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# European Law: Thinking About It and Teaching It - An Introduction to the Symposium (Dimensions of European Union Law: A Symposium)

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## ARTICLES

### DIMENSIONS OF EUROPEAN UNION LAW: A SYMPOSIUM

#### EUROPEAN LAW: THINKING ABOUT IT AND TEACHING IT — AN INTRODUCTION TO THE SYMPOSIUM

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The papers in the symposium section of this volume of the *Columbia Journal of European Law* are based on talks delivered in January, 1995, at a symposium on the "Dimensions of European Union law" that I organized for the comparative law section of the Association of American Law Schools.<sup>1</sup> Since that symposium, I have had many requests as to when and where the papers would be published, and I am deeply grateful to Professor George Bermann for agreeing to publish them in this journal.

My central aim in organizing the symposium was to present U.S. law teachers with tools that should be of value in thinking about, analyzing and teaching the law of the European Union (EU). In recent years, growth and change within the EU have provided an extraordinary amount of legal "data" from and about the EU, and the computer has put much of it at every law professor's fingertips. The challenge lies in penetrating, organizing and interpreting this expanse of information. It is a daunting task for any observer, but particularly for U.S. legal scholars and teachers who are seldom in a position to focus their primary energies on following these developments and who frequently lack some of the background knowledge about European

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\* Professor of Law, Chicago-Kent College of Law. Professor Gerber was chair of the comparative law section of the Association of American Law Schools 1994-1995, and in that capacity he organized the symposium from which these papers were developed."

<sup>1</sup> I would like to thank William Fisch and Mary Ann Case, vice-chair and secretary-treasurer, respectively, of the AALS Comparative Law Section, 1994-5, for their valuable assistance in developing this symposium.

politics, policies and cultures that can be important for understanding what is happening within the Union. Our symposium, then, offers some analytical tools for making sense of the EU.

We have organized the symposium around the task of providing insights into *decisionmaking* within the EU. This focus on the decisional process flows from the belief that the more we know about the factors that influence decisions, the better able we should be to understand individual decisions, see patterns in the mass of decisions and, therefore, assess likely outcomes in the future. This focus should, therefore, provide insights and information of particular value to scholars and lawyers based outside the EU who seek to understand EU law.<sup>2</sup>

If this thesis has merit, then a central goal of both teaching and scholarship should be to develop tools and perspectives for comprehending EU decisionmaking processes, and this is what we here offer. We first look at some of the factors that influence how we currently think about EU law. We then look at decisionmaking in the European Court of Justice and in the European Commission, exploring cultural, linguistic, institutional and constitutional factors that influence judicial and administrative decisions. In the oral version of the symposium Professor Anne-Marie Slaughter (formerly Burley) completed this picture by using social science tools to illuminate the ways in which political factors influence EU decisionmaking. We regret that Professor Slaughter is obligated to publish her very valuable contribution elsewhere.

In this brief introduction I set the stage for the papers that follow by seeking to shed light on how we currently think about EU law. The central idea here is that we are likely to be better able to fashion effective perspectives on the law of the European Union if we have a sense of the influences that shape our current thinking about it. I seek to identify, therefore, some of the factors that have shaped the way U.S. scholars perceive European Union law and suggest some of the ways in which these perspectives may influence writing about and teaching EU law in the United States.

Judge Frederico Mancini and his co-author David Keeling then provide an "insider's view" of the process of decisionmaking in the European Court of Justice. They reveal how cultural, linguistic and other factors affect the way judges think about their judicial roles, interact with each other and, ultimately, reach decisions. A former law professor at the Universities of Rome and Bologna, Judge Mancini has been a member of the court for more than a decade. He brings to his task a broad range of sensibilities and intellectual tools, and the result is a remarkably insightful analysis of the decisionmaking processes of the court.

Professor George Bermann then portrays the institutional, procedural and constitutional dynamics of decisionmaking in the EU. His focus is on decisionmaking in the European Commission, and his depiction of this often opaque process is exceptionally illuminating. Drawing on his expertise in comparative law, and particularly comparative administrative law, he

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<sup>2</sup> I discuss this in more detail *infra*, part III.

identifies and analyzes with much insight the kinds of influences that institutional and procedural structures exert on the process of decisionmaking in the Commission.

## I. PERCEPTIONS OF EUROPEAN UNION LAW IN THE UNITED STATES: THE CONCEPTUAL LENSES

The task for me then is to try to gain some insight into the perspectives that U.S. scholars and lawyers use in viewing European Union Law. I look at some of the factors that have shaped current images of the EU among U.S. legal scholars, challenge some existing orthodoxies and indicate ways in which these may distort our picture of the EU. I then offer some preliminary suggestions for reducing such distortions in both scholarship and the classroom.

My focus is on the conceptual lenses we employ in looking at the EU,<sup>3</sup> that is, the filters through which we process information about Europe.<sup>4</sup> These comments are not intended to represent a thorough study of such lenses, but rather to be suggestive, perhaps even provocative. I do not suggest that the lenses identified here are the only lenses we use. One could identify others. Nor do I suggest that these lenses are used in fixed patterns. Individual observers will combine lenses based on their experience, and the combinations will vary greatly, depending on factors such as the degree of specialization in EU law today and the periods, circumstances and degrees of exposure to EU law in the past. A final, perhaps unnecessary, caveat is that I do not suggest that observers use lenses objectively or dispassionately. Such uses are always informed by life experience, personal agendas and the like.

### A. *The Public Law Lens*

The first of these lenses I call the "public law lens." Fashioned by the interplay of two conceptual schemes — international law and constitutional law, it has played a central role in structuring the way U.S. legal scholars view EU law. It shapes the discourse of EU scholarship by directing the attention of scholars, setting their collective agendas, and urging the questions to which they seek answers.

#### 1. *Shaping the Lens*

The public law lens developed out of the early role played by public international law in thinking about the EU. The law professors who initially shaped issues for U.S. observers were virtually always public international law specialists, and thus they used concepts and categories from this area of law in

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<sup>3</sup> I will generally use "EU" to refer to the institutions of the current European Union at all stages of their development rather than use different designations such as EEC and EC for earlier incarnations of these institutions.

<sup>4</sup> Although these comments relate specifically only to U.S. legal scholarship, portions of the analysis may also be applicable to European scholarship on the EU.

dealing with the EU.<sup>5</sup> They were primarily concerned with the formal rights and obligations of governments — issues such as the scope and nature of sovereignty, the obligations arising from the Rome treaty, and the legal status and characteristics of international organizations. These were “public law” issues in the sense that they were about the relations between governments.

During the EU's first few years, these traditional international law issues were at the core of the integration process in Europe. “Sovereign states” had entered into an agreement, and the central issues were how public international law principles should be applied so as to give meaning to that agreement and to establish the obligations it entailed. Public international law principles and methods were undeniably applicable, and the intellectual tools of the public international lawyer were the primary sources of guidance for decisionmaking.

By the mid-1960s, however, the predominance of these specifically international law issues was waning. In the 1962 case of *Van Gend en Loos*, the European Court of Justice declared that “the Community constitutes a new legal order. . . .”<sup>6</sup> From then on the EU was increasingly conceived as something *sui generis* that no longer fit easily into the existing conceptual framework of international law, and this conceptualization rapidly became the foundation for further European integration.

For scholars of the EU this meant a change in their subject matter. What had been public international law issues were unobtrusively transformed into “something else” as to which public international law had little direct relevance. Yet the change was gradual, and it took time for observers to recognize its implications. Moreover, U.S. international law scholars generally did not focus their attention on considering the implications of this change for the lenses they were using in viewing Community law. Nor was it clear that they should — or could. The EU had become something new, unique; there were no readily available alternative frameworks for thinking about it. In addition, a scholarly community constructed around a specific form of discourse — in this case, the conceptual framework of international law — is not likely to change that discursive field lightly, not only because of intellectual inertia, but also because of its members’ psychological and other investments in that discourse.<sup>7</sup>

This situation led to a little noticed conceptual relocation of many key issues — a kind of sliding turn into constitutional discourse. Many of the issues from the international law period — for example, the meaning and extent of sovereignty within the EU — remained of central concern, but they were now

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<sup>5</sup> I will not here consider the separate perspectives developed in the political science literature. For a useful guide to the main strands of that literature and their relation to legal thought, see Anne-Marie Burley and Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993).

<sup>6</sup> Case 26/62, *NV Algemene Transport - en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12.

<sup>7</sup> For insightful discussion and application of the idea of “communities of discourse” in European history, see ROBERT WUTHNOW, *COMMUNITIES OF DISCOURSE* (1989).

positioned at or near the intersection of law and politics *within the EU* rather than in formal legal relationships *among independent states* under international law. They moved to a murky area that resembled the terrain of national constitutional laws, but was not quite the same.

What had occurred was a recasting of familiar subject matter rather than a shift of concerns. International law issues such as the nature of treaty obligations sufficiently resembled “constitutional” issues such as federalism that scholars were seldom induced to examine self-consciously the adequacy of the lenses through which they were viewing these issues. This left the “public law” concern with the formal structures of government as the focus of the U.S. scholarly community’s attention.

The intervening years have not fundamentally changed this picture. U.S. scholars of the EU continue to focus on these public law issues. Although relationships between EU institutions and both private organizations and individuals have dramatically increased in practical importance, the public law lens continues to shape the discourse and interests of EU scholars.<sup>8</sup> Scholars in the area still tend to have their closest personal and intellectual ties to the public international law community, and their scholarship continues to dwell primarily on the EU’s governmental structure.

## 2. *Exclusions and Biases*

By itself, however, the public law lens is becoming increasingly distortive, for it provides little information about components of EU experience that are rapidly growing in importance and that in some respects have become more central to that experience than issues of governmental structure. It focuses attention on the basic anatomy of the EU governmental system — the political authority of member states, voting arrangements and the like, but tends to exclude information about its physiology — the influences that drive and inform decisions within this structural framework. Yet the exponential expansion in the scope of activity of EU institutions is creating an urgent need to understand these decisional influences. From human rights to competition law to social and educational programs, the range of legal issues handled by EU institutions has greatly increased during the last decade, as have the categories of people and institutions affected by such decisions. Although the anatomical framework remains important, these developments call for more attention to the factors that influence how decisions are made within that framework.

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<sup>8</sup> The major exception has been in the area of competition law. Here U.S. writers approach EU law almost exclusively against the background of experience with U.S. antitrust law. Although the literature on the subject is vast, much of it has been written by practitioners, and it has been oriented largely toward the needs of practitioners. For valuable U.S. scholarly writing in the area that goes beyond this need, see, e.g., Eleanor Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness*, 61 NOTRE DAME L. REV. 981 (1986) and Thomas E. Kauper, *Whither Article 86: Observations on Excessive Prices and Refusals to Deal*, ch. 28, in 1989 FORD. CORP. L. INST. (Barry Hawk, ed. 1990).

The evolution and predominant role of the public law lens not only excludes important categories of information, but it may also distort the expectations and perceptions of U.S. scholars. It introduces a general bias in favor of recognizing similarities between the U.S. and the EU and neglecting areas of dissimilarity, and this, in turn, contributes to an assumption that EU law is "directly accessible" to U.S. scholars. This assumption disregards potential cognitive impediments to acquiring knowledge about the EU, allowing U.S. scholars to turn easily to the law of the EU, confident that they can rely exclusively on their own intellectual tools to "know" what there is to know. It is a potentially dangerous assumption.

Throughout the history of the EU the public law lens has encouraged this assumption by packaging EU issues in familiar categories and discouraging concern with obstacles to direct accessibility. In the early years, the predominant role of public international law issues established this intellectual posture because it made "Community law" amenable to existing conceptual categories. Public International law categories and tools were universally applicable — the same whether applied to the "Community" or to other relations between states. International law scholars could, therefore, readily treat Community issues with familiar tools. This is not to say, of course, that the problems were not sometimes recognized as difficult, but they were perceived as tractable with the tools at hand.

The constitutional turn reinforced this appearance of accessibility. As issues such as federalism came to the forefront of EU law, U.S. scholars found themselves on especially familiar territory. This was a discursive field in which they felt "at home" and in which they considered themselves — with some justification — masters. Moreover, U.S. experience was a promising source of comparative perspectives on the emerging problems of the EU, and Europeans often turned to U.S. scholars for advice, thus encouraging confidence among these scholars that they did — or at least could — understand what was happening in EU law.

## B. *The Case Law Lens*

A second lens plays a similarly important, but quite different role. It influences the way U.S. observers think about EU law by shaping the way they look at its sources — i.e., the materials to which they turn for information. This "case law lens" assumes that "a case is a case is a case." By filtering out the perception of differences between U.S. and EU cases it often leads U.S. observers to believe, first, that in order to understand the EU they need merely read EU cases *and*, second, that they can read them in the same way that they read U.S. cases.

### 1. *Formative Factors*

The predominant role of the public law lens, especially in the early evolution of U.S. thought about the EU, has contributed to shaping the case law lens by encouraging the assumption that EU law is directly accessible. If the basic intellectual posture is that EU law is directly accessible by U.S. lawyers, it

follows that they can rely on their own conceptual tools in dealing with it. This move is not a process of conscious logical deduction, but of the unexamined association of perceptual images.

A second assumption that has shaped the case law lens sees the EU as essentially "cultureless," with "culture" here referring to patterns of thought and conduct within a community that acquire meaning from their location and roles within that community.<sup>9</sup> A comparison with Japanese cases illustrates the point. Most U.S. law professors are likely to be aware in reading an English version of a Japanese case that cultural factors might affect their ability to interpret it effectively, assess its role, and draw conclusions from it. They are likely to suspect that they might need additional information in order to perform those tasks, and, at the very least, they are likely to assume that caution is appropriate in dealing with Japanese cases.

In contrast, this perception of "alienness" and its concomitant cautionary stance are seldom in evidence when U.S. observers read EU cases. They there seem to assume without much reflection that the *language itself* will yield the necessary information. Often there is little attention to "red flags" within the text — such as differences in structure and style — that might signal the need to ask additional questions, and few pay much attention to their position outside of the community of discourse within which EU decisions are made.

This assumption of culturelessness is rooted in historical associations with the concept of culture itself. The image of community-based patterns of thought and action is generally associated with ethnic groupings and states, but there is little historical experience associating it with supranational organizations. As such organizations take on new roles and greater prominence, their specifically "cultural" dimensions will become both better developed and more obviously significant. Experience in the EU is likely to play an important role in breaking down the constraints on thought created by current images of the domain of culture, but this may well be a slow process.

Even without the constraining influence of these images, the assumption of culturelessness attaches easily to the EU because it does not exhibit many of the most common signals of a separate "culture." There is, for example, neither an EU "language" nor a separate educational system for the EU, and yet both language and education are generally considered critical factors in the development of community-based patterns of thought and conduct (i.e., culture). Moreover, there are many member states of the EU, and each of these *does* have its own legal/political culture, seemingly obscuring if not precluding the perception of cultural elements within the EU itself. Finally, the institutions of the EU are relatively new, and it is generally assumed that community-based patterns of thought and conduct require significantly longer

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\* This definition is based on the concepts of anthropologists such as Clifford Geertz. See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973).



periods of time to develop.<sup>10</sup> These factors inhibit the perception of cultural influences in viewing EU law.

U.S. scholars also have incentives — whether consciously recognized or not — to give prominence to the case law lens and promote the assumption of culturelessness on which it rests. Our methodological expertise tends to be in the treatment of cases, and thus the value of our scholarly enterprises tends to correlate with the importance attached to cases as sources of information and authority. The more valuable cases are considered to be, the greater the claims of these enterprises to legitimacy and respect.

## 2. *Impacts*

The case law lens signals U.S. lawyers that they can read EU cases as if they were U.S. cases, despite significant differences in their format, style and language. If EU cases are assumed to be essentially the same as U.S. cases, it follows that the same methods can be employed in interpreting them. U.S. lawyers thus often apply those methods to EU materials — looking for “holdings” in EU cases, for example, or assembling cases based on careful analysis of similarities and dissimilarities in factual patterns or interpreting cases exclusively in terms of other cases.

There is no necessary harm, of course, in reading cases carefully,<sup>11</sup> *provided* that the reader places these methods in the appropriate context. In particular, this means recognizing that these methods may bear considerably less predictive weight in the EU context than in the U.S. In the U.S. they are valuable not necessarily because of some intrinsic merit, but because they are the interpretive methods that legal decisionmakers predominantly use, and thus their use helps predict decisions within the U.S. legal system.

In the EU, however, these methods are often applied in different ways or play different roles, and thus their exclusive, uninformed or noncontextual use may lead to unwarranted conclusions about the decisions that are likely to be made within that community. In assessing legal materials for the purpose of determining what “the law” is, the value of an interpretive strategy depends on its proximity to the methods used by the relevant decisionmakers.

U.S. scholars often seem to assume, for example, that cases play the same role in the EU that they play in the U.S. legal system. In particular, they often project onto the EU the central role of cases in the U.S. This projection can lead US observers to focus on cases as virtually the sole influence on future decisions, allowing them to assume that reading cases is all they have to do to acquire adequate knowledge of “the law.”

The problem is that cases frequently do not play the same role in the legal system of the EU that they play in the U.S. legal system. At the formal level,

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<sup>10</sup> Concepts of culture sometime even tend to reinforce accessibility assumptions, at least on the surface. English has become, for example, probably the most widely used language within EU institutions other than the courts.

<sup>11</sup> Indeed, under the influence of English and Irish judges and lawyers, EU courts themselves have begun to do some of this. See Giuseppe Federico Mancini and David T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, published in this symposium.

the lack of a principle of *stare decisis* in the EU signals the difference, but, if employed at all, this formal aspect should be seen only as a convenient label for operational differences. On this “operational” level, cases are seldom seen in the EU as exclusive sources of authority whose function is to “bind” future courts and decisionmakers.<sup>12</sup> They often serve in a more general way to establish authoritative principles to guide judicial and administrative decisionmakers. Courts and administrative officials are very likely to apply the principles established in judicial decisions, but they are less likely to apply them in the context of the dense factual analysis that is the core of U.S. methodology. Moreover, prior judicial decisions are likely to play a less dominant role in decisionmaking in the EU than they often do in the US. In interpreting EU decisions, prior precedents often explain less than values such as the need to foster economic and political integration.

To treat EU cases as if they played the same roles as U.S. cases can, therefore, distort the way they are treated and interpreted. It may, for example, lead to overvaluing the role of cases in decisionmaking and concomitant undervaluing of other potentially significant factors. Effective analysis of EU cases requires treating and interpreting cases as they are treated and interpreted within the community of decisionmakers in the EU.

The case law lens has other impacts as well. It tends, for example, to segment U.S. perspectives on the EU. The tendency of lawyers and legal scholars to rely primarily on this lens increases their cognitive distance from political scientists who tend to have little regard for the predictive value of judicial cases.<sup>13</sup> The result is a situation in which legal scholars focus almost exclusively on what the courts do, while political scientists focus almost exclusively on the EU’s political and administrative institutions. This bifurcation of the perspectival field is likely to diminish the acuity of both communities.<sup>14</sup>

Finally, the predominant role of the case law lens reinforces the appearance that EU law is “directly accessible” to U.S. scholars. The causality is circular — or, better, self-referential. If it is assumed that the EU is “cultureless” and “directly accessible,” then the use of U.S. legal methods, including its focus on cases, is justified, and if, in turn, cases are all that is needed to understand EU law, the assumption of EU accessibility is confirmed. The case and public law

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<sup>12</sup> For a useful discussion of decisionmaking in the European Court of Justice by one of its former judges, see Ulrich Everling, *The Court of Justice as a Decisionmaking Authority*, 82 MICH. L. REV. 1294 (1984).

<sup>13</sup> For discussion of political science perspectives on legal decisions, see, e.g., Burley & Mattli, *supra* note 5.

<sup>14</sup> The exceptionally valuable contributions of legal scholars such as Martin Shapiro, Anne-Marie Slaughter (Burley) and Joseph Weiler, who have intellectual roots in both law and political science, lend support to this suggestion. See, e.g., Martin Shapiro, *The European Court of Justice*, in *EUROPOLITICS: INSTITUTIONS AND POLICYMAKING IN THE “NEW” EUROPEAN COMMUNITY* 123 (Alberta Sbragia ed. 1992); Burley & Mattli, *supra* note 3; and esp. Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

lenses strengthen each other, and thus it becomes important to be aware of — and combat — the potential effects of this circular reinforcement.

### C. *The Bureaucracy Lens*

A third lens which sculpts our thought about the EU filters information through assumptions about the nature of “bureaucracy.” In talking with another U.S. comparatist recently, I mentioned that I was paying increasing attention to the application of comparative methodology to the EU. The response was something like “That can’t be very interesting. It is merely bureaucratic regulation, and bureaucrats do the same thing and talk the same way everywhere.” This perception of the nature of “bureaucracy” creates potentially distorted expectations about the thought and conduct of administrative decisionmakers and filters out information that is inconsistent with those expectations.

An assumption of “culturelessness” has also played a role in shaping this lens, but it is somewhat more complex than the one we encountered above. To the image that the EU is “cultureless” is added the idea that bureaucracy is a cultureless phenomenon that both creates and is subject to patterns of thought and conduct that are essentially the same everywhere.<sup>15</sup> At least since Max Weber’s writings on the rationalizing and standardizing functions of bureaucracy, this has been a standard theme in both popular and legal discourse in many countries.

But there is an additional component of the lens that relates specifically to U.S. experience. U.S. attitudes and experiences with bureaucracy strengthen in at least two ways the assumption that bureaucracy is “cultureless.” First, little attention is paid in the U.S. to administrative thought and conduct, particularly by legal scholars. “Bureaucracy” represents a vaguely suspect category which generally enjoys limited esteem, and, therefore, relatively little effort is invested in analyzing it. This contrasts sharply with countries such as France and Germany in which administrative thought and conduct are generally considered very important and receive much attention.

Second, there is little concern with administrative “culture” in the U.S. For example, there is little specific training for administrative careers, and that which does exist generally does not enjoy high prestige. In France, in contrast, the *École Nationale d’Administration* is arguably the most prestigious educational institution in the country. Similarly, the notoriously short tenure of U.S. high officials militates against the development of community-based patterns of thought and conduct, particularly at higher levels of administration. It stands in marked contrast to the pattern of lifetime service to be found in countries such as Germany.

These attitudes and expectations regarding bureaucracy produce a “flat” image of both the processes and products of administrative decisionmaking —

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<sup>15</sup> It would be more precise to refer to bureaucracy as monocultural rather than cultureless, but in this context the referent — lack of distinctiveness — is the same.

i.e., an image which provides little depth and context. This takes on particular importance in the context of the EU because administrative decisionmaking there plays such a central role. Although the EU's two courts provide general principles and can resolve key conflicts, decisions taken by administrators are in many ways the central "stuff" of EU experience.

The bureaucracy lens sees primarily two types of influences on administrative decisionmaking. One is "bureaucratic rationality" -- the goal of implementing the orders of the sovereign in as orderly and effective a manner as possible. The other is interest maximization -- the influence of personal and political incentives on administrative decisions. Both are "universalist" influences in the sense that they are assumed to apply to bureaucrats at all times and in all places. Their predictive utility is, however, often limited -- in the first case by high levels of abstraction, and in the second by the difficulties and costs of obtaining relevant information.

The lens generally cannot reveal influences that relate to the particular patterns of thought and conduct that operate within EU institutions. It does not pick up, for example, the role of systems of ideas in decision making in the EU. French administrative law has played an important part in the structuring and dynamics of EU law,<sup>16</sup> especially in its early years, and the discourse of German competition law continues to be highly influential in EU competition law thinking,<sup>17</sup> but the bureaucracy lens generally cannot "see" such influences. Similarly, it typically cannot discern the patterns of influence that inhere in the relationships between EU officials and the national communities from which they originate.

These biases also affect the images that U.S. scholars and lawyers have of the products of administrative decisionmaking. One often encounters the implicit assumption that regulations and directives can be read like U.S. legislative and administrative texts -- i.e., a prescriptive text is a prescriptive text.

The consequences are similar to those produced by the case law lens. The bureaucratic lens reduces the potentially applicable interpretive options regarding textual material. It supports the assumption that U.S. scholars can read regulations and directives without reference to the methods employed by the interpretive community that will make decisions based on them. It produces, therefore, the same type of literalism in treating prescriptive texts that the case law lens produces in regard to adjudicative texts, and it further contributes to the appearance of direct accessibility of EU law.

#### D. *Combined Effects*

Taken together then, these lenses produce images of European Union law that often make it appear directly accessible to U.S. lawyers. These

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<sup>16</sup> For detailed discussion of the evolution of administrative law in the EU, including the role of French administrative law, see JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* (1992).

<sup>17</sup> See, e.g., David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 41 AM. J. COMP. L. 25 (1994).

perspectives assume that U.S. methods are appropriate for interpreting conduct and texts within the EU and suggest, therefore, that the methods for achieving "knowledge" are essentially the same as those in the U.S. Such lenses may not only fail to recognize much that is of importance, but they may also distort the images they produce.

## II. FROM STATICS TO DYNAMICS?

The images produced by the lenses we have just examined are valuable, but static. They are valuable because they depict the structures of authority and power within EU institutions and transmit what courts, administrators and political decisionmakers have decided. They are static in the sense that they often provide relatively little insight into influences on future decisions — what I call the "dynamics" of the system.

Yet it is in these dynamics that the central challenge of scholarship resides. Most U.S. legal scholars are likely to agree that a main task of both scholarship and practice relating to any legal system is to gain insight into the factors that influence decisions within that system. Justice Holmes' famous quip that law is what judges do is the guiding principle in a tradition in which virtually all of us participate, at least to some degree. In this tradition, the focus is on what will happen next. A statute or a case may be an important influence on subsequent decisions, but we can only assess its influence to the extent that we understand the decisionmaking processes of those who will make the relevant decisions.

This suggests that U.S. legal scholars appear to be satisfied with static images in looking at the EU only because they are unaware of the degree to which those images *are* static. If the methods they use "at home" produce acceptable images, they indulge — perhaps unwittingly — a presumption that such methods will produce acceptable images when applied to EU materials. As we have seen, however, changes in the background knowledge of the observers and the function of language often make this a mirage.

The rapidity of change within the EU underscores the importance of dynamic analysis. Even the most intimately involved observers admit that the speed of change often makes it difficult to understand what is happening in EU law. Under these circumstances, static descriptions of past decisions can quickly lose their value. Only by focusing on the factors that influence decisions can we hope to understand those decisions. In attempting to assess new concepts such as "subsidiarity," for example, static analysis has little value.<sup>18</sup> What is needed are tools that discern the factors that influence how decisionmakers are likely to make decisions involving subsidiarity — the intellectual traditions in which they operate, the sources of guidance to which they look, and the incentives to which they respond.

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<sup>18</sup> For an excellent discussion of the subsidiary principle and the problems involved in developing it, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM L. REV. 331 (1994).

### III. IMPROVING THE PICTURE: THE POTENTIAL VALUE OF A SYSTEMIC LENS

In order to produce more dynamic images and analyses of the EU, we will need to fashion a lens that focuses on these decisional influences. When directed toward a particular decisional situation it should reveal as many forms of influence as possible, indicate how they operate and assess the intensity of their influence — both individually and in relation to each other. As we indicated at the outset, however, the lens must also be designed to order such information in ways that make it accessible and manageable by U.S. scholars.

One perspective that may be worth exploring in this connection uses what I call a “systemic lens.” This lens “sees” the EU as a system of interactions among texts, institutions, communities of decisionmakers and ways of thinking. It seeks to discern influences on decision-making in a two-part process. The first reveals patterns of influence within the system itself — the sources and strength of decisional influences (the “systemic analysis”), and the second locates specific decisions within these fields of contesting influences (the “locational analysis”). This is not the place to try to sketch out such a project, but some comments illustrate what I envision.<sup>19</sup>

The systemic analysis identifies and examines factors that affect decisions within the system. I suggest four main categories of influence, but other categorizations may prove equally or more convincing. I do not suggest that individual observers will normally map out all of the decisional influences within the entire system, but that they will be able to apply the lens to specific decisional situations in order to identify and assess relevant influences.

Authoritative texts such as directives, regulations and cases represent one important category of influence, because they are primary sources of guidance and justification for decisionmakers. The lens would, therefore, focus attention on the texts themselves — how they are constructed, style factors, conventions of drafting, and so on — in order to reveal the types of influence their language can support.

Decisions are, however, made within institutions, and the decisionmakers are subject to the pressures of particular institutional environments. A second component of the analysis examines, therefore, the decisional influences within relevant environments. In addition to looking at structural factors such as procedural requirements, it would seek to reveal other influences internal to the institution such as the types of incentives and pressures faced by decisionmakers within it. If international trade issues were involved, for example, it might examine the political pressures on officials in the directorates of the commission which are likely to influence such decisions (typically, those of external affairs, competition and industry).

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<sup>19</sup> I have applied some of these principles in a recent article on EU competition law. See David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L L. J. 97 (1994).

A third category of influences relates to communities that are not coterminous with EU institutions. In the EU, communities defined by factors such as nationality, language and economic interests often play roles that are both important and difficult to detect. Judges and officials of the European Commission are supposed to be guided in their activities solely by the interests of the EU, but how they *view* issues and interests will often be shaped primarily by their participation in such communities. They typically remain tied in many ways to communities in their countries of origin, and their memberships in linguistic, intellectual and social communities can directly or indirectly influence their decisionmaking.

Finally, systems of ideas and patterns of thought often play distinct roles within the EU. For example, the economic constitutionalism first developed primarily by German neo-liberals in the postwar period has been a major influence on decisionmaking in the EU, particularly during the first decades of the EU and most notably in the area of competition law. It has provided an intellectual framework for interpreting economic and political events, and thus analysis of its role can reveal influences on decisionmaking that may otherwise go undetected.<sup>20</sup>

The core function of a systemic lens is to “see” these influences as part of a system — i.e., to see their interrelationships.<sup>21</sup> It analyzes texts, for example, in relation to the other intellectual, political and social influences we have discussed, asking questions such as who interprets the text, for what purposes, and in what contexts. It explores how the text relates to the institutional forces within the system, how patterns of thought affect its interpretation and which communities of discourse are involved in interpreting it. It should, therefore, provide new insights into EU law while ordering the information in a way that is manageable and accessible to U.S. scholars.

Use of a systemic lens in examining the EU may also counteract or undermine two assumptions that currently impair images of EU law. First, it would replace the assumption of “culturelessness” in the EU with a presumption that community-based patterns of thought and conduct play significant roles within the EU. Second, it would replace the assumption that EU and U.S. legal methods are the same with the presumption that they are not. Rather than assuming that there are no cognitive obstacles to knowledge of the EU it would emphasize critical examination of assumptions of similarity.

The value and utility of using a systemic lens to analyze EU law will have to be tested. It represents not a body of knowledge, but a way of looking at the EU, and its contours will have to be explored in use. Moreover, effective development and deployment of such a lens is likely to call for the integration

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<sup>20</sup> For discussion, see Gerber, *supra* note 17.

<sup>21</sup> For an exceptionally insightful example of the kind of analysis that is called for here, see, e.g., Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

and application of methods and insights from two currently underutilized sources — comparative law and social science.<sup>22</sup>

#### IV. IMPLICATIONS FOR TEACHING

A systemic lens may also prove valuable in teaching EU law in U.S. law schools, offering some of the same benefits for teaching that it provides for scholarship. It can be used to generate insights into the dynamics of the EU and present them in a form that is accessible and manageable by U.S. law students. I will not here explore its potential benefits in detail, but merely hazard a few thoughts. Much of what I am suggesting reflects pedagogical perspectives already familiar to U.S. law teachers that I am applying to the teaching of EU law.

The teaching situation intensifies two problems that we have already encountered — limited knowledge and limited available resources. Students typically have little background knowledge about Europe, at least those aspects of Europe that relate to decisionmaking within the EU. Moreover, they frequently have little time and few resources to invest in learning about EU law. Few take more than one course in EU law, and thus they are seldom in a position to digest large amounts of material or to master complex analytical tools.

This setting suggests a pedagogical focus on developing abilities rather than transmitting data. Students need to develop the ability to orient themselves within the EU's institutional and intellectual landscape and interpret information about the situations they may face. In many cases the most valuable of these abilities will be to know which kinds of questions to ask and where to look for information.

The use of a systemic lens may be an effective tool for developing such abilities. By organizing information in terms of the relationships among components of a system, it places the vast amounts of EU material within a manageable conceptual framework while *at the same time* efficiently revealing features of the landscape within which students will need to orient themselves.

The duplex structure of this lens calls for organizing course materials and developing teaching methods according to two objectives. One is to provide insights into the system itself — decisional influences and their interrelationships. The other is to develop the ability to locate specific decisional situations within this system of relationships and thus recognize and assess influences on those decisions.

The first of these objectives requires at a minimum that students acquire an overview of the EU's institutions and their formal structures. This type of information is often included in current EU courses, and presents relatively few challenges. The systemic lens then focuses attention, however, on the types

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<sup>22</sup> For a valuable recent analysis of the problems involved in comparing EU law with national laws, see Renaud Dehousse, *Comparing National and EC Law: The Problem of the Level of Analysis*, 42 AM. J. COMP.L. 761 (1994).



of influences on decisionmaking within the EU and how they relate to each other. This calls for readings in secondary sources that reveal these forms of influence, and it is likely to include at least some political science and other social science materials. It also calls for classroom methods that focus on revealing the recognition of these types of influences within the EU, and in this context a lecture format may sometimes be valuable or even necessary.

The second major objective — developing the ability to locate decisions within this framework — lends itself conveniently to common U.S. law school methods and materials. Cases can be used to place students in specific decisional situations in which they are asked to locate the potentially relevant influences. Socratic discussions focused on cases are particularly suitable to developing these localizing abilities, provided that students have adequate materials on the potentially relevant decisional influences.

The enormous amount of material about the EU and the rapidly expanding scope of EU activities pose major problems in organizing and teaching any EU course. To teach a basic EU course is to try to teach an entire legal system in a single course. The systemic lens addresses this problem by focusing on patterns and structures within EU material and on developing abilities that can be used throughout the system. Such abilities can be developed in the context of “constitutional” issues as well as in the context of a substantive area such as competition law, although obviously most instructors will seek to familiarize students with several key areas of EU law (e.g., basic institutional structures, competition law and “single market” principles).<sup>23</sup> This aspect of the systemic lens has the additional advantage that the instructor can apply it to areas in which the instructor’s own knowledge and abilities can most effectively be utilized.

These few comments on the potential benefits and problems of using a systemic lens in teaching EU law in U.S. law schools are intended only as suggestions for further thought. Note that the basic methodological assumptions are not very different from “business as usual” for many American law professors. As in teaching domestic legal subjects, the objective is to help the student recognize and assess influences on decisionmaking. What changes is the system being taught and the relation of the student to that system, and effective teaching is likely to require awareness of the consequences of those changes.<sup>24</sup>

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<sup>23</sup> Under these circumstances, a computerized casebook may well be a useful means of presenting EU law to students. The use of such materials would obviously make it possible to include new material more quickly than would be possible with traditional materials. The challenge would be to order such new material. This would not be easy even for a small team of specialists, but without careful selection and integration of the material, this form of presentation may merely compound the problem of excessive material.

<sup>24</sup> For example, rather than being “at home” in the system — i.e., having a relatively dense experiential base to which they can relate legal information, the U.S. student generally looks at a system from the outside and has little knowledge of the social and other contexts in which it operates.

## V. CONCLUDING COMMENTS

In this introduction to the symposium, I have looked at how we tend to see and, therefore, study and teach European Union law. I have suggested that the lenses that tend to shape our views of the EU are often not only inadequate for understanding its dynamics, but may actually impede our ability to penetrate its complexity, and that we need, therefore, to modify these perspectives and perhaps develop new ones. I have also suggested consideration of a systemic lens that may be of value in this effort.

I intend these comments as well as the symposium as a whole to contribute to a process of evaluation by U.S. scholars and teachers of the way they view texts and events in the EU. The other two articles in the symposium develop insights into a particular type of influence on EU decisionmaking. Taken together (particularly when Professor Slaughter's analysis is included) they provide a valuable picture of the dynamic forces within EU law and point to lines of inquiry that promise to add depth to that picture. Our focus is on intellectual tools, because the extraordinary recent developments in the process of European integration present immense challenges both to those within the EU and to those of us outside of it who seek to understand that process.

