

ARTICLE

Special Issue — Law and Political Imagination: The Perspective of Paul Kahn

Between Integration and the Rule of Law: EU Law's Culture of Lawful Messianism

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Abstract

The present article seeks to identify the particular culture that undergirds the practice of EU law, by drawing from Paul Kahn's Cultural Analysis of Law. It will do so by extracting from his work certain models for understanding the imaginative life of a political community, most importantly those of the rule of law and of political action, which in Kahn's observation of American realities stand in competition to one another. This will lead us, first, to consider the particular place held by European integration, as a messianic project of collective transformation. While this might seem to structure the practice of EU law in a way that is consistent with Kahn's description of political action, such a view, we will then submit, does not consider the particular place of law in the EU's legal culture, as the very substance in which the European order appears incarnated, and which provides the impetus for much of its development. To account for these two dimensions in the political imaginary of the EU, it is argued that, unlike Kahn's description of the American context, the rule of law and political action do not stand in tension with one another. Instead, the practice of EU law operates under an idiosyncratic frame of experience, which can be usefully associated to Robert Cover's notion of "lawful messianism," and which synthesizes key aspects of Kahn's account of the rule of law and political action. Finally, to illustrate the operation of just that culture of lawful messianism and its persistence to this day, the article turns to the place of the rule of law as a "foundational value" of the European legal system and recent developments around this particular norm of EU law.

Keywords: Rule of law; cultural analysis of law; EU constitutional law; political messianism; EU legal order

A. Introduction: Paul Kahn's Cultural Analysis of Law As Method and Model

Within Paul Kahn's scholarly production, one of his main contributions is what he terms the "cultural analysis of law." Developed mainly in the earlier part of his career,¹ this is an attempt at locating and understanding the "rule of law" as a "distinct way of understanding and perceiving meaning in the events of our political and social life."² Kahn does not, therefore, approach the rule

¹The work that we will be focusing on mostly is THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999). To a large extent, that book synthesizes two previous publications: THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA (1997), LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992). We will be mainly referring to the former of these.

²See KAHN, THE CULTURAL STUDY OF LAW, *supra* note 1, at 1.

of law as a set of norms, a principle of government, or a type of polity, but as a “social practice” or “a way of being in the world.”³

Kahn’s *Cultural Analysis of Law*, which we will capitalize in the rest of this article to distinguish from other law-as-culture approaches, is intimately tied to the American context. It springs from a certain dissatisfaction at the state of legal scholarship in the United States, as caught between a dominant “internal perspective” (focused entirely on legal reform) and a peripheral “external perspective” (which denies any real autonomy to law). In relation to the first, Kahn notes that legal scholars tend to focus on proposing better ways to legislate, criticize judges for wrong interpretations, push for the law to live up to the ideals to which it is committed, et cetera. This perspective he labels “internal,” because it collapses any meaningful separation between the analyst and the object of analysis, or between theory and practice. In all these instances, Kahn observes, scholarship seeks to influence the law by stating what the law already is—analyzing law is another way of *doing* law. Against this tendency, there are those that deny any real autonomy to law and choose instead to look for guidance in other disciplines, most notably the empirical social sciences (economics, policy analysis, et cetera). Such an “external perspective,” whilst peripheral within the study of law, may nevertheless eventually mutate into an internal one, as truth claims based on non-legal sciences are incorporated within legal reasoning.⁴ The example offered by Kahn is the legal realists, and their various descendants such as the law and economics movement.

The *Cultural Analysis of Law* rejects both perspectives, or rather seeks to position itself “on the line separating” the two. On the one hand, against “external” perspectives on law, it takes law seriously as an autonomous cultural form. Law is never, Kahn writes, “a failed form of something other than itself.”⁵ Our quest to understand law must not take us outside of it, whether to economic forces or moral ideals, in search of explanatory or justificatory forces. On the other hand, however, the *Cultural Analysis of Law* renounces any claim to influence the development of the law, aiming to suspend as much as possible, or at least “push off into the future a bit,”⁶ any judgment, whether moral or political, of our object of enquiry. To achieve such distance from the rule of law is harder for us, as our beliefs and perceptions are shaped by the very world that we seek to understand, than if we hailed from a completely different cultural context. It is nevertheless not impossible, Kahn suggests, to aim for some sort of temporary estrangement—indeed, his *Cultural Analysis of Law* stands within a long tradition of critical self-reflection, a practice that “rests upon the capacity of the individual to transcend every context, and so to examine the conditions of belief that make possible our ordinary activities and norms.”⁷

There is some ambiguity in this part of Paul Kahn’s work. On the one hand, it can essentially be read as only about America, in other words as an enquiry into the legal imaginary that is specific to that country’s experience. There are good reasons to read it this way, including his almost exclusive focus on American materials and specific historical development, and the fact that Kahn himself warns against extending his conclusions outside that particular context. If so, the *Cultural Analysis of Law* should be included among various other scholarly trends that approach law as a context-dependent cultural form. Legal anthropology is an obvious example, given particularly its interest in the study of “legal consciousness”—that is, “the extent to which individuals see themselves as defined by the law and entitled to its protections.”⁸ The most influential figure in this tradition is probably Clifford Geertz, who studied law as “not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real.”⁹ Mautner presents scholarship inspired from Geertz’s work,

³*Id.* at 36.

⁴See Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J. L. & HUMANITIES 141 (2001).

⁵KAHN, THE CULTURAL STUDY OF LAW, *supra* note 1, at 92.

⁶*Id.* at 38.

⁷*Id.* at 32.

⁸See Sally Engle Merry, *What Is Legal Culture - An Anthropological Perspective*, 5 J. COMP. L. 40, 44 (2010).

⁹See CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 173 (1983).

including that of Paul Kahn himself, as taking a “constitutive approach” to the relationship between law and culture, seeing law as imagining “social life,” a “system of meaning” parallel to science, art, religion, or ideology.¹⁰ There is however an important difference between the work of Kahn and that of legal anthropology, in that the latter depends on the ethnographic study of material practices, whereas Kahn focuses entirely on the imaginative forms found only in texts. In that sense, he is closer to strands within comparative law, who see culture as the ultimate focus of comparison between different jurisdictions, and emphasize the need to reach a position of enquiry that is neither external nor internal to the object of study. Thus, William Ewald’s “comparative jurisprudence” seeks to identify in the law of a particular community specific ideas about how society should be governed and why,¹¹ while Pierre Legrand argues that particular rules and institutions are nothing more than “surface phenomena,” the most visible outside manifestation in the legal domain of “collective mental programmes,” or “frameworks of intangibles within which interpretive communities operate and which have normative force for these communities.”¹²

If that is the proper way of reading Kahn, then the interest in his work, for anyone other than those seeking to understand the idiosyncrasies of America’s legal imagination, would necessarily lie in the possibility of finding within it a methodological roadmap, one that would allow us to unlock, as put by Legrand, the “cognitive structures” that are specific to other polities, so as to “explicate how a community thinks about the law.”¹³ Much of the book *The Cultural Study of Law* concerns this possibility, most clearly chapter three, which identifies a series of “methodological rules” that would allow for a new “discipline of law” that breaks legal scholarship from legal practice.

That, however, is not the only way of reading Kahn. The penetrating portrait of the rule of law that he gradually draws can be detached from the specific American experience, and be seen instead as concerning a more general symbolic form, a model that can be potentially found in different contexts, where it can compete with alternative frameworks of imagination. This does not mean that Kahn’s discussion of method is moot—it simply means that this discussion can be seen as a pathway to access, not to the particularities of particular jurisdictions, but that specific autonomous form of experience that he calls the “rule of law” (or “law’s rule”), and which elsewhere he has associated with the modern nation-State.¹⁴ Such a “jurisprudential” reading of Kahn brings it closer, not to comparative law scholarship, but to other enquiries into the nature of law and its cultural or anthropological autonomy. These include the work of other eclectic scholars such as Robert Cover (who views law as a “bridge” between the world and our imagined futures)¹⁵ or more recently Alain Supiot (through his enquiry into law’s “anthropological function,” as the technique that “connects our infinite mental universe with our finite physical existence and in so doing [serves to institute] us as rational beings.”)¹⁶

In sum, there are two sides to Kahn’s *Cultural Analysis of Law*, which are not easy to separate—a context-dependent enquiry into the political imagination sustaining a particular community’s legal practice, and a jurisprudential elaboration of the rule of law as a specific frame of making sense of social and political experience. Our aim, in the present contribution, is to use both aspects of Kahn’s work in a different context to his own, that of the EU. On the one hand, we will follow his methodological recommendation by looking within EU law for the specific frame of experience that sustains legal practice in that field, and on the other hand we will examine that practice against the particular model of the rule of law that Kahn has elaborated.¹⁷ From both angles, the

¹⁰See Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 848 (2011).

¹¹See William Ewald, *Comparative Jurisprudence (I): What Was It like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995).

¹²Pierre Legrand, *European Legal Systems are not Converging*, 45 INT’L & COMPAR. L. Q. 52, 56 (1996).

¹³*Id.* at 60.

¹⁴See PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* (2005).

¹⁵See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983–4).

¹⁶ALAIN SUIPIOT, *HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW* ix (Saskia Brown trans.) (2007).

¹⁷See the work of Ullrich Haltern, who has previously analyzed EU legal practice by relying on both dimensions of Kahn’s work (i.e. the method of *Cultural Analysis of Law* and the model of the rule of law), even if to produce a slightly different

goal is to transcend the external versus internal analytical divide, avoiding both the tendency to seek to influence the reform or proper interpretation of EU law, and the temptation to seek outside of law a better source of explanation and further development.¹⁸ Between these two, there is much space for digging deeper in search of a “legal culture” sustaining EU law (similarly to Weiler’s reflections on the “Political and Legal DNA of European Integration”)¹⁹, and uncovering its potential originality (following Azoulai, who talks of the EU’s legitimation requiring “a new form of legal knowledge and legal practice.”)²⁰ Ours is therefore an initial enquiry into the idiosyncrasies of law’s rule within the EU polity as an independent cultural form—one that approaches it with as much scientific agnosticism as possible, without seeking to reconstruct EU law rationally or push it in a certain direction, but respecting its autonomy as a specific symbolic order that may find itself in tension with alternative frames of experience.

We will proceed as follows. Part B will lay out Paul Kahn’s particular elaboration of the rule of law, on the basis of his analysis of the American experience. We will be insisting on the oppositional nature of this elaboration, as the particularity of the model is defined in confrontation to two other key approaches to the political order—love and political action. Part C will then turn to the practice of EU law, to argue that, at first sight, and somewhat counterintuitively, that practice fits more obviously with Kahn’s understanding of political action, rather than law’s rule, given the prevalence of a commitment to the cause of European integration. In Part D, we will attempt to complicate this analysis, by showing that it fails to take into account the central and decisive place given to law in the imaginative framework undergirding the practice of EU law—which will lead us to uncover an original model, specific to the EU, that collapses Kahn’s key duality between law’s rule and political action. In Part E, we will further illustrate this idea, through an examination of the particular practice around the constitutional principle of the rule of law in the EU legal order.

B. The Rule of Law as Political Imagination

Let us begin first by situating where Paul Kahn’s particular approach to the rule of law stands in relation to dominant takes. When discussing this concept, most of the literature adopts what Kahn would describe as an internal perspective—that is, it pushes for a certain conception of the rule of law by describing what the rule of law already is. What that amounts to varies considerably, and it is certainly a culturally contingent concept, but in general the rule of law tends to be understood either as a “mode of association”—to refer to a certain political entity whose very existence is constituted and operation determined entirely through rules—or as a principle of government—one that ties legitimate political rule to a certain set of constitutional prescriptions designed to

analysis from our own: *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 EUR. L. J. 14 (2003); *Integration Through Law*, in EUROPEAN INTEGRATION THEORY 177 (A. Wiener & T. Diez eds., 2004); *The Dawn of the Political: Rethinking the Meaning of Law in European Integration*, SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 585, 608 (2004); *On Finality*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 205 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed., 2010).

¹⁸Francis Snyder’s call for an interdisciplinary study of European law is emblematic of such efforts: *New Directions in European Community Law*, 14 J. L. & SOC. 167 (1987). From the 90s, that call spawned an interest in economics, political science and governance studies. More recently, attention has shifted to sociology, theories of justice or law and political economy: See Loïc Azoulai, “*Integration Through Law*” and Us, 14 INT’L J. CONST. L. 449 (2016). All of these are nevertheless destined, if they have not already done so, to become “internal,” much like Kahn’s observation of the influence of legal realism in the US, as the various claims that they produce grow to influence the development of EU law and to be incorporated within its practice.

¹⁹See Joseph H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 137 (Julie Dickson & Pavlos Eleftheriadis eds., 2012). See also *Europe in Crisis - On ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’*, SINGAPORE J. LEGAL STUDIES 248 (2012).

²⁰See Loïc Azoulai, *Structural Principles in EU Law: Internal and External*, in STRUCTURAL PRINCIPLES IN EU EXTERNAL RELATIONS LAW 31, 32 (Marise Cremona ed., 2018).

prevent dictatorship and arbitrariness.²¹ External perspectives on the rule of law also abound, nonetheless, as, for instance, the international development literature that ties certain features associated with this concept to economic and social advancement.²²

Paul Kahn's interest in the rule of law is of an entirely different nature. The most crucial aspect to insist upon is that he approaches it as a totalizing cognitive framework, or, as already stated, a "distinct way of understanding and perceiving meaning in the events of our political and social life." It does not therefore prescribe particular actions or institutions, but intervenes, at a more fundamental level, to enable actors to experience any aspect of reality around them and to make sense of it in a particular way. This means that it makes no sense to speak of falling foul of the rule of law, if understood in this way. As he writes, "[l]aw's rule is never at stake in the outcome of the particular case."²³ The fact that any particular event may be negatively apprehended (as unlawful, unconstitutional, arbitrary, etc.) does not mean that the rule of law retreats or disappears—the rule of law is still present in making that apprehension possible; in fact the more negative the apprehension the more this signals the strength of its hold over that event's perception. Thus, rather than engage in the "normative practice" of judging events based on their conformity to particular ideals or commitments, Kahn sets to identify the content of the particular frame of perception that is the rule of law, and the extent to which it prevails in the political and social life of a certain community, vis a vis alternative frames.

So what is it that is specific to the rule of law, under this conception? Kahn insists that answering this question requires identifying those other symbolic forms with which law finds itself in competition, in shaping our understanding of the political order: "To understand the rule of law we must examine that which we imagine to be other than law."²⁴ There are two main alternatives, he argues: the first is "political action," the second one "love." It is only in confrontation to them that we can seize the specific way in which the rule of law structures meaning within the political community.

The relationship to the first is the one that Kahn insists upon the most (and we will too). There are three main dimensions to this opposition.²⁵ The first is the relationship to time. The rule of law is backward facing, inasmuch as it frames events in terms of their continuation of the past. Its commitment is to the maintenance of the legacies of previous generations, as the work of each generation is to preserve the work of those that came before. Political action, by contrast, is forward looking. It frees itself from any loyalty to the past and is powered instead by "responsibility toward future generations," the ambition of building something new and better from what was received from our predecessors. The second dimension relates to subjectivity, who is it that rules? Law's rule is characterized by its "impersonality," in the sense that it operates by hiding any subjective authorship. Decisions are viewed as flowing from the law, not from the individual judge charged with delivering them. It is in that sense that the rule of law can claim to be the "rule of no one in particular"—if it were the rule of someone it would not be the rule of law. It thus stands in opposition to a politics of "personal distinction," typical of political action. The realization of such actions calls for individual achievements by particular political actors; their authorship is intensely foregrounded. Finally, the two frameworks are opposed in the nature of the rule that they conjure. It is a mediated rule, under the rule of law, as it is necessarily a "system of representation." It speaks on behalf of a sovereign that is not directly present, and can only be authoritative to the extent that it can credibly do so—hence its "representative quality." Conversely, political action speaks for no third person—it rules without mediation, there is no

²¹See Martin Loughlin, *The Rule of Law in European Jurisprudence*, Study 512/2009, Venice Commission (2009), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-DEM\(2009\)006-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-DEM(2009)006-e).

²²See Shane Chalmers & Sundhya Pahuja, (*Economic Development and the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW 377* (Jens Meierhenrich & Martin Loughlin eds., 2021).

²³KAHN, *THE CULTURAL STUDY OF LAW*, *supra* note 1, at 117.

²⁴*Id.* at 119.

²⁵This is mainly the focus of his previous work. See KAHN, *THE REIGN OF LAW*, *supra* note 1.

separation between the ruler and its ruling. It therefore operates through the mode of “instantiation,” as the “experience of meaning is not detachable from the embodied forms in which its presence is felt.”

Even though the rule of law and political action offer completely different perceptions, Kahn also points out that, in the American context, the two ultimately work together. In other words, law cannot succeed in wholly displacing political action. For law acknowledges that political action’s most dramatic form, that of the revolution, is “simultaneously the opposite of law and its origin.”²⁶ Indeed, it appears both as the beginning of law (as the American rule of law came into being as a result of the revolutionary struggle) and also its potential ending (with the revolution that may conceivably one day bring it to the end and usher in a new rule of law). As Kahn writes: “Law’s time is the period between revolutions.”²⁷

The particularity of law’s rule is not, however, reducible to its opposition to political (revolutionary) action. Important dimensions of the rule of law only become evident when it is put in contrast to love, the other main alternative form of political imagination identified by Kahn. Against love, the rule of law’s boundedness becomes apparent. As we have just underlined, it has a bounded time frame, as the “community under law” has a beginning and a potential ending—both of which point, in the American context, to revolutionary action. But it is also spatially bounded, as the rule of law presupposes a connection between a specific space and the community under law. Indeed, “[l]aw’s space is always bordered space”—and not just any bordered space but a specific one that belongs to the community. “[R]ule by foreign law,” therefore, “is not the rule of law at all.”²⁸ Love, on the other hand, is characterized precisely by the lack of such boundaries. In its pure form, it has neither beginning nor end, and it recognizes no particular relationship between a community and a place. It is, as Kahn writes, “without temporal sequence or geographical limits. It binds us to all persons everywhere and at all times.”²⁹

Love’s challenge to law is therefore more radical. While political action works towards a different political order, love seeks to transcend law and dissolve “just those distinctions . . . upon which law depends.”³⁰ Nevertheless, as with political action, the relationship between law and love is one of “competition within a mutual dependence”—“love needs law, as much as law needs love.”³¹ This is because, while pure love without law’s protection “has no power to endure” (as its drive to dissolve all boundaries eventually collapses into “madness”) love is indispensable for there to be any attachment to the political community under law, and therefore to its very existence.³² Working from within law, love does not translate in unbounded utopianism, but works instead, as Kahn concludes, “to realize a new community in history.”³³

C. European Integration as a Framework of Political Action

After this brief presentation, the question we now wish to consider is the following: to what extent does the practice of EU law fit within Paul Kahn’s understanding of law’s rule? Does that particular frame of perception dominate EU legal practice? We wish to argue that it does not in any straightforward way, in spite of the traditional narratives around the primordial role of law in

²⁶*Id.* at 20.

²⁷*Id.* at 70.

²⁸KAHN, *THE CULTURAL STUDY OF LAW*, *supra* note 1, at 56.

²⁹*Id.* at 121.

³⁰*Id.*

³¹*Id.* at 122.

³²For Kahn’s more in-depth reflection on the erotic foundations of the political order, see PUTTING LIBERALISM IN ITS PLACE, *supra* note 14.

³³KAHN, *THE CULTURAL STUDY OF LAW*, *supra* note 1, at 122.

European integration,³⁴ or the more recent enthusiasm around the EU's commitment to the rule of law as a constitutional principle.³⁵

The first thing to note is that a distinction needs to be introduced, to account for a particular feature of EU law. Legal practice here lives a double existence. It can be experienced in two different ways, depending on the context where it is inserted. On the one hand, EU law appears as a mere component of the applicable legality of the various Member States, alongside other sources of domestic, regional or international origin, all of which have to be coherently administered and applied by national authorities. Most legal actors encounter EU law in this way, as but one of many relevant materials, which in different areas of legal practice will carry more or less weight. In this way, the experience of EU law will be integrated within a larger framework, which will tend to be overwhelmingly national—as administered by national systems of justice and enforcement, fitting within national hierarchies of legal sources, interpreted by communities of mostly national scholars, et cetera. We will leave aside in this article this dimension of the experience of EU law, which would require an analysis of its complex and transformative interaction with the legal cultures of the various Member States.³⁶

On the other hand, however, EU law is also understood as forming an autonomous legal order, a world of law unto itself. This perspective is especially prevalent in the practice of certain European institutions and scholars of EU law. From this angle, EU law is not subordinated to a larger system, but inhabits its own particular totalizing universe. It is on this universe that we will solely be focusing. Our thesis is that it is decisively shaped by a commitment to European integration, in a manner that does not fit with Kahn's account of the rule of law. In other words, that commitment is not only influential of the development of EU law, but also plays a key role at the cultural level, in producing an alternative cognitive frame that dominates legal practice.

It is important here to clarify the precise nature of the commitment to integration. We are not talking here about functionalism or the output legitimacy that is so often spoken of in the EU context, or even the political goals that are associated with federal entities, such as security or prosperity.³⁷ European integration is a “dynamic” project³⁸ for the transformation of European societies and political orders, both individually and collectively, rather than the mere achievement of measurable results. It is for this reason that Weiler is right to describe the EU as based on a form of “political messianism.” Under that paradigm, as he explains, “justification for action and its mobilizing force derive not from process, as in classical democracy, or from result and success, but from the ideal pursued, the destiny to be achieved, the ‘Promised Land’ waiting at the end of the road.”³⁹ That destiny is not an abstract, timeless utopia, based for instance on “the fixed essence of an abstract human being” (as might be the case with neoliberalism, for example) but, as is characteristic of the messianic, the promise of a concrete communal transformation—here, the realization of Europe as a political community⁴⁰ or, to use the words of the Schuman declaration, an “organised and living” entity.

Observations about the place of the teleology of integration within the practice of EU law are traditionally commonplace. The “integration through law” thesis presented law as a key driver for

³⁴See Mauro Cappelletti, Monica Seccombe & Joseph H.H. Weiler, *Integration Through Law: Europe and the American Federal Experience*, in 1.1 INTEGRATION THROUGH LAW 3 (Mauro Cappelletti, Monica Seccombe & Joseph H.H. Weiler eds., 1986).

³⁵See Laurent Pech, *The Rule of Law as a Constitutional Principle of the European Union* (Jean Monnet Working Paper Series, No. 04/09, 2009).

³⁶See, e.g., SIGNE REHLING LARSEN, *THE CONSTITUTIONAL THEORY OF THE FEDERATION AND THE EUROPEAN UNION* 81 (2021) (analyzing the different experiences of integration in the various constitutional traditions of the Member States).

³⁷*Id.* at 52.

³⁸See Loïc Azoulay, *The Acquis of the European Union and International Organizations*, 11 EUR. L. J. 196 (2005).

³⁹See Weiler, *DNA of European Integration*, *supra* note 19, at 145.

⁴⁰See Agata Bielik-Robson, *The Messiah and the Great Architect: On the Difference Between the Messianic and the Utopian*, 29 UTOPIAN STUDIES 133 (2018).

the European construction.⁴¹ And it has long been observed that buying into that particular agenda seemed part of what it meant to “do EU law”—celebrating advances towards integration, decrying any resistance to it. Today, integration is seen as more problematic, and Loïc Azoulai rightly speaks of a “critical turn” in EU legal studies.⁴² This shift began to take off after the failure of the Constitutional Treaty but only became clearly perceptible in the aftermath of the financial crisis, with various calls to rethink the European project. Nevertheless, that turn has not really come to undermine a broad commitment to integration, which continues to be taken as a given.⁴³ For the most part, the issues are with how integration has been carried out. Criticism has therefore had the effect of seeking new bases for the project, away from its traditional focus on the internal market and individual rights. Integration as such remains however in good health. There is little or no interest in revisiting those areas that have been traditionally integrated (the euro, EU citizenship, the internal market, structural principles such as primacy of EU law, etc.), and if anything the critical turn has fueled calls for novel areas of supranationalist development (fiscal integration, rule of law policing, further enlargement, energy, security, etc.).

This fact alone does not tell us much from the perspective of Kahn’s *Cultural Analysis of Law*. The law may evolve in one sense or another, regardless of the type of culture within which it is implanted. What we wish to insist upon, however, is that the commitment to integration is also decisive in shaping how legal practice is experienced and channeled. That alternative frame, as Ullrich Haltern has already argued,⁴⁴ appears to fit better with the one that Kahn associates with political action (and in fact identifies as the rule of law’s opposite). To elaborate this idea further, we will turn to the three declinations outlined earlier, in order to illustrate how the practice of EU law may appear as a forward-looking projection, fueled by a politics of distinction, and instantiating the particular project of European integration.

First of all, the teleology of integration pushes to consider the practice of EU law from the perspective of its contribution to that project, the realization of which lies somewhere in the remote future. Thus, the reform or interpretation of EU law is discussed in terms of its contribution to that forthcoming construction. There are moments where momentum is lost (as in the “critical turn” mentioned earlier), while at other times the process speeds up (as is perhaps again the time now).⁴⁵ What is essential, however, is that the development of EU law is understood necessarily as a step in that direction, a “new stage in the process of creating an ever closer union” (to use the language of the EU Treaty).⁴⁶ A move in any other direction remains outside of what the framework of integration renders conceivable, and most of all any step back from what has been acquired—and hence the tendency to refer to EU law currently in force as, revealingly, an *acquis*. In other words, “disintegration” is not simply a “risk” which EU law works to prevent,⁴⁷ the very possibility is entirely ruled out.⁴⁸ None of this means that the endpoint of integration is viewed as an unreachable fantasy—it is very much understood to be a real possibility, even if one that lives in the future. The EU would become something completely different from what it is,

⁴¹See Cappelletti, *supra* note 34.

⁴²See Azoulai, *supra* note 18.

⁴³See, e.g., Weiler, *Europe in Crisis*, *supra* note 19, at 268 (“The problems are European and the solution has to be at the European level.”).

⁴⁴See Haltern, *Pathos and Patina*, *supra* note 17.

⁴⁵*Editorial Comments: From Conference to Convention? Ideas and Prospects for Reform of the EU Treaties*, 59 COMMON MKT. L. REV. 1583 (2022).

⁴⁶Consolidated Version of the Treaty on European Union, art. 1 [2012] OJ C326/13.

⁴⁷See Azoulai, *supra* note 20, at 33.

⁴⁸Some authors have spoken of “disintegration” trends within the EU legal order, see Jo Hunt & Jo Shaw, *Fairy Tale of Luxembourg?: Reflections on Law and Legal Scholarship in European Integration*, in REFLECTIONS ON EUROPEAN INTEGRATION: 50 YEARS OF THE TREATY OF ROME 93 (David Phinnemore & Alex Warleigh eds., 2009). The examples usually given, however, are doctrines meant to carve out a space for national or local decision making, such as subsidiarity or the margin of appreciation. Leaving aside the question of their success in doing so, it remains the case that their emergence is, in reality, consolidatory of integration, as they come as compensation for key expansions of EU powers or the reach of EU law.

both if the promised land were suddenly considered to have been reached—it became a present reality—or it came to be understood only as a theoretical possibility—rather than a real one. Even if some saw in the aftermath of the euro crisis the collapse or even the fulfilment of the promise of integration,⁴⁹ it does not seem to us, as pointed out earlier, that we are in any of those scenarios today, in terms of the dominant frame of imagination. Europe’s realization as a political community remains on the horizon, and it is the commitment to that novel yet-to-be collective that defines the identity of the EU as a whole.

Second, the forward march of the European project advances also through exceptional individual contributions to the development of EU law, which are then remembered and cherished as transformative moments. There is a certain tendency to speak of the EU’s founding fathers (Monnet, Pescatore, Hallstein, Delors, etc.), imitating the American devotion. In our context, however, the politics of distinction shapes above all our understanding of the work of particular institutions, which step in at crucial times of crisis or doubt to take on their responsibility to push the project onwards. Thus, the Court’s revealingly named “heroic period” in the 1960s and 70s is celebrated as moving the EC from an intergovernmental institution to a new legal order comprising individual citizens. The Commission’s contribution in the 80s is looked back upon as the driver for the completion of the internal market. The ECB’s intervention during the financial crisis is feted as responsible for saving the monetary union, or pushing towards a more tightly bound community. Again, these moments must not be reduced to securing particular outputs, but more fundamentally as working to trigger or advance a process of collective transformation.

Finally, in its commitment to the realization of the European project, EU law is understood as sweeping through the European territories and societies as purposeful action. The functionalist paradigm makes it seem like EU law intervenes merely as an external force to bring about certain results; in fact, that action instantiates the EU project, that project exists only as embodied in EU law. This is why effectiveness is existential. To use the terminology of the Court of Justice to justify a variety of doctrines, key to the expansion of the reach of EU law, *effet utile* is of “the essence,”⁵⁰ a property “inherent in the system.”⁵¹ And conversely, why the failure of EU law translates into the negation of the EU. Member States do not simply fall foul of EU law, they situate themselves outside of Europe, and the EU shrinks as a result—the internal market evaporates, the European value-laden project retreats. We see a reflection of this in frequent talking points. Thus, Hungary’s and Poland’s “rule of law backsliding” are said to amount to a *de facto* withdrawal from the EU, Greece’s alternatives to austerity were presented as either Grexit or the disappearance of the monetary union, if not the EU as a whole.

D. European Integration and the Constitutive Role of Law

The previous observations might suggest that law is experienced in the practice of EU law as an entirely empty form. As one subordinated to the logic and requirements of the political project of integration, potentially replaceable by other modes of intervention, where these prove more effective in advancing towards that goal. This may seem convincing to those sceptics of purely “juristic ideas.”⁵² Or it may lead to Ullrich Haltern’s analysis, which views EU law as “just texts, empty shells with no roots,”⁵³ and argues that, in the absence of any “reservoirs of meaning” stored by law, meaning can only “be generated through political action, again and again.”⁵⁴ It remains the

⁴⁹Weiler, *DNA of European Integration*, *supra* note 19 (arguing that messianism has “collapsed” as a result of its realization, since reality necessarily falls short of what had been promised).

⁵⁰See Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, ¶ 22.

⁵¹See Joined Cases C-6/90 & C-9/90, *Andrea Francovich & Danila Bonifaci & others v. Italian Republic*, 1991 E.C.R. I-05357, ¶ 35.

⁵²See Martin Shapiro, *Comparative Law and Comparative Politics*, 53 SOUTHERN CALIF. L. REV. 537 (1981).

⁵³Haltern, *The Dawn of the Political*, *supra* note 17, at 608.

⁵⁴Haltern, *Pathos and Patina*, *supra* note 17, at 33.

case, nevertheless, that the practice of EU law has historically imagined its own role, and continues to do so, as much more central to the process of European integration. In the legal culture of the EU, or the “common sense” that dominates large areas of practice,⁵⁵ law does not appear as a mere medium for the implementation of the integration agenda, but its very substance and concrete incarnation.

Within this framework, effectiveness is of the essence, but so is law. Hence the traditionally held idea that, in bringing the EU into existence, law does not play an instrumental role but, as Hallstein famously said, a “constitutive” one. Or the understanding of membership in this particular community as essentially a legal affair—as it results, not from a negotiated political agreement made to suit the particular circumstances of each State, but from adherence to EU law as a coherent and indivisible whole, i.e. the *acquis*.⁵⁶ And where Member States act collectively beyond the reach of EU law, it is not a case of the EU acting *ultra vires* or engaging in an unlawful exercise of power, but one where the EU is simply not there. It has no existence—as in the controversial agreement with Turkey to return refugees to that country,⁵⁷ or the creation of the eurozone bailout fund.⁵⁸ In those two instances, the Court is not purporting to create exceptions to the normal operation of EU law based on special circumstances or needs, but is merely emphasizing a central tenet of EU law—that the European supranational order ceases where law ends. Hence the importance of the expression “community of law” to describe the EU,⁵⁹ one that contrasts with Kahn referring to the US as a “community under law.” In that sense, law is nothing short of extremely meaningful.

How to square the intensely legal understanding of the EU’s very existence, with our previous observations about integration imposing the logic of political action rather than that of the rule of law? Our thesis is that, rather than seeing EU legal practice as subject to two competing logics, it is more useful to see it as articulating an original vision, which fuses essential aspects of both. The key lies in an understanding of law that allows for its constant overcoming. To expose the particularity of this understanding, it is necessary to return to Weiler’s idea of European integration as a messianic project. Messianism comes however in many different forms. In its relationship to law, as explained by Robert Cover, one can distinguish between a messianism that is geared towards the dissolution or transcendence of law (similarly to Kahn’s description of love), and one that aims for law’s perfection and full realization. To use Cover’s language,⁶⁰ the first is “antinomian messianism,” the second “lawful messianism.”⁶¹ Our suggestion is that the latter provides a useful model for understanding the specific culture of EU law. In other words, while EU legal practice shows a commitment to its own gradual development and transformation (most notably, from its origins as “mere international treaties” to its constitutional metamorphosis),⁶² that commitment is understood as present within EU law itself, rather than in outside forces. In

⁵⁵See ANTOINE VAUCHEZ, BROKERING EUROPE. EURO-LAWYERS AND THE MAKING OF A TRANSNATIONAL POLITY 140 (2015).

⁵⁶*Id.* at 172.

⁵⁷See Orders of the General Court (Feb. 28, 2017), Cases T-192/16, T-193/16 and T-257/16, 28 February 2017, NF, NG and NM v European Council, ECLI:EU:T:2017:128 (where the Court declares that it lacks jurisdiction to hear actions against the EU-Turkey statement that seeks to prevent migrant crossings into Europe and establishes a controversial mechanism for their return to Turkey, on the basis that this is an agreement reached with Turkey by individual EU member States rather than the EU itself).

⁵⁸See Case C-370/12, Thomas Pringle v. Gov’t Ir. and Others, ECLI:EU:C:2012:756 (Nov. 27, 2012), <https://curia.europa.eu/juris/liste.jsf?num=C-370/12&> (upholding the lawfulness of the European Stability Mechanism, whilst at the same time considering that its creation is the result of an international agreement between Member States outside the framework of EU law).

⁵⁹See Case 294/83, Parti écologiste “Les Verts” v. Eur. Parliament, 1986 E.C.R. 01339. The expression found in the English version of the judgment is actually “community based on the rule of law,” but “community of law” is a more perfect translation of the French “communauté de droit” and the German “Rechtsgemeinschaft.”

⁶⁰Robert M. Cover, *Bringing the Messiah through the Law: A Case Study*, 30 NOMOS 201 (1988).

⁶¹See also Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 872 (1993).

⁶²VAUCHEZ, *supra* note 55.

other words, it is a commitment to the maintenance of the EU legal order that drives also the process of gradual transformation that is European integration.

Thus, our use of Kahn's three categories needs to be made more complex, by allowing for the role of law as constitutive of the EU, but also as driving its constant self-overcoming. We have already underlined how law forms the very substance of integration, instantiating that supranational project rather than representing an absent sovereign. Furthermore, while the project of EU integration calls for individual actors to distinguish themselves through their specific contributions, the essentially legal character of this process places a special responsibility on certain actors due to the nature of their institutional position. This is the case of the Commission, in its enforcement role as "guardian of the Treaties," through which it has decisively contributed to the integrationist development of EU law. But it is also true, most obviously, of the Court of Justice as the ultimate interpreter of EU legality, as well as courts in general. Larsen aptly describes these two institutions, together with the ECB, as "guardians of Europe," entrusted with a double task: a "conservative" one that looks "towards the past," in order to "uphold the constitutional contract between the Member States," and a "transformative or creative task," of looking towards the future "to create a not-yet-there."⁶³ These observations reveal the difficulty of sticking too closely with Kahn's dualities in our context, even to understand the work of courts: while their institutional centrality indeed derives from the essentially legal character of the integration process, the messianic nature of that process transforms their role by "dramatically increasing the range of current legal commitment," and placing upon them "a looming responsibility for drastic change" (as put by Cover to describe a "messianic mode of judicature").⁶⁴

Finally, in relation to the dimension of temporality, it is misleading to reduce the practice of EU law to the realization of the promised land of integration. First of all, that future is not extraneous to EU law, but already contained within it. Thus, as per Larsen's observations, the practice of EU law is somewhat Janus-faced: it advances by examining its past, it maintains itself by moving forward. Indeed, while that practice is, as we have argued, permanently in motion towards that supranationalist destiny, the drive for this movement is provided by various essential resources contained within EU law. Key among those resources are so-called "structural principles," which provide the most important legal incarnation of the European project. As explained by Loïc Azoulay, these principles possess the same double dimension we have identified: they serve "to introduce new and concrete forms of action, but at the same time they are capable of providing a solid and coherent basis for the whole construction."⁶⁵ Or, as put by Von Bogdandy in his discussion of "founding principles" (a near equivalent notion), these allow for both the "maintenance" and the "development" of the EU's "legal infrastructure."⁶⁶ The principle of autonomy is one example—it is through loyalty to its very nature as an independent legal order that EU law has, for instance, come to develop its own unique standards of human rights protection, formally free from the influence of both international law and national legal traditions.⁶⁷

Second, the practice of EU law does not only operate to bring that future to the present. It also works to delay its realization, to set the exact speed and rhythm at which that movement takes place. The Court's contribution is not only made up of bold, integrationist judgments. Often, they show remarkable timidity, or prudent pragmatism, and produce much frustration among the champions of integration. The necessary loyalty to available legal materials does not allow for ceaseless innovation. And we can also see this, with Cover, as the reflection of a feature intrinsic to any work of legal interpretation, even within a messianic mode of judicature: That work does not

⁶³See LARSEN, *supra* note 36, at 101.

⁶⁴See Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 196 (1984–1985).

⁶⁵See Azoulay, *supra* note 20, at 32.

⁶⁶Armin Von Bogdandy, *Founding Principles of EU Law: A Theoretical and Doctrinal Sketch*, 16 EUR. L. J. 95 (2010).

⁶⁷See Niamh Nic Shuibhne, *What is the Autonomy of EU Law, and Why Does that Matter?*, 88 NORDIC J. INT'L L. 9 (2019).

only reflect a judgment about the ideal content of the law, as Dworkinian jurisprudence might suggest, but also necessarily incorporates an assessment about the conditions for its practical realization, its capacity to “transform itself into action.”⁶⁸ It cannot be otherwise in the EU context, given the particularly fragile position in which European institutions find themselves, as dependent on national authorities for cooperation and enforcement. In brief, the specifically legal form taken by European integration entails a moderating effect, which derives not from law’s symbolic structure, but from its particular connection to material realities. Within our messianic reading of EU legal culture, this means that the teleological agenda of integration can only advance in fits and starts and through limited steps.

E. EU Legal Culture and the Constitutional Principle of the Rule of Law

In this Section, we will pursue our argument by focusing on the development of the principle of the rule of law in the EU legal order. This should not be confused with the notion of the rule of law that we have considered heretofore. The latter is the one found in Paul Kahn’s work, to describe a particular form of political imagination. Our goal now is to focus on the norm, often referred to as a constitutional principle, that is mobilized in EU legal practice by various institutions and to various effects.⁶⁹ The point will be to show, by following Kahn’s three declinations, how practice around this principle illustrates well our previous analysis—it reflects the political imagination of integration, but at the same time preserves the specifically legal substance of this project. We have chosen to focus on this specific example because, even though its origins can be traced back to the “classic” period of EU law, it is only in recent years that it has attracted huge attention and acquired major practical importance. That newly-acquired prominence reflects a certain shift in the preoccupations of EU lawyers, now centered on the implementation of the EU’s axiological foundations (within which the rule of law occupies a special place), rather than the completion of the internal market, free movement or other traditional concerns. That does not mean, however (and herein lies in part the interest of using this particular example), that a fundamental change has taken place at the level of the legal culture underpinning the practice of EU law. Law continues to be awarded the same central position that we have previously described, despite views about its diminishing importance within the overall development of the European project,⁷⁰ or even predictions of its outright collapse.⁷¹

To begin with, one should consider the particularity of the principle of the rule of law’s appearance within the EU legal system. In the constitutional traditions of various European countries, the rule of law often features as a certain type of political order, one that defines the State in question—and that is why it is often better to speak here of a “rule of law State.” Take for instance the case of Spain. Per the very first article of its constitution, Spain constitutes itself as an “*Estado social y democrático de Derecho*.” The rule of law here gives specific form to the State, as a very particular kind of entity—the social and democratic rule of law State. But what kind of entity is a rule of law State? As various scholars have argued, the idea that the rule of law could be understood as a type of association is, in itself, desperately lacking, as it implies that the political entity has no existence outside the law, against the obviously very material reality of State power.⁷² The concept of the rule of law State thus implies a blindness to the material conditions of its own

⁶⁸See Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986).

⁶⁹See Pech, *supra* note 35.

⁷⁰See Christian Joerges, *Integration Through Law and the Crisis of Law in Europe’s Emergency*, in *THE END OF THE EUROCRATS’ DREAM: ADJUSTING TO EUROPEAN DIVERSITY* 299 (Damian Chalmers, Markus Jachtenfuchs & Christian Joerges, eds., 2016); Agustín J. Menéndez, *The Crisis of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)Technocratic Governance*, in *AUSTERITY AND LAW IN EUROPE* 56 (Marija Bartl & Markos Karavias eds., 2017).

⁷¹See Weiler, *Europe in Crisis*, *supra* note 19.

⁷²See Loughlin, *supra* note 21.

validity and existence outside of law itself.⁷³ And yet that is probably its principal potency, as a type of founding myth—that the legal system can self-sustain, allowing it to close upon itself much like Kelsen’s *Grundnorm*. This is why, to take again the Spanish example, the principle of the rule of law serves as a sort of frontispiece for the whole constitutional edifice. But it is also why it is of very little use as a directly applicable norm in the hands of a Spanish judge, other than as an umbrella term for a broad variety of more specific doctrines and principles, or as a sort of tautological maxim to insist that law is binding because it is law.⁷⁴

The position given to the rule of law in the constitutional context of the EU is considerably different. There the principle is formally enshrined in Article 2 of the Treaty on European Union, as one of several axiological foundations: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” This might seem like a rather downsized role, as it serves not to describe the type of entity that is the EU (unlike the term “community of law,” discussed earlier), but to identify one of the many values to which it is committed. In reality, however, this different position gives the principle of the rule of law a more formidable potential, as a mandate for transformative action. As Schmitt had identified, that is precisely the nature of values: They call for their own constant implementation, which is the very condition for their existence.⁷⁵ As put by the Court of Justice, the Article 2 values create the responsibility for the EU to “defend them,” as well as the power to do so.⁷⁶ The principle of the rule of law has thus emerged as a directly applicable norm of EU law (and a very powerful one), in contrast to its inanity in the national adjudicatory context. At the same time, however, recasting the rule of law as a call to action leads to a certain paradox, in that pushing forwards towards its concrete realization can justify devaluing adherence to formal legal sources, and empowering instead highly discretionary powers or creative judicial constructions. In the European context, this has not escaped commentators, who have noted that the promotion of the rule of law by EU institutions has sometimes been detrimental to a strict understanding of what the principle normally entails in traditional constitutional practice.⁷⁷

Thus, the principle of the rule of law has served, first of all, to create pathways for the Court of Justice to supervise areas formally under Member State competence. The recent *ASJP* case opened the door to a European control over national judicial structures,⁷⁸ and much of the legal discussion today concerns the specific content of the obligations for domestic authorities that this has generated under EU law. Among scholars, the rule of law is even invoked to support an absolutist interpretation of the principle of primacy, against attempts by national constitutional courts to exert some form of exceptional review over the rulings of the Court of Justice.⁷⁹ The principle has also served to reinforce the powers of the European Commission, in order to monitor continued adherence to the rule of law by Member States before and after joining the EU. This has been most obvious in the “before” phase, as the incorporation of this principle among the Copenhagen criteria for accession has massively empowered the Commission to define, in the words of

⁷³See Ernst-Wolfgang Böckenförde, *Naissance et développement de la notion d’État de droit*, in *LE DROIT, L’ÉTAT ET LA CONSTITUTION DÉMOCRATIQUE* 127 (2000).

⁷⁴See Toni Marzal, *L’État de droit et les valeurs du droit de l’Union européenne dans le débat sur l’indépendance de la Catalogne*, *REVUE DES AFFAIRES EUROPÉENNES* 467 (2018).

⁷⁵See CARL SCHMITT, *LA TIRANÍA DE LOS VALORES* 131 (2010).

⁷⁶See Case C-156/21, *Hung. v. Eur. Parliament & Council of the Eur. Union*, ECLI:EU:C:2021:974 (Feb. 16, 2022), ¶ 127, <https://curia.europa.eu/juris/liste.jsf?num=C-156/21&>.

⁷⁷See Dimitry Kochenov, *Rule of Law as a Tool to Claim Supremacy* (RECONNECT, Working Paper No. 9, 2020).

⁷⁸See Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117 (Feb. 27, 2018), <https://curia.europa.eu/juris/liste.jsf?num=C-64/16&>.

⁷⁹See R. Daniel Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech & Renáta Uitz, *National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order*, *VERFBLOG* (May 26, 2020), <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>.

Christophe Hillion, “the prototype of an EU Member State, both in political, economic, legal, administrative, and judicial terms.”⁸⁰ More recently, various efforts have been undertaken to allow the Commission to maintain a monitoring role for current Member States and prevent “rule of law backsliding.” The most notable example is the 2020 Conditionality Regulation, which assumes a “clear relationship” between “principles of sound financial management” and “respect for the rule of law,” and thus allows budget allocations to Member States to be blocked following breaches of the rule of law, where these affect the “efficient implementation of the Union budget.”⁸¹

It is not enough to note, however, that the rule of law is, as a foundational value, a launchpad for action. We must still account for the fact that the EU’s commitment to the principle of the rule of law is considerably stronger than to the other Article 2 values. “Solidarity,” “dignity,” or “democracy,” for instance, barely register as applicable norms, despite their obvious potential for transformative intervention, and it is often repeated that, “while there is no hierarchy among Union values,” the rule of law occupies a sort of a *primus inter pares* position.⁸² We must also account for the fact that the rule of law is not pursued indiscriminately by EU institutions, but in a highly selective manner. After all, despite the talk of the EU’s promotion of the rule of law abroad,⁸³ the Court of Justice often finds that a particular situation, due to its extraterritorial configuration, lies entirely outside any significant form of legal scrutiny—as for instance much of the work of Frontex,⁸⁴ the enlargement process,⁸⁵ or refugee applications for humanitarian visas lodged at Member State consulates abroad.⁸⁶

The answer to these questions lies in our previous elaboration of the legal culture of the EU. EU law’s commitment to the rule of law is not the expression of an abstract utopia, but is instead tied up, in its concreteness, with the lawful messianism of the European order.⁸⁷ Unlike Kahn’s vision of love as an approach to the political order—which as stated knows “no temporal sequence or geographical limits”⁸⁸—the project of integration is very much situated in time and space. Thus, as we have just seen, the implementation of the rule of law is not for the benefit of everyone; some fall within the territorial perimeter of European integration and some without.⁸⁹ And from a temporal angle, we see here an expression of the two-faced nature of EU law’s operation that was mentioned earlier—it looks forward towards its future development, but only gradually and out of loyalty to its foundational commitments. The prevalence of this vision over practice around the principle of the rule of law is best illustrated by the idea, which recently made its way into the case law, of a principle of “non-regression.”⁹⁰ This seems to preclude States from reforming their laws in a way that effects a reduction in the protection of the rule of law, in comparison to the previous status quo. The new doctrine has been hailed by some as the way for the EU to acquire the power to

⁸⁰Christophe Hillion, *Enlargement*, in *THE EVOLUTION OF EU LAW* 186, 198 (Paul Craig & Grainne de Búrca eds., 2nd ed. 2011).

⁸¹See Regulation 2020/2092, of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L. 433) pmbL. ¶ 13.

⁸²*Id.* at pmbL. ¶ 6.

⁸³See, e.g., Rachel Kleinfeld & Kalypso Nicolaidis, *Can a Post-colonial Power Export the Rule of Law? Elements of a General Framework*, in *RELOCATING THE RULE OF LAW* (Gianluigi Palombella & Neil Walker eds., 2009).

⁸⁴See LISA HESCHL, *PROTECTING THE RIGHTS OF REFUGEES BEYOND EUROPEAN BORDERS: ESTABLISHING EXTRATERRITORIAL LEGAL RESPONSIBILITIES* 176 (2018).

⁸⁵See Elena Basheska, *EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia*, 14 *HAGUE J. ON RULE L.* 221 (2022).

⁸⁶Case C-638/16 PPU, X & X v. État belge, ECLI:EU:C:2017:93 (Mar. 7, 2017), <https://curia.europa.eu/juris/liste.jsf?num=C-638/16&>.

⁸⁷See Bielik-Robson, *supra* note 40.

⁸⁸KAHN, *THE CULTURAL STUDY OF LAW*, *supra* note 1, at 121.

⁸⁹Toni Marzal, *The Territorial Scope of Application of EU Law: A Private International Law Enquiry into Constitutional Identity* (forthcoming).

⁹⁰See Case C-896/19, *Republika v. Il-Prim Ministru*, ECLI:EU:C:2021:311 (Apr. 20, 2021), <https://curia.europa.eu/juris/liste.jsf?num=C-896/19&>.

prevent States from “backsliding” (a term which itself carries similar connotations to the *acquis*) even if such a competence has previously seemed non-existent, so as to allow the EU to “stay true to itself.”⁹¹ Whether commendable or not, the implication is that the principle of the rule of law is understood as a temporal horizon of integration, to which the EU is called upon, even if creatively *praeter* or even *contra legem*, to march by measurable steps.⁹² To move backwards (dis-integration), or indeed in any other direction, is inconceivable. At the same time, however, its realization cannot be immediate, it is a gradual affair under the rhythm set by law—law delays it as much as it pushes towards it, given the particular material constraints within which law necessarily operates.

What about the special place of the rule of law among the EU’s “foundational values?” The commitment to all those values is said to “define the very identity of the European Union as a common legal order.”⁹³ And yet, the rule of law is elevated to a higher level, operating differently from other values in defining that identity. It does not only serve as a potential mandate for action, to be balanced against the others. That particular commitment is also an expression of the very substance of the European order, as a “community of law” whose autonomy can never be forfeited.⁹⁴ This is particularly obvious in the earlier *Les Verts* case, which extends the Court’s powers of judicial review on the basis of that characterization of the European Community.⁹⁵ But more recent case law continues to connect the promotion of the rule of law to “the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law.”⁹⁶ The rule of law thus presents an existential quality that the other values lack, as it is tied up to the continued maintenance of the EU legal order.⁹⁷

A further expression of this idea is the repeated emphasis on effectiveness, which would flow from this principle. In other words, the rule of law pushes for the concrete instantiation of the European project, to speak again in Kahn’s terms. The Court has made clear that “the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.”⁹⁸ Indeed, in the hands of the Court, the principle of the rule of the law in the EU context is not only notable for creating novel powers of judicial review, it also serves to create sanctions where none existed. Thus, the rule of law has allowed the Court to grant itself the means necessary to ensure the respect of its decisions, in order to guarantee the full realization of EU law. In this way, financial penalties may be imposed on States where they do not comply with interim measures issued by the Court—those penalties seek to “guarantee the effective application of EU law, such application being an essential component of the rule of law.”⁹⁹ The role performed by this principle becomes similar, in this way, to the one performed by other structural principles, such as autonomy or *effet utile*.

Finally, the rule of law crisis, triggered mainly by the attempts of Hungary and Poland’s ruling parties to control their judiciaries, is also characterized by what Kahn terms a politics of distinction, but focused on the EU’s legal actors. The preservation and development of the EU

⁹¹Mathieu Leloup, Dimitry Kochenov & Aleksejs Dimitrovs, *Non-Regression: Opening the Door to Solving the ‘Copenhagen Dilemma’? All the Eyes on Case C-896/19 Repubblica v Il-Prim Ministru* (RECONNECT, Working Paper Nov. 15, 2021).

⁹²Julian Scholtes, *Constitutionalising the End of History? Pitfalls of a Non-regression Principle for Art. 2 TEU*, 19 EUR. CONST. L. REV. 59 (2023).

⁹³*Hung.*, Case C-156/21 at ¶ 127.

⁹⁴See, e.g., Case Opinion 2/13, ECLI:EU:C:2014:2454 (Dec. 18, 2014).

⁹⁵*Parti écologiste “Les Verts,”* Case 294/83.

⁹⁶See *Hung.*, Case C-156/21 at ¶ 125.

⁹⁷Jacob van de Beeten, *On Metaphor and Meaning: The Autonomy of EU Legal Order Through the Lens of Project and System* (April 3, 2023). Forthcoming in European Papers, LSE Legal Studies Working Paper No. 10/2023, Available at SSRN: <https://ssrn.com/abstract=4408114>.

⁹⁸*Associação Sindical dos Juizes Portugueses*, Case C-64/16 ¶ 36.

⁹⁹Case C-441/17 R, Order of the Court, Eur. Comm’n v. Republic of Poland, ECLI:EU:C:2017:877 (Nov. 20, 2017) ¶102, <https://curia.europa.eu/juris/liste.jsf?num=C-441/17&>.

principle of the rule of law calls for heroic protagonists, ready to push through “heroic legal action”¹⁰⁰ towards its realization. The language of responsibility is widespread among EU scholars and institutions. Thus, in its latest Rule of Law Report, the Commission proclaims that “safeguarding and upholding our democratic institutions and values is a shared responsibility of Member States and EU institutions,” whilst recognizing its own “role in realising this shared responsibility, whether through galvanising change, driving cooperation, or pointing out and acting on failings.”¹⁰¹ Starting with an assumption about the insufficiency of the legal status quo to adequately preserve judicial independence and other aspects of the rule of law at the national level, a call is made on the various European institutions to fulfil their duty in correcting this, celebrating the bold creativity of those who rise up to the challenge (as with the Court of Justice, who is said to “come to the rescue”),¹⁰² and chastising the timidity of those who do too little too late.¹⁰³

F. Conclusion

We hope to have shown that Paul Kahn’s *Cultural Analysis of Law* can be productively applied in the particular context of the EU, despite the obvious differences with the American legal culture that he has so penetratingly portrayed. This involves considering Kahn’s contribution from a methodological angle, in order to search for the type of political imagination that undergirds the practice of EU law, whilst separating as much as possible that analysis from EU law’s practical development. But it also involves extracting from his work certain models for understanding the imaginative life of a political community, most importantly those of the rule of law and of political action, against which the specific experience of EU law can be set. This has led us, first, to consider the particular place in the EU of the messianism of integration, as a project of collective transformation, for Europe’s realization as a political community. At a cultural level, this might seem to structure the practice of EU law in a way that is consistent with Kahn’s description of political action, which in his work stands directly in opposition to the rule of law, and therefore leaves for law the mere role of an empty vessel. Such an observation, however, does not consider the central place of law in the EU’s legal culture, as the very substance within which the European order appears incarnated. To account for these two dimensions in the political imaginary of EU legal practice, we have therefore posited that, unlike Kahn’s description of the American experience, the rule of law and political action do not stand in tension with one another. Instead, the practice of EU law operates under an idiosyncratic frame of experience, which can be usefully associated to Cover’s notion of “lawful messianism,” and which synthesizes key aspects of Kahn’s account of the rule of law and political action. Under that original frame, the practice of EU law is channeled through two structuring assumptions that complement each other: first, a commitment to the future achievement of European integration, and second, a legal ontology of integration—where law is the substance for Europe’s emerging community, but also provides the impetus and sets the rhythm for its gradual realization. The fact that just such a culture of lawful messianism persists to this day is best illustrated, as shown in the last part of the article, through one of the most important areas of current development—that related to the constitutional principle of the rule of law in the EU, which serves to reaffirm the continuing commitment to European integration and the legal nature of the process.

¹⁰⁰Ronald R. Garet, *Meaning and Ending*, 96 YALE L. J. 1801, 1811 (1987).

¹⁰¹European Commission, *2022 Rule of Law Report: The rule of law situation in the European Union*, COM (2022) 500 final.

¹⁰²Laurent Pech & Sébastien Platon, *Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case*, 55 COMMON MKT. L. REV. 1827 (2018).

¹⁰³See, e.g., Kim Lane Scheppele, Dmitry Vladimirovich Kochenov & 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*, 39 YEARBOOK EUR. L. 3 (2020).

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