

European (Dis)Union: From the 1992 Single Market to Brexit
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1.0 Introduction

The 25th anniversary of the establishment of the University of Miami International and Comparative Law Review (ICLR) provides an opportunity for reflection on the ways in which international and comparative law have changed during the last quarter century. In the inaugural issue (at that time the Journal was named the University of Miami Yearbook of International Law) Victor Marroquín-Merino, the first Editor-in-Chief, wrote a Foreword, dated December 1991, in which he noted that the establishment of the review reflected the interest of University of Miami students in international law, and dramatic changes in international law.² Although the name of the journal at that time referred to international law the aim was also to understand lawyers from other jurisdictions: the journal was to engage with transnational and comparative law as well as international law.³

I first visited Miami in February of 1992 to give a job talk, the subject of which was the European project to create a single internal market,⁴ and the first course I taught at the University of Miami was a course on the law of the European

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² Victor Marroquín-Merino, *Foreword*, 1 U. MIAMI Y.B INT'L L (1991) available at: <http://repository.law.miami.edu/umiclr/vol1/iss1/2> (“Many Miami students... had been attracted to the University by its strong reputation as a center for research in international law. We wanted to have a journal where we could write and edit articles about the European Community, the Soviet Union, Japan, Latin America, the Middle East, Africa, even Australia. International law had changed dramatically in the last few years, and there were many things we could talk about: international trade, human rights, the environment”)

³ *Id.* (“We knew that a good understanding of foreign law, especially of foreign legal terminology, would be of great help to us in our professional careers as international lawyers.”)

⁴ See Caroline Bradley, *1992: The Case of Financial Services*, 12 N.W. J INT'L L & BUS 124 (1991).

Economic Community. Many UM students in the JD and LLM programs were and are interested in international and comparative law courses. International law, and the law of what is now the European Union, have evolved, both in substance and in accessibility. In 1992 the Official Journal came to Miami in microfiche format, but during the 1990s it moved online, making European public documents dramatically more accessible.⁵ By the beginning of 1992 Europe was moving forward from the Single European Act towards Economic and Monetary Union with the signing of the Maastricht Treaty in December 1991.⁶ Between the signing of the Maastricht Treaty and the summer of 2016 Europe engaged in a general process of widening — expanding membership— and deepening — intensifying the links between members,⁷ although with the evolution of special arrangements for individual Member States in some areas.⁸

In June 2016 the United Kingdom held a referendum on the question whether the UK should leave the European Union (EU) in which 51.9% of those who voted said they wished the UK to leave the EU.⁹ Implementing Brexit is a challenge for the UK Government, and also has implications for the future of a European Union

⁵ Cf. Deirdre M. Curtin, *Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?*, 37 COMMON MKT. L. REV. 7, 10 (2000) (noting that “the EU is moving towards a position of (greatly) facilitating such access to information via digital means and is putting some emphasis on the function of facilitation of democratic political participation by citizens in this manner.”)

⁶ See, e.g., Michael J Baun, *The Maastricht Treaty as High Politics: Germany, France, and European Integration*, 110 Political Science Quarterly 605, 605 (1995-6).

⁷ See, e.g., Neill Nugent, *The Deepening and Widening of the European Community: Recent Evolution, Maastricht, and Beyond*, 30 J. COMMON MKT. STUD. 311 (1992); Christina J. Schneider, *Domestic Politics and the Widening–deepening Trade-off in the European Union*, 21 J. EUR. PUB. POLY 699 (2014).

⁸ See, e.g., Rebecca Adler-Nissen, *OPTING OUT OF THE EUROPEAN UNION* Cambridge: Cambridge University Press (2014). The UK and Denmark negotiated opt-outs with respect to Economic and Monetary Union. *Id.* at 5.

⁹ See, e.g., The Electoral Commission, EU Referendum Results at <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>

without the UK as a Member. But the UK Brexit decision is not the only stress the European Union faces in 2017. The EU is still in the process of managing the sovereign debt crisis that followed the global financial crisis,¹⁰ and the ongoing refugee crisis strains relations between the EU Member States.¹¹ In his State of the European Union speech in 2016 Jean-Claude Juncker, the President of the European Commission, noted that the EU faced a number of ongoing crises: “From high unemployment and social inequality, to mountains of public debt, to the huge challenge of integrating refugees, to the very real threats to our security at home and abroad — every one of Europe’s Member States has been affected by the continuing crises of our times.”¹² Also in September of 2016, Jacques Delors, a President of the EU Commission from 1985 to 1995, argued that “In this time of crisis for European identity, it is essential for the EU to show that it is not paralysed but ready to act as a leading force in the many challenges we face: the fight against climate change, increasing inequality, the need to ensure sustainable and inclusive development, promoting human rights and ensuring that nobody is left behind.”¹³

The contrast between 1992 and 2017 could not be more stark. In 1992 the

¹⁰ See, e.g., International Monetary Fund, Euro Area Policies 2016 Article IV Consultation— Press Release; Staff Report; and Statement by the Executive Director for The Euro Area , IMF Country Report No. 16/219 (Jul. 2016); Desmond Dinan, *Governance and Institutions: Implementing the Lisbon Treaty in the Shadow of the Euro Crisis*, 49 J. COMMON MKT. STUD. ANN. REV. 103 (2011). Dinan notes that “The word ‘crisis’ is much used and abused in the rhetoric of European integration.” *Id.* at 103.

¹¹ See, e.g., IMF *supra* note [10](#).

¹² Jean-Claude Juncker, President of the European Commission, State of the European Union 2016, 7 (Sep. 14, 2016).

¹³ Jacques Delors, Restoring a Europe Built on Values for its Youth (Sep. 12, 2016), at <http://www.wwf.eu/?277870/Jacques-Delors-Restoring-a-Europe-built-on-values-for-its-youth>, published to coincide with a Common statement by 177 European and National Civil Society Organisations and Trade Unions (Sep. 12, 2016) at http://d2ouvy59p0dg6k.cloudfront.net/downloads/common_statement_a_new_europe_for_people_planet_and_prosperity_for_all.pdf.

Cold War was at an end,¹⁴ the European countries were moving forward with processes of widening and deepening European integration,¹⁵ and regulators were beginning to build transnational networks to address common problems.¹⁶ By the end of 2016, and in particular after the UK Brexit referendum and the US election, commentators struggled to understand a world in which crises and political reactions to those crises disrupted the international order.¹⁷ These 2017 weaknesses in the European components of the transnational order arguably relate back to decisions taken in the late 1980s and early 1990s,¹⁸ or even earlier. The UK has been an irritant in the European project since before the UK accession, and Euroscepticism in the UK

¹⁴ See, e.g., Janice Gross Stein, Thomas Risse-Kappen, Rey Koslowski, Friedrich V. Kratochwil & Richard Ned Lebow, Symposium: The End of the Cold War and Theories of International Relations, 46: 2 International Organization (1994).

¹⁵ See, e.g., Geoffery Pridham, *EU Enlargement and Consolidating Democracy in Post-Communist States—Formality and Reality*, 40 J. COMMON MKT STUD 953-973 (2002).

¹⁶ See, e.g., Peter M Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1(1992); Ethan Barnaby Kapstein, *Power and Purpose: Central Bankers and the Politics of Regulatory Convergence*, 46 INT’L ORG. 265, 266 (1992) (“ It was the threat of a bilateral agreement on capital regulation that would have been disadvantageous to banks based outside New York and London, two of the world's most important financial centers, that moved the other G-10 central bankers from mutual education and discussion of common aversions to collective action. Within two years, the bilateral agreement thus spread to the other G-10 countries.”)

¹⁷ See, e.g., Robin Niblett, *Liberalism in Retreat*, 96 Foreign Affairs 17-24 (2017).

¹⁸ See, e.g., Mathias Matthijs, *Europe After Brexit: A Less Perfect Union*, 96 FOREIGN AFFAIRS 85, 86 (2017) (“The roots of the EU’s current crisis can be traced to the 1980’s”); Luigi Guiso, Paola Sapienza & Luigi Zingales, *Monnet’s Error?*, 31 ECON POLICY 247, 250 (2016) (“This positive feedback loop, however, seems to break down with the 1992 Maastricht Treaty (and the simultaneous crisis in the European Monetary System). There is a drop in support for the European membership and by looking at individual data this drop is highly correlated with a reduced support for the single market and for further political integration. This step seems to have created a permanent backlash.”)

has a long history.¹⁹ But although this article focuses on developments in the European Union, the 2016 US election illustrates that similar disruptions are occurring on both sides of the Atlantic.²⁰

The European project has been an important component of the post World War II movement to promote peace through the development of transnational organizations and linkages.²¹ These organizations include the United Nations,

¹⁹ See, e.g., Oliver Daddow, *Margaret Thatcher, Tony Blair and the Eurosceptic Tradition in Britain*, 15 BRITISH JOURNAL OF POLITICS & INTERNATIONAL RELATIONS 210, 212-3 (2013) (“In this article the British Eurosceptic tradition will be interpreted as that tradition of thought about Britain’s national identity that sees Britain as being not only geographically separate from the continental landmass of Europe but, crucially, as psychologically distant from the European integration movement formalized in the Rome Treaty of 1957.”); Philip Lynch & Richard Whitaker, *Where There is Discord, Can They Bring Harmony? Managing Intra-party Dissent on European Integration in the Conservative Party*, 15 BRITISH JOURNAL OF POLITICS & INTERNATIONAL RELATIONS 317, 321 (2013) (“The proportion of Eurosceptics in the parliamentary party has grown since 1979, with each new intake more Eurosceptic than the last “)

²⁰ See, e.g., Joseph Nye, *Will the Liberal Order Survive?*, 96 FOREIGN AFFAIRS 10, 14 (2017) (“The 2016 presidential election was marked by populist reactions to globalization and trade agreements in both major parties, and the liberal international order is a project of just the sort of cosmopolitan elites whom populists see as the enemy.”) See, also, e.g., *id.* at 15 (“Discontent and frustration are likely to continue, and the election of Trump and the British vote to leave the EU demonstrate that populist reactions are common to many Western democracies.”) Academics have focused on trying to identify the sources of this new populism. See, e.g., Ruben Durante, Paolo Pinotti & Andrea Teseiati, *The Political Legacy of Entertainment TV*, CEP Discussion Paper No 1475 (Apr. 2017) available at <http://cep.lse.ac.uk/pubs/download/dp1475.pdf> at p. 4 (“While popular discontent with the political establishment is likely to have deep socioeconomic roots, our findings suggest that by popularizing certain linguistic codes and cultural models, entertainment television may have contributed to creating a fertile ground for the success of populist leaders.”)

²¹ See, e.g., A Loveday, *The European Movement*, 3 Int’l Org. 620 (1949) (examining a number of separate post-war initiatives towards European union). Cf. Jean Monnet, *A Ferment of Change*, 1 J. COMMON MKT. STUD. 203, 204 (1963) (“the countries of continental Europe, which have fought each other so often in the past and which, even in peacetime, organized their economies as potential instruments of war, are now uniting in a Common Market which is laying the foundations for

established as the successor to the League of Nations,²² the OECD, which grew out of the Marshall plan to reconstruct Europe,²³ and the Bretton Woods organizations: the World Bank and the IMF.²⁴ But the geopolitical context in which these institutions currently operate is very different from their original context.²⁵ The Cold War, which began in the aftermath of World War II, ended with the fall of the Berlin Wall in 1989, just before the Review began (and presumably part of the dramatic changes Victor Marroquin-Merino had in mind in 1991).²⁶

More recently there have been further geopolitical shifts with developments in the middle east, with the new visibility of China on the world stage, and with a

political union.”)

²² See, e.g., Leland R Goodrich, *From League of Nations to United Nations*, 1 INT’L ORG. 3 (1947)

²³ See, e.g., Thomas C. Blaisdell Jr., *The European Recovery Program – Phase Two*, 2 INT’L ORG. 443 (1948) (describing the European Recovery Program); Lincoln Gordon, *The Organization for European Economic Cooperation*, 10 INT’L ORG. 1, 3 (1956) (“From the very beginning of systematic Washington consideration of the administrative problems of the European Recovery Program, it was felt desirable that there be some form of European institution, both to provide a mechanism for organizing mutual aid among the beneficiary countries and to serve as a center where United States representatives could negotiate and consult on European-wide problems.”)

²⁴ See, e.g., Klaus Knorr, *The Bretton Woods Institutions in Transition*, 2 INT’L ORG. 19 (1948), Charles P. Kindleberger, *Bretton Woods Reappraised*, 5 INT’L ORG. 32 (1951).

²⁵ See, e.g., OECD, *Final NAEC Synthesis: New Approaches to Economic Challenges*, Meeting of the OECD Council at Ministerial Level Paris, 3-4 June 2015 at <http://www.oecd.org/mcm/documents/Final-NAEC-Synthesis-Report-CMIN2015-2.pdf>. The Report, at page 3 notes that “NAEC recognises the increased international economic integration and resulting complexity, and the insights that may be gained by analysing the global economy as a complex adaptive system. This will help to take into account uncertainty, spill-overs, systemic risks and network effects. This analysis, amongst others, will help policymakers get a better grip on rising global interconnectedness. “

²⁶ See *supra* note [2](#).

transfer of some power from governments to non-governmental entities.²⁷ Increasingly policy-makers are conscious of a large number of new risks to the international system and to individual states: risks of terrorism, financial risks which spread across borders, and climate change, involving disruptive weather events, rising sea levels and threats of food insecurity.²⁸ National anxiety in the face of these risks is part of what has caused developments like the UK Brexit vote;²⁹ appeals to nationalism and populism are designed to counter supranational co-operation. But the idea that globalization, and the development of the EU have harmed national interests is controversial: Alan Milward has argued that the European project has strengthened, rather than weakened, nation states.³⁰

2.0 Before 1992: Creation, Widening, Deepening

In the aftermath of World War II Europeans were imagining the development of closer relationships between European states in a number of different fora.³¹ In 1950, Robert Schumann, the then French Foreign Minister, set out a specific proposal, arguing that “Europe will not be made all at once, or according to a single

²⁷ See, e.g., Nye, *supra* note [20](#), at 13.

²⁸ See, e.g., International Monetary Fund, Global Financial Stability Report (Apr. 2016) at p. 2 (“Increased political uncertainty related to geopolitical conflicts, political discord, terrorism, refugee flows, or global epidemics loom over some countries and regions, and if left unchecked, could have significant spillovers on financial markets.”).

²⁹ See, e.g., World Economic Forum, The Global Risks Report 2017, 12th Ed. (2017) at p. 9 (“This 12th edition of The Global Risks Report is published at a time of heightened political uncertainty, following a year of unexpected electoral results, particularly in the United States and the United Kingdom. Polarized societies and political landscapes are taking centre stage in many countries, with deepening generational and cultural divisions amplifying the risks associated with sluggish economic recovery and accelerating technological change.”)

³⁰ See, e.g., Alan S. Milward, THE EUROPEAN RESCUE OF THE NATION STATE, (University of California Press: 1992). See also, e.g., Moravcsik, *supra* note [71](#), at 161 (“The interests of European governments consistently converged across a wide range of issues in response to a 50-year regional boom in intra-industry trade and investment, which made Europe by far the most interdependent region in the world.”)

³¹ See, e.g., Loveday, *supra* note [21](#).

plan. It will be built through concrete achievements which first create a de facto solidarity.”³² Schuman proposed a pooling of coal and steel production between France and Germany (that other countries could join) and argued that “The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.”³³ Schuman’s idea was implemented in the treaty which established the European Coal and Steel Community, a body with supranational powers which Gerhard Bebr described as marking “a basic departure from the conception of all previous international organizations.”³⁴ Subsequently Europeans agreed to work together with respect to atomic energy and economic matters.³⁵ The European Coal and Steel Community,

³² Robert Schuman, Declaration of 9 May 1950, available at <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-391-en.pdf>. See also, e.g., Jacques Ziller, *THE EUROPEAN CONSTITUTION*, 24 (trans. Mel Marquis) (2005) (“From these words it may be inferred that European integration is a process of accretion whereby the interests of different States become, above all for pragmatic reasons, increasingly intertwined.”).

³³ Schuman Declaration, *supra* note 32. Cf. William N. Parker, *The Schuman Plan--A Preliminary Prediction*, 6 INT’L ORG. 381, 383 (1952) (describing the Schuman Plan’s intent to create a single market in coal and steel: “Consequently, interferences with the free movement of these products, and all distortions of the picture of relative real costs are to be forbidden, regulated or discouraged. The member governments are obligated to abolish tariffs, quota restrictions, and impediments to the free movement of workers and to attack the problem of discriminatory freight rates. Subsidies to state-owned enterprises or to private producers are forbidden.”)

³⁴ See, e.g., Gerhard Bebr, *The European Coal and Steel Community: A Political and Legal Innovation*, 63 YALE L. J. 1, 1 (1953)

³⁵ See, e.g., Reuben Efron & Allan S. Nanes, *The Common Market and Euratom Treaties: Supranationality and the Integration of Europe*, 6 INT’L & COMP. L. Q. 670 (1957). Efron and Nanes note that the supranational aspects of these Treaties were less obvious than with the European Coal and Steel Community Treaty. *Id.* at 687 (“the framers of these treaties were evidently quite determined to avoid any demonstrative phraseology that would arouse the hostility of those industrialists and political leaders, particularly among the French and Germans, who object to any infringement on the principle of national sovereignty, whether from motives of ideology or economic interest. This is clearly brought out by the fact that in contrast to the Coal and Steel Community there is absolutely no mention of the

Euratom and the European Economic Community involved the establishment of a common market among the Member States, originally France, Germany, Italy, Belgium, the Netherlands and Luxembourg,³⁶ with a common external tariff, and breaking down barriers to free movement of goods, persons, services and capital.³⁷ This idea of the breaking down of barriers between separate national markets³⁸ is often described as negative integration, but along with this negative integration the European treaties provided for positive integration through the harmonization of rules for a common European market.³⁹ Jean Monnet argued that the development of new institutional mechanisms for European states to work together was “the most important event in the West since the war.”⁴⁰

In the early years the implications of the new Treaty arrangements were

word "supranationality." Yet, as the authors hope they have shown, this concept has been introduced through the back door, as it were, in a number of Articles in which supranationality is implied, if not expressed.”)

³⁶ Cf. Ivo Maes & Amy Verdun, *Small States and the Creation of EMU: Belgium and the Netherlands, Pace-setters and Gate-keepers*, 43 J. COMMON MKT. STUD. 327, 331 (2005) (“Belgium, the Netherlands and Luxembourg founded the Benelux on 5 September 1944. The purpose was to set up a customs union between these countries as soon as the Second World War was over.”)

³⁷ Cf. Raymond Bertrand, *The European Common Market Proposal*, 10 INT’L ORG. 559 (1956). The European Free Trade Association was established in 1959. See, e.g., U. W. Kitzinger, *The Six and the Seven*, 14 INT’L ORG. 20, 20 (1960) (“two separate areas of free trade are being set up, at much the same pace, the “Inner Six” centered around France and Germany, the “Outer Seven” around Britain and Scandinavia.”)

³⁸ Cf. A.W.H. Meij & J.A. Winter, *Measures Having and Effect Equivalent to a Quantitative Restriction*, 13 COMMON MKT. L. REV. 79 (1976).

³⁹ See, e.g., Eric Stein, *Assimilation of National Laws as a Function of European Integration*, 58 AM. J INT’L L 1 (1964).

⁴⁰ Monnet, *supra* note [21](#), at 211 (“European unity is the most important event in the West since the war, not because it is a new great power, but because the new institutional method it introduces is permanently modifying relations between nations and men. Human nature does not change, but when nations and men accept the same rules and the same institutions to make sure that they are applied, their behaviour towards each other changes. This is the process of civilization itself.”)

uncertain and ambiguous.⁴¹ And although early decisions of the European Court of Justice, such as *Costa*⁴² and *Van Gend en Loos*⁴³ are now seen as the foundations of a process of Europeanization through law,⁴⁴ it was not always clear how Europe, its law and institutions, would evolve.⁴⁵ During the 1960s there were political problems when de Gaulle rebuffed the UK's interest in joining the European project,⁴⁶ and when France's withdrawal from the Council caused what commentators described as

⁴¹ See, e.g., Leon N. Lindberg, *Decision Making and Integration in the European Community*, 19 INT'L ORG. 56, 58 (1965) ("both the architects of the Community treaties and the ministers and national experts who take common decisions in Brussels have rarely had any clear notion of what the consequences of these acts might be for their respective national systems, or indeed for the relations between themselves and between them and the rest of the world.")

⁴² Case 6/64 *Costa v ENEL* [1964] ECR 1251.

⁴³ Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1. See, also, e.g., Stefan A. Riesenfeld & Richard M. Buxbaum N. V. *Algemene Transport- En Expeditie Onderneming van Gend & Loos c. Administration Fiscale Neerlandaise: A Pioneering Decision of the Court of Justice of the European Communities*, 58 Am. J. Int'l L. 152, 152 (1964) ("unquestionably one of the most important judgments rendered by that tribunal during the first decade of its existence.")

⁴⁴ See, e.g., GF Mancini & DT Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 183 (1994) ("The effect of *Van Gend en Loos* was to take Community law out of the hands of politicians and bureaucrats and to give it to the people. Of all the Court's democratising achievements none can rank so highly in practical terms.")

⁴⁵ See, e.g., Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, 2 INT'L POLITICAL SOCIOLOGY 128, 131 (2008) ("The general idea is that Euro-law's force is not a substantive feature related to a-historical characteristics of Law, but rather that it comes out of the various sorts of EU-related economic, political or bureaucratic struggles in which it has been enrolled in the course of European history.")

⁴⁶ See, e.g., Roy Pryce, *Britain Out of Europe?*, 2 J. COMMON MKT. STUD 1-10 (1963); Andrew Moravcsik, *De Gaulle Between Grain and Grandeur: The Political Economy of French EC Policy, 1958–1970 (Part 2)*, 2 J. COLD WAR STUD. 4, 6 (2000).

a “crisis,”⁴⁷ or the “empty chair crisis,”⁴⁸ but which was eventually resolved by means of the Luxembourg compromise.⁴⁹ After the compromise policy-making was slow,⁵⁰ and commentators wondered whether supranationality had a future.⁵¹ It is clear that from the very beginning of the post war European project different actors had different ideas about what that project involved,⁵² or at least about who should make decisions about the framing of the project,⁵³ and these differences of view have

⁴⁷ See, e.g., John Lambert, *The Constitutional Crisis 1965-66*, 4 J. COMMON MKT. STUD. 195–228 (1966). Lambert predicted that similar issues would arise in future. *Id.* at 228 (“The crisis of 1965-66 is to be seen as a constitutional clash, involving an attempt to change certain basic rules: but it was also probably part of a more long-term political conflict over the nature of the Community that in no way ceased when the immediate crisis ended on 29 January. The difference in question can be expected to persist and to be reflected continually in relations between the member governments inside and outside the framework of the Treaties.”)

⁴⁸ See, e.g., N. Piers Ludlow, *Challenging French Leadership in Europe: Germany, Italy, the Netherlands and the Outbreak of the Empty Chair Crisis of 1965-1966*, 8 CONTEMP. EUR. HIST. 231, 232 (1999) (“A French boycott of the Community institutions had begun and would last until the end of January 1966. Throughout this time, the French chair at all Community meetings would remain empty and the French viewpoint unstated, apart from periodic Delphic utterances by President de Gaulle and his senior ministers.”)

⁴⁹ See, e.g., *id.* at 226.

⁵⁰ See, e.g., Eric Stein, *The European Community in 1983: A Less Perfect Union?* 20 COMMON MKT. L. REV. 641, 647 (1983).

⁵¹ See, e.g., Nina Heathcote, *The Crisis of European Supranationality*, 5 J. COMMON MKT. STUD. 140, 141-2 (1966) (“The still unresolved conflict of interest between the EEC’s national members is evidence that the organization is still an arena of power politics, unmodified by the supranational framework.”) Cf. Maryon McDonald, ‘Unity in Diversity’. *Some Tensions in the Construction of Europe*, 4. SOC. ANTHROPOLOGY 47 (1996).

⁵² See, e.g., Loveday, *supra* note [21](#).

⁵³ See, e.g., Ludlow, *supra* note [48](#), at 233 (“The breakdown of June 1965, the article will suggest, should be seen not as the product of French dissatisfaction with the Community as it existed, but on the contrary as the outcome of mounting frustration amongst all of France's partners, Germany, Italy and the Netherlands in particular, about the extent to which the French had been able to dominate the

persisted through periodic enlargements of membership.

The European project achieved forward movement in one direction when the UK, Denmark and Ireland acceded to the treaties in 1973,⁵⁴ although the enlargement raised new questions about the legal and political implications of enlargement,⁵⁵ as well as the economic impact of enlargement.⁵⁶ The introduction of new Member States with different interests and including actors with more different views made agreement on the future of Europe more, rather than less, complicated.⁵⁷ But although enlargement was progress of a sort, the widening was not accompanied by the sort of deepening that many hoped for.⁵⁸ During the 1970s European states grappled with economic problems which raised questions about the usefulness of European integration.⁵⁹ Nevertheless, further enlargements followed: Greece

formative years of the EEC.”)

⁵⁴ Treaty of Accession of Denmark, Ireland and the United Kingdom (1972), O.J. No. L 73 (Mar. 27, 1972).

⁵⁵ See, e.g., Stanley Henig, *New Institutions for European Integration* 12 J. COMMON MKT. STUD. 129 (1973); L.J. Brinkhorst & M.J. Kuiper, *The Integration of the New Member States in the Community Legal Order*, 9 COMMON MKT. L. REV. 364 (1972). Norway also negotiated to join, but Norwegian citizens voted to reject membership. See, e.g., Einar Lie, *Masters and Servants: Economists and Bureaucrats in the Dispute Over Norwegian EEC Membership in 1972*, 24 CONTEMP. EUR. HIST. 279 (2015).

⁵⁶ See, e.g., W. G. C. M. Haack, *The Economic Effects of Britain's Entry into the Common Market*, 11 J. COMMON MKT. STUD. 136 (1972).

⁵⁷ See, e.g., Stein, *supra* note [50](#), at 655 (“In the running debate on the Community’s future, some wonder whether the original Community pattern, although suitable for a homogenous group of six states, is workable for a Community of ten, twelve or more states with diverse cultures, legal systems and levels of development (Greece, Portugal, Spain, eventually Turkey).”)

⁵⁸ Some have argued that deepening should occur before widening. See, e.g., Ziller, *supra* note [32](#), at 153 (“many have repeatedly argued that the integration project must be consolidated and “deepened” before the Community— with the argument now applying to the Union— is expanded any further.”)

⁵⁹ See, e.g., European Union, Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council, Bulletin of the European Communities Supplement 1/76 at 11 (“we plunged into a crisis and are experiencing rates of

acceded in 1981,⁶⁰ and Spain and Portugal followed in 1986.⁶¹ But enlargement was part of what led commentators to speculate about possibilities for a multi-speed Europe in which different rules would apply to different Member States.⁶²

By 1991, after the adoption of the Single European Act,⁶³ Andrew Moravcsik identified a new period of hope for the future of Europe.⁶⁴ The Single European Act was presented as a reinvigoration of the European project where the Member States

inflation and unemployment the likes of which have never been seen by the present generation. It is therefore hardly surprising if the Community is crumbling beneath the resurgence, which is felt everywhere, of purely national preoccupations. Especially as the Community, in its present state, is unbalanced: in some fields it has been given far-reaching powers, in others nothing, or practically nothing, has been done, very often because our States were too weak to undertake anything new.”)

⁶⁰ See, e.g., Treaty of Accession of Greece (1979), O.J. No L 291 (Nov. 19, 1979).

⁶¹ See, e.g., Treaty of Accession of Spain and Portugal (1985), O.J. No. L 302 (Nov. 15, 1985).

⁶² See, e.g., Alexander C-G. Stubb, *a Categorization of Differentiated Integration*, 34 J. COMMON MKT. STUD 283 (1996); Alberto Alesina, & Vittorio Grilli, *On the Feasibility of a One-speed or Multispeed European Monetary Union*, 5 ECONOMICS & POLITICS 145, 146 (1993) (arguing that “proceeding at “two speeds” or more will jeopardize the achievement of complete integration.”); Eberhard Grabitz & Bernd Langeheine, *Legal Problems Related to a Proposed “Two-Tier System” of Integration Within the European Community*, 18 COMMON MKT. L. REV. 33 (1981).

⁶³ See, e.g., Juliet Lodge, *The Single European Act: Towards a New Euro-Dynamism?*, 24 J. COMMON MKT. STUD. 203 (1986).

⁶⁴ Andrew Moravcsik, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community*, 45 INT’L ORG. 19-56, 19 (1991) (“The late 1970s and early 1980s were periods of “Europessimism” and “Eurosclerosis,” when politicians and academics alike lost faith in European institutions. The current period is one of optimism and institutional momentum.”) Cf. Neil Fligstein & Iona Mara-Drita, *How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union*, 102 AM. J. SOCIOLOGY 1, 3 (1996) (noting that the single market “project took the EU from an organization in crisis to one that was able to attain some remarkable agreements.”) Contrast e.g., Lodge, *supra* note 63 at 221 (noting “a danger... that the pragmatism that it embodies may, as in the past, discourage Member States from taking the steps necessary for progress.”)

agreed to work at creating an internal market for Europe (a reframing of the original common market idea rather than a wholly new project)⁶⁵ by the end of 1992.⁶⁶ It was initially unclear what this single market would involve,⁶⁷ although the Commission published a White Paper in 1985 with an analysis of the steps necessary to create a single market.⁶⁸ The UK joined in agreeing to the Single European Act and the 1992 initiative.⁶⁹

Comparing the attitudes to the condition of Europe of observers at the beginning of the 1990s with attitudes at the beginning of 2017, there seems to be a contrast between attitudes of hope (then) and attitudes of uncertainty and anxiety (now). This raises the question of how Europe changed from an enterprise of hope to an existential crisis. Three sets of issue help to understand this evolution. The first involves problems with the idea of ever closer union and a single market and the idea of continuous forward movement. The second relates to crisis and the European (and national and international) response to crisis. The third involves the conflict between technocratic and political governance. But it should also be noted that the contrast between then and now may be less stark than some sources suggest. From the beginning the European project involved differences of opinion and uncertainties that sometimes were more obvious and sometimes less so. 2017 may be one of those periods where the tensions are more visible.

3.0 1992 and Beyond: An Ever Closer Union, a Single Market, and Continuous Forward Movement

⁶⁵ See, e.g., Fligstein & Mara-Drita, *supra* note [64](#), at 11.

⁶⁶ See, e.g., Paolo Cecchini, *THE EUROPEAN CHALLENGE: 1992 THE BENEFITS OF A SINGLE MARKET* (1988).

⁶⁷ Fligstein & Mara-Drita, *supra* note [64](#), at 11 ("The biggest problem of this idea was to define what a single market meant.") Cf. Lodge, *supra* note [63](#), at 210-212.

⁶⁸ Commission White Paper: Completing the Internal Market, COM(85) 310 final (Jun. 14, 1985).

⁶⁹ See, e.g., Daddow, *supra* note [19](#), at 217 ("It should not be forgotten, however, that [Margaret Thatcher] ...willingly... signed Britain up to one of the most integrationist European treaties of recent times, the 1986 Single European Act (SEA), which created the single European market in the 1990s.")

Although the Single Market Act proposed the creation of a single European market in 1992, many commentators think that the EU's single market is incomplete twenty-five years later.⁷⁰ Ideas embedded in the European treaties such as the internal market and ever closer union⁷¹ have always been ambiguous and susceptible to different interpretations. It has never been clear, for example, whether a single market requires uniform rules or not, and, if not, how much differentiation in rules is consistent with a single market.⁷² These ambiguities are the product of differences in views among the negotiators of the texts. Ambiguity allows for agreement without the need to pin down exactly what is agreed. Ambiguity then allows for subsequent political negotiation to determine the contours of the European project (although some ambiguities are resolved through decisions of courts rather than legislators or Treaty negotiators.). But ambiguity also leaves open opportunities for contestation which can be problematic.

The Court of Justice has resolved some textual ambiguities in the Treaties by adopting a teleological approach to interpretation, an approach which is sometimes characterized as “constitutionalizing” the Treaties or as being “creative.”⁷³ Beyond

⁷⁰ See, e.g., Mario Mariniello, André Sapir & Alessio Terzi, *The Long Road Towards the European Single Market*, Bruegel Working Paper 2015/1, 2 (Mar, 2015) (noting that a “commonly held opinion among observers today is that the single market is far from being complete.”)

⁷¹ See, e.g., Andrew Moravcsik, *The European Constitutional Settlement*, 31 THE WORLD ECONOMY 158, 158 (2008) (“For five decades, the primary concern of European integration was summarised in the 1950s era technocratic slogan embedded in the Treaty of Rome’s preamble: ‘Ever Closer Union.’)

⁷² Cf. Barry Eichengreen, *European Monetary Unification*, 31, J. ECON. LIT. 1321, 1322 (1993) (“I dispute the belief that a single currency is a technically necessary concomitant of a single market in capital, labor, and good.”)

⁷³ See, e.g., G Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L REV. 595, 596 (1989) (“the Court has sought to “constitutionalise” the Treaty, that is to fashion a constitutional framework for a federal-type structure in Europe.”). See also, e.g., *id.* at 599 (“The now undisputed existence of a supremacy clause in the Community framework is therefore a product of judicial creativeness.”) Cf. Dagmar Schiek, *The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation*, 35 INDUSTRIAL L. J. 329, 335 (2006) (“With Mangold, the Court of Justice grants a more far-reaching effect to the prohibition of discrimination on grounds of age. The

resolving ambiguities the Court of Justice has also developed EU law over time, and in ways not compelled by the express language of the Treaties,⁷⁴ for example, recognizing that fundamental rights were part of EU law before they were spelled out in the EU Charter of Fundamental Rights.⁷⁵ Another example is the Court's enhancement of the enforceability of citizens' legal rights by the recognition of a right for people to go to court in a Member State and claim damages for the Member State's violations of EU law.⁷⁶ This right to damages has itself evolved over time,⁷⁷ so

recognition of the constitutional quality of the prohibition on discrimination will surely have consequences beyond Mangold, especially as it can hardly remain confined to the ground of age.”)

⁷⁴ See, e.g., Vauchez, *supra* note 45, at 134 (“Principles such as “direct effect,” “supremacy,” “principle of proportionality” or “rule of speciality,” which have become undisputed description tools of the EU polity, are specific legal constructions that do not draw on the treaties themselves as much as they do on the science of law for which, at the end of the day, lawyers are the only judges.”)

⁷⁵ See, e.g., Jason Coppel & Aidan O’Neill, *The European Court of Justice: Taking Rights Seriously?*, 12 LEGAL STUD. 227, 228 (1992) (“the European Court discovered that the protection of fundamental rights was indeed a general principle of European Community law. This development ...was effected notwithstanding the absence of any mention or list of fundamental rights within the texts of the Community treaties.”); Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order Of the European Communities*, 61 WASH. L. REV. 1103, 1105 (1986) (“If one ever needed an example of sheer judicial power it would appear to be in this particular “saga.”...in the absence of a written bill of rights in the Treaty and an apparent freedom for the Community legislature to disregard individual rights in Community legislation, the European Court of Justice, in an exercise of bold judicial activism, and a reversal of earlier case law, created a judge-made higher law of fundamental human rights, culled from the constitutional traditions of the Member States and international agreements such as the European Convention on Human Rights (ECHR).”)

⁷⁶ See, e.g., Paul Craig, *Francovich, Remedies and the Scope of Damages Liability*, 109 LAW QUARTERLY REVIEW 595, 596 (1993) (“The *existence* of liability was established through a blend of reasoning from first principle, and through reliance on textual foundation in the Treaty itself.”).

⁷⁷ See, e.g., Carol Harlow, *Francovich and the Problem of the Disobedient State*, 2 EUR. L. J. 199 (1996). Cf. Tobias Lock, *Is Private Enforcement of Eu Law*

that a claim in damages against the State may now relate to the failure of courts in the Member State to interpret and apply EU law properly.⁷⁸ Member State governments who see the Court of Justice as interpreting the Treaties in surprising ways may react by becoming entrenched in positions which are not favourable to the promotion of the European project.⁷⁹ Worries about European overreach led to the development of the doctrine of subsidiarity,⁸⁰ and over time the ways in which the EU managed subsidiarity have evolved to include national parliaments as subsidiarity monitors.⁸¹ However, subsidiarity, like other aspects of the EU, has its own ambiguities.⁸² More

Through State Liability a Myth: an Assessment 20 Years after Francovich, 49 COMMON MKT. L. REV. 1675 (2012).

⁷⁸ See, e.g., Lock, *supra* note [77](#), at 1676 (“In Kdbler the ECJ later extended the doctrine of Member State liability to also cover breaches by the judiciary where the infringement of European Union law was manifest.”).

⁷⁹ Cf. Vauchez, *supra* note [10](#), at 141 (“It is well known that over the past 15 years the number of critics of the ECJ has increased far beyond the restricted circles of eurosceptics. It comes as no surprise that the recent politicization of EU debates is now touching the European Court of Justice... itself denounced for its many biases (from its neo-liberal or ordo-liberal agenda to its “tentacular” development at the expense of national legal sovereignty).”)

⁸⁰ See, e.g., Andreas Føllesdal, *Subsidiarity*, 6 JOURNAL OF POLITICAL PHILOSOPHY 190, 191 (1998) (“The principle of subsidiarity was introduced in the European Union in the late 1980s through the initiative of the European Parliament, Britain and Germany in response to fears of centralized power by placing the burden of argument with integrationists.”). Cf. Kees van Kersbergen & Bertjan Verbeek, *The Politics of Subsidiarity in the European Union*, 32 J. COMMON MKT. STUD. 215, 216 (1994) (“the theory of subsidiarity was put on the European political agenda in the late 1970s by Christian democratic members of the European Parliament in an interesting, yet - in the light of recent developments -paradoxical effort to justify the enlargement of the competences of the European Commission. It was only in the 1990s that subsidiarity evolved into a principle for curbing the potential expansion of power of the European Commission.”)

⁸¹ See, e.g., Ian Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 J. COMMON MKT. STUD. 281 (2006).

⁸² See, e.g., van Kersbergen & Verbeek, *supra* note [80](#), at 221 (“Three views of the relationship between state and society have furnished three different interpretations of subsidiarity: (1) Christian democratic ideology, (2) German

recently, concern about decisions of the Court of Justice have been part of the UK Government's discomfort with EU membership (although sometimes the roles of the Court of Justice and the European Court of Human Rights seem to have become intertwined in politicians' imaginations).⁸³

The UK is not the only locus of resistance to the idea that European Court decisions might pre-empt conflicting domestic law.⁸⁴ Whereas the Court of Justice has been very clear that EU law has the characteristic of supremacy,⁸⁵ national courts have not always accepted this idea unconditionally. Germany is the most prominent example of this tension between EU supremacy and domestic Constitutional law.⁸⁶ Over many years the Court of Justice and German courts navigated this terrain very

federalism, and (3) British conservatism. The lowest common denominator of all three is a narrow legal view which envisions subsidiarity solely as a constitutional arrangement between central and local public actors.”)

⁸³ Cf. House of Lords, European Union Committee, *The UK, the EU and a British Bill of Rights*, HL Paper 139 (May 9, 2016) at 8 (“The EU Charter is often confused with the European Convention on Human Rights (ECHR), as the Court of Justice of the EU in Luxembourg (the CJEU) is with the European Court of Human Rights in Strasbourg (the ECtHR). While both contain overlapping human rights provisions, they operate within separate legal frameworks.”)

⁸⁴ Cf. Karen J. Alter, *Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 50 INT'L ORG. 121, 123 (1998) (“The ECJ, however, interpreted existing EC laws in ways that member states had not intended and in ways that compromised strongly held interests and beliefs. As member states began to object to ECJ jurisprudence, they found it difficult to change EU legislation to reverse court decisions or to attack the jurisdiction and authority of the ECJ. Because there was no consensus among states to attack the authority of the ECJ, member states lacked a credible threat that could cow the Court into quiescence. Instead, the institutional rules combined with the lack of political consensus gave the ECJ significant room to maneuver.”)

⁸⁵ See, e.g., *id.* a 126.

⁸⁶ See, e.g., Philipp Kiiver, *The Lisbon Judgment of the German Constitutional Court: a Court-ordered Strengthening of the National Legislature in the EU* 16 EUR. L. J. 578 (2010); Gunnar Beck, *The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor*, 17 EUR. L. J. 470 (2011).

carefully, but the tension resurfaced in the wake of the financial crisis when German citizens challenged some of the EU's responses on the basis that they were ultra vires.⁸⁷ The courts' reactions to these issues have been unusual. One commentator wrote that "if the preliminary referral in OMT evidenced an unexpected desire on the part of the BVG to set the entire system on fire by actually declaring an EU act ultra vires, the ECJ in Gauweiler appeared completely content to drop off matches and lighter fluid at the front door of the Federal Constitutional Court in Karlsruhe."⁸⁸

The European project is often analyzed in terms of moving forward, or failing to do so.⁸⁹ Progress or forward movement is inherent in the terminology of an ever closer union, and, although the idea of an ever closer union might seem to require only the deepening of relationships between the Member States, in fact it has also involved widening, or an expansion of membership.⁹⁰ The emphasis on progress

⁸⁷ See, e.g., Monica Claes & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, 16 German L. J. 917 (2015).

⁸⁸ John Henry Dingfelder Stone, *Agreeing to Disagree: The Primacy Debate between the German Federal Constitutional Court and the European Court of Justice*, 25 MINN. J. INT'L L. 127, 150 (2016).

⁸⁹ See, e.g., Erik Jones, R. Daniel Kelemen & Sophie Meunier, *Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration*, 49 COMPARATIVE POL. STUD. 1010, 1012 (2015) ("Why have piecemeal responses forged by minimum winning coalitions in the heat of crisis consistently moved the EU in the direction of deeper integration over time, rather than toward a dismantling of shared governance institutions and market structures? This tendency to pursue ever deeper integration is a puzzle because it suggests that there is an underlying dynamic connecting iterated intergovernmental bargains. As a result of this dynamic, the EU appears to "fail forward"; again and again responding to the failures of incremental reforms by taking new steps to expand the scope and intensity of integration.")

⁹⁰ On enlargements since 1991, see, e.g., Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L. J. 1092 (1994); Geoffery Pridham, *EU Enlargement and Consolidating Democracy in Post-Communist States—Formality and Reality*, 40 J. COMMON MKT. STUD. 953-973 (2002); Frank Schimmelfennig, *EU Political Accession Conditionality after the 2004 Enlargement: Consistency and Effectiveness*, 15 J. EUR. PUB. POLY. 918 (2008).

towards closer union means that failures to achieve forward movement are risky:⁹¹ managing Europe is sometimes analogized to riding a bicycle (where stopping risks falling off).⁹² Enlargement is a component of this forward movement but enlargement involves complexities. The new Member States need to adapt to the existing *acquis communautaire*, both in terms of formal adjustment of their legal regimes, but also in terms of adjusting their approach to government. Compliance with EU norms relating to the rule of law is expected,⁹³ but not always achieved, and it is hard for the EU institutions to police non-compliance effectively.⁹⁴

If the move from 6 to 10 Member States made agreement more complex, the transition to a Union of 28 Member States has increased this complexity significantly. Enlargements which have increased the diversity of the Member States

⁹¹ See, e.g., Henig, *supra* note 55 at p 129 (“by its very nature the Community cannot stand still: the notion of consolidation is alien to the process of integration. When ‘spill-over’ becomes inoperative and member governments refuse to extend the sphere of integration, the Community is bound to wither.”) Cf. Guiso, Sapienza & Zingales, *supra* note 18, at 251 (“Since the survival of the euro is dependent upon further transfers of national powers to the EU, then the European Project seems to be stuck: Europeans do not want to go forward, they do not want to go backward, but they cannot stay still.”)

⁹² See, e.g., Rorden Wilkinson (2009) *Language, Power and Multilateral Trade Negotiations*, 16 REV. INT’L POL. ECON. 597, 604 (2009) (“At its simplest, the bicycle metaphor suggests that trade liberalization, like the forward motion required to keep a bicycle moving, needs to be in a state of perpetual motion. If that motion were to cease, the process (like the bicycle) would collapse and cause injury to the global economy/the bicycle’s rider.”) Wilkinson discusses this metaphor with respect to trade liberalization generally rather than specifically with respect to the EU. For the bicycle metaphor with respect to the EU see, e.g., Moravcsik, *supra* note 71, at 158.

⁹³ See, e.g., Commission Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final/2 (Mar. 19, 2014).

⁹⁴ See, e.g., Commission Recommendation Regarding the Rule of Law in Poland, C(2016) 8950 final (Dec. 21, 2016) at 7 (“The present Recommendation complements the Recommendation of 27 July 2016. It examines which of the concerns raised in that recommendation have been addressed, sets out the remaining concerns and lists a number of new concerns of the Commission with regard to the rule of law in Poland which have arisen since then. On this basis, it makes recommendations to the Polish authorities on how to address these concerns.”)

have implications for social cohesion in the EU,⁹⁵ which again makes political agreement among the Member States more difficult to achieve.⁹⁶ And some national governments have decided to seek the approval of their citizens for EU developments, which means that changes need citizen as well as governmental approval. The EU's attempt to adopt a Constitutional Treaty, after a prolonged complex negotiating process involving participants from national parliaments, national governments, the European Parliament and the Commission,⁹⁷ and an Intergovernmental Conference,⁹⁸ managed to overcome the difficulty of achieving agreement among the Member State governments,⁹⁹ only to run into opposition from citizens expressed in referenda,¹⁰⁰ although the EU managed to find a way through the opposition.¹⁰¹

The EU Member States are diverse: in terms of size¹⁰² and wealth¹⁰³:

⁹⁵ See, e.g., Jan Delhey, *Do Enlargements Make the European Union Less Cohesive? An Analysis of Trust between EU Nationalities*, 45 J. COMMON MKT. STUD 253 (2007).

⁹⁶ See, e.g., Schneider, *supra* note [7](#).

⁹⁷ See, e.g., Ziller, *supra* note [32](#) at 85.

⁹⁸ *Id.* at 106-115.

⁹⁹ See, e.g., Ziller, *supra* note [32](#), at 29 (“it is clear that the imperfect but impressive text produced by the Convention— later adopted mostly intact by the European Council— is a *hybrid* text reflecting hard-won compromises between opposing visions of the purpose and direction of European integration.”)

¹⁰⁰ See, e.g., Paul Taggart, *Questions of Europe – The Domestic Politics of the 2005 French and Dutch Referendums and their Challenge for the Study of European Integration*, 44 J. COMMON MKT. STUD. ANNUAL REVIEW 7 (2006)

¹⁰¹ See, e.g., Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT L. REV. 617 (2008); Dinan, *supra* note [10](#).

¹⁰² Influence within the EU system is not inevitably merely a function of size. See, e.g., Maes & Verdun, *supra* note [36](#), at 330 (“The influence of states on the European integration process is related only in part to their size.”)

¹⁰³ See, e.g., Moravcsik, *supra* note [71](#), at 163 (noting, with respect to the 2004 enlargement, that “The GDP of the 10 new members of the EU totalled only 3 per cent of the GDP of existing members, and their demands on existing EU

Luxembourg has a population of about 550,000 people, but is very wealthy; Bulgaria has a population 14 times that of Luxembourg but its GDP is smaller. In 2014 the GDPs of the EU Member States ranged from \$9.5 billion (Malta, which has an even smaller population than Luxembourg) to nearly \$4 trillion (Germany, which has a population of over 80 million). There are economic differences between the Member States in terms of how developed their economies are and how significant agriculture or fishing or financial services are to the economy. The refugee crisis highlighted differences between the different Member States: Italy and Greece, located at the edges of the EU nearest to the origins of the refugees have been more directly affected by an influx of refugees than other Member States further away.¹⁰⁴ Some Member States have more diverse populations than others, although identifying causal relationships between population diversity and attitudes to immigration is complex,¹⁰⁵ and even the more diverse Member States include citizens who focus on

budgetary spending, agricultural policy and free movement rules were carefully restricted.”) *Cf.* Schneider, *supra* note 7, at 701 (“All studies assume that enlargement has generally increased the heterogeneity of preferences among EU members. Empirically, heterogeneity of preferences has been measured mostly as the heterogeneity in gross domestic product (GDP) within the Council because income is an important conflict dimension.”) Schneider argues that enlargement does not have the same sort of impact on partisan heterogeneity, which is affected by elections. *Id.* at 709.

¹⁰⁴ *See, e.g.*, EU Commission & High Representative Of the Union for Foreign Affairs and Security Policy, Joint Communication: Migration on the Central Mediterranean Route Managing Flows, Saving Lives, JOIN(2017) 4 final (Jan. 25, 2017) at 3 (“In 2016, over 181,000 irregular migrants were detected on the Central Mediterranean route, the vast majority of whom reached Italy. Italy reported an 18% increase in arrivals compared to 2015, a number even surpassing the previous peak of 2014. Arrivals to Malta are low in comparison. Libya was the main country of departure for almost 90% of migrants, followed by Egypt (7%), Turkey (1.9%), Algeria (0.6%) and Tunisia (0.5%).”) The agreement between the EU and Turkey reduced the impact of migration on Greece. *Id.* *See also, e.g.*, Commission Communication, Eighth Report on Relocation and Resettlement, COM (2016) 791 final (Dec. 8, 2016) at 6 (noting variations in the willingness of Member States to accept relocation of refugees from Italy and Greece, and in particular, that Austria and Hungary had not participated in any relocations or pledges to do so.)

¹⁰⁵ *See, e.g.*, James Laurence & Lee Bentley, *Does Ethnic Diversity Have a Negative Effect on Attitudes towards the Community? A Longitudinal Analysis of the Causal Claims within the Ethnic Diversity and Social Cohesion Debate*, 32 EUR.

national identity, which can result in hostility to immigration and immigrants, whether from other EU Member States or from outside the EU.¹⁰⁶

The differences between the Member States matter when they make reaching agreement on policy questions more difficult,¹⁰⁷ and when policy decisions combine different Member States in regimes (like the regime for the Euro) that do not take full account of the differences.¹⁰⁸ In addition to economic differences there are also differences between the Member States in attitudes to religion,¹⁰⁹ and in the diversity

SOCIOL. REV. 54 (2015). Attitudes to immigration may be influenced by individuals' personality traits. *See, e.g.*, Markus Freitag & Carolin Rapp, *The Personal Foundations of Political Tolerance towards Immigrants*, 41 JOURNAL OF ETHNIC AND MIGRATION STUDIES 351 (2015).

¹⁰⁶ Cf. John Sides & Jack Citrin, *European Opinion About Immigration: The Role of Identities, Interests and Information*, 37 BRIT. J. POL. SCI. 477, 478 (2007) (“Amid all the talk of a growing sense of European identity, the present research points to the explanatory power of identification with the nation-state and beliefs about the nation-state’s cultural identity.”)

¹⁰⁷ *See, e.g.*, Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MKT. STUD. 473, 474 (1993) (arguing that Europe should be seen in terms of “liberal intergovernmentalism: a liberal theory of how economic interdependence influences national interests, and an intergovernmentalist theory of international negotiation.”)

¹⁰⁸ Economic and Monetary Union combined Germany, a strong economy, with a strong currency with other, weaker economies with weaker currencies. The Stability and Growth Pact was designed to address this problem. *See, e.g.*, Martin Heipertz & Amy Verdun, *The Dog That Would Never Bite? What We Can Learn From the Origins of the Stability and Growth Pact*, 11 J. Eur. Pub. Poly 765, 768 (2004) (“The political background of the SGP can be traced back to German domestic politics. It was used to comfort public opinion and to appease the Bundesbank. The German public needed reassurance on EMU as it had become extremely anxious about giving up the well-proven Deutschmark in favour of a new single currency that would include traditionally weak economies which lacked a stability culture.”) But the Stability and Growth Pact was not very effective. *See, e.g., id.* at 776 (“A number of countries no longer act as if the SGP budgetary ceilings are to be taken seriously”) Eventually there was a crisis in the Euro Area.

¹⁰⁹ *See, e.g.*, Ziller, *supra* note [32](#) at 5.

of their populations.¹¹⁰ And the possible accession of Turkey¹¹¹— supported by the EU’s reliance on Turkey to manage the immigration crisis,¹¹² but imperilled by the state of emergency which raises issues of human rights and the rule of law¹¹³— would only increase the differences between EU Member States.

Deepening— the development of an ever closer union between the Member States— has occurred along with enlargement. The Maastricht Treaty began the

¹¹⁰ See, e.g., Aniko Horvath, Zsuzsanna Vidra & Jon Fox, *Tolerance and Cultural Diversity Discourses in Hungary*, Centre for Policy Studies Policy Research Reports (2011) available at

https://cps.ceu.edu/sites/default/files/publications/cps-research-report-tolerance-and-cultural-diversity-2011_0.pdf, at 4 (“Immigrants in Hungary, although very small in number, are also typically viewed with a combination of fear and distrust.”)

Cf. Council of Europe, *Human Rights in Culturally Diverse Societies Guidelines Adopted by the Committee of Ministers and Compilation of Council of Europe Standards* (2016) available at

<http://www.culturalpolicies.net/web/files/47/en/CoE - HR in culturally diverse societies.pdf>, at 9 (“Conscious of the increasing cultural diversity in European societies and underlining that diversity is a source of enrichment which calls for mutual understanding and respect for each other.”)

¹¹¹ Turkey expressed interest in becoming part of the European project in 1987. Cf. Schimmelfennig, *supra* note 90, at 919 (“even existing commitments to Turkey and the Western Balkans have come under pressure from relevant member states. After 2004, ‘enlargement fatigue’ has been seen as the prevailing mood in Brussels, in many member state capitals, and among EU citizens.”)

¹¹² See, e.g., EU-Turkey statement (Mar. 18, 2016) at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>. Cf. Commission Communication, *A European Agenda on Migration*, COM (2015) 240 final (May 13, 2015) at 2 (“Emergency measures have been necessary because the collective European policy on the matter has fallen short. While most Europeans have responded to the plight of the migrants, the reality is that across Europe, there are serious doubts about whether our migration policy is equal to the pressure of thousands of migrants, to the need to integrate migrants in our societies, or to the economic demands of a Europe in demographic decline.”)

¹¹³ See, e.g., Kareem Shaheen, Patrick Wintour & Jennifer Rankin, *Turkey Threatens to End Refugee Deal in Row over EU Accession*, *The Guardian* (Nov. 25, 2016). If Turkey were an EU Member State its actions against judges, prosecutors, journalists, mayors, removing parliamentary immunity from deputies of the National Assembly, would involve issues with respect to Treaty provisions on the rule of law.

transition from a European Community to a European Union, and introduced new “pillars” of European integration: a Common Foreign and Security Policy (CFSP), police and judicial cooperation in criminal matters, the idea of European citizenship, and Economic and monetary union.¹¹⁴ These aspects of deepening have not however, all been unproblematic. Economic and monetary union and the euro were conceived as much for political as for economic reasons, and failures of compliance with the requirements of the Stability and Growth Pact and political failures to police compliance with those requirements led to a European sovereign debt crisis.¹¹⁵ The (disputed) notion that the EU is the source of an ever increasing, and even excessive, proportion of domestic rule-making in the Member States,¹¹⁶ produces political opposition.¹¹⁷

Other aspects of deepening within the EU over the last quarter century include the evolution of institutional structures.¹¹⁸ For example, the allocation of

¹¹⁴ On the Maastricht Treaty see, e.g., Joseph M. Grieco, *the Maastricht Treaty, Economic and Monetary Union and the Neo-realist Research Programme* 21 REV. INT’L STUD. 21 (1995).

¹¹⁵ See, e.g., Philip R. Lane, *The European Sovereign Debt Crisis*, 26 J. ECON. PERSPECTIVES, 49, 56 (2012) (noting that the “revelation of extreme violation of the euro's fiscal rules on the part of Greece also shaped an influential political narrative of the crisis, which laid the primary blame on the fiscal irresponsibility of the peripheral nations, even though the underlying financial and macroeconomic imbalances were more important factors.”)

¹¹⁶ See, e.g., Moravcsik, *supra* note 71, at 175 (“In 1988, Jacques Delors famously predicted that in 10 years ‘80 percent of economic, and perhaps social and fiscal policy-making’ in Europe would be of EU origin. This prediction has become a fundamental ‘factoid’ in discussions of the EU – often cited as a claim that 80 per cent of law making in all issues in Europe already comes from Brussels. Yet recent academic studies demonstrate that the actual percentage of EU-based legislation is probably between 10 and 20 per cent of national rule making.”)

¹¹⁷ See, e.g., Mark Pollack, *The End of Creeping Competence? EU Policy-Making Since Maastricht*, 39J. COMMON MKT. STUD. 519, 520 (2000) (arguing that during the 1990s there was a “backlash against against the spread of centralized policy-making in the EU.”)

¹¹⁸ See, e.g., Moravcsik, *supra* note 71.

voting rights among citizens and the Member States has changed,¹¹⁹ the EU Parliament has more power than it used to have,¹²⁰ many EU legislative measures are now adopted on the basis of a legislative procedure involving the Parliament and approval by a majority of the Member States representing a majority of the EU population;¹²¹ and there is a broad range of EU level agencies.¹²² As a result of the prevalence of legislation by majority vote, Member States are bound by legislative measures they may not have agreed with. And there has been an increase in the number of EU level rules. Over time there is more and more harmonization of more aspects of the law in the EU Member States.¹²³

The combination of the supremacy or primacy of EU law, and a perception that decisions about legal rules and policy are increasingly taken by EU institutions rather than by national governments became a problem after the onset of the financial crisis. Citizens who tolerated centralization of decision-making when times were good were less happy with such centralization in times of crisis.¹²⁴ For example, the

¹¹⁹ See, e.g., Christopher Lord & Johannes Pollak, *Unequal but Democratic? Equality According to Karlsruhe*, 20 J. EUR. PUB. POL'Y 190 (2013);

¹²⁰ See, e.g., Moravcsik, supra note 71., at 179 (“the EU itself has not increased in popularity with the significant expansion in the powers of the EP over the past five years.”)

¹²¹ See, e.g., Charlotte Burns, Anne Rasmussen & Christine Reh, *Legislative Codecision and its Impact on the Political System of the European Union*, 20 J. EUR. PUB. POL'Y 941 (2013) (introducing a special issue on twenty years of legislative codecision in the European Union).

¹²² See, e.g., Morten Egeberg & Jarle Trondal, *Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?*, J. COMMON. MKT. STUD. 2017 pp. 1–16 DOI: 10.1111/jcms.12525.

¹²³ See, e.g., EU Commission Communication, *Upgrading the Single Market: More Opportunities for People and Business*, COM(2015) 550 final (Oct. 28, 2015) at 1 (“The European Commission that came into office in November 2014 is responding to these challenges. It has made increasing jobs, growth and investment its top priority and is pursuing it by deepening the Single Market across sectors and policy areas.”)

¹²⁴ See, e.g., Fabio Serricchio, Myrto Tsakatika & Lucia Quaglia, *Euroscpticism and the Global Financial Crisis*, 51 J. COMMON MKT. STUD. 51, 51 (2013) (“the crisis seems to have enhanced the role of public confidence in national

EU and the IMF imposed austerity measures on Greece as a condition of financial support, and these measures generated mass opposition in Greece.¹²⁵

The next section of the paper looks at how crises have affected the current situation of the EU.

4.0 Crisis and Responses to Crisis

Over the last decade the EU has faced a cascade of new crises, from the global financial crisis through the European sovereign debt crisis to a refugee crisis. The global financial crisis began in the US, rather than in the EU, and infected financial institutions and markets and ordinary people around the globe. The crisis stressed EU financial institutions and led Member States to bail out these financial institutions, which, in turn, stressed public finances.¹²⁶ Because EU capital adequacy rules did not force banks to distinguish between risky and less risky sovereign debt, EU banks continued to invest in riskier, and more profitable sovereign debt. This led to a serious problem of mutual dependence between banks and sovereigns, which some commentators described as a vicious circle.¹²⁷ This mutual dependence problem was particularly acute in the Eurozone,¹²⁸ and the developing crisis in the Eurozone

political institutions, and that of national identity, in accounting for Eurosceptic tendencies at the level of public opinion.”)

¹²⁵ See, e.g., Wolfgang Rüdig & Georgios Karyotis, *Who Protests in Greece? Mass Opposition to Austerity*, 44 BRITISH JOURNAL OF POLITICAL SCIENCE 487 (2014).

¹²⁶ See, e.g., Nicholas Dorn, *Regulatory Sloth and Activism in the Effervescence of Financial Crisis*, 33 L. & POLICY 428, 428 (2011) (“In 2010 it became clear that sovereign states, which had “bailed out” the banking sector, were themselves becoming targets of a mixture of speculation and genuine fears and uncertainties over their financial health”.)

¹²⁷ See, e.g., Ashoka Mody & Damiano Sandri, *The Eurozone Crisis: How Banks and Sovereigns Came to be Joined at the Hip*, 27 ECON. POL’Y 199 (2012); David Howarth & Lucia Quaglia, *THE POLITICAL ECONOMY OF EUROPEAN BANKING UNION* (2016).

¹²⁸ Mark Hallerberg, *Fiscal Federalism Reforms in the European Union and the Greek Crisis*, 12 EUR. UNION POL. 127, 128 (2011) (“The sovereign debt crisis in Greece in the spring of 2010 and, to a much lesser extent, in Ireland, Spain and Portugal seemed to change everything. It put significant pressure on the euro and on

demonstrated weaknesses in governance.¹²⁹ The problems in the Eurozone were especially significant as the idea of Economic and Monetary Union was so central to the idea of the ever closer union.¹³⁰ The EU's response to the financial crises involved an acceleration and intensification of harmonization. For example, before the financial crisis financial regulation was carried out by domestic regulators applying harmonized rules of financial regulation.¹³¹ After the crisis began the EU agreed to make the European Securities Market Authority (ESMA) responsible for regulating credit ratings under a new EU regulation,¹³² and ESMA was made responsible for controlling short selling.¹³³ To address the financial trilemma

the governance structures of the euro zone. It also made clear the degree to which all countries in the euro zone are connected to one another. Budget decisions in one of the smallest economies in the euro zone had implications for all countries that have the euro.”)

¹²⁹ See, e.g., OECD, *OECD Economic Surveys: Greece 2011*, 11 (2011) (“The dire economic situation was magnified by lost credibility as serious deficiencies in statistical monitoring of government accounts were exposed.”); Manos Matsaganis, *The Welfare State and the Crisis: The Case of Greece*, 21 *J. Eur. Soc. Pol.* 501, 501 (2011) (“The revised figures stunned public opinion at home and shocked markets abroad.”) Cf. Jones, Kelemen & Meunier, *supra* note 89; Luc Eyraud, Vitor Gaspar & Tigran Poghosyan, *Fiscal Politics in the Euro Area*, IMF Working Paper 17/18 (Jan. 30, 2017).

¹³⁰ See, e.g., Nicole Scicluna, *When Failure isn't Failure: European Union Constitutionalism after the Lisbon Treaty*, 50 *J. COMMON. MKT. STUD.* 441, 452 (2012) (“the very projects that were meant to unite European citizens and promote their common identity, such as the euro, are now straining transnational solidarity and producing a rise in nationalist and protectionist sentiments.”)

¹³¹ See, e.g., Niamh Moloney, *EU Financial Market Regulation after the Global Financial Crisis: More Europe or More Risks*, 47 *COMMON MKT. L. REV.* 1317, 1319 (2010) (noting the pre-crisis “mis-match between the pan-EU operations of some major banking groups and nationally-based supervision and resolution regimes.”)

¹³² See, e.g., Fabian Amttenbrink & Jakob de Haan, *Regulating Credit Ratings in the European Union: A Critical First Assessment of Regulation 1060/2009 on Credit Rating Agencies*, 46 *COMMON MKT. L. REV.* 1915 (2009).

¹³³ See, e.g., Valia Babis, *The Power to Ban Short-selling and Financial Stability: the Beginning of a New Era for EU Agencies?*, 73 *CAMBRIDGE L. J.* 266

affecting the Eurozone,¹³⁴ the EU established a European Banking Union for the eurozone in November 2014, introducing a system of centralized supervision of banks (but not of securities, insurance and pensions markets) for a subset of EU Member States.¹³⁵ The crises created changes in legal institutions and arrangements that would not otherwise have occurred.¹³⁶ The move towards centralization of financial regulation proceeded beyond banking with a proposal to establish an EU Capital Markets Union.¹³⁷ This proposal was not driven by the same urgent need to control risks as the Banking Union, but economic conditions seemed to present an opportunity to make new progress on ideas that had been around for some time.¹³⁸ The Capital Markets Action plan was related to the crises, as European bank weaknesses limited lending, making the development of more effective EU capital

(2014).

¹³⁴ Dirk Schoenmaker, *The Financial Trilemma*, 111 *Economics Letters* 57 (2011).

¹³⁵ See, e.g., David Howarth & Lucia Quaglia., *Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary Union*, 51(S1) *J.Common Mkt. Stud.* 103 (2013).

¹³⁶ See, e.g., Arjen Boin, Madalina Busuioc & Martijn Groenleer, *Building European Union Capacity to Manage Transboundary Crises: Network or Lead-agency Model?*, 8 *REGULATION & GOVERNANCE* 418, 419 (2014) (“Over the past two decades, the European Union (EU) has developed an array of crisis management mechanisms that facilitate transboundary coordination and cooperation. We might say that the EU has become a “policy laboratory” for transboundary crisis management.”)

¹³⁷ See EU Commission, *Building a Capital Markets Union*, COM (2015) 063 final (Feb. 18, 2015); EU Commission Communication, *Action Plan on Building a Capital Markets Union*, COM (2015) 468 final (Sep. 30, 2015).

¹³⁸ See, e.g., *Building a Capital Markets Union*, *supra* note [137](#), at 2 (“It is true that many of the issues at stake – insolvency and securities laws, tax treatments – have been discussed for many years. The need to make progress is, however, more pressing than ever. While this will be a long term project, requiring sustained effort over many years, that should not stop us making early progress.”)

markets a policy priority.¹³⁹ Unlike the Banking Union, the idea of the Capital Markets Union is to encourage, rather than to control, financial activity.¹⁴⁰ If the Capital Markets Union project was designed to reassure the UK that the EU was pro-market in order to encourage the UK to feel better about EU membership¹⁴¹ it failed to persuade UK citizens. The UK's Brexit vote in June 2016 threatened to undermine the achievement of the Capital Markets Union as the UK is the EU Member State with the most active capital markets,¹⁴² and the dominant capital markets regulator.¹⁴³ The Commission has been encouraging the Member States to move forward with the Capital Markets Union with a Communication published in September 2016, a year after the Action Plan,¹⁴⁴ and a new Consultation on Capital Markets Union in January

¹³⁹ See Action Plan on Building a Capital Markets Union, *supra* note [137](#), at 3 (“integrated financial and capital markets can help Member States, especially those inside the euro area, share the impact of shocks. By opening up a wider range of funding sources, it will help to share financial risks and mean that EU citizens and companies are less vulnerable to banking contractions. Furthermore, more developed equity markets, as opposed to increased indebtedness, allow for more investment over the long term.”)

¹⁴⁰ See, e.g., Nicholas Dorn, *Capital Cohabitation: EU Capital Markets Union as Public and Private Co-Regulation*, 11 CAPITAL MARKETS L. J. 84 (2016)

¹⁴¹ See, e.g., *id.* at 90.

¹⁴² See, e.g., TheCityUK, Key Facts about the UK as an International Financial Centre, 9 (Nov. 2016) (“A high proportion of EU financial market activity is concentrated in London and other cities in the UK, especially in wholesale markets such as foreign exchange and OTC derivatives trading and specialist markets such as hedge fund and marine insurance. More than half of European investment banking activity is conducted in the UK.”)

¹⁴³ See, e.g., Reza Moghadam, *How a Post-Brexit Redesign Can Save the Capital Markets Union*, FINANCIAL TIMES (Feb. 13, 2017) (“a regulatory splintering is also on the cards — with adverse implications for consistency and efficiency.”) Cf. André Sapir, Dirk Schoemaker & Nicolas Véron, Making the Best of Brexit for the EU27 Financial System, Bruegel Policy Brief Issue 1 (Feb. 2017).

¹⁴⁴ EU Commission Communication, Capital Markets Union - Accelerating Reform, COM (2016) 601 final (Sep. 14, 2016).

2017.¹⁴⁵

By the beginning of 2017 the financial crises no longer seem to be the most urgent crises that the EU faces, despite new worries about Italian banks,¹⁴⁶ and continuing concerns about Greece.¹⁴⁷ During 2015, more than a million people – refugees, displaced persons and other migrants – made their way to the EU.¹⁴⁸ In May 2015 the EU Commission developed a European Agenda on Migration, which stated:

We need to restore confidence in our ability to bring together European and national efforts to address migration, to meet our international and ethical obligations and to work together in an effective way, in accordance with the principles of solidarity and shared responsibility. No Member State can effectively address migration alone. It is clear that we need a new, more European approach. This requires using all policies and tools at our disposal – combining internal and external policies to best effect. All actors: Member States, EU institutions, International Organisations, civil society, local authorities and third countries need to work together to make a common European migration policy a reality.¹⁴⁹

The EU entered into an agreement with Turkey whereby Turkey would act to prevent migrants from moving to Greece, and to address the problem of migrants dying in transit.¹⁵⁰ The agreement did succeed in limiting migration into the EU from the

¹⁴⁵ EU Commission, Consultation Document, Capital Markets Union Mid-term Review 2017 (Jan. 20, 2017).

¹⁴⁶ See, e.g., Andreas (Andy) Jobst & Anke Weber, Profitability and Balance Sheet Repair of Italian Banks, IMF Working Paper WP/16/175 (Aug. 2016).

¹⁴⁷ See, e.g., 2016 Article II Consultation—Press Release; Staff Report; and Statement by the Executive Director for Greece, IMF Country Report No. 17/40 (Feb. 2017).

¹⁴⁸ See, e.g., Phillip Connor, Number of Refugees to Europe Surges to Record 1.3 Million in 2015, Pew Research Center (Aug. 2016).

¹⁴⁹ EU Commission Communication, A European Agenda on Migration, COM (2015) 240 final (May 13, 2015).

¹⁵⁰ Cf. International Organization for Migration, *Mediterranean Migrant Arrivals Reach 12,381; Deaths: 272* (Feb. 17, 2017).

middle east.¹⁵¹ But the agreement also compromised the EU's ability to criticize Turkey for its own violations of the rule of law. The EU also found financing to support the identification of migrants who did reach Greece,¹⁵² and also for food and shelter.¹⁵³ But some Member States were more willing than others to accept some of the migrants who succeeded in getting to Greece. In July 2016 the Commission proposed an EU Resettlement Framework to establish a common European policy on resettlement to ensure orderly and safe pathways to Europe for persons in need of international protection.¹⁵⁴ The proposal made an appeal to an idea of solidarity among Member States, aiming to share responsibility for protection of refugees among EU Member States fairly, so that the burden of protecting refugees did not fall on states at the edges of the EU,¹⁵⁵ that had already suffered more than northern EU Member States from the financial crises.¹⁵⁶ Newspapers reported stories of Germans opening up their homes to migrants.¹⁵⁷ But official data on relocations of refugees

¹⁵¹ See, e.g., Frontex, Annual Risk Analysis 2017, 6 (2017).

¹⁵² See, e.g., EU Commission, Press Release, Commission Provides Additional Support for Fingerprinting of Migrants in Greece (Jan. 13, 2016).

¹⁵³ See, e.g., EU Commission, Press Release, EU Provides €83 Million to Improve Conditions for Refugees in Greece (Apr. 19, 2016).

¹⁵⁴ EU Commission, Proposal for a Regulation Establishing a Union Resettlement Framework, COM(2016) 468 final (Jul. 13, 2016).

¹⁵⁵ *Id.* at 3 (“the proposal aims to: provide a common approach to safe and legal arrival in the Union for third-country nationals in need of international protection, thus also protecting them from exploitation by migrant smuggling networks and endangering their lives in trying to reach Europe; help reduce the pressure of spontaneous arrivals on the Member States' asylum systems; enable the sharing of the protection responsibility with countries to which or within which a large number of persons in need of international protection has been displaced and help alleviate the pressure on those countries; provide a common Union contribution to global resettlement efforts.”)

¹⁵⁶ See, e.g. Lillian M. Langford, *The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity*, 26 HARV. HUMAN RIGHTS J. 217, 217 (2013).

¹⁵⁷ See, e.g., Luke Harding, Philip Oltermann & Nicholas Watt, Refugees Welcome? How UK and Germany Compare on Migration, *The Guardian* (Sep. 2,

show that progress is slow.¹⁵⁸ And the issue of migration and the need for protection of refugees has collided with concerns about security after terrorist attacks in European cities.¹⁵⁹ Whether or not the EU has dealt effectively with its financial crises, the EU had powers with respect to the single market and the Eurozone and some level of common agreement that something needed to be done. Although critics challenged some of the EU's responses to the financial crises as going beyond its powers,¹⁶⁰ or as using intergovernmental rather than Community methods, the EU did act to calm the financial crises. But the EU's acceptance of austerity as a response to the crisis arguably intensified citizen discomfort with the EU as a project that favoured elites.¹⁶¹ And the refugee crisis helped to nourish a wave of populism in the

2015) (“Thousands of ordinary Germans have volunteered to help the refugees now arriving daily. Some have filled up their cars with shopping, and distributed clothes, nappies, food and cuddly bears. Others have offered German lessons, translation and babysitting.”) *See also, e.g.*, <http://net.fluechtlinge-willkommen.de/> .

¹⁵⁸ *See, e.g.*, EU Commission Communication, Ninth Report on Relocation and Resettlement, COM(2017) 74 final (Feb. 8, 2017) at 3 (“After the adoption of the 8th Report, the Commission called bilaterally on almost all Member States to increase their efforts to meet the targets. Already active Member States and Associated Countries reacted positively and communicated to the Commission their planning for monthly pledges. However, the picture is disappointing with certain other Member States. Hungary, Austria and Poland remain the only Member States that have not relocated anyone. Slovakia continues relocating on a very limited basis and the Czech Republic has not pledged since May 2016 and has not relocated anyone since August 2016.”)

¹⁵⁹ *See, e.g.*, Proposal for a Directive on Combating Terrorism, COM (2015) 625 final (Dec. 2, 2015) at 3 (“The existing rules need to be aligned taking into account the changing terrorist threat Europe is facing. This includes adequate criminal law provisions addressing the foreign terrorist fighter phenomenon and risks related to the travel to third countries to engage in terrorist activities but also the increased threats from perpetrators who remain within Europe.”)

¹⁶⁰ *See, e.g.*, Claes & Reestman, *supra* note [87](#); Babis, *supra* note [133](#).

¹⁶¹ *See, e.g.*, Sarah B. Hobolt, *The Brexit Vote: a Divided Nation, a Divided Continent*, 23 J. EUR. PUB. POL'Y 1259, 1260 (2016) (“many voters across Europe see the EU as part of the problem rather than the solution when it comes to protecting ordinary citizens from the challenges of an ever more globalized and integrated world.”) And see also *e.g. id.* at 1263-4 (“the Leave side successfully mobilized not only salient concerns about immigration but also anti-establishment attitudes,

EU that seems to have affected the UK Brexit vote and to be affecting elections in other EU Member States.¹⁶²

The next section of this paper looks at the current tension in the EU and beyond between technocratic, evidence-based policy-making and democratic governance.

5.0 Technocratic vs Political Governance

Although the European Economic Community always had a Parliament, the Parliament originally had limited powers and was not directly elected by citizens.¹⁶³ The Parliament's powers increased over time, but the intergovernmental aspects of the EU remain significant.¹⁶⁴ And, although European citizens elect Members of the European Parliament, voter turnout for these elections tends to be low.¹⁶⁵ Many

portraying the vote as a chance for ordinary citizens to 'take back control' from the elites in Brussels.”)

¹⁶² Opposition to immigration was one of the major motivators of votes to leave the EU. *See, e.g., id.* at 1263 (“the two key arguments that resonate more with Remain voters than with Leave voters relate to the economy, specifically the loss of economic stability in the event of Brexit and the economic benefits of EU membership, while Leave voters highlight mainly concerns about immigration as expressed by one respondent: ‘Immigrants flooding into the country if we don’t regain control of our own borders.’”) *Cf. Cigdem Kentmen-Cin & Cengiz Erisen, Anti-immigration Attitudes and the Opposition to European Integration: a Critical Assessment*, 18 EUROPEAN UNION POLITICS 3 (2017).

¹⁶³ *See, e.g., Eric Stein, The European Parliamentary Assembly: Techniques of Emerging "Political Control,"* 13 INT’L ORG. 233, 233 (1959) (“the European Parliamentary Assembly is far from being a parliament.”)

¹⁶⁴ *See, e.g., Sergio Fabbrini, Intergovernmentalism in the European Union. A Comparative Federalism Perspective,* 24 J. EUR. PUB. POL’Y 580, 581 (2017) (“In the new policies, the Commission has come to play an implementing rather than decision-making role, whereas the EP has been downsized in its influence and power.”)

¹⁶⁵ *See, e.g., European Parliament / Results of the 2014 European Elections at <http://www.europarl.europa.eu/elections2014-results/en/turnout.html>* (visited Apr. 13, 2017).

commentators have critiqued the democratic deficit in Europe,¹⁶⁶ and others have argued for thinking about justifying Europe on the basis of output legitimacy.¹⁶⁷ They argued that the legitimacy of the EU could be assessed based on what it did, as much as on how it did what it did.¹⁶⁸ Assessing what the EU has done is a complex and highly technical exercise, and involves experts rather than citizens. Citizens with higher levels of education are more likely to be receptive to arguments based on expertise and so it is not surprising that more highly educated citizens have more positive views of the EU than less educated citizens.¹⁶⁹

However, failures of technocratic policy-making worry even those who may generally be inclined to accept technocratic justifications for policy decisions. The financial crisis and responses to the crisis have raised issues about the effectiveness of policy-making, in the EU and in other parts of the world, especially with respect to financial regulation. The pre-financial crisis paradigm of financial regulation was one in which technocratic regulators acknowledged and deferred to the expertise of market actors in identifying and controlling risk.¹⁷⁰ But investigations of the financial crisis identified deregulation and excessive faith in mathematical models as an

¹⁶⁶ See, e.g., Joseph H.H. Weiler, Ulrich Haltern & Franz Mayer, *European Democracy and its Critique: Five Uneasy Pieces*, EUI Working Paper RSC No. 95/11 (1995). Cf. Hening, *supra* note 55, at 130 ("However, it is legitimacy and not democracy which is the critical operating condition for integration. It follows that at least part of the debate over the future role of the European Parliament has been in a false context. Even on the assumption that the granting of more powers to that body is equivalent to making the Community more democratic, the act of doing this may contribute little towards making the institutions legitimate.")

¹⁶⁷ See, e.g., Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. Common Mkt. Stud. 603 (2002).

¹⁶⁸ Cf. Andreas Follesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: a Response to Majone and Moravcsik*, 44 J. Common Mkt. Stud. 533 (2006).

¹⁶⁹ See, e.g., Hobolt, *supra* note 161, at 1265.

¹⁷⁰ See, e.g., Caroline Bradley, *Changing Perceptions of Systemic Risk in Financial Regulation*, in Pablo Iglesias-Rodriguez, Anna Triandafyllidou & Ruby Gropas (Eds.), *AFTER THE FINANCIAL CRISIS: SHIFTING LEGAL, ECONOMIC AND POLITICAL PARADIGMS* (2016).

important cause of the crisis.¹⁷¹ This was not just an issue for the EU: domestic policy-makers in EU states and elsewhere adopted the deregulatory, risk-management paradigm of financial regulation that helped to generate the crisis, but EU institutions also participated in these developments. And, since the financial crisis there are reasons to continue to doubt whether financial regulation in the EU and elsewhere is as effective as it needs to be: for example, financial institutions have been targets of enforcement actions relating to manipulation of benchmarks and failures of compliance.¹⁷² Meanwhile, the EU's Capital Markets Union proposal, which emphasizes the need to break down barriers, both in national law and in the EU's prospectus rules,¹⁷³ demonstrates an openness to the idea that financial regulation should not impede the financing of business. The Commission argues that the EU Capital Markets Union is important because of ongoing weaknesses in EU banking markets since the financial crisis.¹⁷⁴ In most EU Member States banking has been more important as a source of funding for business activity than capital markets.¹⁷⁵ The UK, which now plans to leave the EU, is a major exception.¹⁷⁶ So,

¹⁷¹ See, e.g., Brooksley Born, *Deregulation: A Major Cause of the Financial Crisis*, 5 HARV. L. & POL'Y REV. 231 (2011); Ross Levine, *The Governance of Financial Regulation: Reform Lessons from the Recent Crisis*, 12 INT'L REV. FIN. 39 (2012).; Financial Services Authority, *The Turner Review: A Regulatory Response to the Global Banking Crisis*, 22 (Mar. 2009).

¹⁷² See, e.g., New York State Department of Financial Services, In the Matter of Deutsche Bank AG and Deutsche Bank AG New York Branch Consent Order under New York Banking Law §§ 39, 44 and 44-a (“this Consent Order addresses serious compliance deficiencies identified in the Department's investigation that spanned Deutsche Bank's global enterprise. These flaws allowed a corrupt group of bank traders and offshore entities to improperly and covertly transfer more than \$10 billion out of Russia, by conscripting Deutsche Bank operations in Moscow, London and New York to their improper purpose.”)

¹⁷³ EU Commission Communication, *Action Plan on Building a Capital Markets Union*, COM (2015) 0468 final (Sep. 30, 2015).

¹⁷⁴ See, e.g., EU Commission, Consultation Document: Capital Markets Union Mid-Term Review 2017 (Jan. 2017) at 4 (The EU economy needs bigger and better capital markets to help break its reliance on bank lending and diversify its sources of funding.”)

¹⁷⁵ See, e.g., International Monetary Fund, European Union: Financial Sector Assessment Program, Technical Note on European Securities and Markets Authority,

although the Capital Markets Union documents suggest a need to balance facilitation of markets with regulation,¹⁷⁷ there are reasons to be concerned that EU policy-makers may focus more on encouraging the EU capital markets to develop than on ensuring the necessary level of regulation of those markets.¹⁷⁸

If the crisis itself led citizens to be skeptical of the EU as an effective policy-making entity, the EU's response to the financial crisis did not help. The EU's response to the crisis increased the EU's democratic deficit.¹⁷⁹ Moreover, austerity, imposed on countries like Greece,¹⁸⁰ or adopted voluntarily as in the UK,¹⁸¹ burdened

IMF Country Report No. 13/69 (Mar. 2013) at 6 (“The EU financial systems are mostly bank-based.”) at 4 (“Europe has a shortage of risk capital for small, early-stage growing businesses. This is holding back the development of high-growth sectors such as technology which are essential for economic competitiveness. While sources of capital such as crowdfunding and business angels are becoming more accessible, the EU is still at a significant disadvantage to the United States.”)

¹⁷⁶ See, e.g., William Wright, Julio Suarez, Paul McGhee & Laurence Bax, *The Benefits of Capital Markets to High-potential EU Economies* (Nov. 2016) available at <https://www.afme.eu/globalassets/downloads/publications/afme-new-financial-report-benefits-of-capital-markets-to-high-potential-eu-economies.pdf> at 6.

¹⁷⁷ Capital Markets Union Mid-Term Review 2017, supra note 174, at 14 (“There is a need to ensure that the regulatory framework strikes an appropriate balance between enabling the development of FinTech on a pan-EU basis and ensuring confidence for investors.”)

¹⁷⁸ CF. AFME, *The Shortage of Risk Capital for Europe's High Growth Businesses* (Mar. 2017) available at <https://www.afme.eu/globalassets/downloads/publications/afme-highgrowth-2017.pdf>

¹⁷⁹ See, e.g., Giandomenico Majone, *From Regulatory State to a Democratic Default*, 52 J COMMON MKT. STUD. 1216 (2014).

¹⁸⁰ See, e.g., Sofia Vasilopoulou, Daphne Halikiopoulou & Theofanis Exadaktylos, *Greece in Crisis: Austerity, Populism and the Politics of Blame*, 52 J COMMON MKT. STUD 388, 388 (2014)..

¹⁸¹ See, e.g., HM Treasury, *Budget 2010*, HC 61 (Jun. 22, 2010) at 1 (“The most urgent task facing this country is to implement an accelerated plan to reduce the deficit. Reducing the deficit is a necessary precondition for sustained economic

the more vulnerable members of European societies.¹⁸² Such circumstances can lead citizens to become politically engaged in new ways,¹⁸³ or to see political issues in new ways.¹⁸⁴ This does not mean that citizens will become interested in the technical details of complex policy areas such as financial regulation, although some commentators argue that the defects of technocratic policy-making require more democratic input.¹⁸⁵ But whether or not citizens get involved in technical policy details, when they are invited to express their views in elections or referenda their actions raise questions about the future of the European project. Brexit is one obvious example of this sort of development.

The current tension between populist politics, which tends to discount

growth. To continue with the existing fiscal plans would put the recovery at risk, given the scale of the challenge. High levels of debt also put an unfair burden on future generations.”); Michael Kitson, Ron Martin & Peter Tyler, *The Geographies of Austerity*, 4 C.A.M.B. J. REGIONS, ECON. & SOC. 289, 294 (2011) (“In the UK, “the Conservative-Liberal Democrat coalition government announced the biggest cuts in state spending since World War II. Savings estimated at about £83bn are to be made over four years. The plan is to cut 490,000 public sector jobs. Most Whitehall departments face budget cuts of 19% on average”.”) Cf. Dawn Holland & Jonathan Portes, *Self-Defeating Austerity?*, 222:1 National Institute Economic Review F4 (2012).

¹⁸² See, e.g., Ulrich Beck, *Why ‘Class’ Is Too Soft a Category to Capture the Explosiveness of Social Inequality at the Beginning Of the Twenty-first Century*, 64 BRIT. J. SOCIOLOG. 68 (2013) (“The risks posed by big banks are being socialized by the state and imposed on retirees through austerity dictates.”)

¹⁸³ Cf. McDonald, *supra* note 51, at 54 (“the economic models that informed the market, and the political science models that have informed moments of institutional optimism, have not been models in which *people* have figured other than as ciphers embodying an ideal rationality that the model-makers themselves construct. Real post-1970s people have burst onto the scene in elections and referenda, however, sending EC officials diving for cover until their optimism could be re-stoked.”)

¹⁸⁴ See, e.g., Alexia Katsanidou & Simon Otjes, *How the European Debt Crisis Reshaped National Political Space: the Case of Greece*, 17 EUR. UNION POL. 262 (2016).

¹⁸⁵ See, e.g., Marija Bartl, *Contesting Austerity: On the Limits of EU Knowledge Governance*, 44 J.L. & SOC. 150 (2017).

complex thinking and to be suspicious of detailed evidence, and the technocratic policy-making processes characteristic of the neoliberal economic order is apparent in the UK, but also in the US.¹⁸⁶ During the campaign leading up to the Brexit referendum, Michael Gove, then the UK's Justice Secretary, said that "people in this country have had enough of experts".¹⁸⁷ And, since the Brexit referendum, increasing evidence that it will be difficult for the UK to negotiate terms for Brexit that would give the UK Leave voters what they seem to have wanted,¹⁸⁸ does not seem to have diminished the calls for Brexit.¹⁸⁹ Voters who feel that the global economy has been managed in ways that disadvantage them have turned to politicians who claim to oppose existing arrangements for international trade. In France, presidential candidate Marine Le Pen has argued that France should leave the eurozone.¹⁹⁰ Supporters of free trade have attempted to respond with arguments that

¹⁸⁶ See, e.g., Nye, *supra* note 20.

¹⁸⁷ See, e.g., Henry Mance, *Britain Has Had Enough of Experts, Says Gove*, Financial Times (Jun. 3, 2016) at <https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c>; Frasier Nelson, *Michael Gove Was (Accidentally) Right about Experts*, The Spectator (Jan 14, 2017) at <https://www.spectator.co.uk/2017/01/michael-gove-was-accidentally-right-about-experts/#>.

¹⁸⁸ See, e.g., Chris Giles, *Brexit Will Damage UK Standards of Living, Say Economists*, Financial Times (Apr. 16, 2017) at <https://www.ft.com/content/dc62922a-204b-11e7-a454-ab04428977f9>; Monica Langella & Alan Manning, *Who Voted Leave?*, CentrePiece Autumn 2016 at <http://cep.lse.ac.uk/pubs/download/cp479.pdf>; Aditya Aney, Alberto Gallo, Pablo Morenes & Tao Pan, *Brexit Could Be the Best Thing That Happened to the European Union*, (Apr. 12, 2017) at <https://www.weforum.org/agenda/2017/04/brexit-european-union-negotiations>.

¹⁸⁹ Theresa May, the UK Prime Minister, has been determined that Brexit means Brexit, and notified the EU of the UK's intention to leave the EU in March 2017. See Prime Minister's Letter to Donald Tusk Triggering Article 50 (Mar. 29, 2017) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

¹⁹⁰ See, e.g., Jean Tirole, *Ideas of Protectionism or Ditching the Euro Stalk the French Vote*, Financial Times (Apr. 13, 2017) at

the problem is not the fact of free trade but rather how politicians respond to the effects of free trade.¹⁹¹ The European Union has attempted to navigate for many years this balance between free trade and protecting citizens as workers and consumers and beneficiaries of fundamental rights. But the financial crisis, the response to the crisis and the refugee crisis combined to produce stresses that the EU institutions have had difficulty addressing effectively.

6.0 Conclusions

The EU Commission commemorated the 60th anniversary of the signing of the Treaty of Rome by publishing a White Paper on the Future of Europe.¹⁹² The White Paper begins by quoting Robert Schumann's idea that "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity."¹⁹³ Recent developments raise questions about the state of European solidarity. The UK's Brexit vote is a new example of what has been a recurrent feature of the UK's relationship with the rest of Europe over the last 60 years.¹⁹⁴ But questions about the relationship between the Member States and the EU have also been raised in elections in other Member States, even in France, one of the original six Member States. And these questions are part of a broader willingness to challenge neoliberalism¹⁹⁵

Many factors have contributed to the EU's current existential crisis, but the crisis raises a fundamental question: what good is transnational governance if it can't protect citizens from the transmission of risks across borders, whether those risks are

<https://www.ft.com/content/8d5887d2-1f8a-11e7-b7d3-163f5a7f229c> .

¹⁹¹ See, e.g., IMF, World Bank, WTO, Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment (Mar. 2017).

¹⁹² EU Commission, White Paper on the Future of Europe, COM(2017)2025 (Mar. 1, 2017).

¹⁹³ *Id.* at 4, and see also *supra* note [32](#).

¹⁹⁴ Cf. Daddow, *supra* note [19](#) at 214 ("Europe has always been constructed and perceived as a 'choice' for the British who can apparently be 'in' or 'out' of Europe and more often than not 'semi-detached' from it. These tensions indicate Britain's unresolved identity as a truly European nation")

¹⁹⁵ See, e.g., Nye, *supra* note [20](#).

financial, or related to climate change or disease, or produced by conflict in other parts of the world. And this question raise a further set of questions about what institutional arrangements for multilevel governance arrangements or quasi-federal structures might be sufficiently resilient to adapt to the sorts of changing circumstances and crises that the world is likely to face in the near future.