Getting out from under those judges?
What Brexit conflicts over the Court of Justice reflect about British and EU politics

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Abstract
Brexit negotiations involve contestation about the European Court of Justice (ECJ). The UK government accepted its jurisdiction during the transitional period and agreed that British judges shall (1) take "due regard" of ECJ rulings and (2) enjoy access to interpretive clarification for eight years after Brexit concerning EU citizenship. Hard Brexiteers lament both concessions, and the government insists that jurisdiction must end, British judges can enforce EU citizen rights, and new institutions will resolve future UK-EU disputes. The EU demands regulatory convergence within the Single Market, and it rejects separate treatment of free movement for goods, capital, services, and people. These demands involve the ECJ, which enforces EU law and interprets the meaning and scope of the four freedoms. During the referendum campaign, Leave supporters assailed "meddling courts" as encroachments on sovereignty and democracy. Remain supporters who defended the ECJ, including Theresa May in her referendum speech, made complex arguments about why the ECJ is tolerable, at least in contrast to the European Court of Human Rights (ECtHR).

Why is there so much acrimony about the ECJ? Is it all "much ado about nothing"? Or does the conflict signify something significant? I argue that controversies about rights and responsibilities, and who gets the last word, are serious, even if national actors often minimize the impact of ECJ decisions. Resentments about judicially expanded "social" rights are prevalent across wealthier states, and the range and number of voices clamoring to "curb the Court" have grown significantly since the early 1990s. If the UK exits the EU, ending the free movement of people and ECJ jurisdiction over all but future trade relations as the government's current proposals seek, Brexit will constitute the first EU crisis producing a break-down in the EU order, or "spillback" in the language of integration theory.

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Introduction

EU crisis and the Court of Justice

The European Court of Justice (ECJ) engages multiple crises in the European Union (EU), including those concerning the Eurozone, democratic backsliding, migration, and Brexit. For example, it issued a preliminary ruling upholding the legality of the European Central Bank's (ECB) Outright Monetary Transactions (OMT) program (ECJ 16 June 2015) – a confidence restoring mechanism during the Eurozone crisis – despite the risk of inviting open defiance from the German Federal Constitutional Court, whose first ever reference boldly questioned the EU legality and German constitutionality of the program (Hinarejos 2015). The German court's acceptance of the ECJ's decision dodged a potentially destabilizing showdown over the authority to interpret EU law and the ability of EU institutions to deploy tools (Payandeh 2017) that relied on the most economically powerful member state: Germany.

In infringement proceedings brought by the European Commission, the ECJ must determine whether Hungarian and Polish reforms concerning courts, public agencies, news media, universities, and civil society organizations violate EU law in a context where observers consider Hungary and Poland to be in clear defiance of fundamental values concerning the rule of law and democracy under Article 2 of the Treaty on European Union (TEU) (Kelemen and Orenstein 2016, Kelemen 2017, Blauberger and Kelemen 2017). Discretion over prosecution in these cases, however, has blunted the impact of judicial enforcement as the Commission deploys narrow legal bases such as directives associated with the single market, rather than fundamental civil and political rights, and settles cases in the wake of symbolic compliance that involves formal legal changes and ongoing practical violations (Batory 2016). Relying primarily on the willingness of national judges to refer disputes from private parties and the Commission to

litigate infringements for its docket,[1] the ECJ can be insulated from sensitive disputes. The lack of these filters in the case of the European Court of Human Rights (ECtHR) helps account for the dramatic rise in (1) applications alleging human rights violations and (2) pending cases against Hungary between 2010 and 2016, when Viktor Orban's Fidesz government began deconstructing liberal democracy (Bozóki and Hegedus 2018). As a result, the ECtHR may bear the brunt of backlash from challenging illiberal, anti-democratic, and abusive behavior in these wayward regimes.

Meanwhile disputes over the migration crisis have reached and are currently headed for the ECJ. In response to a reference from the Belgian Council for asylum and immigration proceedings, the Court of Justice ruled that EU law did not require a member state's embassy abroad to grant visas to a Syrian family hoping to apply for asylum in Belgium, although it remained welcome to do so under national law (ECJ 7 March 2017). Deferring to the Belgian Immigration Office in this case skirted what would have been an explosive choice: Enabling the large majority of Syrians displaced abroad to seek access to asylum via European embassies within neighboring states (Lebanon, Jordan, Turkey), obviating the need for the treacherous journey across the Mediterranean, would have dramatically increased refugee inflows when the EU was working to limit them.[2] Yet the infringement case the Commission is pursuing against Hungary, Poland, and the Czech Republic's refusal to admit refugees in a EU relocation scheme designed to reduce the concentration of refugees in front-line states such as Greece and Italy

[1] Private parties can initiate direct actions of their own in response to EU acts that directly target them, e.g. a firm contesting a fine or other penalty for a Commission-determined violation of EU competition law, but these challenges are typically not among the more politically controversial and first reach the General Court and may be appealed to the ECJ.

[2] The Syrian family lodged their applications for humanitarian visas on 12 October 2016, more than six months after the EU negotiated its March 2016 deal with Turkey to reduce irregular migration into Greece after the unprecedented surges during the summer and fall of 2015.

(BBC 7 December 2017) will have no easy solution. Siding with the Commission will infuriate these Visegrad states that have led opposition to any redistribution of refugees among states, and is likely to result in overt defiance, while relieving countries of any obligations to help with the refugee crisis will infuriate Italy's nationalist government which insists on a more equitable sharing of responsibility toward refugees arriving on its shores. The Commission may spare the ECJ of this lose-lose proposition in the migration crisis by backing away from its prosecution, as political solutions focus on securing the EU's external border (Deutsche Welle 28 and 29 June 2018).[3]

By contrast, Brexit poses the most immediate, fundamental crisis for both the EU and Court of Justice. Frank Schimmelfennig defines crisis in European integration to include situations with a significant probability of disintegration (2017), which involves a reduction in the existing level, scope, or membership of integration (Leuffen, Rittberger, and Schimmelfennig 2013). Even if the United Kingdom (UK) negotiates the softest Brexit by falling back to the European Economic Area (EEA) and remaining within both the Single Market and Customs Union, this reduces the level and scope of integration it currently experiences as an EU member.[4] British withdrawal from the EU on any terms under Article 50 of the Lisbon Treaty will be the first major act of disintegration that the EU has ever encountered, and the government's current White Paper proposes a substantially more disintegrated future relationship, where only existing arrangements for trade in goods, as well as state aid provisions, might persist. The proposal

[3] Italy generated pressure by refusing to allow ships carrying rescued migrants to dock in Italian ports, risking a humanitarian disaster, and then threatened to block any agreement at the European Council meeting unless the EU Council agreed to measures to alleviate Italian responsibility for the disproportionate share of migrants reaching its shores (Pundy 2018 and Deutsche Welle 28 June 2018).

[4] Primarily to the UK's disadvantage as it would lose voting rights as a member, although it would be able to extend its range of opt-outs to reduce the level and scope of integration further than it already has with its existing, exceptional extent of opt-outs.

removes the UK from the Common Agricultural and Fisheries Policies; the Customs Union; free movement of services, capital, and people; and pointedly, ends the jurisdiction of the ECJ in the UK (Department for Exiting the European Union 2018).

If the future relationship between the UK and EU bears any resemblance to the British proposals of July 2018, it will involve three types of disintegration discussed by Douglas Webber (2017): Horizontal, as the number of EU members declines; Vertical, as the competence of the EU's supranational institutions (such as the ECJ) over the British government in its EU arrangements declines; and Sectoral, as the number of issue areas for which common policies exist for UK-EU relations declines.

Finally, UK withdrawal from the EU and the British government's demand to end ECJ jurisdiction both fit John Ikenberry's definition of crisis as "an extraordinary moment when the existence and viability of the political order are called into question" (2008, 3). Despite the centrality of the Franco-German partnership historically and the increasing self-isolation of the UK within the EU in recent times (Webber 2017), the withdrawal of one of the three most economically and militarily powerful member states constitutes a seismic shift in the EU's political order generally. More specifically for the purposes of this paper, the demand to end ECJ jurisdiction questions the institutional order that has resolved legal disputes involving EU law for the UK for nearly half a century. It also fits the extra-ordinary form of resistance to international courts classified as "backlash" by Madsen, Cebulak, and Wiesbusch, where fundamental change affects structures in contrast to the "pushback" associated with ordinary criticism (2018). This would even be the case if the UK opted for the "Norway model" within the EEA since the European Free Trade Area (EFTA) Court exercises jurisdiction over only three non-EU EEA members (Iceland, Liechtenstein, and Norway) and interprets EU law on the single market, but it

does not cover common policies in the fields of agriculture, fisheries, taxation, foreign policy, and currency. Moreover, although the EFTA Court usually follows ECJ case law to promote the uniform application of single market provisions across the entire EEA (including the EU-28), it has also "gone its own way" on "essential questions of European single market law" (Baudenbacher 2017). Institutionally, the EFTA Court is independent of and significantly different from the ECJ: unlike the Court of Justice, the EFTA Court has not recognized the principles of direct effect and supremacy, national courts of last instance have no formal obligation to make references to it, and its "advisory opinions" in response to references are not formally binding on the referring court (EFTA Court 2018, Baudenbacher 2017). These institutional differences are reasons why even UK government proposals and some British eurosceptics consider the UK becoming a party to EEA institutions without being a full member of the EEA – "docking into" the EFTA Court – as a potentially viable alternative form of dispute resolution for future UK-EU agreements (Wright 2018). If the UK instead successfully negotiates entirely new dispute resolution mechanisms with the EU, or if it "crashes" out of the EU without any deal on its future relationship at all, the institutional order between the EU and EU will be even more fundamentally transformed. No other "exits" from the EU seem plausible, but this does not mean that the ECJ's role in the Brexit crisis has no broader implications for the EU. Resentments that fueled the popular vote to "leave" the EU exist across the EU, and British grievances about the role of the ECJ generally and the content of its case law specifically are shared by several other wealthy western member states.

Theories, Brexit, and the British aversion to the ECJ: Who explains what's happened?

The Brexit referendum result shocked the UK government, EU, and most informed observers, despite repeated occurrences of negative EU referendum results in other countries.

Longstanding neofunctionalist and liberal intergovernmentalist theories have difficulty explaining both why the Brexit backlash occurred and why "getting out from under the ECJ" is among the few "red lines" of the UK government in EU negotiations, along with ending free movement of persons and EU membership fees. Predicting ongoing spillovers to the ever closer union, neofunctionalism and related approaches such as transactionalism and historical institutionalism, with their one-way ratchets toward further integration and sticky path-dependency given sunk costs, preclude Brexit and the end of ECJ jurisdiction over the UK's affairs with the EU. Neofunctionalist accounts of legal integration describe a world that no longer exists, where the ECJ insulates itself from the intrusion of politics through the "mask and shield" of legal reasoning and the relationships it cultivates with legal professionals who serve the beneficiaries of integration (Burley and Mattli 1993). Even though it overtly engages politics, liberal intergovernmentalism's emphasis on the dominant role of governments and organized economic interests from society in managing the challenges of economic interdependence (Moravcsik 1998) misses the central source of the Brexit shock: public opinion and voters. Although the British cabinet was split, the then Prime Minister, David Cameron, and his Secretaries of State leading the most powerful ministries campaigned to Remain.[5] Despite deep divisions in the Conservative party, the majority of members of Parliament from both parties preferred to remain in the EU. Organized business, and the dominant financial sector of the British economy, moreover, were also strong Remain supporters. Somehow, inexplicably, the decisive agents of liberal intergovernmentalism lost control.[6]

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[5] The Chancellor of the Exchequer (George Osborne), Foreign Secretary (Philip Hammond), and Home Secretary (Theresa May) all sided with Remain. The most prominent Cabinet member to break ranks for Leave was the then Justice Secretary Michael Gove.

[6] Even if we grant the concession that political elites are not infallible, the only "save" for liberal intergovernmentalism is Brexit not happening at all, or less convincingly a very soft Brexit that

Traditional intergovernmentalism was more sensitive to both states' insistence to retain sovereignty over key areas and the consequences of the absence of a "European people" capable of replacing nationalist passions (Hoffmann 1966, 175), exemplified most colorfully by Charles de Gaulle when he predicted that "a united Europe could not … be a fusion of its peoples" and derided the notion that nationals from the original member states could become "fellow citizens of an artificial motherland" as "make believe" (De Gaulle 1971, 34, 37). The UK's historic efforts to oppose federalizing impulses and opt out of the Schengen zone and monetary union fit comfortably within Stanley Hoffmann's expectations of a state reserving core areas of "high politics" for itself, and the rejection of EU membership by a majority of UK voters is a clear manifestation of Hoffmann's observation that "there has been no transfer of allegiance" to European institutions (1966, 175). Hoffmann also anticipated that functional integration might not satisfy "bigger powers" such as the UK and that failed federations provoke succession (1966, 171-72 and 176). Cameron's reckless gamble with a referendum that could threaten British economic interests so seriously fits Hoffmann's acknowledgement of "political muddling through, of the kind that puts immediate advantages above long-term pursuits" (1966, 174). Yet Hoffmann argued it was a mistake to believe that any political regime not conforming to the "sorry image" of the French Fourth Republic would behave in this short-sighted way (1966, 174). In a parliamentary system that concentrates power in the hands of a government with the majority of seats in the House of Commons, Cameron's miscalculation had no excuse within intergovernmentalist theorizing.

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accommodates organized economic interests and the UK's interests in an ongoing close partnership with the EU. But to the extent that a soft Brexit costs the UK its voting rights, this no longer makes sense in this theory, particularly not in order to pander to mass popular opinion.

By contrast, more recently developed integration theories offer compelling accounts of the current predicament concerning Brexit and the ECJ. With his actor-centered institutionalism, Fritz Scharpf argues that the (de facto unanimous) intergovernmental consensus necessary for new EU agreements impedes the EU's ability to respond promptly and effectively to emerging challenges, rendering EU policy increasingly dysfunctional over time. Moreover, any imposed solutions by supranational institutions such as the European Central Bank and ECJ risk being perceived as democratically illegitimate, which is exacerbated by the lack of a strong common European identity (Scharpf 2006). Substantively, ECJ enforcement of liberal EU treaties, while the EU's "legislator" remains mired in disagreements, leads negative integration to outpace positive integration in ways that threaten popular national social systems (Scharpf 2010).

Observing the EU's market bias as among the longstanding critiques from the left, postfunctionalists Liesbet Hooghe and Gary Marks then explain how the post-1990 extension of European integration into areas more closely associated with state sovereignty and national identity – particularly monetary union and EU citizenship – mobilized opposition from the right and generally resulted in mass politicization of integration for the first time in history (2008). Inspired to explain the puzzle of failed EU referendums and the transformation from a popular "permissive consensus" on integration into a "constraining dissensus," Hooghe and Marks tell a story of polarization and cross-cutting pressures within the traditionally pro-integration mainstream parties of Western Europe. They find that identity can become decisive in shaping outcomes when economic forces are opaque (such as the benefits of free trade for consumers), political leaders draw connections between cultural and/or economic insecurities and issues such as EU enlargement (typical of far-right parties), and the venue of decision-making involves mass organizations rather than specialized interests (referendum/election versus most lobbying of

elected representatives). Identity is most salient when it is exclusive, and although Hooghe and Marks saw no clear trends in survey data across the EU over time (2008, 12), cross-nationally, the British are exceptional. The UK is the only member state in which the highest percentage of respondents identify as their "own nationality only" in every Eurobarometer survey between 1992 and 2018, and the percentage of "own nationality only" is the majority position (rather than just the plurality) in nearly all of these surveys. More typically, the highest percentage of respondents in most member states fluctuates between "own nationality only" and "own nationality and European" with the inclusive dual identity becoming the increasingly most common choice in recent years (European Commission 2018a).[7] Charting the percentage of respondents who identify "only with their own nationality" graphically illustrates the extent to which the British are outliers relative to their geopolitical and accession peers (Figure 1), accession candidates for the 1995 enlargement (Figure 2), the newest member states and Turkey (Figure 3), and all other member states where a majority of respondents identified as their "own nationality only" at least once (Figures 4 and 5). Only the Norwegians match the British for their sense of exclusive nationality in one of the few surveys they took back in 1993 (Figure 2), and only exclusive Turkish national identity significantly exceeds all others in Turkey's sole survey from 2005 (Figure 5).[8] Hooghe and Mark's discussions of the impact of exclusive national identity, the clash between nationalism and neoliberalism in the British Conservative party since

[7] Member states where the highest percentages of respondents identify inclusively as both their "own nationality and European" across all 25 surveys include France, Luxembourg, Malta, Poland, Slovakia, and Spain (European Commission 2018a).

[8] I have excluded data from surveys taken in October 1998 given a lack of data for Germany and the UK, November 2015 given a lack of UK data, and October 2004 due to obvious irregularities in all data for that survey: percentages across the response categories only add to about 50 percent, and all states' percentages identifying with their "own nationality only" are substantially lower than surveys surrounding October 2004. Even in this anomalous survey, however, a plurality of British voters still selected the "British only" option.

the Maastricht era, and the danger of partisan disunity read like a prophetic warning a decade before the referendum. The rising popularity of the far-right United Kingdom Independence Party (UKIP) under the charismatic leadership of Nigel Farage and the decision of several prominent Conservative Leave campaigners' to join UKIP in nationalist, anti-immigrant rhetoric (Glencross 2016, 37), helped create the perfect postfunctionalist storm for the Brexit result and ongoing contestation over the UK's future relationship with the EU within the Conservative government.

The referendum victory of the Leave campaign, with its criticism of EU membership fees, unlimited intra-EU migration, burdensome regulation, and meddling courts corresponds to the government's red lines in Brexit negotiations: the UK will leave the single market and customs union[9] and end both the free movement of persons and ECJ jurisdiction over the UK. This hard Brexit rhetoric masks significant tension within the Conservative cabinet, however, and in Parliament more generally, where many of the highest-level ministers[10] and the majority of MPs want to maximize British access to the single market, a substantial number see remaining in the customs union as potentially necessary to avoid a hard border with Ireland, and many want to maximize rights for resident EU citizens' in the UK and keep the labor market open to EU workers after Brexit. Yet no one champions the Court of Justice,[11] even while the government tolerates its temporary post-Brexit jurisdiction over the UK as a necessary evil of maintaining

[9] Thereby freeing it of the need to pay EU membership fees and follow all EU law and enabling it to pursue independent trade deals with other countries, which Leave campaigners pitched as more promising than being tied to the EU's common trade policy.

[10] After the July 2018 resignation of Leave cheerleader Boris Johnson as Foreign Secretary, and his replacement with Jeremy Hunt, all of the most powerful ministries are once again led by Remain campaigners: Philip Hammond as Chancellor of the Exchequer and Sajid Javid as Home Secretary (previously Amber Rudd).

[11] By no one, I mean no elected politicians. A large chorus of scholars and lawyers views the Court of Justice as the hero of integration and European citizens.

membership benefits for the transitional/implementation period and a potentially more longstanding role in regulating the free movement of goods. In the next section of the paper that draws on scholarship focusing on the ECJ, I will explain why the UK wants out from under that Court, but has nonetheless agreed to a limited degree of ECJ influence going forward.

Breach of contract? Why the ECJ generates political resistance

After decades of scholarship lauding the ECJ for its role as the engine of European integration (Stein 1981, Weiler 1991, Alter 2001, Stone Sweet 2004, Cichowski 2007, Wind 2009, Kelemen 2011), more critical voices have emerged in recent years.[12] The fact that the ECJ offers an escape from the dysfunctional EU legislative process (Falkner 2011) is no cause for celebration to its critics. Turning approving arguments about the creation of a supranational constitution on their head, Richard Bellamy argues that independent international courts and constitutionalized case law remove policy options from elected representatives (2007).[13] Susanne Schmidt leveled the most comprehensive critique of the ECJ, following Grimm (2015) in explaining how the direct effect and supremacy of EU treaties "over-constitutionalize" the EU legal order in a way that narrows policy choices and threatens democratic legitimacy. By applying legal solutions first developed to promote the free movement of goods to the free movement of workers and then persons, and by expanding EU citizenship rights, the ECJ created controversial mandates to which national governments never agreed in EU primary (treaties) or secondary law (regulations and directives). Resentments about these unanticipated obligations

[12] With the exception of a large normative legal literature including contributions by Europeans who praise ECJ jurisprudence, the laudatory accounts of the ECJ's political role in the EU primarily derive from US contributors, who Gordon Silverstein argues are exceptionally attracted to judicial resolution of political disputes (2009). An early, exceptional critic of the ECJ's role in integration includes the Danish scholar Hjalte Rasmussen (1986).

[13] See also Scharpf 2016 for a parallel argument justifying de-constitutionalization as a democratic imperative for the EU.

then fuels radical resistance to the EU generally (Schmidt 2018) and the ECJ specifically (Kelemen 2016). Far from engaging in some minor interstitial interpretation to "complete the contract" of general legislation, the Court of Justice instead breached the contracts member states made with each other in EU treaties, regulations, and directives.

The constitutionalizing rulings declaring the direct effect and supremacy of EU law were themselves ECJ inventions long contested by national supreme courts (Slaughter, Stone Sweet, and Weiler 1998), whose challenges still resurface (Komárek 2013; Dyevre 2016, 107-108; Madsen, Olsen, and Sadl 2017) and inspire normative justification from constitutional pluralists (Krisch 2010, Avbelj and Komáreck 2012, Berman 2012). National judges in Nordic and Central/East European states refer disproportionately few cases to the ECJ for preliminary rulings that interpret EU law, shielding their governments from individual efforts to enforce EU rights directly against potentially incompatible state policies (Bobek 2008, Wind 2010). British judges also refrained from referring disputes to avoid ECJ interference in domestic policy (Golub 1996) and remain unusually reluctant to engage the ECJ, making only 63 percent as many references for preliminary rulings as French judges and only 27 percent as many as German judges (Rabkin 2016, 95).[14] Marlene Wind attributes such judicial reticence to majoritarian political culture in countries such as Denmark, Sweden, and the UK, where judicial/constitutional review to overturn legislation does not exist domestically (2010). Indeed, it appears to have been so alien to the British that Parliamentary debates about the UK's adoption of the European Communities Act 1972 – years after the ECJ declared the direct effect and

[14] British figures are disproportionate to population: the UK has more people (65,648,100) than metropolitan France (62,814,233), and the UK population constitutes 81 percent of the German population (80,594,017) (Central Intelligence Agency 2016-2017).

supremacy of EU law – show essentially no understanding that the future of parliamentary sovereignty was at stake (Nicol 2001).[15]

The functional logic for the direct effect and supremacy of EU law may be compelling, since member states could otherwise free themselves from all agreed rules through new national legislation. However, the deployment of these doctrines to expand rights and obligations far beyond the letter of the law in substantive areas is not logically necessary and can be expected to generate political resistance. Scholars disagree about the extent to which the ECJ is responsive to member state preferences, but a substantial contingent argue that it is a strategic actor that seeks to avoid unacceptable rulings that would provoke (1) override through treaty revision or legislative correction or (2) pervasive non-compliance. Early variants of this position claimed that the ECJ secured consent by ruling in favor of the most powerful member states (Garrett 1992), which could not be empirically substantiated. More nuanced arguments followed, where others examined member state interventions before the Court of Justice quantitatively and found that the number of member states voicing opposition or support influence the rulings (Carruba, Gabel, and Hankla 2008 and 2012; Larsson and Naurin 2016). Historical accounts of the early period of integration demonstrate that the ECJ was aware of strong national preferences and tried to make rulings that member states could tolerate (Pollack 2013). A qualitative case study of social policy case law on the health care sector found that the Court narrows unwelcome legal principles to limit the negative practical impact of controversial decisions, simplifying

[15] Although Nicol shows that the British government understood the implications of the ECJ's constitutionalizing case law but opted not to clue in MPs the few times that any asked a question in this direction. To be fair, however, the French Conseil d'État rejected the ECJ's supremacy decision until 1989 and other national courts questioned the direct effect of directives as framework legislation that required national transposition to take any effect. It is plausible that the UK government in 1972 reasonably expected that constitutionalization of EU law might be flexible.

implementation and increasing member state compliance (Obermaier 2008). Another quantitative analysis found that the ECJ's political responsiveness varies over time and peaks in years coinciding with treaty revisions and in the three months prior to the formal signature of a treaty revision, presumed to be a strategic effort to avoid irritating national governments when they are best positioned to rollback, maintain, or expand the Court's future jurisdiction or substantive rulings (Castro-Montero et al 2017). Exasperated with such judicial political sensitivity, a legal scholar chastised the ECJ for upholding a restrictive British social provision that was under attack for nationality discrimination in an infringement proceeding only nine days before the Brexit referendum. Assailing the judgment as part of a trend to dismantle EU citizenship rights, Charlotte O'Brien argues that the "ECJ has played politics and lost," thereby sacrificing "the last vestige of EU citizenship on the altar of the UK's nativist tendencies" (2017, 209). Growing ranks of legal scholars agree that the Court recently shifted toward a more restrictive interpretation of EU citizen rights (Shuibhne 2015, Thym 2015, Verschueren 2015, O'Brien 2016, Sadl and Madsen 2016),[16] which a team of political scientists attribute to its responsiveness to politicization and shifting public debates (Blauberger et al 2018).

Several other scholars reject these arguments on the grounds that the unanimous consent and domestic ratification procedures for treaty revision are too difficult to pose credible threats to judicial independence (Pollack 1997, Alter 1998, Mattli and Slaughter 1998, Scharpf 2010, Höpner and Schäfer 2012, Kelemen 2012, Voeten 2013, Davies 2016). The difficulty of treaty revision then renders override through legislative correction (potentially) futile, given that (over)

[16] Sadl and Madsen find the greatest continuity in the preservation of core citizenship rights for mobile EU citizens with significant "social and economic capital," but they also see more deference to national courts generally and to member states on grounds related to security and public policy, more restrictions on the rights of third-country family members of EU citizens, and stricter rules about what "sufficient resources" means for the purpose of residence rights.

constitutionalization enables the ECJ to reassert its preferences by declaring "politically corrective" secondary legislation incompatible with the treaty (Davies 2014, Schmidt 2018). Some contest the evidence in strategic studies and assert that no significant instances of override exist and noncompliance does not weaken the ECJ (Stone Sweet and Brunell 2012). Exhibiting the typical faith of legal scholars in the logic of the law, Gareth Davies claims that the restrictive turn in EU citizenship rights results from the emergence of less deserving litigants (2018).[17]

Evidence of overrides in all forms of EU law and non-compliance reflect a more nuanced picture of judicial politics than either side of this debate typically asserts. Moreover, studies that compare areas of law, or focus on particular areas of law, illuminate more starkly that the ECJ has been both politically sensitive and tone deaf, and that it has been overridden and defied in ways that deprive some of its legal declarations of any meaningful practical impact. As the most definitive means to curtail the Court, treaty change deserves close attention in three respects. First, treaty revisions that react negatively to past ECJ rulings are rare, but they exist. The Barber and Grogan Protocols to the Maastricht Treaty did not overturn judgments, but they circumscribed their potential impact, clearly communicating the limits of political toleration (Curtin 1992; Garrett, Kelemen, and Schultz 1998). In the Amsterdam Treaty, Article 141 (4) overrode the ECJ's 1995 *Kalanke* ruling that had rejected a German affirmative action measure (Conant 2002, 235). The rarity of these events fails to settle the debate since it could result from either a politically strategic court or the difficulty of attaining unanimous consent. Denying their significance, however, is folly, as they addressed, respectively, changes in the age to qualify for

[17] Portraying especially Trojani or even Brey as more deserving than Alimanovic, and casting Sala as more deserving than Dano requires a thick lens of white, male, and/or Christian privilege. The only unambiguously more deserving litigant that Davies discusses is Baumbast, who was economically active abroad and possessed sufficient resources to support a family (2018). That the Court sees through these lenses of racial, gender, and religious privilege would not be surprising, given its demographic composition (Gill and Jensen 2018).

full pensions, abortion policy, and efforts to combat sex discrimination, all of which are salient to ordinary people and the first had potentially dire fiscal consequences for public pension schemes.

Second, while member states have never removed a competence that the ECJ already enjoyed, member states have repeatedly excluded or limited ECJ jurisdiction for particular new areas of cooperation from the Maastricht to Lisbon treaties. Most importantly for the enforcement of individual rights, the exclusion of Justice and Home Affairs from ECJ jurisdiction in Maastricht has only been partially eroded over time, as member states negotiated partial opt-ins and continuing opt-outs in subsequent treaties. The typical mechanism of decentralized EU law enforcement through national courts is truncated since only courts of last instance may refer disputes to the ECJ for preliminary rulings concerning asylum and immigration, and member states can decide to allow or forbid references from lower courts in areas related to policing and judicial cooperation (Due 1998, Conant 2002). Reserving references for courts of last instance is a significant constraint on access to justice since it forces parties to appeal through the national judicial hierarchy and then requires cooperation from the judges who are least likely to make references in most states, despite their formal obligation to refer disputes concerning the interpretation of EU law. Despite net gains overtime, the ECJ had its authority over Article 7 TEU[18] limited to reviewing procedural requirements and it continues to be largely excluded from the Common Foreign and Security Policy (Barents 2010).

Third, discussions and proposals to introduce mechanisms to curb the Court reflect the more politicized context in which the Court has been operating since the 1990s. The informal British proposal to overturn ECJ rulings through qualified majority vote in the Council of Ministers (Garrett, Kelemen, and Schulz 1998) foreshadowed Scharpf's more recent arguments

[18] The provision under which the Council may suspend a member state's voting rights for violations of democratic values and fundamental rights.

that states feeling too constrained by a ruling be able to subject its recognition to support from a majority of governments in the European Council (2009 and 2010). European Parliament debates indicate that threats to eliminate the right of lower courts to make references to the ECJ repeatedly surfaced in reform proposals of the early 1990s (European Union 14 September 1993), and limits on references characterize ECJ jurisdiction for what became new, highly sensitive competences (see above). In its official proposals to the 1996 Intergovernmental Conference, the UK called for an appeals procedure within the ECJ, an expedited procedure for important references for preliminary rulings, and a Council competence to initiate proceedings to correct judicial interpretations of regulations and directives, which would eliminate the need for a proposal by the European Commission, but preserve voting rules for the adoption of the proposed amendment (UK 1996, 2-16). These proposals sought more voice for national governments in the process of legal integration, and Schmidt now emphasizes how the exclusive right of the European Commission to propose all new EU legislation ratchets up integration because its role as guardian of the treaties leads it to privilege the Court's expansive interpretations of the treaties over member states' explicit words in secondary legislation (2018). Parallel ideas for legislative overrides from a neoliberal, Conservative British government in the mid-1990s[19] and a pair of progressive German academics in contemporary times suggest that Luxembourg has a problem. The ECJ has unified not only the mainstream right and left in ire, but also those from opposing poles of the majoritarian versus constitutional democracy divide.

Meanwhile, legislative overrides in EU secondary law happen, and despite the constitutional opportunity for 'judicial revenge,' the ECJ did not strike them down as incompatible with the treaties. Explicit regulatory reversals of rulings are rare, but as with treaty

[19] Not to mention the current British demand to end ECJ jurisdiction in the UK after Brexit.

revision, they concern disputes over salient social policies affecting individual rights. The Council adopted an amending regulation in 1980 in order to overrule an ECJ judgment and reassert national control over access to cross-border health care, a restrictive approach later affirmed by both the Council and European Parliament in the patient rights directive (Martinsen 2015, 227). In response to a series of judgments expanding access to non-contributory social benefits, member states acted unanimously in the Council to overturn the Court's more generous approach with another amending regulation in 1992 (Conant 2002, 193; Martinsen 2015, 227).

More commonly, both EU and national legislative resistance to unwelcome ECJ rulings takes the form of what has been labeled "restrictive application as policy" and "preemption" (Conant 2002, 32-33), "modification" (Martinsen 2015, 36), or "compensatory measures" (Schmidt 2018, 209-211) all of which entail legislation to limit the full impact of judicial interpretation in order to make it more politically tolerable.[20] Examples include a broader array of policy areas including the balance between mutual recognition and regulatory harmonization, liberalization of electricity provision and air transport, posting of workers, collective bargaining, rights of EU citizens, and cross-border health care. Usually successful at the EU level, this strategy has enjoyed variable success when deployed unilaterally by national governments in domestic law (Conant 2002, 194-195; Blauberger 2012, Schmidt 2018, 209-210). Moreover, the ECJ has occasionally failed to take the hint for a long time, chipping away at obvious restrictions in the letter of EU law until opposition becomes loud and widespread (Blauberger et al 2018). Expansive interpretations of rights associated with the free movement of workers and their extension to "persons" in the advent of EU citizenship have been particularly controversial

[20] The opposite situation involves "codification" (Martinsen 2015 and Schmidt 2018) or Conant's "complete application as policy" (2002) where legislation confirms ECJ case law comprehensively, which Martinsen shows is likely only in highly specific, technical, or apolitical legal issues (2015, 226).

(Schmidt 2012 and 2014, Blauberger and Schmidt 2014 and 2017), which will be discussed further below.

Given the difficulty in passing EU legislation, innovative case law is often met with legislative gridlock, the "non-adoption" of broader regulatory guidelines, and legal uncertainty about how principles developed for specific disputes apply more generally (Martinsen 2015, Schmidt 2018). Obedience to this creative case law is possible (Blauberger 2014; Schmidt 2018, 211), but more typically confusion about implementation and "pushback" prevails. Schmidt observes that "the sheer complexity of the regulatory framework, which is driven by case law, is actually resulting in 'dis-unity', as national administrations and EU citizens will make sense of and practice the complicated legal regime in very different ways" (2018, 243). This lack of uniformity offers opportunities for national governments to avoid unacceptable policies, which reduces the risk of backlash against the ECJ (Conant 2002, Martinsen 2015, Werner 2016), but it also results in inconsistencies that amount to unequal treatment under the law (Schmidt 2018). Commission prosecution of questionable choices by national administrations can result in formal infringement proceedings. Yet in the contentious cases that make it all the way to adjudication, compliance with ECJ judgements is delayed in half of all cases and seriously resisted in another ten percent (Hofmann 2018, 12).[21] Even more cases are closed in the wake of symbolic compliance or payment of some fines (Kilbey 2010, Batory 2016), despite ongoing defiance, most often to protect important constituencies or avoid costly implementation measures (Falkner 2015).

Decentralized enforcement through national courts directly applying EU law is unlikely to yield significantly different outcomes than infringement proceedings. Even if national courts

[21] A case study focusing on German social and environmental policy infringements also found the same 50 percent compliance rate within two years of ECJ judgments (Panke 2007, 851).

that refer questions to the ECJ usually comply with its preliminary rulings (Nyikos 2003), they include preemptory opinions in about half of their references, signaling what the ECJ should decide (Nyikos 2006; Leijon 2015). More importantly, references constitute a small fraction of EU law cases before national courts (Mayoral 2013, Hübner 2017, Pollack 2017). National judges in France, Germany, and the UK (Conant 2002, 190) and Denmark, Norway, and Sweden (Wind 2018, 336) demonstrate a clear preference for independence: they all cite treaties, conventions, EU legislation much more frequently than rulings from the European courts responsible for interpreting these texts authoritatively. Existing studies of national judicial interpretation indicate that outcomes vary dramatically across courts and often diverge substantially from existing ECJ case law. Early studies found that British judges systematically refused to overturn national provisions that were incompatible with EU law (Chalmers 2000), German and French judges independently interpreted EU law in ways that contradicted ECJ rulings (Conant 2002, 173 and 209-210, and Spanish judges gave precedence to national case law when it conflicted with ECJ jurisprudence (Ramos Romeu 2006). Such resistance continues, with more recent studies finding that national courts enjoy significant discretion in their application of EU law (Davies 2012, Schmidt 2018, 219-224); national high courts across twenty-five EU member states failed to enforce EU law in a majority of cases (Mayoral 2015); and French, German, and Italian courts did not enforce the EU Race Equality Directive a decade after its adoption (Hermanin 2012).

To the extent that legal ambiguities persist and national administrations do not anticipate rigorous (national or European) judicial enforcement of EU law, governments are free to evade onerous implications of ECJ interpretations. My early research found that national administrators routinely “contain compliance” with unwelcome ECJ obligations by obeying the judgment with

respect to the parties to the case and ignoring the broader policy ramifications for similar situations unless legal or political mobilization generated pressures for more general application (Conant 2002). A growing literature confirms that such narrow forms of compliance (Helfer 2013) and other forms of evasion characterize many areas of attempted ECJ intervention, with several studies reinforcing the finding that domestic administrative and political responses to ECJ principles determine their practical impact. Controversial judicial efforts to subjugate national labor relations to the free movement of services in the single market from the mid-2000s achieved their intended effects in Sweden and the UK but fell flat in Denmark, Germany, and Italy, owing to different constellations of interests and structures (literature reviewed in Hofmann 2018) or intransigent national courts (Perinetto 2012). Member states contested ECJ expansions of eligibility for social benefits and residence rights to migrating EU and third-country nationals long before these issues attracted mass attention, and national administrations consistently demonstrated their ability to limit access in practice (Conant 2002, 2006).

Equal treatment, migration, and the absence of European solidarity

Persistent official resistance is striking considering that few workers took advantage of their free movement rights historically, with the exception of mass Italian migration in the early days of integration (Straubhaar 1988, Conant 2004). Eastern enlargement transformed this situation after 2004 as Ireland, Sweden, and the UK immediately accepted workers from the new member states, and opportunities for firms to post workers in countries imposing the seven-year delay in free movement rights led to elevated levels of de facto labor migration in countries such as Germany (Schmidt 2018, 210, 216). Mass migration from new member states promptly ensued, with the UK receiving nearly 500,000 Eastern migrants by 2006 rather than the 26,000 Tony Blair's government had expected (Drew and Sriskandarajah 2007), but the surge should not

have been surprising in light of enormous differentials in average hourly wages (Schmidt 2018, 210).[22] Suddenly, the judicially constructed social rights of EU citizenship captured the popular imagination (Blauberger and Schmidt 2014) as acutely elevated levels of intra-EU migration emerged for the first time in nearly 40 years.

Despite all the acrimony over "welfare migration" or "benefits tourism," Austria and Germany succeed in denying EU citizens access to minimum subsistence benefits (Heindlmaier and Blauberger 2017), the UK deploys mass administrative procedures (rather than required individual assessments) to exclude claimants from eligibility (Blauberger and Schmidt 2017), and Denmark and the Netherlands creatively "quarantine" mobile EU citizens from benefits coverage (Kramer, Sampson, and Van Hooren 2018). In cross-border health care, Danish courts insulated the national system from ECJ principles until prolonged pressure from the Ombudsman resulted in legislative reform while the Spanish legislature ignored its national courts' efforts to apply EU law (Martinsen and Mayoral 2017). Poland adopted EU requirements on cross-border care in legislation, but administrative practices remain restrictive and national courts usually look the other way (Vasev, Vrangbaek, and Krepelka (2017), displaying a pattern of formal legal change with no implementation that is common in post-communist democracies (Falkner and Treib 2008, Conant 2014). An in-depth case study of Danish welfare utilization reveals that local administrators follow the more restrictive provisions of EU secondary law rather than the more expansive eligibility declared by the ECJ, enabling Denmark to limit residence rights to EU citizens who provide for themselves and grant full benefits only after a substantial work history (Martinsen, Pons Rotger, and Thierry 2018).

[22] Average wages per hour were 4.74 euro in Poland in comparison to 26.90 euro in Germany. Even though UK wages are not as high as those in Germany, they are much closer to German than Polish rates, and are boosted by "in-work benefits" designed to encourage welfare recipients to work (Glencross 2016, 31).

Given the success of states in patrolling welfare provision, it is not surprising that existing research examining the fiscal impact of intra-EU migration exposes the notion of any "welfare burden" as a myth. In both the UK and Denmark, EU migrants make net fiscal contributions to public coffers rather than exerting a net drain on them (Alfano, Dustmann, and Frattini 2016; Martinsen and Pons Roger 2017). This is consistent with the general paucity of cross-national redistribution in the EU, where only .75 percent of its total economic output gets redistributed in the form of agricultural and cohesion policy. Postfunctionalists argue that the potential for "redistribution is throttled in Europe" as a result of cultural diversity, where citizens are "loathe to redistribute income to individuals who are not perceived to belong to the same community" (Hooghe and Marks 2008, 15). By contrast, relatively small and homogeneous societies' shared sense of fate and greater willingness to sacrifice for collective welfare – such as Scandinavian countries – are associated with redistribution that reaches approximately 33 percent of gross domestic product (GDP) (Kenworthy and Pontusson 2005).[23] In the EU, intense frustration develops even when states face obligations to extend equal treatment to culturally very similar EU citizens: Austria and Belgium oppose the free movement of German and French university students in coveted programs of study including medicine and veterinary sciences (de Witte 2012).[24]

All of the evasion and recent controversy surrounding social and residence rights for EU citizens indicates that the ECJ pushed member states and their publics beyond the limits of

[23] In their account, only non-democratic regimes have achieved major redistributions when communities were highly heterogeneous.

[24] The ECJ's lack of regard for the interest of Austria and Belgium to regulate the inflow of students from France and Germany, which operate highly selective admissions procedures for these fields while Austria and Belgium do not, and which have significantly larger populations able to "study abroad" in these countries while using their native languages, fails to recognize the complete lack of reciprocity in cross-national demand for very expensive educational programs.

toleration. Even if national administrations excel at getting out from under unwelcome judicial dictates, they may still resent the convoluted efforts this requires (Schmidt 2018). It is telling that Cameron sought to reduce newly arriving EU citizens' access to social benefits as part of his effort to negotiate a new deal for the UK prior to the Brexit referendum, and that the limited concessions the EU granted failed to placate the Leave majority who wanted to restrict the right of EU citizens to immigrate (Glencross 2016, 26-33). It is implausible to read the EU's resistance to rolling back welfare entitlement or refusal to limit intra-EU migration as indications of generous European solidarity. Instead, they reflect rigidities of EU negotiations among 28 member states with distinct interests. While Poland rejected demands to exclude its citizens working abroad from equal treatment with nationals in their host states, Germany refused to consider quantitative restrictions on intra-EU migration (Glencross 2016, 29). Considering that only Ireland, Sweden, and the UK immediately welcomed EU workers from new member states in 2004, eschewing the seven-year transitional period that the other twelve EU member states imposed, the UK is neither uniquely nor exceptionally averse to intra-EU migration. It did experience an acute, large, and unanticipated surge of in-migration from Poland and other Central/East European member states. Other member states that encountered sudden, large numbers of immigrants arriving irregularly in the refugee crisis also recoiled in response, and the EU now focuses on means to stem this inflow rather than accept it without quantitative restrictions.

A closer look at ECJ responsiveness to member state preferences reveals that the judges listen most carefully to national governments who confirm the judicial bias of advancing European integration. Olof Larsson and Daniel Naurin found that the impact of member state observations supporting "more Europe" before the ECJ was four times greater than the effect of

those hoping to maintain more domestic control (2016, 398). Cross-sectorally, they show that rulings were much less likely to respect state views concerning the free movement of workers than other policy areas (Larsson and Naurin 2016, 396). National governments preferring more autonomy in this domain is consistent with aversion to robust intra-EU mobility in all but "sending" EU member states. Finally, the Court was more attuned to national preferences in areas with qualified majority voting (QMV), purportedly acting in its strategic interest to avoid override since QMV would make it easier to overturn judgments with new EU legislation (Larsson and Naurin 2016, 401).

Paradoxically, however, this renders the ECJ most politically obtuse in the most sensitive areas: those where member states cared so deeply that they insisted on unanimous voting to preserve their veto over EU legislation. Taxation and social security/social protection are among the five policy domains that remain subject to unanimity after the Lisbon Treaty (EU 2018). Disputes about free movement of workers/persons often relate to eligibility for social provisions, many of which derive funding from general taxation in several of the member states most annoyed by the ECJ's citizenship jurisprudence, including notably, the UK. And if all of this were not bad enough, Larsson and Naurin also found that the UK voiced interventions in more cases than any other member state (2016, 392). Although the British often join the "more Europe" contingent in disputes over competition policy and the free movement of goods, services, and capital, they were also ring leaders in two political corrections (the Barber protocol and re-instating restrictions on special non-contributory benefits) and have been the most adamant supporter of efforts to exert more political control over the ECJ.[25] Meanwhile, all "political corrections" of judgments relate to social policy (three treaty revisions and two

[25] The UK also spearheaded the 2012 Brighton Declaration's agenda to reign in the ECtHR (Madsen 2016).

legislative overrides), and reference rights to the ECJ remain restricted to national courts of last instance in areas concerning asylum and immigration. Finally, despite member states' early and consistent opposition to expansive interpretation of social citizenship and their effort to modify rights in a restrictive direction in the Citizenship Directive 2004/38, it took another decade before the ECJ reversed course with its *Dano* judgment of 2014 (Blauberger et al 2018). Blauberger and his team interpret the trajectory of events as an indicator that the Court responds to the public mood rather than to government threats (2018). Yet elected governments are likely to possess a relative advantage over judges in predicting public reactions to developments, and heeding their warnings might have been a wiser course than waiting to respond until rulings on social entitlements became salient and inflamed increasingly hostile attitudes concerning immigration.

Politicians misread the public mood as well, but they must correct course more quickly than judges to keep their jobs. If David Cameron spectacularly misjudged the Brexit referendum generally, and mistakenly thought fiddling with EU citizens' social welfare entitlements would be sufficient to reduce animosity toward unlimited EU migration, his successor took the hint. In the final days of Brexit campaigning, the then Home Secretary Theresa May, along with another Remain campaigner, Yvette Cooper, claimed that there could be new talks about EU migrant quotas after a vote to remain (Glencross 2016, 33). Since becoming Prime Minister in July of 2016, May has held fast to the red line of ending free movement of persons. Even while she has progressively granted concessions to extend rights for resident EU citizens, May insists on regaining autonomy to regulate new EU migration after the transitional/implementation period ends on 31 December 2020. Analysts expect that the UK will pay a high price for future control over EU immigration. Economically, the best-case scenario is either remaining an EU member

state or achieving a three-way free trade deal with the EU and US, which appears unlikely under the protectionist Trump administration and EU intransigence about the indivisibility of the single market, while continued membership in the single market and customs union minimizes the costs of EU withdrawal, and a no-deal Brexit results in a British economic contraction of 4.9 percent by 2029 (Ahmed 2017). The government's current White Paper, which tolerates ongoing EU regulatory and judicial authority to maintain free trade in goods, while giving up many of its freedoms to provide (financial) services across the EU, is a classic "EU" compromise that is not economically rational but instead serves salient political interests, such as avoiding a hard border with Ireland and ending the free movement of EU citizens. Given the contributions of labor market expansion to British economic growth, some estimates expect that any actual achievement of reduced immigration will be the largest source of economic damage from Brexit (*Economist* 2017). Sacrificing so much only makes sense if unfettered EU immigration is a "third rail" leading to imminent political disaster.

The peculiar relative position of EU citizenship in the UK helps explain both the referendum outcome and the evolution in Theresa May's positions on the ECJ. A bitter fact of Brexit is that the UK disenfranchised those most directly affected by it: (1) EU citizens living in the UK[26] and (2) British citizens living abroad (even if in the EU) for over 15 years were all denied the right to vote in the EU membership referendum (UK 2017, Johnston and White 2017).[27] Numbering approximately 2.9 million, 2.15 million of whom work and were presumably old enough to vote, the population of resident EU citizens could have swung the result to "Remain" (BBC 8 July 2016), which trailed "Leave" by only 1,269,501 votes (BBC 24

[26] Unless they were Irish (331,000), Cypriot, or Maltese, all of whom were entitled to vote.
[27] While approximately 1.2 million UK citizens live in another EU state, only 264,000 overseas voters were registered in December 2016 (BBC 8 July 2016, Johnston and White 2017).

June 2016). By contrast, the right of resident Commonwealth citizens – from Antigua and Barbuda to Zimbabwe – to vote (UK 2017) implies that an imperial sense of belonging remains stronger than European identification. Even if this pattern of enfranchisement is an archaic legal relic, which never attracted scrutiny for reform, British public opinion is distinctive in its relative lack of differentiation in attitudes toward EU immigrants and those from third countries. A Eurobarometer survey taken during the Brexit referendum campaign shows that the British do not hold the most negative attitudes toward immigrants from other EU countries, but they have one of the narrowest spreads in attitudes about EU and third-country immigrants. Only the Swedish share such a small attitudinal difference, but in a context where only a minority of Swedes have negative views of both populations in contrast to the approximately half of British respondents with negative impressions (See Table 1). Given the relatively dim popular view of immigrants in the UK, no matter their origin, it makes little political sense for a prime minister to privilege migration for EU citizens over anyone else.

Despite supporting "Remain" during the referendum, Theresa May's campaign speech comparing the relative costs and benefits of British membership in the EU and other international organizations displays a typically British utilitarian and eurosceptic orientation (Glencross 2016) that grants no special deference to European affiliations. Following the Conservative Manifesto of 2015, May argued that the UK should leave the European Convention on Human Rights (the Convention) and the jurisdiction of the ECtHR rather than the EU because it was the Convention and ECtHR that constrained British sovereignty in unacceptable ways that left the UK less secure and no more prosperous (Conservatives 2015, May 2016). As a long-serving Home Secretary, she emphasized how the ECtHR and its de facto position as a final appeals court prevented and delayed extraditions and deportations of foreign criminals and terror suspects while EU

mechanisms such as the European Arrest Warrant and various data sharing arrangements simplified efforts to combat crime and improve national security, in addition to including beneficial economic linkages. Declaring herself "no fan" of many rulings by the Court of Justice, she indicated her awareness of the opportunities that the EU legal system offers to evade unwelcome judicial interpretations by noting that the ECJ has no role as a final appeals court and no powers to issue orders (May 2016). Her distinction between the two European Courts betrays how the ECtHR exercises complete discretion in accepting individual applications that invariably demand that a national (often supreme) court decision be overturned, while the ECJ relies nearly entirely on the discretion of the European Commission and the cooperation of national courts to develop and enforce its case law.[28] Once the UK voted to leave the EU and May succeeded Cameron as prime minister, she has pursued Leave voters' demands to end free movement of persons and negotiated to minimize future ECJ jurisdiction as much as possible.

Since the ECJ specifically confers rights on mobile EU citizens that others do not enjoy, May's limited toleration of its authority in disputes over EU citizenship in the "Withdrawal Agreement" continues this political logic. In this text, UK courts shall merely take (1) "due regard" of CJEU decisions and (2) maintain access to a mechanism for interpretive clarification for only eight years (European Commission 2017a).[29] Due regard requires fair consideration of all the facts, but it is not direct effect, which requires enforcement.[30] Acquiring dual citizenship will be a wise insurance policy for everyone seeking to preserve existing rights because

[28] May's approach could derive from the same factor that historian Richard Vinem articulated to explain Margaret Thatcher's eurosceptic pragmatism: those who have been in government longer realize what they can get away with inside the EU, while Leave enthusiasts tend to be those who had been in government only a short time or who resigned in the run-up to the referendum (Mudge 2018).

[29] An eternity for Brexiteers but very brief protection in the lifetime of an individual.

[30] As such, it offers as much comfort as politicians' promises to take action in "due course."

residence rights for EU citizens already living in the UK will be subject to "criminality and security checks," British expats' rights are limited to the host *State* and *State* of work rather than all EU-27 *States*, and free movement rights for new immigrants between the EU-27 and the UK may evaporate after the "specified date" (European Commission 2017b: note 58) in the transitional arrangement: 31 December 2020 (European Commission 2018b).[31] Unless an agreement on the future relationship between the EU and UK expands these rights, British citizens living in the EU or UK who are interested in moving transnationally within the EU-27 and EU citizens not resident in the UK as of the end of 2020 will lose EU entitlements and have to join the same immigration queues as third-country nationals. Current restrictive arrangements will most directly impact the mobile "Eurostars" (Favell 2008) who have the greatest personal stake in EU-wide opportunities. Yet their relative small number means that elected politicians need not prioritize their interests. Sociological inquiry reveals that genuinely transnational cosmopolitanism appeals to a small minority: Only 10 – 15 percent of the EU's population is connected by deep economic and social ties to Europe and benefits materially and culturally from it, while 40 – 50 percent have a shallow affiliation to Europe, and another 40 – 50 percent of mostly older, poorer, and less educated people fear European integration (Fligstein 2008).

Brexit and the Court of Justice: British exceptionalism or a canary in the mine for the EU?

Accordingly, the government's White Paper outlining its preferred future relationship with the EU is consistent with the political realism of (liberal or traditional) intergovernmentalism in that it accepts transfers of sovereignty in order to facilitate the free movement of goods but restores domestic regulatory authority over immigration. EU regulation

[31] Most Austrians and Brits living in each other's countries will be out of luck, however, since Austria maintains Europe's most restrictive approach to dual citizenship, coming close to a total prohibition (EUI 2017).

and ECJ case law on trade in goods has been historically much more acceptable to member states than European promotion of free movement for persons (Larsson and Naurin 2016, 396), and free trade promotes the benefits of economic interdependence acknowledged by more concentrated political actors. Even if relatively open labor migration continues to serve British economic interests, getting out from under EU law means that the government can restrict entry and residence to those who are economically active and/or self-sufficient. Facilitating migration among the economically active and financially independent is all that national governments ever agreed to in EU law; it is not a preference unique to the UK. Since the Leave victory, net EU migration has fallen from its pre-referendum peaks and the composition of EU immigrants has shifted to a higher percent arriving with a job offer and a lower percent coming to look for work (Weaver 2018, Syal and O'Carroll 2018). This change has occurred despite the current authority of EU law in the UK,[32] and it is playing out according to the interests of Conservative Remain supporters who wanted to limit entitlement to social benefits for migrant EU jobseekers. Finally, while the UK's full acceptance of EU legal obligations during the transitional/implementation period incenses hard Brexiteers, it is a very short period of time to suffer the indignity of being a "vassal state" in order to safeguard the British economy.[33]

To conclude, Brexit conflicts over the Court of Justice engage all three scenarios of EU responses to crisis proposed in this volume. If the UK withdraws from the EU, ends free movement of EU citizens, and reduces the extent to which the ECJ exercises jurisdiction over its future relationship with the EU, the disintegrative scenario of "break down" will occur.

[32] Presumably due to EU citizens taking the hint from the Brexit outcome and aftermath that they were no longer welcome and faced an uncertain future in the UK.
[33] A means of gaining access to the Single Market that Norwegians appear to perceive as evidence of a good deal given their exclusion from unacceptable aspects of EU membership such as the common agricultural and fisheries policies (Brianson 2018, 133).

Extensions of current rights to EU citizens who are resident in the UK as of the end of the transitional/implementation period, and a trade and customs regime anything close to what the government proposes in its White Paper, constitute examples of "muddling through" where path-dependent and incremental responses largely build on pre-existing institutional structures.

Finally, Brexit may be the crisis that the EU needs to trigger a new means of "heading forward" that has historically responded to challenges with more integration, but which has met the limits of popular toleration. Heading forward, in the sense of preserving most of the benefits of European integration, may require more cross-national differentiation than has existed in the past and even a degree of "spillback" rather than spillover. David Cameron's efforts to negotiate a new status for the UK within the EU prior to the referendum was a plea for greater differentiation that was largely stone-walled by the rest of the EU. Theresa May's White Paper is another plea for even greater differentiation for a novel partnership from outside the EU. Whether Michel Barnier can see beyond the EU's preoccupation with the "all four freedoms or no freedoms" approach to avoid a universally damaging no-deal Brexit remains to be seen. Pragmatic compromises might serve the EU better in the long run.

May's Remain speech identified a preference for a mode of decision making that could be characterized as "spillback" but is also largely what actually dominated the EU's means to cope with the Eurozone crisis, and could be more broadly utilized to keep the EU's course within the realm of democratically responsive politics. In mapping out how the UK could chart a more positive future trajectory within the EU, May argued

> We need to have a clear strategy of engagement through the Council of Ministers, seek a bigger role for Britain inside the Commission, try to stem the growth in power of the European Parliament, and work to limit the role of the Court of Justice. We need to work not only through the EU's institutions and summits, but by also pursuing more bilateral diplomacy with other European governments (2016).

Facing an existential threat to European Monetary Union, the EU did not rely exclusively or even primarily on the supranational institutions theoretically tasked with managing the single currency (ECB) or enforcing EU rules (ECJ) against overt violators such as Greece. Instead a more hierarchical, intergovernmental, Council-intensive, and German led process of decision-making engaged with supranational (ECB and the European Commission) and broader multilateral institutions (IMF) to solve the sovereign debt crises plaguing several Eurozone members. Meanwhile, the European Parliament was side-lined,[34] and the interests of creditors over debtors took center stage (Nugent 2017). Whether Europhiles and progressives like these political trade-offs or not, pretending that judges can guarantee preferable policies is not a sustainable strategy. Courts do not operate in political vacuums, and judges can be expected to be fickle friends in the wake of sustained and significant political pressure. Those that persistently defy the wishes of democratically elected politicians will eventually face negative consequences, as will the beneficiaries of their generosity. Those who seek a more socially progressive, cosmopolitan Europe will need to invest in the sweat equity of mobilizing for this goal politically in democratically accountable venues and socially in communities where national identity remains salient rather than legally in the relative comfort and rationality of the court house.

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[34] It is implausible to rate the European Parliament as more democratically legitimate than elected national governments acting in the European Council and EU Council of Ministers given pervasively low and declining voter participation rates in European Parliament elections.

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