COMPLICATED—BUT NOT TOO COMPLICATED: THE SUNSET OF E.U. LAW IN THE U.K. AFTER BREXIT

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INTRODUCTION

The British people voted in June 2016—by a fairly narrow but decisive margin and on a large voter turnout—to leave the European Union (E.U.).[1] There were essentially three forceful reasons for Brexit put forth by the Leave campaign: (1) *Democracy*: that E.U. institutions in their various ways are insulated from popular judgment and lack democratic accountability, and that the United Kingdom (U.K.) has increasingly lost self-government to the E.U.[2]; (2) *Over-regulation*: that there is too much bureaucratic regulation of social as well as economic matters by E.U. bodies[3]; and (3) *Ineffectiveness*: that the E.U., despite or because of its ambitions towards an ever-closer union, has not governed

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1 *See EU Referendum: Results in Full*, BBC NEWS, http://www.bbc.com/news/politics/eu_referendum/results (last visited Dec. 29, 2017).

2 For a very moderately-phrased account of the E.U.'s "democratic deficit," see Andreas Follesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533 (2006).

3 For a critical overview of E.U. consumer regulation, see Soeren Kern, *EU Regulations: "Dictatorship of the Bureaucrats"?*, GATESTONE INST. (Nov. 14, 2013, 5:00 AM), https://www.gatestoneinstitute.org/4053/eu-regulations.

successfully, at least on numerous important matters. Key examples of unsuccessful E.U. governance include: (1) the E.U. currency, the euro, which has proved damaging or worse for many of the euro's E.U. members[4]; (2) mass migration into the E.U., which has neither taken place under orderly control, nor with any clear prospect for great numbers of migrants to be integrated eventually into European society[5]; (3) economic stagnation in Europe, where in recent years, economic growth has been the lowest of the continents on the globe.[6]

The character of the E.U. is complicated. Leaving the E.U. will also be complicated.

From its outset, the E.U. embraced a contradiction, or at least it embraced tendencies that potentially conflict between free trade on the one hand and command-and-control regulation on the other. Actually, the E.U.—like the Common Market out of which it evolved—is not open to world free trade as such: rather, it was and is a customs union, with free movement of goods, services, and citizens among the member states and with exclusive authority to negotiate its members' trade agreements with outside countries.[7] As membership in the E.U. has expanded and because major trade agreements with foreign countries require unanimous approval by E.U. member governments,[8] negotiating such agreements is increasingly a slow, difficult, and uncertain process. An E.U. free trade agreement with Canada remains stalled after more than seven years of negotiations, having risked failure at various points for want of E.U. unanimity.[9] Nonetheless, the European common

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4 For a critique of the euro by a former Chairman of the U.S. Council of Economic Advisers, see Martin Feldstein, *The Failure of the Euro*, FOREIGN AFF., Jan.–Feb. 2012, https://www.foreignaffairs.com/articles/europe/2011-12-13/failure-euro.

5 *See* Walter Russell Mead, *The Roots of the Migration Crisis*, WALL ST. J. (Sept. 11, 2015, 2:16 PM), https://www.wsj.com/articles/the-roots-of-the-migration-crisis-1441995372 (pointing out the conceptual and practical failures of E.U. policy toward migration).

6 *See* Maria Obiols, *World's GDP Growth by Region 2017*, GLOBAL FIN. (Nov. 2, 2017), https://www.gfmag.com/global-data/economic-data/economic-dataworlds-gdp-growth-by-region.

7 *See* Henry Newman, *To Make the Most of Brexit, Britain Must Leave the EU's Customs Union*, TELEGRAPH (Mar. 27, 2017, 10:16 AM), http://www.telegraph.co.uk/news/2017/03/27/make-brexit-britain-should-leave-eus-customs-union (drawing distinctions between a customs union and free trading); *see also* Daniel Hannan, *Staying in the Customs Union After Brexit Would Be a Disaster for British Trade*, INT'L BUS. TIMES (July 3, 2017, 12:03 PM), http://www.ibtimes.co.uk/staying-customs-union-after-brexit-would-be-disaster-britains-trade-1628721 ("Custom unions are much rarer [than free trade areas]. They provide, not just for free trade among the participants, but also for a common external tariff applied against non-members.").

8 *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 64(3), 113, Oct. 26, 2012, 2012 O.J. (C 326) 72, 94 [hereinafter TFEU]. *See generally* TRANSPORT & ENVIRONMENT, CLIENT EARTH, BRIEFING ON THE LIFE CYCLE OF EU TRADE AGREEMENTS (2016), http://www.s2bnetwork.org/wp-content/uploads/2015/09/2016-03-02-briefing-on-the-life-cycle-of-eu-trade-agreements-coll-en.pdf.

9 *See* Viktoria Dendrinou & Julia-Ambra Verlaine, *EU, Canada Sign Landmark Free-Trade Agreement*, WALL ST. J. (Oct. 30, 2016, 3:44 PM), https://www.wsj.com/articles/eu-canada-prepare-to-sign-ceta-trade-deal-1477831000 (describing the "contentious approval process" for

market did do away with internal trade barriers, hence promoting European prosperity in the decades since the Second World War and surely helping to discredit, at least to some extent, the protectionist ideas which historically held sway in continental Europe.[10]

Combining free trade liberalism with a high degree of administrative regulation might be workable, even if somewhat uneasily, at least so long as neither the classically liberal nor the less-liberal tendency is pushed too far and perhaps so long as times are good. The combination actually has fairly deep roots in continental civil law countries, running back at least to Bismarck.[11] In past eras, to be sure, this did not mean international or even Europe-wide free trade—the continental pattern was always protectionist—but it did mean economic capitalism within each European country domestically, yet subject to virtually unlimited Napoleonic government or at least a broadly powerful government bureaucracy. It is not a combination that sits easily with a common law culture or with the British political and mercantile traditions.[12]

Given the somewhat Janus-faced character of the E.U., the U.K. Brexit campaigns, on both sides, were internally contradictory, or rather, they too embraced contradictory tendencies and interests. The Leave party was both pro–freer trade (Daniel Hannan, a prominent and sophisticated leader of the Leave campaign, typified this tendency, urging that the U.K. could and should pursue global freer trade outside the E.U.) and pro–more protectionism and concern about uncontrolled movement of goods, services, and people (Nigel Farage expressed this tendency up to a point, which surely motivated some number of Labour and ex–Labour Leave voters). On the other side, the Remain party was both pro-free trading within the E.U. common market and at the same time—in many cases at least—pro-extensive regulation and—especially on the political center-left—pro-statist and pro-bureaucratic "rule by experts," suspicious (at best) toward market freedom.[13]

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the agreement). The agreement remains stalled as of July 2017. *See* Janyce McGregor, *Canada's Trade Deal with Itself Now in Effect, as EU Deal Waits*, CBC NEWS: POLITICS (July 2, 2017, 5:00 AM), http://www.cbc.ca/news/politics/cfta-interprovincial-trade-july-1-1.4181380.

10 *See generally* RONALD FINDLAY & KEVIN H. O'ROURKE, POWER AND PLENTY: TRADE, WAR, AND THE WORLD ECONOMY IN THE SECOND MILLENNIUM (2007) (examining the history of European protectionist policies).

11 *See* WILLIAM HARBUTT DAWSON, BISMARCK AND STATE SOCIALISM: AN EXPOSITION OF THE SOCIAL AND ECONOMIC LEGISLATION OF GERMANY SINCE 1870 (1891) (a classic study of Bismarck's domestic policy).

12 *See* Ben Wellings, '*Beyond Awkwardness: England, the European Union and the End of Integration,' in* THE UK CHALLENGE TO EUROPEANIZATION: THE PERSISTENCE OF BRITISH EUROSCEPTICISM 33, 46 (Karine Tournier-Sol & Chris Gifford eds., 2016) (quoting Daniel Hannan on the distinctiveness of "Anglosphere values").

13 As an example of mixed signals concerning the E.U., Margaret Thatcher was cited by both sides during the Referendum campaign, albeit more often by the Leave side. On Mrs. Thatcher's

The outcome of the referendum therefore leaves various questions open. Might the U.K. re-join "Europe" on essentially unchanged or on modestly changed terms, perhaps as a European Free Trade Association (EFTA) member; or will it get a better "special" deal with the E.U.; or will it trade on World Trade Organization terms? Will the U.K. move toward more global free trade or more protectionism? What about Scotland? What about Northern Ireland and the cross-border arrangements with the Republic of Ireland—the U.K.'s prospective land border with the E.U.? Much remains to be resolved. The results of the British general election in June 2017—disappointing to Theresa May's Conservatives—are generally thought to have weakened Britain's negotiating position with the E.U., and the government faces criticism, not only from disaffected Remainers, that it lacks a credible plan for withdrawal from the E.U.[14]

From a legal point of view, dis-embracing the E.U. will not be simple. The U.K. has been in the E.U. and hence has subjected itself to E.U. law and regulation over the course of four decades. People outside the U.K. and Europe might not fully appreciate how intertwined the two—E.U. law and U.K. law—have really become. (The E.U. and its institutions are so non-transparent that many people in Britain were not—perhaps until after the referendum—fully aware of it either.) Many, if not most, areas of U.K. law are deeply affected by E.U. treaties, regulations, directives, and decisions. Two such areas of law by way of example are: free movement of people and environmental law. These are by no means unusual in illustrating the extent to which E.U. law has achieved a commanding presence in U.K. legislation, adjudication, and administration.

I. FREE MOVEMENT

In 1957, the European Economic Community (EEC), consisting of six western European member states at the time, created a limited economic right for citizens to live and work (or receive economic services) in any Common Market country.[15] Over the decades, the EEC

ambivalence towards the E.U., her early support for the free-market aspects of the E.U. single market, but her eventual opposition to European integration, see 2 CHARLES MOORE, MARGARET THATCHER: THE AUTHORIZED BIOGRAPHY 337–408 (2015) (Mrs. Thatcher "had 'a love-hate relationship' with the [Single European Act]. She loved 'the commercial aspect of Europe' but she hated 'the political aspects . . . . The only aspect of the EC which Margaret was comfortable with was trade.'" (quoting Secretary of State David Young)).

14 *See Election 2017: Results*, BBC NEWS, http://www.bbc.com/news/election/2017/results (last visited Dec. 29, 2017). *See generally* Jennifer Rankin, *Q&A: How Will the UK Election Result Affect Brexit Talks?*, GUARDIAN (June 12, 2017, 8:04 AM), https://www.theguardian.com/politics/2017/jun/12/brexit-q-and-a-how-will-uk-election-result-affect-eu-talks.

15 *See* Consolidated Version of the Treaty Establishing the European Economic Community

evolved through a series of treaties into the European Union, today embracing twenty-eight member states from the Atlantic to eastern Europe—culturally, economically, and politically much more disparate than the original six. The rights of E.U. citizens and their families to live anywhere in the E.U. have grown as well, both in scope and in complexity. These rights have been incorporated into U.K. law through: E.U. Regulations, which have direct effect in member states; E.U. Directives, which must be adopted through national legislation—and the U.K. has been notably faithful in legislating in accordance with E.U. Directives; and through numerous decisions of the European Court of Justice, which are binding on member states.

E.U. citizens today are free to move and settle throughout the E.U. E.U. Directives and court decisions have addressed—and generally decided in generous terms—ever-widening implications of this freedom. The right to settle—and to live, study, or work without discrimination—extends not only to E.U. citizens, but also to their non-E.U. "third country" family members: spouses or registered partners; children and parents (of both spouses or partners); and to some extent to other dependent family members.[16] Are E.U. migrant workers and their families (including non-E.U. citizens) entitled to social benefits? (Generally yes, as successive decisions have granted unemployment benefits, admission of unmarried partners, job-seekers' allowances, student finance, child-raising allowances, and travel reduction cards for large families.) Must dependent family members (including children over twenty-one) be members of the E.U. citizen's household? (They need not live under the same roof.) How soon are E.U. migrants and their families entitled to permanent residency with no further restriction on their lifetime access to welfare state benefits? (Five years at most, but in many specified circumstances less than that.) How many absences from the host country, and for how long, may occur during the qualifying periods for permanent resident status? (This is minutely regulated in successive decisions.) These questions and many more have given rise to an extensive body of law.[17]

There appears to be general agreement—endorsed by prominent Leave supporters and political leaders—that E.U. citizens who have settled in the U.K. under E.U. law should not lose their rights when the U.K. leaves the E.U. But many issues will need to be resolved including: the status of non-E.U. family members and partners and *their* family members and dependents; eligibility for social welfare benefits;

art. 39, 1992 O.J. (C 325) 51 ("[F]reedom of movement for workers.").

16 *See* ELSPETH GUILD ET AL., THE EU CITIZENSHIP DIRECTIVE: A COMMENTARY (2014) (a thorough and clearly-written treatise on freedom-of-movement law in the E.U., detailing all these points and many more).

17 *See id.*

reciprocity for U.K. citizens in the E.U.; and much more.

II. ENVIRONMENTAL LAW

Environmental law is one element (or chapter) of the E.U. *acquis*—i.e., one of the areas of jurisdiction and control acquired by the E.U.[18] Environmental protection was said to be "one of the Community's essential objectives" by the E.U. court, even before any such objective was expressed in an EEC or E.U. treaty.[19] Later, the Maastricht and Amsterdam Treaties included environmental goals and provisions.[20] Accordingly, U.K. environmental law is extensively determined by the need to comply with E.U. regulations, directives, and decisions. Halsbury's Laws of England provides fifty-three subchapters of U.K. environmental law that follow detailed E.U. legislation, including the laws governing air quality; energy and "climate change"; water quality; waste management and disposal; landfill; noise control; eco-labeling; and more.[21] In cataloging U.K. environmental law, Halsbury's cites 172 binding European regulations, directives, and decisions, many with multiple sub-provisions and articles.[22]

E.U. environmental rules can have dubious, or even perverse, consequences. For example, E.U. policy favors diesel engines, in part out of a preoccupation with greenhouse gases since diesel emits less carbon dioxide than ordinary petrol engines. But diesel emits dangerous pollutants of other kinds, which have contributed to exceptionally severe air pollution in European cities. A scandal emerged in 2015 and 2016 over various Volkswagen and other diesel models, which apparently were systematically designed to cheat emission controls in order to improve their road performance. More than half the European passenger fleet is diesel-powered, whereas only three percent of cars and pickup trucks in the United States are diesel, and E.U. policy is evidently a weighty reason for the disparity.[23] In this, as on many other

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18 The French word *acquis* has a connotation of held tightly, not to be given up.

19 Case 240/83, Procureur de la République v. Ass'n de défense des brûleurs d'huiles usages, 1985 E.C.R. 531, 549.

20 Treaty on European Union, Signed at Maastricht on 7 February 1992 art. 130r(1), 1992 O.J. (C 191) 28 (addressing "environmental problems" now an objective of the E.U.); *see* Eileen Barrington, *European Environmental Law: Before and After Maastricht*, 2 U. MIAMI INT'L & COMP. L. 79 (1992); Banny Poostchi, *The 1997 Treaty of Amsterdam—Implications for EU Environmental Law and Policy-Making*, 7 RECIEL 76 (1998).

21 *See* 45 LORD MACKAY OF CLASHFERN, HALSBURY'S LAWS OF ENGLAND 17–73 (5th ed. 2010).

22 *Id.* at 47–52.

23 *See* Charles W. Schmidt, *Beyond a One-Time Scandal: Europe's Ongoing Diesel Pollution Problem*, 124 ENVTL. HEALTH PERSPECTIVES 19 (2016), https://ehp.niehs.nih.gov/wp-content/uploads/124/1/ehp.124-A19.alt.pdf.

points, U.K. environmental rules and standards have been controlled by E.U. law.

E.U. free movement and environmental law are merely two examples of the broad E.U. presence in U.K. law. There are actually thirty-five chapters of the E.U. *acquis*, which include not only free trade/common market matters like free movement (within the E.U.) of goods, capital, services, and workers, but also competition policy (the analogue to U.S. antitrust), consumer and health protection, company law, intellectual property law, veterinary law, agriculture, fisheries, and much more.[24] The impact, and the degree of absorption, of E.U. mandates on U.K. law is such that it is now impossible to say what proportion of U.K. law is influenced or required by the E.U. Published estimates range from ten or fifteen percent to sixty-five or seventy percent—the low estimates typically come from British supporters of E.U. membership, the high from skeptics or opponents.[25] A House of Commons Report in 2010 concluded that "it is possible to justify any measure between 15% and 50% or thereabouts."[26] David Cameron, leader of the Opposition, publicly "maintained that almost half of all the regulations affecting UK businesses came from the EU."[27] If U.K. administrative rulings of various kinds, as well as statutes, are taken into account—especially on subjects that touch upon the extensive E.U. *acquis*—it is clear that a substantial body of U.K. law has been shaped by E.U. requirements.

III. FORMS OF E.U. LAW

Prime Minister May's Government has undertaken that with Brexit, Parliament will enact a "savings" law to keep everything the same, and indeed, to adopt existing E.U. rules into U.K. law, with the exception of specified laws related to E.U. membership and future submission to E.U. law, regulation, and adjudication.[28] This will set the

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24 *See Chapters of the Acquis*, EUROPEAN COMM'N, https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en (last updated June 12, 2016).

25 *See* Amy Sippit & Conor James McKinney, *UK Law: What Proportion Is Influenced by the EU?*, FULL FACT (June 8, 2016), https://fullfact.org/europe/uk-law-what-proportion-influenced-eu (estimates "have varied wildly from under 10% to 70%"); *see also* Anoosh Chakelian, *How Much of Our Law Is Made in Brussels?*, NEW STATESMAN (June 16, 2016), https://www.newstatesman.com/politics/uk/2016/06/how-much-our-law-made-brussels.

26 Vaughne Miller, *How Much Legislation Comes from Europe?* 3 (House of Commons Library, Research Paper 10/62, 2010), http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP10-62.

27 *Id.* at 17.

28 *See* Jessica Elgot, *Theresa May To Trigger Article 50 by End of March 2017*, GUARDIAN (Oct. 2, 2016, 10:04 AM), https://www.theguardian.com/politics/2016/oct/01/theresa-may-to-

stage for later Parliamentary legislation or statutory instruments—"secondary legislation" in U.K. jargon, equivalent to executive orders or administrative regulations in the United States—to change existing law or regulation. In the Queen's Speech at the opening of the new Parliament after the general election in June 2017, the Government formally undertook to introduce a "Repeal Bill" to revoke the U.K.'s statutory accession to the E.U. and to adopt E.U. law as U.K. domestic law. A Repeal Bill was duly introduced in July 2017.[29] It will be open to debate and amendment in both the House of Commons and the House of Lords after the summer parliamentary recess in 2017 and in 2018. Debate and efforts to amend are sure to be extensive.[30] Given the existing intertwining of U.K. and E.U. law and the complexity of the E.U. legal framework itself, it will not be a simple matter to adopt existing E.U. law: at least, a variety of legal questions will confront Parliament.

E.U. law takes the form of E.U. treaties, E.U. directives, E.U. regulations, E.U. decisions, and judicial decisions of the Court of Justice of the E.U.[31]

E.U. treaties are now incorporated into U.K. law by the European Communities Act 1972, which gives precedence to binding provisions of E.U. law over inconsistent U.K. legislation.[32] The Repeal Act will repeal the European Communities Act. Parliament will have to decide which provisions of the E.U. treaties, if any, are to be retained in U.K. law. Brexit means that the fundamental provisions, whereby the U.K. is a member of the E.U., cannot be retained.

E.U. directives require member states to enact domestic legislation. They are "binding, as to the result to be achieved" but leave it to each member the "choice of form and methods."[33] The U.K. has been faithful in enacting laws, or adopting "secondary legislation," to conform to E.U. directives. As such, E.U. law stemming from E.U. directives is already embedded in U.K. domestic law and will therefore continue in

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propose-great-repeal-bill-to-unwind-eu-laws.

29 *See* European Union (Withdrawal) Bill 2017-19, HC Bill [5] (UK), https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf; *see also EU Withdrawal Bill (Repeal Bill)*, INST. FOR GOV'T, https://www.instituteforgovernment.org.uk/explainers/repeal-bill (last updated Oct. 30, 2017, 12:45 PM) (summarizing the Repeal Bill and providing links, *inter alia*, to the text of the Bill and to the government's explanatory notes).

30 *See* Stephen Booth, *What to Expect When the Repeal Bill Lands in the Commons Next Week*, OPEN EUR. (July 6, 2017), http://openeurope.org.uk/today/blog/what-to-expect-when-the-repeal-bill-lands-in-the-commons-next-week (previewing the likely course of the Parliamentary passage of the Repeal Bill: "the whole process could easily blow up").

31 *See Regulations, Directives and Other Acts*, EUR. UNION, https://europa.eu/european-union/eu-law/legal-acts_en (last updated Dec. 30, 2017).

32 European Communities Act 1972, c.68, § 2(4) (U.K.) (making U.K. law "subject to" directly applicable E.U. law).

33 TFEU, *supra* note 8, art. 288.

force until amended or repealed, now or in the future.

E.U. regulations, by contrast, are "directly applicable" in member states without the need for domestic implementing legislation.[34] They now hold sway in the U.K. by virtue of the European Communities Act. The Repeal Bill would bring the E.U. regulations, at least for now, into U.K. domestic law. E.U. regulations are numerous and in fact underpin much of today's U.K. law. Yet many E.U. regulations are considered burdensome by many people in Britain, and surely as a body of regulation as a whole, by many who voted for Brexit. As of now, these regulations are separate in principle from the rest of U.K. law. Among other things, this means they are interpreted by the U.K. courts in accordance with E.U. principles of interpretation, somewhat differently from the way domestic laws are interpreted.[35] There is at least a certain irony in fully incorporating E.U. regulations into U.K. law at the very moment the U.K. leaves the E.U., and there will be a question as to how the U.K. courts are to interpret them in the future.

E.U. decisions—by the "executive" rather than the judicial arms of the E.U.—are addressed to particular persons or entities and are binding upon them.[36] A typical decision might rule on a proposed business merger or permit (or forbid) a company to put a particular product on the market.[37] As to such E.U. decisions already in force, the Repeal Bill would adopt them into U.K. domestic law.

Judicial decisions of the E.U. Court of Justice interpret the law of the E.U. and are binding on member states. The court decides upward of six hundred cases per year on all aspects of E.U. law: competition and antitrust, intellectual and industrial property, environmental law, issues arising over the free movement of people, and much else. It is generally recognized that the court has a "teleological" tendency, namely to advance E.U. integration, or to put it plainly, to enhance the power of E.U. institutions at the expense of the member-state governments.[38] E.U. law concerning freedom of movement and the rights of E.U. migrants, to take one example, is largely defined by hundreds of E.U. Court decisions issued at an accelerating rate in the past two or three decades.[39] Advocates for Brexit during the referendum campaign urged that the U.K. should no longer be subject to the rulings of the E.U. court

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34 *Id.*

35 *See infra* note 42 and accompanying text.

36 *European Union Decisions*, EUR-LEX, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Aai0036 (last updated Sept. 16, 2015).

37 *See, e.g.*, Commission Decision 2016/1189, 2016 O.J. (L 196) 50 (permitting Dairy Crest Ltd., an Irish dairy company, to market ultra-violet treated milk). *See generally European Union Decisions*, *supra* note 36.

38 *See, e.g.*, GERARD CONWAY, THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE (2012).

39 *See* GUILD ET AL., *supra* note 16.

and that U.K. courts, instead, should once again have the final say in the U.K.[40] If existing E.U. law is to be adopted into U.K. law, this will include the E.U. court's jurisprudence to date. If so, will this mean that the court's decisions will be accepted only as to the rights of the parties adjudicated in those cases, or will the court's interpretations of E.U. law—hitherto binding generally—be accepted as well?[41]

In addition to the specific rules and decisions, there are also general principles of E.U. law, which the domestic courts of member states as well as the E.U. courts are required to apply when ruling on matters that touch on E.U. law. One such is the principle of "proportionality," essentially a balancing test for judicial review, weighing the public need for a particular government measure against the burden on the individual challenging it.[42] The U.K. courts, until now, apply the principle as they must, when faced with matters touching on the E.U. *acquis*. Purely domestic U.K. law, on the other hand, is not subject to the proportionality principle. There is judicial review of government actions by U.K. courts—on matters not within E.U. competence—on grounds of illegality, procedural impropriety, or irrationality, but review for proportionality means greater intensity of review, more judicial discretion, and power to review the benefits and burdens of government policies and actions.[43] If E.U. law is now to be adopted as U.K. law, will the U.K. courts continue to have the power of review for proportionality? Will this power be restricted, as it is now, to questions which touched on E.U. competence during the U.K.'s membership in the E.U.? Or will the U.K. courts gain this power in all cases of judicial review? The broader the scope for the proportionality principle, the greater the power of the judiciary over public policy: a power which has traditionally been quite limited in England, in contrast to the broader scope of constitutional judicial review in the United

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40 *See* Stephanie Bodoni, *Why EU Court of Justice Is a Key Brexit Battleground*, BLOOMBERG POL. (July 26, 2017, 12:00 AM), https://www.bloomberg.com/news/articles/2017-07-27/why-eu-court-of-justice-is-a-brexit-battleground-quicktake-q-a. There is fairly long-standing precedent for British desire not to be subject to the judgments of foreign tribunals. The first Statute of Praemunire was adopted in England in the year 1353, prohibiting appeals outside the realm—i.e. to the Papal courts—and anyone who offended by pursuing such an appeal was liable to outlawry. This was more than a century and a half before the Protestant Reformation. *See Praemunire*, ENCYCLOPEDIA BRITANNICA (11th ed. 1911).

41 *See* Richard Ekins, *The Panic About a Brexit Legal Limbo Isn't Justified*, SPECTATOR (Aug. 12, 2017, 8:15 AM), https://blogs.spectator.co.uk/2017/08/the-panic-about-a-brexit-legal-limbo-isnt-justified (noting that the outgoing President of the Supreme Court has called for guidance from Parliament about how the U.K. courts should interpret and apply European Court decisions after Brexit).

42 *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 139 (2008) ("[Proportionality Analysis] constitutes the foundation of the ECJ's jurisprudence . . . .").

43 *See* R. v. Sec'y of State for the Home Dep't, Ex Parte Daly [2001] UKHL 26, [27] (appeal taken from Eng.) (The "intensity of review" is "greater" for proportionality).

States.[44] The U.K. will have to decide to what extent such E.U. principles will be adopted, if at all, into U.K. law.

IV. RECEPTION OR SUNSET?

In considering how the U.K. might manage the legacy of E.U. law after Brexit, the "reception" of common law by the newly independent United States in the late eighteenth and early nineteenth centuries might—at least superficially—seem an interesting and relevant model. In the aftermath of the Declaration of American Independence in 1776, each American state signaled its reception of English common law, either in its state constitution, by state statute, or in a state judicial decision. On the other hand, the U.S. Constitution made no explicit provision for the reception of English law, although "law and equity" and "suits at common law" are mentioned without reference to whose common law.[45]

The Delaware State Constitution of 1776, fairly typically, provided:

> The common law of England, as-well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, &c., agreed to by this convention.[46]

The North Carolina Reception Statute of 1778 provided:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.[47]

There is extensive scholarly literature on the reception of English common law in the early years of American independence and some controversy over how much weight English law and precedent actually

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[44] *See* Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 209–12 (1994) (attributing the judicial restraint of twentieth century English courts to the sociology of the English judiciary and the Bar from which it was drawn).

[45] U.S. CONST. art. III, § 2, cl. 1; U.S. CONST. amend. VII.

[46] DEL. CONST. art. XXV (1776).

[47] Act of 1778, ch. 133, P.R., *reprinted in* N.C. GEN. STAT. § 4-1 (2015).

had in American government and adjudication.[48] It is clear that by the mid-nineteenth century, if not before, American legal institutions already diverged substantially from British ones and that American courts cited English precedents less and less.[49] Nonetheless, some English common law institutions persisted, and persist to this day: trial by jury, habeas corpus, judge-made law based on more or less flexible precedent, and numerous common law rules and doctrines, as well as something of a common law ethos.

In various ways though, the early American adoption of common law might be a misleading model for the U.K. in confronting E.U. law. The English common law, especially at the time of American independence, was mostly case law accompanied by a fairly modest body of statutes, and many English statutes were either explicitly repudiated or tacitly ignored in America.[50] As such, common law was readily adaptable to changing circumstances. Moreover, common law at the time and thereafter, both in England and America, tended more or less consciously to reflect classically liberal ideas.[51] E.U. law, by contrast, includes a great volume of minute regulation, often—perhaps increasingly in recent years—more in the spirit of a Bismarckian administrative state than in any classically liberal spirit. Insofar as the Brexit decision represents a rejection of the E.U. regulatory model, a reception of E.U. law—or at least sticking with E.U. law wholesale and for the long term—would seem to be at odds with the spirit of the decision.

In a different approach, the U.K. might consider adopting a "sunset" principle for E.U. law.[52] A sunset rule provides that a given law, body of law, or regulation lapses after a stipulated period of time unless affirmatively re-enacted. There is a case for the idea that all laws should be subject to such a principle, rather than the idea that a law once enacted should stay on the books forever.[53] Thomas Jefferson suggested

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48 *See* Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 L. LIBR. J. 13 (1989) (analyzing the course of common law in the United States and providing a bibliography of sources).

49 *See, e.g.*, Elizabeth Gaspar Brown, *Frontier Justice: Wayne County 1796–1836*, *in* ESSAYS IN NINETEENTH-CENTURY AMERICAN LEGAL HISTORY 676, 686 (Wythe Holt ed., 1976) (noting a nineteenth century change from reliance on English sources of law to an increasing reliance on citations to American sources).

50 *See* Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 817 (1951) (noting that post-independence, American states accepted "some, but not all, of English statutory law" and "left judges relatively free to make a selective application of British legislation").

51 *See* Maimon Schwarzschild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 678 (2007) (reflecting on the "classically liberal ideas in the common law bloodstream").

52 Thanks to my colleague Gail Heriot, who suggested the desirability of sunset provisions in this context.

53 *See, e.g.*, Philip K. Howard, *A Case for Sunset Laws: One Nation, Under Too Many Never-Ending Statutes*, OR. LIVE (Jan. 1, 2011, 7:46 AM), http://www.oregonlive.com/opinion/

that "every law," and indeed every constitution, should "naturally expire[] at the end of 19 years"—a generation as he calculated it.[54] This might seem especially apt for E.U. law in the U.K., given that the Brexit decision implies that the U.K. should be free of E.U. requirements, at least ultimately, unless the U.K. affirmatively opts for a given E.U. rule or body of rules. On the other hand, the period of years implicit in a sunset principle takes into account the desire or need for stability and continuity at the outset of Brexit. It also takes into account that much U.K. law today is E.U. law and that the U.K. will surely decide to keep some of it and after consideration and debate, might decide to keep much of it. U.K. environmental law is one example, by no means unique, of a field now dominated by E.U. rules. Environmentalist voters and groups may—in fact they almost certainly will—strongly agitate for keeping the existing framework of environmental regulation.

In recent months, after the Prime Minister said that E.U. law would be adopted into U.K. law, there have actually been calls for sunset provisions. A former head of the British Chambers of Commerce advocates a sunset clause for E.U. law with a "cutoff point as late as 2030."[55] A Conservative member of Parliament has called for a sunset period of just five years.[56] If sunset provisions are to be adopted, Parliament will have to decide what the time periods will be and the types or subject matters of E.U. law to which the provisions will apply. But sunset clauses have been common in British statutes, past and present—they "are in the legal DNA of the UK."[57] By creating a presumption for the eventual expiry of E.U. rules—subject of course to retention or re-enactment of E.U. law wherever this is thought desirable—the sunset principle would concentrate the minds of the government, the civil service, and the voting public, on which E.U. rules are valued and should be kept in force.

If sunset clauses are not adopted, the practical alternative will be for Parliament to give the government power to cancel E.U. rules by secondary legislation—by "statutory instrument," equivalent to

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index.ssf/2011/01/a_case_for_sunset_laws_one_nat.html ("America is choking on laws of our own making.").

54 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 1 THE FOUNDERS' CONSTITUTION, 68, 69 (Philip B. Kurland & Ralph Lerner eds., 2001), http://press-pubs.uchicago.edu/founders/print_documents/v1ch2s23.html ("[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.").

55 William Shaw, *UK Business Experts Call for Brexit 'Sunset Clause*,*'* LAW360 (Oct. 6, 2016, 6:56 PM), https://www.law360.com/articles/848976.

56 Thomas Colson, *A Conservative MP Is Calling for a 'Sunset Clause' Which Would Kill All EU Laws in the UK After Five Years*, BUS. INSIDER (Oct. 24, 2016, 6:21 AM), http://www.businessinsider.com/brexit-deal-mp-grant-shapps-calls-for-sunset-clause-to-kill-all-eu-laws-in-uk-2016-10.

57 ANTONIOS E. KOUROUTAKIS, THE CONSTITUTIONAL VALUE OF SUNSET CLAUSES: AN HISTORICAL AND NORMATIVE ANALYSIS 171 (2017) (internal quotation marks omitted).

executive order or administrative regulation in the United States. This power is commonplace in U.K. legislation and much of the E.U. law now in force was in fact introduced into U.K. law by just such secondary legislation. Since the referendum it was generally anticipated, by friend and foe of Brexit alike, that Parliament would grant broad power along these lines.[58] The Repeal Bill introduced by Prime Minister May's Government provides for ministers to have power to deal with "deficiencies" in E.U. law incorporated into U.K. law.[59] The question then will be how the Government or future Governments will use this power, how extensively E.U. regulation will be cut back after Brexit, and which E.U. rules will be retained in the years and decades ahead.[60]

While Brexit will surely be complicated in various ways, it is also the case that many countries have acquired, or re-acquired, their independence and cut their pre-existing legal umbilical cords—and many have thrived. The United States itself is an obvious example, but there are numerous more recent examples as well. The Common Market and even the E.U. were by no means all bad or even all bad for Britain, even from a classically liberal point of view. But the E.U., as almost everyone concedes, has a considerable "democratic deficit." As its bureaucracy has grown, it has not grown more accountable, and the E.U. faces numerous and grave economic and social challenges. Britain was a member of the E.U. for decades but never fully enthused by it.[61] Re-acquiring independence will raise difficulties: the British people were fully warned of these in a massive Remain campaign which no one could fault for understatement. Choosing to Remain, in what some might view as perpetual tutelage, might have been the path of least resistance. But the majority of U.K. voters decided that is not what they wanted. Given the tendency towards ever-greater centralization of power in E.U. institutions and the increasing erosion of national

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58 *See, e.g.*, Jo Murkens, *The Great Repeal Act Will Leave Parliament Sidelined and Disempowered*, LSE BREXIT (Oct. 21, 2016), http://blogs.lse.ac.uk/brexit/2016/10/21/the-great-repeal-act-will-leave-parliament-sidelined-and-disempowered ("The Bill will probably include a 'Henry VIII' clause, authorising the government, rather than Parliament, to use subordinate legislation to amend or repeal primary [i.e. E.U.] legislation. Such clauses are admittedly common in domestic legislation.").

59 European Union (Withdrawal) Bill 2017-19, *supra* note 29, cl. 7.

60 For a perceptive analysis of the judicial politics likely to arise over the government's executive powers of secondary legislation regarding inherited E.U. law, see David Campbell, Marbury v. Madison *in the UK: Brexit and the Creation of Judicial Supremacy*, 39 CARDOZO L. REV. 921 (2018).

61 *See* Phillip Stephens, *The UK Mindset That Heralds a Disorderly Brexit*, FIN. TIMES (Jan. 5, 2017), https://www.ft.com/content/4434bb14-d275-11e6-b06b-680c49b4b4c0 (complaining from the Financial Times' strongly pro-E.U. standpoint that "Britain has regarded the EU as a commercial transaction not a political project," and quoting the passionately pro-E.U. Chris Patten, a former E.U. Commissioner, that "for all its decades of membership, Britain . . . never really joined the EU").

democracy that membership implied, it was a bold and admirable decision.[62]

[62] For a fascinating philosophical exploration of the principles inspiring Brexit, see Yoram Hazony, *Nationalism and the Future of Western Freedom*, MOSAIC (Sept. 6, 2016), https://mosaicmagazine.com/essay/2016/09/nationalism-and-the-future-of-western-freedom (distinguishing the imperial idea of universal government in Western thought from the Biblical idea of national freedom and pluralism and arguing that "the possible re-emergence of a free and independent Britain" represents a challenge by the latter Biblical idea to the elite hegemony of the former).