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AN ANTIFEDERALIST EU

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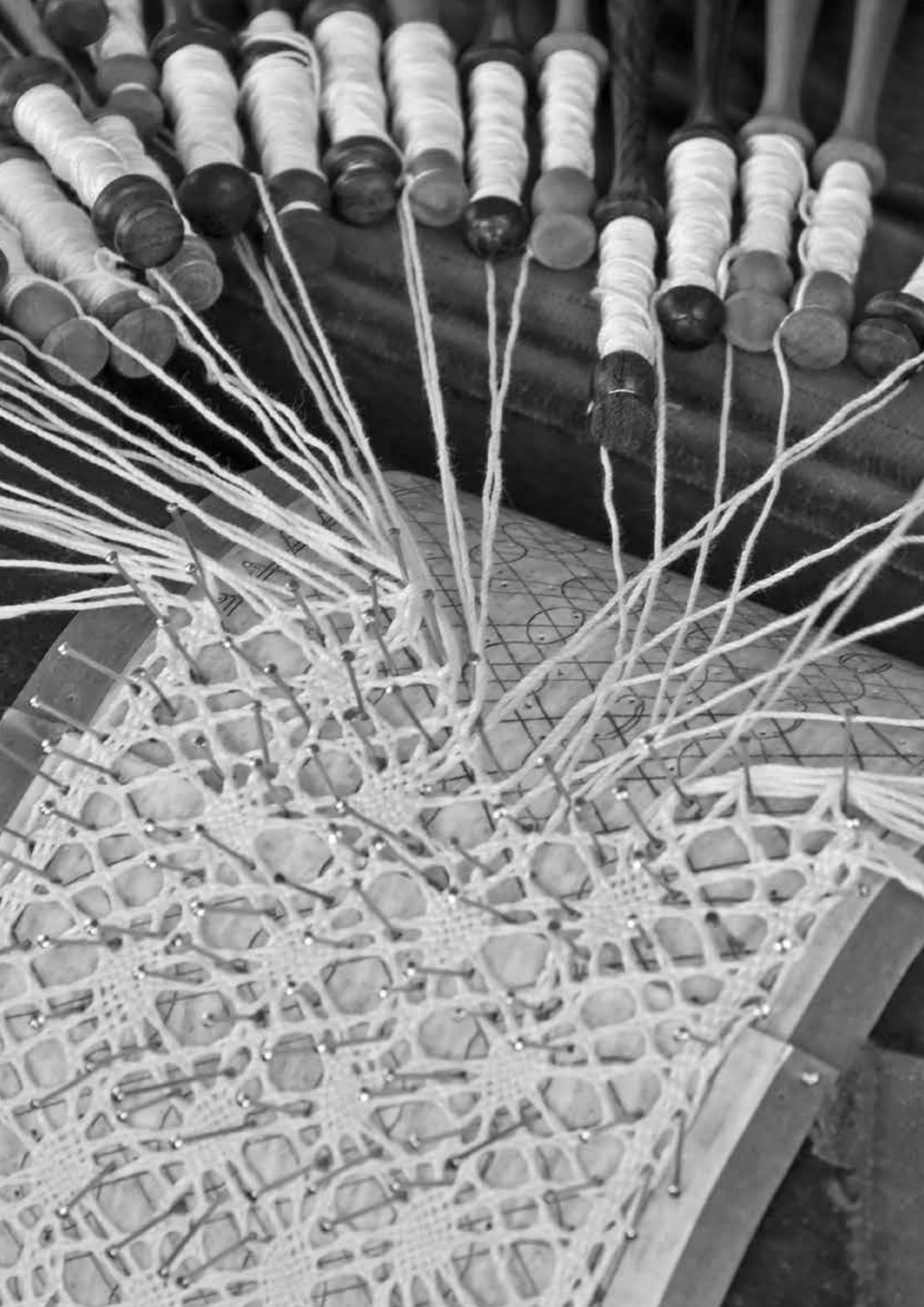
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INTRODUCTION

AN ANTIFEDERALIST EU

The history of western political thought is a magnificent tapestry of multiple threads, which, over the ages, have been woven and unpicked in countless fashions. New patterns have been added, obscuring older material that was once central to the picture. From time to time restoration work has brought back to life fabric that earlier ages had allowed to fade away. Some themes have endured through the centuries: sovereignty prime among them. Others are mere eccentricities, deviations whose stitches have torn our politics rather than refreshing it: in the future, socialism will surely come to be seen as the great aberration of our time.

The most insightful historians of political thought have studied the tapestry to recover what Hannah Arendt called “lost treasure”—modes of politics, once influential, that later schools of thought dominated and obscured. Thus, Isaiah Berlin made us think afresh about pluralism, as JGA Pocock rescued Machiavelli and Quentin Skinner resurrected civic republicanism.

This paper argues that there is another lost treasure that we in Europe need now to recover: the noble tradition of antifederalism. The argument is that the federal vision of Europe has failed and that, if the European Union is to survive and thrive, it is only antifederalism that can rescue it. •

1

FEDERALISM AND ANTIFEDERALISM

In the constitutional tumult of 250 years ago, the time of Tom Paine, Edmund Burke and Thomas Jefferson, an idea was born: that the atom of sovereignty could be split, allowing a single nation to be forged from multiple states without those component parts being swallowed up by the new whole. This was nation-building without Leviathan, a new order indeed. Its architects called it federalism, from the Latin *foedus* (meaning covenant): new world government-by-compact to replace old world rulership-by-conquest.

It hasn't worked. Even in its birthplace, federalism is dying. The twenty-first century United States of America would be not merely unrecognisable, but anathema, to the eighteenth-century federalists who founded it. They wanted a national government far more powerful than anything assembled under the Articles of Confederation (which the US Constitution replaced) but even the Constitution's foremost advocates thought that the powers of the federal government would be "few and defined" whereas those remaining with the states would be "numerous and indefinite", as James Madison put it in the *Federalist* No 45.

The *Federalist* papers, authored principally by Madison and Alexander Hamilton in the winter of 1787 and spring of 1788, remain not only the foremost guide to the meaning and, as lawyers put it, "original intent" of those who wrote the US Constitution: they are also one of the greatest works of constitutional theory in the English language. Their purpose was to persuade. Specifically, their aim was to coax the state of New York into ratifying the Constitution. They did this by identifying the powers to be delegated to the new federal government and by painstakingly justifying why each such power is appropriately exercised at that level and not left to the states. Why should the US have powers over national defence

and security? Why should it have powers to tax? How could states be sure that such powers would be exercised cautiously, respecting the rights and interests of the states and their citizens, and not recklessly or, even worse given the states' colonial history, imperiously?

The *Federalist's* answers lay much emphasis upon devices that may have been new to the 1780s but which we have come to take for granted as core components of a functioning constitution: the separation of powers, limited legislative competence, and judicial review by an independent judiciary. American government was nothing to fear, wrote Madison, because it would not be powerful. Not only was power divided between the executive and legislative branches (the presidency and the US Congress) but each branch of government would have the means to check and balance the other. Moreover, added Hamilton, both branches would be subject to the supervision of the Supreme Court, who would ensure that the limits of the Constitution were adhered to, thereby adding to the safeguards accorded to the states.

To anyone with a knowledge of twenty-first century American government, what is most striking about reading the *Federalist* papers now—indeed, what is most striking about the text of the US Constitution itself—is how misleading they have become. Anyone using James Madison as a map to navigate today's American government would be utterly lost, for the modern reality is the very reverse of his dictum in *Federalist* No 45. It is central government whose powers are "numerous and indefinite"; those of the states have withered to the "few".

This is not because Madison was disingenuous. It is because American federalism has failed. Or, at least, it has failed as a means of constraining the

centralisation of power. Madison's portrayal of what the US Constitution says was not wrong in *Federalist* No 45. The legislative powers conferred upon the US Congress are indeed limited. Lest there be any doubt about that, the Tenth Amendment to the US Constitution (added in 1791) provides that "The powers not delegated to the United States by the Constitution ... are reserved to the States respectively ...". The constitutional scheme of American government is exactly as Madison described. Congress has only those powers as are conferred upon it by the Constitution: all other powers remain with the states individually.

Yet, the short list of Congressional powers provided in Article 1 §8 of the US Constitution bears no relation to the vast panoply of power now wielded across the United States from Washington DC. There is no conferral in the Constitution of powers relating to education, housing or health, for example (so, under the Tenth Amendment, these powers should have remained with the states). Yet the federal government's Department of Health and Human Services now has an annual budget of more than \$1 trillion and, despite President Reagan's pledge to abolish it, there has been a US Department of Education since 1979. Both health and education have been key issues in recent US presidential elections, despite the inconvenient fact that, constitutionally

speaking, they are properly matters for the states and not for the federal government at all.

Why has this been allowed to happen? In part, the answer is that the early American economy crashed. The Great Depression collapsed not only the economy but the constitutional foundations upon which it had rested, including the federalists' insistence that the federal government would be focussed "principally on external objects, as war, peace, negotiation and foreign commerce" and that "the powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people" (Madison, *Federalist* No 45). The Depression, of course, triggered President Roosevelt's New Deal, which rebooted the American economy along avowedly national lines. Whereas the Supreme Court was initially critical, striking down aspects of Roosevelt's plan as being unconstitutional in their intrusion into states' powers, a presidential threat to "pack" the Court led to a sharp about-turn in American jurisprudence.

Roosevelt's reconstruction of the American economy may have been economically necessary, but it did greater damage to the fabric of the US Constitution than anything that predated it—the Civil War included. It was the New Deal, not Lincoln's triumph eighty years earlier, which marked the decisive victory



over those who had championed "states' rights" as a principal hallmark of American constitutionalism. After the Second World War "states' rights" became mired in the ugly and violent politics of race, being associated for a generation with Jim Crow segregation.

President Reagan was elected on a platform of seeking to breathe fresh respectability into American federalism. Two of his three nominees to the US Supreme Court, Justices Sandra Day O'Connor and Antonin Scalia, spent much of their time on the Court endeavouring to do just that, but their achievements were, in the end, limited. The reach of American government into not only the economy but social policy continued to grow, not shrink. From abortion to gay marriage, from Obamacare to the American government's controversial "no child left behind" and "every student succeeds" education policies, there is less and less for the states to do. Arizona cannot control its long border with Mexico even when the immigration controls it enacts are held to be consistent with federal law: it is pre-empted from doing so by the fact that Congress has "occupied

the field". Justice Scalia's dissent on that issue was a magnificently defiant, but ultimately futile, essay on the once cherished but now quaint notion of state sovereignty. Indeed, some influential American policy-makers think now that states are little more than a relic from the past, and that it is clusters of cities and city-regions that are the economic powerhouses, not states. If these clusters transcend state boundaries, so be it. Can the states survive—and can they survive with anything meaningful to do—are now live questions in American politics.

One of the States' most enduring functions is the composition of the electoral college for presidential elections, but even this is under threat from Democrats aghast that their 2016 candidate, Hillary Clinton, failed to beat Donald Trump to the White House, despite having "won the popular vote". Well, it's not the "popular vote" that matters—it's the electoral college, constructed as it is around the States. Attempts to remove the electoral college from the American map show just how readily today's Democratic party is to abandon federalism for nationalism. Truly, they are the party of big government.

The Jim Crow era casts a long shadow. It has obscured from modern view an honourable tradition of American political thought—antifederalism. The antifederalists of the 1780s thought that the move from the Articles of Confederation to the US Constitution was a mistake. They did not want the centralisation of power and the loss of state sovereignty that the new Constitution would entail. They distrusted both government and power; they wanted the former to be small and the latter to be closely guarded, kept as near to home as possible. They were localist, rural, non-commercial, small property holders and farmers. They considered themselves to be democrats. Their federalist opponents were more cosmopolitan, more urban, more commercial, often wealthier, and considered that participation in strong central government was far preferable to purer forms of democracy. If this sounds familiar, it is: the contemporary divide between the "metropolitan liberal elite" and the rest is nothing new.

The antifederalists lost: the Constitution was adopted. But the antifederalists were right: the Constitution would eviscerate the states, would centralise power across a continent, and would fail to constrain the extraordinary scope of American government.



1.1 EUROPEAN ANTIFEDERALISM

The United Kingdom's decision by referendum in June 2016 to leave the European Union can be interpreted in many ways. In part, it was about immigration control. In part, it was the inchoate protest of the “losers” in the globalisation race. In part, it was a reflection of the gulf between the metropolitan liberalism of the political left's leaders and the protectionist instincts of the British working class. In part, it was a simple howl against The Establishment—a rage against the machine. But of one thing we can be clear. The vote was a firm rejection of the federalist model for Europe.

Britain has never been in the vanguard of European federalism. Even the UK's most Europhile governments have held back from adopting the full menu of European integration, and the next items in preparation for addition to that menu hold no appeal in Britain. Even if the UK had voted to stay Britain would have had nothing to do with any European army and as little as possible to do with a fiscal union.

It will be fascinating to watch the EU's reaction to Brexit—the latest in a long line of crises to befall it. Its responses to the two most recent crises before Brexit—the Eurozone and migrant crises—have been disastrous. The former resulted in unprecedented centralisation of banking regulation and fiscal control—perhaps the gravest single incursion into national sovereignty in the EU's fifty-eight years. The latter produced bewilderment, revealing chronic dysfunction in the relations between the EU and its member states. The impression given is that the only solution the EU has to offer is more EU—more centralisation of control—

the federalists' answer. The sole alternative, as in the migrant crisis, is confusion and inaction.

A decade ago, the European Union was in search of a new constitution. Echoing Philadelphia in 1787, a constitutional convention was convened, and a Constitutional Treaty was produced. It failed: voters in two of the EU's founding states rejected it in referendums in 2005. Scholars at the time bemoaned the fact that, unlike in the new world in the eighteenth century, Europe had no Madisons. But it wasn't a Madisonian federalist the EU needed: it was a sceptical antifederalist. A voice to remind Europe's leaders of the importance of state sovereignty and of the basic political truth (which the Americans understood so well in the eighteenth century) that you can take government only as far as the people will allow. When government's reach outstrips what the people will consent to, all authority to govern is lost.

The EU's response to the failure of the Constitutional Treaty was typical of the institution's stubborn refusal to respect this basic truth. After a short pause, the deal was repackaged, renamed, and adopted as European law. Were the lessons of the 2005 French and Dutch referendums learnt? They were not: Europe's leaders marched on, despite the fact that the French and Dutch people had told them not to. The demands of the project—ever closer union—overrode the brake the people had tried to apply. When Denmark rejected the Maastricht Treaty in a referendum in 1992 it did not stop the European project: it led merely to a few tweaks and to Denmark being asked the question again (having got the answer wrong the first time around). Likewise in Ireland in 2001.

This is the European context in which the United Kingdom's decision to leave the EU should be seen. The result on 23 June 2016 was not a one-off, but the latest in a long line of opportunities taken by voters in diverse member states to say to their leaders that the European project does not have their consent.

The lesson to be learnt is that it absolutely did not have to be like this. Had the federalists listened, whether in 1992, 2001 or 2005, Britain's 2016 referendum would not even have taken place, never mind delivered a result to leave. Had the EU developed after Maastricht along antifederalist lines, it would not have achieved ever closer union, but it would have delivered prosperity and stability across the continent and, moreover, it would have endured. Imagine an EU law that said this: “Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not ... expressly delegated”. Not my words, but those of the 1781 Articles of Confederation—the arrangements the antifederalists wanted to keep instead of surrendering state sovereignty to the US Constitution.

No-one reads the Articles of Confederation any more. But we should. They are beautiful. And they are what the EU needs. They talk of states that “severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other”. They acknowledge that free movement is necessary “to secure and perpetuate mutual friendship” and they provide that “the people of each state shall have

free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce”.

A European Union along these lines is one the UK would have wanted to lead, not leave. It would be a union of sovereign states—a confederation forged in friendship and mutual self-interest, not a federal superstructure founded on the coercive rule of a supranational law no-one ever voted for. Europe has much to learn from the American constitutional experience. But for half a century we have been looking in the wrong place and drawing the wrong conclusions. It's not federalism Europe needs: it's a good old-fashioned, democratic dose of antifederalism.

It may now be too late from a British perspective. The United Kingdom is going to leave the European Union come what may—that is the clear and unmistakable message coming from Theresa May's Conservative government, a government that will respect and deliver the outcome of the referendum despite the fact that the Prime Minister, like her predecessor David Cameron, campaigned for the UK to remain in the EU. But it is not too late for the European Union. The EU's reaction to Brexit should not be more-of-the-same; it should not be “more EU”; but neither should it be idle bewilderment. It should be a decisive turn away from the federalist model, embracing a new antifederalist Europe. Failure to adopt this course will serve only to encourage other member states to follow the UK through the exit door.

This paper outlines what an antifederalist EU would look like. It does so by highlighting a number of respects in which the EU has gone wrong—a series of federalist missteps. For each an alternative course is set out. There is nothing inevitable about the political path upon which the EU has found itself since Maastricht. There is nothing fixed in stone, nothing beyond repair, should there be the will to see the flaws clearly and to rectify them with determination and confidence. In that sense, this is an avowedly optimistic paper: it is founded in a deep belief in the value of European union, but also in the conviction that, unless the European Union changes course, it will fracture as other Member States follow Britain's lead and start to pull away. The European Union has a choice. If it wants to thrive into the twenty-first century, it needs to admit its mistakes and to embrace reform. •

2

SOVEREIGNTY, SUBSIDIARITY AND THE RULE OF LAW

This chapter examines the case law of the Court of Justice. We will see that the Court, in numerous fields, has manipulated its case law, in several instances going substantially beyond the Treaties, to give greater effect to the federalist ambitions of integration and ever closer union. We will see that one of the most significant obstacles to an antifederalist EU is the case law of the Court. Both the substantive jurisprudence of the Court's precedents and, more importantly perhaps, the way in which the Court conceives of its role will have to be revised and revisited if the ambitions of an antifederalist EU are to be realised.

Some of the EU's constitutional innovations have been much more happily absorbed into the fabric of European law than others. There is a clear pattern to this. Those innovations and reforms designed to accelerate ever closer union have achieved their objectives, whereas those designed to check or to put a brake on the pace of integration have not.

Consider two reforms introduced simultaneously into the Treaties at Maastricht: citizenship and subsidiarity. One has thrived and prospered; the other has languished. Citizenship, because it can be used as a weapon to hammer states seeking to obstruct or decelerate integration, has only grown in the hands of the European Court of Justice, as the judges fashion and refashion it to sharpen its bite on the Member States. Subsidiarity, by contrast, has withered as a juridical device in EU law. Designed as a means of ensuring that legislation was passed at EU level only when necessary—other matters being left to the Member States—the Luxembourg court has simply never been interested in enforcing it. (We shall return to subsidiarity later in this chapter and we will turn to citizenship in the next chapter.)

This is perfectly consistent with the decades-long pattern of ECJ jurisprudence. When Member States or

the public authorities of national governments stand in the way of the onward march of integration, the Court is quick to act—even when there is scant legal authority for its doing so. But when the EU's political institutions over-reach, trampling on terrain the Treaties have left to the Member States, the Court sits on its hands.

To long-time students of the Court's cases, the ECJ is not a court of law but, as its name implies, a court of justice. That is, a court dedicated not to the objective enforcement of the law as written by the Member States and enshrined in the Treaties, but to the advancement of what one commentator famously called "*une certaine idée de l'Europe*". Instead of making rulings based on what the Treaties say the Court uses the Treaties as a guide to what European law should be. The ECJ is far from alone amongst the world's leading constitutional and supreme courts in understanding its role in this way. The "living constitutionalism" beloved of the Supreme Court of Canada; the activism of the Supreme Court of Israel (particularly under the Chief Justiceship of Aharon Barak); and the many US Supreme Court Justices from whom the late Antonin Scalia routinely dissented share much of the ECJ's approach. Judgement, on this view, requires more than the mechanical expertise of applying known law to proven facts. It requires interpretation, invention, and creativity.

I would agree that effective law-making requires all of these things. But, as Justice Scalia pointed out repeatedly in his long career in Washington DC, this is the burden of legislation, not of adjudication, and it is a political task, not a judicial one.

Courts that engage in "living constitutionalism" often find themselves in search of principle. If texts such as statutes, constitutions or treaties are to be interpreted rather enforced—are to shape the law



rather than define it—the interpretation needs to be based on something. Otherwise judgments would be mere opinion. For the ECJ the guiding principle—the “certain idea of Europe” upon which so much of its jurisprudence has been founded—is ever closer union. Indeed, one of the great secrets of the EU is that it has not been the Commission that has been the motor of integration, but the Commission and the Court in harness. Perhaps one of the most remarkable aspects of this is the extent to which Member State governments have acquiesced in it. It is popular opinion, not national governments, that the joint Commission/Court project has failed to carry.

2.1 GIVING EFFECT TO EUROPEAN LAW—THE EXPANSIONIST CASE LAW OF LEGAL REMEDIES

The project—the judicial enforcement and expansion of that *certain idée de l'Europe* — commenced long before the United Kingdom acceded to what were then the European Communities. The creation of the doctrine of direct effect in *Van Gend en Loos* in 1962 and the bold assertion of the supremacy of European law in *Costa v ENEL* in 1964 are among its earliest, and best-known, manifestations. The invention of direct effect has been perhaps the most important device ever created by the Court of Justice to augment the ways national courts and tribunals can—indeed, must—give effect to European law in the legal systems of the Member States. It marks European law out as substantively and procedurally different from the ordinary rules of public international law, signalling that notwithstanding the treaty basis of European law, the EU was to be, as the Court expressed it, a “new legal order”. The doctrine of direct effect means that parties to litigation in national courts and tribunals can plead (or invoke) a point of European law in their favour directly in those proceedings. At a stroke it makes every court and tribunal in every Member State a court not only of that jurisdiction’s national law, but also of European law. This very significantly sharpens the effect of European law in the legal systems of the member states. The Court did all this despite there being no provision to this effect in the Treaty of Rome and even though three of the then six Member States intervened in *Van Gen den Loos* to argue that there was no such doctrine in European law.

How did the Court arrive at the conclusion that European law had direct effect in the legal systems of the Member States despite the absence of any such

rule in the Treaty? The answer—which explains not only *Van Gend en Loos* but so much of the Court’s expansionist case law ever since—lies in the Court’s famous use of “teleological” reasoning. What animates the Court is not what European law says, but the goal, objective, or *telos*, of what European law is seeking to achieve. That goal, of course, is integration—the “ever closer union” of which the Court appoints itself guardian-in-chief. The Court’s judgment in *Van Gend en Loos* was explicit about this: “it is necessary to consider the spirit, the general scheme and the wording” of the Treaty, the Court said. Focusing on what the Court distils as the spirit of European law frees the judges from the normal judicial burden of having to give effect to legislative text as enacted in Treaties or directives. It enables the Court to view legislation—even legislation made by Member States—as a mere guide.

In *Van Gend en Loos* the Court ruled that European law was “a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields”. Two years later, in *Costa v ENEL*, the Court went further in holding that this new legal order of European law was supreme over the countervailing laws of the member states. Again, there was no provision to this effect in the Treaty of Rome, but the Court deployed its teleological reasoning such that the mere words of the Treaty were supplemented—supplanted, even—by its spirit and general scheme. The claim that European law is supreme over the laws of the Member States has three elements. First and most straightforwardly it is a claim of primacy: where European and national law clash the latter must give way to the former. Secondly it is a claim about competence: European law determines its own limits—the question of what powers the European Union has is a question of European law for the Court of Justice to determine, not a question of national constitutional law for the member states. Thirdly it is a demand for fidelity, or loyalty: a legal duty enforceable by the Court of Justice on Member States and their national authorities—including courts and tribunals—faithfully to give effect to European law.

Van Gend en Loos and *Costa v ENEL* are bold beginnings, and the Court was eager to build on them as the European Union grew through the 1970s and 1980s. In the 1980s a doctrine of “indirect effect” was created by the Court, to give further effect to European legislation in the legal systems of the Member States. Under this doctrine, courts and tribunals are required, as far as possible, to construe

national legislation “in the light of the wording and the purpose” of European legislation “in order to achieve the result pursued by the latter”. Going yet further, the Court ruled in the 1990s that a Member State found to be in breach of European law could be fined by the Court of Justice if the breach was “sufficiently serious” and if it injured a third party (for example, by denying them some right or benefit to which they would otherwise have been entitled).

An antifederalist court would behave quite differently. It would stick to the terms of the founding treaties and would privilege their concrete provisions over any abstract notion of their spirit and general scheme. It would not stand in the way of the Member States legislating for a doctrine of direct effect (or even of indirect effect or state liability) if that is what the Member States chose to do, but neither would it go beyond the clear words of the founding treaties to invent such doctrines for itself. Were an antifederalist court to engage in any form of teleological reasoning the *telos* it would seek to protect and promote would be one of state sovereignty, not ever closer union, founded in the conviction that, to the extent Member States have agreed to pool and share their sovereignty, they have so agreed only to extent clearly provided for in the treaties.

2.2 THE DOUBLE-STANDARD OF PROPORTIONALITY

Proportionality is a core concept in European public law. It is central to German administrative law, to the case law of the European Court of Human Rights, and to the Court of Justice. It has also been adopted and developed by a number of the world’s leading constitutional courts outwith Europe, including the Supreme Courts of Israel and Canada, amongst many others. The Court of Justice was relying on the concept of proportionality as early as 1970, when the notion was defined in the following, attractively simple, terms: “the individual should not have his freedom of action limited beyond the degree necessary in the public interest”. Expressed in these terms the principle is unobjectionable. What is striking, however, is the way the Court of Justice has manipulated the principle differently in two contrasting contexts.

When it is argued that a Member State has disproportionately obstructed or interfered with the exercise of a party’s rights or interests under European law, the Court of Justice tends to use proportionality

as a sword: as a sharp-edged judicial tool that strikes down the action of the Member State. In contrast, when it is argued that a provision of European legislation, or an aspect of European administration, disproportionately interferes with an individual’s rights or interests, the Court tends to use proportionality as a shield, protecting the European rule or action from challenge, and seeking wherever possible to uphold it. In the former context, the test of proportionality is that the national measure is liable to be held unlawful unless the Member State can establish that it was necessary to achieve a legitimate aim and that no less restrictive (or less intrusive) alternative course was open to it. In the latter context, by contrast, the Court will not quash the European rule or action unless it has been shown to be “manifestly inappropriate”.

Now, proportionality is a flexible judicial tool wherever it is used, but the clear double-standard adopted by the Court of Justice is striking. Again, it is simply explained. When Member States are, in the view of the Court, obstructing the path to ever closer union, proportionality is a weapon to clear them out of the way. But when third parties challenge the proportionality of what the EU institutions are doing, proportionality is a defence mechanism that protects the cause of European integration. This is why it is much easier for a litigant to argue that a protectionist measure adopted by a Member State to safeguard its trade interests is a disproportionate (and therefore unlawful) interference with the free movement of goods than it is to contend, for example, that a European regulation is a disproportionate interference with property rights.

Yet there is nothing in the Treaties to support the view that such a double-standard should have been adopted in European law. This is the result not of the law as made by the Member States but of the manipulation of that law by the Court of Justice. The double-standard privileges the federalist impulse of ever closer union over the Member States’ interests in autonomy and sovereignty. That there is one law of proportionality for the Member States and an altogether different law of proportionality for the EU institutions flatly contravenes the rule of law as it has been understood for more than a century in Anglo-Saxon jurisprudence. It is elemental to the rule of law that there should be one law, common to us all, that regulates our behaviour equally, without fear or favour. This is the aspiration for the rule of law to which the European Union should be dedicated, not the twisted federalist logic of the Court of Justice.



2.3 THE FAILURE OF SUBSIDIARITY

The Treaty on European Union provides in article 5(3) that “under the principle of subsidiarity ... the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. This principle, formally introduced into the Treaties at Maastricht, has manifestly failed. Despite being frequently invoked before the Court of Justice, that court has yet to annul a single measure for breach of the principle.

Part of the problem stems from the sort of legislative action the EU tends now to adopt in its regulation of the internal market. The typical instrument is a harmonisation directive—that is, a directive designed to achieve “the approximation of the provisions laid down” by national laws (as it is expressed in Article 114 TFEU). By this means the European institutions are able to regulate areas where they have no direct legislative competence. Only exceptionally rarely has the Court of Justice ruled that the bounds of competence have been exceeded—as in the famous

decision invalidating the Tobacco Advertising directive in 2000. That directive was principally concerned with public health, not with eliminating distortions of competition in the internal market.

Even where a directive regulates an area of trade that one would ordinarily expect to be left to the Member States, where the objective of the directive is to harmonise regulation across the internal market, it is extraordinarily difficult to argue that the directive violates the principle of subsidiarity. Numerous examples from the Court’s case law testify to this. A well-known instance is the unsuccessful attempt by the Netherlands in 2001 to have the Biotechnological Inventions directive annulled. This directive required Member States to amend their patent laws so as to protect certain biotechnological inventions. The directive determined which inventions involving plants, animals or the human body could or could not be patented. In the Netherlands, as in a number of other Member States, genetic manipulation involving animals and plants was a sensitive and contested matter, which, the Dutch government considered, should be left to Member States. The Court of Justice disagreed. Focusing entirely on the objective of the directive—harmonisation—and not

on its controversial subject-matter—biotechnology—the Court was dismissive of concerns as regards subsidiarity. The objective pursued by the directive, the Court said, was “to ensure the smooth operation of the internal market by preventing or eliminating difference between the legislation and practice of the various member states in the area of the protection of biotechnological inventions”, an objective that “could not be achieved by action taken by the member states alone”. And that was that.

The same glib dismissal of subsidiarity-based arguments has been apparent in many other cases, including British cases challenging European rules on the labelling of tobacco products (health warnings and the like) and on food supplements. In the latter case the claim that it is Member States, not the EU’s institutions, who are best placed to determine, in their respective markets, the public health requirements justifying restrictions on the free marketing of food supplements was swept away with the self-fulfilling proposition that the pan-European co-ordination of the market in food supplements can be achieved only at European level.

An antifederalist jurisprudence of subsidiarity would take the idea seriously, not glibly. It would focus not on the means by which the EU is seeking to act (eg, harmonisation) but on the substance of the issue on which the EU is seeking to regulate (eg, biotechnology or public health). It would hold EU legislation to a high standard, ensuring that it is required on the basis of objective and verifiable evidence, ruling it unlawful where the matter should be left to the Member States. Subsidiarity should be the central, animating and active principle of European constitutional law, not the pathetic and withered add-on the Court of Justice has allowed it to become.

2.4 OBJECTIONS FROM THE UNITED KINGDOM

For the supreme or constitutional courts of several member states, the Court of Justice’s integrationist jurisprudence has gone too far. Most outspoken has been the Polish Constitutional Court, which took the view in 2005 that the EU’s Treaties were no different in Polish constitutional law from any other international law treaty, flatly contradicting the “new legal order” line of thinking the Court of Justice has relied upon since *Van Gend en Loos*. Even amongst Member States who have not gone that far, the authority of EU law has only rarely been accepted on the terms set out by the Court of Justice. Most Member States accept the authority of EU law conditionally, with the constitutional or supreme courts of the Member State determining the terms and conditions. This is the case, for example, in the Czech Republic, Denmark, Estonia, France, Germany, Ireland, Italy, Latvia, Slovenia, Spain, and the United Kingdom.

The German Constitutional Court has led the way on this front, holding in a series of judgments from the late 1980s through to 2010 and beyond that EU law takes effect in Germany *as long as* it respects fundamental rights and *as long as* the EU institutions act within the limits of their legislative and regulatory competence (limits which are set down by the Member States, of course). This is known as the *Solange* doctrine. The German Constitutional Court has also drawn attention to the limited democratic credentials of the European Union, which, in its view, inhibit the EU from acting in a number of areas that must be left to Member States, whose governments, unlike the EU’s institutions, are directly accountable





to the people. Amongst these areas are criminal law, the use of armed force, central budgetary issues, core issues of social policy, and culturally sensitive matters such as religion, education and the family. Courts in the Czech Republic, Estonia, France, Poland and Portugal have made similar remarks.

In two judgments in 2014 and 2015 the United Kingdom Supreme Court added its voice to this continental chorus of judicial concern about the shape and direction of EU law. The first of the UK cases concerned a legal challenge to the British government's plans to build a new high-speed rail link north from London first to Birmingham and then on to Manchester and, eventually, to Scotland (the project is known as HS2). The claimants' argument was that the project fell foul of European rules on environmental impact. The Supreme Court was unanimous in ruling that there was no such violation. In the course of the judgment, two of the Justices (including the President of the Supreme Court, Lord Neuberger) noted that, on their proper construction, the EU's environmental impact

directives could never have been in play in this case, and that they had become relevant only because of their inappropriate expansion at the hands of the Court of Justice. It is worth looking at the detail of this.

The strategic environmental assessment directive ("SEA directive") requires that certain "plans and programmes ... required by legislative ... provisions" are subject to environmental assessment. HS2 is not required by legislation, although it is regulated by legislation. In a series of cases the Court of Justice has interpreted "required" to mean "regulated", thereby extending the scope of the SEA directive considerably—and considerably further than was intended by those who drafted and made the directive.

A related directive, the environmental impact assessment directive ("EIA directive") excludes from its scope "projects the details of which are adopted by a specific act of national legislation, since the objectives of this directive, including that of supplying

information, are achieved through the legislative process". In a series of cases the Court of Justice ruled that the word "since" in the EIA directive means "provided that". This completely alters the meaning of the directive, such that it has come to mean more or less the opposite of what was intended by those who made it. It is not that "projects set out in legislation are excluded from the directive's scope because the legislative process means that the requirements of the directive are in any event satisfied" but that "projects set out in legislation are included within the directive's scope unless the legislative process can be shown to satisfy the requirements of the directive". As with the SEA directive, so too here the result is significantly to extend the directive's reach.

In its judgment in the HS2 case the UK Supreme Court condemned these unwarranted and improper extensions of European legislation at the hands of the Court of Justice. That Court, said the Justices in London, had not interpreted the law as made by the authors of the directives, but had provided an "exegesis" on it—a gloss on their meaning, rather than a faithful rendition of their meaning. The UK Supreme Court was strongly critical of this, for several reasons. First, it is contrary to the Treaties, under which the Court of Justice is charged to "ensure that, in the interpretation and application of the Treaties, the law is observed". Its case law on the SEA and EIA directives did not ensure that the law is observed: it changed that law beyond the meaning intended by those who had made the legislation.

This leads to the UK Supreme Court's second reason: that the directives concerned had been made by representatives of the national governments in the Council of Ministers and by directly elected representatives in the European Parliament. It is contrary to the principles of democracy for unelected courts to re-write the law as made by representatives. Where that law is improperly made or contravenes basic rights, courts can intervene to quash it. But setting aside bad law is a quite different task from extending and twisting the meaning of perfectly valid law.

Thirdly, the UK Supreme Court pointed out that the effect of the Court of Justice rewriting European legislation to alter its meaning violated a principle of European law much heralded by the Court of Justice: namely, the principle of legal certainty. Court of Justice case law provides that "the general principle of legal certainty, which is a fundamental principle of

[EU] law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly". The UK Supreme Court cited this passage to underscore the essential difference between judicial interpretation of legislation (ie, construing legislation in the light of its language, context and objectives where necessary in order to clarify its meaning), which is perfectly proper, and judges rewriting legislation so that it means something quite different from what it says, which no court should do.

The second recent case in which the UK Supreme Court has expressed reservations about the case law of the Court of Justice concerns not environmental impact, but nationality and citizenship. The Secretary of State, a senior minister in the British government, wished to deprive an individual named Pham of his British citizenship because Pham was suspected to have received terrorist training from Al Qaida. (The Secretary of State wished to deport Pham but British nationals cannot be deported from the United Kingdom; thus he was to be stripped of his British nationality in order that he could be deported.) Pham argued that depriving him of his British citizenship would make him stateless (and would therefore be unlawful) but the Secretary of State argued that Pham was a dual national, possessing both British and Vietnamese citizenship. As an additional argument, Pham also argued that the Secretary of State could not deprive him of his citizenship without breaching EU law. Pham's contention was that depriving him of British citizenship would deprive him of his EU citizenship; this would be an act falling within the scope of Union law; it would therefore attract the protection of the principle of proportionality; and



thus the Secretary of State could deprive Pham of his British citizenship only if she could show that this was proportionate in all the circumstances.

European citizenship, as we shall discuss in more detail in the next chapter, was introduced into the Treaties at Maastricht. Article 20 TEU provides that “citizenship of the Union shall be additional to and not replace national citizenship”. At Maastricht it was agreed formally by declaration that “the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned”. That the point is both significant and sensitive is underscored by the number of times it has been repeated in subsequent declarations. As the Supreme Court put it in its judgment in Pham’s case, “there is nothing on the face of the Treaties to confer on the EU, or on a Union institution such as the Court of Justice, any power over the grant or withdrawal by a Member State of national citizenship”, this remaining “the exclusive role of Member States”.

Yet, despite all this, the Court of Justice has, in the years since Maastricht, so expanded the notion of European citizenship that it is no longer preposterous to argue—as it should be—that EU law can stop a national government from depriving a suspected terrorist of his citizenship so that the individual may be deported. It has been a cardinal principle of the internal market that EU law does not affect “wholly internal situations”—ie, circumstances that are wholly within a single Member State. Some cross-border element is required before EU internal market law is triggered. Yet, despite the abundantly clear intention of the heads of government at Maastricht, the Court of Justice has allowed—indeed, the Court has positively encouraged—the law of citizenship to trespass into wholly internal situations such as the decision by a national government of whether to deprive one of its nationals of citizenship.

The Pham case was not the first occasion on which senior judges in the United Kingdom have spoken out

against this. In a Court of Appeal case in 2013 one of the UK’s most experienced constitutional lawyers wrote as follows: “the conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation state. They touch the constitution: for they identify the constitution’s participants”. They are, in short, of the very essence of sovereignty. It would require a great deal of argument, the Court of Appeal judge continued, before he could be satisfied that, on a proper construction, “the law of the European Union obtrudes in any way upon our national law relating to the deprivation of citizenship”, notwithstanding the Court of Justice’s expansionist case law on the topic.

The Supreme Court endorsed these remarks in its judgment in Pham’s case. As it had been in the HS2 case, the UK’s highest court was clear that the Court of Justice had gone too far, reminding the Luxembourg court of the importance of acting with “mutual respect and with caution in areas where Member States’ constitutional identity is or may be engaged—particularly so where, as in the present context, great care has been taken to emphasise this by declarations accompanying the relevant Treaty commitments”.

Ideas of mutual respect and of caution around Member States’ constitutional identity are central to the antifederalist tradition. The UK Supreme Court does not use the label of antifederalism but an adherence to its core ideas is, in effect, what the British judges are calling for. They are absolutely right to do so for, as we have seen throughout this chapter, there are numerous ways in which the aggressively federalist jurisprudence of the Court of Justice has gone too far. Too far by reference to the altogether more considered and cautious provisions of the Treaties. Too far by reference to the views of the supreme or constitutional courts of several Member States. And too far by reference to any conventional standard of the rule of law, under which courts should enforce the law as enacted, not rewrite it to further their *certainie idée de l’Europe*. •

3

ECONOMIC OR SOCIAL UNION - THE PROBLEM OF CITIZENSHIP



Citizenship is a beautiful idea and a fundamental right. It connotes that deep sense of belonging and attachment we rightly feel to one of the institutions core to our identity as political animals—the state. We are citizens of our country. Citizenship is a bond which, for many of us, is outranked only by the unique ties of marriage and family. We may feel loyalty to our cities, to our workplaces, to our colleagues, and to our football teams. But citizenship is no ordinary connection, for it speaks directly to one of the most venerable of all the political virtues—patriotism.

As such, it should never have been appropriated by the European Union. Associating something as precious as citizenship with an international trading organisation should have been regarded as risible. We are not citizens of Nato. We are not citizens of the UN. To consider oneself a citizen of the world is to fail to understand the special bond that citizenship entails. One can no more be a citizen of the world than a

citizen of one’s street. Of course the neighbourhoods in which we live are important to us—likewise the planet we inhabit—but “importance” translates into “citizenship” only if the latter is deprived of all its significance and meaning.

Citizenship is about nation-building. Early-modern Americans went out of their way to nurture a sense of American citizenship as the various States gave birth to the new continental nation. That is what federalism does. But it is never what the European Union should have been about. The US is a single nation composed of fifty States, but the EU is an international body composed of 28 (or, soon, 27) nations. Citizenship goes to nation: US citizens are American; but Europeans are French, German, Italian or British. Such, at any rate, is what the heads of government ought to have understood when the notion of European citizenship was proposed as an addition to the Treaties at Maastricht.

3.1 THE MISTAKE OF MAASTRICHT

First agreed at Maastricht, Article 20 TFEU (as it is now) provides that “Citizenship of the Union is hereby established”. Such citizenship is immediately made contingent upon nationality. The very next words of Article 20 are as follows: “Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”. The Maastricht Treaty then identified four rights to be associated with citizenship: a qualified right to move and reside freely within the territory of the Member States; a limited right to vote and stand as candidates in elections to the European Parliament and municipal elections in other Member States; a limited right to the diplomatic protection of other Member States; and rights to petition the European Parliament and complain to the European Ombudsman.

Two things are worthy of note about this (very short) list of citizenship rights. First, free movement was not meant to be extended by reclassifying it as a citizenship right: the qualified right to free movement pre-existed the invention of European citizenship at Maastricht. Maastricht simply re-stated and re-badged it. Secondly, the other rights explicitly linked to citizenship in the Treaty are political rights—and rather limited political rights at that—not economic or social rights.

This is a vision of citizenship that does not amount to very much: the rebranding of an extant right that already existed in European law plus three relatively minor (if symbolically important) political rights. Clearly, having introduced the concept of European citizenship at Maastricht the heads of government were concerned to give it as little content and as restricted a scope as possible.

They should have known better. For it was not long before the Court of Justice set to work to inflate European citizenship into something altogether grander. In 1998 the Court considered the legal position of nationals of one Member State residing in the territory of another. It ruled that it is unlawful for the host Member State to discriminate against such citizens on grounds of nationality “in all situations falling within the scope” of European law. This direct linking of the principle of non-discrimination to the concept of citizenship was, as we have seen, not envisaged in the Treaty and was a judicial creation.

The Court did not rest there. In 2001 it clarified its view that European citizenship meant that nationals of one Member State residing in another should “enjoy the same treatment in law irrespective of their nationality”. Plainly, this general principle goes very considerably beyond the specific language used at Maastricht. But in clear conflict with that language, the Court proclaimed in the same 2001 case that “Union citizenship is destined to be the fundamental status of nationals of the Member States”. This is the very opposite of what the Treaty enacted: that European citizenship was additional to and shall not replace national citizenship. But, as we saw in the previous chapter, the mere words of the Treaty have rarely stopped the Court from aggressively prosecuting its *certain idée de l'Europe*, even when to do so rests on no legal foundation whatsoever.

3.2 FREE MOVEMENT - ECONOMIC OR SOCIAL?

Citizenship may have been added to the corpus of European law at Maastricht but the problem it seeks to address long pre-dates the early 1990s. Since the very beginning European law has grappled rather unconvincingly with that most troublesome of the four fundamental freedoms—free movement of workers. Indeed, European law does not even know what to call this freedom. Is it free movement of *workers*, or free movement of *people*? There is the world of difference.

If it is the former, the right of free movement is essentially economic. This would make sense. After all, the other fundamental freedoms are all economic—the free movement of goods, the free movement of services and the free movement of capital. But if free movement extends not only to the economically active (workers) but to all people across the Member States, we are talking about something that goes beyond the merely economic: in this case we are talking about an essentially social right.

The move to make free movement a social right, and not a merely economic one, started as long ago as the 1960s. Regulation 1612/68 fleshed out in secondary legislation the basic Treaty right to free movement. Article 7 of this regulation provided that migrant workers “shall enjoy the same social and tax advantages as national workers”. The Court of Justice interpreted the expression “social advantages”

expansively to include benefits (whether or not linked to a contract of employment). Thus was the free movement of workers linked in EU law to questions of social security. Thus also was the link between free movement and work stretched (or broken, even). As social advantages were extended not only to migrant workers but also to accompanying members of their family—a spouse’s healthcare, a child’s education—free movement became decoupled from its economic roots and morphed into the fully fledged social right it is today. As with the developments of European law seen in the previous chapter, so too here was the key driver the European Court of Justice. From those legislative words in 1968 (“social advantages”) a vast panoply of European case law grew.

It was not until 2004 that the judicial expansionism in this area of European law was made subject to comprehensive legislation. The Citizenship Directive of that year (Directive 2004/38) sought to codify the rights of EU citizens to move and reside in other Member States. Its provisions on residence fall into three categories. First, short-term residence: EU citizens may move throughout the territory of the Member States and live anywhere for a period of up to three months. Such citizens may not be an unreasonable burden on the social assistance system of the host Member State and have no EU law rights to social assistance in the host state. Secondly, residence of more than three months: this is a right enjoyed by EU citizens who are workers or self-employed persons in the host Member State, or have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance cover. Finally, permanent residence: EU citizens who have resided lawfully in another Member State for five

years acquire the right to remain there permanently, exempting such citizens from the conditions as to sufficient resources that apply in the first five years of residence.

The attempt to use legislation as a means of constraining the Court’s persistent over-extensions of the law of citizenship has been partially successful, but has not worked in all instances. Prior to the Citizenship Directive coming into force, the Court had ruled that an Irish citizen seeking work in the United Kingdom was entitled—as a matter of EU law—to Jobseekers Allowance, the main social security benefit paid in the UK to persons in search of employment. The directive sought to rein this in, providing that social assistance is not required to be paid to migrant jobseekers until their residence in the host Member State is well established. Yet in a case called *Vatsouras* in 2009 the Court ruled that benefits “intended to facilitate access to the employment market” do not constitute “social assistance” and are therefore not caught by the limitations provided for by the directive.

In this way, attempts by the EU’s legislature to return free movement of labour from a broad social right back towards a more narrowly focused economic right were undermined by the Court’s aggressively expansionist case law.

3.3 CONCLUSION

The free movement of labour is one of the most contested aspects of EU law. Its over-reach is arguably the biggest single reason why millions of Britons voted on 23 June 2016 that the United Kingdom should leave the European Union. Had the former Prime Minister David Cameron secured enforceable



and binding limits on the free movement of labour, the result on 23 June would almost certainly have been different. (The leave campaign's most potent argument in the referendum campaign was that the UK should "take back control" of its national borders; it was a claim the remain campaign could find no compelling answer to.)

The agreement the British Government reached in February 2016 with the other twenty-seven Member States fell some way short, although it did address more modestly the link between social benefits and free movement. That agreement included the following provision: "Free movement of workers within the Union is an integral part of the internal market ... However, the social security systems of the Member States, which Union law co-ordinates but does not harmonise, are diversely structured and this may in itself attract workers to certain Member States. It is legitimate to take this situation into account and to provide ... for measures limiting flows of workers of such scale that they have negative effects both for the Member State of origin and for the Member State of destination". The "measures" envisaged by the European Council in February 2016 were, however, limited, vague and—as ever—subject to the over-riding interpretation of the Court of Justice. For these reasons, they were never enough to satisfy the demands of those who had simply had enough of the free movement of people, and who wanted a more controlled immigration regime. Hence the result on 23 June.

An antifederalist European Union would not necessarily find it any easier than a federalist one to answer the question: is free movement a narrowly economic right or a broader social one? After all, as we saw in chapter 1, the Articles of Confederation which the American antifederalists wanted to preserve spoke of "the people of each state [having] free ingress and regress to and from any other state".

But an antifederalist EU would very clearly understand where sovereignty lay in determining what limits should be imposed on "ingress and regress". It would lie with the Member States, and not with the centre.

It is one thing for states to say "let's pool and share our risks and resources" so that social solidarity and welfare are shared across them. This is what the four home nations of the United Kingdom do in choosing British union over English, Scottish, Welsh or Northern Irish independence (and it is what the American states choose, too). It is quite another for sovereign states to say "our economic interests require us to have access to migrant labour". In an antifederalist EU it would be for the Member States to decide which of these—quite different—interpretations of free movement should prevail. Antifederalism tells us nothing about the respective merits or drawbacks of the two options but it makes clear that, whichever is chosen, it would be quite improper for institutions such as the European Commission or the European Court of Justice to seek to subvert that choice by replacing one option with the other.

That is exactly what so many voters think has happened: that the carefully delimited rights and opportunities conferred by the Member States through the introduction of measures such as the law of citizenship have been subverted into something altogether grander and more ambitious by institutions no-one ever voted for and in ways that voters have never endorsed.

This is why the core message of the leave campaign in the UK's referendum in 2016—"take back control"—was so effective. In the end it was not an argument about what kind of immigration controls we want—it was not an argument about the *substance* of free movement. It was an argument about *who decides* what free movement should mean. •

CONCLUSION

THE CONSENT OF THE GOVERNED

I voted "remain" on 23 June 2016. Readers of this paper may be surprised at that, for the previous three chapters have been deeply critical of the EU, of European law, and of the case law of the European Court of Justice. Among the reasons why I wanted to remain are that I wanted to see a reformed European Union—an EU reformed along antifederalist lines—and I considered such reform to be less unlikely with the UK remaining a Member State than were the UK to leave. Hope springs eternal, and it is still possible that Brexit may yet turn out to be the catalyst that finally delivers the radical change of direction the European Union so badly needs.

I voted to remain also because, while I could see the limitations in what the British Government had managed to agree with the other twenty-seven Member States in February 2016, I could also see that that agreement was worth something—it was a move in the right direction, even if only a first step. The recognition that free movement should not be understood to confer upon EU citizens any sort of right to engage in welfare tourism—travelling to a Member State with a more generous social security system simply in order to take advantage of its largesse—was welcome and long overdue, even if it did not go far enough. So too was the opt-out from "ever closer union", a much more symbolically powerful change than it was ever given credit for in the referendum campaign. So too was the acknowledgement that, for the single market to flourish, it needed to become more competitive and less bogged down by regulation, with the axe taken to burdens on business, unnecessary compliance costs and the like.

In short, while the UK's revised terms of membership would not quite have turned Britain's relationship with the rest of the EU into an antifederalist one, it would have gone a long way to restoring a sense of British sovereignty. And that is the core of the difference between federalism and antifederalism. A federalist splits sovereignty, dividing it between nation and state or between continent and country. An antifederalist, by contrast, safeguards sovereignty, associating it not

with new orders of supranational law but with the political unit—the body politic—to which our bonds are closest and with which our identities as citizens are most entwined.

At the European level the great advantage of antifederalism is that it is where the people are. In other words, it is democratic. The year 2016 was politically tumultuous but, as many commentators have observed, its two biggest shocks have much in common: both the election of Donald Trump as President of the United States and the UK's decision to leave the EU were popular rejections of the federalist status quo, uprisings against received opinion, shots across the bows of the metropolitan liberal elite.

There is nothing wrong with metropolitan liberalism. I am an internationalist, not a nationalist; I favour an open, global, trading economy, not a nativist protectionism. I am an advocate of free trade—and of its great emancipatory promise. I believe in it because of the freedoms upon which it rests as well as for the prosperity it delivers. Culturally, I am a cosmopolitan, in the arts, in the media and in everything that modern city-living offers. But I recognise, as a member of the elite, that I am one of the lucky ones, one of the winners in the globalisation race. Not everyone is so fortunate and the marked failure of metropolitan liberalism has been its wilful overlooking of this fact—its self-conscious and hypocritical denial of its own elite status.

Elites govern. But in our age they—we—may govern only if and only for as long as we carry the people with us. Of course it is the job of leaders to lead, but when voters make it plain that they are not willing to follow, it is time to change course—or change leaders. This is the path urged by this paper—that the European Union changes course. Viewed from a pan-European perspective the British result on 23 June 2016 was neither an isolated nor even all that unusual an event. Following on from Denmark in 1992, Ireland in 2001, and the Netherlands and France in 2005, it



was but the latest signal from the people that the shape and direction of the European project does not have their consent.

This does not mean that the idea of European union has run its course. But it does mean that the European Union as we have known it since Maastricht must now change course. A new direction for the EU—antifederalist not federalist, democratic not elitist, with sovereignty restored and citizenship returned to its rightful domain, is what this paper has sought to sketch.

The tapestry of western political thought is rich and colourful, but it has its limits. One limit is that we have invented—or discovered—only two working models of political legitimacy. The first is the state; the second is the international organisation. The first relies on the rule of law, the separation of powers, democratic government and regular elections in which the “scoundrels” can be “thrown out”. The second obtains its legitimacy not directly but via the states that constitute it. International power (and international law) is power by agreement, power by contract, the parties to the agreements being states and the nature of the contracts being treaties.

For more than fifty years the European Court of Justice has led a campaign, sometimes joined by the other European institutions and sometimes not, to create a new, third model of legitimacy: one that is neither a state nor an ordinary international organisation. Direct effect, state liability, citizenship and proportionality have all been components of this project—to make EU law distinctive to and different from ordinary international law. It is time to recognise that the project has not worked. There is no third way. Just as the failed Constitutional Treaty was an unhappy compromise between a constitution (something for a state) and a treaty (something for an international organisation), so too does the Court of Justice’s fifty-year project collapse.

The federalists have long since dreamed of building European law into something much closer in its resemblance to a state. The problem with this is that it is manifestly not what the peoples of Europe want. When asked, they repeatedly, stubbornly and in my view quite rightly say: no thanks. Despite sixty years of intense political, legal and economic integration in Europe the primary unit of power—and our principal point of cultural and social reference—remains nation, state and country.

There is also a problem, however, with thinking of the EU as if it were an ordinary international organisation. This problem is its chronic democratic deficit. Fifteen years ago one of the United States’ finest commentators on the European Union, Andrew Moravcsik, wrote a compelling “defence of the democratic deficit”. He argued that, given what the European Union then did, what was remarkable about the EU was how open, responsive, accountable and participatory it is. The EU of the era in which Moravcsik was writing, however, was quite different from the EU of today. In 2002, when Moravcsik’s essay was published, the EU was focused on central banking, constitutional adjudication, economic regulation and technical administration. Nowhere are these matters subjected very fully to the democratic gaze. Central bankers, supreme court justices and technocrats are generally independent from and held at arm’s length from democratic bodies. They may be directly or indirectly accountable to parliaments, either upon appointment or during the currency of their office, but they are at least one step removed from the democratic process, and rightly so. In the last fifteen years, however, the EU has moved more and more into altogether different territory—into realms that possess far more electoral salience

than technical economic regulation. Taxation and the setting of fiscal priorities; social welfare; defence; education policies and a range of other policy areas have fallen within the EU’s competences as “ever closer union” has marched on. This is most marked, of course, in the Eurozone countries, particularly in terms of fiscal policy, but is certainly not unique to the Eurozone. It has affected every Member State.

The more the EU moves into politically sensitive and electorally salient arenas such as these, the more the “democratic deficit” matters and the less apt the indirect accountability of the international organisation is for the EU. And herein lies the dilemma for the European Union: the conventional model of the international organisation does not allow for the sort of direct accountability—the ability to throw the scoundrels out—that the EU’s moves into fiscal, defence and social welfare policies demand. Yet there is evidently no popular appetite in Europe for the EU to jettison its treaty-basis to become anything like a state.

It is the failed project of European federalism that has impaled the EU on the horns of this dilemma. And it is antifederalism that needs now to come to the EU’s rescue. •



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