

# THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE TWENTY-FIRST CENTURY

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## I

### INTRODUCTION

Where a court stands depends on where that court sits. External context generally shapes the law and politics of judicial institutions. For any court, key contextual factors may include, for instance, political actors and institutions that must enforce judicial rulings and that may react to unwanted rulings with ‘court curbing’ measures; other courts with which the court cooperates or competes; members of the legal field,<sup>1</sup> including the lawyers and litigants who bring cases and the scholars who interpret the court’s jurisprudence; and the broader sociopolitical or geopolitical context that may influence prevailing attitudes about governance by judges. In one external context, political actors may accept and even embrace assertions of judicial power. In another, political actors may suppress the judiciary. In one external context, a high court may rely on widespread support from lower courts. In another, a high court may struggle to assert its authority vis-à-vis other courts. And in one external context, a court may benefit from the support of a burgeoning “legal field” that generates cases and promotes the acceptance of new doctrines, whereas in another, a court may find itself with few friends and even fewer cases.

External contextual factors have played a profound role in shaping the law and politics of the European Court of Justice (ECJ).<sup>2</sup> Indeed, it is hard to conceive of a set of more influential causal factors. The ECJ has emerged as the

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1. On the concept of legal fields, see generally Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987); Yves Dezalay & Mikael Rask Madsen, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, 8 ANN. REV. L. & SOC. SCI. 433 (2012).

2. Naming conventions for the EU’s courts changed with the Lisbon Treaty. The EU’s high court is formally referred to as the European Court of Justice (ECJ). The lower court, formerly known as the Court of First Instance, is now known as the General Court. The EU judiciary as a whole, encompassing the ECJ, the General Court, the EU Civil Service Tribunal, and other specialized courts that the EU may establish, is known as the Court of Justice of the European Union, or CJEU. This unfortunate naming convention uses the singular—“Court” in CJEU—for what is actually a plural: a judicial system made up of multiple courts.

most powerful supranational court in world history, achieving a status more akin to that of a domestic constitutional court than to other international or supranational courts, such as the others discussed in this issue. In terms of the measures of authority,<sup>3</sup> the ECJ has clearly achieved extensive authority. Its rulings are accepted not only by the parties to the case and “compliance partners,”<sup>4</sup> such as executive branch officials, administrative agencies, and judges, but also by a much broader legal field encompassing scholars, legal practitioners, and other actors who advise individuals, governments, and firms on what the law requires. The distinctive achievements of the ECJ have depended crucially on its external context, a context which has been much more conducive to judicial empowerment than the contexts surrounding other international courts. To be sure, factors internal to the ECJ itself—relating to its internal structure, operations, and its strategic behavior—have been necessary to its success, but such internal factors could only help the Court secure such extensive authority because the Court already enjoyed a favorable external context.

The introduction to this issue<sup>5</sup> highlights three categories of external contextual factors—institution-specific context, constituencies context, and geopolitical context—that affect the development of an international court’s authority. Aspects of each of these three categories have been crucial to the development of the ECJ’s extensive authority. First, the ECJ benefited from an overarching geopolitical context—including its linkage to the project of regional integration in Europe, the institutional setting of the early European Community, and the broad trend toward the judicialization of politics in Europe—that was highly supportive of the expansion of judicial authority. Second, the core subject matter of the Court’s early jurisdiction, which centered on adjudicating disputes pertaining to the European Community’s single market, allowed the ECJ to focus initially on issues of relatively low political salience and thus to develop its jurisprudence protected behind a veil of technocratic obscurantism. Third, the ECJ’s core constituencies—national governments, national courts, and members of the European Union (EU) legal field—tended to be supportive of judicial empowerment. Together, these aspects of the ECJ’s external context provided a highly supportive environment in which the Court could develop its jurisprudence and gradually extend its judicial power during its first few decades of existence. Rarely do international courts enjoy such favorable external contexts. Indeed, even the ECJ itself today faces a more threatening external context than it did in past decades.

Although the ECJ’s external context remains broadly supportive of its authority, external changes over the past decade present the Court with a new

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3. Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 *LAW & CONTEMP. PROBS.*, no.1, 2016, at 9–12.

4. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 53 (2014).

5. Alter, Helfer & Madsen, *supra* note 3.

set of challenges. Declining public support for the project of European integration has negative implications for the Court. The expansion of the scope of EU law into more sensitive policy fields draws the ECJ into increasingly contentious political debates. Rumbblings of anti-ECJ backlash among a number of the Court's core constituencies, including some national governments, national judiciaries, and members of the European legal field, portend dangers on the horizon. Thus, although the Court's authority is in many respects more extensive than ever before, the ECJ faces a number of new risks in its external context and it must tread carefully as its terrain grows more treacherous.

Part II of this article analyzes the impact of geopolitical context on the development of the Court's authority. This article shows that the early Court benefited from a very supportive geopolitical context, but recent changes have rendered its geopolitical context more threatening. Part III analyzes how the EU's initial focus on the single market as a core subject matter supported the extension of its authority and how the spread of the Court's jurisdiction to more controversial subject matters poses new challenges to this authority. Part IV focuses on the ECJ's constituencies, highlighting the impact of member governments, national courts, and the broader European legal field on the development of the Court's authority. In particular, recent changes in the ECJ's constituencies context present the Court with new risks.

## II

### GEOPOLITICAL CONTEXT

In its first few decades of operation, the ECJ benefited from an overarching geopolitical context that supported the expansion of the Court's authority. The ECJ's assertion of judicial power at the supranational level and its promotion of various EU rights were very much in keeping with regional geopolitical trends—above all, the political drive for regional integration in Europe and the judicialization of politics.<sup>6</sup> The geopolitical context surrounding the ECJ remains broadly supportive of its authority today, but recent trends, in particular declines in public support for the EU, do raise cause for concern.

The first overarching political trend supporting the ECJ's drive to enhance its authority was the project of regional integration in postwar Europe. Support for increasing an international court's authority is influenced by the degree of support for the regional body with which the court is associated.<sup>7</sup> In postwar Europe, national governments of West European democracies demonstrated an abiding commitment to the project of European integration, particularly to the

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6. On the political drive for regional integration in postwar Europe, see generally DESMOND DINAN, *EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION* (2004); ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* (1998). On the trend to the judicialization of politics, see generally Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 *COMP. POL. STUD.* 397 (1994); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000).

7. See Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 *THEORETICAL INQUIRIES L.* 411, 413–14 (2013).

aim of establishing a common market.<sup>8</sup> Whereas enthusiasm for the integration project certainly went through peaks and troughs over time and varied across member states, all member states, broadly speaking, remained committed to regional economic integration from the 1950s onward, and, in a series of Treaty revisions, all agreed to further steps toward political integration.<sup>9</sup>

The establishment of the ECJ's authority is inseparable from Europe's push for integration. The ECJ formed an integral part of the institutional architecture of the European Communities and, later, the EU. In short, the Court was part of the package of European integration, and states and other actors that wished to reap the benefits of regional integration had to accept the Court and its authority as part of that overall package. They might have resisted implementing particular rulings and occasionally called for reforms to rein in the Court, but, so long as they wanted to be part of the EU, they could not unilaterally reject the Court's growing authority. Member states recognized that they needed the ECJ in order to enhance the credibility of their commitments to integration and to solve the formidable collective-action problems the member states faced.<sup>10</sup>

Moreover, the institutional structure of the EU provided a context conducive to judicial empowerment. The EU is a political system in which power is highly fragmented. In the EU, as in other political systems, political fragmentation encourages judicial empowerment.<sup>11</sup> In the EU, power is fragmented both horizontally and vertically. Horizontally, EU power is fragmented among the European Commission, the Parliament, and governments in the Council, all of which play a role in adopting new EU legislation. Power is also fragmented vertically between EU lawmakers and the national administrations that implement most EU policies. This bidirectional, political fragmentation, therefore, gives the ECJ space to play an active policy role with little fear of concerted political reprisals. Assembling the large political coalitions necessary to rein in the ECJ is difficult, and this insulates the Court against political attacks. When it comes to reining in the ECJ through

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8. MICHELLE P. EGAN, *SINGLE MARKETS: ECONOMIC INTEGRATION IN EUROPE AND THE UNITED STATES* 8–13 (2015). On European leaders' renewed focus on market integration from the 1980s onward, see generally, NICOLAS JABKO, *PLAYING THE MARKET: A POLITICAL STRATEGY FOR UNITING EUROPE, 1985–2005* (2006).

9. See generally MORAVCSIK, *supra* note 6 (reviewing the major treaty revisions that advanced the process of European integration from the 1950s through the 1990s).

10. See MORAVCSIK, *supra* note 6, at 67–76.

11. On the relationship between political fragmentation and judicial power, see TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 256, 261 (2003); R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW & REGULATION IN THE EUROPEAN UNION* 24–28 (2011). See generally MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *LAW & CONTEMP. PROBS.* 41, 55–60 (Summer 2002) (explaining that political fragmentation allows courts to independently engage in policy formulation); Keith Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 *INT'L J. CON. L.* 446 (2003); Keith Whittington & R. Daniel Kelemen, *Establishing and Maintaining Judicial Independence*, in *OXFORD HANDBOOK OF LAW AND POLITICS* 99 (Keith Whittington et al. eds., 2008).

legislation or treaty amendment, member states face a “joint decision trap,”<sup>12</sup> a decision-making deadlock that arises when parties who would be adversely affected by a decision are able to veto it. To override an ECJ interpretation of the EU Treaties, member states must agree unanimously. To override an ECJ interpretation of secondary legislation, member states must pass new legislation, which under the most common legislative procedure used today<sup>13</sup> requires the introduction of a proposal by the Commission, a qualified majority in the Council, and a majority in the European Parliament. As long as one or more crucial veto players in the EU legislative process support the ECJ’s assertions of authority, they can shield the Court from political attacks.<sup>14</sup>

The fragmentation of power has not only insulated the Court against political reprisals but has also generated incentives for lawmakers to expand the Court’s role. The fragmentation of political authority creates principal–agent problems between EU lawmakers, the principals, and the national administrations that implement most EU law, the agents. Because EU lawmakers cannot necessarily trust national administrations to faithfully implement and enforce EU law, they frequently craft legislation that stipulates in detail the actions their agents must take and that invites courts to play an oversight role to ensure that these agents fulfill their mandates.<sup>15</sup> In other words, EU lawmakers frequently write legislation that invites the ECJ to play a central role in governance.

More generally, the fact that the EU has such a limited administrative capacity of its own has long encouraged lawmakers to rely on judicialized modes of governance.<sup>16</sup> In effect, EU lawmakers treat judicialization as a functional substitute for their lack of a strong, centralized administrative bureaucracy. Because they cannot deploy vast legions of Eurocrats to monitor and enforce EU policies, EU lawmakers have conscripted private litigants into acting as the eyes, ears, and long arm of Brussels, encouraging the litigants to bring enforcement actions before national and EU courts.<sup>17</sup>

A second aspect of the geopolitical context of postwar Europe also facilitated the development of the ECJ’s authority: in the postwar era, democratic political systems across Western Europe were experiencing a substantial judicialization of politics domestically.<sup>18</sup> The fact that fascist parties

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12. See Fritz W. Scharpf, *The Joint-Decision Trap: Lessons From German Federalism and European Integration*, 66 PUB. ADMIN. 239, 239 (1988). For an updated account of this dilemma, see Fritz W. Scharpf, *The Joint-Decision Trap Revisited*, 44 J. COMMON. MKT. STUD. 845 (2006).

13. The so-called “Ordinary Legislative Procedure” is outlined in the Consolidated Version of the Treaty on the Functioning of the European Union art. 289, Oct. 26, 2012 O.J. (326), [hereinafter TFEU].

14. See R. Daniel Kelemen, *The Political Foundations of Judicial Independence in the European Union*, 19 J. EUR. PUB. POL’Y 43, 47 (2012) (discussing the ECJ’s high degree of insulation from political reprisals).

15. KELEMEN, *supra* note 11, at 25–26.

16. *Id.* at 27.

17. *Id.* at 27–28.

18. See generally STONE SWEET, *supra* note 6; Shapiro & Stone, *supra* note 6.

in Germany and elsewhere had used their control of Parliament to extinguish democracy called into question the parliamentary supremacy model that had prevailed in European democracies. Many member states supplanted this traditional parliamentary supremacy model with a “new constitutionalism” involving a more expansive role for the judiciary in reviewing legislative action and safeguarding fundamental rights.<sup>19</sup> Powerful constitutional courts were established in a number of postwar European democracies and were empowered to review legislation’s compatibility with constitutional values.<sup>20</sup>

Greater judicial power was not just apparent in the realm of constitutional politics and rights but also in more routine areas of economic regulation. With the growing complexity of public regulation in the postwar era, the production of regulatory norms shifted more and more from parliament to executive departments and administrative agencies, and national constitutional courts were called on to monitor this transfer of authority.<sup>21</sup> The role of courts in regulatory governance intensified further beginning in the 1980s, when many European countries moved to privatize state owned enterprises and to liberalize previously sheltered markets.<sup>22</sup> In doing so, Europeans set up new systems of regulation to control these privatized and liberalized sectors.<sup>23</sup> These reforms replaced restrictions on market entry and direct state control with rule-based, highly judicialized regulatory regimes that invited judges to regulate markets that previously had been controlled by bureaucrats.<sup>24</sup>

Thus, the assertions of authority by the ECJ from the 1960s to 1980s occurred in a political context that was experiencing a more general trend toward a greater judicialization of politics and policymaking, including stronger judicial protection of fundamental rights.<sup>25</sup> EU member states were democracies not only committed to the rule of law; they were also increasingly accepting of judicial power. Member-state acceptance of the growing authority of the ECJ and of the supranational judicial system it helped to construct in partnership with national judges must be understood against this new domestic acceptance of judicial power. The ECJ helped promote this wave of judicialization, but it also benefited from riding the wave. In this context, for a government to defy the ECJ’s authority outright or to interfere with the ECJ’s relationship with the national courts who applied its judgments would have raised questions not just about that government’s commitment to European integration but also about

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19. STONE SWEET, *supra* note 6, at 31–38; Shapiro & Stone, *supra* note 6, at 400–01.

20. STONE SWEET, *supra* note 6, at 40–49.

21. See generally PETER L. LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE* (2010).

22. See generally Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77 (1994).

23. *Id.*

24. KELEMEN, *supra* note 11, at 22–23.

25. Mikael Rask Madsen, *Human Rights and European Integration: From Institutional Divide to Convergent Practice*, in *A POLITICAL SOCIOLOGY OF TRANSNATIONAL EUROPE* 147 (Niilo Kauppi ed., 2013).

its commitment to the rule of law, judicial independence, and fundamental rights, which, at the time, governments were eager to demonstrate.

Many aspects of the geopolitical context that supported the expansion of the ECJ's authority in the first few decades of European integration remain in place today. The basic structural features of the EU continue to encourage lawmakers to rely on a judicialized mode of governance. Indeed, this dynamic has grown even more pronounced in recent years as the EU's administrative capacity has failed to keep pace with its growing legislative ambitions. Just as the EU relied heavily on the Court when the scope of its competences was limited primarily to economic policy, so too has the EU continued to rely on the ECJ as it has extended its reach into more and more policy areas.<sup>26</sup> Also, the gradual enlargement of the EU from six to twenty-eight member states has exacerbated the joint-decision trap, making it harder for member states to assemble the coalitions needed to rein in the ECJ and thus further insulating the ECJ from political overrides.<sup>27</sup>

Although the overall geopolitical context remains supportive, some recent developments pose risks to the ECJ. Support for an international court's authority is tied to support for the regional integration project with which the Court is associated. In the wake of the Eurozone crisis, public support for the EU hit an all-time low,<sup>28</sup> and commentators from across the political spectrum questioned the long-term viability of the European project.<sup>29</sup> Support for the ECJ is not immune from this trend, and trust in the ECJ in fact declined somewhat in the years since the eruption of the Eurozone crisis.<sup>30</sup> Further erosion of public support for the EU would pose a long-term risk to the ECJ.

Nevertheless, trust in the ECJ has declined less than has trust in other EU institutions or national political institutions.<sup>31</sup> The ECJ remains today, as it has long been, the most trusted of all government institutions assessed in Eurobarometer surveys—including national governments, national parliaments, national political parties, national courts, and other EU institutions.<sup>32</sup> Beyond risks associated with general declines in support for European integration, recent EU enlargement to states with weaker judiciaries and rule-of-law traditions poses another set of new challenges to the Court—challenges explored further in part IV. Before considering the ECJ's relationships with

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26. See KELEMEN, *supra* note 11, at 24 (on the EU's reliance on the ECJ and judicialized modes of governance "across a wide range of policy areas").

27. See R. Daniel Kelemen, Anand Menon & Jonathan Slapin, *Wider and Deeper? Enlargement and Integration in the European Union*, 21 J. EUR. PUB. POL'Y 647, 658–59 (2014) (arguing that while EU enlargement has to some degree increased legislative gridlock, this has in turn increased the ECJ's room for maneuver).

28. Ian Traynor, *Crisis for Europe as Trust Hits Record Low*, THE GUARDIAN (Apr. 24, 2013), <http://www.theguardian.com/world/2013/apr/24/trust-eu-falls-record-low>.

29. Matthias Matthijs & R. Daniel Kelemen, *Europe Reborn*, 94 FOREIGN AFF. 96, 97 (2015).

30. See European Commission, *L'Opinion Publique dans l'Union Européenne*, 79 EUROBAROMÈTRE STANDARD 90 (2013).

31. *Id.*

32. *Id.*; see also Kelemen, *supra* note 14.

national courts and other constituencies, however, we first consider the impact that the ECJ's original core subject matter, the Single Market, had on the expansion of its authority.

### III

#### THE SINGLE MARKET AS A CORE SUBJECT MATTER

The successful expansion of the ECJ's authority depended not simply on the fact that it was embedded in a project of regional integration; rather, it depended quite specifically on the fact that in its early years this project was, above all, one of market integration. Market integration proved to be a fertile subject matter competence for the expansion of ECJ authority for two main reasons: First, it enabled the ECJ to establish the core doctrines of the EU legal system in cases involving issues often of relatively low political salience, and second, the dynamics of market integration enabled the ECJ to trigger a cycle of deregulation and reregulation that served to expand the corpus of EU law—and with it, the ECJ's authority. Even today, the core of EU law remains focused on the ongoing construction of a single market, and this subject matter focus continues to bolster the expansion of the Court's authority. However, as the scope of EU law has expanded into more sensitive areas of national policy, such as healthcare, education, collective bargaining, fundamental rights, and fiscal policy, the ECJ has been drawn into fields where its decisions are more likely to spark public outcries and political reprisals. The ECJ's authority today may be sufficiently robust to weather the criticisms that come from involvement in such controversial areas, but it was able to achieve this authority only because it started out focused on seemingly technocratic—and therefore less politically salient—issues of market integration.

First, the ECJ's focus on market integration generally led it to intrude on less politically contentious issues than those faced by some other international courts, such as those focused on human rights. Many ECJ decisions did impose high costs on particular member states and proved highly controversial. But on the whole, the focus on market integration helped the ECJ hide behind a veil of technocracy. The ECJ was able to establish landmark legal doctrines in cases that often involved technical, market-integration issues of low political salience, ranging from the classification of chemicals for the purpose of customs duties<sup>33</sup> to rules concerning the protection of employees in the event of their employer's insolvency.<sup>34</sup> This technocratic focus helped the ECJ use the law more effectively as a “mask and shield” for the broader political transformation of Europe that the Court was promoting.<sup>35</sup>

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33. Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

34. Joined Cases C-6/90 & C-9/90, *Francovich and Bonifaci v. Italian Republic*, 1991 E.C.R. I-5357.

35. Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 44, 72 (1993).



Second, the focus on the common market enabled the ECJ to unleash a cycle of “negative integration” and “positive integration” that drove the EU forward—and, in the process, enhanced the Court’s authority.<sup>36</sup> The establishment of a common or single market involves both negative integration, the elimination of barriers to trade, and positive integration, the introduction of common rules. Courts play a direct role in negative integration when they strike down regulations that constitute nontariff barriers to trade between jurisdictions. Positive integration requires lawmakers to adopt common regulatory standards that apply across all jurisdictions in the common market. But even here courts play a role. When court-led negative integration strikes down existing regulations at the state level (deregulation), lawmakers often respond by introducing common standards to apply to all states (re-regulation). As noted above, when lawmakers do re-regulate in the context of a political system like the EU’s, they will often do so in a way that invites courts to play a strong role in governance. In other words, lawmakers couple national deregulation with supranational, judicialized re-regulation.

In many areas of policymaking related to the Single Market, purely deregulatory, negative market integration is politically unacceptable. If the ECJ strikes down national regulations on issues such as food safety, environmental protection, or financial services because such regulations constitute nontariff barriers to trade, this is not the end of the story. Voters and national politicians will quite simply reject an outcome in which national regulatory regimes are gutted and consumers are left vulnerable. Instead, judicial rulings striking down national regulatory barriers to trade generate political pressure for the establishment of common, EU-wide regulations. This cycle of negative integration spurring positive integration has played out again and again in many regulatory areas connected to the Single Market. In fact, member governments have repeatedly proved willing to surrender their veto over fields of legislation that have been affected by judicial negative integration, in part so that they could facilitate the process of passing positive integration legislation at the EU level.<sup>37</sup> So, while the ECJ has promoted market liberalization that has eliminated some national social regulations, it has also promoted a legislative countermovement of historic proportions in the form of a massive accumulated body of EU legislation and rulemaking, the *acquis communautaire*, that

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36. ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 108–45 (2004). On the concepts of negative integration and positive integration more generally, see Fritz Scharpf, *Negative and Positive Integration in the Political Economy of European Welfare States*, in *GOVERNANCE IN THE EUROPEAN UNION* 15 (Gary Marks, Fritz Scharpf, Philippe Schmitter & Wolfgang Streeck eds., 1996).

37. This contradicts some elements of Weiler’s equilibrium thesis. See Alec Stone Sweet & R. Daniel Kelemen, *Assessing the Transformation of Europe: A View from Political Science*, in *THE TRANSFORMATION OF EUROPE: 25 YEARS ON* (Miguel Maduro & Marlene Wind eds., forthcoming 2016); Joseph H.H. Weiler, *The Transformation of Europe*, 100 *YALE L. J.* 2403 (1991). Moreover, Caporaso and Tarrow have linked this dynamic in the EU to Karl Polanyi’s insights concerning how destabilizing market liberalization can spark countermovements designed to re-embed markets in a social context. James A. Caporaso & Sydney Tarrow, *Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets*, 63 *INT’L. ORG.* 593 (2009).

establishes uniform EU-level regulations.

Challenging this view, many critics of the EU on the left claim that the EU promotes a neoliberal agenda, in part because its capacity for negative integration driven by the ECJ exceeds its capacity for positive integration by EU lawmakers.<sup>38</sup> Although it is true that the EU's capacity for negative integration often exceeds its capacity for positive integration, the EU has far more capacity for positive integration—that is, passing legislation—than any other supranational organization. In fact, the EU has demonstrated more capacity for the adoption of common regulations than most states, with its *acquis communautaire* regulating most aspects of economic activity in EU member states.<sup>39</sup> The passage of a vast body of EU directives and regulations, in turn, expanded the body of EU law over which the ECJ was the ultimate judicial authority. In this way, the cycle of deregulation at the national level followed by re-regulation at the EU level related to the single market enabled the ECJ to extend its authority into a wide range of areas.

On the whole, the focus on market integration has been extremely conducive to the development of the ECJ's authority; nevertheless, the extension of the EU's competences into new, more sensitive policy areas raises new challenges for the ECJ. As EU law has expanded further into politically charged policy areas ranging from healthcare to education, immigration, fundamental rights, and fiscal and monetary policy, the ECJ has been pressed into new terrain where its decisions are more likely to spark public outcries and political reprisals. For instance, a string of ECJ rulings, the so-called Laval quartet,<sup>40</sup> in which the ECJ was asked to weigh national social rights against the EU's liberal economic freedoms, led to widespread denunciation of the Court by critics on the left.<sup>41</sup> And the reference recently sent to the ECJ by the German Constitutional Court in the divisive *Gauweiler* case<sup>42</sup> has forced the ECJ into potentially explosive terrain.<sup>43</sup> Beyond the sphere of socioeconomic

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38. See, e.g., Martin Höpner & Armin Schäfer, *Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting*, 66 INT'L. ORG. 429, 448 (2012) (“[T]he ECJ drives forward market liberalization . . . while member state heterogeneity makes both political agreement on harmonization and political override of ECJ decisions unlikely.”); Fritz W. Scharpf, *Legitimacy in the Multilevel European Polity*, 1 EUR. POL. SCI. REV. 173, 193–94 (2009).

39. See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 19–35 (2012) (highlighting the expansive reach of EU regulation and noting that the EU often adopts the strictest regulatory standards in the world and frequently determines global standards).

40. Case C-341/05, *Laval un Partneri*, 2007 E.C.R. I-11767; Case C-438/05 *Int'l Transport Workers Federation and Finnish Seaman's Union v. Viking*, 2007 E.C.R. I-10779; Case C-319/05, *Commission of the European Communities v. Federal Republic of Germany*, 2007 E.C.R. I-4323; Case C-346/06, *Dirk Ruffert v. Land Niedersachsen*, 2008 E.C.R. I-1989.

41. See Michael Blauberger, *With Luxembourg in Mind... The Remaking of National Policies in the Face of ECJ Jurisprudence*, 19 J. EUR. PUB. POL'Y 109, 109 (2012).

42. Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag*, not yet published (responding to the German Constitutional Court's questions on the legality of the Outright Monetary Transactions (OMT) bond-buying program put in place by the European Central Bank to stabilize the monetary union and ruling that the program is in fact compatible with the EU treaties).

43. See Erik Jones & R. Daniel Kelemen, *The Euro Goes to Court*, 56 SURVIVAL: GLOBAL POL. & STRATEGY 15, 17 (2014); see also Opinion Of Advocate General Cruz Villalón, Case C-62/14,

rights and policies, the increasing intervention of the EU and the ECJ in the field of fundamental human rights since the formal adoption of the Charter of Fundamental Rights in the Lisbon Treaty has also generated many controversial new cases.<sup>44</sup> The EU's likely upcoming accession to the European Convention on Human Rights would bring new fields of fundamental rights cases before the ECJ. These cases could provoke for the ECJ the same sort of political backlash they already have provoked for the European Court of Human Rights, and they could trigger clashes between this court and ECJ as to which is the ultimate supranational arbiter of human rights in Europe.<sup>45</sup>

#### IV

#### CONSTITUENCIES CONTEXT

In addition to a favorable geopolitical context and a subject matter jurisdiction conducive to judicial empowerment, the ECJ has long benefited from the fact that the key actors it has engaged—including national governments, national courts, and members of the European legal field—have been generally favorable to increases in the Court's authority. However, developments over the last decade, particularly ones related to EU enlargement, have given rise to a new set of challenges to ECJ authority.

##### A. National Governments

The national governments of EU member states, of course, constitute a crucial aspect of the ECJ's external context. After all, governments created the ECJ, appoint its judges,<sup>46</sup> and enforce its rulings. Much of the literature on European legal integration has treated national governments as a brake on the ECJ's ambitions.<sup>47</sup> According to this view, the supranationalist ECJ consistently

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Gauweiler et al. v. Deutscher Bundestag, Jan. 14, 2015; R. Daniel Kelemen, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*, MAASTRICHT J. EUR. & COMP. LAW (forthcoming 2016).

44. For a review of ECJ case law since the Charter became a legally binding instrument of EU law, see generally Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. LAW 168 (2013).

45. See generally Tobias Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, 8 L. & PRAC. INT'L CTS & TRIB. 375 (2009) (exploring the likely future relationship between the ECJ and the European Court of Human Rights (ECtHR)); Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, LAW & CONTEMP. PROBS., no. 1, 2016, at 167; Voeten, *supra* note 7, at 418 (showing that recent ECtHR rulings on controversial cases have led to a dramatic decline in public support for the ECtHR in the United Kingdom). Also, for an illustration of potential conflict between the ECJ and the ECtHR, see the recent ECJ ruling rejecting the draft agreement on the EU's accession to the European Convention on Human Rights, Opinion 2/13, (Dec. 18, 2014).

46. See R. Daniel Kelemen, *Selection, Appointment and Legitimacy: A Political Perspective*, in SELECTING EUROPE'S JUDGES 253–56 (Michael Bobek ed., 2015) (detailing recent changes in the appointment procedure for ECJ justices including the fact that an expert committee composed of a majority of national judges now influences the process through which national governments select ECJ judges).

47. See, e.g., Karen J. Alter, *Who Are the "Masters of the Treaty"?*, *European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998); Burley & Mattli, *supra* note 35; Geoffrey Garrett,

seeks to enhance its power by expanding the scope of European law and accelerating the pace of European legal integration. Member states, by contrast, seek to apply intergovernmentalist brakes to the Court's ambitions, pressuring the ECJ—through threats of legislative overrides, noncompliance, or other punishments—to temper its activism. Scholarly debates, then, tend to center on examining how and when the ECJ can overcome the efforts of member states to control its activism. For the most part, the literature on interactions between member governments and the ECJ has long since arrived at a general consensus that member governments set the outer bounds of how far the ECJ can push both its authority and the scope of European law but that within these bounds the ECJ has substantial room for maneuvering that it can use to promote deeper integration.<sup>48</sup>

Scholars have put forward a number of arguments rooted in varieties of new institutionalism to explain why member governments often fail to constrain ECJ activism.<sup>49</sup> The most powerful and frequently invoked explanations suggest that governments are hamstrung by the EU's joint-decision trap<sup>50</sup> in which the high threshold for reaching agreements prevents states from acting collectively to rein in the ECJ.<sup>51</sup> Importantly, however, even among scholars who emphasize the limited ability of governments to rein in the ECJ, the prevailing assumption is that states do seek to act as a brake on the Court, to the limited extent they

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R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998); Mark A. Pollack, *Delegation, Agency, and Agenda Setting in the European Community*, 51 INT'L ORG. 99 (1997); Alec Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, 5 LIVING REVIEWS EUR. GOVERNANCE 1, 16–22 (2010).

48. Three articles published in a 1998 issue of *International Organization* set out the parameters of the consensus. See Alter, *supra* note 47; Burley & Mattli, *supra* note 35; Garrett, Kelemen & Schulz, *supra* note 47. Carrubba, Gabel and Hankla recently sought to resurrect a stronger intergovernmentalist account, claiming that the ECJ was systematically constrained by threats of override and noncompliance from member governments. See Clifford Carrubba, Matthew Gabel & Charles Hankla, *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 435 (2008). Stone Sweet and Brunell offer a more convincing analysis of Carrubba, Gabel, and Hankla's data, however, arguing that the data actually suggest that governments placed few constraints on the Court. See Alec Stone Sweet & Thomas Brunell, *The European Court of Justice, State Noncompliance and the Politics of Override*, 106 AM. POL. SCI. REV. 204 (2012).

49. See, e.g., KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001) (emphasizing in particular how the development of the ECJ's relationships with national courts limited governments' ability to constrain the ECJ); MARK POLLACK, *THE ENGINES OF EUROPEAN INTEGRATION* (2003) (applying the logic of rational choice institutionalism and principal-agent theory to explain why member state 'principals' have difficulty controlling the ECJ and other supranational 'agents'); Paul Pierson, *The Path to European Integration*, 29 COMP. POL. STUD. 123 (1996) (applying insights from historical institutionalism and path dependence to explain why member state governments fail to control the process of European integration).

50. See *supra* text accompanying note 12.

51. Scharpf, *The Joint Decision Trap*, *supra* note 12, at 39; see also Weiler, *supra* note 37, at 24, 26 (arguing that the unanimity requirement for decisionmaking in the early European Community was the key to judicial empowerment).

can.<sup>52</sup>

Although member-state governments have sometimes provided a kind of brake on the ECJ's ambitions, setting outer limits to the pace and scope of its promotion of legal integration, this narrow perspective misses the bigger picture. In a larger sense, member-state governments have been great enablers of the ECJ. This truth stands out when considering the ECJ's relationship with national governments from a comparative perspective. For example, many of the other international courts discussed in this issue interact with governments that include semi-authoritarian or authoritarian regimes with little commitment to the rule of law and marginal inclination toward real pooling of sovereignty. By comparison, the governments of EU member states seem to have been particularly receptive to its assertion of judicial power.

Certainly, the ECJ has acted strategically to empower itself, extending its mandate more rapidly and taking it far beyond what many member-state governments originally envisaged. But one should not view governments simply as feckless brakemen unable to control the wily ECJ. Such an interpretation is implausible because member governments have repeatedly taken steps in new EU treaties to empower the ECJ, and they have done so despite the Court's well-known propensity to push for deeper integration. To be sure, one can find rare instances in which member governments threatened the Court;<sup>53</sup> took steps at intergovernmental conferences to limit the fall-out from ECJ rulings, such as adding the Barber Protocol to the 1992 Maastricht Treaty;<sup>54</sup> or attempted to shield sensitive policy areas from ECJ influence such as by restricting ECJ jurisdiction over 'Third Pillar' Justice and Home Affairs issues in the Maastricht Treaty. But much more common have been steps taken by the member-state governments at intergovernmental conferences to expand the power of the ECJ.

In every round of EU treaty revision, the member states have extended the ECJ's jurisdiction to new fields of law. They have extended the Court's reach well beyond the sphere of the single market to include more sensitive areas such as "Justice and Home Affairs,"<sup>55</sup> some areas of foreign and security policy,<sup>56</sup> and fiscal surveillance.<sup>57</sup> Indeed, the 2012 Fiscal Compact Treaty<sup>58</sup> relies on the ECJ

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52. See, e.g., Kelemen, *supra* note 14, at 45–47; Stone Sweet *supra* note 47, at 16–22.

53. See, e.g., HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 354–56 (1986) (discussing a court packing plan proposed by Valéry Giscard d'Estaing in 1980); Alter, *supra* note 47, at 130 (discussing proposals by British Conservatives in 1991 and 1995 that call for limits to the jurisdiction of the ECJ and the establishment of a political body that could veto its rulings).

54. Garrett, Kelemen & Schulz, *supra* note 47, at 166–67.

55. See generally STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (3d ed. 2011); Jörg Monar, *Justice and Home Affairs*, 52 J. COMMON MKT. STUD. 141 (2014).

56. See generally DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW (Marise Cremona ed., 2008); THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW—CONSTITUTIONAL CHALLENGES (Marise Cremona & Anne Thies eds., 2014).

57. Deborah Mabbett & Waltraud Schelkle, *Searching Under the Lamp-Post: The Evolution of Fiscal Surveillance* (London Sch. of Econ., LEQS Paper No. 75, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2434008##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434008##).

to provide judicial review of the adequacy of member-state, balanced-budget arrangements that are the centerpiece of that treaty. Likewise, member governments have granted the ECJ new enforcement powers to increase the bite of its rulings, such as the ability to impose penalty payments on governments that fail to comply with previous ECJ rulings.<sup>59</sup> Finally, the member governments have dramatically increased the ECJ's capacity to process cases by adding judges to the ECJ<sup>60</sup> and by establishing subsidiary courts. In the 1986 Single European Act, member states endorsed the creation of a Court of First Instance, which is now the General Court, beneath the ECJ, effectively doubling the size of the EU's judiciary.<sup>61</sup> Governments endorsed further expansion of the EU judiciary again in the Nice Treaty, which entered into force in 2003.<sup>62</sup> The Nice Treaty empowered EU lawmakers to set up specialized judicial panels, now called Specialized Courts, in specific areas of law. The first such panel, the Civil Service Tribunal, was established in 2005.

Why have member-state governments repeatedly empowered the ECJ despite their occasional complaints about its pro-integration judicial activism? First, and most importantly, member-state governments believed and continue to believe that, in order for their project of political and economic integration to succeed, they need a powerful court to help them overcome collective action problems and to make their commitments credible by enforcing their agreements and maintaining the rule of law within the EU.<sup>63</sup> Many member states may be unhappy with particular ECJ decisions, but they still collectively recognize that they need the ECJ if the EU is to operate successfully.

Second, the Court has facilitated the acceptance of its expansive jurisprudence by engaging in "majoritarian activism."<sup>64</sup> The Court has been activist by consistently promoting deeper legal integration, but its activism has focused on imposing norms favored by the majority of member states on the minority.<sup>65</sup> This does not mean that the ECJ is bowing to the pressure of

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58. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, art. 8(1), Mar. 2, 2012.

59. See, e.g., TFEU art. 260, May 9, 2008, 2008 O.J. (C 115) 47 (on the procedure for the imposition of penalty payments for non-compliance with ECJ rulings); Brian Jack, *Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgements?*, 19 EUR. L. J. 404 (2013) (discussing revisions in the Lisbon Treaty designed to facilitate use of the penalty payments procedure and ongoing problems with it).

60. The ECJ has been composed of one judge appointed by each member state, which has allowed the Court to grow with each enlargement of the EU. See Kelemen, *supra* note 46, at 253–56.

61. R. Daniel Kelemen, *Constructing the European Judiciary* (2013) (unpublished manuscript) (on file with author).

62. Treaty of Nice amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts, Mar. 10, 2001 O.J. C 80/1.

63. See MORAVCSIK, *supra* note 6, at 73–77 (highlighting the need for credible commitment as a motivation for governments to delegate considerable authority to institutions charged with adjudication).

64. MIGUEL MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* 11 (1998).

65. *Id.*

particular governments. Rather, it means that in seeking to develop common legal norms around which to integrate diverse national legal orders, the ECJ often imposes on the minority the norms favored by the majority of legal systems. Thus, by encouraging an increase in the ECJ's authority, member states empowered a body that could consistently be expected to impose the will of the majority of states on the minority.

EU member governments have provided a mostly supportive external constituency for the Court, but worrying signs loom on the horizon. The EU's 2004 enlargement added to the Union a number of relatively new democracies in which commitment to judicial independence and the rule of law was not well established. In part, this lack of commitment to judicial independence and the rule of law has manifested itself in deficiencies in young democracies' judiciaries<sup>66</sup> and, at least in the case of Hungary, both in the government's systematic flouting of EU law and fundamental values and in outright attacks on judicial independence. In the 2010 Hungarian parliamentary election, Viktor Orbán's Fidesz Party won a two-thirds supermajority that enabled his government not only to push through its legislative agenda but also to amend Hungary's constitution. Since then, Orbán's government has introduced a new constitution, eliminated democratic checks and balances, installed party loyalists in previously independent government positions, undermined independence in the judiciary and the media, and introduced a new election law designed to favor his party.<sup>67</sup> These moves have been widely criticized by international organizations such as the European Parliament<sup>68</sup> and the Council of Europe's Venice Commission,<sup>69</sup> by nongovernmental organizations such as Human Rights Watch,<sup>70</sup> and by academic observers.<sup>71</sup>

In response to developments in Hungary, the Commission turned to its traditional toolkit, bringing a series of infringement actions before the ECJ against the Hungarian government for violations of particular directives and regulations.<sup>72</sup> And though the Hungarian government has not explicitly denied the ECJ's authority in these cases, it has played a game of cat and mouse with the Commission and Court, systematically working to avoid compliance with EU law. The enforcement of ECJ judgments has always had shortcomings, and many member states have tried to delay or avoid compliance with particularly

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66. See *infra* notes 96–101 and accompanying text.

67. Kim Lane Scheppele, *Hungary and the End of Politics*, THE NATION (May 26, 2014), <http://www.thenation.com/article/hungary-and-end-politics/>.

68. See PARL. EUR. DOC. (2012/2130(INI)) (2013) (The Tavares Report).

69. See Venice Commission, *Adopted Opinions for "Hungary,"* <http://www.venice.coe.int/web/forms/documents/?country=17&year=all>.

70. HUMAN RIGHTS WATCH, *WRONG DIRECTION ON RIGHTS: ASSESSING HUNGARY'S NEW CONSTITUTION AND LAWS* (2013).

71. See R. Daniel Kelemen, *Judicialization, Democracy and European Integration*, 49 REPRESENTATION 295, 300 (2013); Jan-Werner Müller, *Eastern Europe Goes South*, 93 FOREIGN AFF. 14 (2014); Scheppele, *supra* note 67.

72. European Commission Press Release, IP/12/24, Jan. 17, 2012.

costly rulings.<sup>73</sup> The scale of systematic resistance on display in Hungary, however, is unprecedented, and the EU legal order thus far seems unable to bring the Hungarian government to heel.

This inability was made most clear when the Orbán government sought to purge the Hungarian judiciary of senior judges who might have presented impediments to its political agenda and to replace them with party loyalists.<sup>74</sup> The government achieved this by reducing the judicial retirement age from seventy to sixty-two. EU officials saw this as an attack on judicial independence and the rule of law in Hungary, and, lacking legal tools with which to directly challenge the Hungarian government for undermining the independence of the judiciary, they used a tool they did have at their disposal—the age-discrimination provisions of the Equal Treatment Framework Directive<sup>75</sup>—to bring an age-discrimination based infringement action against Hungary before the ECJ. This legal strategy succeeded: the ECJ ruled against the Hungarian government in the infringement case.<sup>76</sup> Nevertheless, the Hungarian government was able to prevent the judges in question from returning to their previous posts because new judges had already filled the positions. Complying with the decision by offering the more senior judges monetary compensation or alternative less significant judicial postings, the Hungarian government succeeded in its ambition to stack the judiciary.<sup>77</sup>

This episode in Hungary illustrates the limits of the case-by-case infringement procedure in combatting systematic efforts by a member government to undermine the rule of law and the domestic application of EU law.<sup>78</sup> The fact that the Hungarian government has continued to defy the EU, with Orbán declaring publicly his intention to abandon the EU's brand of liberal democracy in favor of building an "illiberal new state,"<sup>79</sup> shows that however extensive the contemporary ECJ's authority, it remains vulnerable to defiance by individual governments.

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73. See Jack, *supra* note 59, at 406.

74. Kim Lane Scheppele, Professor of Sociology and International Affairs, Princeton, What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions, paper presented before the European Comm'n, *Assises de la Justice* 21–22 (Nov. 2013) (providing a detailed account of the outcome in the conflict over judicial retirement ages in Hungary); Kim Lane Scheppele, *First, Let's Pick All the Judges*, N.Y. TIMES, CONSCIENCE OF A LIBERAL BLOG (March 10, 2012, 11:32 AM), [http://krugman.blogs.nytimes.com/2012/03/10/first-lets-pick-all-the-judges/?\\_r=0](http://krugman.blogs.nytimes.com/2012/03/10/first-lets-pick-all-the-judges/?_r=0) (analyzing the Hungarian government's efforts to restructure the judiciary through changing the retirement age for judges).

75. Council Directive 2000/78/EC O.J. (L303).

76. Case C-286/12, *Commission v. Hungary* 2013, 1 CMLR 44.

77. See Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union?*, *supra* note 74.

78. *Id.*

79. Editorial, *A Test for the European Union*, N.Y. TIMES, (Aug. 1, 2014), [http://www.nytimes.com/2014/08/02/opinion/a-test-for-the-european-union.html?\\_r=0](http://www.nytimes.com/2014/08/02/opinion/a-test-for-the-european-union.html?_r=0).



## B. National Courts

It can be lonely at the top, especially lonely if those who you view as your subordinates do not recognize you as their superior. When the ECJ was created, there was every reason to believe it might remain lonely in Luxembourg, receiving few cases and winning little respect from the national courts charged with enforcing European law within their jurisdictions. National courts constituted a key element of the ECJ's external context; winning their respect, their acceptance of its legal doctrines, and their cooperation in the construction of the European judicial order was crucial for the ECJ's development. The ECJ's success in promoting European legal integration would be unthinkable in the absence of its constructive relationship with national courts, which refer cases to the Court via the preliminary ruling procedure and which enforce EU law in cases that come before them. But as constructive as the ECJ's relationship with national courts is overall, the relationship has always been fraught with tensions regarding particular national courts and particular issues. Some of the tensions that emerged early on persist to this day, and new ones have surfaced with the enlargement of the EU's membership and the expansion of the scope of its jurisdiction.

The remarkable story of how the ECJ gradually secured the support and cooperation of national courts is well known.<sup>80</sup> From multiple nuanced accounts of the development of the relationship between the ECJ and national courts emerges a prevailing narrative: the "judicial empowerment thesis."<sup>81</sup> The story begins with a peculiarity of the EU's founding treaty. Article 177 of the Treaty of Rome<sup>82</sup> established the so-called preliminary ruling procedure, a procedure whereby any national court hearing a case requiring it to interpret a provision of European Community law could send a reference to the European Court of Justice asking it to interpret the provision of law in question. After receiving a judgment from the ECJ, the national court could then apply the ECJ's interpretation in the case before it.

The judicial empowerment thesis argues that many national courts saw cooperation with the ECJ via the preliminary ruling procedure as a means to promote judicial power at the national level vis-à-vis other branches of government. Also, many lower courts saw the ECJ as a potentially powerful judicial ally outside and above the rest of their national judicial hierarchy. Referring cases directly to the ECJ allowed lower national courts to circumvent higher courts within their own jurisdiction that might have otherwise overturned the lower courts' rulings on appeal.<sup>83</sup> Those dynamics gave many

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80. See, e.g., ALTER, *supra* note 49; STONE SWEET, *supra* note 36; Burley & Slaughter, *supra* note 35; Weiler, *supra* note 37.

81. For a review of this literature, see Alec Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, 5 LIVING REVIEWS IN EU GOVERNANCE 1, 29 (2010).

82. Treaty Establishing the European Economic Community, art. 177, Mar. 25, 1957, 298 U.N.T.S. 11.

83. See ALTER, *supra* note 49 (developing the inter-court competition model).

national courts an incentive to engage with the ECJ and to participate in the construction of European law. As the ECJ gradually strengthened its direct relationships with national courts across Europe, it became less and less plausible for national governments to resist the domestic application of EU law. To do so, these national governments would have had to challenge their own courts—challenges that would have created the impression of political interference with the independent judiciary.

The ECJ was not passive in the process of judicial empowerment. The ECJ, along with other EU institutions, actively cultivated and supported the training of networks of national judges committed to European law who might send them cases through the preliminary ruling procedure and who would actively enforce EU law—sometimes against the wishes of those judge’s governments. Initially, the judges of the ECJ “court[ed] the national courts” through a somewhat ad-hoc mixture of “seminars, dinners, regular invitations to Luxembourg and visits around the community.”<sup>84</sup> By now, the system for training national judges is far more established and systematic. In partnership with pan-European institutes such as the Academy of European Law, national judicial training bodies, and networks of judges such as the European Judicial Training Network, the Commission sponsors an extensive system to train national judges in European law.<sup>85</sup> The Commission recently announced a goal of ensuring that at least half of the nearly eighty-thousand judges who staff the judiciaries of the EU’s twenty-eight member states receive training on EU law by 2020, and they claim to be on track to achieving that goal.<sup>86</sup> Already, thousands of judges across the twenty-eight states of the EU participate in EU-related judicial networks, engage with the EU courts in Luxembourg, and have been trained in European law. Also, the EU has made judicial reform and judicial training a central part of the enlargement process, with the ECJ and the EU’s political institutions working to socialize national judiciaries of new member states into the interlocking system of national and EU-level courts.<sup>87</sup>

Although the ECJ has had great success in convincing national judiciaries to become central actors in the EU legal order, national courts did not come to support this legal order all at once or with equal enthusiasm.<sup>88</sup> It was not until the 1990s that all national courts accepted fundamental doctrines—and the story of the relationship between the ECJ and national courts does not simply

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84. Burley & Mattli, *supra* note 35, at 62; see also RASMUSSEN, *supra* note 53, at 247 (explaining the ECJ’s campaign to educate national judges through all-expense-paid informational conferences).

85. See *Communication On Building Trust In EU-Wide Justice*, COM (2011) 551 final (Sept. 13, 2011); European Commission, *Report On European Judicial Training 2011* (2012).

86. See *id.*

87. See generally DANIELA PIANA, *JUDICIAL ACCOUNTABILITIES IN NEW EUROPE* (2010); Kalypso Nicolaidis & Rachel Kleinfeld, *Rethinking Europe’s “Rule of Law” and Enlargement Agenda* (OECD Sigma Papers No. 49, 2012).

88. See ALTER, *supra* note 49; *THE EUROPEAN COURTS AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE* (Anne-Marie Slaughter, Alec Stone Street & J.H.H. Weiler eds., 1998) (providing case studies of the gradual acceptance of EU law in various national judicial orders).

end with the courts' gradual acceptance of ECJ supremacy by the 1990s and the ECJ's corresponding seamless conversion into a reliable guardian of EU law. Rather, considerable tensions between the ECJ and national constitutional courts remain over the question of which judicial authority should define the limits of the EU's competence, and, in other respects as well, some national courts have pushed back against the ECJ's assertions of authority.

Even from the outset, some national courts only accepted the ECJ's supremacy subject to qualifications. Germany's Federal Constitutional Court, the *Bundesverfassungsgericht* (BVerfG), was the most prominent dissenter, maintaining in its series of *Solange* judgments that it would treat EU law as supreme only so long as the EU guaranteed protection of fundamental rights as afforded under German constitutional law.<sup>89</sup> The long-simmering tensions between the BVerfG and the ECJ are coming to a head in the context of the BVerfG's recent reference—its first ever—to the ECJ in *Gauweiler*.<sup>90</sup> The reference seems to have been crafted so as to force the hand of the ECJ to rule in a particular manner, implying that, if the ECJ failed to rule as the BVerfG deemed necessary, the BVerfG would defy the ECJ's ruling.<sup>91</sup> Now that the ECJ has ruled on the *Gauweiler*<sup>92</sup> reference and provided broad backing for the Outright Monetary Transactions program, it remains to be seen whether the BVerfG will follow through on its threat of defiance or will simply accept the ECJ's ruling. If the German Court openly defies the ECJ when it issues its own final ruling on the case, this would lead to a profound constitutional crisis for the EU.

The BVerfG is hardly the only one pushing back against the ECJ and the EU legal order. Courts in Nordic member states continue to be reluctant to use the preliminary ruling procedure,<sup>93</sup> and courts in some new Eastern European member states have shown similar reluctance.<sup>94</sup> Likewise, courts in the Czech Republic, Hungary, and Poland have challenged the ECJ on critical doctrines.<sup>95</sup> Even more worryingly, recent challenges to the independence of the judiciary in new EU member states have raised new questions about the ECJ's ability to

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89. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 357–63 (2008) (discussing the German Court's *Solange* cases). See generally BILL DAVIES, *RESISTING THE EUROPEAN COURT OF JUSTICE* (2012) (providing a more general account of development of the relationship between the ECJ and the German courts).

90. See *Gauweiler*, *supra* note 42; see also *supra* text accompanying note 42.

91. Jones & Kelemen, *supra* note 43.

92. *Gauweiler* *supra* note 42.

93. See Marlene Wind, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, 48 J. COMMON MKT. STUD. 1039, 1046–55 (2010).

94. Michal Bobek, *Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice*, 45 COMMON. MKT. L. R. 1611, 1611 (2008).

95. See Arthur Dyeve, *Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?* (Max Planck Inst. for Int'l & Comparative Law, Working Paper, 2012), [http://works.bepress.com/arthur\\_dyeve1/7/](http://works.bepress.com/arthur_dyeve1/7/) (arguing that challenges to ECJ doctrines posed by courts in new member states are not as threatening as challenges posed by higher profile courts such as the German Constitutional Court). See generally Wojciech Sadurski, 'Solange, chapter 3': *Constitutional Courts in Central Europe – Democracy – European Union*, 14 EUR. L. J. 1, 1 (2008).

depend on a potentially unreliable network of thousands of national courts to enforce European law. In addition to the Hungarian threats to judicial independence, Bulgaria and Romania have been plagued by judicial corruption and more general deficiencies in the functioning of their judiciaries so severe that, upon accession to the EU, the two states were subject to a special system of ongoing supervision of reform of their judiciaries—the Cooperation and Verification Mechanism.<sup>96</sup>

The EU legal system relies heavily on decentralized enforcement before national courts, and the effectiveness of that model depends on the existence of independent national judiciaries willing to enforce European law even in the face of countervailing pressure from their governments. The Commission highlighted this dependence in the context of the dispute over the Hungarian government's ousting of senior judges when it reminded the Hungarian government that whenever national courts apply EU law, they act as "Union courts" and need to meet EU minimum standards concerning judicial independence and effective judicial redress.<sup>97</sup> But it remains questionable whether the EU can count on courts in Hungary, Romania, Bulgaria, or some other member states to act faithfully as "Union courts." EU leaders in Brussels may need to stand up much more forcefully to some governments to make sure their judiciaries remain reliable partners for the European Court. In response to these new challenges, in March 2014, the Commission proposed a new rule-of-law initiative to strengthen its ability to combat persistent threats to the rule of law in EU member states.<sup>98</sup> The new framework is designed to bolster the EU's existing Article 7 procedure, which allows the European Council to suspend the voting rights of a member state found to be in persistent breach of core EU values, including "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights."<sup>99</sup> The new rule of law initiative establishes a procedure with a series of steps that would incrementally ratchet up pressure on states on track to violate EU core values and trigger Article 7 procedure, but it remains to be seen whether the Commission will deploy the new procedure.

From the earliest days of the European Community legal order, national courts have been vital partners to the ECJ in extending the ECJ's authority. The authority of the ECJ has surpassed that of other international courts not simply because it has secured more consistent compliance by governments but because it has more effectively penetrated national judicial orders. EU policymakers and the ECJ have embraced national courts as integral elements of the EU judiciary, insisting that they are not simply national courts but also

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96. See Milada Vachudova & Aneta Spendzharova, *The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession*, 2012 EUR. POL'Y ANALYSIS 1, 2 (2012).

97. European Commission Press Release, Memo/12/165, Hungary – Infringements (Mar. 7 2012).

98. *Communication: A New EU Framework to Strengthen the Rule of Law*, COM (2014) 158 final (Mar. 19, 2014).

99. Consolidated version of the Treaty on European Union, arts. 2, 7, Oct. 26, 2012, C 326/15.

“‘ordinary’ courts within the European Union legal order.”<sup>100</sup> As evidenced by the fact that use of the preliminary ruling procedure by national courts across the EU continues to increase steadily, the ECJ has had tremendous success in this respect.<sup>101</sup> But while the EU has found many partners among national courts, the relationship between the ECJ and national judiciaries is, in some ways, rocky; the landscape remains marred by pockets of resistance.

### C. The Legal Field

Courts exist in social contexts, sometimes called “legal fields,”<sup>102</sup> which extend beyond governments and other political institutions and encompass a wide range of actors. Any legal field is a kind of local social order comprised of an interrelated system of actors, social positions, and institutions. The European legal field<sup>103</sup> has formed a crucial part of the ECJ’s external context. This legal field is comprised not only of European and national judges and governments but also of the set of lawyers, academics, private litigants, firms, and NGOs involved in using, shaping, debating, and reacting to EU law. The emergence of an active and supportive European legal field has been crucial to the development of the ECJ and the European legal order more generally. The ECJ was not simply a passive beneficiary of the existence of the European legal field; it played an active role in constructing it, particularly in the early days of the EU legal system. That legal field, in turn, has played a crucial role in supporting the development of the ECJ’s authority. As the scope and impact of EU law grew, the European legal field expanded and diversified as well. While ECJ judges, European officials, and academics supportive of the Court were able to dominate most of the discourse about the Court in its early years, the expansion of the European legal field has brought with it more discordant voices that are critical of the ECJ and its jurisprudence.

Historians, sociologists, and political scientists examining the foundations of the EU legal system have produced a rich empirical literature showing how a committed group of legal entrepreneurs—including not only officials from the ECJ, Commission, and Parliament, but also scholars and private practitioners—worked to support the legitimacy of the ECJ’s jurisprudence and to establish European law as a distinct field of academic study and legal practice.<sup>104</sup>

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100. Case C-1/09, *Creation of a unified patent litigation system*, para. 80, 2011.

101. KELEMEN, *supra* note 11, at 89.

102. See Bourdieu & Terdiman, *supra* note 1; Dezalay & Madsen, *supra* note 1. On field theory more generally, see Neil Fligstein, *Social Skill and the Theory of Fields*, 19 SOC. THEORY 105 (2001).

103. See generally LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD (Antoine Vauchez & Bruno de Witte eds., 2013); Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union*, 2 INT’L POL. SOC. 128 (2008).

104. For an overview of this literature, see Mark Pollack, *The New EU Legal History: What’s New, What’s Missing?*, 28 AM. U. INT’L L. REV. 1257 (2013); see also Karen Alter, *Jurist Advocacy Movements: The Role of Euro-Law Associations in European Integration (1953–1975)*, in THE EUROPEAN COURT’S POLITICAL POWER: SELECTED ESSAYS 63–91 (Karen Alter ed., 2009); Antonin Cohen, *Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)*, 32 LAW & SOC. INQUIRY 109

Members of this close-knit circle started academic associations to promote the discipline of European law.<sup>105</sup> The Commission helped finance conferences, academic research centers, and new journals focusing on European law<sup>106</sup> whereas the staff of EU institutions and the private legal practitioners who interacted with them wrote many of the articles published in these new journals.<sup>107</sup> ECJ jurisprudence gained legitimacy and expanded in scope in large part because the emergent European legal field, including academics and practitioners, endorsed the Court's bold jurisprudence and its vision of EU law as not simply a form of international law but rather a new constitutional order. As legal historian Morten Rasmussen said, "The academic field of European law would play a key role in legitimising the jurisprudence of the Court of Justice."<sup>108</sup>

In the early years of the EU, the ECJ was blessed with "benign neglect by the powers that be and the mass media."<sup>109</sup> With so few people paying attention, ECJ justices and those closely affiliated with the Court were able to shape and dominate much of the discourse there was about the Court in the emerging legal field. They were able to encourage the spread of a "legal positivism" discourse that suggested the Court was not engaging in judicial activism but was simply fulfilling its mandate by "merely using legal interpretation to work out the details agreed to in the Treaty of Rome."<sup>110</sup> This helped generate a legal scholarship that was overwhelmingly supportive of the ECJ's expansive, constitutional reading of the treaties. But this scholarship may have ignored political considerations and presented

the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology.<sup>111</sup>

But the days of splendid isolation in which the Court could readily shape the discourse about itself are long past. The European legal field grew dramatically

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(2007); Antonin Cohen & Antoine Vauchez, *Introduction: Law, Lawyers and Transnational Politics in the Production of Europe*, 32 *LAW & SOC. INQUIRY* 75 (2007); Davies, *supra* note 89 (detailing the early tensions between the ECJ and the German Courts); Morten Rasmussen, *The Origins of a Legal Revolution—The Early History of the European Court of Justice*, 14 *J. EUR. INTEGRATION HIST.* 77 (2008).

105. Alter, *supra* note 104, at 65–72.

106. Morten Rasmussen, *Constructing and Deconstructing 'Constitutional' European Law*, in *EUROPE: THE NEW LEGAL REALISM* 639, 650–51 (Henning Koch et al. eds., 2010).

107. Harm Schepel & Rein Wesseling, *The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3 *EUR. L. J.* 165, 172 (1997).

108. Rasmussen, *supra* note 106, at 653.

109. Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 *AMER. J. INT'L L.* 1, 1 (1981).

110. Alter, *supra* note 104, at 35; *see also* R. Daniel Kelemen, *Talking about the European Court*, in *STUDIES IN LAW, POLITICS, AND SOCIETY: THE DISCOURSE OF JUDGING* 147, 148 (Austin Sarat ed., 2012) (developing the concept of the legal positivism discourse on the ECJ).

111. Martin Shapiro, *Comparative Law and Comparative Politics*, 53 *S. CAL. L. REV.* 537, 538 (1979).

over time—itself a testament to the Court’s growing authority. The twenty-first century ECJ is surrounded by an extensive and robust European legal field including dozens of journals specializing in European law, legions of scholars writing on European law, and thousands of lawyers and other members of the legal services industry focused on European law. But with that growth has come a far greater diversity of views; today, alongside supportive voices, the European legal field also produces many voices critical of the ECJ. When Hjalte Rasmussen wrote critically about the ECJ’s expansive judicial activism in 1986, he was nearly a lone voice. Today, as ECJ judgments touch ever more sensitive policy areas, the ECJ is regularly met with scholarly critics on the right or on the left who accuse it of engaging in antidemocratic judicial activism.<sup>112</sup> New discourses have emerged among EU law specialists that support a vision of “constitutional pluralism,” which challenges the ECJ’s understanding of the supremacy of European law and favors a more heterarchical legal order in which the EU legal order and national legal orders coexist without the former being superior to the latter.<sup>113</sup>

The proliferation of critical voices in the European legal field raises a question: Might the European legal field, which has so long supported the authority of the ECJ, come to act as an external constraint on the Court? Might criticisms of the ECJ emanating from the European legal field affect how political leaders, national judges, and the European public view the ECJ and react to its judgments? Any court that rules on controversial cases must expect to find itself the object of criticism. One might simply view the increasing criticisms of ECJ doctrine in the European legal field as an inevitable byproduct of the emergence of a robust and diverse European legal field and of the Court’s success in expanding its influence into ever more controversial policy areas. There is, however, cause for concern. Just as earlier academic literature legitimized the Court’s constitutional understanding of the EU legal order, the spread of academic literature endorsing constitutional pluralism and rejecting a strict judicial hierarchy could legitimize increasing defiance of the ECJ by national courts in the coming years.

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112. Michelle Everson, *Is the European Court of Justice a Legal or Political Institution Now?*, THE GUARDIAN, (Aug. 10, 2010), <http://www.theguardian.com/law/2010/aug/10/european-court-justice-legal-political>; Roman Herzog & Lüder Gerken, *Stoppt den Europäischen Gerichtshof!*, FRANK. ALLGEM. ZEIT (Aug. 9, 2008); Scharpf, *supra* note 38.

113. Neil MacCormick, *The Maastricht Urteil: Sovereignty Now*, 1 EUR. L. J. 259, 264 (1995); see also CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Matej Avbelj & Jan Komárek eds., 2012); GRÁINNE DE BÚRCA & J.H.H. WEILER, THE WORLDS OF EUROPEAN CONSTITUTIONALISM (2012) (providing a recent overview of the literature on constitutional pluralism); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY 102–04 (1999) (introducing the term ‘constitutional pluralism’ in the context of EU law); Martin Loughlin, *Constitutional Pluralism: An oxymoron?*, 3 GLOBAL CONSTITUTIONALISM 9 (2014) (providing a compelling critique of the concept of constitutional pluralism); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002).

## V

## CONCLUSION

Like any court, the ECJ has faced constraints in its external context, including constraints imposed by national governments and national courts. But overall, and particularly when regarded through the comparative lens embraced in this issue, the ECJ has benefited from a remarkably benign external environment. The ECJ has found much support from key actors including national governments, national courts, and members of the European legal field. When opposition to the Court has emerged, the institutional structure of the EU has helped insulate the ECJ against the variety of court-curbing measures that political opponents of judicial power often deploy in other contexts.<sup>114</sup> As a result of this supportive context, the ECJ was able to establish the “extensive authority” discussed in the introduction to this issue.<sup>115</sup> Moreover, with the growth of EU law in covering more and more subject matters and with the enlargement of the EU to include more and more member states, the actual power exercised by the ECJ has become expansive.<sup>116</sup>

The ECJ is—and for the foreseeable future will remain—the most powerful of the international courts examined in this issue. Nevertheless, looking forward, it is by no means clear that the ECJ’s external context will continue to support the expansion of its authority to the extent it has in the past. In the twenty-first century, the ECJ faces new contextual challenges in its relationship with member governments, national courts, and the European legal field. New member governments with fragile democracies and questionable commitments to the rule of law may increasingly test the extent to which they can defy or evade EU law without incurring a robust response from the EU. The delicate *modus vivendi* between the ECJ and national constitutional courts may also unravel as the obfuscation embodied in the concept of constitutional pluralism gives way to more open conflicts over the ultimate seat of judicial authority. Finally, the growth and diversification of the European legal field and the encroachment of EU law on increasingly sensitive policy areas is likely to provoke more intense criticism of the Court. Although the origins and historical development of the ECJ’s remarkable power are, by this point, well understood, future research will be needed to uncover how and to what degree the ECJ can maintain—or even expand—its authority in an increasingly challenging external context.

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114. See Kelemen, *supra* note 14.

115. See Alter, Helfer & Madsen, *supra* note 3, at 10–11.

116. *Id.* at 11, 34.