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DIALOGUE AND DEBATE: SYMPOSIUM ON LAW, CONFLICT AND TRANSFORMATION - THE WORK OF CHRISTIAN JOERGES

Unpacking the beast of burden: Joerges on the constitutional, political, and epistemological baggage of European integration

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Abstract

Christian Joerges is a scholar whose work spills over the conventional boundaries between public and private law, social science and legal theory, law and public policy, empirical inquiry and normative philosophy. This essay brings into focus Joerges's under-appreciated role as a prescient, critical intellectual biographer of European integration. It argues that Joerges's work has helped to diagnose, explain, and dismantle three misconceptions or myths with which European integration has been saddled from its formative decades. These misconceptions are (1) that the European integration project is 'self-legitimating' and therefore politically neutral; (2) that the delegation of decision-making authority to supranational institutions is constitutionally neutral; and (3) that there can be an epistemologically neutral, authoritative disciplinary perspective from which to comprehend European integration. Breaking the hold of these misconceptions is an essential step towards gaining a critical understanding of the promises and limitations of European integration today.

Keywords: European project; European court of justice; legal integration; constitutionalisation; social welfare state

By critically engaging with his work, many contributions to this special issue pay homage to Christian Joerges, a scholar whose work spills over the conventional boundaries between public and private law, social science and legal theory, law and public policy, empirical inquiry and normative philosophy. Given the diversity of the fields of inquiry to which he has contributed, it would be a Herculean task to synthesise Joerges's contributions to knowledge. In this review essay, I set a much more modest goal. I attempt to bring into focus Joerges's under-appreciated role as a prescient intellectual biographer of European integration by emphasising three misconceptions about the integration project which Joerges has helped to diagnose, explain, and dismantle. Although these misconceptions are no longer quite as pervasive, they continue to weigh down the European project, and are worth unpacking for that reason.

Let me list these misconceptions in stark terms so that they stick in the mind. I plan to add some complexity later.

- The first misconception holds that the European integration project (through the delegation of competences to supranational institutions) is 'self-legitimating'[1] and therefore ***politically* neutral**. It is not, Joerges teaches us.

[1]C Joerges, *Conflict and Transformation. Essays on European Law and Policy* (Bloomsbury 2022) 5.

- The second misconception holds that the project of supranational delegation of competences is ***constitutionally*** **neutral**. It is not, Joerges teaches us.
- The third misconception is that there is a privileged discipline (whether law, political science, or economics) that offers an ***epistemologically*** **neutral** perspective, an Archimedean point from which to authoritatively comprehend European integration. There is not, according to Joerges.

Why have any of these misconceptions endured? Part of my argument will be that they were convenient – perhaps even expedient – for getting the integration project off the ground. For this reason, perhaps it is more accurate to describe them as *myths*.[2] It is unsurprising that myths disintegrate under the critical glare of social science, since their social functions do not hinge on their descriptive or explanatory validity. What *is* surprising, then, is the extent to which social scientific observers of European integration themselves internalised and helped to propagate these beliefs. A key contribution of Joerges's scholarship, I will argue, has been to 'unpack the beast of burden', ie, to expose key misapprehensions that have hindered a more critical grasp of the political choices that have shaped the integration project and its many pitfalls.

1. Political neutrality

The European Union is a modern-day marvel of political organisation. It brings together a diverse group of nation-states with mutual histories of devastating conflict, as well as disparate, sometimes orthogonal interests. The fact that these states have agreed to hand off critical powers to supranational institutions and have continued decade after decade to comply with their ever-expanding range of decisions is extraordinary. The success of European integration has inspired many political leaders, social scientists, jurists, and legal scholars to tell a providential story about its trajectory. Joseph Weiler has described this narrative of legitimacy as 'messianic'[3] although – jettisoning the eschatological undertones but retaining the descriptive power of his diagnosis – we might do better to call it *teleological* instead. On this view, European integration is treated 'as a self-legitimising goal' and 'as a success story'[4] that throws the halo of legitimacy over each stage of widening and deepening the scope of cooperation among member states. But while the *telos* of 'peace and prosperity' in Europe may have seemed self-evidently desirable from any reasonable political perspective (and hence, ***politically*** **neutral**) in the wake of two catastrophic wars, as Joerges has consistently argued, the institutional blueprint through which that *telos* was pursued was decidedly *not* politically neutral in its design or implications.

In this section, I will argue that two key factors reinforced the political neutrality narrative. First, the desirability of European integration was the subject of a notably sturdy overlapping consensus across the mainstream political spectrum during the founding decades. Second, it was supported by an argument from 'economic rationality criteria' supplied, as Joerges has argued, by German ordo-liberal thought in particular, according to which the entrenchment of an 'economic constitution' guaranteeing market freedoms at the supranational level would advance the Pareto frontier for *all*.[5] The political neutrality thesis, in turn, supported a *depoliticising strategy* in the

[2]'[M]yth and ritual function to promote social intercourse and security, and to maintain the established tradition as a living reality within the milieu of primeval tradition as a consolidating dynamic . . . The function of myth, in short, is to stabilise the existing regime, to afford infallible precedents for practice and procedure, and to place on an unassailable foundation the general rules of con duct, traditional institutions and the sentiments controlling social behaviour and religious belief. The irrationalities and inconsistencies in the stories and traditions are of no consequence because they are irrelevant for these purposes'. EO James, 'The Nature and Function of Myth' 68 (4) (1957) Folklore 474 at 477.

[3]JHH Weiler, 'Europe in Crisis – On "Legitimacy", "Political Messianism" and the "Rule of Law"', *Singapore Journal of Legal Studies,* December 2012, 248.

[4]Joerges (n 1) 5; C Joerges and C Kreuder-Sonnen, 'European Studies and the European Crisis: Legal and Political Science between Critique and Complacency' 23 (2017) European Law Journal 118 at 119.

[5]Joerges (n 1) 5.

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pursuit of European integration. Until the 1990s, most decisions in the service of this process were seen as too important to be subjected to the vagaries of mass political contestation, which was in any case unnecessary given that the process would be universally beneficial for *all* sectors of society.

To be sure, member state governments have often tussled, even gridlocked over the configuration of Community institutions and over specific policy decisions.[6] However, the degree of consensus that obtained especially during the early decades among European leaders, bureaucrats, jurists, scholars, and public intellectuals over the *desirability* – even imperative – of European integration is remarkable. Generations of leaders from across the ideological spectrum supported the integration project and complied with the ever-expanding, ever more demanding decisions of the supranational institutions. Serious critiques from within the political mainstream remained rare. On the continent, Euroscepticism was relegated to the fringes of the political spectrum until the 2000s. Of course, the reluctance of political elites to ask critical questions about the means and ends of integration left the field wide open for more virulent forms of opposition to emerge. During the founding decades, however, this consensus gave the integration project a semblance of political neutrality and supported the narrative of a self-legitimating union.

The consensus over the desirability of European integration was also instrumental in deflecting qualms about the lack of democratic accountability of supranational decision-making. Because its legitimacy was self-evident, 'the pursuit of integration [was privileged] above the maintenance or establishment of democratic processes of opinion formation and decision-making'.[7] As Jan Werner-Müller has shown, this reflected a peculiar, paradoxical understanding of mass participatory democracy during the postwar period. Democracy was seen simultaneously as *necessary* where political questions have no self-evident correct answer *and* as appropriate *only* in the domains where mass participation did not pose existential risks to the postwar order.[8] European elites in the political, legal, and scholarly domains regarded market-led integration as *both* the obviously right path for Europe *and also* as too important to be exposed to the vicissitudes of partisanship and majority rule.[9] The conjunction of these two assumptions obviated the need to subject European integration to true democratic contestation.

Many of Joerges's essays collected in the recent *Conflict and Transformation* volume explore the internal contradictions of this posture, tracing its implications in areas including law, market regulation, monetary policy, and constitutional politics, and the consequences of avoiding, for as long as possible, the inclusion of European integration as a question for democratic politics. Two sets of tensions are central to Joerges's scholarship, namely, between supranational power and democratic sovereignty on the one hand, and between the redistributive and market efficiency models of social welfare, on the other. In his telling, these tensions are layered together and reinforce each other. They have not only survived successive rounds of treaty-making and institutional reform, Joerges shows, but have also resisted fancy theories designed to resolve them.

One of the most influential of these theories came from the social democratic left during the 1990s, which for a time viewed the European Union as a promising vehicle of social justice in the age of economic globalisation. Social democrats worried that the postwar achievement of the social state was on a path of irreversible decline and regarded the transfer of solidarity responsibilities to the supranational level as the only way of salvaging the European social model.[10]

[6]A Moravcsik, *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998).

[7]Joerges (n 1) 5.

[8]J-W Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press 2011).

[9]Ibid., 149.

[10]See, for example, Lionel Jospin's speech of 29 May 2001 calling for 'greater economic solidarity'; Romano Prodi's speech of the same date calling for EU tax ('If we want a social model in which solidarity is a key element ... we must pursue integration: only the constitution of a sufficiently large political Union will enable us to defend this model on the world scene'.) available at <https://ec.europa.eu/commission/presscorner/detail/en/speech_01_244> accessed 13 December 2024.

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In this hope, they were willing to overlook the fact that market liberalisation constituted a central, institutionally hard-wired priority of the European project. Puzzlingly, Joerges writes, '[e]conomic integration was not perceived as a challenge to national welfare states'.[11] Rather, it was assumed that once the framework of supranational governance was firmly in place, it could eventually take over from the nation-state the mission of pursuing social justice.

Of course, the Eurofederalist left recognised that such a move would not resolve, but would indeed deepen, the EU's problem of democratic legitimation. Moving redistributive responsibilities (the so-called *power of the purse*) to the supranational level would necessitate constructing significantly stronger circuits of democratic representation and accountability at that level. In an influential series of essays, Habermas argued for a re-founding of the integration project around a fully-fledged federal constitution that would take on the democratic legitimation role hitherto assumed exclusively by national representative institutions.[12] A 'Constitution for Europe' would have a 'catalytic' effect on the emergence of a European *demos* capable of generating meaningful democratic opinion- and will-formation at the supranational level.[13] Thanks to this new 'legal institutionalization of citizens' communication', a European 'ethical-political self-understanding' would emerge that would not be parasitic on any essentialised cultural identity.[14] Instead, 'the communicative network of a European-wide political public sphere embedded in a shared political culture' would be 'founded on a civil society composed of interest groups, nongovernmental organizations, and citizen initiatives and movements, and will be occupied by arenas in which the political parties can directly address the decisions of European institutions and go beyond mere tactical alliance to form a European party system'.[15] Yet Habermas's use of the passive voice was instructive. Who would move the citizens? Who would do the occupying?

As Dieter Grimm observed in his celebrated 1995 exchange with Habermas,[16] it was politically naïve to assume that popular political commitment to integration would simply materialise once supranational institutions were in place. Grimm did not disagree with Habermas that European integration was the right response to systemic pressures with which the nation-state was ill-equipped to cope. Grimm and Habermas also agreed that the contemporary configuration of the EU had serious democratic shortcomings, but Grimm stayed truer to the guiding principles of political legitimacy articulated by Habermas in his political philosophy.[17] Although his position is often mischaracterised as confusing the *demos* with the *ethnos*, Grimm is careful to note that '[t]he people are certainly not some community whose unity and will are pre-given'. Instead, he makes a much more nuanced argument about the political, institutional, and linguistic preconditions of a well-functioning public sphere:

> the parliamentary process does not by itself guarantee democratic structures . . . [It] instead builds on a social process of interest mediation and conflict control that partly eases the

[11]C Joerges, 'Integration through Law and the Crisis of Law in Europe's Emergency' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream. Adjusting to European Diversity* (Cambridge University Press 2016) 303.

[12]See especially J Habermas, *The Inclusion of the Other: Studies in Political Theory* (C Cronin and P de Greiff (eds), MIT Press 1998).

[13]Ibid., 161.

[14]Ibid.

[15]Ibid., 153.

[16]D Grimm, 'Does Europe Need a Constitution?' 1 (1995) European Law Journal 282; J Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' 1 (1995) European Law Journal 303. The passages below quote the version of this essay as reproduced in Habermas (n 12).

[17]'A legal order is legitimate to the extent that it equally secures the co-original private and political autonomy of its citizens; at the same time, *however, it owes its legitimacy to the forms of communication in which alone this autonomy can express and prove itself. In the final analysis, the legitimacy of law depends on undistorted forms of public communication and indirectly on the communicational infrastructure of the private sphere as well.* This is the key to a procedural understanding of law'. J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Democracy* (W Rehg (tr) MIT Press 1996) 409, emphasis added.

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> burden on parliamentary decision and partly patterns it. The links between the individual, social associations and the State bodies are maintained chiefly by the communication media, which create the public needed for any general opinion forming and democratic participation.[18]

Furthermore, Grimm argued, 'Information and participation as basic conditions of democratic existence are mediated through' a shared language, which puts multinational polities like the EU at a democratic disadvantage.[19] In Grimm's view, the strong communicative structures necessary for meaningful democratic engagement could not be conjured through a process of constitutional *relancement*. A further sequence of legalistic, top-down steps toward a European federation threatened to create a distant, centralised, elite-run racket (if not quite the 'soulless despotism' that Kant had warned about).[20] In the ensuing years, the ill-fated attempt to orchestrate a constitutional re-founding for the EU bore out Grimm's scepticism.

Like Grimm, Joerges has focused on the tensions generated by member state diversity, though for Joerges, it is Europe's *socioeconomic* rather than sociocultural diversity that makes scaling up the welfare state problematic from a democratic point of view.[21] According to Joerges, the obstacle is not only that member states take distinct approaches to social welfare provision stemming from their unique historical, social, and political matrices. In addition, he points out that 'the institutional infrastructures of the economy as a social *acquis* – of "the economy as a polity"' are inextricably tied to 'state constitutions and their democratic legitimacy'.[22] In other words, the internal pluralism of the 'European social model' is the result of democratic contestation and compromise, and attempts to pave over it (as the EMU has to some extent done) were bound to generate not only a crisis of governance but also of democracy.

According to Joerges, the Eurofederalists' hopes of a democratic supranational welfare state was naïve on another front. These hopes rested on the heroic assumption that existing supranational institutions could be retrofitted for social democratic ends. To steer the engine of European integration towards a social democratic horizon, however, would require overcoming the path-dependency of institutions built to advance market integration along a deregulatory track. Institutions designed around the core objective of *dismantling* regulatory barriers to market activity could not be expected to seamlessly take over the complex social policy functions of the European nation-state. While Joerges was hardly alone in emphasising the politically and socially embedded nature of economic decisions,[23] he comprehensively traced the implications of this embeddedness for legal and constitutional theory. His attentiveness to the autonomous logics of the legal domain lent further support to his scepticism that the supranationalisation of the welfare state model was feasible, let alone desirable. In fact, Joerges predicted the opposite, namely that the tensions between domestic mechanisms of social solidarity and the supranational entrenchment of market liberalisation would only deepen. The 'commands of economic integration have determined and curtailed the development of "social Europe"', while subjecting member state social policies to 'the required primacy of economic rationality' and market competition.[24] Indeed, far from marking a linear progression towards a salutary *telos*, each expansion of supranational competences from the Single European Act onwards has deepened the unresolved tensions mapped out by Joerges.

[18]Grimm (n 16) 293.

[19]Ibid., 295.

[20]I Kant, 'Perpetual Peace. A Philosophical Sketch' in *Political Writings*, with an introduction by Hans Reiss (ed), (HB Nisbet (tr) 2nd edn, Cambridge University Press 1997) 113.

[21]Joerges (n 1) 223.

[22]Joerges (n 1) 120.

[23]On this point, Joerges frequently acknowledges the contributions of Scharpf. See especially, FW Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot be a "Social Market Economy"' 8 (2010) Socio-Economic Review 211.

[24]Joerges (n 1) 222.

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In retrospect, it is surprising that champions of the postwar welfare state were ever persuaded by the political neutrality narrative of European integration. It took European elites many decades to acknowledge a basic fact that runs like a bright thread through Joerges's work: insofar as the *telos* of peace and prosperity was pursued primarily through facilitating the movement of factors of production and reinforcing market competition, it was not and could not be politically neutral. Market integration created winners and losers, involved trade-offs between social solidarity and economic productivity, and was far from being equally suited to advancing all mainstream political agendas – from the steeply redistributive to the radically deregulatory. Rather, the alleged political neutrality of the European integration process has functioned as an ideological justification for insulating supranational decision-making from more robust forms of political accountability, contestation, and revision.

The belief in European integration as a self-legitimising goal was always questionable, Joerges writes, but '[i]n view of the all-encompassing and overwhelming crises with which Europe is now confronted, it is now a hopeless one'.[25] And indeed, the financial and sovereign debt crisis that engulfed the EU in 2009 disabused nearly everyone of this particular misconception. Today, each decision along the path of European integration must be justified and defended, with good arguments, against roaring Eurosceptical winds. In a democratic system, this is as it should be.

Whether they are located on the right, the left, or in the 'void',[26] today's observers are clear-eyed about the institutional biases and trade-offs of integration that Joerges tirelessly documented over the decades. For instance, it is now a cliché on the left to lament the ways in which the EMU not only enforces a permanent regime of fiscal discipline that puts more radically redistributive social democratic policy options out of reach for most member states, but also curtails the reach of democratic decision-making. The disillusioning realisation that the EU is 'a constitutional order tailor-made for the interests of global capitalism and managerial politics'[27] has motivated many democratically-minded critics to embrace 'the case for left Brexit', heeding a call to revive social democracy by restoring domestic parliamentary sovereignty. In abandoning the disabled cruise ship of the EU, lexiteers appear prepared to take their chances once again on that leaky old dinghy of the nation-state. Meanwhile, some of us opt to stay on board the supranational cruiseliner not because we are confident that it is seaworthy, but because we do not find the dinghy particularly reassuring in the face of planetary economic and geopolitical winds. This is not an easy strait to navigate, but Joerges is an excellent helmsman, charting an equidistant course between his admiration for and commitment to the European integration project and his concern for upholding the diverse, hard-won, and well-adapted social achievements of the several member-states. Perhaps my strait analogy is not just tortured but also inapposite, since according to Joerges, we can only reach the former by way of the latter.

My point here is twofold. First, to riff on the invaluable lesson of Joerges's classic 2004 essay, 'What is Left of the European Economic Constitution?' (cheekily spelled with a capital 'L'),[28] what is left of Left supranationalism must today be suitably chastened and realistic about the challenges of rejiggering the EU's market-oriented supranational apparatus to social ends. Second, Joerges's critique of the self-legitimising strategy and his warning that it would inevitably be a source of crisis – issued all the way back when European integration was humming along just fine – are remarkable for their prescience.

[25]Joerges (n 1) 5.

[26]P Mair, *Ruling the Void. The Hollowing of Western Democracy* (Verso 2013).

[27]R Tuck, 'The Left Case for Brexit', *Dissent*, June 6, 2016. Available at <https://www.dissentmagazine.org/online_articles/left-case-brexit> accessed 13 December 2024.

[28]Reprinted in Joerges (n 1).

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A. The Court as oracle of the political neutrality myth

Although the corrosive effects of the market-building and monetary union projects on national welfare states have become clearer over the past two decades, the narrative of the distributive and political neutrality of supranational governance endures as an official ideology of sorts for the EU. Although the financial and sovereign debt crisis created a moment for potential honesty for supranational institutions, bodies such as the ECB and the CJEU doubled down on their perennial claim to be responding to technocratic imperatives. That is, they continued to make highly political choices while denying that there was any choice to be made at all. As Joerges and Kreuder-Sonnen observe, 'the European crisis response was marked by a rationale of safeguarding both the institution of the common currency as well as its neo-liberal underpinnings at all cost [sic], legal and political'.[29]

The narrative of integration as a steady march towards a politically neutral *telos* receives its clearest and most steadfast articulation in the case law of the Court of Justice. During the initial decades of integration, supranational judges and legal scholars formed a relatively tight-knit epistemic community characterised by a belief in the self-legitimating character of European integration.[30] The Luxembourg Court treated integration as a standard of legality against which all challenges to member state actions were to be judged. For instance, it prioritised the uniformity and effectiveness of Community law over key aspects of member states' constitutional arrangements where it viewed the latter as challenging the authority of Community law.[31] National measures that were found to impede key vectors of integration, even if only 'potentially' (such as measures having equivalent effect to quantitative restrictions, or measures that discouraged the freedom of movement of EU citizens), were held to be presumptively illegal under the Treaties[32]; while measures that seemed *ultra vires* under Treaty rules could be considered legitimate insofar as they advanced integration, and were therefore legal. As Slaughter and Mattli observed in a seminal 1993 essay, 'the Court was careful to create a one-way ratchet by permitting individual participation in the system only in a way that would advance community goals',[33] while others with equally important interests at stake in Community organs' decisions did not receive nearly as favourable a hearing.[34]

Its use of integration as a *de facto* horizon of legitimacy *and* legal validity has arguably interfered with the ECJ's ability to fulfil its judicial review function, particularly when it comes to keeping other supranational institutions within their mandates.[35] Of course, it may not be all that surprising for an apex court in a multilevel polity to have a preference in favour of shifting power to the federal level. After all, courts are political actors and they are motivated to expand their scope of institutional autonomy when given the chance.[36] But in the EU's case, layered on top of

[29]Joerges and Kreuder-Sonnen (n 4) 120.

[30]'Legal scholarship and European politics turned a blind eye to the tensions created by the dynamics of integration', Joerges writes, most notably those between 'the commands of economic integration0 and the objective of a 'social Europe'. Joerges (n 1) 221–2.

[31]M Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2004) 225.

[32]A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[33]A-M Burley [Slaughter] and W Mattli, 'Europe Before the Court' 47 (1) (1993) International Organization 41 at 60.

[34]See for instance Case 44-79 *Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290.

[35]'The ECJ was created as part of the European Coal and Steel Community in order to protect member states and firms by ensuring that the supranational high authority did not exceed its authority. When the EU was founded, the Court's mandate was changed, but its primary function remained to keep the Commission and the Council in check'. K Alter, 'Who are the "Masters of the Treaty"? European Governments and the European Court of Justice' 52 (1) (1998) International Organization 121 at 124. See also T Isiksel, 'European exceptionalism and the EU's accession to the ECHR' 27 (2016) European Journal of International Law 565. For an egregious example of the supranational judiciary's unwillingness or inability to exercise meaningful judicial review over EU institutions in the domain of fundamental rights, see J De Coninck, 'Shielding Frontex 2.0: The One with the Impossible Proof', *VerfBlog,* 2024/1/30 <https://verfassungsblog.de/shielding-frontex-2-0/> accessed 13 December 2024.

[36]M Shapiro, 'Political Jurisprudence' in M Shapiro and A Stone Sweet (eds), *On Law, Politics, and Jurisprudence* (Oxford University Press 2002) 19; Alter (n 35) 129.

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the conventional *institutional* cleavage between supranational and member state prerogatives is a *functional* cleavage between market integration and other, countervailing public policy values relegated to the nation-state level. The Court has therefore sought not only to reinforce supranationalism against the generic centrifugal momentum of a heterogeneous federation, but also to uphold the market-building project and prioritise it over competing social policy priorities reserved/relegated to the domestic arena.[37]

The CJEU's much-debated *Gauweiler* decision neatly illustrates these tensions. In that decision, the CJEU defended the constitutionality of the European Central Bank's Outright Monetary Transactions (OMT) programme against the charge that it contradicted the no-bailout clause of the TFEU (Art 125). In its decision, the Court acknowledged that the 'Treaty contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the ESCB for the purpose of implementing that policy'.[38] Instead, it accepted the ECB's claim that it had 'the competence to decide what monetary policy "is"',[39] and deferred to the ECB's judgment that the OMT program was a matter of monetary policy. As Joerges points out, this move contradicts the conventional wisdom that independent non-majoritarian institutions 'are *not* the masters of their mandate' (ie, they lack *Kompetenz-Kompetenz)* and must instead observe the scope of authority allocated to them by legislation (and as interpreted by courts). Instead, the Court accepted that as the arbiter of what falls within the domain of monetary policy, it must *eo ipso* be competent to engage in whatever practice it saw as belonging in that domain. To be sure, the CJEU's punt was partially in deference to the 'highly technical terrain in which it is necessary to have an expertise and an experience which, according to the Treaties, devolves solely upon the ECB'.[40] However, it also signaled 'the submission of law to crisis politics'.[41]

Beyond illustrating the CJEU's permissive teleological interpretation of the scope of supranational competence (and its consequent abdication of any judicial review role vis-a-vis the scope of authority of supranational institutions like the ECB), Joerges argues that the *Gauweiler* decision is remarkable for its 'disquieting theoretical poverty'.[42] In particular, it ignores the glaring fact that '[t]echnical expertise cannot be neatly separated from, or insulated against, normative assessments and policy choices',[43] especially in an arena laden with so many distributional consequences and externalities as monetary policy. Non-majoritarian institutions such as the ECB and the CJEU are meant to refrain from creating significant redistributive effects that they have no democratic mandate to impose.[44] By sweeping these effects under the rug of the ECB's scope of competence, the Court provided cover to the solipsism of the technocrats and failed to take seriously roiling democratic, social, and moral objections to the EU's crisis management strategy. In other words, it sought safety in the time-honored narrative that economic integration represents a politically neutral, self-legitimating objective that draws the contours of supranational legal validity.

2. Constitutional neutrality

The second misconception that Joerges seeks to correct is the idea the delegation of erstwhile national competences to supranational institutions is ***constitutionally* neutral**, in the sense of not disturbing the integrity of domestic constitutional arrangements, the rule of law, and the circuits of democratic legitimation. Instead, Joerges has shown, supranational governance is quite radically

[37]C Joerges and F Rödl, 'Informal Politics, Formalised Law, and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' 15 (2009) European Law Journal 1, esp. 13–15.

[38]Case C-62/14 *Gauweiler*, EU:C:2015:400, para 42.

[39]Joerges (n 1) 39.

[40]Opinion of AG Cruz Villalon in Case C-62-14 *Gauweiler* ECLI:EU:C:2015:7, para 111.

[41]Joerges and Kreuder-Sonnen (n 4) 121.

[42]Joerges (n 1) 42.

[43]Ibid.

[44]Joerges and Kreuder-Sonnen (n 4) 127.

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transformative of member state constitutional systems. With scholars like Barav,[45] Stein,[46] and Weiler,[47] Joerges has consistently emphasised the constitutional character of European law and the concomitant transformations this effected over member state legal systems. However, Joerges deepens this diagnosis with a critique of the substantive commitments that this process of constitutional transformation has entrenched at the expense of nation-states' democratically legitimated social arrangements. In other words, rather than simply theorising the constitutionalisation of the Treaties, Joerges brought into focus 'the consequences of the *economic* emphasis of the European project'.[48] In his words, 'the transfer of economic regulation to the European arena has indeed turned out to be a significant constitutional problem' because '*the aims and the substance of economic law are always tied up with the definition of the functions of the constitutional state*'.[49] According to Joerges, the tenets of this system align closely with German ordoliberalism and are in fundamental tension with the 'socio-economic, institutional, and political heterogeneity of Europe'.[50] As a result, 'the institutionalising of a European market order does not simply bear upon states' capacity for political action, but ultimately also on the states' own constitutional identities'.[51]

The irony, Joerges notes, is that member state courts like the German Federal Constitutional Court have been among the foremost proponents of the constitutional neutrality thesis.[52] In its *Brunner* decision, "[t]he GCC found that it was precisely the substitution of politics and policies by legal rules and the independence of the ECB which ensured the compatibility of the EMU with the [German] Basic Law."[53] In other words, the German Federal Constitutional Court ratified the claim that monetary policy as codified in the Maastricht Treaty is political neutral, and held that the technocratic solipsism of monetary policy guaranteed the sphere of domestic democratic sovereignty against supranational encroachment. Accordingly, it was convenient *both* for the supranational institutions *and* member states constitutional courts to pretend that a) decisions concerning market integration and monetary policy could be neatly separated from states' core constitutional identities; and b) that these decisions did not entail any abridgement or serious modification of the latter. This strategy allowed member state courts to credibly invoke the primacy of domestic constitutional norms without derailing moves toward ever closer integration. However, it came at the cost of denying (not as credibly) the political and democratic salience of the domains of market regulation and monetary policy. Put differently, authority over policy-making could be conceded to supranational institutions without loss of national democratic autonomy *only if* the policy matters in question could be represented as matters of mere technocratic management.

As discussed earlier, Joerges has always insisted that they cannot be so represented. However, he is also interested in tracing the lineage of the *belief* that supranational governance essentially consists of a system of 'technocratic regimes and governance structures in which expertise substituted the rule of law and democratic legitimation'.[54] In Joerges's telling, a prominent (and

[45]A Barav, 'The Judicial Power of the European Economic Community' 53 (1980) Southern California Law Review 461–525.

[46]E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' 75 (1981) American Journal of International Law 1.

[47]JHH Weiler, 'The Transformation of Europe' 100 (1991) Yale Law Journal 2403.

[48]C Joerges 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration' 2 (1996) European Law Journal 105 at 109, emphasis added.

[49]Ibid., 109.

[50]Joerges (n 11) 317.

[51]Joerges (n 48) 109.

[52]Joerges (n 1) 338; C Joerges, 'The Law in the Process of Constitutionalising Europe', *EUI Working Paper Law 4/2002*, 24–6, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=307720> accessed 13 December 2024.

[53]Joerges (n 11) 315.

[54]Ibid., 300.

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intriguing) intellectual figure in this tradition is Hans-Peter Ipsen. A Nazi jurist who later reinvented himself as a scholar of EC law and established considerable stature in the field,[55] Ipsen described the European Communities as a *Zweckverband funktionaler Integration* (a purposive association for functional integration).[56] Supranational institutions, according to Ipsen, were legitimated primarily by a freestanding rationale of administrative and technical efficacy in delimited issue areas.

This functionally delimited understanding of European integration arguably received its most comprehensive and programmatic statement in the writings of Giandomenico Majone, who contends that the proper role for supranational institutions was regulatory rulemaking and coordination in areas where unanimity and consensus were feasible objectives. 'As long as the tasks assigned to [the supranational] level are precisely and narrowly defined, non-majoritarian sources of legitimacy – expertise, procedural rationality, transparency, accountability by results – should be sufficient to justify the delegation of the necessary powers'.[57] The distinction between regulatory efficiency and redistribution, Majone argues, should serve as a guide of substantive legitimacy when commissioning tasks to non-majoritarian institutions. Since redistributive decisions create clear winners and losers, they must be left exclusively to directly democratically accountable bodies.[58] Although Majone concedes that many regulatory policies have incidental redistributive consequences, he argues that the efficiency gains would be enough to compensate the losers.[59]

While compatible with the constitutional integrity of member states' democratic systems, such a technocratic conception of legitimacy can only support a limited and self-limiting kind of integration project. Majone clearly acknowledges this implication. In his more recent writings, Majone has critiqued the expansion of the EU's ambitions beyond the relatively narrow domain of market-building and regulation. In his view, the expansion of competences embroils supranational institutions in messy distributive conflicts that have no epistemically superior or Pareto-optimal solutions, and which they are therefore ill-equipped to resolve.[60] 'The greatest threat to legitimacy… is not the peculiarity of the supranational institutions, but their unrelenting effort to expand their own competence, even at the risk of depleting their limited resources of legitimacy'.[61] Other scholars in this vein, most notably Peter Lindseth, have been more forthright in accepting the political stakes of supranational regulation and have approached the problem of the legitimation of administrative competence more critically.[62] For instance, Lindseth stresses 'the incapacity of supranational institutions to legitimize themselves apart from mechanisms of national oversight'[63] and has argued for more robust involvement of elected national institutions (such as parliamentary committees) with greater 'legitimacy resources' in EU policy-making.

Joerges, for his part, has questioned the stability of the very distinction between regulatory and redistributive politics.[64] Instead, he has emphasised that the technocratic mode of legitimation was destined to be neither self-sufficient nor sustainable, even when the arena of supranational competence was narrower. Up until the Single European Act, Joerges writes, 'Europe was

[55]C Joerges 'Europe a *Großraum*? Shifting Legal Conceptualisations of the Integration Project' in C Joerges and N Singh Ghaleigh (eds), *Darker Legacies of Law in Europe* (Hart 2003) 182–3, n 92.

[56]Joerges (n 1) 250.

[57]G Majone, 'Europe's "Democratic Deficit": The Question of Standards' 4 (1998) European Law Journal 5 at 28.

[58]G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' 17 (1997) Journal of Public Policy 139 at 162.

[59]Majone (n 57) 28.

[60]G Majone, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005).

[61]Ibid., 32.

[62]PL Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press 2010) 36–7.

[63]Ibid., 37.

[64]Joerges (n 52) 26.

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conceived according to principles of a dual polity', with an 'economic constitution' designed to promote competitiveness insulated from political intervention, with social policy conceptualised as a 'categorically-distinct subject' to be governed by political processes at the domestic level.[65] This 'original equilibrium was not, however, to remain stable', as the EU soon became engaged 'in ever increasing policy fields and the development of sophisticated regulatory machinery'.[66] Proponents of the 'economic constitution' had not foreseen the extent to which EU institutions would be pulled into the arena of 'social regulation' including 'the health and safety of consumers and workers, and environmental protection'.[67] According to Joerges, this vindicates Karl Polanyi's key insight that markets generate intense embedding, disembedding, and reembedding pressures. Because the economic questions entrusted to the EU cannot be neatly cabined off from political questions, the constitutional 'zone' of technocratic decision-making (Ipsen's *Zweckverband funktionaler Integration*) cannot but impinge on policy areas that are supposedly at the discretion of representative institutions at the domestic level. In other words, the 'dual polity' is riven by a dual set of tensions; the first between the market and social policy, and the second between the technocratic governance authority of supranational institutions and the democratic lawmaking authority that member state constitutions supposedly reserve for elected representatives of their respective *demoi*.

Whether one agrees that the limited model of technocratic or functional legitimacy could have remained stable over time had it not been for overreach into areas such as monetary policy, social regulation, etc, Majone is surely right that the EU's scope of authority is far too wide today to make that model credible today. What is remarkable is that – as illustrated by the earlier discussion of the CJEU's *Gauweiler* decision – supranational institutions remain oblivious to that conclusion. Rather, '[t]he ordering of the entire economy of the eurozone is conceptualized as a non-political *epistemic* task. This task is delegated to a supranational bureaucracy which enjoys practically unlimited discretionary powers'.[68] Needless to say, a system with unlimited discretionary powers cannot be politically or constitutionally neutral, particularly if it lacks democratic accountability and constitutional oversight. Like the narrative of political neutrality, therefore, that of constitutional neutrality fulfills an ideological function. For many decades, it served to insulate supranational institutions from political pressure and anaesthetised political debate around market integration and monetary union. It has also suited the CJEU particularly well: it could respond to challenges from national courts by casting supranationalism as a constitutionally neutral, technocratic enterprise that left member states' democratic and constitutional identities intact.

Paradoxically, the purported constitutional neutrality of the integration project has been cited as the principal reason for *rejecting* the transfer of more robust social policy powers to the EU. The conventional wisdom has always been that supranationalising social policy (in particular, social welfare provision) would alter the democratically legitimated institutional arrangements of the member states and would thereby seriously abridge popular sovereignty. According to this view, the democratic legitimacy of redistributive policies can only be ensured by keeping them under the control of elected legislatures at the national level. But although neither the Treaties nor the European Court of Justice are 'legitimated to reorganise the interdependence of Europe's social and economic constitutions, let alone replace the variety of European social models with a uniform Hayekian *Rechtsstaat*',[69] from the Single European Act to the EMU to the financial and sovereign debt crisis of the 2010s, that is precisely what they have done. Joerges's writings show the extent to which the twin projects of market integration and monetary union have *already* eroded the capacity of member state representative institutions to make major redistributive decisions.

[65]Joerges (n 1) 229.
[66]Joerges (n 1) 230.
[67]Ibid.
[68]Joerges and Kreuder-Sonnen (n 4) 137.
[69]C Joerges and F Rödl (n 37), at 18.

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In other words, by constraining the power of the purse through a permanent regime of fiscal discipline, the EMU has evacuating popular sovereignty of much of its political efficacy, leaving behind only its symbolic value.[70] This drives home the extent to which it was a *political choice* to reject one type of transformation (reinforcing the European welfare state at the supranational level) while embracing the other (market liberalisation and the fiscal strictures of monetary union). In other words, it illustrates how the constitutional neutrality of European integration has served as a legitimating myth rather than a descriptive fact.

3. Epistemological privilege

Attention to 'the interdependence between economics, politics, and law' is a theme that unifies much of Joerges's work.[71] For Joerges, this interdependence operates on two registers: first, between economics, politics, and law understood as spheres of social interaction; and second, between the academic disciplines that study these spheres. While it is tempting to understand the second register of interdependence as merely derivative of the first, the phenomenal and noumenal realms are not so clearly distinct: our ideas about the economy, law, and politics shape the objects of our study.[72] To convey this point in a perhaps overwrought way: the two registers of interdependence are interdependent.

That epistemic authority is pluralistic and no single discipline can claim a monopoly of explanatory power are not merely metatheoretical assumptions for Joerges[73]; they are commitments he affirms through his boundary-crossing approach European integration. This brings me to the third misconception of which Joerges has worked to disabuse us, namely the idea that there can be an ***epistemologically* neutral** perspective, an Archimedean point, from which to authoritatively comprehend European integration. While this seems like an obvious point, scholars frequently succumb to claiming more than their fair share of epistemic authority vis-à-vis the phenomena that they study. European integration is a particularly instructive case in point.

The historiographic reflections Joerges offers throughout his essays on the rise and demise of disciplinary perspectives on European integration add up to a meta-disciplinary critique of specific epistemologies of this process. In these important reflections, Joerges marks the distinctive contributions as well as blind spots of these epistemologies. Principally, political scientists emphasise the autonomy of member state preferences and their causal determinacy in shaping the course of integration, taking an 'instrumentalist'[74] attitude to law as an outcome to be explained.[75] Legal scholars privilege the autonomy of supranational law and its 'normative pull' as an engine of integration in a posture that undergirds the popularity of the constitutionalisation thesis.[76] Perhaps most prominently, economists emphasise the immanent rationality of economic and

[70]W Streeck, 'Markets and Peoples: Democratic Capitalism and European Integration' 73 (2012) New Left Review 63.

[71]Joerges (n 1) 584.

[72]In natural science, EH Carr writes, 'the facts exist independently of what anyone thinks about them. In the political sciences, which are concerned with human behaviour, there are no such facts'. Rather, facts about the social world 'can be changed by the desire to change it.' 'Every political judgment helps to modify the facts on which it is passed. Political thought is itself a form of political action. Political science is the science not only of what is, but of what ought to be.' We may, of course, say the same of economics and law. To illustrate his argument, Carr compares capitalism and cancer: 'The facts about capitalism are not, like the facts about cancer, independent of the attitude of people towards it.' Carr may have been wrong about cancer (research suggests that the course of disease *can be* responsive to the attitudes of patients and caregivers), but he is surely right about capitalism. EH Carr, *The Twenty Years' Crisis 1919–1939. An Introduction to the Study of International Relations* (M Cox (ed), Palgrave MacMillan 2016 [1939]) 3–5.

[73]See especially the essays collected in Part I of Joerges (n 1).

[74]Joerges (n 1) 11.

[75]Joerges critiques political science for its tendency 'to restrict itself to analytical pronouncements and causal explanations' (Joerges (n 1) 2) and a consequent failure to take the normativity of the law seriously. See especially chapter 2 of Joerges (n 1).

[76]T Isiksel, 'How Transformative is the European Project?' in M Maduro and M Wind (eds), *The Transformation of Europe. Twenty-Five Years On* (Cambridge University Press 2017) 272–3.

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monetary union and the open-ended, often sweeping measures needed to uphold it ('whatever it takes' in ECB President Mario Draghi's immortal words at the height of the crisis).[77] These assumptions are not necessarily problematic on their own; rather, Joerges laments the failure of each discipline to take seriously the possibility that their respective lenses might filter out salient dimensions of the issues they study.

Drawing inspiration from Joerges's interdependence thesis, let me offer a schematic reconstruction of the errors we are prone to make when we neglect or underestimate the importance of one or another of these spheres (understood in both the phenomenological and epistemological senses).

First, what are the risks of neglecting law? Joerges often singles out political scientists for failing to take seriously the 'normative properties of law'[78] (a remonstrance through which we can perhaps glimpse the Kantian foundations of his thought). This failure is pervasive among contemporary political scientists, but no research agenda illustrates it better than the dominant neorealist strand of contemporary international relations scholarship. According to classic statements of the neorealist perspective, the international realm is characterised by anarchy[79]: 'in a world without world government, power is the ultima ratio in deciding whose claim prevails.'[80] Of course, the absence of *law* need not mean the absence of *order*. For instance, the Concert of Europe promoted a stable coexistence among European monarchies for much of the 19th century without a significant legal or institutional component. But it exemplifies what Rawls terms a mere *modus vivendi,*[81] a fortuitous confluence of interests in the absence of a principled consensus. In other words, it is fact without norm. While the balance of power or economic interdependence can provide stability for some time, technologies evolve, alliances fall apart, calculations of national interest change, and economic competition can turn violent. Anarchy refers to the omnipresent possibility of war in the absence of a central enforcer.[82]

Realists and Kantians agree that in a world without law, power reigns supreme.[83] But whereas realists believe this to be true whether we like it or not, Kantians refuse to surrender to the untrammeled reign of power, since it would mean giving up the possibility of freedom and capitulating to the reign of necessity. Instead, they point to the domestic sphere to illustrate that sovereign power need not be unbounded. If it can be hemmed in domestically through constitutionalism and representative institutions, then its external aspect can also be subjected to a rightful condition or *Rechtszustand* that guarantees the equal freedom of all.[84] In fact, Kant maintains, it is nonsensical and self-defeating to insist on constitutional order in the domestic arena without striving for its international counterpart, since the achievements of constitutional government will be forever threatened by the lawlessness of the external realm.[85]

From a Kantian perspective, then, European integration represents a particularly advanced attempt at 'control[ling] the excesses of the modern nation-state ... especially, but not only, its propensity to violent conflict'.[86] The key to this success, according to legal scholars, is the gradual

[77]Speech by Mario Draghi at the Global Investment Conference in London (26 July 2012), available at <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> accessed 13 December 2024.

[78]Joerges (n 1) 14.

[79]Eg, see KN Waltz, *Theory of International Politics* (McGraw Hill 1979).

[80]RK Betts, 'The Realist Persuasion' 139 (September/October 2015) The National Interest 46.

[81]J Rawls, 'The Idea of an Overlapping Consensus' 7 (1987) Oxford Journal of Legal Studies 1 at 1.

[82]'So the nature of War, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.' T Hobbes, *Leviathan.* Ed Richard Tuck (revised edn, Cambridge University Press 1996) 88–9.

[83]JJ Mearsheimer, 'The False Promise of International Institutions' 19 (3) (1994) International Security 5.

[84]T Isiksel, 'Cosmopolitanism and International Economic Institutions' 82 (1) (2020) The Journal of Politics 211.

[85]As the Seventh Thesis of the universal history essay has it: 'The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states and cannot be solved unless the latter is also solved.' I Kant, 'Idea for a Universal History from a Cosmopolitan Point of View' [1784] in *Political Writings* (n 20) 47

[86]JHH Weiler, 'To be a European Citizen – Eros and Civilization' 4 (4) (1997) Journal of European Public Policy 495 at 506.

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emergence of a supranational legal system that has subjected the sovereign prerogatives of member states to the rule of law. The ECJ's audacious constitutionalising jurisprudence during the early decades of integration received an enthusiastic reception among scholars of Community law. They interpreted the success of this legal system as evidence that their insights were germane to a domain from which they had hitherto been excluded. In other words, the evolution of the founding treaties into a supranational legal order provided a rare opportunity to assert the relevance of law as an epistemological perspective in a domain known for its lawlessness. For his part, Joerges has argued that the triumphalism of law scholars underestimates the legitimation problems of a supranational 'constitutional' system, particularly insofar as that system prioritises market rules at the expense of socioeconomic diversity of member states.

Nonetheless, Joerges embraces a particular justificatory strand of the Kantian commitment to an international rule of law. In Joerges's view, the supranational legal system draws its legitimacy from the promise of tempering the moral particularism of nation-states with a more universalistic posture.[87] The most important promise of 'de-nationalized governance structures' such as the EU is to address 'the structural democracy deficits of nation-state governance',[88] most notably their propensity to privilege the interests of members over non-members. Supranational governance mechanisms provide representation for 'the interests and concerns of those who are affected by, but not represented in, [national] decision-making processes'.[89] 'A European law that concerns itself with the amelioration of such external effects, ie, which seeks to compensate for the failings of the national democracies, may induce its legitimacy from this compensatory function'.[90] Joerges's preferred term for the institutionalisation of this normative commitment is 'deliberative supranationalism', although he has forthrightly acknowledged that it cannot provide a comprehensive legitimating logic for supranational governance. The ever-growing complexity of supranational governance tasks, 'the deepening of socio-economic differences' among member states, and the enormous challenges of coordination, harmonisation, and compliance posed by the EMU make any one model of legitimation (including that of deliberative supranationalism) inadequate on its own.[91] In contrast to Kantians whose distrust of the nation-state motivates them to embrace the moral superiority of any system of governance that promises to transcend the nation-state's parochial ethical universe, Joerges forthrightly accepts the limits of supranational political legitimacy and the enduring importance of constitutional democracy at the member-state level.

If dismissing the relevance of law to relations among states would mean giving up on the possibility of reordering those relations in less violent, more emancipatory, and more inclusive ways, what sorts of risks does 'neglect of the economic'[92] pose? For clues, we might look to the fate of grandiose attempts at effecting political change in the international realm, such as the Kellogg-Briand pact and the European Political and Defense Communities. They suggest that codifying noble political ideals into law often proves insufficient to modify state behaviour.[93] The failure of these ambitious projects has motivated an incrementalist and functionalist approach to interstate cooperation,[94] according to which international institutions that can generate tangible, immediate

[87]Joerges (n 1) 78–9.

[88]Joerges (n 1) 131.

[89]Joerges (n 1) 160.

[90]Joerges (n 1) 423, also pp. 277–8. On the 'compensatory' functions of postnational constitutionalism, see A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' 19 (2006) Leiden Journal of International Law 579.

[91]Joerges (n 1) 130.

[92]Joerges (n 1) 46.

[93]Kant himself seems to have been aware of this risk, since the 'preliminary articles of perpetual peace' that he proposes seem prosaic, even trivial. Kant (n 20), First Section.

[94]D Mitrany, *The Functional Theory of Politics* (LSE/Martin Robertson 1975). Mitrany himself saw Robert Schuman and other framers of the European Communities as promoting a federal vision at odds with his own functionalist model and

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benefits that all societies are presumed to want are less likely to be bogged down by political opposition than those that overtly challenge national sovereignty. In the European context, this approach has been tremendously influential under the moniker (whether accurate or not) of *the Monnet method*.[95] Though a humble attempt at sectorally limited supranational governance, the European Coal and Steel Community succeeded in establishing norms and institutions that regulated states' interactions and curbed their sovereign prerogatives within those sectors. The European Economic Community built on the ECSC's institutional success by gradually reorienting the attitudes of political and economic elites, consumers, and other key constituencies within member states, with far more significant long-term results. As the Preamble to the Rome Treaty prominently stated, it would aim at the 'improvement of the living and working conditions' of the peoples of the member states.[96] Market integration provided concrete benefits for these constituencies by expanding business opportunities, easing mobility, spurring productivity, encouraging competition, and increasing efficiency. Law may have served as 'both the object and the agent' of the integration project,[97] but economic prosperity was the 'deliverable' without which the idea of an ever closer union would have remained abstract, contentious, and far less attractive. Premising the European Community's (later, the EU's) claim to legitimacy on the idea of effective governance in the economic sphere shielded incipient supranational institutions from overt contestation. The gambit, in other words, was to pursue integration through the structural coupling of law and economics, at the expense – pointedly – of politics (particularly of the participatory kind).

This brings us to the dangers of neglecting politics. During the early decades of integration, the de-politicising, legalistic and functionalist approach to supranational governance made eminent strategic sense. Over time, however, the latent tensions of this approach have come to the fore. As the EU has taken exclusive responsibility over such essential areas of public policy as monetary policy, the perils of its elite, expert-driven mode of decision-making have become clearer. To quote one of Joerges's most frequently invoked aphorisms, 'the economy *is* a polity': the 'inherently political dimensions of the "economic"' sphere make the depoliticising strategy not only contradictory but ultimately self-defeating.[98] Using the purported imperatives of preserving the monetary union to short-circuit contestation of highly politically salient decisions cannot but breed popular distrust and scepticism of the integration project. '[V]irtually all the crisis measures' adopted during the early 2010s, Joerges and Kreuder-Sonnen write, 'seem more or less fundamentally at odds with established normative principles of European governance, be it the norm of democratic control, the norm of political contestation, or the principles of state sovereignty on matters not delegated to the EU level'.[99] In other words, they deny the dignity and autonomy of the political sphere wholesale. This is not to glorify *the political* for its own sake, of course, but to lament the loss of democratic control over decision-making, the efficacy of representative mechanisms, and the closing off of avenues of meaningful participation in decision-making.

Even when it is spectacularly efficient, the EU's style of technocratic governance leaves mass publics with no room for effecting policy change through participatory mechanisms and thwarts the satisfaction of demands expressed through the democratic political process. When it faces a challenge as momentous as the financial and sovereign debt crisis of the 2000s, the consequences of the EU's exclusively technocratic claim to legitimacy can be catastrophic. Since the full burden of its legitimation rests on the quality of governance outcomes, during moments of governance failure, it cannot fall back

critiqued the latter for treating the ECSC '[as] but the first rung of the federal ladder.' D Mitrany, 'The Prospect of Integration: Federal or Functional' 4 (1965) Journal of Common Market Studies 119 at 121.

[95]Ernst B. Haas proposed the explanatory microfoundations of this approach in his *The Uniting of Europe. Political, Social, and Economic Forces 1950–1957* (University of Notre Dame Press [1958] 2004).

[96]Treaty of Rome Establishing the European Economic Community [1957], Preamble.

[97]R Dehousse and JHH Weiler as quoted in Joerges (n 1) 12.

[98]Joerges (n 1) 335.

[99]Joerges and Kreuder-Sonnen (n 4) 127.

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on the sense of common ownership and community that robust democratic institutions generate. This is the true cost of the institutional choice of insulating supranational policy-making from democratic contestation.

4. Conclusion

As Joerges observes, law and political science have given way to economics as the authoritative dynamic of European integration and to the rule of economists as the oracles of that process.[100] This primacy is hardly puzzling given that the single market and monetary union, with the close coordination of economic and fiscal policy that they imply, form the centerpiece of supranational governance in Europe. What is troubling is that economics has gained institutional as well as epistemic priority that instrumentalises (and 'overburdens') law and displaces politics. Insofar as the imperatives of monetary policy, GDP growth, and fiscal responsibility trump other goals such as social justice, democratic autonomy, and environmental stewardship, the economy claims political sovereignty. Insofar as it arrogates a superior claim to rationality and empirical validity, economics claims epistemic sovereignty. In other words, what Joerges objects to is (borrowing Dani Rodrik's phrase) 'the rule of economics'[101] understood both as a social system with its own internal logic, and as the academic discipline that studies that social system. When applied as a key to policy-making, 'economism' creates fallacies such as 'the propensity to avoid moral considerations' in favor of questions of profit and loss and the tendency to measure 'growth' in pure material output terms.[102] Likewise, economics' claim to be *regina omnium scientiarum* leads to an inability to recognise competing standards of value and validity.

This gets us to one of the most central and illuminating insights of Joerges's scholarship, namely his scepticism of the attempt to reduce questions of political knowledge to optimisation problems. Just as there is no privileged epistemic perspective that explains European integration in full, there can be no solutions to complex policy problems without remainder. The epistemic/technocratic pretense merely conceals the creation of winners and losers, insulates trade-offs from contestation and scrutiny, and sweeps moral implications under the rug.

As Sabine Frerichs points out in her contribution, Joerges calls for scholars to 'overcome a division of labour which puts different disciplines in charge of different spheres of reality (eg, economic, political, legal, social)'.[103] Additionally, he cautions against disciplinary hubris; namely, the misconception that any one perspective is sufficient to provide comprehensive insights or authoritative prescriptions) regarding the integration project. We should understand Joerges' 'interdependency thesis' in this capacious sense: as a social and epistemological condition that frustrates claims to disciplinary authority and comprehensiveness.

In the place of futile efforts at disciplinary privilege, Joerges's writings exemplify a critical, self-reflexive attitude that is about the mediation of conflict in ways that are transparent, deliberative, and pragmatic. 'The conflict of laws', a method of managing plurality and discord that Joerges adapts from the private law domain to the EU's complex, multilevel governance dynamics, exemplifies this broader philosophic sensibility. His writings help us to better understand the hopes and fears we have fastened to the European integration project. To acknowledge these burdens is not to abandon those hopes; rather, it is an essential first step in reassessing the ability of this beast to carry them.

[100]Joerges (n 1) 12.

[101]Rodrik quoted in Joerges (n 1) 12.

[102]T Judt, 'What is Living and What is Dead in Social Democracy?' *The New York Review of Books*, 1 December 2009 <https://www.nybooks.com/articles/2009/12/17/what-is-living-and-what-is-dead-in-social-democrac/> accessed 13 December 2024.

[103]S Frerichs, 'Europe's Vocation: From Reconstructive Vision to Counterfactual Critique', in this issue.

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