

EU LAW IN POPULIST TIMES: CRISES AND PROSPECTS

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Chapter 1

Introduction: EU Law, Sovereignty, and Populism

Francesca Bignami

Over the past decade, the European Union has been shaken to the core by the rise of populist parties and movements. The watershed moment was the global financial crisis of 2008, which for Europe, quickly escalated into a sovereign debt crisis. In southern debtor countries, populist left-wing parties have risen to prominence on anti-austerity platforms. They have either been in government, as in the case of Greece's Syriza party and Italy's Five Star Movement, or have come very close to entering government, as with Spain's Podemos party, which captured twenty-one percent of the vote in the last parliamentary elections. Although the economic crisis was not as dramatic in Eastern Europe, it has served as fodder for the rise of authoritarian populism, first in Hungary with Fidesz's parliamentary supermajority in 2010, and then in Poland, with the Law and Justice party's victory in the 2015 parliamentary elections.¹ At the same time, parties on the extreme right in Western Europe have mutated from fringe to mainstream political players. Although not openly authoritarian and illiberal, as some of their East European counterparts, they are both ethno-nationalist and anti-immigrant. To take but the most salient examples, in France, the Front National's candidate came in second in the last presidential election; in the Netherlands, the Party for Freedom became the second-largest party in the last parliamentary elections; the Sweden Democrats won 17 percent of the vote in the most recent elections; and, representing an

¹ For purposes of brevity, the term "Eastern Europe" is used in this chapter to refer to the countries in the former Eastern Bloc that joined the EU in 2004 and in later years.

extraordinary moment for German post-war politics, in 2017 the Alternative für Deutschland entered the Bundestag with over 12 percent of the vote. Perhaps the most striking, and certainly the most consequential, example of the populist turn to date was the British referendum of June 2016, in which the majority voted to leave the European Union, and which has triggered the painful and protracted Brexit process. At the time of this writing, the elections for the 2019-2024 European Parliament will be the next test of strength for populist parties.

Although the national parties and movements behind the populist turn are radically different in many respects, they all share a common hostility to the political establishment and mainstream parties that have governed their countries in the post-war era, or in the case of Eastern Europe, the post-Communist era. This aversion extends to one of the most important projects of Europe's post-war political elites—the European Union. Notwithstanding the diversity of political forces that have emerged over the past decade, they are remarkably unified in their opposition to, if not outright rejection of, the EU.² In populist discourse, the EU is shorthand for greedy bankers, austerity-imposing technocrats, social dumping, uncontrolled immigration, and enforced pluralism and multi-culturalism. On the left, the EU is blamed for dismantling the welfare state and undermining social rights through its management of the euro crisis. On the right, the principal rallying cry is the ethnic and cultural identity of the nation state. European integration is, by definition, a cosmopolitan political project that seeks to overcome parochial nationalisms and it has proven an easy target for right-wing populists. In particular, the ire of the right has been fueled

² Throughout this introductory chapter, and reflecting the nomenclature that applies since the Lisbon Treaty, which was signed in 2007 and entered into force in late 2009, the term “European Union” is used to refer to the political entity that was previously named European Economic Community and, later, the European Community.

by EU policies aimed at promoting the migration of persons among the Member States, as well as managing the migration of certain categories of individuals from outside the EU.

As this string of complaints highlights, at the heart of the populist critique is not simply an amorphous establishment, but a concrete set of EU laws and policies. Populist leaders take aim at the elements of the EU agenda that go to the heart of national sovereignty: economic policy, human migration, internal security, and fundamental constitutional precepts connected with the rule of law, rights, and democracy. These are all relatively new areas of EU governance linked to the EU's switch in *raison d'être* in the Maastricht Treaty of 1992. Until then, the EU had been primarily a market-making and market-regulating entity. In the Maastricht Treaty, the foundations of an ambitious political union were laid down. The Member States committed to economic and monetary union (EMU) and cooperation on justice and home affairs (now renamed the Area of Freedom Security and Justice or AFSJ), which refers to border control, immigration from third countries, and law enforcement and criminal justice.³ These AFSJ competences were added to an already substantial body of law facilitating the intra-European migration of Member State nationals for economic purposes, known as the law of free movement of persons. The preamble to the Maastricht Treaty also prominently stated the common attachment of all the signatory states in their own constitutional law to the “principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.” In the years since Maastricht, cooperation on EMU, AFSJ, and free movement of persons has been extensive, and there have also been efforts to improve human rights and rule-of-law monitoring. As a result, the EU has come to exercise authority over core areas of state sovereignty. The classic economic, territorial control, security,

³ The Maastricht Treaty also included cooperation on foreign and defense policy, called the Common Foreign Security Policy, but this continues to be the least developed area of European integration and is not taken up in this volume.

and constitutional functions of the nation state are performed today not by Member States alone, but in conjunction with the EU.

This book affords a detailed and comprehensive analysis of the sovereignty-sensitive areas of EU law that have become extraordinarily salient with the populist surge and that have taken on extreme urgency for the future of Europe—*economic policy*; *human migration*, defined in this book as both intra-European migration and third-country immigration (economic immigration and asylum-seekers), as well as border control of the EU external border; *internal security*, which refers to both police and judicial cooperation; and *constitutional fundamentals*, a long list of values, but which can be boiled down to the rule of law, rights, and democracy. With the growing importance and politicization of these areas of EU governance, it has become critical to understand their basic legal contours, their fundamental challenges, and their future prospects. The contributors to this volume, all recognized authorities in their respective sub-fields, provide a state-of-the-art account of the law, debates, and future reform possibilities in each of these hot-button areas. At the same time, the authors employ a variety of theoretical frameworks, drawn from both the law and political science, to illuminate and assess the current trajectories of EU law.

By providing a cross-cutting perspective on the subjects, this volume fills an important gap in the legal literature, both didactic and scholarly. Didactic efforts at the systematic exposition of EU law continue to focus on the single market as the substantive core of the field and to treat economic policy, human migration, internal security, and constitutional fundamentals as peripheral, and unrelated, topics.⁴ Although this approach is faithful to the historical development of European integration, it is out of touch with the current realities of EU law and politics. Today,

⁴ See, e.g., Roger J. Goebel et al., *Cases and Materials on European Law*, 4th ed. (Saint Paul, M.N.:

West Academic Publishing, 2015); Anthony Arnall, *European Union Law* (Oxford: Oxford University Press, 2017).

with the exception of intelligence agencies, defense, and foreign policy, EU law squarely occupies every sovereignty-sensitive area of public policymaking and this book provides an essential guide to that law. In doing so, it equips the reader with the basic knowledge necessary to engage in the highly charged debates that have swept European politics. The claims thrown around about the EU and its law contain a mixture of truth, over-simplification, and falsehood. This book lays the groundwork for a more level-headed understanding of how the EU intervenes in core areas of state sovereignty.

From a scholarly perspective, by affording a cross-cutting look at what are generally siloed areas of legal scholarship, this volume creates important theoretical and normative opportunities. It serves as the basis for drawing out analytical frames and theoretical dynamics that can improve our understanding of EU law and inform the future development of the law.⁵ In these areas, the EU exerts legal authority over issues that are central to the symbolic politics, the organizational and policy backbone, and the public law of the nation state. Because of the national sensitivities of economic policy, human migration, internal security, and constitutional fundamentals, the EU's legal authority was not announced in a grand act of political union, but rather has accrued piecemeal through spillover—inter-state cooperation on relatively low-hanging fruit has expanded

⁵ The proposition that a cross-cutting analysis of EU governance outside the single market domain can lead to fruitful theoretical insights has been explored in political science, see Philipp Genschel and Markus Jachtenfuchs, eds., *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford: Oxford University Press, 2014) and Gerda Falkner, ed., *EU Policies in Times of Crisis* (Abingdon: Routledge, 2017). Legal scholarship so far has examined the far-ranging legal and constitutional consequences of the euro crisis, e.g., Damian Chalmers, Markus Jachtenfuchs, and Christian Joerges, eds., *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge: Cambridge University Press, 2016), but has not included developments in other areas of sovereignty-sensitive EU law in their analysis.

to cooperation in more controversial policy areas. In the concluding chapter of this volume, I argue that there are three critical implications of these shared roots that have not been adequately appreciated in the subject-specific legal scholarship—implications for the quality of law, the protection of rights, and the operation of democracy.

The remainder of this introduction proceeds as follows. The next section explains the historical spillover trajectory through which EU law has come to occupy sovereignty-sensitive areas and thus serve as fodder for populist parties and political movements. I then preview the individual chapters by subject area, focusing on the unique theoretical and analytical contribution of each. Last, I sketch the cross-cutting legal challenges and reform proposals that are set out in depth in my concluding chapter to this book.

I. Spillover into Economic Policy, Human Migration, Internal Security, and Constitutional Fundamentals

How has the EU been catapulted from a free trade organization to a quasi-federal entity with power over economic policy, the territorial belonging and safety of people, and the essential aspects of liberal democratic political morality? The answer is spillover. That is, the Member States have pooled sovereignty in relatively well-delimited areas that benefit from a high degree of consensus and then, based on the experience with such cooperation, have proceeded to share sovereignty in other, related areas. This logic, associated with the positive and normative theory of neo-functionalism, was originally conceived as a process of gradually expanding supranational governance by jumping from one successful cooperative endeavor to another to maximize the

common gains to be had from European integration.⁶ In many respects, the gradual expansion of free movement of persons in the 1980s and 1990s can be said to have followed this trajectory. In the past decade or so, the political incentives underpinning spillover have been cast more in the negative vein—new policy prerogatives being necessary to stave off disaster.⁷ The prime example of this negative logic is the euro crisis and the leap from monetary union to economic and fiscal policy. Regardless of the precise nature of the incentives, the undeniable centrality of spillover to European integration has come with the absence of a grand plan for a federal union. What has generally come first for nation states has come piece-by-piece and last, if at all, for the European Union.

1. Economic Policy

To turn to the spillover specifics: As hinted to above, in the case of economic policy, it was tight cooperation on monetary policy that gave rise to economic interdependence and intense pressure to integrate fiscal and budgetary matters during the euro crisis. The Maastricht Treaty introduced

⁶ Jean Monnet, *Memoirs*, trans. Richard Mayne (London: Third Millennium Publishing, 2015), 300, 393-94 (first published in Great Britain in 1978 by William Collins Sons & Co. Ltd); Ernst Haas, *The Uniting of Europe* (Stanford: Stanford University Press, 1968), xxxi-xxxvii. Although spillover is associated with the broader theory of neo-functionalism, this discussion is not meant to take sides in the long-running debate between neo-functionalists and intergovernmentalists in political science. See Liesbet Hooghe and Gary Marks, “A Postfunctionalist Theory: From Permissive Consensus to Constraining Dissensus,” *British Journal of Political Science* 39, no.1 (2009): 3-5. The concept of spillover is used only to capture the sequencing of the policies that have come to occupy the EU agenda, and not to address the question of which actors (national governments or supranational institutions) and interest groups (national or transnational) are responsible for putting those policies on the EU agenda.

⁷ Erik Jones, R. Daniel Kelemen, and Sophie Meunier, “Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration,” *Comparative Political Studies* 49, no. 7 (2016): 1010-034.

the goal of monetary union and a single currency and the process was completed on January 1, 2002, when the euro entered into circulation in the twelve original members of the Eurozone.⁸ To the extent that there was a Eurozone economic policy it was fiscal discipline, to be imposed by legal rules and financial markets. To avoid inflationary pressures and promote the overall economic stability of the Eurozone, Member States signed up to the Stability and Growth Pact in 1997, which set a 3 percent GDP limit for budget deficits and a 60 percent GDP limit for the state debt. There were so-called “preventive” and “corrective” arms, designed to ensure that Member States complied with the budgetary limits. At the same time, there was the Treaty “no-bail out clause” which prohibited the assumption of national debt by either the EU or the Member States and therefore made debtor countries reliant on markets to finance their budgets—and hence, the theory went, subject to the discipline of financial-market demand for their debt.

As was obvious to anyone who witnessed the unfolding of events after 2008, fiscal discipline as the EU’s lone economic policy tool failed miserably.⁹ After the euro was introduced, financial markets for sovereign debt failed to price in different risk premiums for countries with different debt prospects and economic outlooks—say, Germany and Italy. Moreover, as demonstrated by the failed effort to enforce the deficit limit against France and Germany in 2004, it was politically impossible to enforce the EU rules limiting budget spending. When the global financial crisis hit in 2008, the EU was woefully unprepared. First came the banking crisis. Particularly hard-hit were smaller economies such as Ireland that had experienced large inflows of

⁸ For a brief overview of this early EMU history, see Matthias Ruffert, “The Future of the European Economic and Monetary Union: Issues of Constitutional Law,” this volume, and literature cited therein.

⁹ For description and analysis of the euro crisis from a political economy perspective, see Matthias Matthijs and Mark Blyth, eds., *The Future the Euro* (Oxford: Oxford University Press, 2015).

private capital during the heady first days of monetary union. Then, by 2010, the banking crisis had escalated into a sovereign debt crisis, as countries were forced to underwrite their banks' debts and as their own access to credit dried up. Propelled by the fear of contagion and financial and economic collapse—and as many have noted, solicitous of the economic interests of the French and German banks that were some of the biggest lenders in the crisis-hit countries—Eurozone leaders acted in fits and starts to the prop up the system.

The end result is a radically transformed EMU that contains both a more robust economic dimension and a more interventionist monetary policy. The European Central Bank (ECB) has assumed an increasingly important role in crisis prevention and management.¹⁰ To avoid a recurrence of the financial crisis, there is now centralized ECB licensing and supervision of large banks (Single Supervisory Mechanism) and a mechanism for winding up failing banks, including an EU fund to compensate partially the shareholders and creditors of failed banks (Single Resolution Mechanism). Moreover, during and after the euro crisis, the ECB intervened with economic stimulus through a massive quantitative easing program involving the purchase of sovereign debt and other types of securities on secondary markets.

Beyond the financial markets dimension, there is also now a more extensive EU economic policy.¹¹ This is the change that has generated the most political controversy and has been responsible for fueling many strands of populist discontent—both in southern debtor countries, where anti-establishment parties have accused EU-imposed austerity of dismantling the public

¹⁰ On EU banking and economic law, see Antonio Estella, *Legal Foundations of EU Economic Governance* (Cambridge: Cambridge University Press, 2018).

¹¹ On all of the below and for extensive citations to the scholarly literature, see the contributions in Part I of this volume.

sector and welfare programs, and in northern creditor states, where parties on the center-right, including populist ones, have resisted fiscal transfers to sinking southern economies.¹² There now is a permanent organization, the European Stability Mechanism (ESM), with the capacity to undertake large-scale fiscal transfers to Eurozone states in grave financial difficulty. These transfers are structured as loans subject to strict conditionality. Although program countries, i.e. those receiving ESM loans, are subject to particularly tight constraints on their public spending, all Eurozone countries now take part in a heightened system of economic surveillance and sanctioning. The Fiscal Compact requires that the signatory countries adhere to a balanced budget rule and introduce mechanisms domestically to enforce the rule. EU legislation known as the Six Pack and the Two Pack has put into place an elaborate monitoring system: Each year, as part of the European Semester, all Member States submit their economic and budgetary plans for review by the European Commission (and Council); in addition, Eurozone countries submit their draft annual budgets before those budgets can be voted on by their national parliaments. There is surveillance for budget deficits in excess of the target imposed by the Stability and Growth Pact (Excessive Deficit Procedure) and for macroeconomic imbalances (Macroeconomic Imbalance Procedure), which comprise a broad range of macroeconomic indicators linked to economic stability. Eurozone Member States that breach these targets and indicators can be required to put down deposits or pay fines or their payments from the European Structural and Investment Funds can be suspended.¹³

¹² See Hanspeter Kriesi and Takis S. Pappas, eds., *European Populism in the Shadow of the Great Recession* (Colchester: ECPR Press, 2016).

¹³ The Structural and Investment Funds represent the largest part of the EU budget and are directed at the agricultural and fishing industries and promoting territorial cohesion by funding projects in less prosperous regions. See European

2. Human Migration

Turning to human migration, the spillover story begins with the renewed impetus for market integration in the Single European Act of 1986. That Treaty contained an important provision declaring that “[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, services, persons and capital is ensured in accordance with the provisions of this Treaty.”¹⁴ The commitment to remove borders for persons soon ran into political difficulty because logically speaking the freedom to travel without having to stop at the border and produce papers would have to extend to all individuals crossing national borders, not only to persons with the right to move to seek employment or engage in other forms of economic activity under the existing law on free movement of persons.¹⁵ Although this law has been in considerable flux over the past decades, it was the case in 1986, and it still is, that the travel and residence rights that are conferred under the law of free movement of persons are tethered to the activity of an economically active person who is a citizen of one Member State and moves to another Member State, either alone or with the rest of the family unit.¹⁶ The person moving must generally be a citizen of

Commission, *European Structural and Investment Funds 2014-2020: Official Texts and Commentaries* (Luxembourg: Publications Office of the European Union, 2015).

¹⁴ Article 8a Treaty Establishing the European Economic Community.

¹⁵ On this early history of the Schengen Convention and Justice and Home Affairs, see Steve Peers, *EU Justice and Home Affairs Law* (Harlow, England: Longman, 1999), 63-76.

¹⁶ For a general discussion of the law of free movement of persons up through the Treaty of Lisbon, see Koenraad Lenaerts, Piet Van Nuffel, and Rober Bray, *Constitutional Law of The European Union*, 2d ed. (London: Sweet & Maxwell, 2005). For a recent discussion and review of the law, including the debates on EU citizenship, introduced in the Maastricht Treaty, and how EU citizenship has (and has not) changed the law of free movement of persons, see

another Member State and must move for a *bona fide* economic reason—in the case of travel for short periods, receiving services such as those connected with the tourist or healthcare industries, and in the case of longer periods of residence, participating in the labor market or attending an educational establishment. The Single European Act’s market “without internal frontiers” would facilitate the movement not only of individuals with rights under the existing free movement law, but also everyone else—most notably third-country nationals and individuals engaged in criminal activity.

In light of the ramifications of the removal of border controls, the Member States divided early on into two groups—the skeptics comprised of the UK, Ireland, and Denmark and the integrationists comprised of the original core of continental Member States. Because of these and other divisions, a subset of Member States moved forward with the project under international law and outside the EU framework, with the Schengen Agreement in 1985 and then the Schengen Convention in 1990. The Schengen Convention, which came into force in 1993 in seven Member States but was only applied in 1995, removed border checks among the participating Member States and created a single, common external border around the so-called Schengen Area. At the same time, as hinted to above, it was widely recognized that this policy would not only facilitate intra-European migration of EU nationals but would also have spillover effects for the movement of third-country nationals. Therefore, the removal of border controls was accompanied by cooperation on immigration, asylum, and visa policy (collectively referred to here as the

Martijn van den Brink, “EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems,” *European Law Journal* 25, no.1 (2019): 21-36.

immigration aspects of human migration).¹⁷ The centerpiece of so-called Schengen flanking measures was, and continues to be, the Schengen Information System (SIS), a centralized database of information on undesirable persons.¹⁸ Especially in the early years, the SIS was dominated by entries on third-country nationals who were to be refused entry or stay in the Schengen Area. In parallel, there was cooperation on asylum policy through a separate international agreement—the Dublin Convention, which was signed in 1990 and entered into force in 1997.¹⁹ This was designed to address the problem of “refugees in orbit,” namely the prospect that no Schengen Area country would take responsibility for examining a particular asylum claim, and the problem of using the borderless travel area to file asylum claims in multiple jurisdictions.

Although spillover from borders to immigration has not been entirely even across the specific issue areas, cooperation today is robust. This is reflected in both the formal and the substantive dimensions of EU policymaking. Since the Amsterdam Treaty, which was signed in 1997 and entered into force in 1999, the authority to make and implement policy on border controls and immigration are squarely EU competences under what is now called the Treaty on the Functioning of the European Union (TFEU). Moreover, there has been significant EU output in

¹⁷ Because of the focus of this volume, this chapter does not address cooperation on civil matters such as contracts enforcement, which is historically connected to cooperation on immigration and law enforcement and in many texts is discussed in conjunction with the latter two policies.

¹⁸ See generally Niovi Vavoula, “Databases for Non-EU Nationals and the Right to Private Life: Towards a System of Generalised Surveillance of Movement?,” this volume, p. 5 and the literature cited therein. The original SIS has been replaced by a second-generation database called SIS II, but the basic contours remain the same.

¹⁹ See generally Evangelia (Lilian) Tsourdi, “The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System,” this volume.

most of the issue areas, with the notable exception of long-term economic immigration.²⁰ There is extensive law and administrative policy on managing the common external border; on visa policy, i.e. whether and under what conditions third-country nationals must obtain a visa to come into the Schengen Area for short stays of three months or less, as well as the requirements for entry and exit of citizens of visa-free countries; and on asylum-seekers and the system for processing individuals who qualify for refugee protection under international law.

The remarkable internal migration that has resulted from the Schengen system, in combination with the older law of free movement of persons, has been a source of political backlash in the Member States. Right-wing populist parties have drawn much of their strength from the fear of migration within the Schengen Area and the perceived threat to economic well-being and, even more so, to national and ethnic identity.²¹ The campaigning on the Brexit referendum illustrates vividly the variety of anxieties that human migration has triggered.²² On the one hand, the finger was pointed at low-skill workers from Member States in Eastern Europe who were accused of dragging down working conditions and wage levels and undermining British

²⁰ See generally, Steve Peers, *EU Immigration and Asylum Law*, vol. I of *EU Justice and Home Affairs Law*, 4th ed. (Oxford: Oxford University Press, 2016); for a comprehensive overview of developments since 2009, see Emilio De Capitani, “Progress and Failure in the Area of Freedom, Security, and Justice,” this volume.

²¹ Hooghe and Marks, “A Postfunctionalist Theory of European Integration,” 13; Liesbet Hooghe and Gary Marks, “Re-engaging Grand Theory: European Integration in the 21st Century,” EUI Working Papers, RSCAS 2018/43, 2018, 9-12.

²² See Simon Deakin, “Brexit, Labour Rights and Migration: Why Wisbech Matters to Brussels,” *German Law Journal*, *Brexit Supplement* 17 (2016): 13-20; Jonathan Faull, “European Law in the United Kingdom,” *European Law Review* 43, no. 5 (2018): 785-86; Neil Nugent, “Brexit: Yet Another Crisis for the EU,” in *Brexit and Beyond: Rethinking the Futures of Europe*, eds. Benjamin Martill and Uta Staiger (London: UCL Press, 2018), 59.

national identity. On the other hand, even though the UK never joined the Schengen Area and therefore was never at risk of so-called “secondary movements” of refugees from frontline countries like Greece and Italy to other Schengen states, images of Syrian refugees lining up at the Hungarian and Austrian borders went viral during the Brexit campaign. The not-so-subtle message was that the UK risked being overwhelmed by people from the Middle East belonging to an entirely different ethnic, racial, cultural, and religious tradition. Strands of this economic and identitarian political rhetoric can be found in virtually every Member State.

3. Internal Security

As mentioned in the last section, the removal of internal border controls and the creation of the Schengen Area raised the prospect of both illegitimate migration by third-country nationals *and* the exploitation of border-free travel by criminal actors, to avoid detection by their national police authorities. Therefore, the Schengen Convention also contained a law enforcement component. Most importantly, the Schengen Information System (SIS) included data on individuals wanted for arrest and extradition, witnesses or persons summoned by judicial authorities, and objects such as stolen vehicles connected to police investigations and criminal proceedings. The SIS was designed to be accessed not only by national border control officers and immigration officials, but also by police and customs enforcement authorities when investigating individuals on their national territory or at their external borders.

Spillover from borders to policing and criminal justice, what this book refers to collectively as internal security policy, has developed more slowly than immigration policy.²³ Although

²³ See generally, Steve Peers, *EU Criminal Law, Policing, and Civil Law*, vol. II of *EU Justice and Home Affairs Law*, 4th ed. (Oxford: Oxford University Press, 2016); for a comprehensive overview of developments since 2009, see De Capitani, “Progress and Failure in the Area of Freedom.”

internal security was included in the Maastricht Treaty, it remained in the Treaty on European Union for almost two decades. (The Treaty on European Union [TEU] is the Treaty that, together with the TFEU, comprises the legal foundation of the EU and that is more intergovernmental, less supranational than the TFEU.²⁴) In the Lisbon Treaty, however, competences for internal security were transferred to the TFEU. This change included qualified majority voting in the Council for most types of internal security measures, which has accelerated considerably the policy output in the domain. The result today is a fairly developed body of EU law that covers everything from the early stages of police investigations up through criminal prosecution and conviction.

The connection between internal security policy and populism is less direct than with respect to economic policy and human migration and, if anything, operates in the inverse sense. In certain populist discourse, human migration in the Schengen Area has been linked to terrorism, serious crime, and other types of social disorder. The threat to economic well-being and national identity from the influx of foreign nationals is coupled with the perception of risk to physical safety and public order. This association is particularly evident for terrorist acts by Islamic extremists, but it also extends to less dramatic forms of criminal violence and to other types of immigrant populations. In limited respects, the EU's growing body of internal security law and policy can be

²⁴ The distinction between intergovernmentalism and supranationalism appears at a number of points in this introductory chapter and the rest of the volume. For most purposes, the distinguishing characteristic concerns the institutions and processes through which decisions are to be made. In the supranational, "Community method" for making laws, the European Commission, European Parliament, and the European Court of Justice are fully empowered, and Member State voting in the Council is by qualified majority. In intergovernmentalism, most of the power rests with the Member States, with no or little role for the other institutions, and the voting rule is unanimity. While the procedures contained in the TFEU tend to be of the supranational variety, those in the TEU are of the intergovernmental variety.

said to be directed at these fears. The Schengen system has been implicated in certain highly visible security failures such as the Paris terrorist attack of fall 2015, involving Islamic extremists that moved between Belgium and France, and European policymakers have sought to improve counter-terrorism coordination among the Member States. The law enforcement aspects of the numerous EU databases on third-country nationals have been enhanced, playing to the characterization of third-country nationals as potential threats to physical safety and public order. Overall, however, there is strong continuity between the original purposes of Schengen flanking measures and the evolution of EU law and policy in the internal security domain. The Schengen Area of borderless travel and Europe's increasingly integrated social space have created significant challenges for police and judicial authorities, still organized along national lines, and therefore policymakers have sought to enhance the tools available to these authorities in pursuing cross-border criminal activity.

4. Constitutional Fundamentals

In the case of constitutional fundamentals, the spillover trajectory is still in its incipiency. In the aftermath of World War Two, European cooperation split into two different international systems: the Council of Europe, headquartered in Strasbourg, was dedicated to fundamental rights and democracy; the European Economic Community, headquartered in Brussels, had responsibility for markets.²⁵ Over time, this division of labor has broken down. Most notably, the EU has acquired a catalogue of fundamental rights and a commitment to democratic principles applicable to its own

²⁵ For an analysis of the early EU choice to side step the issue of fundamental rights, see Gráinne de Búrca, "The Road Not Taken: The European Union as a Global Human Rights Actor," *American Journal of International Law* 105, no. 4 (2011): 649-93.

institutions and scheme of government.²⁶ Still today, however, the Member States are reluctant to cede control over their internal democratic and human rights practices to EU scrutiny. Compared to the Council of Europe system, the EU is significantly more powerful and therefore giving it full-fledged prerogatives would represent a far greater loss of state control and sovereignty over the essential blueprint of how national government works and domestic affairs are conducted.

The question of giving the EU a role in monitoring internal affairs cropped up with prospect of enlargement to the East after the fall of the Berlin Wall. Until then, membership in the Council of Europe and adherence to the European Convention of Human Rights (ECHR) and the jurisdiction of the European Court of Human Rights (ECtHR) had functioned as the principal guarantee that Member States would adhere to fundamental principles of the rule of law, rights, and democracy. However, the political circumstances of East European accession were different—the anticipated entry of at least eight new states that until recently had been authoritarian regimes under the Communist yoke. At the Copenhagen European Council of 1993, when the official green light was given to the eventual membership of countries in the former East, the accession criteria were crafted to include not only the incorporation into domestic law of the so-called Community *acquis* (the EU’s existing body of law and jurisprudence) but also respect for the rule of law, rights, and democracy.²⁷ The European Commission was tasked with monitoring the progress of the

²⁶ On the early history of this constitutional transformation, see Bill Davies, *Resisting the European Court of Justice: West Germany’s Confrontation with European Law, 1949-1979* (New York: Cambridge University Press, 2012); on developments after the Maastricht Treaty, see Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge: Cambridge University Press, 2010).

²⁷ For a detailed discussion of this pre-accession history, see Milada Anna Vachudova, *Europe Undivided: Democracy, Leverage, and Integration After Communism* (Oxford: Oxford University Press, 2005).

candidate countries towards fulfillment of these criteria, one of the prerequisites for becoming a Member State. At the same time, there was concern that post-Communist countries, lacking a consolidated tradition of democracy, might be tempted to backtrack on some of the progress made to satisfy the Commission and obtain EU membership. Therefore, with the Amsterdam Treaty of 1997, the TEU was amended to include the principles of the rule of law, rights, and democracy (Article 6) and a procedure for sanctioning Member States for “a serious and persistent breach” of those principles (Article 7).²⁸

What are now numbered Articles 2 and 7 of the TEU remain the EU’s main policy tool for overseeing the rule of law, rights, and democracy at the national level. Notwithstanding the many tweaks to the procedure that have been made since 1997, it remains a weak policy instrument. The list of liberal democratic principles, now called values, has gotten longer, but the values themselves remain vague and undefined: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”²⁹ As a result, the Council of Europe system continues to operate as the primary reference point for the flesh and bones of the values and the EU institutions have heavily relied on ECtHR case law and Venice Commission opinions.³⁰ Moreover, the Article 7 TEU procedure remains highly

²⁸ On the post-Amsterdam legal trajectory of the rule of law, democracy, and rights, see Kim Lane Scheppele and R. Daniel Kelemen, “Defending Democracy in EU Member States: Beyond Article 7 TEU,” this volume, and literature cited therein.

²⁹ Article 2 TEU.

³⁰ The Venice Commission is an advisory body of the Council of Europe. It authors reports and studies in the areas of the rule of law, democracy, and rights, see, e.g., Venice Commission, Rule of Law Checklist, Study No. 711/2013. CDL-AD(2016)007 (March 18, 2016), and issues opinions on the constitutional situation in Member States, including

intergovernmental and the determination of a “serious and persistent breach” is subject to unanimity among the Member States (with the exception of the Member State being sanctioned); even though Article 7 TEU has been formally triggered against Poland, and now Hungary, the process has been excruciatingly slow and most doubt that it will ever be brought to completion and sanctions imposed.³¹

Although EU powers over the rule of law, rights, and democracy are less substantial than in any of the other policy areas covered in this volume, there is evidence that here too spillover is pushing in the direction of greater European integration. In this domain, the spillover comes from the administrative and judicial architecture essential to virtually every field of EU law. The EU has a very small administrative and judicial apparatus. For the most part, it relies on the bureaucracies and judiciaries of the Member States to implement EU law through a system known as integrated administration: national authorities implement the law on their territories in cooperation with other national authorities and coordinated by EU-level authorities.³² As is

many recent ones on Poland and Hungary. See Venice Commission, “Documents by Opinions and Studies,” https://www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN.

³¹ *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland*, COM (2017) 835 final (December 20, 2017); European Parliament, Report On a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded, A8-0250/2018 (July 4, 2018).

³² See Francesca Bignami, “Foreword: The Administrative Law of the European Union,” *Law and Contemporary Problems* 68, no. 1 (2004): 10-16; Giacinto Della Cananea, “The European Union’s Mixed Administrative Proceedings,” *Law and Contemporary Problems* 68, no. 1 (2004): 197-218; Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2012).

essential in rule-of-law systems, these national authorities are subject to the jurisdiction of their national courts, which in turn participate in the EU court system by making preliminary references on EU law to the European Court of Justice (ECJ). In the single market days, the national authorities responsible for implementation were mostly the bureaucratic actors responsible for regulating markets, under the supervision of their courts; now that the EU exercises competences in civil and criminal justice, these authorities are also courts directly, which are responsible for deciding civil and criminal cases. A certain degree of civil service independence from executive branch politics has always been important for Member State administrative authorities to faithfully perform their tasks under EU law, resist inevitable national biases, and cooperate with their counterparts at the EU level and in the Member States. For all of the obvious, rule-of-law reasons, the independence of courts is even more critical. It is because of the centrality of national courts, especially in the implementation of EU criminal law, that it has been possible to mount challenges before the ECJ against authoritarian moves to curb judicial independence in Hungary and Poland, outside the throttled Article 7 TEU framework, and inside the powerful judicial architecture of the TFEU.³³

The emerging jurisprudence on independence of courts and, in some cases, administrative actors has the potential to unravel the EU's system of integrated administration because, as a matter of law and not simply practice,³⁴ Member State actors can refuse to cooperate with their

³³ For a discussion of this jurisprudence, see Scheppele and Kelemen, "Defending Democracy in EU Member States."

³⁴ On the importance of cooperation and trust in the practice of EU integrated administration, with particular attention to East-West relations, see Francesca Bignami, *The Challenge of Cooperative Regulatory Relations After Enlargement*, in *Law and Governance in an Enlarged European Union* (Portland and Oxford: Hart Publishing, 2004), 97-140.

counterparts in other Member States if there are reasons to suspect their rule-of-law bona fides. The most prominent illustration of this point comes from the liberty-impinging area of criminal law—the recent preliminary reference in which the Irish court maintained that it did not have a duty to execute a European arrest warrant originating in Poland and return the suspect to Poland to face trial.³⁵ Even matters of less consequence for liberal rights can be affected by a lack of trust in the independence and integrity of the cooperating authorities. For instance, short-term visas and long-term residence permits give foreign nationals the right to travel anywhere within the Schengen Area;³⁶ social security certificates give the recipient the right to avoid paying into the social security system of the host state where he or she is temporarily working (because the certificate warrants that the worker is paying into the system of the home state).³⁷ If there are doubts as to the structural independence and operational good faith of the issuing authorities, why should other Member States recognize those visas, residence permits, and social security certificates as valid, along with all the benefits they confer within the single market and the Schengen Area? As with the euro crisis, where the need to save the single currency spurred the development of economic policy, the threat of unraveling policies that European political leaders are highly invested in, for instance the preservation of the Schengen Area, might prompt more vigorous legislative action, such as making access to Structural and Investment Funds conditional

³⁵ Case C-216/18 PPU, *Minister for Justice and Equality v. LM*, ECLI:EU:C:2018:586 [hereinafter *Celmer*].

³⁶ For a general discussion of this aspect of immigration law, see De Capitani, “Progress and Failure in the Area of Freedom.”

³⁷ For a discussion of EU social security law and emerging cracks in the judicial and administrative architecture of that law due to lack of trust among certain national authorities, see Ulf Öberg and Nathalie Leyns, “On Equal Treatment, Social Justice and the Introduction of Parliamentarism in the European Union,” this volume.

on the domestic rule of law.³⁸ It goes without saying that these incentives are especially strong for the ECJ, which bears direct responsibility for the EU's implementation architecture, and which is coming under pressure to develop a role in monitoring respect for liberal democratic values at the national level.

In the case of constitutional fundamentals, there is a two-way relationship between EU law and populism. On the one hand, Article 7 TEU and the Court of Justice's jurisprudence are targeted directly at the authoritarian strand of populism that seeks to take over liberal democratic institutions and undo checks and balances in the name of "the people."³⁹ On the other hand, like economic policy and human migration, the conflict generated by the EU's intervention plays to an important element of populism's political base. In the rhetoric of authoritarian populists, the genuine representatives of the people (themselves) are pitted against independent courts and supranational bodies, which are cast as elite bodies that thwart the will of the people and that serve other, external masters.⁴⁰ Resisting the EU, and in particular the law of the EU, is an important component of this ideology. There are many examples of outright non-compliance with EU law. For instance, Hungary and Poland, along with the Czech Republic and Slovakia, refused to take their refugee quotas under the emergency EU relocation decisions adopted during the height of the

³⁸ Scheppele and Kelemen discuss the possible development of conditionality in "Defending Democracy in EU Member States."

³⁹ On authoritarian populism, see Bojan Bugarič, "The Populist Backlash Against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe," this volume and the literature cited therein.

⁴⁰ For a discussion of what is often referred to as "the politics of resentment", see Tomasz Koncewicz's chapter in this volume and the literature cited therein.

Syrian refugee crisis.⁴¹ The Polish government has successfully resisted attempts to require Poland to comply with EU law on nature conservation.⁴² Article 7 TEU and the European Court of Justice’s case law on judicial independence is yet another arena for this populist-supranational conflict to play out, but an extraordinarily visible one where the payoffs for authoritarian leaders are potentially high.

In the preamble to the Treaty of Rome, the political leaders of the original six Member States declared that they were “determined to lay the foundations of an ever closer union among the peoples of Europe.” This historical discussion of the spillover process by which the EU has come to exercise legal authority in classic areas of state sovereignty shows that Europe’s founding fathers were actually quite prescient. At the same time, as also highlighted by the discussion, this law has been highly salient and has served as a rallying cry for populist political forces, many of which directly oppose ever closer union. This is the general state of affairs in sovereignty-sensitive domains. It is now time to take each field in turn and preview the individual contributions.

II. Survey of the Volume

The book’s consideration of the individual subjects begins with *economic policy* and the legal and institutional landscape of post-crisis Eurozone governance. In Chapter 2, Matthias Ruffert briefly narrates the historical development of EMU, with special attention to the role of constitutional

⁴¹ See Bruno De Witte and Evangelia (Lilian) Tsourdi, “Confrontation on Relocation-The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v. Council,” *Common Market Law Review* 55, no. 5 (2018): 1457-494.

⁴² See Tomasz Konciewicz, “The Politics of Resentment and First Principles in the European Court of Justice,” this volume for a detailed discussion of the Polish Białowieża Forest saga.

courts, and then turns to a presentation of the most salient reform proposals that have been put forward by a variety of stakeholders. He unpacks the proposals by focusing on three elements that are common to virtually all of them: an expanded budget for the Eurozone; more flexible surveillance of national budgetary discipline; and a revised institutional framework including, most prominently, more parliamentary accountability. Ruffert argues that as a matter of intergovernmental and party politics, and possibly also as a matter of constitutional law, more budgetary spending will have to be coupled with a robust commitment to fiscal stability if the proposals are to move forward. With respect to parliamentary accountability, Ruffert takes the view that it is largely satisfied through the ESM's consensus rule for granting loans, since the governments on the Board of Governors answer their national parliaments. In the future, however, as EMU governance becomes more politically driven, he argues that accountability to the European Parliament may have to be enhanced; at the same time, the constitutional framework should be flexible, to allow for political debate and change.

Chapter 3 turns specifically to the fiscal and economic surveillance aspect of EMU governance. As Philomila Tsoukala explains, in the course of the European Semester, the European Commission reviews the budgetary and economic policies of the Member States and formulates country-specific recommendations (CSRs) designed to improve growth and fiscal stability. Based on its experience in administering conditionality in country bailouts, the Commission has developed CSRs into a far-reaching set of structural reforms and best practices for public administration and labor, welfare, tax, and social security policy. There can be powerful incentives to adopt the recommended reforms, especially for Member States at risk of being sanctioned under the corrective limb of the Macroeconomic Imbalance Procedure. As analyzed by Tsoukala, CSRs are largely aimed at liberalizing markets and creating export-based economies.

Although some commentators have argued that the recent inclusion of social indicators for evaluating national economic policy represents a change of direction, Tsoukala is skeptical. She argues that EMU's continued emphasis on budgetary discipline and the low capacity for redistribution in the Eurozone will most likely produce pressure to converge on a minimalist version of the welfare state—flexible labor markets and welfare for the neediest. Overall, Tsoukala questions the legitimacy of CSRs given that the European Commission is a technocratic body cut off from genuine democratic debate.

Nicolas Jabko, in Chapter 4, takes a step back from the specifics of economic governance and situates the post-2008 developments in the political science literature on European integration and international relations. He asks the question of why, contrary to general expectations, the politically charged issue of bailouts, with their highly visible consequences for state sovereignty, gave way to more European integration rather than disintegration. The answer, Jabko argues, requires a more fluid concept of sovereignty than is generally presumed in political science theories. In Jabko's theoretical account, European political leaders responded to the flaws in EMU revealed by the euro crisis by searching for solutions that were both transformational and that took on board sovereignty concerns. They proposed greater solidarity through loans, but at the same time only as a "last resort" to preserve the Eurozone; they required considerable discipline of recipient countries, but framed as a temporary, *quid pro quo* for loan financing. European leaders built political coalitions in support these new sovereignty practices—both at the international level and among their domestic electorates. The last step, in this account, was to progressively institutionalize the new sovereignty practices in EU economic governance.

Before the sovereign debt crisis, there was the banking crisis, and Chapter 5 by Elliot Posner analyzes its impact on EU financial regulation. Since financial regulation is one of the most

globalized of all policy areas, Posner considers both its internal and the external dimensions. He demonstrates that the integration of European financial markets that occurred in the 1990s rested on an internal political bargain that gave a central role to the UK, the region's leading financial center, and on a regulatory harmonization strategy that drew from the (often neoliberal) standards of transnational regulatory bodies, widely seen as technocratic and neutral. This both accelerated integration internally, and elevated the EU externally, making it an important player in global standard-setting. After the crisis, the internal political bargain suffered: the EU ratcheted up regulation through Banking Union and other reforms and in the process, London was often isolated or part of the losing coalition. Posner argues that these internal divisions have, in combination with other factors, diminished the EU's international bargaining heft. The likely upshot, especially in view of Brexit, is a London-New York alliance in transnational standard-setting bodies that will set the regulatory terms for global financial markets and that will sideline the EU.

The section on economic policy concludes with Renaud Dehousse's analysis of the impact of the euro crisis on the wider European political system. In Chapter 6, he uncovers two important trends. On the one hand, the response of European leaders to the euro crisis was to seek to depoliticize macroeconomic policy, by empowering the European Commission in the surveillance procedure and by giving the ECB authority over the banking system. On the other hand, politicization has been occurring at both the national and the EU levels. Largely because of austerity, domestic political parties have come to mobilize around EU issues, either rejecting the idea of integration entirely or opposing specific EU policies. At the same time, at the EU level, there is a trend towards parliamentary government and an effort to enhance the importance of European elections, with the development of the so-called *Spitzenkandidaten* system: in elections for the European Parliament, European political parties each select a candidate for president of the

European Commission, and the winning party's candidate becomes president. This resembles the confidence relationship between parliament and government in a domestic parliamentary system and has contributed to a more political role for the Commission president. Dehousse demonstrates that there are fundamental contradictions between the de-politicized "trusteeship" model and the parliamentary government model, evident for instance in Commission's ambiguous role in enforcing the Eurozone budget-deficit targets. Dehousse argues that these contradictions will have to be addressed, although he underscores that this will be difficult in the current environment of widespread opposition to Brussels and growing polarization among the Member States.

The book then moves to *human migration*. Chapter 7, by Ulf Öberg and Nathalie Leyns, focuses on intra-EU migration and the historical evolution of the law of free movement of persons. They argue that through to the 1990s, the principle of non-discrimination in the context of free movement of workers (for long-term employment) and services (for short-term labor movements) was interpreted as protecting both foreign and domestic workers: on the one hand, Member State nationals were guaranteed access to employment in other Member States but at the same time, through the application of the principle of equality and equal pay for equal work, the nationals of host Member States were guaranteed that their wages and working conditions would not be undercut. This was largely also the case for the ECJ's interpretation of the Posting of Workers Directives, which was adopted in 1996 and which was designed to facilitate the cross-border provision services and ensure a minimum level of social protection for posted workers. However, in their account, the Court's approach changed after the 2004 accession: in the *Laval*, *Ruffert*, and *Viking* line of cases, what had previously been viewed as legitimate social demands for non-discrimination in line with the labor law principle of *lex loci laboris* came to be seen as xenophobic and protectionist, and the minimum labor standards contained in the Directive were interpreted as

a ceiling that prevented the imposition of higher standards, such as average pay rates. This jurisprudence, together with other developments, has generated political backlash, and Öberg and Leyns trace a number of EU legislative and jurisprudential developments favorable to labor and social rights which lead them to be optimistic about the future prospects of EU democracy.

In Chapter 8, Evangelia (Lilian) Tsourdi turns to migration from outside the EU, and one of the most developed and salient areas of EU policy involving third-country nationals—the Common European Asylum System. After exploring the foundational legal principles that govern in this area, Tsourdi focuses on the administrative component, which she argues is underdeveloped and bears a large part of the blame for the mishandling of the 2015-2016 refugee crisis. She identifies three key elements of asylum implementation—the Dublin System of assigning responsibility for asylum seekers to the Member State of first irregular entry; practical cooperation among national authorities under the umbrella of an EU agency (EASO); and EU funding. Tsourdi argues that on each dimension there has been change, driven by attempts at fairer burden-sharing in the asylum system—relocation of asylum applicants from the state of first entry to other Member States, a greater role for EASO in managing migration hotspots, and more EU funding. Although she sees the greatest promise in administrative integration, she also outlines parallel trends in the form of Member State unilateralism and the externalization of refugee protection obligations through EU agreements with countries like Turkey.

In Chapter 9, Niovi Vavoula tackles the proliferation of EU databases on third-country nationals. Vavoula traces three waves of databases: (1) those connected with the early Schengen and Dublin Conventions (SIS and Eurodac); (2) those fueled by the tendency post-9/11 to view immigration as a potential security risk, including the database for short-visa applicants (VIS), the second-generation SIS (SIS II), and the revamped Eurodac; (3) those prompted by the Paris and

Brussels terrorist attacks of 2015 and 2016, including two databases designed to cover visa-free travelers (EES and ETIAS) and legislative proposals to make all of the existing databases interoperable. The chapter then conducts an evaluation of the databases from the perspective of personal data protection and privacy. Among the numerous concerns, one of the most basic is how travel and the everyday exercise of personal freedoms by third-country nationals are viewed as inherently suspicious and operate as a trigger for state surveillance.

The next section of the book covers *internal security*, i.e. police and judicial cooperation. In light of the highly salient Paris and Brussels terrorist attacks of 2015 and 2016, this section opens with internal security policy focused specifically on counter-terrorism. In Chapter 10, Gilles de Kerchove and Christiane Höhn give essential background on the historical evolution, legal framework, and institutional architecture for EU counter-terrorism policy. As they explain, the EU's competences in the field are significant, but they are largely centered on law enforcement cooperation, and exclude cooperation between (domestic) security services and (foreign) intelligence services, which falls under the umbrella of "national security" and which remains the sole responsibility of the Member States. The chapter then analyzes in depth one of the most important elements of EU counter-terrorism strategy—the use of information and EU databases to detect planned terrorist attacks and apprehend suspected terrorists.

Valsamis Mitsilegas follows with a critical perspective on some of the policy developments in the counter-terrorism field, as well as internal security more generally. In Chapter 11, he argues that the blurring of the boundaries between police and criminal law and other areas of law has led to a general shift from the classic repressive model of state coercive action to a paradigm of preventive justice. One of the key elements of this shift has been the mobilization of data collected for a variety of purposes—as described in the previous two chapters of the book—to prevent future

criminal acts. Another aspect has been the use of external affairs competences and legal measures to target internal security risks. In light of the implications of the preventive paradigm for the rule of law and fundamental rights, Mitsilegas argues that the EU should drop the “security crisis” mentality that has produced the preventive paradigm and should adopt a more reflective approach, aimed at managing security within a solid framework of human rights and the rule of law.

As de Kerchove and Höhn underscore, EU-US cooperation on counter-terrorism and combating other types of serious crime is essential. In Chapter 12, the book turns to a recent effort to bolster law enforcement investigations that has an important transatlantic dimension—the CLOUD Act in the US and the e-Evidence proposal in the EU. As Jennifer Daskal explains, the rise of a globally connected Internet and cloud storage has led to ever-increasing amounts of digital evidence being held by private service providers located outside the territory of the investigating nation. The traditional mutual legal assistance process, which requires the use of official inter-state channels to obtain the evidence, has proven cumbersome in this new context. In response, the US has recently enacted the CLOUD Act, which clarifies that US warrant authority reaches all data under the control of US service providers, without regard to the location of the data; the EU has proposed legislation that would allow Member State authorities to directly compel the production of stored data held by service providers located in another Member State. Daskal assesses the potential for international cooperation under these legislative schemes and argues that they represent an important first step in addressing the problem of evidence gathering in the contemporary, globalized data environment.

Chapter 13, by Marc Rotenberg and Eleni Kyriakides, considers the role of the ECHR in safeguarding fundamental rights. As explained earlier in this introduction, the Council of Europe system, including the ECHR and the ECtHR, has traditionally had primary responsibility for

overseeing Member State respect for liberal democratic rights, rights which come under great pressure when states respond to international terrorism. Rotenberg and Kyriakides describe how France used Article 15 ECHR (“Derogation in Time of Emergency”) to derogate from important Article 8 privacy rights in the aftermath of the Paris terrorist attacks; Turkey did the same after the failed coup attempt in the summer of 2016. They argue that neither France nor Turkey satisfied the requirements for derogations under the ECtHR’s jurisprudence, and they propose new institutional mechanisms that would give NGOs an important role in identifying and publicizing excessive derogations from Article 8 rights.

As explained in the spillover section of this introduction, border control, immigration and internal security policy have common political and legal origins and today are both part of the Area of Freedom Security and Justice (AFSJ). In Chapter 14, Emilio De Capitani concludes this part of the book with a holistic analysis of recent developments in the AFSJ. After analyzing the full range of legal innovations that were introduced in the Lisbon Treaty, he canvasses the legislative track record in AFSJ. He points to a number of significant flaws with how the Lisbon governance model has worked in practice, in particular from the perspective of the European Parliament. These include the failure of national police authorities to communicate the statistics and data necessary for good policymaking; and the empowerment of EU agencies at the expense of the Commission and Parliament. The chapter ends with a list of pragmatic recommendations for the upcoming 2019-2024 legislature.

Moving to *constitutional fundamentals*, the book takes up the problem of democratic backsliding in the Member States and the response in EU law. Chapter 15 by Kim Lane Scheppele and R. Daniel Kelemen gives the historical and legal background of Articles 2 and 7 TEU and explain why partisan politics in a multi-level, federal-type system like the EU make it unlikely that

Article 7 will ever be deployed against Hungary, Poland, or other cases of democratic backsliding. The chapter puts forward a series of more promising legal alternatives for enforcing liberal democratic values: systemic infringement actions under Article 258 TFEU; suspension of payments of European Structural and Investment Funds to Hungary and Poland under the existing ESIF rules requiring effective judicial oversight in recipient countries; and allowing courts of one Member State to stop cooperating with courts of another Member State under EU criminal and civil justice schemes based on a legitimate concern for judicial independence in that Member State.

In Chapter 16, Tomasz Koncewicz shifts our attention specifically to Poland. He explores the role of resentment—*anxiety about the “other,” anger at the liberal establishment, fear of exclusion*—in driving the current illiberal turn and a switch in constitutional doctrine from *rule of law* to *rule by law*. The chapter then analyzes how the politics of resentment has played out on the EU stage with the Białowieża Forest case. Brought in 2017, this was an infringement action against Poland for logging in the ancient Białowieża Forest in violation of EU nature conservation directives. On the one hand, the case vindicated the rule of law, as it resulted in two interim orders and a judgment against Poland, as well as a novel legal doctrine of periodic penalty payments being available for non-compliance with interim measures. On the other hand, Koncewicz argues that ultimate result was disappointing, since Poland openly defied the Court and continued logging, and the Commission lacked the political resolve to apply the periodic penalty payments against Poland.

Chapter 17 offers a complementary diagnosis of authoritarian populism in Poland and Hungary. Bojan Bugarič argues that populism in general, and the illiberal variety in Poland and Hungary in particular, can be explained in large part by austerity and the neoliberal structural reforms of the past decades. After considering the legal and economic sanctions in the EU toolkit

and explaining why they are unlikely to work, the chapter focuses on economic and social policies. Bugarič argues that populist leaders have built their following by promising better material conditions and that European political leader should counter by articulating an alternative to austerity and offering progressive economic policies that promote growth, better jobs, high-quality social services, and high environmental standards.

The last chapter in this section rounds out the discussion of constitutional fundamentals by shining the spotlight on EU governance and the perennial problem of the democratic deficit. In Chapter 18, Peter Lindseth argues that even as extensive regulatory power has been delegated to supranational EU institutions, the experience of democratic self-government—legitimacy—has remained stubbornly national. This is a historical-sociological problem, not one of institutional architecture as suggested by the term “democratic deficit,” and therefore Lindseth calls it the “democratic disconnect.” The democratic disconnect is used as an analytical frame for understanding the developments in economic policy, migration, and internal security over the past decade: in all of these areas, the EU has been called upon to do more, but it has relied almost exclusively on autonomous national fiscal and human capacity to do so, since only the state has the legitimacy and hence the power to mobilize resources. Looking forward, Lindseth argues that even as the ECJ takes on a more important role in monitoring constitutional fundamentals at the national level, as advocated by Scheppele, Kelemen and Koncewicz, it should avoid erecting a quasi-federalist constitution for the EU that is out of sync with the sociological experience of democratic self-government.

III. Assessing the Overall Legal Architecture of Sovereignty-Sensitive Domains

The book's concluding chapter takes stock of the policy areas covered in the volume and brings to light three important legal and normative challenges that cut across all of them. As discussed earlier, it is commonplace that the rule of law, rights, and democracy are the bedrock of the European constitutional tradition. Like Member State law, EU law is expected to abide by these elements of the European constitutional tradition and the concluding chapter assess how it measures up. By tracing the development of EU law in sovereignty-sensitive areas, both the formal legal powers and how those powers have been used over the past decade, the concluding chapter reveals a number of common characteristics and shortcomings on the three dimensions. At the same time, by understanding the shortcomings, it is possible to make proposals for advancing the rule of law, rights, and democracy across the spectrum of policy areas.

First, the rule of law: As chronicled earlier, the EU has come to exercise powers over economic policy, human migration, internal security, and constitutional fundamentals not by grand design but through spillover and in seeking to accommodate sovereignty concerns, European leaders have constructed a highly complex legal order. To govern in these controversial areas, they have used two very different types of legal norms, what I call international and supranational, and over time the norms in the international category have migrated into the supranational category. This process of migration, in turn, has generated confusion, undermining what in legal scholarship and doctrine is referred to as legal certainty. *Variety* in the type of norm and *change* in the status of the norms over time, have generated extreme legal complexity and have undermined the knowability of law—a central element of the rule of law. The chapter argues that legal simplification can be advanced by integrating economic and internal security law into the core TFEU and, within the TFEU, by limiting the doctrine of direct effect as a pre-condition for domestic litigation based on EU law.

Second, with respect to rights, the concluding chapter highlights the inadequacies of access to justice and the procedure for testing EU law. The preliminary reference system is the primary vehicle by which EU citizens can challenge the validity of EU law based on the higher law of fundamental rights.⁴³ In sovereignty-sensitive areas, however, it is more difficult to use the system, since Member States tend to retain considerable discretion in implementing EU legislation, which for a variety of reasons complicates making the validity claim in the preliminary reference procedure. At the same time, it is more important to get cases heard in areas such as economic policy, immigration, and internal security because unlike single market regulation, where the economic rights of relatively sophisticated market actors are at stake, the fundamental rights of ordinary citizens come under pressure—the civil, political, and social rights that are central to the liberal and social democratic identity kit. Because of these deficiencies, the chapter advances two proposals that would expand direct access for individuals to the European Court of Justice.

The third and final element of the European constitutional tradition considered in the concluding chapter is democracy, taking the institutional template contained in the Lisbon Treaty as the baseline. Lawmaking across the different policy areas, even those like immigration and internal security which are now formally governed through the supranational Community method, has tended to veer towards intergovernmentalism because of their sovereignty stakes. Intergovernmentalism, a process in which the asymmetric interdependence and bargaining power of states determines outcomes and democratic politics operate between domestic electorates and their political leaders, is undoubtedly a political fact. Intergovernmental politics, however, both at

⁴³ For a general description of the preliminary reference system, see Court of Justice of the European Union, Recommendations to National Courts and Tribunals, in Relation to the Initiation of Preliminary Ruling Proceedings, 2016 O.J. (C 439) 1.

the European and the domestic levels, avoid the moral dilemmas of Europe-wide governance and short circuit the construction of a Europe-wide identity. Therefore, this chapter argues for greater accountability to the European Parliament, even though decisional powers for the Parliament might not yet be politically feasible. Although the European Parliament undoubtedly has its flaws, which the chapter discusses, it is the one forum where Europe-wide debates and politics can be conducted and it offers an important arena for developing a European perspective on sovereignty-sensitive policy areas.

Independently, when seen in isolation from the perspective of any of the legal sub-fields, the problems of legal complexity, access to justice, and retreat to intergovernmentalism may not be perceived as particularly grave. Lawyers, with enough training, can always decipher the complexities of their fields of specialization; there are alternative modes for assessing fundamental rights compliance in the various policy areas; intergovernmentalism can produce the action necessary for successful policy outputs. However, when these shortcomings exist across the entire gamut, it is hard to avoid the conclusion that they compromise the legal system as a whole and that they can and should be addressed through common forms of legal innovation. These are the cross-cutting theoretical and normative lessons that I draw in my conclusion to this volume. But before delving further into these general lessons, it is time now to turn to the details of how law and governance have evolved in each of the policy domains.

Chapter 19

Conclusion: The Rule of Law, Rights, and Democracy in Sovereignty-Sensitive Domains

Francesca Bignami

The expansion of EU law over the past quarter-century beyond market regulation and into domains of classic state sovereignty has been breathtaking. In the 1990s, it might have been possible to dismiss some of the developments as paper phenomena, but with the introduction of the euro, the Lisbon Treaty's provisions on immigration and internal security law, the dizzying succession of institutional transformations provoked by the euro crisis, and the pressure to develop a role in monitoring constitutional fundamentals, it is fair to say that the EU looks more state-like today than it has at any other point in its history. Yet it is difficult to find any latter-day Jean Monnets celebrating. The EU's exercise of such powers has been contentious, and the rise of populism is the most telling sign. The politics of policymaking have become more complex than ever, characterized by a variety of ideological and regional cleavages. But even though the populist voices in favor of disintegration might be the loudest, there are also steady and substantial efforts being made to improve the EU's capacity to overcome divisions and govern legitimately.

As a joint project of mostly legal scholars, this book and chapter cannot opine on how to render the politics more stable and the policies more viable. It can, however, scrutinize the legal edifice that has been built in sovereignty-sensitive domains, uncover where that edifice falls short of the ideals and normative standards of the law, and suggest improvements. The European project has always relied heavily on cooperation with and acceptance by the legal establishments of the

Member States.⁴⁴ Even though the dynamics have shifted over time, and it is no longer possible to speak of integration through law sheltered from politics, the legitimacy of integration continues to turn in no small measure on how the law that is generated measures up against classic notions of law in a liberal and social democratic constitutional order.

Drawing on the subject-specific contributions in this volume, this concluding chapter assesses the overall legal architecture that has emerged across the gamut of economic policy, human migration, internal security, and constitutional fundamentals.⁴⁵ It takes as its metric what for the European legal tradition is by now the commonplace trio of rule of law, fundamental rights, and democracy—prominent in both the European Convention on Human Rights and the EU Treaties.⁴⁶ Thanks to the cross-cutting perspective offered by this book’s coverage of sovereignty-sensitive law it is possible to identify important characteristics and flaws of that law—flaws that

⁴⁴ Joseph H.H. Weiler, “A Quiet Revolution: The European Court of Justice and its Interlocutors,” *Comparative Political Studies* 26, no. 4 (1994): 510-34.

⁴⁵ The use of these terms is the same as in the introductory chapter and in the organizing scheme of the book. To refresh the reader’s memory: economic policy refers to fiscal policy, general programs affecting the economy, and banking regulation connected to the economic stability of the Eurozone area; human migration refers to intra-EU migration under the law of free movement of persons, to third-country immigration (both economic immigration and asylum seekers), and to border control; internal security refers to police and judicial cooperation; and constitutional fundamentals covers the list of values in Article 2 Treaty on European Union, encapsulated in the three principles of rule of law, rights, and democracy.

⁴⁶ There is an extensive literature that analyzes how the rule of law, democracy, and rights apply in the EU context. For one important, and critical, discussion of the experience of these values in EU governance, see Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge: Cambridge University Press, 2010). For purposes of the analysis in this chapter, as explained below, it suffices to take the legal and institutional settlement contained in the Lisbon Treaty as the baseline.

can get buried or minimized in the subject-specific literature driven more by the details and concerns of the individual policy areas. For each parameter, the discussion focuses on a shortcoming of sovereignty-sensitive law, in particular as that law has developed since 2009 under the influence of the euro crisis and the new powers conferred in the Lisbon Treaty. The analysis is broken out by the subject areas covered in this book, with the exception of constitutional fundamentals, which is less central than the other areas to the sections on rights and democracy. As highlighted in the next section, there are no specific EU lawmaking competences for constitutional fundamentals and the emerging law is being developed in ECJ jurisprudence. Since this chapter's analysis of rights and democracy focuses on the legitimacy of the EU's lawmaking activity, it is less relevant to what for the moment is the largely jurisprudential domain of constitutional fundamentals. The discussion of each of the three parameter concludes with constructive proposals for improving the law.

As explained in the introduction to this book, the EU has come to govern and make law in the sovereignty-sensitive domains that have raised populist hackles through the historical process of spillover. Legal prerogatives over economic policy, human migration, internal security, and constitutional fundamentals have expanded in piecemeal fashion. There is no grand constitutional declaration of political and legal authority. But that should not be an obstacle to developing a structurally coherent legal architecture that abides by the standards common to the European legal tradition.

I. Legal Complexity and the Rule of Law

European integration through spillover has given rise to legal complexity that bypasses the ordinary complexity of law in developed economies and plural societies and that makes it difficult

for citizens and even, in certain cases, legal professionals to know what rules govern individuals in their dealings with other individuals and their public authorities. This complexity has obvious, negative implications for the rule of law—law must be knowable for it to count as law.⁴⁷ The crux of the problem is the use of two very different types of legal norms in the process of European integration—international and supranational.⁴⁸ International norms are applicable between Member States and subject to treaty-based dispute resolution and, in some cases, centralized enforcement. Since they are conceived as operating in the international realm, as between states, and not applicable to the citizens of those states, they are often not published and made widely available. Likewise, citizens cannot rely on international rules and cannot go to court to enforce and challenge those rules. These rules tend to be used for contentious, sovereignty-sensitive issues

⁴⁷ This element of the rule of law has a long pedigree, going back at least as far as Jeremy Bentham’s writings on codification, see Philip Schofield, “The Legal and Political Legacy of Jeremy Bentham,” *Annual Review of Law and Social Science* 9 (2013): 51-70, and is very much alive and well today, with ongoing efforts at simplification and improving the quality of law in various jurisdictions. See, e.g., Conseil d’État, “Étude Annuelle 2016—Simplification et Qualité du Droit,” 2016.

⁴⁸ These labels are used in line with classic debates in analytical philosophy on the nature of law and the distinction between borderline cases (international law) and core cases (domestic law, which I call supranational law in the EU case). Herbert L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), 15. I use the term “supranational norms” instead of “domestic norms,” since the latter has traditionally been used to refer to the legal norms of nation states and causes confusion in the EU context. It should also be noted that my use of the labels “international” and “supranational” in this discussion of legal complexity is designed to capture only the nature of the rules, not the status of the legal system. The latter, of course, is a highly contested matter and I am not suggesting that the EU is akin to the legal system of a federal nation state or taking sides in the debate. For an introduction to the legal philosophy of EU Law, see Julie Dickson and Pavlos Eleftheriadis, eds., *Philosophical Foundations of EU Law* (Oxford: Oxford University Press, 2012).

because Member States can retain more control over the future evolution of cooperation. By contrast, supranational norms are akin to classic domestic law: they are binding on public authorities and citizens in their dealings with one another and are subject, in the courts, to enforcement, interpretation, and judicial review for compliance with higher-law principles. Those courts, in the EU's judicial system, include both the European Court of Justice (ECJ) and the courts of the Member States. Supranational norms are generally used when the EU institutions deal directly with individuals, when the issue benefits from a high degree of Member State consensus, or when the policy requires uniform implementation. For individuals to know what is law they must be able to distinguish between rules in the international category—not law—and those in the supranational category—law.

In light of the quantity of EU norms, parsing them into the international and supranational categories is no small hurdle to the knowability of law. The difficulty is compounded, however, by the fact that the distinction between the two categories has been a moving target. That is because as spillover occurs, and intergovernmental cooperation through international instruments intensifies, the reality of policymaking often belies the international label given to the norms. As a result, the legal establishment, whether through the European Court of Justice's jurisprudence or through legal reform, has sought to transform them into supranational norms. This impetus comes in large measure from the moral implications of failing to hold such norms to the standards of domestic legal norms. If most of the substance of public action affecting individuals is being driven by the European level, not the national level, then those rights and obligations created at the European level should meet the standards of law in a rule-of-law system: they should be published and widely available so that European citizens know what conduct is expected of them and their public authorities; in line with the liberty function of law in classic liberalism, individuals should

be able to rely on the rules in court, thus guaranteeing private rights and curbing arbitrary state action; and those same rules should be challengeable in court based on the higher-law principles of system, in accordance with the post-war consensus on administrative and constitutional law.

Even though the jurisprudence and legal reform that has transformed international norms into supranational ones has generally had beneficial consequences for the rule of law, it has also had negative ones, which in European legal scholarship comes under the heading of “legal certainty.”⁴⁹ The essential problem is that as rules move from the international to the supranational categories, there is confusion, albeit generally only for a certain transitional period, as to whether those rules can be relied upon by individuals in their dealings with other individuals and their public officials, and whether they can be litigated in their Member State courts. This uncertainty is particularly problematic when, as is often the case, there is an alternative Member State law that sets out different, possibly conflicting, rights and obligations. Although the primacy of EU law over Member State law is well established⁵⁰ and therefore there is no confusion as to the ranking of legal norms, there is confusion as to what counts as a legal norm. This confusion, for any given class of legal rules, generally only persists for a limited period, until the jurisprudential change has been consolidated or the transitional period set down in the legal reform has expired. Therefore,

⁴⁹ For a discussion of this concern in recent scholarship and jurisprudence, see Mikael Raks Madsen, Henrik Palmer Olsne, and Urska Sadl, “Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court’s Decision in the *Ajos* Case and the National Limits on Judicial Cooperation,” *European Law Journal* 32, no. 1-2 (2017):140-50.

⁵⁰ Given the focus on EU law, this discussion omits the issue of primacy from the perspective of Member State legal systems and the voluminous debate on constitutional pluralism. See, e.g., Neil Walker, “Constitutional Pluralism Revisited,” *European Law Journal* 22, no. 3 (2016): 333-55.

for purposes of this discussion, the legal certainty issue is grouped together with the more general problem of legal complexity.

Because of their impact on national sovereignty, European integration in the policy areas covered in this volume has proceeded, as an initial matter, through international norms and instruments and has then come under pressure to migrate to the supranational category. As a result, legal complexity has undermined the knowability of law. The rest of this section briefly narrates this legal trajectory, which maps onto the historical spillover process described in the introductory chapter of initially cautious intergovernmental cooperation followed by more intense integration. It concludes with recommendations for the EU's ongoing efforts at legal simplification.

1. Early Forms of Cooperation on Economic Policy and Human Migration Through Directives

Under the original Treaty of Rome, there was one type of legal instrument available for inter-state cooperation that was squarely international—directives.⁵¹ They were “binding, as to the result to be achieved, upon each Member State to which [they are] addressed, but shall leave to national authorities the choice of form and methods.”⁵² Since directives were thought to operate in the international realm, as between states, and not to apply broadly to the citizens of those states, publication was not required. Relatedly, it was generally believed that directive provisions could

⁵¹ Early views of the legal status of directives can be found in Benedetto Conforti, “Mécanismes Juridiques Assurant la Mise en Oeuvre de la Législation Communautaire par les Autorités Législatives ou Exécutives Nationales (Rapport General),” 1965 FIDE Congress 25 (1966); “Rapports Nationaux de la 1^{ème} Commission,” 1965 FIDE Congress 25-26 (1966); *Revue Trimestrielle de Droit Européen* 618, no.1 (1965), Troisième FIDE Colloque, 25, 26 27 novembre 1965; *Revue Internationale de Droit Comparé* 152 (1966), Troisième Colloque de Droit Européen.

⁵² Article 288 TFEU.

not be invoked by individuals in their domestic courts and through the preliminary reference system, except for the rare instances when Member States explicitly relied on their provisions to impose liabilities on individuals. The early efforts aimed at coordinating economic policy and facilitating the free movement of persons were largely conducted through directives.

As has been amply chronicled in legal and historical scholarship, the distinction between directives and instruments of the supranational ilk, i.e. regulations, has been progressively eroded by the European Court of Justice so that the rules contained in directives can, for the most part, be relied on by individuals in their Member State courts.⁵³ In the standard account of the expansion of direct effect—the doctrinal test used vet norms and to recognize the supranational as opposed to international status of certain legal rules—the emphasis has been on the Court’s federalizing mission to create an effective and uniform legal order. In the facts and the rhetoric of the early cases, however, the rule-of-law considerations discussed above were also on full display: the robust cooperation occurring under the legal rubric of directives made it difficult to treat directives as categorically different from the squarely supranational instrument of the regulation and denying directives direct effect would undermine the liberty function of law (in the reasoning of the Court,

⁵³ For a general legal discussion of directives and their direct effect, see Sacha Prechal, *Directives in EC Law*, 2d ed. (Oxford: Oxford University Press, 2005); for a legal history account, see Morten Rasmussen, “How to Enforce European Law: A New History of the Battle over the Direct Effect of Directives, 1958-1987,” *European Law Journal* 23, no. 3-4 (2017): 290-308. As the debate has evolved, the view put forward here of the doctrine of direct effect has become more controversial, see Elise Muir, “Of Ages in—and Edges of—EU Law,” *Common Market Law Review* 48, no. 1 (2011): 39-62, but it is consistent with the early usage of the doctrine and also brings out the legal parallels to more recent episodes of integration in sovereignty-sensitive policy areas.

“rights” and “equality”) in a rule-of-law system.⁵⁴ At the same time, there has been pushback from elements of the legal establishment and national courts drawing on the legal certainty concern. This was true in the 1970s, when the Court faced opposition from high courts in France and Germany for recognizing that Directive 64/221 (on limitations on the free movement of persons) and Directive 77/338 (on calculation of value-added tax) could have direct effect;⁵⁵ and it is still true today, as the Court continues to close gaps in the supranational status of directives, as evidenced by the recent opposition from the Danish Supreme Court to the use of general principles of law to give horizontal direct effect to provisions of Directive 2000/78 (on equal treatment in employment).⁵⁶

2. Economic Policy

In part because the Court has significantly reduced the possibility of cooperation through international legal norms within the original Treaty of Rome, the more recent efforts at cooperating in sovereignty-sensitive policy areas have all begun outside the Treaty of Rome, in newly

⁵⁴ The possibility of direct effect for directives was established in a line of cases beginning with decisions (another instrument initially believed to be of the international ilk) and ending with directives. These cases all focus on the robust practice of European governance and the corresponding need to give individuals rights. See Opinion of Advocate General Roemer, Case 9/70, *Grad v. Finanzamt Traunstein*, ECLI:EU:C:1970:76, p. 847; Opinion of Advocate General Roemer, Case 33/70, *SACE v. Italian Ministry for Finance*, ECLI:EU:C:1970:107, p. 1228; Opinion of Advocate General Mayras, Case 41/74, *van Duyn v. Home Office*, ECLI:EU:C:1974:123, p. 1355; L.J. Brinkhost, “Case Note on *Grad* and *SACE*,” *Common Market Law Review* 7 (1970): 380-92.

⁵⁵ See Gerhard Bebr, “The Rambling Ghost of *Acte Clair* and the Court of Justice,” *Common Market Law Review* 20, no. 3 (1983): 439-72.

⁵⁶ Madsen, Olsne, and Sadl, “Competing Supremacies and Clashing Institutional Rationalities.”

negotiated international treaties not subject to the jurisdiction and case law of the Court.⁵⁷ As discussed in the introductory chapter and the economic policy section of this book, Economic and Monetary Union (EMU) was originally placed in the mainstream Treaty of Rome (which at the time was referred to as the “First Pillar” and is now called the Treaty on the Functioning of the European Union [TFEU]), and there have been a number of important measures adopted under those provisions, i.e. the surveillance system set out under the Six Pack and the Two Pack, as well as an amendment to the TFEU’s no-bailout provision. However, the most significant law on fiscal transfers has been adopted outside the TFEU. Although the situation of the Eurozone bailouts and conditionality is complex, the bulk of the loans came from the European Financial Stability Facility (EFSF), established by international agreement, and shortly thereafter the European Stability Mechanism (ESM), also created by international agreement and the current organization for financial assistance to Eurozone states facing economic difficulties.⁵⁸ In line with the international status of the norms, the various loan agreements setting out the financial terms of the loans and the accompanying memoranda of understanding (MoU) on the conditions that had to be met for the successive tranches of the loans to be released were not systematically published and were

⁵⁷ Another important, and related, reason, is that cooperation in these sovereignty-sensitive areas has proceeded without all the Member States and therefore especially before the Amsterdam Treaty introduced the concept of “variable geometry” and the possibility of moving forward with just a subset of Member States under the rubric of the EU Treaties, it was necessary to use separate international agreements covering a separate set of signatory states.

⁵⁸ Some of the loan facilities were established under the TFEU. For a discussion of the complexity generated by the multiple sources of loans, as well as rule of law issues related to the EFSF and ESM loans, see Claire Kilpatrick, “On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts,” *Oxford Journal of Legal Studies* 35, no. 2 (2015): 325-53; Claire Kilpatrick, “The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality,” *Current Legal Problems* 70, no. 1 (2017): 337-63.

generally not made available to the public. Moreover, even though the ESM carves out a role for the European Court of Justice, its jurisdiction is limited to adjudicating disputes between the contracting state parties or between the state parties and the international organization; there is no possibility for individuals to access the ECJ, either directly or through the preliminary reference procedure. The other Eurozone fiscal mechanism that has been created in response to the euro crisis—the fund for creditors and shareholders of failed banks in resolution—is also being funded by an international agreement.⁵⁹ There too, the jurisdiction of the ECJ is limited to disputes between the contracting parties. It also bears recalling that the ratcheting up of the balanced-budget rule for the Member States was accomplished by international treaty (the Fiscal Compact).

There have been a number of legal challenges to the MoUs under EU fundamental rights law, but the cases involving MoUs connected to the EFSF and ESM loans (as opposed to the smaller loans that were made under TFEU facilities) have not been successful so far since those MoUs are considered international norms—not EU acts subject to the jurisdiction of the ECJ.⁶⁰ At the same time, however, there has been jurisprudential movement towards recognizing that the substance of economic policymaking for bailout countries is driven in large part by the European level, not by discretionary decisions made in Athens, Madrid, or any of the other recipient governments. Not only can the terms of MoUs be quite precise, but they rely on the EU institutional system for enforcement, i.e. European Commission surveillance under the Six Pack and Two Pack. Thus, in one recent judgment, the litigants were allowed to proceed against the MoU on the theory that the Commission, which was one of parties responsible for negotiating the MoU, could be held

⁵⁹ Intergovernmental Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund. Available at Council Doc. 8457/14 (May 14, 2014).

⁶⁰ See, e.g., Joined Cases C-105/15 P to 109/105 P, *Mallis and Malli v. Commission and ECB*, ECLI:EU:C:2016:702.

responsible under the principles of government liability.⁶¹ Legal commentators have also proposed that these MoUs be brought within the TFEU's system of legal rights and remedies by recognizing their role in the Six Pack, and especially the Two Pack (one piece of which applies exclusively to bailout countries), a budgetary surveillance system which is squarely conducted under the TFEU.⁶²

There have also been law reform proposals to eliminate the international status of the ESM and bring it within the EU Treaties. The Commission's proposal on establishing a "European Monetary Fund" (EMF) would be the most far-reaching.⁶³ For present purposes, the most important elements are the provisions requiring publication of MoUs and decisions of the Board of Governors and the establishment of the EMF as a Union body, which would bring it under the jurisdiction of the ECJ and its jurisprudence on the legal status of norms. What might be called the "domestication" of ESM law is one important reason why the Commission's proposal has faced significant opposition, the other being the creation of direct lines of accountability to the Council and the European Parliament. Although the future evolution of the law governing bailouts and conditionality is an open question, it is evident that it is in a period of flux as various legal actors are seeking to push that law towards a supranational legal framework more in line with rule-of-law principles.

3. Human Migration

⁶¹ Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising v. Commission and ECB*, ECLI:EU:C:2016:701.

⁶² Kilpatrick, "The EU and its Sovereign Debt Programmes," 340-53; Menelaos Markakis and Paul Dermine, "Bailouts, the Legal Status of Memoranda of Understanding and the Scope of Application of the EU Charter: *Florescu*," *Common Market Law Review* 55, no. 2 (2018): 643-71.

⁶³ *Commission Proposal for a Council Regulation on the Establishment of the European Monetary Fund*, COM (2017) 827 final (December 6, 2017).

Cooperation on the borders and immigration aspects of human migration began earlier than economic policy, but it too started in international agreements—the Schengen Agreement, soon followed by the Schengen Convention; and specifically for asylum, the Dublin Convention.⁶⁴ Soon thereafter came the Maastricht Treaty, which introduced border control and immigration as policy areas under the EU umbrella. However, this was done by creating the so-called pillar system, and placing these issues outside the mainstream “First Pillar” Treaty (concerning the single market, what is now called the TFEU) and into the special, new Treaty (the Treaty on European Union [TEU]) containing the “Third Pillar” for Justice and Home Affairs. The instruments set out for cooperation and policymaking were squarely international: conventions, under public international law; and so-called “joint actions,” whose legal effects as between the Member States were never settled.⁶⁵ The question of ECJ jurisdiction was left to be negotiated in the individual conventions, and a complicated set of arrangements was adopted.

Then came the Amsterdam Treaty, which remedied most of the rule-of-law defects of cooperation through norms of the international variety by transitioning them into the supranational category.⁶⁶ Border control and immigration were removed from the Third Pillar and placed in the mainstream First Pillar Treaty. The legal instruments to be used for policymaking were the

⁶⁴ The discussion in this concluding chapter largely excludes the intra-EU dimension of human migration, since the law (on free movement of persons) developed much earlier and has been squarely supranational since the 1980s. However, it should be recalled that the decision to abolish internal borders and establish a common external border in the Schengen Agreement had the effect of facilitating tremendously the rights enjoyed under the law of free movement of persons.

⁶⁵ Steve Peers, *EU Justice and Home Affairs Law* (Harlow: Longman, 1999), 25-29. This discussion only covers JHA instruments for internal cooperation, not for cooperation on external affairs.

⁶⁶ Peers, 39-62.

standard, supranational ones. Moreover, for the first time, individuals were given the right to rely on, and bring challenges to, the measures taken in the field through the EU judicial system, i.e. through the preliminary reference procedure involving Member State courts and the ECJ. The Amsterdam Treaty, however, did place restrictions on the preliminary reference procedure, by only contemplating references from courts of last resort and by excluding from the procedure issues relating to law and order and the protection of security. These restrictions were only removed in the Lisbon Treaty.

The last important move made in the Amsterdam Treaty was to integrate what, until then, had been the free-standing organization and law under the international Schengen Convention (the so-called Schengen *acquis*) into the EU legal order. Cooperation on external borders through the Schengen Convention involved mostly border control and immigration issues but there were also aspects related to apprehending criminals and enforcing customs law. Since, as explained in the next section, the Amsterdam Treaty left internal security in the Third Pillar even as it placed border control and immigration in the First Pillar, the integration of the Schengen *acquis* into the EU legal order was not straightforward. Ultimately, the Schengen Convention (and the related *acquis*) was divided into border control and immigration provisions, which were allocated to the First Pillar; police and customs cooperation provisions, which were allocated to the Third Pillar; and the Schengen Information System, which since it was used for multiple purposes was left to the default solution of the Third Pillar.⁶⁷

In contrast with economic policy, the shift from international to supranational in the field of human migration is complete. Since the Amsterdam Treaty has been in force for twenty years now, there is no hang over of international rules adopted in the era of the Schengen and Dublin

⁶⁷ Peers, 56-60.

Conventions or under the Maastricht Treaty. All of the legal norms that currently exist for border control and immigration have been enacted under the First Pillar and fit the supranational mold. In addition, since the Lisbon Treaty, the ordinary rules on ECJ jurisdiction apply, most importantly for preliminary references. In sum, the variety in types of legal norms used for human migration policy has been reduced considerably now that they are all clearly of the supranational ilk and the change (and prejudice to legal certainty) associated with the transition from international to supranational has now been completed. At the end of this historical process, the knowability of law and the related respect for the rule of law have improved considerably.

4. Internal Security

As with border control and immigration, European cooperation on internal security began in the international Schengen Convention and then was brought into the EU framework in the Maastricht Treaty. Like border control and immigration, the drafters of the Maastricht Treaty placed internal security in the Third Pillar and stipulated that policymaking was to proceed through international “conventions” and “joint actions” and with *ad hoc*, not guaranteed, ECJ jurisdiction. At the time of the Amsterdam Treaty, however the two policy trajectories diverged. While border control and immigration policy were transferred to the supranational First Pillar, internal security remained in the Third Pillar. The Amsterdam Treaty retained conventions (and eliminated joint actions) and stipulated two new types of instruments for cooperating on internal security, still of the international ilk: an instrument called “framework decisions” for harmonizing Member State law related to internal security, which were binding on the Member States but where “direct effect” was expressly excluded; and another new instrument called “decisions” for all other purposes, which again were to be binding but where “direct effect” was expressly excluded. Although ECJ jurisdiction over preliminary references was not mandatory, Member States had the option of

signing up to a modified form of the procedure and the vast majority did. Through the preliminary reference procedure, the ECJ was soon called upon to rule on the interpretation and effect of Third Pillar measures, and it held that framework decisions, like directives (in so-called horizontal situations) could have “indirect effect,” i.e. were legal instruments of the supranational ilk;⁶⁸ somewhat later, the ECJ also found that framework decisions were subject to interpretation and validity challenges based on EU fundamental rights.⁶⁹ Thus we can observe law reform and jurisprudential pressure pushing legal norms from the international to the supranational categories in the domain of internal security.

The final step in this legal trajectory was the Lisbon Treaty. The Third Pillar, where internal security had been placed, was eliminated and it is now be found in the mainstream TFEU. These powers are to be exercised through the standard set of supranational EU legal instruments—no longer are there conventions, framework decisions, and decisions for internal security matters. With one exception, the limitations on preliminary reference jurisdiction have been removed and the general provisions on ECJ jurisdiction now apply. That exception is for review, in the context of EU police and judicial cooperation, of the “validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”⁷⁰ This is a significant limitation on judicial review of police action linked to EU law and illustrates the continuing reluctance to move away from international-style norms in sovereignty-sensitive policy areas.

⁶⁸ Case C-105/03, *Maria Pupino*, ECLI: EU:C:2005:386.

⁶⁹ Case 399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107.

⁷⁰ Article 276 TFEU.

The historical trajectory of EU law in the domain of internal security vividly demonstrates the legal complexity connected to the spillover process. Inter-state cooperation began through international norms. In successive treaties, to remedy their rule-of-law deficiencies, European legal reformers replaced them with norms that were public, binding, and amenable to individual enforcement and challenge (based on higher law) in the EU court system; the ECJ's jurisprudence also contributed to the shift from international to supranational. But the switch was incremental, leading to an immense variety of instruments and judicial frameworks, as well as uncertainty, along the way. Indeed, the process was more complex than conveyed in this account because the Lisbon Treaty subjected the application of the ECJ's TFEU preliminary reference jurisdiction (for Third Pillar internal security measures that had been adopted prior to Lisbon's elimination of the Third Pillar) to a five-year transitional period during which the Third Pillar procedure continued to operate.

The shift from international to supranational legal norms in internal security policy is largely—but not entirely—complete. There are two remnants of the international approach and hence sources of complexity: the carve out for judicial review of police action; and the continuing existence of acts adopted under the Third Pillar during the Maastricht and Amsterdam Treaty years, whose legal effects, i.e. international character, are expressly preserved under the Lisbon Treaty. With respect to Third Pillar acts, their number has been reduced over the years (because they have been repealed or rendered obsolete by subsequent TFEU measures) but there are bits and pieces that linger: implementing measures left over from the Schengen *acquis* that was transferred into the Third Pillar by the Amsterdam Treaty; three Conventions and a number of Joint Actions related to internal security and adopted under the Maastricht Treaty; and a number of Decisions and Framework Decisions left over from the Amsterdam Treaty, including the European Arrest

Warrant, which is of great practical importance in light of how much it is used by Member State authorities.⁷¹

5. Constitutional Fundamentals

Turning to the constitutional fundamentals of the Member States, the legal norms are squarely of the international variety. As explained earlier in this book, they were introduced in the Amsterdam Treaty and inserted into the intergovernmental TEU.⁷² The rules on constitutional fundamentals are styled as a general declaration of commitment to common values, are contained in Article 2 TEU and therefore exempted from the ordinary system of norms and ECJ jurisdiction in the TFEU, and are not accompanied by lawmaking competences. Their enforcement in Article 7 TEU is through a special procedure that ultimately turns on the willingness of the European Council (the most intergovernmental of EU institutions) to determine by unanimity vote (excluding the offending Member State) that there has been a serious breach of the values. The ECJ's jurisdiction is limited—much more so than in the fiscal treaties and the Maastricht-era conventions that were agreed on internal security. It can intervene only at the behest of the Member State found to be in serious breach and only on the issue of whether the procedural requirements were respected. In sum, on the face of it, there does not appear to be a right for individuals to rely upon Article 2 TEU values as law, which they can invoke and enforce against their national governments in the EU court system.

⁷¹ Steve Peers, *EU Criminal Law, Policing, and Civil Law*, vol. II of *EU Justice and Home Affairs Law*, 4th ed. (Oxford: Oxford University Press, 2016), app. II.

⁷² They were originally numbered Articles 6 and 7 TEU and since the Lisbon Treaty are numbered Articles 2 and 7 TEU.

As explained in the introductory chapter, the policy domain of constitutional fundamentals is currently experiencing spillover in the form of a more robust, supranational system of surveillance and enforcement through the ECJ's ordinary jurisdiction in the TFEU. Recently, the Court has been called upon to assess the independence of the Polish judiciary and Poland's compliance with the rule of law in a number of preliminary references and a Commission infringement action.⁷³ Since the process through which this is unfolding is not through the changing status of legislative instruments but the operation of what might gradually become oversight by a human rights court, it has a smaller impact on legal complexity and legal certainty; judicial oversight is relatively familiar from the European Court of Human Rights (ECtHR) and the quantity and specificity of the norms is less significant. Nevertheless, there are two important sources of uncertainty: First, so far, the case law has tied surveillance of constitutional fundamentals to Member State implementation of EU law under the TFEU. However, it has been suggested that the Court should unmoor the rule of law, rights, and democracy from the specific obligations of EU law and police Member States *tout court*, as a direct obligation of Member States under Article 2 TEU to govern with respect for constitutional fundamentals.⁷⁴ This change could

⁷³ Case C-216/18 PPU, *Minister for Justice and Equality v. LM*, ECLI:EU:C:2018:586 [hereinafter *Celmer*]; Case C-522/18, Request a Preliminary Ruling from the Sąd Najwyższy (Poland) Lodged on August 9, 2018, 2018 (C 427) 8 [hereinafter *Polish Judges*]; Case C-619/18, *Commission v. Poland*, ECLI:EU:C:2018:910 (Action brought on October 2, 2018).

⁷⁴ See Scheppele and Kelemen's analysis in this volume of Case C-64/16, **Associação Sindical dos Juizes Portugueses v. Tribunal de Contas**, ECLI:EU:C:2018:117; Carlos Closa, "Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations" in *Reinforcing Rule of Law Oversight in the European Union*, eds. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016); Christophe Hillion, "Overseeing the Rule of Law in the EU: Legal Mandate and Means," in *Reinforcing Rule*

potentially allow the Court to cover elements of domestic constitutional orders that still today are omitted from the scope of EU law but nonetheless are central to a functioning liberal democracy. The second source of uncertainty is the question of which rights and duties will be monitored by the ECJ in light of the vagueness of the Article 2 TEU values. At present, the focus has been judicial independence, but that is only one of the important elements of liberal democratic morality. The Court will undoubtedly draw from the EU Charter of Fundamental Rights, in a process that might eventually come to resemble the U.S. Supreme Court's incorporation of the U.S. Bill of Rights, which originally only applied to the federal government but beginning in the early twentieth century was gradually and selectively applied to the states.

The chart below summarizes, chronologically, the evolution of the different policy areas with the attention to the type of legal norms used at each stage. It shows a clear trajectory from the international to supranational category for human migration and internal security, and to a lesser extent for constitutional fundamentals. With respect to economic policy, the legal norms are both international and supranational and the situation is still in flux.

of Law Oversight in the European Union, eds. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016).

Table 1—Mapping type of legal norms in different policy areas: international and supranational

POLICY AREA	PRE-MAASTRICHT	MAASTRICHT (1992)	AMSTERDAM (1997)	CONTEMPORARY DEVELOPMENTS: LISBON/EURO CRISIS	POST-
ECONOMIC POLICY		1st Pillar (EMU)		TFEU -Art. 136.3 TFEU on bailouts (2011) -Six Pack (2011) -Two Pack (2013) -C-8/15 P to C-10/15 P, Ledra Advertising (2016)	
			<i>International:</i> -EFSF (2010); ESM (2012) -Fiscal Compact (2012) -IGA on banks resolution (2014)		
HUMAN MIGRATION (BORDER CONTROL AND IMMIGRATION)	<i>Schengen Convention; Dublin Convention</i>	<i>3rd Pillar (conventions, joint actions)</i>	First Pillar But: limited preliminary reference jurisdiction	TFEU	
INTERNAL SECURITY	<i>Schengen Convention</i>	<i>3rd Pillar (conventions, joint actions)</i>	<i>3rd Pillar (conventions, framework decisions [FD], decisions)</i> But: optional preliminary reference jurisdiction and indirect effect for FD	TFEU But: 3 rd Pillar measures still in force with same legal effects as before; exception for preliminary reference review of police action	
CONSTITUTIONAL FUNDAMENTALS			<i>Arts. 6 & 7 TEU (renumbered as Arts. 2 & 7 TEU in Lisbon Treaty)</i>	Jurisprudential developments under TFEU: -Commission infringement action (C-619/18 on Poland) -Preliminary references (C-216/18 PPU [Celmer]; C-522/18 [Polish Judges])	

Key: International instruments and legal norms are in *italics*; supranational instruments and legal norms are in **bold**. In those cases where the international or supranational designation does not capture the transitional elements of the norm, an explanation is given in regular.

6. Reducing Legal Complexity and Bolstering the Rule of Law in the EU

Reducing complexity and improving the knowability of law through simplification is a perennial item on the EU agenda and this discussion highlights a number of areas where progress could still be made.⁷⁵ First, even though as discussed earlier, directives have largely become supranational instruments, there is one circumstance in which directives still cannot officially be invoked by individuals in their Member State courts—in horizontal situations between individuals. In light of the substantial doctrinal evolution that has occurred since *Van Duyn* and the other early directive cases from the 1970s and 1980s, it seems that the time is ripe to discard this rule.⁷⁶ The test for direct effect, which is based on the precision of the norms, could still be applied to the individual provisions of directives (and, of course, all other types of legal instruments), but establishing that the norms are precise enough to allow for claims to be litigated would now effectively operate as just one of many conditions that individuals must satisfy to succeed in court—conditions that are central to virtually all legal systems. By discarding the special rule on horizontal direct effect, the doctrine would no longer operate to categorically exclude certain types of EU law from being

⁷⁵ For instance, legal simplification was one of the four mandates given to the drafters of the Constitutional Treaty. See Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge: Cambridge University Press, 2010), 11.

⁷⁶ This is certainly not a novel suggestion, since the legal certainty concerns that are raised every time doctrinal innovations expand the effect of directives in horizontal situations often appear to outweigh any prejudice to the legal certainty of individuals from a wholesale doctrinal shift to direct effect. See Opinion of Advocate General Jacobs, Case C-316/93, *Nicole Vaneetveld v. Le Foyer*, ECLI:EU:1994:32, para. 31.

litigated in Member State courts as under the original doctrine of direct effect.⁷⁷ With respect to bailouts, irrespective of which proposal for ESM reform is adopted, MoUs should be integrated with the system of legal instruments in the TFEU and should be subject to the ordinary jurisdiction of the ECJ. Based on an inventory of the remaining Third Pillar measures for internal security, the ones of any significance should be identified and either readopted as TFEU measures or, if not politically feasible, any pertinent differences with respect to their TFEU counterparts highlighted.⁷⁸

One objection to reducing the scope for international-style instruments by curtailing the doctrine of direct effect and consolidating everything within the TFEU is that it reduces the flexibility of norms in a political system where state sovereignty is still critical. But there are many other tools available to lawmakers to signal that legal norms are open-textured and cannot give relief to affected individuals in court, without having to resort to the legal fiction that those norms do not exist in court. Most straightforward, the legal norm can be written in such a way that it does not dictate specific outcomes for individuals when they go to court, even though it does oblige state authorities take steps to implement common policies. Another possibility is the use of labels to signal how rigid or flexible the instrument is intended to be—on the flexible end of the spectrum Article 288 TFEU already includes “recommendations” but there could also be “guidelines,” or “guidance.”

⁷⁷ Deuxième colloque internationale de droit Européen organisé par l'Association Néerlandaise pour le Droit Européen, The Hague, October 24-26, 1963 (N.V. Uitgeversmaatschappij W.E.J.Tyeenk Willink, Zwolle, 1966), 49-63.

⁷⁸ In this sense, see Steve Peers, *EU Immigration and Asylum Law*, vol. I of *EU Justice and Home Affairs Law*, 4th ed. (Oxford: Oxford University Press, 2016), 72.

II. Access to Justice and First- and Second-Generation Rights

One of the remarkable things about the current politics is that the essential dilemmas of public law that marked the development of the nation state in the nineteenth and twentieth centuries are today front and center of the EU legal stage. As EU policymaking has expanded to core state prerogatives, the fundamental rights mission of the ECJ has mushroomed. The ECJ has issued numerous judgments on the rights of criminal suspects in cases involving the European Arrest Warrant⁷⁹ and in fraud prosecutions.⁸⁰ It has heard and, so far, rejected claims that cuts in public sector salaries and pensions designed to satisfy the conditions attached to EU bailouts violate the property and social rights of those public employees.⁸¹ These are first- and second-generation constitutional rights that are enshrined in national constitutions and that are elaborated in national criminal procedure codes, criminal law, and labor and social security law, and that go to the heart of the liberal and social democratic constitutional tradition.⁸²

Developing a jurisprudence of first- and second-generation rights is not categorically different from earlier forms of ECJ fundamental rights litigation. The right to certain forms of public income, together with the associated equality and legitimate expectations guarantees, have

⁷⁹ See, e.g., *Melloni*; *Celmer*.

⁸⁰ See, e.g., C-42/17, *M.A.S. and M.B.*, ECLI:EU:2017:564.

⁸¹ C-258/14, *Florescu and Others*, ECLI:EU:C:2017:448; *Associação Sindical dos Juizes Portugueses*.

⁸² For a discussion of the difference between first and second-generation rights in the French tradition, see Diane Roman, “Les Droit Sociaux, entre ‘Injusticiabilité’ et ‘Conditionnalité’: Éléments pour une Comparaison,” *Revue Internationale de Droit Compare* 61, no. 2(1) (2009): 285-313. For a comparative law survey of social rights, see Krzysztof Wojtyczek, ed., *Social Rights as Fundamental Rights: XIXth International Congress of Comparative Law* (The Hague: Eleven International Publishing, 2016).

been litigated in the context of the common agricultural policy and other market sectors since the 1960s.⁸³ Due process rights have been established in the context of administrative enforcement of competition law, again since the 1960s.⁸⁴ There are good reasons to believe that the Court's jurisprudential method for developing rights based on the "constitutional traditions common to the Member States" can be transferred relatively seamlessly from the market arena to economic policy, internal security, and other sovereignty-sensitive areas.

Where the current phase of fundamental rights adjudication gives pause is in the mechanisms available for bringing claims against EU measures before the ECJ. Access to justice for individuals is based on the so-called "subjective rights" model of public law litigation. When the Court was first established in the 1950s, it was largely conceived as a judicial forum for hearing claims of illegal behavior by public administration. The drafters of the Treaty of Rome adopted the German model of subjective rights in property and liberty, as opposed to the French model of objective interests in lawful government, as the test for obtaining standing and getting individual claims heard by the Court.⁸⁵ This had the effect of dramatically limiting access to the Court, and channeling most litigation, including litigation challenging the validity and fundamental rights compliance of EU measures, through the system of preliminary references from domestic courts

⁸³ See Eleanor Sharpston, "Legitimate Expectations and Economic Reality," *European Law Review* 15, no.2 (1990): 103-60.

⁸⁴ See Francesca Bignami, "Creating European Rights: National Values and Supranational Interests," *Columbia Journal of European Law* 11, no. 2 (2005): 259-72.

⁸⁵ Michel Fromont, "L'Influence du Droit Français et du Droit Allemand sur les Conditions de Recevabilité du Recours en Annulation devant la Cour de Justice des Communautés Européennes," *Revue Trimestrielle de Droit Européen* 2, no. 1 (1966): 47-65.

to the ECJ. Notwithstanding the considerable critique of this system over the years,⁸⁶ it was changed only marginally in the Lisbon Treaty and standing doctrine remains largely the same as it was in 1957.

Now that the EU governs in the areas of economic policy, human migration, and internal security, the preliminary reference mechanism as the vehicle for testing the validity of EU legislation and other legal acts of general application is coming under strain. There are at least two reasons to think that preliminary references are ill suited to the current governance landscape. First, and most straightforward, the fundamental rights at stake now are more central to individual well-being and liberal and social democratic morality than the economic rights vindicated by the relatively sophisticated market actors of the previous generation of litigation. Preliminary references always involve delay and uncertainty, both because of the complex national systems that exist for litigating against public authorities and because of resistance of domestic courts to making preliminary references on the validity issue—out of deference to the external imperatives of enforcing EU law, reluctance to delay the resolution of the case, aversion to losing control of the case to Luxembourg, and other reasons. Although the structural benefits of the preliminary reference system might have outweighed the disadvantages in the common market days, the calculus changes once the policy prerogatives and rights shift.

Acknowledging this qualitative difference between litigation in the new and old policy areas, the Lisbon Treaty modified the preliminary reference procedure so that if the question is “with regard to a person in custody, the Court of Justice of the European Union shall act with the

⁸⁶ See, e.g., Erik Petersen, “L’Influence Possible du Droit Anglais sur le Recours en Annulation auprès de la Cour de Justice des Communautés Européennes,” *Revue Trimestrielle de Droit Européen* 2, no. 1 (1966): 31.

minimum of delay.”⁸⁷ But the actual deprivation of physical liberty is not the only reason why public powers in the areas of human migration and internal security are more central to liberal democratic morality than market regulation. Arbitrary state action in these areas can oppress and deter democratic participation without having to incarcerate individuals. Similarly, the budgetary constraints imposed by EU economic law have important effects on public sector pay and the availability of social services and social security programs, as well as the equal treatment of beneficiaries and respect for their legitimate expectations. These are considered property and social rights in the European constitutional tradition and it is important for citizens to be able to test EU policies based on these rights. In sum, there is good reason to think that it should be easier to litigate in Luxembourg now that the EU acts in domains of classic state sovereignty that have significant impacts on the civil, political, and social rights of EU citizens.

The second development, also connected to the EU’s contemporary policy agenda, is that in sovereignty-sensitive areas the allocation of responsibility between the different levels of government can be complex which, in turn, can prevent cases from being heard in Luxembourg. Even as Member States are driven by the spillover logic to govern through the EU, they seek to retain as much control as possible to preserve their distinctive national approaches and bureaucratic organizations. Therefore, EU legislation in sovereignty-sensitive policy areas typically grants Member States considerable discretion. There is a stark contrast between these new arrangements—broadly sketched conditionality attached to the various bailout funds, minimum harmonization of immigration and criminal law, optional law enforcement cooperation through EU agencies, to name just a few—and the administration of the customs and common agricultural policy (CAP) of the first decades of European integration. In the celebrated string of fundamental

⁸⁷ Article 267 TFEU.

rights cases that were brought through the preliminary reference system in the 1970s, all of which involved a combination of CAP and customs law, there was no question that the German authorities were acting in a ministerial fashion by executing the commands of CAP regulations and that the challenge should be aimed at the European legal sources, not the German administrative acts.⁸⁸ Today, when a retiree's pension is cut, an individual is stopped at the external border, or a suspect is put on trial for terrorism, it is far less clear what part of that state action is attributable to EU law, what part to Member State law.

In principle, it is not necessary to be able to scientifically parse which authority is responsible for what to challenge the fundamental rights *bona fides* of a Member State act taken in the context of an EU legislative scheme. As it currently stands, the doctrinal test is that all Member State actions taken to implement EU law or that come within the scope of EU law can be reviewed by the ECJ for fundamental rights; a wide array of Member State determinations have been swept up under this test. In practice, however, the test has not proven as generous as it might seem on its face. In certain cases, the EU layer can be unclear to litigants and national courts and therefore they may not refer the issue to the ECJ or, if they do, they may fail to establish to the satisfaction of the ECJ the requisite link between the national measure and the EU law. Besides the legal confusion, there are also strategic reasons for not referring the validity issue to the ECJ. National courts, by training their fundamental rights scrutiny on the domestic policies adopted to implement EU law, can avoid head-on conflicts with the EU level of governance and can retain control over the case and the fundamental rights determination.

⁸⁸ C-29/69, *Stauder v. Stadt Ulm*, ECLI:EU:C:1969:57; C-11/60, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114; C-44/79, *Hauer v. Land Rheinland-Pflaz*, ECLI:EU:C:1979:290.

Putting the two pieces of puzzle together, the risk is that EU law will not be reviewed for compliance with fundamental rights, and for compliance with fundamental rights that are central to the liberal and social democratic identity kit.⁸⁹ In the past, so-called privileged parties that always have standing, in particular the European Parliament, might have served as surrogates for individuals in fundamental rights litigation. However, as the Parliament becomes more politicized, a phenomenon that is discussed in Renaud Dehousse's contribution to this book, and is more directly connected to the political forces in the Commission and the Council involved in passing the legislation, it can be expected to behave more like a standard legislature and less like a fundamental rights advocate. In sum, the traditional system of access to justice for individuals, based on the subjective rights model of litigation, is increasingly out of sync with the political realities and the formal powers of the EU. The inadequacies of the preliminary reference system in sovereignty-sensitive domains is illustrated below with examples from the areas of economic policy, human migration, internal security.

1. Economic Policy

As explained earlier, in absolute figures, the most important bailouts were conducted under international agreements and their loan terms were treated as international legal norms. However, there were smaller loans made under programs established under the TFEU, namely Article 143 TFEU balance of payments assistance and Article 122 (2) TFEU on granting Union financial assistance to Member States (limited to the Union's relatively meager budget). These smaller loans

⁸⁹ In the past, so-called privileged parties, in particular the European Parliament, might have served as surrogates for individuals in fundamental rights litigation. However, as the Parliament becomes more politicized, and is more directly connected to the political forces in the Commission and the Council involved in passing the legislation, it can be expected to behave more like a standard legislature and less like a fundamental rights advocate.

also came with MoUs and yet even though the MoUs were based on the TFEU and therefore clearly legal norms of the supranational variety subject to the jurisdiction of the ECJ, there is only one case to date that has tested, through the preliminary reference procedure, the fundamental rights compliance of MoU-related austerity measures.⁹⁰ By contrast there has been extensive litigation on the constitutionality of such programs under national constitutional law in national courts, in particular in Latvia, Portugal, and Romania.

Even though access to domestic courts has been relatively straightforward, access to the ECJ has been far more difficult, in large measure because of the Member State discretionality characteristic of sovereignty-sensitive legal frameworks more generally speaking. The legal scholar Claire Kilpatrick has extensively documented and analyzed this phenomenon in her writings.⁹¹ In most of the cases brought to the constitutional courts of Latvia, Portugal, and Romania, there were no preliminary references made on the validity of the national austerity measures under EU law. Part of the reason was that the relationship between the EU bailout sources and the national laws cutting pensions, public sector pay, and other forms of public spending was unclear; fiscal law is complex as a general matter, and the EU layer of legal sources was particularly complex and lacking in transparency. Another reason for the dearth of preliminary references was the desire of national constitutional courts to avoid confrontation with, and interference by, EU institutions. In those cases where preliminary references were made, most

⁹⁰ *Florescu*.

⁹¹ See Kilpatrick, “The EU and its Sovereign Debt Programmes”; Claire Kilpatrick, “Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry,” in *Constitutional Change through Euro-Crisis Law*, eds. Thomas Beukers, Bruno de Witte, and Claire Kilpatrick (Cambridge: Cambridge University Press, 2017), 279-326.

were summarily rejected by the ECJ because the national court had not adequately articulated the relationship between the national austerity legislation and the EU bailout sources, as necessary to invoke social and property rights under the EU Charter of Fundamental Rights. The upshot of this procedural obstacle course is that there is copious national jurisprudence on the social and property rights that must be considered in designing austerity measures, but hardly any ECJ jurisprudence on those same rights when European leaders devise the bailout terms that drive austerity measures.

2. Human Migration

Even though EU law on border controls and third-country nationals has expanded considerably, the Member States continue to enjoy extensive autonomy with respect to both the substantive and procedural criteria for entry and residence and the administrative apparatus, which remains overwhelmingly national. At the same time, the borderless Schengen Area and the variegated set of travel and residence entitlements that apply when third-country nationals move between the Member States, require extensive cooperation among national authorities. Information exchange on third-country nationals has emerged as the EU's principal tool for managing border control and immigration policy in this context of pervasive decentralization. As explained in Niovi Vavoula's contribution to this volume, national authorities now enter information into and extract information from a number of EU databases on third-country nationals—SIS II, Eurodac, VIS, EES, and ETIAS.

Although some of these EU databases have been operational for quite some time, none have been challenged before the ECJ, through the preliminary reference system or any other procedural avenue. Yet there are clearly possible fundamental rights objections that can be made, as elaborated in Vavoula's data protection and privacy analysis, and in Valsamis Mitsilegas's rule of law analysis in Chapter Eleven of this volume. The reason for the dearth of challenges again

rests in the discretion built into this sovereignty-sensitive area of law. Any determination that affects the liberty or property interests of an individual, which is what in the EU's subjective rights model is necessary to bring a challenge to the EU regulations establishing the databases, is at least one step removed from the information contained in the database at issue. Even when, as a matter of EU law, national authorities are compelled to consult the database and to deport individuals based on the information contained in the database, the result is never automatic because of the application of discretionary factors to the removal decision. Moreover, this chain of events is quite uncommon in the operation of the EU databases. Many of their features are designed as convenient tools for national authorities to assist them with different functions, not mandatory duties, and therefore it may never be clear to the individuals concerned whether their information in the EU database was consulted or was used to make an adverse determination. In these types of administrative arrangements, it is difficult to peel away the different levels of government action and attack what plausibly is at the source of the alleged injustice—the EU legislation establishing the database. To put the problem as concretely as possible, what route would an EU citizen take to obtain a judgment on the right to personal data protection in the revamped database on asylum seekers (Eurodac) or the Schengen database (SIS II), similar to the judgments that have been rendered by the German Constitutional Court on functionally similar German databases?⁹²

3. Internal Security

If anything, protection of internal security touches even more directly upon state sovereignty than control over human migration, and the EU legislative schemes in this domain build in extensive flexibility at the national level. As explained in the internal security section of this book,

⁹² See, e.g., Bundesverfassungsgericht, Judgment 1 BvR 518/02 of April 4, 2006 (police counterterrorism data mining); Judgment 1 BvR 1215/07 of April 24, 2013 (counterterrorism database).

information exchange is an important type of EU policy instrument for enabling national police and judicial authorities to combat cross-border criminal activities. Most of the EU databases on third-country nationals discussed above can also be consulted by law enforcement actors in the context of criminal investigations. Moreover, there are a number of EU information systems that are specifically directed at detecting and investigating criminal activity and obtaining information on previous convictions, including among others the Europol Information System, the decentralized Prüm system for exchanging fingerprints, DNA, and vehicle registrations, and the decentralized European Criminal Records Information System.

None of these internal security databases have been the target of fundamental rights challenges in the EU court system. The reasons are similar to those analyzed in the context of border control and immigration since the discretionary logic evident there applies with even greater force to law enforcement bodies. For the most part, EU information systems are crafted as attractive tools for national police and judicial authorities and do not include mandatory duties on inputting data, extracting data, or taking follow up measures to pursue the alleged criminal activity. This characteristic of EU information systems can sometimes get lost in the operation of European Arrest Warrants, which do create specific duties—they are registered in SIS II, they are subject to a mutual recognition system that creates a quasi-automatic duty to return the suspect to the home Member State, and they have generated copious litigation in domestic courts and the ECJ. European Arrest Warrants, however, represent only one of the many EU schemes involving information-exchange designed to assist law enforcement actors, most of which do not operate with quasi-automatic triggers and which vest national bodies with considerable discretion. As a result, the EU layer can be invisible to those who have standing to challenge EU legislation in the

subject rights model—the individuals placed under surveillance or prosecuted by Member State authorities who defend against police and prosecutorial action in their domestic courts.

The EU has also enacted a number of minimum harmonization directives designed to facilitate evidence gathering and to create a common baseline for the criminal proceedings of national authorities, both the procedural and substantive aspects. At the same time, precisely because of the contentiousness and sovereignty implications of EU internal security policy, these directives allow for considerable discretion when they are transposed into national law.⁹³ Here too, the difficulty of allocating responsibility for state action in the EU's multi-level system has impeded fundamental rights challenges to the EU portion of the legislative framework. So far, the most vivid illustration of this phenomenon is the litigation generated by the EU Data Retention Directive. The Directive sought to improve the investigative capacities of national police authorities by requiring national telecommunications providers to retain the telecommunications data of their clients. However, the Directive also gave extensive leeway to Member State legislatures at the transposition phase to define the length of the retention period and the conditions that had to be satisfied for the police to obtain access to the data.⁹⁴ When data retention came under fire for violating data protection and privacy rights, a number of national constitutional courts preferred to review the national component alone for fundamental rights compliance, rather than

⁹³ Part of the reason for this discretion was the old split between the First and the Third Pillars, but that split itself reflected the national sensitivities of internal security policy.

⁹⁴ Directive 2006/24/EC, O.J. (L 105) 54.

refer the question of the validity of the EU Directive to the ECJ.⁹⁵ It is reasonable to suspect that some of the motives mimicked those evident in economic policy and judicial review of austerity measures—a desire to retain control of the issue and to avoid direct confrontation with EU institutions, including the ECJ. Of course, ultimately, the Directive did come before the ECJ in preliminary references made by an Irish court and the Austrian Constitutional Court, and the ECJ found that it was invalid on fundamental rights grounds. That judgment, however, was handed down almost seven years after the Member State duty to transpose the Directive had taken effect and after a number of national constitutional courts had issued their own judgments.⁹⁶

The discretionary logic of minimum harmonization very likely serves as an obstacle to fundamental rights scrutiny with respect to other pieces of EU criminal law. For instance, as Valsamis Mitsilegas observes in his contribution to this volume, the EU legislation setting down a common set of terrorist offenses adopts a preventive justice model that criminalizes travel and speech activities—activities that in a classic, backwards-looking system of criminal justice are generally treated as legitimate.⁹⁷ So far, however, there has not been a fundamental rights challenge to this EU legislation. Part of the reason may very well be that EU law only establishes a common core for the terrorist offenses and, at the time of transposition, the Member States can

⁹⁵ Curtea Constituțională decision No. 1258, October 8, 2009 (Romania); Bundesverfassungsgericht, Judgment 1 BvR 256/08 of March 2, 2010 (Germany); Cyprus Supreme Court, Civil applications 65/2009, 78/2009, 82/3009 and 15/2010-22/2010, February 1, 2011; Constitutional Court of the Czech Republic, Pl. ÚS 24/10, March 22, 2011.

⁹⁶ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238.

⁹⁷ See European Parliament and Council Directive (EU) 2017/541, *On Combating Terrorism*, 2017 O.J. (L 88) 6 (replacing Council Framework Decision 2002/475/JHA).

leave a heavy national footprint, making it difficult to separate the EU from the national components.

4. Expanding Individual Standing in the European Court of Justice and Reinforcing Rights in EU Legislation

It is certainly not the case that all law must be tested in court for adherence to fundamental rights. There is undoubtedly a place for the political branches to interpret and apply higher-law requirements. Moreover, it is intrinsic to the multi-level system of European governance and the subsidiarity principle that there will be differences in the fundamental rights enjoyed by the citizens of the many Member States. At the same time, it should not be possible to evade constitutional requirements and rights guarantees by shifting important policy determinations from the domestic to the EU level. To do so would quite obviously undermine the legitimacy and credibility of the EU. The preliminary reference system, which forms the backbone of the EU judiciary by linking domestic courts with the ECJ, has quite rightly been celebrated as one of the motors of European integration.⁹⁸ At the same time, as this discussion has suggested, the preliminary reference system does not always allow for adequate fundamental rights scrutiny of EU legal acts.

The obvious solution to this dilemma would be to take up once again the proposals for loosening conditions of individual standing in the ECJ. The last time there was extensive debate on the issue was during the Convention on the Future of Europe, which was responsible for drafting

⁹⁸ See, e.g., Joseph H.H. Weiler, *The Transformation of Europe*, *Yale Law Journal* 1000, no. 8 (1991): 2413-415; Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001); Alec Stone Sweet and Thomas L. Brunell, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community," *American Political Science Review* 92, no.1 (1998): 63-81.

the Constitutional Treaty of 2004. The various subgroups included one on the European Court of Justice, where a number of options were put forward for expanding direct access.⁹⁹ Two in particular would address the shortcomings reviewed above. First, it was proposed that individuals could be given the right to file fundamental rights complaints against EU legal acts directly with the ECJ. Second, it was suggested that the criteria be relaxed for individual standing before the Court, as specified in Article 263 TFEU. The most generous version of this shift would have enabled individuals affected by EU legal acts of general application, including what this chapter has been referring to as EU legislation, to be challenged in the ECJ based on all the legal grounds typically available under Article 263 TFEU, which includes rights. Although this is not the place for discussing the specifics of the different proposals, the growing power of the EU in areas that heavily implicate fundamental rights strongly suggests that it is time to revise the clunky procedural system for bringing individual challenges to EU legislation and other legal acts of general application.

III. Intergovernmentalism and Supranational Democracy

It is common ground in the European constitutional tradition that it is not enough to have legal rules that are clear and can be enforced against private and public parties alike in a judicial forum; and to have legal rules that can be challenged based on the higher law of the system. Those legal rules must also be generated through processes that are considered democratic. Since the Maastricht Treaty's paradigm shift from single market to political union, the question of whether the European Union is capable of operating as a true democracy has been a constant preoccupation

⁹⁹ European Convention, Chairman of the Discussion Circle on the Court of Justice, Final Report of the Discussion Circle on the Court of Justice, CONV 636/03, CERCLE I 1 (March 25, 2003).

for politicians and scholars alike. The perplexities of overcoming the democratic deficit and creating the institutional and societal underpinnings for a supranational democracy have been recurring themes over the past twenty-five years.¹⁰⁰

With the Lisbon Treaty, it appeared that there would be a pause in the debate on the democratic deficit. Although the rejection of the Constitutional Treaty made it clear that the public did not have the stomach for a true Europe-wide constitution, the Lisbon Treaty that followed included many of the same democratizing institutional innovations, just stripped of constitutional symbolism.¹⁰¹ The Lisbon Treaty consolidated what had come to be known as the Community method for lawmaking and entrenched a hierarchical model of legislative and administrative power that replicated in many ways the institutional arrangements of national democracies. Significantly, the Community method of Commission legislative proposal and co-decision by Parliament and Council was relabeled the “ordinary legislative procedure.”¹⁰² The Parliament (together with the Council) was formally tasked with “legislative and budgetary” function and was also given the “political control” function.¹⁰³ The Treaty provided that that the acts enacted through this legislative procedure could confer “delegated” and “implementing” powers to the Commission¹⁰⁴ and left standing the existing ECJ jurisprudence under which it was permissible to delegate powers to bodies not established under the Treaties, e.g. EU agencies, as long as they were not

¹⁰⁰ See Peter Lindseth, “The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance,” this volume, for references to the literature on the EU’s democratic deficit and his contribution to the debate.

¹⁰¹ See generally, Piris, *The Lisbon Treaty*.

¹⁰² Article 289 TFEU.

¹⁰³ Article 14 TEU.

¹⁰⁴ Articles 290 and 291 TFEU.

“discretionary powers implying a wide margin of discretion.”¹⁰⁵ This core institutional template was applied even to the sovereignty-sensitive policy areas covered in this book—human migration and internal security,¹⁰⁶ and certain aspects of economic policy.¹⁰⁷ This Lisbon template represented one attempt to reconcile the pragmatic politics of the supranational realm with the normative and ideal understandings of a democratic polity.

As it turns out, the entry into force of the Lisbon Treaty coincided with the onset of the European sovereign debt crisis and was followed, six years later, by the Syrian refugee crisis and several high-profile terrorist attacks in France and Belgium. To understand the democratic credentials of law in the economic policy, human migration, and internal security domains, it is important to ask what happened to the Lisbon template in the aftermath, in the various institutional responses to these crises. Looking broadly, it is apparent that the European Parliament and the allocation of responsibilities between legislation and administration tended to recede into the background and instead the intergovernmental model of bargaining among states and conferral of

¹⁰⁵ C-9/56, *Meroni v. High Authority*, ECLI:EU:C:1958:7. For an up-to-date discussion of the jurisprudence, see Johannes Saurer, “EU Agencies 2.0: The New Constitution of Supranational Administration beyond the EU Commission,” in *Comparative Administrative Law*, eds. Susan Rose-Ackerman, Peter L. Lindseth, and Blake Emerson (Cheltenham: Edward Elgar, 2017), 619-631.

¹⁰⁶ In the interest of accuracy, it should be noted that there are a few exceptions, for instance the regulation of conditions under which law enforcement of one Member State may operate on the territory of another Member State (Article 89 TFEU).

¹⁰⁷ Article 121 TFEU on the adoption of regulations on the multilateral surveillance procedure.

authority to administrative bodies that could be trusted to carry out those bargains took center stage.¹⁰⁸

1. Economic Policy

As brought out in the economic policy section of this volume, intergovernmental tendencies have been on display in economic governance. The massive government bailouts that occurred during the euro crisis and the new fiscal apparatus that resulted, namely the ESM, have been driven by an intergovernmental coalition built around a Franco-German alliance.¹⁰⁹ The bargain that was reached was bailouts and an improved capacity for budgetary intervention, in return for austerity and fiscal stability. To credibly commit to this bargain, independent bodies have been given significant oversight and sanctioning powers over Member State fiscal policy. These delegations to independent bodies include the balanced budget rule in the Fiscal Compact, to be enforced by national constitutional courts and fiscal councils; and the reinforced Stability and Growth Pact, which confers significant surveillance and sanctioning powers over national budgets to the Commission.¹¹⁰

In the area of banking regulation, which also revealed itself to be critical for the stability of the Eurozone, there also has been conferral of power to an independent body—the European

¹⁰⁸ On the intergovernmental model generally, see Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca: Cornell University Press, 1998); more specifically on the role of administrative and judicial bodies in this model, see Mark A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford: Oxford University Press, 2003).

¹⁰⁹ Nicolas Jabko, “Politicized Integration: The Case of the Eurozone Crisis,” this volume.

¹¹⁰ Renaud Dehousse, “The Euro Crisis and Beyond: The Transformation of the European Political System,” this volume; Philomila Tsoukala, “Post-Crisis Economic and Social Policy: Some Thoughts on Structural Reforms 2.0,” this volume.

Central Bank. In light of the tight relationship between banks and their Member States, in particular as a result of their government debt holdings, it was felt that national banking authorities did not adequately enforce the rules on minimum capital requirements and other issues central to bank solvency. Lax national regulators, and potential bank insolvencies, could risk destabilizing the entire Eurozone. To credibly commit to strict banking regulation, the Member States have taken away oversight and enforcement powers from national regulators and have given them to the independent ECB, which now has exclusive licensing and supervision powers over large banks, as well as a central role in winding up failed banks.¹¹¹

It should be noted that these delegations stand out in the extent to which the Commission and the ECB operate independently of the political actors in the system and outside of ordinary accountability relationships. It is for this reason that the institutional schemes that have been created in economic policy fit more closely the pattern of credible commitments to facilitate interstate bargains rather than delegations of power to administrative authorities to improve the expertise and efficiency of policymaking—delegations which generally can be modified if the political actors in the system disagree. This enhanced independence is evident in a number of elements of economic governance. In surveilling national budgets and economic policies, if the Commission recommends sanctions against Member States for excessive budget deficits or for macroeconomic imbalances, those sanctions apply automatically unless vetoed by a qualified majority vote in the Council.¹¹² This stands in contrast with the previous system by which the Council had to affirmatively adopt the recommended sanction for it to take effect. Although the European Parliament may request the Commission, Council, and other institutions to appear and

¹¹¹ Dehousse, “The Euro Crisis and Beyond.”

¹¹² Dehousse.

give information on any aspect of the surveillance occurring in the European Semester, including potential sanctions (so-called “Economic Dialogues”) there are very few reporting requirements or other forms of direct parliamentary oversight.¹¹³ With respect to bank regulation, it is generally agreed that the ECB is one of the most independent of all the institutions established under the EU Treaties.¹¹⁴ Among other things, the ECB is constituted by national central banks which themselves have constitutional guarantees of independence; it is governed by a President and members of an Executive Board that hold office for a fixed, eight-year term; and its operations are not subject to the same transparency regime as other institutions, at least in part to protect its independence.

2. Human Migration

In the domain of human migration, the EU’s most developed scheme on the right of entry and residence for third-country nationals applies to asylum-seekers. In asylum governance, the Syrian refugee provoked unilateralism, followed by a certain amount of intergovernmentalism.¹¹⁵ At the time of the crisis, a new generation of EU asylum legislation had just been adopted following the ordinary legislative procedure. Even though this legislation and the associated TFEU provisions contain mechanisms for dealing with migratory pressures, the political leaders of Austria, Hungary, Germany, and other Member States acted outside of this framework when confronted

¹¹³ European Parliament Briefing, *Economic Dialogue with the other EU Institutions under the European Semester Cycles (2014-2019)*, PE 528.782 (January 2019).

¹¹⁴ Antonio Estella, *Legal Foundations of EU Economic Governance* (Cambridge: Cambridge University Press, 2018), 76-87.

¹¹⁵ See Evangelia (Lilian) Tsourdi, “The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System,” this volume, for more detailed description and analysis of these developments in the asylum field, as well as references to the broader literature.

with large-scale secondary movements in 2015-2016; they unilaterally closed their borders using the emergency exception to border-free travel in the Schengen Borders Code. Later on, there were two EU measures passed on emergency relocation of asylum-seekers. However, they were not implemented by the countries of the Visegrad Group (Poland, Hungary, Czech Republic, and Slovakia), leading to Commission infringement actions.

So far, the most robust EU response to the refugee crisis has been the empowerment of EU agencies operating in the policy area, most notably the European Border and Coast Guard (Frontex) and, to a lesser extent, the European Asylum Support Office (EASO). There is new legislation expanding Frontex's mandate, and a legislative proposal that would do the same for EASO. During the crisis, both Frontex and EASO assumed unprecedented operational responsibilities at hotspots in Greece and Italy. There is also the possibility that, *de facto*, these EU agencies might assume policymaking responsibilities. As Emilio De Capitani argues in his contribution to this book, even though there is a legislative proposal on the table that seeks to improve what is broadly acknowledged to be a dysfunctional asylum system, the process remains deadlocked by intergovernmental disagreements; the risk is that Frontex will step into the void, thus exercising not simply operational but also policymaking functions.

This combination of unilateralism, legislative deadlock, and empowerment of EU agencies is another example of intergovernmentalism taking over from the Lisbon template. Action through the ordinary legislative procedure and the emergency mechanisms set out under the TFEU have proven difficult. Instead, Member States have either acted alone or through EU agencies, which unlike the Commission and the ECB are generally cast not as independent authorities but as more

akin to creatures of the Member States.¹¹⁶ They are headed by management boards comprised of Member State representatives; their permanent staff is not hired as part of the EU civil service system; and they rely heavily on personnel from Member State administrations, in the case of Frontex and EASO as seconded national officers charged with assisting the Member State under migratory pressure with border policing and asylum applications.¹¹⁷ To be sure, as Tsourdi argues in her chapter, it is vital to develop an administrative component to the Common European Asylum System. Moreover, the integrated administration that is spearheaded by EU agencies often reflects and develops common technocratic and supranational world views rather than serving as proxies for intergovernmental bargaining.¹¹⁸ Nonetheless, it remains the case that in the asylum field, EU agencies have the potential for short-circuiting the European Parliament and the supranational dimension of legislation and administrative oversight.

3. Internal Security

With respect to internal security, there has been an acceleration of legislative activity since the Lisbon Treaty extended the ordinary legislative procedure, including qualified majority voting in the Council, to the policy field. There are now legislative measures facilitating mutual recognition in cross-border criminal investigations and prosecutions, setting down minimum standards for

¹¹⁶ See R. Daniel Kelemen, “The Politics of ‘Eurocratic’ Structure and the New European Agencies’,” *West European Politics* 25, no. 4 (2002): 93-118; Ariadna Ripoll Servent, “A New Form of Delegation in EU Asylum: Agencies as Proxies of Strong Regulations,” *Journal of Common Market Studies* 56, no. 1 (2018): 83-100.

¹¹⁷ There is a proposal, however, to significantly develop Frontex’s autonomous administrative capacity by increasing the number of Frontex employees from 1,500 to 10,000.

¹¹⁸ Morten Egeberg and Jarle Trondal, “Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?” *Journal of Common Market Studies* 4, no. 55 (2017): 675-90.

criminal offenses, and setting down minimum standards for rights of the defense and victims.¹¹⁹ Among the most significant developments has been the legislation strengthening EU agencies involved in coordinating cross-border police investigations and criminal prosecutions—Europol, Eurojust, and now, for fraud involving the EU budget, the European Public Prosecutor.

In this field, the impact of crisis, which has taken the form of high-profile terrorist attacks, has been quite different from what has been observed in economic policy and human migration. Internal security is less integrated than the other two policy fields. It is characterized by national autonomy and unilateralism, but with ever-increasing efforts at cooperation under the EU umbrella. In this domain, Member State resistance to cooperation appears to have bureaucratic roots, not political ones as in the case of economic policy and bailouts or human migration and asylum burden-sharing. Police and prosecutors fear that disclosing information to authorities in other jurisdictions will compromise their sources and investigations and therefore they are reluctant to exchange strategic and operational information across borders and feed the relevant information on criminal activity into EU databases. There are many EU laws that seek to overcome this bureaucratic foot-dragging by creating and improving technical systems for information-sharing among Member State authorities; establishing freestanding EU databases that can be useful tools for national law enforcement actors; and imposing duties on national authorities to assist one another with evidence-gathering and prosecutions.

¹¹⁹ See de Gilles de Kerchove and Christiane Höhn, “The EU and International Terrorism: Promoting Free Movement of Persons, the Right to Privacy, and Security,” this volume, and Emilio De Capitani, “Progress and Failure in the Area of Freedom, Security, and Justice,” this volume; see also, with particular attention to the criminal law dimension, Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Oxford: Hart Publishing, 2016).

As highlighted in the internal security section of this volume, the EU legislative and administrative effort to counteract bureaucratic resistance to cooperation has been accelerated, not hindered, by high-profile terrorist attacks and other criminal events with cross-border dimensions. The new initiative announced by Commission President Juncker in April 2016, called the EU Security Union, includes a heavy emphasis on further expanding information-sharing and creating more EU information tools that can be attractive to national law enforcement authorities.¹²⁰ For instance, the new EU Passenger Name Record (PNR) System requires the exchange of PNR data to enable national authorities to identify terrorist suspects; Europol's newly established European Counter-Terrorism Centre pools already existing information and data analysis capacity to assist national counter-terrorism investigations; and a significant legislative proposal on making existing EU databases interoperable would effectively create a new resource for national police authorities.

Yet even as progress has been made on the operational aspects of cross-border investigations and prosecutions, the failure of national interior ministries and other government actors to communicate information continues to undermine the quality of EU legislation.¹²¹ Many of the measures that have been enacted by the European Parliament and Council have been passed without comprehensive information on the shortcomings of national criminal law and law enforcement practices that would justify an EU layer of law and governance. In the same vein, the Commission has had difficulties obtaining the national data necessary to conduct periodic reviews of the effectiveness of EU legislation.

¹²⁰ de Kerchove and Höhn, "The EU and International Terrorism"; Valsamis Mitsilegas, "The Preventive Turn in European Security Policy: Towards a Rule of Law Crisis?" this volume.

¹²¹ De Capitani, "Progress and Failure in the Area of Freedom, Security, and Justice," this volume.

Internal security is marked by less integration than economic policy and human migration but recent terrorist attacks and other salient examples of cross-border criminal activity have led to the intensification of EU-level initiatives. Among the most significant advances in European integration has been information-sharing coordinated by Europol and Eurojust. However, these are EU agencies, which as explained earlier have a distinct intergovernmental bent. They are governed by management boards of Member State representatives, have relatively small permanent staffs that are recruited outside of the general civil service framework, and rely on domestic police and judicial officers seconded for limited periods for many of their personnel needs. By contrast, legislation and oversight by the supranational European Parliament and Commission have been hampered by traditional state reluctance to disclose information and cooperate on issues related to territorial security.

4. The European Parliament, the European Court of Justice, and Forging Supranational Deliberation and Democracy

Beyond recognizing the intergovernmental tendencies in sovereignty-sensitive areas and the factual and political limits on the Lisbon Treaty's version of supranational democracy, this experience brings out what is missing from the current set up and what should be advanced in the future governance of sovereignty-sensitive policy fields—a pan-European perspective, which in the Lisbon template, is to be supplied by the European Parliament. Even though intergovernmentalism can achieve results, as illustrated by the salvaging of the Eurozone, it comes up short on the construction of a European political identity. Bargains struck in Brussels are sold by European leaders at home because they are advantageous to national interest. The relationship between Brussels and national capitals is transactional rather than pitched as part of wider scheme

of governing in the common European interest.¹²² National politicians are notorious for taking the credit when things are going well, blaming Brussels when economic and other policy outputs stumble. Although there are of course exceptions, it is rare to hear European political leaders making the case for Europe to their voters, especially if the EU policy in question appears, on balance, to entail more burdens than benefits for the particular Member State.

The *European Parliament* is the one Europe-wide public forum where public policies and their effects on all Europeans can be debated and where elected representatives and their voters are confronted with the consequences of nationally driven conceptions of the public interest. The absence of social justice—both rights and solidarity—is cited by many as the principal flaw of EMU and the asylum system.¹²³ In the European Parliament, the moral implications of this absence can be confronted head on. It is a forum where it is difficult to avoid the question of whether EMU is sustainable or desirable when it imposes through its policies such regionally differentiated benefits and burdens, and is complicit in generating vastly different life chances and circumstances. If the answer is no, then the European Parliament is also the place where the solutions to this hard question can be put forward and debated—whether it be to include EU citizens from other Member States within certain commitments to social rights and solidarity, to scale back on the European project, or some other route. Likewise, the Parliament offers a setting

¹²² See Helen Wallace, “The JCMS Annual Review Lecture: In the Name of Europe,” *Journal of Common Market Studies* 55, no. S1 (2017): 13. Although Wallace is referring specifically to the UK relationship to the EU, it is also evident in the narratives and politics of other Member States.

¹²³ See, e.g., Agustín J. Menéndez, “The Crisis of Law and The European Crises: From the Social and Democratic *Rechtsstaat* to the Consolidating State of (Pseudo-)Technocratic Governance,” *Journal of Law and Society* 44, no. 1 (2017): 56-78 (Eurozone); Tsourdi, “The Emerging Architecture of EU Asylum Policy” (asylum).

for scrutinizing the inequities of how the Schengen Area and the asylum system have played out—the attraction of Schengen Area border-free movement compounding the migratory pressures on Member States on the geographic frontline while at the same the Dublin System assigning all responsibility for those asylum seekers to those same Member States.

Similarly, the European Parliament is an important forum for airing the civil and political rights dimensions of the EU's policies on human migration, internal security and constitutional fundamentals. There are many material benefits to be gained from safeguarding the Schengen Area of borderless travel and ratcheting up the border control, immigration, and internal security policies that are central to governance of the Schengen Area. The risk, however, is that the implications for civil and political rights will be overlooked. A parliamentary body like the European Parliament is the natural venue for deliberating upfront and hardwiring these rights into human migration and internal security policy. In enforcing constitutional fundamentals against the Member States, there is also a temptation to overlook violations of civil and political rights in favor of economic, geopolitical, and other realpolitik considerations; the Parliament is a public forum for exposing the hypocrisy of EU approaches that privilege convenience over liberal democracy and turn a blind eye to democratic backsliding. In sum, the European Parliament and the surrounding politics and media can be said to represent the closest thing Europe has at the moment to Habermas's public sphere. It offers an important arena for developing a European identity and perspective on the critical areas of EU governance that have come to the fore over the past decade—an identity and perspective that are necessary for the legitimate governance of these areas in the long run.

By no means is this discussion intended to be starry-eyed about the European Parliament (EP). It is a well-established fact that turnout for EP elections is low and has declined over time.¹²⁴ For most of its history, voters have used EP elections to express their attitudes towards their national governments and parties, not their preferences on EU issues. Even with the rise of Euroskepticism and the many legal and political developments narrated in this book, EP elections have served more as an opportunity to express anti-EU sentiment rather than to take sides over the direction of important EU policies. At the level of parliamentary politics, it should come as no surprise that the workings of the European Parliament fall short of the democratic deliberation ideal. This volume offers two prominent examples of the grittier side of EP politics. As Scheppele and Kelemen explain in their chapter, the European People's Party (EPP), the largest pan-European political party in the EP and the party group of the center right, has been one of the biggest defenders of Hungary's Fidesz and Viktor Orbán. Since Fidesz is a member of the EPP and delivers the votes necessary for the EPP to sustain its lead over the other parties in the European Parliament, the EPP has stalled efforts to sanction Hungary for democratic backsliding. On a separate note, Emilio De Capitani explains that the European Parliament has opposed moves to improve transparency in the legislative process, and the progress that has been made can largely be attributed to litigation and the ECJ's jurisprudence. Nevertheless, the question of how to foster the pan-European perspectives and debates that are critical for supranational democracy remains. Even taking into account the Parliament's many flaws, it is better placed to foster such perspectives

¹²⁴Dehousse, "The Euro Crisis and Beyond" discusses politicization and voter behavior in national and EP elections; see also Julie Hassing Nielsen and Mark N. Franklin, eds., *The Euro-sceptic 2014 European Parliament Elections: Second Order or Second Rate?* (London: Palgrave, 2017).

and debates than the intergovernmental Council and European Council or any of the EU's other institutions.

The upshot of this discussion is that even though the governance of sovereignty-sensitive policy areas often takes an intergovernmental turn, the European Parliament should still be kept in the loop. In the debates on Eurozone governance, there is an important proposal that has been advanced for a Eurozone parliament as a means of counteracting the inequities that have arisen from EU economic policy.¹²⁵ Although it is not politically viable to give the Parliament decisional powers over bailouts and fiscal surveillance at this point in European history, it is important for the Parliament to have oversight powers in the area. This requires greater transparency than is currently the case: The Commission's surveillance of Member State budgets and economic policies and the national measures taken in response should be made public and accessible, in layman's terms, to the Parliament and the public. Likewise, in border control, immigration, and internal security, the transparency of the relevant EU agencies (Frontex, EASO, Europol, Eurojust) could be enhanced and the Parliament's scrutiny powers improved. Currently these agencies submit their annual agency work programmes to Parliament and consult Parliament on their multi-annual programmes but there is the potential for more regular parliamentary involvement, debate and input through routine agency reporting and oversight.¹²⁶ The European Parliament could also take a more proactive role in fostering pan-European civic education and public debate. For instance, it could publish and distribute a weekly or biweekly magazine for the general public,

¹²⁵ Stéphanie Henneke, Thomas Piketty, Guillaume Sacriste, and Antoine Vauchez, *Pour un Traité de Démocratisation de l'Europe* (Paris: Éditions du Seuil, 2017).

¹²⁶ European Parliamentary Research Service, *EU Agencies, Common Approach and Parliamentary Scrutiny: European Implementation Assessment* (Brussels: European Union, November 2018), 57-67; 82-87.

following examples such as the German Bundestag's *Das Parlament*. The publication could report on topical issues from the Parliament's perspective, and could also include an insert explaining in very straightforward language important aspects of EU policies and EU governance. In sum, the experience of European governance of sovereignty-sensitive policy areas demonstrates a penchant for intergovernmentalism, even in cases where the Lisbon Treaty provides otherwise. But it is possible to craft forms of parliamentary participation that have the potential for fostering pan-European debate and that might, in the future, overcome national fault lines and pave the way for an important decisional role for the Parliament.

It is fitting to conclude this discussion of EU law's democratic credentials with the *judicial branch*. In the Lisbon template, the *European Court of Justice* is tasked with the classic functions of a constitutional and administrative court and a court of last resort on EU legal sources. As is to be expected, the Court is not to exercise negative or positive legislative powers. However, a number of scholars argue that the Court has assumed such powers by giving overly expansive interpretations to the market freedoms in the TFEU and thereby illegitimately narrowing the space for legislative action and democratic choice.¹²⁷ In essence, the claim is that the Court has constitutionalized the market freedoms at the expense of the other objectives of the Treaties and European integration. More recently, a similar argument has been made with respect to EMU and

¹²⁷ Dieter Grimm, "The Democratic Costs of Constitutionalisation: The European Case," *European Law Journal* 21, no. 4 (2015): 460–73; Gareth Davies, "The European Union Legislature as an Agent of the European Court of Justice," *Journal of Common Market Studies* 54, no. 4 (2016): 846–61; Fritz W. Scharpf, "De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe," *European Law Journal* 23, no. 5 (2017): 315–34; Agustín José Menéndez, "Constitutional Review, Luxembourg Style: A Structural Critique of the Way in Which the European Court of Justice Reviews the Constitutionality of the Laws of the Member States of the European Union," *Contemporary Readings in Law and Social Justice* 9, no. 2 (2017): 116–45.

its commitment to fiscal stability and a balanced budget.¹²⁸ The overall effect in the eyes of the critics is to have imposed a neoliberal mold on EU law and governance that is extremely difficult to shake.

The claim of judicial interference with the legislative process through over-constitutionalization is indeed a serious challenge for the democratic credentials of EU law. It also has special relevance for my analysis in this concluding chapter, since I argue for more supranational legal norms and direct access to the ECJ to reduce legal complexity and improve the protection of rights. Both proposals would, on their face, lead to an even greater role for the ECJ with the potential for even more matters to be taken out of the hands of legislatures.

On closer examination, however, these proposals would not necessarily empower the judicial branch more than its current status. As explained earlier, legal simplification by integrating the norms generated through ESM bailouts and the old Third Pillar with the TFEU and curtailing the doctrine of direct effect would not necessarily affect the flexibility of law, since there are many other techniques for signaling the flexibility of legal rules. The prospect of more fundamental rights challenges to EU measures by expanding direct access to the ECJ likewise does not automatically imply greater constitutionalization. In light of the extensive array of rights protected by the EU Charter of Fundamental Rights (CFR), the Court will be called upon to balance fundamental rights of equal status, far more than in the previous generation of internal market litigation. Such multi-polar rights balancing often produces indeterminate outcomes and allows the legislature's choices to stand. Similar considerations can be made with respect to the ECJ's potential future role in guaranteeing the constitutional fundamentals of the Member States. There

¹²⁸ See Bojan Bugarič, "The Populist Backlash Against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe," this volume and the literature cited therein.

is no reason why the margin of appreciation doctrine, used by ECtHR, cannot also be used by the ECJ when it scrutinizes Member State practices based on the guarantees of certain essential CFR provisions.

Turning to the terrain of judicial and political practice, there is evidence in the contributions to this volume that the TFEU provisions on market freedoms and fiscal stability are less rigid, more flexible than is sometimes presumed in the critical academic literature. The chapter by Öberg and Leyns on intra-EU migration and the law of free movement of persons demonstrates that the Court has moved away from the neoliberal approach that it took in the *Laval*, *Rüffert*, and *Viking* line of cases.¹²⁹ Moreover, they show that the EU legislature was able to mobilize in response to the ECJ's neoliberal jurisprudence and to enact new legislation giving Member States greater power to regulate the pay and working conditions of posted workers from other Member States.¹³⁰ In a similar vein, the chapters on economic policy by Jabko and Dehousse separately bring out aspects of flexibility in EMU governance. Most straightforward, Jabko narrates how the no-bailout provision in the TFEU was amended when it proved necessary to save the euro. Dehousse argues that Commission enforcement of the rules on fiscal stability in the context of the Six Pack and Two Pack surveillance system is not automatic but allows for a fair bit of Commission discretion. In sum, the EU Treaties and the jurisprudence of the Court of Justice have not consistently operated

¹²⁹ For other examples of less categorical application of the market freedoms, see Jan Zgliniski, "The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law," *Common Market Law Review* 55, no. 5 (2018):1341-385.

¹³⁰ This is a counter-example to the "join decision trap," which magnifies the counter-majoritarian effect of an activist supreme court. Fritz W. Scharpf, "De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe," *European Law Journal* 23, no. 5 (2017): 315-34; Fritz W. Scharpf, "The Joint Decision Trap: Lessons from German Federalism and European Integration," *Public Administration Review* 66, no. 3 (1988): 239-78.

as straightjacket and recent experience with market and economic governance furnishes a number of examples of where the political process has prevailed.

Hence there is good reason to believe that more litigation in the ECJ will not cut off legislative politics. In fact, in line with an important strand of legal theory, expanding individual standing to allow for more fundamental rights claims against EU legislation might spawn more vigorous democratic debate in the EU polity. Sociolegal scholarship has demonstrated that under certain circumstances rights can operate as a powerful discursive resource in politics and can serve as important lightning rod for organized, collective challenges to the *status quo*.¹³¹ This insight is particularly apt for the social rights that were written into many European constitutions after the Second World War, which require positive state action and the mobilization of material resources. Because of the spillover logic of European integration, democracy must play catch up with the policy and legal apparatus that has been built for economic policy, human migration, and internal security. Affirming, in the public and prestigious forum of the EU courtroom, not only liberal market rights, but also the full array of civil, political, and social rights that are part of the European constitutional tradition can lend discursive resources to those political actors that seek to promote such rights in European Parliament elections and legislative debates. A multi-faceted judicial practice of fundamental rights might contribute to more balanced political contestation over the appropriate direction for sovereignty-sensitive policy areas. To return to the populism with which this chapter began, it might help channel some of the outright opposition to the project of European

¹³¹ See Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Social Change* (New Haven: Yale University Press, 1974) and discussion of this and other sociolegal theories of rights in Michael McCann, “The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era,” *Law and Society Review* 48, no. 2 (2014): 245-73.

integration into a plural and democratic debate over the content of the many policies of European integration.

IV. Conclusion

The rule of law, rights, and democracy is not a tired idiom but a set of foundational legal values to be continuously revisited and assessed in the changing landscape of EU law. Over the past decade, the EU has become increasingly implicated in core areas of traditional state prerogatives, and the emerging legal architecture reveals a number of flaws. The excessive complexity of today's EU law undermines the ordering and liberty qualities of law. Simplification, by curtailing the doctrine of direct effect and integrating ESM law and old Third Pillar law with the TFEU, is critical. The laborious preliminary reference system is inadequate for calling to task EU lawmakers when they legislate on economic policy, human migration, and internal security and potentially breach fundamental civil, political, and social rights. Individuals should have standing to go directly to the European Court of Justice to have a hearing on potential legislative infringements of their fundamental rights. The intergovernmental politics of sovereignty-sensitive areas shortchanges the future development of Europe-wide debate and perspectives on the right direction for policymaking. There should be extensive reporting and disclosure in each of the policy areas to the European Parliament to keep alive pan-European debate and pave the way, eventually, for a living and breathing practice of supranational democracy. The Parliament could also take greater responsibility for routinely informing the lay public on important aspects of EU policy and governance. The trio of rule of law, rights, and democracy underscores the importance of the emerging law on constitutional fundamentals in the Member States and highlights the desirability of the ECJ's human-rights court function.

Among pro-EU forces, thinking on legal reform is divided. On the one hand, there is little appetite for treaty reform among European political leaders. Especially in the current political environment of populism and Euroskepticism, there is apprehension that any attempt to pick at, and improve, small pieces of the Treaties might embolden some to push for the wholesale unraveling of other parts of the Treaties. Treaty amendments also require Member State ratification, and that raises the prospect of national referenda, again something that is feared in the current political climate. On the other hand, as canvassed in the economic policy section of this book, the fallout from the euro crisis and austerity have led other political actors and certain scholars to call for far-reaching change to EMU—either the full-fledged transformation and federalization of economic policy or the dismantling of the common currency. To save Europe, the thinking goes, it is necessary to radically change her.

The analysis and proposals put forward here avoid this all-or-nothing schism in the debate on how to move forward. Significant Treaty changes present considerable political risks, which are not worth taking at this historical moment. The rule of law, rights, and democracy are undoubtedly better off with than without the EU construct and its central building blocks. In countless ways, EU citizens have been emboldened by the EU to exercise personal liberties and to freely define and pursue life projects—liberties and life projects that are hard to imagine in the absence of the EU’s legal framework and geopolitical status. Historical counterfactuals are always tricky, but there is a good case to be made that pursued within the confines of the European nation state, or on a regional and world stage where EU citizenship meant little, these freedoms would be stunted. In responding to the current politics of anti-globalization and populist backlash, many have blamed well-heeled cosmopolitan elites and the inequitable distribution of the benefits and burdens globalization that has created a large class of left-behinds. However fitting this diagnosis

might be for other parts of the world, it has limited purchase over European experiences with the EU. Even though neoliberalism and austerity have increased inequality over the past quarter-century, European societies are still marked by policies with significant redistributive and social insurance aims. Because of the continuing prominence of the social justice aspects of democracy, the educational, professional, employment and cultural opportunities afforded by Europeanization have been quite broadly available. It is not only that goods have been able to move freely and generate new consumption habits. People have also had the means and the material safety net important for experimenting with educational, cultural, and employment opportunities in other European jurisdictions. The availability of public education, at both the secondary and post-secondary levels, and the social democratic aspects of labor markets and social security systems have enabled great numbers of EU citizens to take advantage of free movement.

Just because it is worthwhile asserting the virtues of the EU and appreciating the risks of tinkering too much with its legal construct does not mean that we should doff our critical caps and eschew constructive changes. Many of the proposals advanced in this concluding chapter are modest and could be accomplished through changes in EU institutional practices. Improving the role of the European Parliament in economic policy, human migration, and internal security would simply require greater transparency and reporting by the European Commission and EU agencies, which could occur informally and eventually through an inter-institutional agreement. The European Parliament's publication activities are already significant and a weekly or bi-weekly magazine targeted at the lay public and distributed broadly should fit comfortably within that existing mission. The integration of old Third Pillar internal security measures into the TFEU would ideally include new legislative measures, but could also stop short; it could entail cataloging and explanation, akin to the preparatory work done by the European Commission's Legal Service

when it consolidates or codifies EU law in specific policy areas. Some of the other proposals that emerge from this volume's survey of sovereignty-sensitive domains are targeted at the ECJ and could be accomplished through jurisprudential changes. This is particularly so for the doctrine of direct effect, which has been created by the ECJ and can be modified by the ECJ.

The only two elements of this chapter's constructive analysis that might require Treaty amendments are those concerning the integration of ESM law into the TFEU and the expansion of individual standing in the ECJ. Reform of the ESM that is focused on legal simplification and not the more politically contentious issue of giving the EU institutions a direct decisional role in country bailouts could require a Treaty amendment. That is because such a move would confer upon the ESM a special status like that of the ECB, which is established under the TFEU and is not an EU body created by legislative act. Under this special status, the ESM would have the power to issue decisions on its own authority, independent of the normal institutional constellation set out in the TFEU, while at the same time its decisions and the ECJ's jurisdiction over those decisions would have supranational—not international—legal status. As for individual standing, in the 60 years since the TFEU's jurisdictional system was first set down, the Court has been steadfast in giving the provision on individual standing a narrow interpretation. The last time the issue was extensively debated, during the Convention on the Future of Europe responsible for drafting the Constitutional Treaty, most of the participating scholars and jurists took the view that any change would require an express Treaty amendment. Although the merits of this position can be disputed, it is true that specific kind of individual standing advocated here—direct access to contest the fundamental rights compliance of all legal measures, including legislative acts—would be a dramatic departure from the current system. Thus, even though there might be room for

expanding standing through doctrinal evolution in the case law, the path would be slow, and a Treaty amendment would be the surest vehicle for making the changes.

In short, limited Treaty amendments bringing the ESM into the EU legal order and allowing direct access for fundamental rights challenges to legislative acts and other legal acts of general application would be significant improvements to the EU legal order. Even if the political environment and calculus are not favorable currently, there are steps that could be taken to pave the way for future Treaty reform. In the case of any future bailouts, as briefly sketched in the introduction to this volume, the European Commission could systematically incorporate the MoU terms in the Two Pack fiscal surveillance regulation, which would place them in the TFEU's supranational system of legal norms and ECJ jurisdiction. Over the years, the many calls that have been made for reforming individual standing have been resisted with the assertion that between direct access for individual acts and preliminary references for everything else, the EU's system of access to justice is complete. In light of the legal developments covered in this book, the completeness claim should be carefully scrutinized by the EU institutions. However the particularities of these and the many other questions raised by this book are resolved, one thing is sure. The uncharted path of European integration is best served not through dogmas and orthodoxies but by the open-minded evaluation and re-evaluation of how to advance core European constitutional values in the EU's evolving legal, social, and political order.