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# Brexit: A Harbinger of Change for The European Union

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# BREXIT: A HARBINGER OF CHANGE FOR THE EUROPEAN UNION

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## INTRODUCTION

The United Kingdom's decision to leave the European Union sent shockwaves across the continent of Europe. Many began wondering what implications the UK's secession, commonly referred to as "Brexit," would have on the future of the EU, on its 510 million citizens, and on the foundational freedoms the European project was designed to protect.[1] On June 23, 2016, the UK staged a referendum wherein 52 percent of voters opted for the country to leave the other twenty-seven member states—freeing itself from both the obligations and privileges that come with EU membership.[2] This monumental departure, supported by pro-Brexit 'Brexiteers' for a number of reasons, will have a long-term impact on the EU that is felt far beyond the borders of the United Kingdom.

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    1.  EU DELEGATION TO THE US, THE EUROPEAN UNION: A GUIDE FOR AMERICANS 1–4 (2016), https://eeas.europa.eu/sites/eeas/files/guide-for-americans_euintheus.pdf [hereinafter DELEGATION].
    2.  JAMES K. JACKSON, ET AL., CONG. RESEARCH SERV., R44559, ECONOMIC IMPLICATIONS OF A UNITED KINGDOM EXIT FROM THE EUROPEAN UNION 1 (version 5 July 14, 2016), https://crsreports.congress.gov/product/pdf/R/R44559 [hereinafter JACKSON ET AL.].

A brief background is necessary to understand the wider context for the Brexit decision, which some pundits recount as rash and illogical. Michael Bloomberg called Brexit the "single stupidest thing any country has ever done."[3] However, reflecting on some of the UK's more pointed critiques of the EU reveals a greater appreciation for the concerns held by many across Europe. Those concerns include the belief that the EU has overstepped its mandate and must be challenged now to preserve its more fundamental values in the future. This paper explores what might become of the European project in the wake of Brexit. "The EU faces a range of political and economic pressures," many of which are fueling the growth of populist political parties across Europe, not just in the United Kingdom.[4] There is anti-EU sentiment—a 'euroskepticism'—bubbling beneath the surface of many current member states, which calls into question the longevity of the EU generally and the far-reaching arms of European law in particular.

## I.   HISTORICAL BACKGROUND OF THE EUROPEAN UNION

The European Union was founded on a shared desire for peace. Still reeling from the devastation caused by World War II, six countries in Western Europe, not including Britain, initiated a shared economic policy designed to foster growth and recovery in the region.[5] The European Coal and Steel Community (ECSC) of 1951 was born and marked the beginning of European integration.[6] The ECSC countries created a single market by handing over control of their coal and steel production to a supranational authority,[7] thus surrendering the raw materials that were needed to conduct another war. The Schuman Declaration set out the vision for this new era, stating, "World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it."[8] It was envisioned that solidarity in production and economic unity created through mutual

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3. Graham Ruddick, *Michael Bloomberg: Brexit is stupidest thing any country has done besides Trump*, GUARDIAN, Oct. 24, 2017, https://www.theguardian.com/politics/2017/oct/24/michael-bloomberg-brexit-is-stupidest-thing-any-country-has-done-besides-trump.

4. KRISTIN ARCHICK, CONG. RESEARCH SERV., R44249, THE EUROPEAN UNION: CURRENT CHALLENGES AND FUTURE PROSPECTS, Summary (version 15 Feb. 27, 2017), https://crsreports.congress.gov/product/pdf/R/R44249/15.

5. Summary of Treaty establishing the European Coal and Steel Community, ECSC Treaty, EUR-LEX, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0022 (last updated Nov. 12, 2017).

6. *Id.*

7. *Id.*

8. Robert Schuman, French Foreign Minister, Keynote Address at the Salon de l'Horloge at the French Foreign Ministry to Propose European Integration: The Schuman Declaration (May 9, 1950), *in* Europa, at https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.

controls would make another European war "not merely unthinkable, but materially impossible."[9]

Over the next decades, this project expanded to become the European Union and welcomed twenty-two other countries willing to surrender specific areas of their own sovereignty to benefit from the economic and social freedoms provided by the body.[10] Various treaties between the member states established a robust single market. The treaties superseded national laws to allow for the free movement of goods, services, capital, and people across the bloc.[11] Since founding these 'four freedoms' of movement, the EU has evolved into a sprawling and complex system of common institutions working to harmonize the laws among member states and secure a more integrated Europe. The UK has historically struggled against this supranational agenda for harmonization and jockeyed for more flexibility within the increasingly uniform and regulated system.[12]

## II.   Competence Creep

The EU has the legal authority to enact harmonization measures that support the goal of a well-functioning and non-discriminatory internal market. Harmonization is the principle of upholding the single market—ensuring that laws across the member states are in concert with one another so that every EU citizen has equal protection under the laws afforded to them by the EU.[13] This authority, also known as competence, implies a legal duty on member states to enact consistently all laws and directives handed down from Brussels.[14] As treaties are signed, the EU institutions are endowed with more authority to affect these laws.[15] The EU legislative bodies exercise these competences by forging agreements, writing laws, and issuing directives, among other things.

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9.  *Id.*

10.  *See* Delegation, *supra* note 1, at 44 (explaining that the United Kingdom, Ireland, and Denmark were the first countries to join the original six-member community in 1973, with many more joining thereafter).

11.  *Id.* at 3.

12.  *See Theresa May's Brexit speech in full: Prime Minister outlines her 12 objectives for negotiations,* Independent UK, (Jan. 17, 2017), http://www.independent.co.uk/news/uk/home-news/full-text-theresa-may-brexit-speech-global-britain-eu-european-union-latest-a7531361.html ("[T]he European Union has struggled to deal with the diversity of its member countries and their interests. It bends towards uniformity, not flexibility").

13.  *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 114, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

14.  Executive Summary of Legal Briefing from Marta Toporek on Behalf of Client Earth (Jan. 20, 2010), https://www.documents.clientearth.org/wp-content/uploads/library/2010-01-01-national-measures-and-the-ecodesign-and-energy-labeling-directives-ce-en.pdf.

15.  *Foreign & Commonwealth Office of the U.K., EU law and the balance of competences: A short guide and glossary*, https://www.gov.uk/guidance/eu-law-and-the-balance-of-competences-a-short-guide-and-glossary (last updated Mar. 21, 2013).

The European Court of Justice (ECJ) is tasked with interpreting EU law in light of the supranational goals of harmonization.[16] Decisions by the ECJ highlight how pernicious this mandate for EU primacy has become. Beginning in 1964, the ECJ ruled that EU law is supreme to any national law.[17] By 2008, the Court held that EU law superseded any international agreement, and by 2013[18] the Court declared that EU law must take precedent over national constitutions.[19] This exemplifies how, over time, the EU's portfolio of competences has grown, incrementally stripping areas of sovereignty away from the member states and creating a snowball effect decried by many as "competence creep."[20]

This growth and evolution, however, has not been without setbacks and dissenters. Brexit brought a long-standing tension to a head; namely, the tension between member states seeking an "ever closer union" in Europe and those member states who appreciate the benefits of the "four freedoms" but prefer that the EU operate at a more intergovernmental level.[21] Rather than forgo more of their nation's sovereignty as the European project marches forward, nations like Norway and Switzerland have refused certain aspects of EU integration measures and have instead secured bespoke membership arrangements within the EU.[22] The UK has done this to a certain degree by declining to adopt the Euro or participate in the Schengen area, for example, but the nation never attained the level of custom participation that it sought.[23] As a result, the UK's interest in removing itself entirely from the EU continued to gather strength until it came to fruition in the June 2016 referendum.

## III.  GROWING EUROSKEPTICISM

Though the underlying system of competence creep encapsulates many of the UK's frustrations with the EU, attempting to lay bare the full motivations behind the referendum lies beyond the scope of this paper. Relevant here is what competence creep and the UK's stance against it says about the EU's future. This section will demonstrate how Brexit is an external sign of an internal euroskepticism festering within the bloc. First, the ever-increas-

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16. ANTHONY BROWNE & MATS PERSSON, OPEN EUROPE, THE CASE FOR EUROPEAN LOCALISM 11 (2011), http://archive.openeurope.org.uk/Content/Documents/PDFs/EUlocalism.pdf (referencing the ECJ's Treaty on European Union, Article 19, mandate to "ensure that in the interpretation and application of the Treaties the law is observed"). Critics of the ECJ's growing influence consider this a mandate to "pursue 'ever closer union.' " *Id.*

17. Case T-6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 66.

18. Case C-402/05, Yassin Abdullah Kadi v. Council and Comm'n, 2008 E.C.R. 461.

19. Case C-399/11, Stefano Melloni v. Ministerio Fiscal, 2013 E.C.R. 107.

20. Bram van der Bruggen, The Charter and Creeping Competences: The Fear of the Member States for the Charter of Fundamental Rights 4 (January 2011) (unpublished LL.M. thesis, Tilburg University), http://arno.uvt.nl/show.cgi?fid=131643.

21. ARCHICK, *supra* note 4, at 4.

22. JACKSON ET AL., *supra* note 2, at 13.

23. ARCHICK, *supra* note 4, at 7.

ing volume of EU regulations and ECJ decisions is evidence of the EU's continued encroachment on the sovereignty of member states. Next, the accelerated pace with which the EU has adopted legislation, issued directives, and broadened its reach through voluminous pro-European judicial decisions has occurred at the same time that Europeans are becoming increasingly more skeptical of the EU as a whole. Voter turnout in EU elections continues to decrease, which demonstrates that average citizens are becoming increasingly disengaged with what their supranational government is doing. The expansion of EU governance, contrasted with a noticeable uptick in anti-Euro sentiment across the bloc, is a demonstrable trend that threatens the ongoing trajectory of the European project.

## A.   *Rising Tide of EU Regulations*

It is undeniable that, over its history, the EU has issued a vast number of laws.[24] A challenge facing scholars, politicians, and analysts is determining just how vast the EU's influence has become through these regulations. Member states struggle to determine how many of their national laws exist in whole or in part because of the EU.[25] A significant challenge is determining what should be counted as EU law, i.e., ascertaining whether a certain law was implemented by a member state, or already codified as a national statute and therefore not attributable to the EU's total influence.[26] Article 288 of the Treaty on the Functioning of the European Union demarcated five types of EU law (regulations, directives, decisions, recommendations, and opinions), each imbued with varying degrees of binding authority.[27] When Brussels issues one of these laws, the impact is felt differently across the bloc depending on how each member state already complies with the new legislation. For this reason, it is difficult to assess the total impact EU legislation has had on any given member state. However, as the graph below indicates, the number of EU actions taken by Brussels has clearly increased over time. This demonstrates how the EU uses integratory methods to accomplish its goal of creating an 'ever closer union.'

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24. Andy McSmith, *15 EU laws and regulations we will miss in post-Brexit Britain*, INDE-PENDENT (June 25, 2016), http://www.independent.co.uk/news/uk/politics/brexit-15-eu-laws-we-will-miss-in-britain-a7103031.html.

25. Michael Bobek, *The Effects of EU Law in the National Legal Systems*, *in* EUROPEAN UNION LAW 143, 145–175 (Catherine Barnard & Steve Peers eds., 2d ed., 2017), https://ssrn.com/abstract=2977530 (discussing the difficulties of determining "*who* enforces EU law in the Member States, and *how*, following what procedures and guided by *what principles*") (emphasis in original).

26. UK HOUSE OF COMMONS, RESEARCH PAPER 10/62, HOW MUCH LEGISLATION COMES FROM EUROPE? 1–2 (Oct. 13, 2010).

27. TFEU, *supra* note 13, art. 288.

FIGURE 1: LEGAL ACTS ISSUED BY THE EU OVER TIME[28]
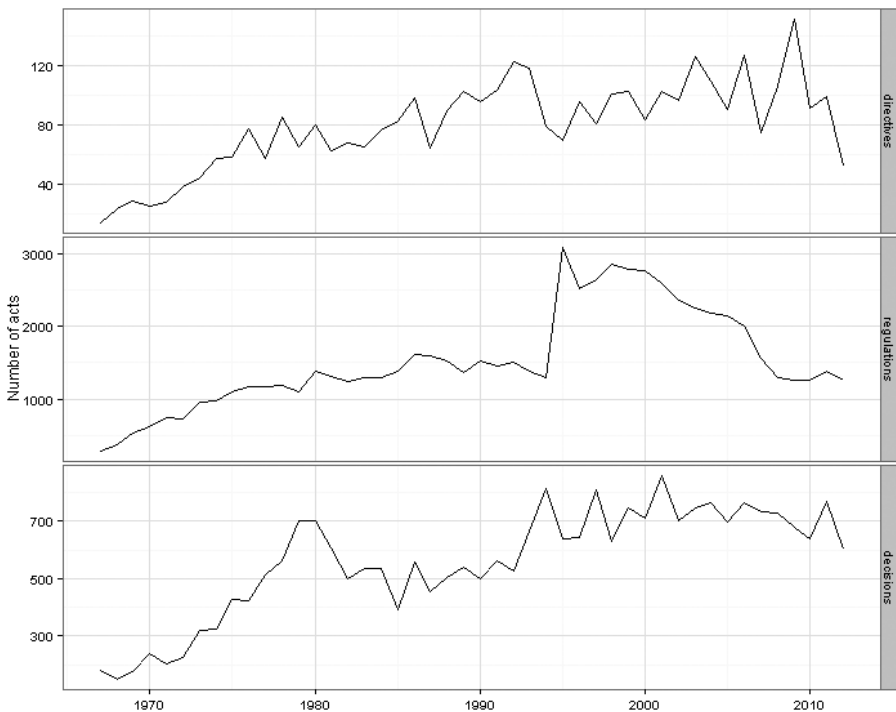


The data illustrates the EU's robust legislative history. It is important to note that law making, particularly through regulations and directives, has declined in recent years. Each year, as more legislation is written, the EU Council and EU Commission amend or repeal laws, while others expire after being in effect for a short period of time.[29] A commonly referenced study published by the UK's House of Commons in 2010 captures this phenomenon.[30] Though a similar data set has not been recreated more recently, the following graph shows the net volume of EU legislation imposed on the bloc. Net legislation offers a more conservative and accurate look into the true impact of new EU legislation affecting member states because it includes all directives, regulations, and decisions issued while excluding legislation that has been repealed or amended.

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28. Dimiter Toshkov, *55 Years of EU Legislation* Fig. 1 (last updated Feb. 2014), http://www.dimiter.eu/Eurlex.html (This online presentation presents the research of Dimiter Toshkov, a professor of social science and politics at the University of Leiden in the Netherlands. Professor Toshkov's 2014 study was derived from the EUR-Lex database.)

29. UK HOUSE OF COMMONS, *supra* note 26, at 13–14.

30. *Id.* at 13.

FIGURE 2: NET EU LEGISLATION ADOPTED (1997–2009)[31]
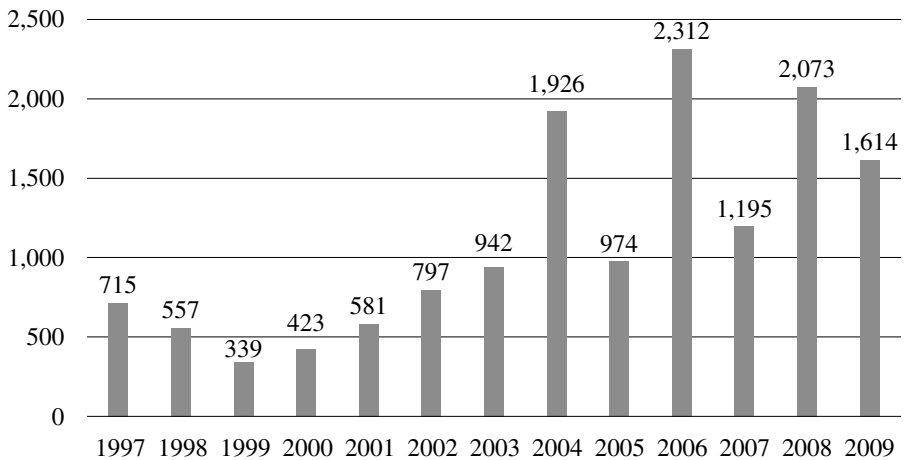


The growing number of laws and the ever-encroaching power of the EU has led many to question the EU's commitment to its own enshrined principles of subsidiarity and proportionality. Article 5 of the Lisbon Treaty confers on the Union competences that are governed by the principles of subsidiarity and proportionality.[32] Subsidiarity means:

> [T]he Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[33]

Proportionality simply ensures that the Union's "content and form . . . shall not exceed what is necessary to achieve the objectives of the Treaties."[34]

To ensure that these principles were upheld and the rights of its member states were preserved, the EU included a balancing mechanism in the Lisbon Treaty. The process requires the EU to send draft legislation to national governments and provide them the opportunity to review and opine revisions as each deems necessary.[35] This serves as a check on the subsidiarity principle, allowing member states to object to legislation from the EU that imposes something at the supranational level that could be carried out nationally. The Commission tracks the number of "reasoned opinions" submitted annually by member states which directly challenge the Commis-

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31. *Id.* at 15.

32. Consolidated Version of the Treaty on European Union art. 5(1), March 30, 2010, 2010 O.J. (C 83) 13, 18 [hereinafter TEU].

33. *Id.* at art. 5(3).

34. *Id.* at art. 5(4).

35. BROWNE & PERSSON, *supra* note 16, at 9.

sion on the principle of subsidiarity.[36] The Commission received eight reasoned opinions in 2015.[37] The following year, that number increased to sixty-five challenges on subsidiarity[38] and then dipped to fifty-two in 2017.[39] This marks a 713 percent increase between 2015 and 2016 of member states alleging that proposed EU legislation would violate the principle of subsidiarity if enacted.

Despite this noticeable rise in member states concerned that the EU was infringing on national sovereignty, the Commission's recent reports indicate that the balancing mechanism had little effect.[40] The annual report highlights the four proposals which received the most reasoned opinions. In 2016, 58 percent of all reasoned opinions challenged four Commission proposals,[41] whereas 2017 saw a different set of four proposals being challenged by 46 percent of all filed opinions.[42] In each of the last two years, high numbers of national Parliaments independently challenged the same four proposals, yet the Commission declined to heed any of these common objections, choosing instead to document the concern but ultimately implement the challenged proposals.[43] The 2016 report concluded by affirming that both the Council and Commission are "jointly committed to ensuring that the principles of subsidiarity and proportionality remain at the heart of European decision-making and that these principles are fully respected throughout the legislative process."[44] However, after a purportedly careful review, the Commission ultimately decided to "maintain its initial proposal" while recognizing that "a number of national Parliaments remain unconvinced of its merits."[45]

This is a stark example of the EU's brazen commitment to progress, no matter the cost. In his 2016 State of the Union Address to the European Parliament, Commission President Jean-Claude Juncker said, "Europe can only be built with the Member States, never against them."[46] Yet the result

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36. EUROPEAN COMMISSION, ANNUAL REPORT 2016 ON SUBSIDIARITY AND PROPORTIONALITY (2017), https://eur-lex.europa.eu/resource.html?uri=cellar:31af944c-5d70-11e7-954d-01aa75ed71a1.0003.02/DOC_1&format=PDF [hereinafter COMMISSION 2016].

37. EUROPEAN COMMISSION, ANNUAL REPORT 2015 ON SUBSIDIARITY AND PROPORTIONALITY 7 (2016), https://eur-lex.europa.eu/resource.html?uri=cellar:941754bf-4d09-11e6-89bd-01aa75ed71a1.0005.02/DOC_1&format=PDF.

38. COMMISSION 2016, *supra* note 36, at 7.

39. COMMISSION ANNUAL REPORT 2017 ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY (2018), https://ec.europa.eu/info/sites/info/files/annual-report-2017-application-principles-subsidiarity-proportionality.pdf [hereinafter COMMISSION 2017].

40. *Id.*

41. COMMISSION 2016, *supra* note 36, at 7.

42. COMMISSION 2017, *supra* note 39, at 5.

43. *Id.*

44. COMMISSION 2016*, supra* note 36, at 16.

45. *Id.* at 17.

46. EUROPEAN COMMISSION, ANNUAL REPORT 2016 ON RELATIONS BETWEEN THE EUROPEAN COMMISSION AND NATIONAL PARLIAMENTS 2 (2017), https://eur-lex.europa.eu/resource.html?uri=cellar:186cfcb2-5d72-11e7-954d-01aa75ed71a1.0001.02/DOC_1&format=PDF.

seen in the 2016 Subsidiarity and Proportionality Report seems to contradict this commitment. By failing to pause Brussels' agenda and heed concerns from its member states, the EU sends another signal that hesitancy toward the European project is unwelcome. This form of lawmaking, which asks for input and then ignores the response, undermines the whole project and feeds a growing distrust for the EU shared by many across the bloc.

### B.   *Large ECJ Involvement*

The vital role played by the ECJ is perhaps a more telling, but often less discussed, aspect of the EU's method of harmonization. As discussed above, the ECJ's influence over European affairs is far-reaching. A growing number of cases are being heard by the ECJ, whether directly or as referrals from a national court.[47] Direct actions and appeals from the EU's General Court made up approximately 36 percent of the ECJ's proceedings between 2012 and 2016.[48] The remaining 64 percent of the cases appearing before the ECJ during these years came as References for a Preliminary Ruling.[49] These are requests made by national courts that are seeking oversight from the ECJ on how to accurately interpret EU law.[50] In 2016 alone, 453 of 704 cases were referred to the ECJ by national courts.[51] As European law and EU competences grow, national courts are seeking help in a higher number of domestic cases, which may only have a small nexus to EU law. Fearing they will later be overruled by Europe's high court, national courts opt for this early oversight, which increases the ECJ's opportunity to interpret law in light of its mandate to harmonize and integrate Europe.[52] The graph below demonstrates the trend of increasing ECJ involvement, emphasizing the growing influence of the Court on the European project.

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47. COURT OF JUSTICE OF THE EUROPEAN UNION, ANNUAL REPORT 2016: JUDICIAL ACTIVITY 91 (2017), https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf [hereinafter ECJ 2016].
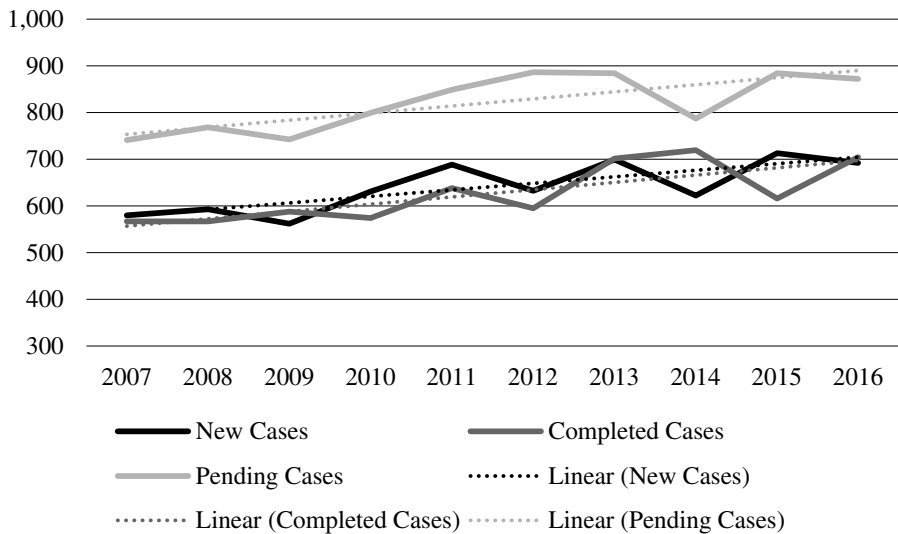48. *Id.*
49. *Id.*
50. TEU, *supra* note 32, art. 19(3)(b).
51. ECJ 2016, *supra* note 47, at 91.
52. BROWNE & PERSSON, *supra* note 16, at 11 (*see* note 16 regarding interpretation of the ECJ's harmonization mandate).

FIGURE 3: ECJ ACTIVITY OVER THE PREVIOUS TEN YEARS[53]



Prominent leaders in Europe have voiced concerns that trending actions taken by the ECJ and other EU institutions are undermining the principle of subsidiarity and effectively stripping aspects of national sovereignty away from member states. Germany's former president, Roman Herzog, long argued for the installation of a European Subsidiarity Court, which would work to balance the overt Euro-centric agenda promulgated by the ECJ.[54] Long before Brexit, President Herzog wrote:

> Judicial decision-making in Europe is in deep trouble. The reason is to be found in the European Court of Justice (ECJ), whose justifications for depriving Member States of their very own fundamental competences and interfering heavily in their legal systems are becoming increasingly astonishing. In so doing, it has squandered away a large part of the trust it used to enjoy.[55]

This sentiment for the EU to honor its commitment to subsidiarity and allow member states more autonomy in lawmaking is strongly held not only by a majority of UK citizens, but also by many groups across Europe.[56] High levels of regulations that supersede national law and the increased influence exerted by the ECJ on national court systems are primary reasons why the UK voted for the referendum. The continuing direction of the EU

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53. ECJ 2016, *supra* note 47, at 87; *see also* COURT OF JUSTICE OF THE EUROPEAN UNION, ANNUAL REPORT 2010 (2011), https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_version_integrale_en.pdf.

54. BROWNE & PERSSON, *supra* note 16, at 11.

55. Roman Herzog & Lüder Gerken, *Stop the European Court of Justice,* EUOBSERVER, Sept. 8, 2008, https://euobserver.com/opinion/26714.

56. BROWNE & PERSSON, *supra* note 16, at 11–12.

is also working to fuel disenchantment with the European project at large—a skepticism not wholly unique to Britain.

## C. Skeptical Citizenry

The UK's pro-Brexit "Leave" campaign argued for separation from the EU primarily due to concerns that Brussels was steadily eroding the nation's sovereignty for the reasons discussed above. It was argued that the UK's economy was stifled by both increased EU legislation and a rise in immigration, which was required under the EU's strict "freedom of movement" principle.[57] The majority of UK voters believe that the country would be better off economically and otherwise if it had more control back from Brussels with which to govern itself. Albeit varying in form and diversity, this euroskepticism is the orientation of more populist, nationalist, and antiestablishment political parties.[58] Many of these parties have experienced growing support across Europe in recent years due predominately to the eurozone crisis and widespread economic stagnation.[59]

Brexit is the most austere anti-EU action taken by any member state to date. However, the euroskepticism held by 52 percent of UK citizens represents an invasive undercurrent of similar sentiments spreading across Europe. Brexit was the first stone dropped into a large pool of member states who too could grow dissatisfied enough to stage their own referendums.

Weeks before the UK's referendum, the Pew Research Center conducted a Europe-wide study attempting to quantify euroskepticism among member states.[60] The following three graphs capture different aspects of the center's 2016 Global Attitudes Survey. Together they demonstrate how the UK's anti-EU sentiment is held, in varying degrees, across the bloc.

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57. JACKSON ET AL., *supra* note 2, at 1.
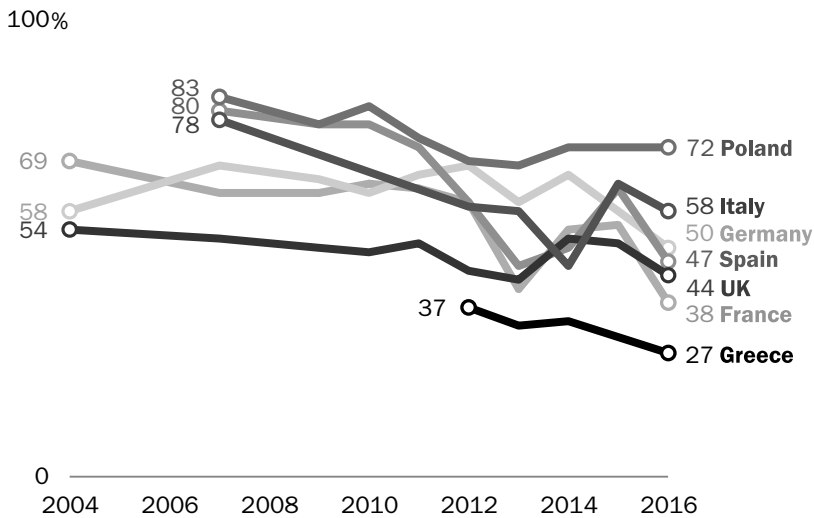
58. ARCHICK, *supra* note 4, at 7.

59. *Id.*

60. Bruce Stokes, *Euroskepticism Beyond Brexit: Significant opposition in key European countries to an ever closer EU*, PEW RESEARCH CTR. (June 7, 2016), http://www.pewglobal.org/2016/06/07/euroskepticism-beyond-brexit/.

FIGURE 4: FAVORABLE VIEW OF THE EU BY MEMBER STATES[61]

## After short-lived rebound, views of the EU on the decline again in key European countries

*Favorable view of EU*

100%

83
80
78

69

58
54

37

72 **Poland**

58 **Italy**
50 Germany
47 **Spain**
44 **UK**
38 France

27 **Greece**

0

2004    2006    2008    2010    2012    2014    2016

Source: Spring 2016 Global Attitudes Survey. Q10c.

"Euroskepticism Beyond Brexit"

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In 2012 and 2013, favorability toward the EU plummeted in many countries as the European economy experienced a downturn.[62] There was a brief rebound in 2014, but by 2016, public support for the EU in some of the largest member states continued its marked decline.[63] Despite its vote to leave the EU, the United Kingdom has not experienced a dramatic decrease in EU-sentiment relative to many of its more traditionally pro-European partners. Since 2004, the UK lost 10 percentage points in public support for the EU while France lost 31 points and Spain lost 33.[64] Nations like France and Germany, seen by many as the bedrock of Europe, are fostering growing distaste for the EU institutions they created.
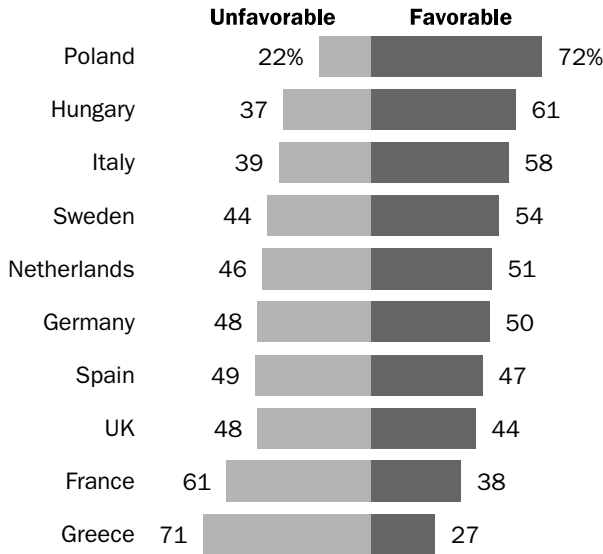
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61.  *Id.*
62.  *Id.*
63.  *Id.*
64.  *See id.*

FIGURE 5: FAVORABILITY OF THE EU ACROSS EUROPE[65]

## EU favorability varies widely in Europe

*Views of EU*

| | Unfavorable | Favorable |
|---|---|---|
| Poland | 22% | 72% |
| Hungary | 37 | 61 |
| Italy | 39 | 58 |
| Sweden | 44 | 54 |
| Netherlands | 46 | 51 |
| Germany | 48 | 50 |
| Spain | 49 | 47 |
| UK | 48 | 44 |
| France | 61 | 38 |
| Greece | 71 | 27 |

Source: Spring 2016 Global Attitudes Survey. Q10c.

"Euroskepticism Beyond Brexit"

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Shortly before the Brexit vote, the study indicated that 48 percent of the UK disfavored the EU. Interestingly, a few weeks later, 52 percent of UK voters opted to leave the Union, demonstrating an even higher rate of euroskepticism than was reflected in this study. Similarly, though not tested by a secession referendum, 48 percent of Germans during the spring of 2016 disfavored the EU—a high proportion, yet still trailing behind the 49 percent of Spaniards who disfavored the EU, 61 percent of French, and 71 percent of Greeks.[66]

*Eurostat*, an encyclopedia for European statistics, published a report detailing how Europeans' trust for EU institutions has declined over time, increasingly so in recent years.[67] The graph displayed in Figure 6 below

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65. *Id.*
66. Stokes, *supra* note 60.
67. *Sustainable development–good governance*, EUROSTAT: STATISTICS EXPLAINED (July 2015), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Sustainable_development_-_good_governance&oldid=253022#Citizens.E2.80.99_confidence_in_EU_institu tions [hereinafter *Sustainable Development*].

shows how 42 percent of EU citizens trusted the European Parliament in 2014. This was still the highest amount of public trust held by any EU institution. The European Commission garnered 38 percent of the public's trust in 2014 compared to the Council's 36 percent and the European Central Bank's 34 percent.[68]

What this says about the potential for a similar referendum in one of these member states is yet to be seen. It would be conclusory at this stage to argue that rising anti-EU sentiment across Europe will certainly lead to similar referendums. However, these numbers vividly illustrate the growing tide of euroskepticism sweeping the continent and caution those who neglect to see Brexit as a warning sign for Europe.

FIGURE 6: EU CITIZENS' LEVEL OF CONFIDENCE IN EU INSTITUTIONS[69]
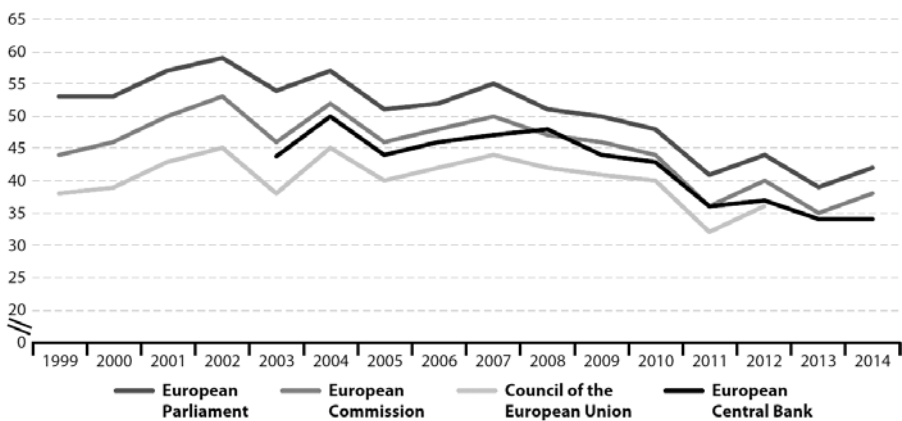


(') Data for trust in the Council of the European Union are only available up to 2012.

Further centralization of Europe, and thereby the degree to which national sovereignty should be sacrificed, was at the heart of the Brexit decision and continues in the overall debate for European reform.[70] The Pew Research Center survey found that Brussels' pursuit of an "ever closer union" was opposed by more citizens in six of ten nations than those who either supported the status quo or hoped to see greater centralization.[71] More than two-thirds of the populations in Greece and the UK wanted at least some EU powers returned to the member states. This view was shared by a plurality in Sweden (47 percent), the Netherlands (44 percent), Germany (43 percent), and France (39 percent).[72] Conversely, far fewer citizens in these countries want greater power for the EU, as seen in Figure 7 below. This

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68. *Id.*
69. *Id.*
70. Stokes, *supra* note 60, at 7.
71. *Id.* at 7 (referencing the 1957 Treaty of Rome, which founded the EU on a shared commitment "to lay the foundations of an ever closer union among the peoples of Europe").
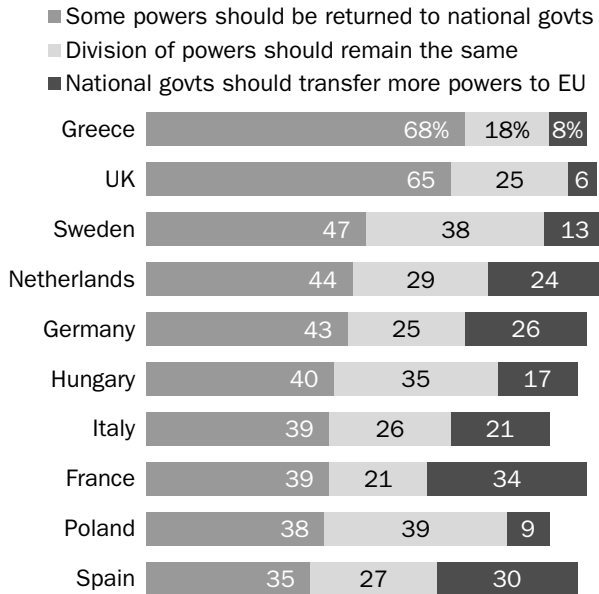72. *Id.*

contradicts the image often portrayed in present day media of the UK's dissent as inane and misguided. In fact, Brexit was simply the UK acting on a perspective shared among many nations in Europe—a belief that European integration has gone far enough.

FIGURE 7: MEMBER STATE CITIZENS' OPINIONS ON
AN "EVER CLOSER" UNION[73]



**Disagreement on 'ever closer' union**

*Which statement best describes your views about the future of the European Union?*

- Some powers should be returned to national govts
- Division of powers should remain the same
- National govts should transfer more powers to EU

| | Some powers returned | Remain same | Transfer more |
|---|---|---|---|
| Greece | 68% | 18% | 8% |
| UK | 65 | 25 | 6 |
| Sweden | 47 | 38 | 13 |
| Netherlands | 44 | 29 | 24 |
| Germany | 43 | 25 | 26 |
| Hungary | 40 | 35 | 17 |
| Italy | 39 | 26 | 21 |
| France | 39 | 21 | 34 |
| Poland | 38 | 39 | 9 |
| Spain | 35 | 27 | 30 |

Note: Don't know responses not shown.

Source: Spring 2016 Global Attitudes Survey. Q49.

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## D.  *Disengaged European Voters*

Finally, widening euroskepticism can be seen in the decline of European voter participation. As shown in Figure 8 below, voter turnout has dropped in every single European Parliamentary election to date.[74] When

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73.  *Id.*
74.  *Results of the 2014 European elections,* EUROPEAN PARLIAMENT (Jan. 7, 2014), http://www.europarl.europa.eu/elections2014-results/en/turnout.html [hereinafter *Results*].

this figure again hit an all-time low in the EU's most recent 2014 elections, critics highlighted the glaring contrast between falling voter numbers and growing EU power.[75] Some point to the falling numbers as evidence of Europe's weakening democratic legitimacy, caused, at least in part, by increasingly convoluted elections.[76] One example of this is Brussels' newly created "*Spitzenkandidaten*" (leading candidates) system, which allows pan-European parties to nominate leading candidates, who are then voted on by Parliament, not directly elected by the populace.[77] In this new system, member states effectively "rubberstamped" the appointment of European Commission President Juncker,[78] a leader who now holds tremendous power in Europe despite not being directly voted into office. Instead, he was appointed by politicians for whom dwindling numbers of Europeans even voted in the first place.[79]

The January 2017 election of Antonio Tajani as the European Parliament's newest president is another example of political dealings contributing to Europe's reputation as an opaque bureaucracy. Amid "searing acrimony" felt widely by critics "over the deal-making that settled the outcome," Tajani's election secured the European People's Party (EPP) a complete monopoly over the leadership of all three EU institutions—the Parliament, the Commission, and the Counsel.[80] After three rounds of member voting failed to name a victor, the EPP's monopoly was finally established through an unusual fourth round of voting and "an 11th-hour deal" between the EPP and the more liberal Alliance of Liberals and Democrats for Europe (ALDE) party who withdrew its candidate and endorsed Tajani in exchange for control over the Conference of Committee Chairs.[81] Critics argue that convoluted appointments like Juncker, fabricated elections like Tajani, and the subsequent policy decisions being made through backdoor channels among Brussels' elite are creating a "democratic deficit" in Europe.[82]

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75. Martin Banks, *Voter turnout in May's European elections was the lowest ever*, THE TELEGRAPH (Aug. 6, 2014, 12:06 PM), https://www.telegraph.co.uk/news/worldnews/europe/eu/11015823/Voter-turnout-in-Mays-European-elections-was-lowest-ever.html.

76. Robert A. Pollard, *Europe's Struggle for Democratic Legitimacy: Voters Say No to EU Super-State,* CTR. FOR STRATEGIC AND INT'L STUDIES (July 10, 2014), https://www.csis.org/analysis/europe's-struggle-democratic-legitimacy-voters-say-no-eu-super-state.

77. *Id.*

78. Banks, *supra* note 75.

79. *See* Pollard, *supra* note 76 ("[S]ince only 43% of eligible voters took part in the election, Juncker actually received the (indirect) support of less than 13% of the electorate. . . . Thus, none of the candidates for Commission President could by any stretch of the imagination be described as 'the people's choice.'").

80. David M. Herszenhorn & Maïa De La Baume, *And the winner is . . . a backroom deal (and Antonio Tajani)*, Politico (Jan. 7, 2017, 10:22 PM), https://www.politico.eu/article/european-parliament-presidency-vote-election-and-the-winner-is-a-backroom-deal-and-antonio-tajani-epp/.

81. *Id.*

82. Pollard, *supra* note 76.

FIGURE 8: VOTER TURNOUT IN EUROPEAN PARLIAMENTARY ELECTIONS[83]
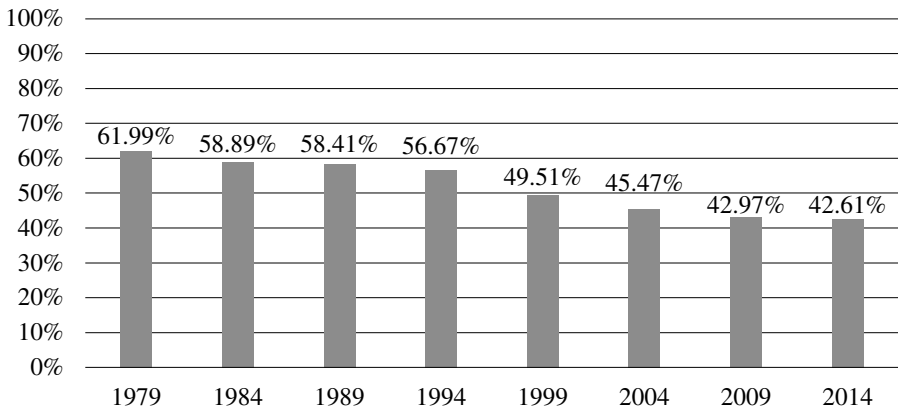


This decline in voter participation is not endemic to all political processes in Europe. Seen below, Figure 9 demonstrates that as voter participation at the supranational level fell (42.61 percent), turnout across the bloc was markedly higher in national elections (68 percent average).[84] In light of these ongoing trends of increased EU action coupled with simultaneous decreases in public opinion and voter participation, there is no reason to expect the future will look any different for the EU, even after Brexit. Absent major changes by the EU at both a general policy level and a more granular statutory level, which affects these larger policy shifts, voters will continue to disengage from European elections. In the euroskeptic's view, Brexit is an example of proactive national politics but offers no cognizable incentive for average voters to engage more actively in their supranational government, which many see as decreasingly democratic. Without demonstrable and sustained change from the EU, Brexit will likely discourage voter participation at the European level as time goes on.

In total, the figures detailed in this section highlight a thread of euroskepticism that can be traced throughout Europe. Long considered one of the most euroskeptical members,[85] the UK certainly contributes to these anti-EU markings but does not lead the pack in all of the categories discussed. This euroskeptic sentiment gained traction in the UK to such an extent that a secession vote became a reality. With so many other member states sharing in the UK's skepticism, future dissenters willing to balk at Brussels' agenda seem increasingly plausible. In many ways, Brexit symbolizes this shared perspective coming to fruition.

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83. *Results*, *supra* note 74.

84. *Sustainable Development*, *supra* note 67.

85. JACKSON ET AL., *supra* note 2, at 1.

FIGURE 9: VOTER PARTICIPATION BY ELECTION TYPE[86]
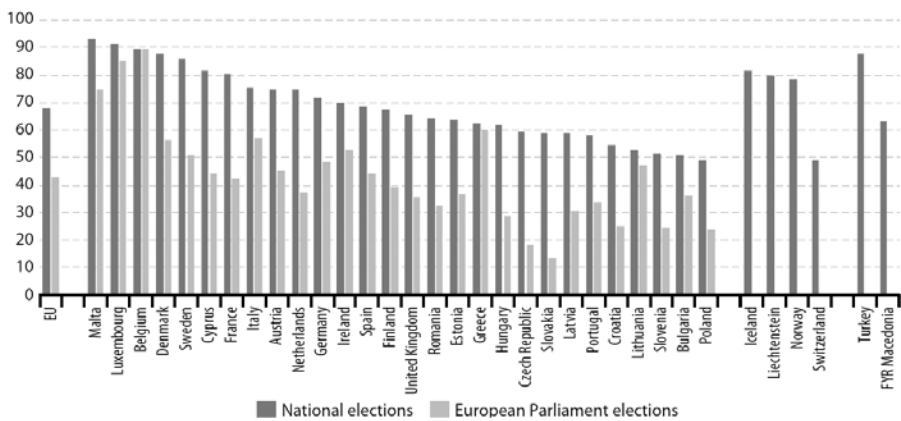


(¹) The EU-28 figure for national elections is a Eurostat estimate. Data for national elections refer to the latest year in which national parliamentary elections were held. For all countries, this year lies between 2010 and 2014. Data for EU parliamentary elections are from 2014.

## IV.   BREXIT AS A SIGNPOST

Grasping a moment in time and predicting what history will say about it is a difficult feat, particularly when politics seem to shroud the interpretation of every fact and figure. A more global perspective, at a time like this, offers some credence to the Brexit campaign, yet not in a way that reveals all of the underlying motivations that led to this result. Instead, such a perspective helps garner appreciation for how euroskepticism, having found its voice in the United Kingdom, is rooted in something much deeper, which is echoing across the EU and around the world.

A dark cloud hung over humanity much of the twentieth century.[87] After two world wars, the brutal genocides of Hitler and Stalin, Hiroshima, and the gripping tension felt in the Cold War, the world heaved a sigh of relief when communism fell in the winter of 1989. A collective optimism took hold, couched in an expectation that regressive evil had ceased, and liberal democracy would usher in untold freedom and opportunities for all. Globalization, as it became known, was the conduit for this unbridled progress. Robert Kagan writes: "The years immediately following the end of the Cold War offered a tantalizing glimpse of a new kind of international order, with nation-states growing together or disappearing altogether, ideological conflicts melting away, cultures intermingling, and increasingly free commerce and communications."[88] Australian writer Mark Sayers argues that this new utopian vision, made possible by globalization, began as a

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86. *Sustainable Development*, *supra* note 67.

87. MARK SAYERS, STRANGE DAYS, 41–60 (2017).

88. *Id.* at 59–60, quoting ROBERT KAGAN, THE RETURN OF HISTORY AND THE END OF DREAMS 1 (2009).

collective desire for economic order accomplished by connecting the world through immigration and trade.[89]

As a reaction to globalization and western materialism, the world experienced a feverish rise in Islamic terrorism, culminating in the birth of ISIS, and the subsequent anti-immigrant rhetoric that came as a result of the ensuing panic.[90] The UK's decision to leave the European Union came from its desire to close its borders and control its own destiny. A few months later, Donald Trump was elected president of the United States with an unapologetic "America First" platform. Trump's campaign mirrored many of the same populist and nationalist sentiments that prevailed in the UK leading to the Brexit vote.[91]

Similar movements are gaining momentum across Europe as well. In the EU's 2016 Parliamentary election, populist parties garnered 13.2 percent of the vote (compared to 5.1 percent in the 1960s), securing leadership in eleven European countries.[92] Austria's recently elected President Sebastian Kurtz, though not a far-right candidate, has taken a clear anti-immigrant and anti-Muslim stance in his country.[93] Neighboring Hungary erected a fence along its southern border to curb the flow of refugees—a move led by the nation's overtly nationalist Prime Minister Viktor Orbán.[94] The Netherlands' alt-right candidate Geert Wilder and France's Marine Le Pen both lost presidential elections this year, but became top political contenders while running on platforms focused on nationalism and anti-immigration. Le Pen drove home the correlations between Brexit and Trump, aligning herself with their shared underdog and nationalist narratives, proclaiming that the British and the Americans "made possible the impossible."[95] A populist movement in Italy this year forced Prime Minister Matteo Renzi to resign.[96] German Chancellor Angela Merkel, lauded as Europe's "last bastion of liberal democracy,"[97] was elected to her fourth term in the fall of 2017, beating back a rising populist movement. A mere ten months

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89. *Id.* at 50.

90. *Id.* at 43.

91. Steven Pinker, Enlightenment Now: The Case for Reason, Science, Humanism, and Progress 334 (2018) (Pinker argues that "[n]othing captures the tribalistic and backward-looking spirit of populism better than Trump's campaign slogan: Make America Great Again." He contends that it was a similar populist agenda, which served to catalyze the Brexit referendum.).

92. *Id.*

93. Editorial Board, *In Election, Austria's Nazi Past Raises Its Head*, N.Y. Times (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/opinion/austria-election-sebastian-kurz.html.

94. Andras Schweitzer, *Why Viktor Orbán has a problem turning his country against immigrant*s, Guardian (Sept. 8, 2017), https://www.theguardian.com/commentisfree/2017/sep/08/viktor-orban-immigrants-hungary-immigration-fears-pro-eu.

95. Simon Shuster, *The Populists*, Time (2017), http://time.com/time-person-of-the-year-populism/.

96. *Id.*

97. Anders Corr, *Liberal Democracy Against A World Of Nationalist Happenstance,* Forbes (Nov. 21, 2016), https://www.forbes.com/sites/anderscorr/2016/11/21/liberal-democracy-against-a-world-of-nationalist-happenstance/#64bd0bae43ec.

earlier, a November 2016 poll found that 42 percent of Germans wanted to stage their own referendum on EU membership.[98] Norbert Roettgen, a senior advisor in Merkel's party, captured the political climate well: "What we are seeing is a re-emergence of state egotism and nationalism. This is our disease, and it goes right to the foundations of the European idea."[99]

Burgeoning populist and nationalist movements are not unique to Europe and the United States, however. In Hong Kong, the Chinese government recently thwarted secession efforts of a growing populist party by preventing two of its pro-independence politicians from taking office.[100] In the Philippines, recently elected President Rodrigo Duterte brought a wave of iron-clad populism to the island nation, promising quick solutions and openly challenging the status quo set by the "elite."[101] These are only a few examples, but they demonstrate a harrowing trend gaining influence across the globe.

Opting not to construct physical walls to keep migrants from entering their countries, some nations are instead erecting cultural barriers. In 2011, France became the first European country to ban the full-face Islamic veil, worn by women in public places.[102] Austria, Germany, Belgium, Italy, and the Netherlands followed suit with their own laws restricting the use of Islamic veils.[103] Other European countries depict men kissing or women bathing topless in advertisements to communicate to would-be migrants that they would not be comfortable in Europe.[104] Far more overt, six thousand alt-right nationalist protesters flooded the streets of Warsaw, Poland, on the nation's independence day in 2017, chanting, "Refugees get out!" and holding signs painted with vividly xenophobic slurs.[105] This nationalist sentiment has found its way as far as South Africa, where the same generation that was freed from the racist oppression of the apartheid era is now committing acts of violence against immigrants from other parts of Africa.[106]

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98.  Shuster, *supra* note 95.

99.  *Id.*

100.  Deidre McPhillips, *Elections You Should Care About in 2017*, U.S. News and World Report (Jan. 19, 2017, 12:21 PM), https://www.usnews.com/news/best-countries/slideshows/key-elections-in-2017?slide=2.

101.  Agence France-Press, *With Duterte win, global populism wave hits Philippines*, Rappler (May 1, 2016, 10:58 AM), https://www.rappler.com/world/global-affairs/132673-global-populism-wave-philippines-duterte.

102.  *The Islamic veil across Europe*, BBC News (May 31, 2018), http://www.bbc.com/news/world-europe-13038095 (experts indicate that national security concerns also play a part in these laws).

103.  *Id.*

104.  Sayers, *supra* note 87, at 44.

105.  Matthew Taylor, *'White Europe': 60,000 nationalists march on Poland's independence day*, Guardian (Nov. 12, 2017), https://www.theguardian.com/world/2017/nov/12/white-europe-60000-nationalists-march-on-polands-independence-day.

106.  *South Africa anti-immigrant violence: Hundreds held*, BBC News (Apr. 19, 2015), http://www.bbc.com/news/world-africa-32372501.

These examples, among many, demonstrate how this disrupted utopian vision of globalized harmony is somersaulting into new forms of populist and nationalist discord around the world. This is not to conclude that the Brexit decision was inherently xenophobic or isolationist. Despite the general narrative espoused by popular media, which consistently aligns all pro-Brexit motivations with these values, it is important to identify legitimate from illegitimate goals—distinguishing patriotism from nationalism, economic protectionism from anti-immigrant rhetoric, and a call for self-determination and true democracy from isolationism and withdrawal. Carefully analyzing competing motivations, while seeking to understand Brexit from a European, and then briefly from a global, perspective reveals a real possibility that this watershed moment for Europe is a signpost of more challenges to come for the EU and perhaps for the rest of the world. In light of the anti-integration sentiments swirling the globe, the EU has an opportunity and responsibility to react and restructure in a way that realigns its mission for peace with the changing landscape of the present day.

## V. CONCLUSION

The European Union is at a crossroads because of Brexit. If Brussels ignores this signpost of impending change, perhaps there will be no immediate consequences, but the European project is facing a period of serious questioning and could even be headed toward devolution if the trends discussed in this paper continue. However, if the EU rises to meet these challenges and is willing to amend some of its laws and much of its bureaucratic culture, the European project, post-Brexit, could emerge stronger than ever. To do this, the EU must curb its advancing legislative agenda in ways that honor its principles of subsidiarity and proportionality so that member states are empowered to play a more active role in the future of Europe. The ECJ's harmonization mandate must be amended so that judicial interpretation no longer serves to further the unenumerated allure of European progress. Finally, the EU must work to quash Brussels' blatant reliance on backdoor political dealings and to bring its democratic processes into the light if voter participation and general citizen enthusiasm for the European project are ever to recover.

Brussels may choose not to heed the warning signs and instead carry on with the European project as usual. By doing this, however, the EU will simply be stoking the embers of euroskepticism that glow beneath the surface of an increasingly hollow democracy. Brexit is the breeze that will keep these embers glowing and may become the wind that bursts them into flame.