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ARTICLE

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

Kahn in Luxembourg: A Prolegomena to the Cultural Study of EU Law

Sabine Mair[1]

[1]University of Amsterdam, Amsterdam, Netherlands
Email: s.a.mair@uva.nl

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Abstract

In the context of growing anxieties regarding the place and role of law in the future of the Europe Union (EU), this article reflects upon the extent to which Paul Kahn's cultural study of law's rule could be relevant for the place and role of EU law in these respects. Drawing upon Kahn's monograph *Making the Case: The Art of the Judicial Opinion*, this article analyses the *Laval* judgment for these purposes, as one of the most controversial cases ever decided by the Court of Justice of the European Union (CJEU). On this basis, the article shows how the cultural analysis of law advanced by Kahn can help us to sharpen our sensibilities with regard to the deeper layers of moral and political meaning that EU law expounds and to thereby enable us to expand our horizons as well as conversations on the socio-political and economic composition of EU law. Yet this article also raises skepticism about the cultural study of EU law's rule. Given the diverse cultural idiosyncrasies and traditions by which citizens of EU Member States live, it questions whether EU law can be assessed from the point of view of a collective identity believed to best persuade EU citizens of the authority of EU law.

Keywords: Cultural Study of Law; Law and Language; EU Constitutional Law; EU Fundamental Rights; Political Theory

A. Introduction

The aim of this article is to reflect upon whether and to what extent the European Union (EU) legal scholarship can learn from the cultural study of the rule of law as developed by Paul Kahn. To investigate such innovative approach to the study of EU law is both imperative and long overdue at a moment like the present one, in which EU law seems to be increasingly powerless in cogently conveying narratives about who we are as European people and a community.[1] Paul Kahn's study of the law as a form of persuasive rhetoric is decisive in these respects, as it assesses the law against its vigor to convey persuasive narratives by which people make sense of their everyday life experiences. The aim of this article is to investigate whether this approach could also be relevant for the study of EU law. Kahn's monograph *Making the Case: The Art of the Judicial Opinion* will thereby serve as the main basis of the analysis.[2] The focus on this monograph is appropriate because here Kahn engages in a cultural study of court judgments, which he regards as the legal texts by which the rhetorical function of the law comes out best.

[1]*See* Luuk van Middelaar, Alarums and Excursions. Improvising Politics on the European Stage 16 (2019).
[2]*See* Paul Kahn, Making the Case: The Art of the Judicial Opinion (2016).

Before investigating the advantages of a cultural study of the rule of EU law in line with and in delineation of Paul Kahn's remarkable work, I would like to start this article with a pressing conceptual clarification: What is it when we speak about the cultural in and of the law?

One way of answering this question is that the law is more than a set of rules asserting commandments and prohibitions. It is also a language comprised of distinct formal features and terminologies as well as of resources of expression and social action that both reflect and institute a certain ontology or way of being in the world.[3] In this view, the law through its language is hence constituted of, as well as constitutes, a distinct moral and political culture.[4] It reflects as well as determines "the meaning and values implicit or explicit in a particular way of life"[5]—such as the conditions under which human beings are considered free, what political and social responsibilities human beings have, what acceptable limits of state action are, or what forms of democracy the state institutions are believed to work by, to name just a few examples. Looking for the cultural in and of the law hence starts from the presumption that the law is not only a medium from which we can mechanically infer rules and regulations, but a language that reflects as well as determines the moral and political meaning of a "particular way of life."

For judges, legal scholars, or practicing lawyers this means that they always unavoidably are cultural interpreters of the law in two major ways.[6] They are reading and interpreting the (legal) composition of others (like statutes, case-law, or case notes) and through this process ascribe (consciously or unconsciously) distinct moral and political meanings to the law. Yet such process of reading only completes itself in the practice of speech and writing. Through arguing for one legal interpretation or result over another in their own compositions, they also define and shape the moral and political imaginaries of a community. It is against this backdrop that James Boyd White has asserted that the life of the legal agent is "at its heart a literary one" as it is both a life "of reading the composition of others ... and of making compositions of one's own."[7]

We can also identify these two elements of legal reading and writing/speaking in *Making the Case*. With regard to the former, Kahn is especially apt to point out the many-voicedness that we can discover when reading a judicial opinion. He urges us to be more aware of the fact that reading a legal text like a judicial opinion is often not so much reading it for a single moral and political meaning, but for a range of possible meanings.[8] For instance, Kahn alludes to us that the Supreme Court case, *Brown v. Entertainment Merchants Associations,* and its dissenting opinions throw up narratives of emancipation from the hands of traditional authorities, of an ever-renewed promise to the next generation, of parental responsibility, and of the deployment of knowledge in governmental regulation. [9]

[3]*See* James Boyd White, *Reading Law and Literature: Law as Language*, *in* HERACLES' BOW: ESSAYS ON THE RHETORIC & POETICS OF THE LAW (1985); James Boyd White, *Imagining the Law*, *in* THE RHETORIC OF LAW (Austin Sarat & Thomas R. Keans eds., 1994) (for an understanding of law as being more than a set of rules, but also as a language constituting meaning).

[4]*See* Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide*, *in* LAW IN EVERYDAY LIFE 27–32 (Austin Sarat & Thomas R. Kearns eds., 1993); Alan Hunt, EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW (1993) (for an understanding of how the law is constituted by as well as constitutes social relations and cultural practices).

[5]This definition of the cultural as "the meaning and values implicit or explicit in a particular way of life" stems from the spectacular genealogist of culture, Raymond William. His work displays an important shift in the cultural studies scholarship from an understanding of culture as the universal progress of humanity towards an understanding of culture as a "particular way of life." William H. Sewell later extended this definition in order to clarify that culture is never static, but constantly changing. *See* W.H. Jr. Sewell, *The Concept(s) of Culture*, *in* BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE (Victoria E. Bonnell & Lynn Hunt eds., 1999).

[6]*See* White, *Reading Law and Literature: Law as Language*, *supra* note 3, at 77.

[7]*See* White, *Reading Law and Literature: Law as Language*, *supra* note 3, at 77.

[8]I will use the terms judicial opinion and judgment interchangeably in this article although the former terminology is primarily used in the U.S. and the latter in the EU context.

[9]*See* KAHN, *supra* note 2, at 24–34. Kahn also showed us how *Bush v. Gore* case, which was decided against an extremely loaded political context of a federal election between George W. Bush and Al Gore, suggests multiple narratives. Amongst those are "the fundamental importance of counting every vote in a democratic society," the idea of a federal structure that

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Yet Kahn's work goes beyond just illuminating the many narrative voices of judicial texts. In fact, his main concern in *Making the Case* is with the judge's democratic responsibility to draft the judicial opinion in a way that it is persuasive in the eyes of the citizens of a polity. In his view, what judges need to do when composing a judicial opinion is to choose (from amongst the many available options) the type of narrative voice that can best speak to citizens beyond the interests that divide them.[10] They need to make sure that citizens see the situation at stake in the case in light of the moral and political values by which they "regularly give order to their social and political life."[11] The judicial opinion, from this point of view, is hence regarded as a persuasive act aimed at nourishing the belief in a particular kind of community. More precisely, it is regarded as "a form of rhetorical address performing the broadly political task of maintaining belief in self-government through law."[12]

Against this background, it is not surprising that Kahn works with a slightly different understanding of what the cultural aspects in and of the law are than the definition advanced above. Kahn does not aim only to dissect and understand the moral and political significance that the language of the law reflects and determines, as a cultural study of the law would do. For Kahn, looking for the cultural in and of the law means more. It means identifying the deep foundational ideas that make possible the experience of law's rule.[13] It means looking for the cultural beliefs and practices that sustain the political life of a community and, when being made explicit in the text of the judicial opinion, are considered able to uphold the rule of the law.[14]

This article aims to examine Paul Kahn's approach from an EU legal point of view. Does his cultural approach to the study of law's rule help us to better understand the deeper layers of moral and political meaning that EU law expounds? And if so, does it also allow us to improve EU law in a way that it better persuades and speaks to EU citizens beyond the preferences that divide them? In order to answer these questions, I will scrutinize a case of the Court of Justice against the backdrop of the analytical distinction outlined above between reading and writing the law. More precisely, I will scrutinize the *Laval* case, which is one of the most controversial cases ever decided by the Court of Justice against the various narrative voices that it alludes to when reading it (part B). Subsequently, I will discuss whether any of the narrative voices identified could have served as a more persuasive justification of the result of the decision and could have hence contributed to an improved "reign of EU law" (part C). It is in this last part of the article and in the concluding remarks (part D) that I will more deeply discuss Kahn's view of the rhetorical function of the law.

What I will conclude in this article is that Kahn's humanistic understanding of the law assists us in unearthing the multiple layers of socio-political and economic meaning that EU law inspires. However, I will also show that a cultural study of EU law's rule (assessing EU law from the perspective of the narratives by which EU citizens can be best persuaded) poses enormous difficulties to the EU legal scholar. The reason for this is that presupposes the existence of a collective identity that all EU citizens subscribe to which is, at this point in time in the development of the EU polity, a difficult presumption to justify and uphold.

B. Understanding the Meaning of *Laval* in Multiple Ways

The Court of Justice has undergone different phases in its drafting style. When reading judgments of the Court of Justice from the 1960s and 1970s, one finds majestic and endless sequences of

emphasizes "the importance and responsibility of the state in the selection of the president" or of the political responsibility of Congress to decide such intricate political matters. *See* KAHN, *supra* note 2, at 24–34.

[10] *See* KAHN, *supra* note 2, at 26.

[11] *See* KAHN, *supra* note 2, at 19.

[12] *See* KAHN, *supra* note 2, at xiv.

[13] *See* PAUL KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 2 (1999).

[14] In *Making the Case* Paul Kahn has particularly emphasized on the role of the judicial opinion in the cultural study of law's rule. *See* KAHN, *supra* note 2.

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whereas-sentences that are assembled in a dry, abstract, and deductively single-sentence syllogistic style. Today, judgments of the Court of Justice are much longer than those found in its earlier days of existence and much more informative.[15] Yet although the drafting style of the European judgments can be understood to have significantly advanced in quality on its earlier days, its reasoning remains heavily deductive in form, magisterially authoritative in tone, and strongly non-discursive in style, often suggesting a single proposition and meaning of EU law.[16]

It is against this background that Kahn's insight on the many-voicedness of a case—and especially the multiple meanings of a single results of a case—is particularly enticing.[17] In his view, if the result of a decision were all there was to the meaning of a judicial opinion "judges would not bother to write opinions that were more than formal statements of the relevant law."[18] In other words, if the result of the case would be synonymous to its meaning, judges could spare themselves a lot of time and trouble by simply stating it, without bothering to compose a judicial opinion. For those analyzing the judicial text of the Court of Justice, this means putting aside the expectation that the moral and political meaning of a judicial opinion can be reduced to a unitary and easily re-statable message. It means looking beyond the strongly "impersonally collegial, deductive, and magisterial"[19] drafting style of the Court of Justice and wondering whether there is more behind the judgments of the Court of Justice than the doctrinal imperviousness that it sometimes suggests.

In the following section, I will analyze the *Laval* judgment decided by the Court of Justice in 2007 against its many-voicedness. In order to be able to do so, I will retract to a method that has its origins in a phenomenological approach to reading legal (as well as literary) texts. It is an approach that assumes that the meaning of a text results both from the terms and structure of the text itself as much as from the reader and interpretive community through which the text is read.[20] In other words, if we want to understand the various moral and political layers of the apodictic legal texts composed by the Court of Justice, we need to pay both attention to the terms and structure of the text itself as much as to the different perspectives through which it can be read.

I. Understanding the Text and Interpretative Context of the Laval Decision

Laval was a Latvian company, which posted 35 workers on a building site in Sweden in the city of Vaxholm/Sweden for the purpose of building school premises.[21] As the company employed its workers on the basis of a Latvian collective agreement, the Latvian workers earned around forty per cent less per hour than comparable Swedish workers (which made the Latvian company more

[15]According to Brown and Kennedy, the Court of Justice started to distance itself from the "grammatical strait-jacket of a single sentence from the 1980s onwards. *See* NEVILLE L. BROWN & TOM KENNEDY, COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 55 (5th ed. 2000).

[16]*See* MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 237 (2004).

[17]When analyzing the Supreme Court case, *Brown v. Entertainment Merchants Associations*, Paul Kahn explains that some narratives like that of parental responsibility, "can be used to support multiple legal outcomes." *See* KAHN, *supra* note 2, at 30. This means that Kahn does not only identify multiple narratives voices for multiple legal outcomes, but multiple narratives voices for one single outcome. Why this is especially relevant for the cultural study of the Laval judgments will become clearer throughout this article.

[18]*See* KAHN, *supra* note 2, at xi.

[19]*See* LASSER, *supra* note 16, at 237.

[20]*See* White, *Reading Law and Literature: Law as Language*, *supra* note 3, at 79-82 (for a prominent example of the use of such phenomenological approach to reading legal texts). White especially draws from the literary insight of Wolfgang Iser (and of Hans-Georg Gadamer) in his worker. *See* WOLFGANG ISER, THE IMPLIED READER: PATTERNS OF COMMUNICATION IN PROSE FICTION TO FROM BUNYAN TO BECKETT (1974); HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 1994).

[21]*See* Arbetsdomstolen, Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others, ECLI:EU:C:2007:291 (May 23, 2007), ¶ 27, https://curia.europa.eu/juris/liste.jsf?num=C-341/05.

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competitive vis-à-vis Swedish companies).[22] Due to fears of social dumping, the major Swedish construction trade union, Byggnads, required the company Laval to sign the Swedish national collective agreement.[23] Yet the company Laval refused this demand. It was, amongst others, not willing to sign a collective agreement that did not comprise any minimum rates of pay, and which required it to first sign the collective agreement and only afterwards negotiate wages on a case-by-case basis with the local trade unions in Vaxholm.[24] As a result of this refusal on part of the company Laval to sign the Swedish collective agreement, the Swedish trade unions started to organize nation-wide strike actions against the company. After four months of strikes, Laval's subsidiary Baltic was declared bankrupt, and the posted workers had to be sent back home to Latvia.[25]

In the legal proceedings, Laval claimed that the strike actions by the Swedish trade unions were contrary to its freedom to provide services as protected by EU law (and in particular the Posted Worker's Directive 96/71 and Article 57 TFEU). In its decision, the Court of Justice ultimately sided with claims of the Latvian service provider and against the Swedish trade unions. It decided that the Swedish trade union, through its strike actions, had violated Laval's freedom to provide services as enshrined in the Posted Worker's Directive and Article 57 TFEU.[26]

The magnitude of negative reactions to this decision were unprecedented in the history of the Court of Justice. In fact, I cannot think of any other case decided by the Court of Justice that has provoked such a consistently adverse (and sometimes even inimical) response amongst legal academics, social scientists, and the general public.

The Court's decision in favor of the economic rights of the Latvian company Laval and against the strike rights of the Swedish social workers was read as undercutting the social dimension of the Union polity in favor of its economic dimension.[27] The employers of the new accession states and their cheap labor were considered "the winners of these decisions; the trade unions and their members in the West the losers."[28] The Court was accused of failing to "take into account the existence of a weaker party (workers) in the economic transnational activity."[29] Some feared that the ruling would be a "license for 'social dumping' and unfair competition."[30] One scholar argued that the decision, "represented one step forward and two steps back for the trade union movement".[31]

What provoked this outrightly negative response? When trying to understand how the law evokes different forms of moral and political meaning, two essential aspects have to be taken into consideration. In the first place, a (legal) text often acts directly upon its language in such a way as

[22]*See* Catherine Barnard, *Viking and Laval: An Introduction*, 10 CAMBRIDGE YEARBOOK OF EUR. LEGAL STUDIES 463, 465 (2008).

[23]*See* Laval, Case C-341/05, at ¶¶ 28–29.

[24]Furthermore, the company Laval was not willing to pay the high-level employment protection standards and pecuniary charges of the Swedish collective agreement which went beyond those requested by EU law.

[25]*See* Laval, *supra* note 21, at ¶ 38.

[26]For EU lawyers, the Laval case is interesting for several reasons. Amongst the issues debated are the horizontal constellation of the case or the fact that the preamble of the Directive leaving matters of strike action for Member States to decide became irrelevance through the decision in Laval (to name just a view examples). All of these doctrinal issues are not relevant for the particular inquiry of this essay and will hence not be discussed in detail.

[27]Catherine Barnard writes that the *Laval* decision shows "that the Posted Worker Directive is primarily a measure to facilitate free movements of services and not a measure to realize social-policy objectives." *See* CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 448 (6th ed. 2019).

[28]*See* Barnard, *supra* note 22, at 492.

[29]*See* Loïc Azoulai, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization*, 45 COMMON MARKET L. REV. 1335, 1354 (2008).

[30]*See Commission Proposal for a Council Regulation on the Exercise of the Right to Take Collective Action Within the Context of the Freedom of Establishment and the Freedom to Provide Services*, Eur. Comm'n H.R. Proposal for a Council Regulation, 2012/0064, 130 final, at 2 (March 21, 2012).

[31]*See* Ann CL Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 INDUS. L.J. 126, 127 (2008).

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to give the words used therein a certain meaning. This can happen by the (legal) text asserting (like a dictionary often does) an equivalence between one word or another. In such case we might find an explicit statement or definition of a legal term. But the (legal) text might also give words a certain meaning by using the key word in combination or delineation of other important words and to thereby "establish contrast, connection, and hierarchy."[32]

We can find several examples of how the text of the *Laval* judgment unfolds certain forms of meaning in this way. One example stands out particularly. The judgment attempts to define what is meant by the "economic" in EU free movement law by delineating it from the "social" realm of the EU polity. The judgment starts out by telling us that that the free movement of service's provisions have the social purpose of, amongst others, fostering sustainable activities of economic engagements and even protecting against social dumping.[33] Yet despite the importance of these social objectives, the text ultimately clarifies that in the specific context of the *Laval* case, the economic goals of the free movement provisions have to be "balanced" against these social purposes.[34] It is argued that because the high Swedish employment standards made it "less attractive, or more difficult, for ... [Laval] to carry out construction work in Sweden"[35], EU free movement law has to prioritize the "economic" preferences of the Latvian service provider over the "social" demands of the Swedish workers in the particular case of the *Laval* context.

The text hence defines the meaning of the "economic" in EU free movement law through contrasting it to the "social". Yet through establishing such a contrast, the text leaves little space for the multiple meanings of the decision. It reduces the significance of the "economic" in EU law to satisfying the preferences of the owners of capital and thereby does not allow for making explicit various understandings that the "economic" can potentially conjure up. In other words, what this decision tells us is that if EU free movement law satisfies the preferences of service providers it does not satisfy the preferences of workers for improved working conditions and vice versa.

Yet, the meaning that we attribute to a text is never only provoked by the text itself, by "what is there"[36] in the text. Its meaning is also essentially formed by the horizons against which the reader engages with the text.[37] This insight is especially decisive with regard to the *Laval* decision, as the case was decided at a time in which the EU discourse was characterized by a deeply aspirational context for a social Europe. It was a time in which many legal and political actors in the EU vested strong hopes into the improvement of EU citizens' autonomous lives through the establishment of an enhanced social (and egalitarian) rights regime in the EU. Three specific discourses contributed to these ambitious expectations about the social future of the EU polity.

With regard to the EU's posted worker's regime, Article 57 TFEU and the Posted Worker Directive were (up until the *Laval* case) mainly believed to side with the preferences of wealthier European states in protecting their high labor standards. EU law, in other words, was understood as protecting the social standards of Western European states and not so much the interests of posted workers coming from Eastern and Central Europe who were presumed to undermine such standards.[38] Yet there were other imperative processes that spurred the aspiration of EU law

[32]*See* White, *Reading Law and Literature: Law as Language*, *supra* note 3, at 84, 82–87.

[33]*See* Laval, Case C-341/05, at ¶¶ 76–77, 103–105.

[34]*See* Laval, Case C-341/05, at ¶ 105.

[35]*See* Laval, Case C-341/05, at ¶¶ 99, 100, 110.

[36]*See* Hans-Georg Gadamer, *The Elevation of the Historicality of Understanding to the Status of Hermeneutic Principle*, *in* The Critical Tradition: Classic Texts and Contemporary Trends 722 (David Richter ed., 3rd ed. 2007).

[37]For such a phenomenological approach to reading, see White, *Reading Law and Literature: Law as Language*, *supra* note 3; Iser, *supra* note 20; Gadamer, *supra* note 20.

[38]In the first posted workers case, the *Rush Portuguesa* case, the Court of Justice decided that the free movement of service's provisions (Art. 57 TFEU) shall be interpreted as allowing companies from State A (here Portugal) to 'post' their own workforce to provide service in the host State B (here France). However, it also decided that the host state (France) was *allowed* to apply all of its labor laws to the service provider's workforce, thereby removing the competitive advantage enjoyed by the company Rush Portuguesa. This position was later reinforced and even strengthened by the enactment of the Posted Worker's Directive 96/71. The Directive no longer *allowed* but *required* the host state to apply to posted workers a 'nucleus of mandatory rules' listed in Art.

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towards a more social predisposition. One such process was the development of the EU citizenship law regime before and after the time of the *Laval* judgement. Enthusiastic about the potentially integrative potency of the concept of EU citizenship, strong forces in EU legal discourse argued for a more inclusive understanding of the idea of EU citizenship. Amongst others, they demanded that EU free moving citizens should be granted social benefits in the host members state independent of whether they were economically active or not.[39] Third and last, it should not be overlooked that the Lisbon Treaty was signed by the European Council of Lisbon five days before the issuing of the *Laval* decisions (on December 13, 2007). It is true that in the eyes of many, the Lisbon Treaty fell short of what it could have achieved. Yet it nevertheless arose expectations with regard to the improvement and consolidation of the EU's social dimension.[40]

What we can conclude from the aforementioned is that that the predominant reading of the *Laval* decision as essentially economic and unsocial in character is hardly astounding. Not only do we find in the text itself a binary category that leaves little room to interpret the decision as anything else than an essentially unsocial verdict. We can also identify the existence of a major "fore-conception"[41] for a social Europe that essentially determined its outrightly negative reception. How could an interpretative context that vests such high hopes into the erection of a social Europe create anything else than a feeling of grave disappointment about a court decision that gave preference to the economic interests of a company over those of workers aiming to improve their working conditions?

What I will show in the following is that the judgment can be read in at least two different ways. It can be read as taking a holistic approach to the various preferences that EU citizens hold and to satisfying the preferences of those least well-off. But it can also be read as contributing to the development of a deliberative democratic society in the EU polity. In order to unearth these different layers of meaning that the court judgment can be said to cultivate, I will read the *Laval* judgment from the perspective of different political theories.[42] These theories will not be employed as predetermined principles believed to constitute an ideal grounding for the normative force of EU law. Rather, they will be serviced as tools to open new interpretative horizons allowing us to

3(1)(a)-(g) which related in particular to minimum wages, working time, equal treatment etc. As a result of these developments, there was a general understanding (until the *Laval* decision) that EU law sides with the concerns of wealthier European states in protecting their high labor standards from being undermined by posted workers coming from southern and eastern European state. For a more detailed account of these developments, see BARNARD, *supra* note 27, at 447–50.

[39]In an effort to bring the EU polity closer to its citizens (through moving from an economic to a more political community), the Maastricht Treaty (adopted in 1993) carved out the concept of EU citizenship, which was specified in subsequent Treaty Revision (of 1996 and 2001) and through secondary law such as the adoption of the Citizens' Right Directive in 2004. The biggest change that this corpus of law (and the Court's interpretation of it) brought was that not only economically active but equally non-economically active EU citizens could increasingly draw rights from EU law (yet it was—and still is—contested as to what extent such rights also include social rights).

[40]The Lisbon Treaty was by many regarded as a successful endpoint of a process, started with the Treaty of Amsterdam and the Treaty of Nice, to improve the democratic functioning and legitimacy of the European Union and to further consolidate the social dimension of European integration. Not only the integration of social objectives into the Treaties were pointed out in these respects (see Art. 3 of the TFEU), but also the recognition of the Charter of Fundamental Rights as having the same binding force than the Treaties (Art. 6 TFU) and the 'solidarity rights' the this newly binging 'bill of rights document' comprises. For more details on this social dimension of the Lisbon treaty, *see* MONIKA MAKAY, SOCIAL AND EMPLOYMENT POLICY: GENERAL PRINCIPLES, FACT SHEETS ON THE EUROPEAN UNION, https://www.europarl.europa.eu/factsheets/en/sheet/52/social-and-employment-policy-general-principles.

[41]*See* Hans-Georg Gadamer, *Elements of a Theory of Hermeneutic Experience*, *in* TRUTH AND METHOD 266 (Joel Weinsheimer & Donald G. Marshall trans., 1994) (Gadamer citing Heidegger).

[42]Such method has just recently been employed by the European private lawyer Martin W. Hesselink in his monograph *Justifying Contract Law in Europe*. Hesselink states from the start that "this book does not take a position, at least not as a starting point, on the epistemic status of normative contract theory." Rather, what it does is to analyze European contract law from six different political philosophies in order to contribute to a better understanding of the "political questions of European contract law" and to open up "the academic and political debate" on EU law. *See* MARTIJN W. HESSELINK, JUSTIFYING CONTRACT IN EUROPE: POLITICAL PHILOSOPHIES OF EUROPEAN CONTRACT LAW 1, 4, 440 (2021).

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read and understand the moral and political significance of a judgment in novel ways. Their usage is hence believed to help us step out of our interpretative communities in order to see more in a case.

II. Reading the Laval *Decision in Multiple Ways*

1. Considering the Preferences of those Least Well-Off in the EU Polity

One of the predominant rationales of our public philosophy, that is, the philosophy that is ubiquitous in the deep structure of our law and our reflection about it, has its origins in liberal theory. The prime concern of such theoretical approach is the safeguarding of the rationale capacity of all people to choose their lives autonomously through elevating to the apex of the constitutional order the granting of individual rights over general welfare considerations. [43] Another theory that is considerably less popular than liberal theory, but which equally percolates the deep structure of our laws, is consequentialism. Here it is not the protection of the principle of individual autonomy but that of the maximization of the preferences of the greatest number in society that plays the decisive role. In practice this means that if a legal or policy measure is able to contribute to the maximization of the preferences of the many, the constraining of the granting of fundamental rights is considered to be morally justified. But how to decide which preferences of the many should be maximized? Consequentialists have elaborated on a large variety of different moral rules and maxims on the basis of which it can be decided which type of preferences should be maximized, such as distributive principles, moral virtues, or criteria like the improvement of human capabilities, to name just a few.[44]

This is an admittingly depthless and pedestrian description of a much more complex and multifaceted strain of thought in political theory. Yet its theoretical insight nevertheless incites us to rethink the prevailing significance ascribed to the *Laval* decision. According to the above insight, one reason to restrict the granting of fundamental rights (in the *Laval* case the fundamental right to strike) might have had to do with the satisfaction of the preferences of a certain group of citizens whose preferences were considered worth maximizing. But what other group of citizens in the EU polity than the ones demanding strike rights was at stake in the *Laval* case?

[43]Liberal philosophers have developed theoretical accounts aiming to transform the Kantian presuppositions of the autonomous self (according to which people can only be autonomous if they are able to rationally choose their own desires and preferences without the imposition of the desires of others upon them) into integral accounts of political philosophy. In their view, the state can only uphold the Kantian priority of the autonomous self, meaning the rational capacity that all people possess to autonomously choose their life paths or desires freely, if it constrains itself from imposing conceptions of the good life on its citizens. The liberal theorist R. Dworkin has, for instance, argued that government should act "independent of any particular conception of the good life, or of what gives value to life." In the words of J. Rawls, as citizens differ in their life conceptions, "government does not treat them as equals if it prefers one conception over the other." *See* Ronald Dworkin, *Liberalism*, *in* Public and Private Morality 127 (Stuart Hampshire, ed., 1977); John Rawls, A Theory of Justice 560 (1971).

[44]Many scholars to date have tried to develop distinct criteria for the determination of the "general mass of felicity." They have developed theoretical accounts in which general welfare or utility is defined on the basis of distinct *moral rules* and *maxims* that people would want to become universal rules, on the basis of *distributive principles*, on the basis of references to distinct *moral values*, or on the basis of consideration of economic utility. *See, e.g.,* Geoffrey Scarre, Utilitarianism (1996) (a so-called rule-utilitarians who favors the definition of general welfare on the basis of moral rules and maxims); Fred Feldman, Utilitarianism, Hedonism, and Desert (1997) (measures pleasures on the basis of distributive principles like desert); John Broome, Weighing Goods (1991) (measures pleasures on the basis of distributive principles like the notion of fairness); Amartya Sen, *Utilitarianism and Welfarism*, 76 J. Phil. 463 (1979); Utilitarianism and Beyond (Amartya Sen & Bernard Williams eds., 1982) (measures utility on the basis of the improvement individual welfare and/or the improvement of human capabilities); George Edward Moore, Principia Ethica (1903) (a so-called ideal utilitarian who takes into account the values of beauty and truth when measuring welfare); Richard A. Posner, The Economics of Justice (1981) (defines general welfare on the basis of economic utility considerations).

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When we think of a "classical" collective bargaining skirmish between labor and management, what we usually have in mind is a conflict between a trade union fighting for better employment conditions for its workers and an employer trying to assert the economic interest of the company against these social demands. I would not be surprised if most commentators of the case had exactly this classical scheme of collective bargaining in mind when assessing the significance of the case. However, when looking closer at the facts of the *Laval* case, the collective bargaining skirmish does not appear so "classical" after all. The reason for this is that the *Laval* case did not concern only a clash of interests between "Swedish labor" and "Latvian management". It also concerned a clash between "Swedish labor" and "Latvian management and labor." In other words, the case did not relate only to the preferences of the Swedish workers (as the working class of the Swedish polity) but, more broadly, to the preferences of Swedish and Latvian workers (as the working class of the broader European Union polity).

What does this insight suggest?

In the *Laval* judgment, as pointed out above, it was argued that the high Swedish employment standards would not allow the company Laval to fairly compete against Swedish undertakings. For instance, with regard to matters of pay, the European judges pointed out that Swedish law made it "impossible or excessively difficult in practice ... [for Laval] to determine the obligations with which it is required to comply"[45] and by result made it "less attractive, or more difficult"[46] for Laval to provide services in Sweden. What the European judges hence argued in the case is that the high employment standards of Sweden made it difficult, or almost impossible, for the company Laval to fairly compete against Swedish companies.

This reasoning (which is the predominant argument that we find in the *Laval* judgment) can certainly be read as protecting the interests of the company Laval and not those of the Swedish workers. But against the above insight, it can also be read as not only protecting the preferences of the company Laval, but also those of the Latvian working class, which the company Laval had hired. From this perspective, the reading of the judgment as undercutting the interests of the working class in Europe is less evident. It is true that the preferences of the Swedish workers were ultimately not satisfied by the *Laval* decision. Yet in the consequentialist reading of the case, this happened because the preferences of another working class in the EU polity were considered more pressing. As the economically poor periphery of Europe, the Latvian workers had entered the EU with the objective to get part of the internal market pie and to thereby improve their livelihood; and the Court of Justice took these desires seriously. It gave priority to the preferences of the Latvian workers for improved sources of revenue and better living conditions over the preferences of the Swedish workers to limit social dumping. It concentrated on the preferences of those workers considered weakest and least competitive in the EU polity from an economic point of view and not the interests of those workers considered more powerful and wealthy.[47]

2. Considering "Deliberative Democratic" Understandings of the Judgment

Yet the *Laval* judgment does not only evoke challenging questions about the various preferences that EU citizens hold. It also prompts foundational questions of democracy. This becomes clear when reading the decision through the prism of deliberate democratic theory.

[45] *See* Laval, Case C-341/05, at ¶¶ 110

[46] *See* Laval, Case C-341/05, at ¶¶ 99

[47] To my knowledge, there has only been one scholar, Damjan Kukovec, who has challenged the dominant reading of the *Laval* judgment. In his view, the judgment was not inspired by a neo-liberal market ideology but by a profound concern for a more egalitarian and social Europe. He comes to this conclusion through looking at the case through the prism of critical theory stressing the EU's divide between the economically poor Member States of the "periphery" and the economically more powerful Member States of the "centre." *See* Damjan Kukovec, *Law and the Periphery*, 21 EUR. L. J. 406, 415 (2015).

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It is not unusual for political theorists to conceptualize strike actions in collective bargaining dynamics between labor and management as (deliberative) forms of democratic engagement.[48] This might sound counterintuitive at first. How can interest groups like trade unions and employer associations, which are known for their partisan and often heated encounters, be viewed as civilized democratic deliberators? Collective bargaining can indeed be an adversarial process. Yet the transformation of this adversity into respectful democratic deliberations is considered possible under certain conditions. If the procedural rules of the negotiations do not exclude any of the parties (formal equality) and if the different distribution of resources, wealth, and power do not influence the party's participation in the negotiations (substantive equality), then reasonable deliberations are said to even be possible between trade unions and employer organizations.[49]

When looking at collective bargaining situations from this point of view, the right to strike usually plays an important role. Unsurprisingly, this is because the right to strike is considered an important tool to equalize the bargaining level of trade unions to that of employer associations. In the words of one theorist, through the granting of the right to strike, "deterrent-based incentives for genuine deliberation based on reciprocity are created, for employers are faced with the potential of serious economic harm if they [manipulate] the deliberative process in bad faith."[50]

Underlying this position is the presumption that trade unions are usually in an economically disadvantageous positions to employer organizations. It supposes that trade unions are the parties that suffer from severe forms of substantive inequality vis-à-vis the employer organizations and therefore need strike actions to be able to bargain on an equalized footing with the latter.

Yet it is not always employers that are "talking" trade unions to death. Sometimes it is trade unions that are "striking" employers and their workers to death. [51] The *Laval* case is a good example in this respect. Laval's bargaining power in relation to the Swedish trade unions was not only impaired by the different economic reality and labor law regime to which the company was

[48]For a scholar focusing specifically on the deliberative aspects that strike actions in collective bargaining dynamics entail, *see* ALAN BOGG, THE DEMOCRATIC ASPECTS OF TRADE UNION RECOGNITION (2009). For scholars unpacking, more generally, the democratic predicaments of strike actions in collective bargaining, *see* Simon Deakin and Jude Brown, *Social Rights and Market Order: Adapting the Capability Approach, in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS: A LEGAL PERSPECTIVE (Tamara K. Hervey & Jeff Kenner, eds., 2003); JOSHUA COHEN & JOEL ROGERS, ASSOCIATIONS AND DEMOCRACY (Erik Olin Wright ed., 1995); ANTONIO LO FARO, REGULATING SOCIAL EUROPE: REALITY AND MYTH OF COLLECTIVE BARGAINING IN THE EC LEGAL ORDER (2000).

[49]For deliberative theorists, reasonable deliberations are desirable because they are said to result, if not in outcomes that everybody can agree with, then at least in "practices that are predicated . . . on respect for, and a desire to accommodate, ineliminable differences." In other words, deliberative theorists would consider it imperative that trade and management organizations would engage in reasonable deliberations because only then would these negotiations be able to create and sustain harmonious, cooperative, and mutually supportive relations amongst citizens of a polity. Even if they would not lead to results that everybody conforms to, they would nevertheless strengthen the ties amongst actors in the polity's civil society realm and thereby make them more acceptable from a democratic point of view. This view has been elaborated on by Thomas McCarthy is opposition to Habermasian deliberative theory presuming reasonable deliberations to always results in outcomes that everybody can agree with. *See* Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions*, *in* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 153 (Michael Rosenfeld & Andrew Arato eds., 1998).

[50]*See* BOGG, supra note 48, at 256.

[51]In the United States, for example, the state sets distinct "conditions of conduct" for the bargaining interaction between labor and management. More specifically, it requires trade and labor groups to bargain in "good faith" with each other. When the "good faith" bargaining obligation was adopted by the US legislator, it at first aimed at constraining management in collective bargaining situations. In other words, it aspired to inhibit "employers . . . [from] seeking to talk a union to death." However, it was quickly realized that also workers organized in trade unions, who were previously always presumed to negotiate amicably and fairly, also have to be required to conform to the legal duty to bargain and strike in "good faith." This obligation on workers was interpreted as meaning that unions were not allowed to make demands during strike actions that were different to those announced to the employer, were required to maintain openness toward public dialogue, and not to act in a way that leads to the financial ruin of the enterprise. *See* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1417 (1958); Emmett P. O'Neill, *The Good Faith Requirement in Collective Bargaining*, 21 MONT. L. REV. 202, 205–210 (1960).

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accustomed to in its state of origin. Laval was also weaker in bargaining power than the Swedish trade unions because it did not employ any Swedish workers, but only Latvian ones, at its building sites in Vaxholm. The Swedish trade unions had hence nothing to lose on behalf of their members when pursuing strike actions against Laval—a circumstance that gave them enormous bargaining power vis-à-vis the Latvian company.

If we look at the *Laval* decision through this new prism, the rationale of the text once again assumes a slightly different meaning. This time, the argument that the Swedish laws would make it "excessively difficult in practice" and "less attractive" for Laval to compete on the Swedish market does not directly speak out of concern for the livelihood of the Latvian workers. Rather, from this point of view, it speaks out of concern for the difficulties that Laval encountered in its negotiations with the Swedish trade unions. Due to Laval's disproportionate bargaining power vis-à-vis the Spanish trade unionists, Laval was unable to negotiate working conditions with the latter in a fair and reasonable manner, that is, in a way that its concern would be heard and taken seriously by the Swedish worker associations.

Encounters between labor and management from different Member States, such as those at stake in the *Laval* case, hold an enormous promise. They constitute the scant instances of life in the EU polity in which EU citizens actually have to meet, listen to each other, and evaluate each other's positions. They are the rare moments in which the European citizenry has to find solutions to the practical problems of living together and organizing their common life on the basis of cooperative and non-violent forms of co-existence. We can understand the *Laval* decisions as setting the stage to make such non-violent forms of co-existence across EU Member State borders possible. Through deciding the case in favor of Laval's free movement rights and against the strike rights of the Swedish trade unionists, the decision made sure that Member State laws (here the Swedish labor law regime) allows domestic trade unions and foreign employers to bargain on an equal footing. The decision was hence one that aimed to create the conditions that would allow European citizens to approach each other in mutual respect and sympathy, to engage in amicable conversations, and "listen as well as to speak, to seek to understand what others say" [52] when trying to find solutions to common problems.

C. Improving the Reign of EU Law?

Note that the two narrative voices of the *Laval* decision as identified above would not change the result of the judgment. They would only somewhat change the narration of it. In other words, the balancing act that the European judges took in favor of the "economic" (by confirming Laval's free movement rights) and against the "social" (by refusing to grant strike rights to the Swedish workers) is not being challenged by the disentanglement of the multiple layers of meaning of the judgment. Only what the "economic" means in the concrete case is contested.

But why is it worth analyzing a decisions' narration distinct from its result? In other words, why should we as EU legal scholars care about the language in which judicial decisions are communicated? Kahn in his writing alludes to one specific reason for the importance of the narrative voice of judicial opinions, which touches deeply onto the elusive and often contested position that judges hold in a democratic society. This view of Kahn will in the following be explained, followed by a discussion on how feasible his understanding of the narrative voice of the judicial opinion is for the study of EU judgments.

I. Kahn's Understanding of the Rhetorical Function of Court Judgments

Judges are usually not elected like members of parliament. They cannot claim to be representatives of the will of the people and therefore cannot "claim authorship for themselves"[53] of the sort that

[52]Will Kymlicka, *Citizenship Theory, in* Contemporary Political Philosophy: An Introduction 289 (2002).
[53]*See* Kahn, *supra* note 2, at 71.

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democratically elected politicians can. In Kahn's view, judges hence have to pay particular attention to the Constitution of a polity, perceived as the reflection of the imaginations by which people live. That is, they have to make sure that judicial opinions comprise narratives that reflect the organizing ideas by which citizens of a polity structure their understanding of themselves and their polity and which are said to be reflected by the constitutional text.[54] An important part of the judicial opinion is hence persuasion through narration. Judges when drafting the judicial opinion need to make sure that they develop "rhetorically persuasive narratives"[55] that reflect America's deep-held political imaginations about the meaning and nature of the American project.

The judicial opinion hence has an important democratic function from this point of view. It needs to persuade us to see the situation of a particular case in light of one of the broad narrative accounts by which we regularly make sense of our social and political lives. As Kahn puts it, "[a]n important part of the work of a legal text in a democracy, then, is to persuade us that we are its authors. Self-government begins here ...."[56]

In Kahn's view, if we (as citizens) do not hear our own authorial voice when reading the judicial text, then the judicial opinion risks losing its democratic legitimacy. The reason for this is that if we do not see the judicial opinion's intervention as an exculpation of the polity's deep organizing ideas, we might start suspecting that it represents not our own voice but that of the court or the judges. And the voice of the court or judge cannot claim authority on its own. As Kahn phrases it, "[a]s soon as we see the opinion as the authored act of the Justices, we will ask with what authority they rule in our democratic policy. There is no answer to that question, for they have no such authority."[57] The biggest challenge for the judges is hence that they narrate judicial opinions in a way that they are in line with the moral and political values that constitute the character of the polity's imaginary foundations. This is the only measure of democratic legitimacy that judges can take.[58]

But what are the organizing ideas, or deep moral and political values, that are in line with the political imaginary of a polity's people? What is it exactly that is said to allow the readers of a judicial opinion to the see the decision in light of the political imaginary by which citizens of a polity make sense of who they are as people and as a community? Kahn in his study of the US legal system notably alludes to the fact that people's trust into US law requires narratives of responsibility (revolution) and their transition into loyalty (rule of law).[59] Furthermore, in the *Making the Case*, he, for instance, points to the fundamental importance of the narrative of an ever-renewed promise to the next generation, of parental responsibility, or of counting every vote in a democratic society as foundational imaginaries of the American polity.[60]

Yet to what extent can we legitimately transpose these assumptions about the organizing ideas of the US legal system to the study of EU law? And what does the conception of the judicial opinion as a form of rhetoric bring with it for the study of EU law? It is these two questions that I will address in the subsequent sections. For this purpose, I will continuously refer back to the preceding analysis of the *Laval* decision.

II. What Persuades in Europe?

The myths and beliefs that Kahn identifies as persuasive in the judicial opinion of the Supreme Court are vastly particular to the history, traditions, and way of life of the United States. For

[54]*See* KAHN, *supra* note 2, at 21–22.

[55]*See* KAHN, *supra* note 2, at 45.

[56]*See* KAHN, *supra* note 2, at 58.

[57]*See* KAHN, *supra* note 2, at 69.

[58]*See* KAHN, *supra* note 2, at 72.

[59]*See* PAUL KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 19–41, 69–74, 84–90 (1997).

[60]Whereas Kahn identifies the first two narratives in his analysis of the Supreme Court case *Brown v. Entertainment Merchants Association* case, he pinpoints the last narratives in the *Bush v. Gore* case. *See* KAHN, *supra* note 2, at 24–34, 43–44.

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instance, in the case *Brown v. Entertainment Merchants Associations*, Kahn writes that the majority opinion appeals to one of the core ideas of the American project—it appeals to "a narrative [that is] as old as America itself: a country founded on the idea of seeking a new place where one would be free from the constraints of tradition, whether on the form of religion, class, or political practice."[61] That Kahn primarily pinpoints narratives of the US's foundational years and traditions as persuasive from a rhetorical point of view is not a critique of his work. It is rather a confirmation of what he has always contended: Namely that the culture of law's rule is essentially particular, not universal. What persuades in a particular polity cannot be generalized but is always greatly unique to the moral and political composition of the respective community.

This does not mean that we should not inquire into what narrative voices can persuade in other legal systems. In other words, we cannot draw from the particular nature of the cultural study of law's rule that we should not inquire into what narratives European judicial opinions need to comprise to persuade EU citizens of a judgment's legitimacy. Quite the opposite and as Benjamin Berger has pointed out, "a fascinating way into comparative constitutionalism is to ask the question 'what persuades here?'"[62]

When looking at the European Union, we can certainly identify grounding ideas that spring from the founding years of the EU polity and that coin and determine the shape of the EU polity until today. Two such grounding ideas that are often pinpointed are the "Community method" and the polity's underlying "promise of a new era."[63] Yet to what extent can such foundational myths be said to exert the same spiritual force amongst European citizens that American myths do in the US context? Looking more closely at these two foundational ideas might help us in answering this question.

The idea of the Community method constitutes the idea that something entirely new can be created by replacing power politics with the law.[64] Europe, in this view, was not meant to be another political creature that would be susceptible to the fallacies of power politics and national antagonisms. Something more stable was required, which the integrative force of the law was thought to provide for. The current rule of law discourse in Europe (which the EU institutions are particularly apt at nurturing) displays the inheritance of this idea clearer than ever: References to the loyalty of the rule of law are ubiquitous; questions of responsibility and sacrifices, as an essential part of every viable polity, are almost entirely bracketed. The ensuing years will clarify whether this sole reliance on the Community method in the current rule of law crises is a viable tool to convince EU citizens of the EU's qualities and benefits. It will show whether different Member States citizenries can be held together by narratives about the force of the law alone.

The second founding myth that determines our thinking about Europe today is the EU's continuous promise of a new era, which has been critically coined "political messianism" by Joseph Weiler.[65] It is without doubt that claims for a better future might at times provide the spiritual force that enables citizens to consolidate or reform a community. [66] In Europe, this gaze into the future can be said to have been necessary in the founding year in order to bridge the fragile

[61]*See* KAHN, *supra* note 2, at 26.

[62]*See* Benjamin Berger, *Narratives of Self Government in Making the Case*, 18 J. APP. PRAC. & PROCESS 89, 102 (2017), citing Benjamin Berger, *Children of Two Logics: A Way Into Canadian Constitutional Culture*, 11 INT'L J. CONST. L. 319, 337–38 (2013).

[63]*See* VAN MIDDELAAR, *supra* note 1, at 157.

[64]*See* VAN MIDDELAAR, *supra* note 1, at 157.

[65]*See* Joseph H.H. Weiler, *United in Fear - The Loss of Heimat and the Crises of Europe*, *in* LEGITIMACY ISSUES OF THE EUROPEAN UNION IN THE FACE OF CRISES: DIMITRIS TSATSOS IN MEMORIAM 364 (Lina Papadopoulou, Ingolf Pernice & Joseph H.H. Weiler eds., 2017); Joseph H.H. Weiler, *Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"*, SINGAPORE J. LEGAL STUD. 248 (2012); Joseph H.H. Weiler, *Editorial: 60 Years Since the First European Community – Reflections on Political Messianism*, 22 EUR. J. INT'L L. 303 (2011).

[66]Martin Loughlin makes this claim with regard to the necessity of utopias. *See* Martin Loughlin, *The Constitutional Imagination*, 78 MODERN L. REV. 1, 13 (2015).

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divide between the EU's modest beginning and the grand ideas that it promoted.[67] Yet as reality is always more "banal and ultimately less satisfying than the dream, which proceeded it,"[68] the risk of narrating a polity based on its potential promise as opposed to its actual composition can eventually provoke severe discontent with the actual status of the polity. No other decision than the *Laval* judgment displays this better. Given the rife hopes for social Europe, how could a decision in favor of the "economic" and against the "social" have created anything else that an unfathomable disillusionment and even exasperation about the current stage of the European polity?

At this point, it is worth bringing in the scholarship of Ulrich Haltern, an EU legal scholar who has been particularly critical towards the aspirational character of the "European imaginary." In his work, Haltern has mainly asserted this critique about the EU's promise of a new era with respect to the discourse about EU citizenship law.[69] After the signing of the Nice Treaty, most scholars read the broad granting of free movement rights to EU citizens by the Court of Justice as giving expression to an understanding of EU citizenship grounded in a European-centered core that compounds an essential European constitutional identity. This view was so ubiquitous at that time that divergent or alternative interpretations of the meaning of EU citizenship law were barely audible. Yet Ulrich Haltern took up the challenge to peruse this seemingly impenetrable discourse, with disillusioning results for some. In Haltern's view, the narration of EU citizenship law as grounded in the idea "civis europeus sum" (I am a European citizen) was nothing more than an aspiration, a dream with little real substance attached to it. It represented a projected nature of European citizens that had little to do with the actual nature of European citizen's experience.[70] Haltern argued that EU (citizenship) law simply does not carry the kind of thick moral and political meaning that would allow European citizens to imagine themselves as collective subject with a single history and a particular future. Neither, did he assert, do we find a transition "from responsibility to loyalty" nor the belief that Europe was born from "beliefs, visionary revolution, shared sacrifice, emotions, or love,"[71] which Kahn so compellingly identifies as nourishing the American imagination.

It is against this insight that Haltern thoroughly refreshened the debate on EU citizenship law by developing a less aspirational and more grounded understanding of what EU citizenship means. Given the marketisation rationality that has driven EU integration, Haltern argued that the broad granting of free movement rights to EU citizens by the Court of Justice might means something much more prosaic than what most constitutionalists suggested at that time. In his view, it might simply mean developing a type of EU market citizenship with a consumerist core characterized by rituals of travel, consumption, and trade.[72] He hence developed an understanding of EU citizenship that has little to do with thick historical and moral concerns, but that was grounded in "a superficial neo-Durkheimian integrative umbrella of consumption rituals and codes."[73]

Against these assumptions, it is understandable why Haltern is skeptical as to how much we can presume thick cultural context (of the sort that we find in the US and which US citizens can be

[67]*See* VAN MIDDELAAR, *supra* note 1, at 158.

[68]*See* Weiler, *United in Fear*, *supra* note 65, at 374.

[69]*See* Ulrich Haltern, *Pathos and Patina: The Failure and the Promise of Constitutionalism in the European Imagination*, 9 EUR. L. J. 14 (2003); Ulrich Haltern, *The Dawn of the Political: Rethinking the Meaning of Law in European Integration*, 14 SWISS REV. INT'L & EUR. LAW 585 (2004).

[70]*See* Haltern, *The Dawn of the Political*, *supra* note 69, at 599.

[71]*See* Haltern, *Pathos and Patina*, *supra* note 69, at 19, 25.

[72]Haltern draws this conclusion, amongst others, from analyzing the Opinion of AG Jacobs and the decision of the Court of Justice in the Konstantinidis case. See Haltern, *The Dawn of the Political*, *supra* note 69, at 589–600. For another article in which he suggests that we have to come to terms with the idea of a EU market citizen, *see* Haltern, *Pathos and Patina*, *supra* note 69.

[73]*See* Haltern, *Pathos and Patina*, *supra* note 69, at 42.

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united upon) to exist in the EU polity. In fact, Haltern provocatively claims that because the supranational (the European) is the place of Civilization as opposed to the nation (the Member States) which is the place for Eros, the former cannot be regarded as comprising any culture at all. In reference to Benedict Anderson's famous monograph "Imagined Communities" he alleges that "[w]hile the nation [. . .] is the place of culture, and culture is the domain of feeling, there is no culture in supranationalism, only an elegant, decorous absence of feeling."[74]

Haltern's account is a powerful critique of the cultural study of law's rule. He questions whether the promise for a new era that often characterizes the narration of the EU (and which is often pervaded by thick narratives that have little to do with EU citizen's real experience) can serve as a legitimate source to improve the reign of EU law. His work is grounded in the presupposition that the identity that EU citizens hold cannot (like in the US) be characterized by references to thick constitutional values of loyalty, responsibility, and sacrifice but only by the extremely thin rationale of the internal market.

Haltern and Kahn hence fundamentally disagree about the substance of the narrative voice by which the law should be narrated. Yet despite of their divergence in this regard, they share one core assumption: They both believe in the existence of a community that can collectively subscribe to some type of identity and which the law, through its narrative voices, can give expression to. In consequence, they both presume that a judgment can only be democratically legitimate if it is able to persuade citizens to see the situation of a particular case in light of the collective identity by which they make sense of their social and political lives.

It is this presupposition that the authors share that I will critically reflect upon in the subsequent and last part of this article. To what extent is it feasible in the EU legal scholarship to pursue a cultural study of EU law's rule aiming to identify a type of collective identity that is thought to allow EU citizens to be persuades by the reign of EU law?

III. A Cultural Study of EU Law or a Cultural Study of EU Law's Rule

What would Haltern's insight mean for the various narrative voices of the *Laval* decision identified above? I would not be surprised if Haltern would be skeptical towards narrating the *Laval* decision as one "taking into account the preferences of those EU citizens considered least well-off" or as one forwarding the idea of a "reasonably deliberating citizenry." He might disparage them exactly as the type of language of "pathos and patina" that unsuccessfully and unpersuasively endeavors to create a common EU identity through references to (non-existent) mutual values and commonalities.[75]

This might certainly be true. Narratives about the preferences of the least well-off EU citizens or a reasonably deliberating citizenry of the sort identified above might not be in line with the ideas by which EU citizens give order to their social and political experiences in the EU polity. However, one might equally question whether "rituals of travel, consumption, and trade" as suggested by Haltern would be in line with the organizing ideas that EU citizens hold. In fact, it seems to have been exactly the reference to principles of trade that provoked the extremely adversarial responses towards the *Laval* decision amongst legal academics, social scientists, and the general public. Against this backdrop and given the many different cultural idiosyncrasies and traditions by which citizens of EU Member States live, one can very well be skeptical as to whether it is at all possible to identify, at this moment in time, a common European imagination or collective identity.

This certainly does not mean that EU law does not give expression to ideas that define the moral and political constitution, in the sense of composition, of the EU polity. In other words, the fact that it is difficult to identify a narrative account by which EU citizens can reasonably make

[74] *See* Haltern, *The Dawn of the Political*, *supra* note 69, at 595.
[75] *See* Haltern, *Pathos and Patina*, *supra* note 69, at 15.

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sense of their experience does not mean that EU law and in particular judicial opinions of the Court of Justice do not suggest distinct values that prompt a particular way of life. EU citizens might identity themselves with narratives concerned with the satisfaction of preferences of its least well-off citizens, as fostering a democratically deliberative citizenry, or as maintaining rituals of travel, consumption, and trade. But this does not mean that these ideas do not constitute the deeper layers of meaning of EU law.

One risk of the cultural study of EU law's rule (that is, of assessing EU law from the perspective of the narratives by which EU citizens can be best persuaded) is that it might lead us to disregard, and even reject, forms of meaning of EU law that might constitute an essential source of information about the actual or potential significance of the EU polity. Through assessing the judicial opinion from the point of view of predefined presumptions about what narratives might best persuade EU citizens, we might be able to conclude that a judgment does or does not give expression to such ideal narratives. But we might not be able to see the many other moral and political ideas that EU law evokes. This is the case independent of whether we favor thick narratives (like sacrifice or responsibility) or thin narratives (like rituals of the market and consumption) as ideal imaginary for the European polity. Reading judgments of the Court of Justice from the point of view of pre-defined assumptions of what collective identity EU law should ideally comprise runs the risk of overlooking the many-voicedness of a decision. Through primarily focusing on what could persuade in Europe, I claim, we might overlook what constitutes Europe.[76]

It is against this backdrop that a cultural study of EU law (assessing EU law against the multiple moral and political ideas that it evokes) as opposed to a cultural study of EU law's rule might be more suitable for the developmental state the EU polity is currently in. The former approach to the study of EU law would not require the assessment of the judicial opinion against whether its narrative voice is able to constitute a unifying European imaginary. Rather, and much more modestly, it would only examine the judicial opinion against the several moral and political meanings of a "particular way of life" that EU law evokes. Instead of treating the judicial opinion as a platform to evaluate what imaginary could best persuade Europe, it would simply mean looking at the judicial opinion as a gateway to better comprehend Europe.

D. Concluding Remarks

With *Making the Case*, Kahn has published a book written out of deeply humanist sensibilities. Through his careful and nuanced reading and writing about the judicial opinion, he has not only sharpened our sensibilities for the many-voicedness of the texts of the law. He has also clarified the importance of narratives in the law for the acknowledgement of the limits of one's own mind and language, and for the insistence of the reality of the experience of other people displayed through such narratives. Yet as this article has displayed, assessing EU law from the point of view of thick (or thin) narratives as potential source of persuasion for the reign of EU law creates challenges for the EU legal scholar who studies the meaning of EU law. The reason for this is that it is hardly possible, at this point in time, to identify one collective European identity by which EU citizens make sense of their lives in the EU polity.

It is against this insight that this article pinpointed the value-added of assessing EU law against the multiple moral and political ideas that it evokes (the cultural study of EU law) as opposed

[76]It is especially this latter aspect of better understanding Europe that is important in the EU polity. What the EU needs more than ever is to be able to better comprehend its actual composition. But the narratives of the founding years of European integration (whether it is the Community method, the continuous promise of a new era, and even Europe's creation as an internal market) sometimes constrain rather than aid us in seeing the many moral and political meanings of the EU polity. In the words of Luuk van Middelaar, "the language and mentality of the founding years has left an inheritance that gets in the way of Europe's understanding of itself today." *See* VAN MIDDELAAR, *supra* note 1, at 157.

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assessing EU law from the perspective of an imaginary said to best persuade EU citizens of law's legitimacy (cultural study of EU law's rule). This does not imply that the insight provided by Kahn about the cultural aspects in and of the law is of no avail to the EU legal scholar. Quite the opposite; Kahn's insight on the many-voicedness of the law allows us to see well-established cases of the Court of Justice, such as the *Laval* judgment, in a new light. Rather than only understanding the decision (as most commentators have done) as prioritizing the preferences of the owners of capital in the EU internal market, it enables us to also read it as protecting the preferences of those least well-off in the EU polity or as allowing for a reasonably deliberating citizenry. To engage in a cultural study of the law hence allows us to expand our horizons as well as reflections on the socio-political and economic composition of EU law in order to inspire new deliberations and conversation about conceptions of individual and collective selfhood in the EU polity.

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