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EU Law in Populist Times: Crises and Prospects

Francesca Bignami
George Washington University Law School, fbignami@law.gwu.edu

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Introduction

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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 close to entering government, as with Spain's Podemos party, which won 21 percent of the vote in the 2015 parliamentary elections.

Although the economic crisis was not as dramatic in Eastern Europe, there it has served as fodder for the rise of authoritarian populism, beginning with Hungary, where Fidesz won a parliamentary supermajority in 2010.[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, as some of their East European counterparts, they are both ethnonationalist and anti-immigrant. To take the most salient examples, in France, the Front National's candidate came 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 extraordinary moment for German postwar 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. The most recent test of strength for populist parties was the May

[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.

2019 vote for the 2019–2024 European Parliament. The results confirmed the decline of the mainstream parties of the left and the right and the growing strength of newer forces across the political spectrum, including, but not limited to, the extreme right.

The national parties and movements behind the populist turn are radically different in many respects, but they all share a common hostility to the EU political establishment. In Western Europe, these parties typically oppose the political forces that have governed their countries throughout the postwar era and that have generally been proponents of European integration. In Eastern Europe, due to the volatile character of party systems, certain populist parties such as Fidesz (in Hungary) and Law and Justice (in Poland) have had significant experience in government in recent years. In these cases, anti-establishment sentiment is directed almost entirely outwards, at mainstream politics in Western Europe and at the EU level.

In populist discourse, the European Union is shorthand for a variety of evils – from greedy bankers, to austerity-imposing technocrats, social dumping, uncontrolled immigration, and enforced pluralism and multiculturalism.[2] 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 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 signed in 1992. Until then, the EU had been primarily a market-making and market-regulating entity. In the Maastricht Treaty, the foundations of an ambitious

[2] Throughout this introductory chapter, and reflecting the nomenclature that has applied 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 the European Economic Community and, later, the European Community.

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, 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 subfields, 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

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

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, 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 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

[4] See, e.g., Roger J. Goebel et al., *Cases and Materials on European Law*, 4th ed. (Saint Paul, MN: West Academic Publishing, 2015); Anthony Arnull, *European Union Law* (Oxford: Oxford University Press, 2017); Stephen Weatherill, *Cases & Materials on EU Law*, 12th ed. (Oxford: Oxford University Press, 2016).

[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 the analysis.

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

[6] Jean Monnet, *Memoirs*, trans. Richard Mayne (London: Third Millennium Publishing, 2015), 300, 393–394 (first published in Great Britain in 1978 by William Collins Sons & Co. Ltd); Ernst Haas, *The Uniting of Europe* (Stanford, CA: 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.

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 previously, 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 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 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

[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): 1010–1034.

[8] For a brief overview of this early EMU history, see Chapter 2 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 of the Euro* (Oxford: Oxford University Press, 2015).

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 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 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 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

[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 what follows in this section and for extensive citations to the scholarly literature, see the contributions in Part I of this volume.

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

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]

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

[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 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: Longman, 1999), 63–76.

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 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, comprising the United Kingdom, Ireland, and Denmark, and the integrationists, comprising 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 previously, 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 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

[16] For a general discussion of the law of free movement of persons through the Treaty of Lisbon, see Koen Lenaerts, Piet Van Nuffel, and Robert Bray, *Constitutional Law of the European Union*, 2nd ed. (London: Sweet & Maxwell, 2005).

[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 Chapter 9 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.

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 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.

Parallel to the development of the Schengen Area was the emergence of an increasingly robust law of free movement of persons.[21] In the 1970s and early 1980s most of the impetus came from the European Court of Justice, which issued a string of important judgments on the rights of workers, their family members, and students under the Treaty and secondary legislation. By 1990, however, the legislative branch had begun to take the lead, with a series of measures that extended certain free movement rights to non-economically active

[19] See generally Chapter 8.

[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 Chapter 14.

[21] For a brief overview of this historical trajectory, see Chapter 7. See also Dimitry Kochenov and Richard Plender, "EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text," *European Law Review* 37, no. 4 (2012): 369–396; Dimitry Kochenov, ed., *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2017); Martijn van den Brink, "EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems," *European Law Journal* 25, no. 1 (2019): 21–36.

persons. Then, in the Maastricht Treaty, the Member States introduced the status of EU citizenship. Although the rights conferred by EU citizenship were notoriously ambiguous, supranational citizenship in conjunction with the existing market freedoms combined to expand the free movement rights of Member State nationals. The adoption of the Citizenship Directive in 2004,[22] which codified much of the Court of Justice's case law and which coincided with East European accession, set the stage for the current era of intra-EU migration.

The remarkable internal migration that has resulted from the law of free movement of persons, in combination with the Schengen system, 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.[23] The campaigning on the Brexit referendum illustrates vividly the variety of anxieties that human migration has triggered.[24] 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 national identity. On the other hand, even though the United Kingdom 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 United Kingdom 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

[22] European Parliament and Council, Directive 2004/58/EC, 2004 O.J. (L 229) 35.

[23] 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.

[24] 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): 785–786; 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.

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.[25] Although 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 historically was more intergovernmental and less supranational than the TFEU.[26]) 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.

[25] 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 Chapter 14.

[26] 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 and enforced. In the supranational, "Community method" 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. Historically, the procedures contained in the TEU were of the intergovernmental variety, while those in the predecessor treaties to the TFEU were of the supranational variety. The situation has changed since the Lisbon Treaty, since the TEU was revamped to incorporate the EU's constitutional and institutional framework. Still today, however, policy areas over which the Member States seek to retain control, most notably the Common Foreign and Security Policy, remain in the TEU.

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. In political rhetoric, the association between violence and the loss of control over borders is particularly evident with respect to terrorist acts by Islamic extremists; however, 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 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,[27] and European policymakers have sought to improve counter-terrorism coordination among the Member States.[28] 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.[29] 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

[27] See, e.g., *Rapport fait au nom de la commission d'enquête relative aux moyens mis en œuvre par l'État pour lutter contre le terrorisme depuis le 7 janvier 2015*, Rapport No. 3922, Assemblé nationale, Quatorzième Législature (July 5, 2016).

[28] See Chapters 10 and 11.

[29] See Chapter 9.

European Economic Community, headquartered in Brussels, had responsibility for markets.[30] Over time, this division of labor has broken down. Most notably, since the 1960s, the European Court of Justice has developed a jurisprudence of rights and values under the rubric of *principes généraux du droit*, applicable to the EU's own institutions and scheme of government; with the Charter of Fundamental Rights of the European Union, proclaimed in 2000 and officially adopted in 2009, the EU also acquired a formal catalogue of rights.[31] 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. 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, among other things, respect for the rule of law, rights, and democracy.[32] The European Commission was tasked with monitoring the progress of the candidate countries toward fulfillment of these criteria, one of the prerequisites for becoming a Member State. However, there was concern that even if the applicant states met the Copenhagen criteria before accession, afterwards, as post-Communist states with a recent history of authoritarianism, they would be tempted to backtrack on fundamental values. Therefore, with the Amsterdam Treaty of 1997, the TEU was amended to include the principles of the rule of law, rights, and

[30] 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): 649–693.

[31] 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).

[32] 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); Dmitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer Law International, 2008).

democracy (Article 6) and a procedure for sanctioning Member States for "a serious and persistent breach" of those principles (Article 7).[33]

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."[34] 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 relied heavily on European Court of Human Rights (ECtHR) case law and Venice Commission opinions.[35] Moreover, the Article 7 TEU procedure remains highly 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.[36]

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:

[33] On the post-Amsterdam legal trajectory of the rule of law, democracy, and rights, see Chapter 15 and literature cited therein.

[34] Article 2 TEU.

[35] 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 many recent ones on Poland and Hungary. See Venice Commission, "Documents by Opinions and Studies," www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN.

[36] *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).

National authorities implement the law on their territories in cooperation with other national authorities and coordinated by EU-level authorities.[37] As is 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.[38]

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,[39] Member State actors can refuse to cooperate with their 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 *Celmer* preliminary reference in which the Irish court maintained that it did not have a duty to execute a European

[37] 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).

[38] For a discussion of this jurisprudence, see Chapter 15.

[39] 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*, eds. George A. Bermann and Katharina Pistor (Portland and Oxford: Hart Publishing, 2004), 97–140.

arrest warrant originating in Poland and return the suspect to Poland to face trial.[40] 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-stay visas and long-term residence permits give foreign nationals the right to travel anywhere within the Schengen Area;[41] 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).[42] 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 European Structural and Investment Funds conditional on the domestic rule of law.[43] 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."[44] 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

[40] Case C-216/18 PPU, *Minister for Justice and Equality* v. *LM*, ECLI:EU:C:2018:586. For an analysis of the relationship between judicial independence and judicial cooperation in the context of the European Arrest Warrant, see Petra Bárd and Wouter van Ballengooij, "Judicial Independence as a Precondition for Mutual Trust? The CJEU in *Minister for Justice and Equality v. LM*," *New Journal of European Criminal Law*, 9, no. 3 (2018): 353–365.

[41] For a general discussion of this aspect of immigration law, see Chapter 14.

[42] 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 Chapter 7.

[43] Kim Lane Scheppele and R. Daniel Kelemen discuss the possible development of conditionality in Chapter 15.

[44] On authoritarian populism, see Chapter 17 and the literature cited therein.

(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.[45] Resisting the EU, and in particular the law of the EU, is an important component of this ideology. There are many examples of outright noncompliance 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 Syrian refugee crisis.[46] The Polish government initially resisted attempts to require Poland to comply with EU law on nature conservation and continued logging notwithstanding an ECJ interim order.[47] 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, signed in 1957, 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 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

[45] For a discussion of what is often referred to as "the politics of resentment," see Chapter 16 and the literature cited therein.

[46] 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): 1457–1494.

[47] See Chapter 16 for a detailed discussion of the Polish Białowieża Forest saga.

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 to 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 of 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 United Kingdom, 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 part 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 toward 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 candidate of the winning party or coalition of parties 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. (This system, however, is still in flux, as demonstrated by the recent elections for the 2019–2024 European Parliament, which led to the appointment of a *Spitzenkandidaten* outsider as Commission president.) Dehousse demonstrates that there are fundamental contradictions between the de-politicized "trusteeship" model and the parliamentary government model, evident for instance in the 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 Directive, which was adopted in 1996 and which was designed to facilitate the cross-border provision of 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 that 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.

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-stay 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 legislation designed 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 part 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. These fall under the umbrella of "national security" and remain 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 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 United States and the e-Evidence proposals in the EU. As Jennifer Daskal explains, the rise of a globally connected Internet and cloud storage have 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 United States 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 European Convention on Human Rights (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 ECHR 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 all 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 the 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 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 explains 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 (ESIF) 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 Tadeusz 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 noncompliance with interim measures. On the other hand, Koncewicz argues that the ultimate result was disappointing, since 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 leaders 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 part 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 L. Lindseth argues that even as extensive regulatory power has been delegated to supranational EU institutions, the experience of legitimate, democratic self-government 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 assesses 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.[48] 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. There, 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 takes up 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 toward intergovernmentalism because of their sovereignty stakes. Intergovernmentalism is a process in which the asymmetric interdependence and bargaining power of states determine outcomes and democratic politics operate between domestic electorates and their political leaders. It is a political fact. Intergovernmental politics, however, both at 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

[48] 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.

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 alternatives to the ECJ 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.