally laid down in the Treaties. In fact, these responsive changes have been enabled by those very foundations, and have merely expanded upon them. This theme emerges forcefully in the book's overarching and more 'political' contributions.[173] It is within this overall interpretive horizon that the Chapter's circling between past and future should be understood.[174] Against this background, one can better understand the Chapter's concluding statement as the ultimate embodiment of the ideal of continuity with the pristine foundations of 1951: '[w]hatever the path of the future of EU law is, the EU is a dynamic and adaptable project. The past 70 years of EU law have led to very concrete

172 Triantafyllou and Malferrari (n. 169), 334.

173 See Ursula von der Leyen, 'Preface' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 3-4, according to which '[f]or the past 70 years, law has been the driving force behind the ever deeper integration of Europe' (3). Von der Leyen then submits that '[the EU] has […] demonstrated its resilience in standing united in the face of extraordinary challenges and using its legal framework as a tool to successfully tackle recent crises […]' (3-4). The President of the Commission hence praises the EU institutions' 'strong political will to use the full potential of the EU's institutional and legal framework' as the key precondition for the EU's 'most recent achievements' (4). Similarly, Metsola (n. 21) claims that '[t]he Treaty of Paris on 23 July 1953 changed the course of Europe. Our community laid down the foundations of EU law and the path of European integration began' (8). Building on this foundation, the President of the European Parliament maintains that '[t]here is no question that the world – Europe included – will continue to change throughout the course of time. Yet, with steadfast values, solid foundations and meaningful institutions safeguarded by EU law, our project can persist even when faced with autocratic threats' (9). Finally, Calleja and Rusche (n. 22) open their synopsis of EU law's historical path by narrating an extraordinary meeting of the European Commission in the same venue where the first meeting of the High Authority took place 70 years earlier. Based on this circling symbolism, they submit that '[s]eventy years [after the beginning of the integration process] the ideal of peace remains very much at the heart of the European project and, in order to achieve it, the scope of action of the European Union has expanded beyond the remit of a purely economic organisation' (15-16).

174 See n. 33 above and surrounding text.

results for EU citizens […] [B]ased on the EU leaders' strong political will to act unitedly, EU law is a powerful and effective tool to deliver responses to new and unforeseen crises'.[175] I thus contend that, in order to make sense of the Chapter's imagination of EU law's future, one needs to place it within the continuity paradigm through which the book reconstructs EU law's past.

Against this background, the picture emerging from the book can be contrasted with the account of the very same developments hereby surveyed to be found in the literature. Take, for instance, Chapter 1's insistence on Art. 2 TEU as the 'already-said/never-said' of European integration.[176] Such reading sits uneasily with reconstructions which attribute a key role to the qualitatively new stage of European integration which spanned from the Maastricht to the Lisbon Treaties. In this account, the turn to values in EU law does not form part of a foundation immanent to EU law since 1951.[177] Rather, it much more flows from a contested process which unfolded over two decades, starting in the 1990s and culminating in the Constitutional and Lisbon Treaties.[178] Similarly, consider Chapter 6's presentation of the 'humanisation' of EU labour law as the progressive implementation of principles latent in the Treaty establishing the European Economic Community (TEEC).[179] The book's account in this respect can be contrasted with much more widespread recollections in the literature. These emphasise not only, as the book also does, the progressive (if incomplete) detachment of this body of law from its original commodifying logic. Rather, the scholarly debate often stresses how even the introduction of the economy-centred account which the book takes as the starting point entailed, to a large extent, a rupture with the initial Treaty framework. This rupture unfolded through contested recalibrations of the Treaty's substantive and procedural content. Once prevailed, it attracted to the supranational level labour and social law- and policy-making to an extent arguably higher than originally intended.[180]

Coming to Chapter 8, the book's understanding of continuity in the transition of the CAP and the CFP towards 'multifunctionality' is also not

175 Calleja and Ladenburger (n. 24), 392.

176 See n. 145-149 above and surrounding text.

177 In the iconic words of Weiler, 'The Political and Legal Culture' (n. 10), '[d]emocracy was not part of the original DNA of European integration. It still feels like a foreign implant.' (694).

178 See Jürgen Bast and Armin von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism', CML Rev. 61 (2024), 1471-1500 (1474-1478, 1480-1481 and 1488-1490).

179 See n. 150-157 above and surrounding text.

180 See Diamond Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', ELJ 19 (2013), 303-324 (307 f.); with further references, Steiert (n. 79).

the only available interpretation.[181] Alternative understandings point out that the CAP's controversial and all-absorbing emphasis on producer support in the early years was, in itself, not compelled by the TEEC provisions. Rather, the TEEC enshrined a plethora of contradictory objectives, in a spirit of compromise between competing views. The CAP's corporatist and protectionist configuration only properly emerged during the 1960s, after hard-fought bargaining amongst the MS. This was to the detriment of other possible articulations which, however, would also have been possible under the Treaty framework.[182] If not even the CAP's protectionism can be predicated to amount to a seamless propagation of the 1957 foundational moment, this goes all the more for the subsequent transition to multifunctionality.[183] Also remarkable is Chapter 13's assumption of continuity in the configuration of the infringement procedure. As highlighted above, the book tells this story as the progressive increase in efficiency of an instrument whose nature was never fundamentally revised.[184] Different accounts rather point to a more fundamental reshuffling of the procedure's systemic significance. These insist, *inter alia*, on the broadening palette of substantive provisions amenable to enforcement, as well as on the very same heightened discretion in setting enforcement priorities which the book itself recollects. Against this background, many an author has underlined how the infringement procedure currently looks less like the law-enforcement tool initially envisaged, and more like a policy-making device.[185] Finally, consider Chapter 14's reading of

181 See n. 158-163 above and surrounding text.

182 Although this configuration admittedly aligned with France's protectionist stance, which was in turn the main reason for the CAP to be included in the TEEC to start with. See, without having to uphold liberal intergovernmentalism as a general theory of European integration, the historical record surveyed in Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998), 208-216.

183 Especially if one considers that the transition to multifunctionality has itself entailed the radical restructuring of many a market, as configured by the CAP's mercantilistic orientation since the 1960s. See Francis Snyder, 'CAP' in: Erik Jones, Anand Menon, and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012), 484-495 (486-491).

184 See n. 164-168 above and surrounding text.

185 Admittedly, a partial concession to this reading is perhaps implied by the book's qualification of infringement proceedings as a 'policy tool' (see n. 166 above and surrounding text). However, the authors do not develop the implications of this opening into acknowledging the changing systemic significance of the procedure. On this structural change, see e. g. Maria Mendrinou, 'Non-Compliance and the European Commission's Role in Integration', Journal of European Public Policy 3 (1996), 1-22 (9-18); Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press 2012), 17-26; Luca Prete and Ben Smulders, 'The Age of Maturity of Infringement Proceedings', CML Rev. 58 (2021), 285-332 (289-294, 296-300, and 330-332). Interestingly, while this is no longer the case at the time of writing, Prete and Smulders have been members of the Legal Service of the Commission. While

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the liberalisations of the 1980s and 1990s as a marginal 'adaptation' of the initial common market project.[186] This continuity can be contrasted with scholarly accounts which understand both the liberalisations specifically, and the path of the common/single/internal market more broadly, as having brought about a radical recalibration in the EU's economic constitution.[187] Under this view, the current internal market is not just a marginal refurbishment of the common market of the 1950s. Rather, it is a completely reconfigured socio-economic space, brought about by a radical discontinuity with the initial economic constitutional model.[188]

To be sure, the contrast above can be nuanced in turn. The book makes significant openings to the concept of discontinuity in some passages,[189] and the literature also offers continuity-inspired readings.[190] However, this does not detract from the overall picture emerging from the above. I thus hope to have made colourable my claim that the divarication highlighted in Section II

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still affiliated with the Legal Service, they also co-authored a contribution which already started tracing developments along these lines: see Luca Prete and Ben Smulders, 'The Coming of Age of Infringement Proceedings', CML Rev. 47 (2010), 9-61 (13-15 and 18-24).

186 See n. 169-172 above and surrounding text.

187 On the shifting conceptualisation of the European market from 'common', to 'single', to 'internal', see Jukka Snell, 'The Internal Market and the Philosophies of Market Integration' in: Catherine Barnard and Steve Peers (eds), *European Union Law* (4th edn, Oxford University Press 2023), 336-365 (343-353).

188 This discontinuity is commonly conceptualised as a move away from 'embedded liberalism' towards a neoliberal paradigm. For the seminal theorisation of 'embedded liberalism', see John G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', IO 36 (1982), 379-415. On its 'unravelling' in the EU in general, see Ashiagbor (n. 180), 304-316; specifically insisting on liberalisations, Matthias Goldmann, 'Die Wirtschaftsverfassung' in: Jürgen Bast and Armin von Bogdandy (eds), *Unionsverfassungsrecht: Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (Nomos 2025), 299-386 (332-338).

189 See, for instance, Galindo Martín et al. (n. 150), who break free with the continuity paradigm underlying their presentation of labour law (see n. 150-157 and surrounding text) when addressing other developments. In fact, the authors acknowledge that healthcare mobility (140-142) and student mobility (142-144) amount to a creation by the ECJ with no basis in the original Treaties. Also see Giacomo Gattinara et al., 'Protecting the Environment and Tackling Climate Change' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 158-178. This Chapter presents the evolution of EU environmental law as the result of a creative use of available legal basis starting in the 1970s (see 158-159). Implicit therein is an acknowledgement that the original Treaty framework completely ignored environmental questions.

190 See e. g. Steve Peers and Marios Costa, 'The Old Dog Learns New Tricks: Reinvigorating Infringement Proceedings to Enhance the Effectiveness of EU Law', E. L. Rev. 46 (2021), 228-241. In fact, Peer and Costa interpret the infringement procedure's developments as having simply streamlined its 'effectiveness', much in the same spirit as n. 164-168 above and surrounding text.

above reflects deeper divergences in the underlying approaches to the *longue durée* of EU law.

V. Conclusion: Narrating Change in EU Law

For a long time now, EU law has essentially been conceived of as a diachronic process.[191] The notion of dynamic historical development is thus of fundamental importance in EU legal discourse. In the context of European modernity's composite temporality, this leads to a centrality of EU law's past when thinking about its future. However, both the past and the future are best understood as positional projects. One's presentation of both is crucially shaped by their assumptions and aspirations, and ultimately aims at situating claims to discursive authority in the here-and-now. With this in mind, it is easier to make sense of the sharp dissonance between the Chapter's focus on questions of procedure, and the literature's emphasis on matters of substance. These can be understood as exercises in different legal imaginations, shaped by broader assumptions about the overall trajectory of EU law. In fact, the book's general understanding of EU law's past strongly resonates with the concept of continuity. More often than not, the book presents the changes which occurred over the years as the progressive unfolding of the founders' forward-looking vision. However, this understanding is far from exhausting the range of possible interpretations. Also more often than not the scholarly literature understands those very same changes as having rather entailed a discontinuity with the Treaties' foundations. In this account, change in EU law has not progressively actualised the immanent project of the 1950s. Rather, it has at once signalled and sustained the emergence of altogether different projects.

Against this background, I understand the procedural tinkering imagined by the Chapter as a projection of the book's continuity paradigm into the future. In the broader context of the book, divorcing procedure from substance is in line with the notion that EU law is all about further streamlining its original project. The assumptions underlying that project thus need not be fundamentally questioned; rather, their translation into practice is to be made more efficient through enhanced supranationalisation and democratisation. In other words, the Chapter imagines a future for EU law which is, in turn, a project of continuity with the original Treaties. By contrast, the literature's more fundamental questioning of the substance of EU law can be interpreted as a call for discontinuity with the *status quo*. It is therefore tempting to see

191 See La Torre (n. 117).

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this as a function of the general predisposition in the field to see this very *status quo* as being, in turn, the product of manifold discontinuities with the original Treaties.

To be sure, this is not the only available interpretation of the materials I presented. Other factors may be responsible for shaping the diverging legal imaginations surveyed in this piece. For instance, the Chapter's emphasis on procedure might be reflective of a much more concrete policy concern: overcoming the stalemate caused by Hungary's policy of systematically obstructing EU decision-making.[192] Conversely, the respective emphasis on continuity and discontinuity might be due not so much to semi-deliberate choices on how to formulate claims to authority, as to the very structure of the Legal Service's and legal academia's epistemes. While the importance of precedent in legal practice incentivises those engaged therein (particularly in an institutional setting) to emphasise continuity with the past, legal academics earn reputation as creative thinkers by proposing novel (read: discontinuous) interpretations.[193] These interpretations are surely at least as tenable as the one hereby advanced. However, rejecting mono-causality, I deem it equally arguable that the broader horizons of continuity and discontinuity are co-determinative of our thinking about the law. Epistemic enrichment in the realm of social phenomena does not derive exclusively from univocal causal determinations (if any are possible at all in this domain). It can also be reaped

192 I am indebted to Armin von Bogdandy for raising this point. The question is particularly acute in the field of external relations, and has given rise to extensive debate: see, amongst many others, Peter van Elsuwege, 'How Viktor Orbán Challenges the EU's Common Foreign and Security Policy', Verfassungsblog, 9 July 2024, doi: 10.59704/da56a3449b491903; Peter van Elsuwege, 'How Hungary's Withdrawal from the International Criminal Court Affects the Credibility of the European Union', Verfassungsblog, 9 April 2025, doi: 10.59704/5b203c654819dbae. Luke D. Spieker, 'Tackling the Union's "Orbán Problem" Now: Seizing Momentum, Reviving Article 7 TEU, Sharpening Conditionality', Verfassungsblog, 10 April 2025, doi: 10.59704/9b1855f0d7899719; Armin von Bogdandy and Luke D. Spieker, 'Overcoming the Hungarian Veto: Advancing Europe's Geopolitical Agency', Verfassungsblog, 13 June 2025, doi: 10.59704/7dbcc468d0db22c4; Martijn van den Brink and Mark Dawson, 'The European Union's Fantastical Constitution: A Response to von Bogdandy and Spieker', Verfassungsblog, 27 June 2025, doi: 10.59704/683c73f664fc9a0b; Lucia S. Rossi, 'A Legal Scalpel Instead of an Axe: How a Reinterpretation of Article 7 TEU Could Neutralise Hungary's CFSP Veto Strategy', Verfassungsblog, 9 July 2025, doi: 10.59704/0ddbf23ae5f67774; Armin von Bogdandy and Luke D. Spieker, 'Overcoming Objections to Overcome the Hungarian Veto: A Rejoinder to Dawson and van den Brink', Verfassungsblog, 31 August 2025, doi: 10.59704/91d8d12473fca44a; Johannes Schäffer, 'EU Sanctions and the Mirage of Unanimity: Overcoming the Hungarian Veto One Step after Another Under the Letter of EU Law', Verfassungsblog, 8 October 2025, doi: 10.59704/6dcbcf81e23133c5.

193 Thanks to Michael Ioannidis, one reviewer, as well as Robert Stendel, for stressing the importance of this point. On the intrinsic orientation towards continuity in the Legal Service's episteme, also see Leino-Sandberg, '70 Years of EU Law' (n. 23).

from defensible ways to make sense of those phenomena.[194] I thus hope to have proposed a convincing way to interpret the visible mismatch to which the present paper was devoted. Furthermore, above and beyond this issue's focus on the book, I hope to contribute to a broader discussion on the epistemology of EU law.[195] In this context, I believe that an archaeological approach can generate remarkable insights on how knowledge about EU law is produced. This approach can thus hopefully be put to use in other critical analyses of how EU law's diachronicity is construed.

A final note is in order. In line with Geschenkron's remarks on (dis)continuity as hermeneutics, I do not aim here at characterising one or the other paradigm as 'correct' *per se*. In fact, I do not aim at such characterisation in respect of either EU law as a whole (which I believe would be simply wrong), nor of any particular areas of the EU legal system. To be sure, it must have transpired that I believe that a discontinuity paradigm captures many developments in EU law better than a continuity one. Relatedly, one of the main reasons why I find a discontinuity-centred understanding so attractive is undoubtedly its critical potential.[196] However, my point is primarily analytical, rather than normative. In other words, I wish to highlight first and foremost that our thinking on EU law's past spills over into our imagination of its future; or, better, that our thinking of both EU law's past and its future is shaped by assumptions which guide us in undertaking those (re-)constructions. In turn, these assumptions are a function our situated perception of EU law's present, and of the projects we wish to pursue through and about it. This can be seen as a question of narratives of EU law; that is, the construction of discourses on EU law based on assumptions about the attribution of meaning. These assumptions shape what is told and how it is told, in the overall effort to make sense of inchoate social

194 Armin von Bogdandy, 'Comparative Constitutional Law as a Social Science? A Hegelian Reaction to Ran Hirschl's *Comparative Matters*', VRÜ 49 (2016), 278-290 (285-287).

195 See e. g. Marija Bartl and Jessica C. Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar 2022); Martijn W. Hesselink, 'Knowing EU Law', Cambridge Yearbook of European Legal Studies 26 (2024), 155-183.

196 This however admittedly raises one further question. This is whether discontinuity carries critical potential under all circumstances; or whether there exist instances where emphasising discontinuity legitimises arrangements which, on closer (critical) scrutiny, can actually be understood as embodying continuity with previous foundations assumed to be problematic. I generally think that the latter is the case (think of the overstatement of the EU's break with Europe's colonial past: see n. 85 above). Roughly, this can be a function of the temporal scale within which the inquiry is undertaken, as well as of the pre-existing conditions of the discursive camp within which the claim is formulated. However, space reasons prevent me from pursuing this point any further on this occasion.

and legal phenomena.[197] However, narrative assumptions do not only structure one's understanding. Rather, they are dialectically reinforced in turn by their actualisation in the narrative. This discursively limits the range of possible courses of future action to those which conform with those assumptions.[198] Against this background, narrating EU law's past as a story of continuity contributes to shaping an imagination of its future which conforms with that continuity. Acknowledging that past changes have rather entailed discontinuities can thus liberate our capacity to imagine discontinuous change also for the future.

197 See, seminally, Robert M. Cover, 'Foreword: *Nomos* and Narrative', Harv. L. Rev. 97 (1983), 4-68 (4-11). With further references, also see Julia Otten, 'Narratives in International Law', KritV 99 (2016), 187-216 (188-206); Daniel R. Quiroga-Villamarín, A *Histoire Juridique Commune*? Historiographical Frames in European and Inter-American Human Rights Narratives (January 15, 2025). MPIL Research Paper No. 2025-03, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5098631 (2-7). Note, however, that the literature on law and narratology often refers to the narrative function performed by legal materials themselves (e. g. the 'stories' narrated in judgements, statutes, or treaties). Here, I rather understand the Legal Service's book, at a higher level of generality, as a narrative *of* EU law and its diachronic development. Other authors similarly scrutinised the rhetoric which underlies institutional practice and public discourse on EU law and policy: see Kalypso Nicolaïdis and Robert Howse, '"This Is My Eutopia …": Narrative as Power', J. Common Mkt. Stud. 40 (2002), 767-792; Floris de Witte, 'Integrating the Subject: Narratives of Emancipation in Regionalism', EJIL 30 (2019), 257-278; Catherine E. de Vries, 'How Foundational Narratives Shape European Union Politics', J. Common Mkt. Stud. 61 (2023), 867-881. For an approach focusing more on legal acts as narrators on their own right, see however Antoine Bailleux, Elsa Bernard, and Sophie Jacquot (eds*), Les récits judiciaries de l'Europe: Concepts et typologie* (Bruylant 2019).

198 Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019), 162-171.