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## The Political Mantra

Brexit, Control and the Transformation  
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## 1. Introduction: Equilibrium Transformed

‘Taking Back Control’. It is hard to deny the power of the Brexiteers’ mantra in the run up to the June 2016 referendum, which set in motion Britain’s exit from the European Union. Obviously, the phrase meant different things to different people depending on what control was about (our laws, our money, our borders, our democracy), who it was taken back from (Brussels, Berlin, London, Apple), and what it actually referred to (autonomy, independence, freedom, sovereignty). But anyone can grasp its universal appeal. The question raised by this core tenet of the Brexit vote is as old as human social life: how do different individuals or groups apprehend the trade-off between cooperation and control? More than ever before, the modern era’s growing interdependence has exacerbated the tension. Western states’ areas of responsibility have increased as their ability to control transnational interaction decreased. Liberal economic policies, including free trade, further allowed for the relinquishing of direct control over aspects of a state’s economy, promising to abide by common rules in exchange for the benefits of freely moving capital and even people. Even if larger states have less need of cooperation than smaller ones, their governments are subject to the same pressures by those (exporters, students, patients, idealists) who value cooperation over control and those (import competing, migrant competing, identity sensitive) who value control over cooperation.

One response to the Brexit mantra is to deny the trade-off altogether—call it ‘ideological crap’, according to Tory grandee Chris Patten. If power is the measure of control over outcomes, events or other actors, giving up control

by conforming to shared EU rules, *actually* buys power or control in at least two ways. First, internally, through *reciprocal control*, that is the control which follows from co-shaping the actions of governments and other actors in other jurisdictions. Being able to tie the hands of others is a net increase in control to the extent that one's power can be translated into shared rules and to the extent the other side's actions impact us irrespectively. Secondly, externally, through greater *collective control* over extra-EU developments, or the 'power multiplier effect'. This is what Macron means when he describes the EU as 'the instrument of power' and 'the right level of sovereignty' enabling each country better to confront global challenges such as migration, terrorism, climate, or digitalization. In this light, in his words 'what is going to happen for Britain is not taking back control: it's servitude'. This was a core tenet of the argument to stay in: by ignoring such loss of reciprocal and collective control, popular decisions against EU membership fall prey to the delusion of what the Norwegians call 'distorted sovereignty'.

Nevertheless, the trade-off between control and cooperation remains, even if mitigated. And the challenge for a cooperative endeavour like the EU is to find the right balance between different national 'right balances'. We can assume that this is true for all exercises in transnational cooperation. The EU is simply a more extreme form of the tension: having engineered more interdependence through greater cooperation between its Member States than any other international organization, and yet home to the very same people whose forbears invented the idea of national sovereignty in the first place and who in their great majority remain wedded to the national as their preferred *locus* of collective control.

EU cooperation has led to different institutionalization of 'the right balance' depending on the issue at stake. But when it comes to an 'existential referendum' as with Brexit, each individual voter makes her own overall and subjective rough assessment. A basic understanding of the UK mainstream pro-leave position is that from the initial decision to join the 'common market' onwards, deeper cooperation has always been the 'price demanded' for continuing trade relations, rather than a goal in itself as it may have been for other Member States on the continent. Brexit then would be the obvious and inevitable consequence of demanding an ever-increasing price for something: eventually, you reach a price the Brits will no longer pay. The expanding costs in terms of 'sovereign control' simply outweigh the benefits of cooperation. Is this the key to Brexit?

This chapter does not pretend to *explain* the radical rupture that Brexit undoubtedly represents for European integration. Instead, I seek to situate Brexit in the *longue durée*, against a highly stylized account of the long-term transformation of the European order and the nexus between the EU, Brexit,

and control. I believe that the 'Brexit moment' calls for systematically laying out what we could interpret as the building blocks, or primary material, upon which politics, political debate, and manipulation ultimately builds, eg the permissive context upon which we layer our explanatory theories. Obviously, this assessment depends on the theoretical lens one adopts to examine the integration process, what one thinks of the primacy granted to inter-governmentalism, whether one holds on to the international relations assumption of state-centrism, or whether one acknowledges existing limitations to materialist notions of power. We can also import into this exercise the insights of adjacent fields that become relevant to European integration with Brexit, namely theories of accommodation of secessionist demands in multinational democracies. Brexit, in other words, opens up a whole range of questions for political scientists, which in turn can help inform the kind of legal debates discussed in this volume.

The focus adopted here on the issue of 'control' is but one possible entry point into this vast agenda. But it is one which I believe is critical if we are concerned not only about Brexit per se but also about the future of Europe after Brexit. If we are, we need to ask: is Brexit primarily due to British exceptionalism and therefore Britain's problem, or is it the expression of a deeper *malaise* about 'control' across the EU, an echo of the French *Non* and Dutch *Nee* to the EU constitutional treaty a decade earlier? Even if we were to agree that the British public is an outlier on the EU, does it not matter to ask whether the EU system is more prone to accommodating differences and even 'exceptions' or weeding them out?

I argue that as scholars come to re-examine four decades of British membership in the EU and their culmination in withdrawal, they ought to pay special attention to developments that have sustained or conversely unsettled the balance between the legal and political constraints of EU cooperation and the technologies of control used by various actors in its political constellation. Our focus must move away from teleology and the implicit centralizing bias of functionalist theories to assess the ways in which the EU's sustainability has been predicated on the 'equilibrium' between cooperation and control imperatives, even if its instantiation has been changing over time.<sup>1</sup> In spite of its remarkable transformation, the EU must more than ever heed Weiler's post-Maastricht warning against unravelling its precious equilibrium.<sup>2</sup> What is at stake here is not merely who stays and who goes but the very essence

<sup>1</sup> Andrew Moravcsik and Kalyso Nicolaïdis, 'Keynote Article: Federal Ideals and Constitutional Realities in the Treaty of Amsterdam' (1998) 36 (Annual Review) *Journal of Common Market Studies* 13.

<sup>2</sup> J H H Weiler, 'The Transformation of Europe' (1992) 100(8) *Yale Law Journal* 2403.

of the EU. If a genuine principle of constitutional tolerance had found its expression in an EU constitutional discipline which is not rooted in a statist-type constitution, it would have meant that European peoples accept to be bound not by a majority of their own but a majority of others. It would have meant that the EU has managed to escape the false alternative between an association of sovereign states and turning into a federal state itself, deepening instead its credentials as a third way, a ‘demoicracy in the making’, a Union of peoples who govern together but not as one, and stay together by choice.

Brexit can be seen as a dramatic commentary on this transformative challenge which, in a most extreme interpretation lies with a kind of radical agonistic bet: that the complex and deep social structure underpinning integration in Europe progressively created a space where conflict about the implications of ‘togetherness’ could take place not only through deliberation but also through contestation and even ultimately peaceful self-exclusion. Is this not the spirit of constitutional tolerance? If this is the case, I believe that the possibility of withdrawing from the Union to reassert control ought to be seen as an intrinsic part of the European project, not an aberration.

In this light, we need to draw lessons from what I call the Brexit paradox—that the possibility and manner of leaving (unilateral and unconditional) contradicts its rationale (eg the assumption that shackled countries need to ‘take back control’).<sup>3</sup> The Brexit paradox emerges from a tension between different expressions of “control”: EU level bargaining over the *scope* of formal jurisdictional space versus how such bargains translate on the ground, or the *depth* of EU impact within each polity. The British state lies at one end of the spectrum in its willingness and capacity to minimize the formal loss of national control from jurisdictional cooperation; but it lies at the other end of the spectrum when it comes to the country’s vulnerability to actual losses of control once commitments have been made—a vulnerability that is political and subjective as much as linked to the UK’s legal and economic material features.

In the rest of this chapter this argument unfolds in three phases, which correspond to the three legal orders of a federation of free states as identified by Kant (1795): (i) relations between states as governed by *ius gentium*, (ii) relations between nationals and a foreign state as defined by *ius cosmopolitanicum*, and (iii) relations between citizens and state as established by *ius civitatis*. In other words, the transformation of the European state system, the transformation of European borders, and the transformation of European states or state-society relations. Each of these realms has evolved differently over time,

<sup>3</sup> Kalypso Nicolaidis, *Exodus, Reckoning, Sacrifice: Three Meanings of Brexit* (Unbound Publishers and Penguin Random House, 2018).

is affected differently by EU membership, and affects the UK differently from other Member States. If exceptionalism resides with a country's specific way of combining common features, British exceptionalism must be sought in the paradoxical contrast between the first (where the UK maximizes control) and the other two (where the UK retains minimal control) dimensions of Europe's legal, political, and constitutional order.

## 2. *Ius Gentium*: The Transformation of the Inter-state System

If the 'law of nations' or *ius gentium* has been broadly understood as the 'reasoned compliance with standards of international conduct' since Antiquity, Britain has long played a central role in shaping its countless variations on the European continent.<sup>4</sup> If the EU is but the last iteration of the transformation of the European state system, Brexit represents but the last expression of the cycle of involvement and retreat between Britain and the continent. Arguably, however, the EU has offered a particularly British-friendly terrain for adjudicating between cooperation and control, which I discuss under the three rubrics of balance of power, constitutional order, and conflict of law. The Brexit paradox starts here.

### 2.1 The EU as Institutionalized Balance of Power

For the last 300 years, the meaning of 'control' when it came to Great Britain's involvement in the politics of the continent came under one main label: the balance of power. The idea gained currency among diplomats and scholars alike during the 17th century, with antecedents in Antiquity and Renaissance Italy, according to which the supreme object of international politics ought to be the maintenance of 'the' equilibrium between the most powerful actors in the system to ensure that none would be in a position to dominate others. As with Newtonian astronomy, states were seen to exert a pull on one another as a function of their respective masses and relative distances, so that the stability of the whole could be affected by changing mass, unless the distances were corrected, the alliances changed, the states regrouped.<sup>5</sup> The idea evolved from descriptive to normative, which not only led to alliances in order to resist the

<sup>4</sup> David J Bederman, *International Law in Antiquity* (Cambridge University Press 2004).

<sup>5</sup> Herbert Butterfield, *Dictionary of the History of Ideas* (University of Virginia Library 1973).

predominant power of the day but to a general assumption that this process itself would constantly need to be reinvented since it would inevitably generate new aggressors, who, demanding more and more security against the enemy, might slide imperceptibly into lust for ‘universal dominion’.<sup>6</sup>

The idea was especially dear to Britain, loath to see its trade access dominated or cut off by some malevolent hegemon from the continent bent on extracting rents in the process. It made sense for the British, Danes, or Venetians to support France against the threat of ‘universal dominion’ from the Habsburgs, spreading from Austria to Spain, from Hungary to Italy, from the Netherlands to Germany. But it equally made sense to resist French hegemony later.

Crucially, its 17th and 18th century defenders claimed that the balance of power system was the only way to secure the existence of small states in a world at the mercy of force. Not only was distribution and dispersion of power important for stability but the system might in fact depend on these small states, capable of shifting their allegiance against the greatest current threat. Moreover, small states offered an intrinsic value against uniformity bolstering a European civilization enriched by the variety of its national manifestations. Dominated in war, they became independent in peace and equal in diplomacy, sustaining an international system which in turn gave them their autonomy and freedom of action.

Equally crucially, defenders of the balance of power argued that such balancing could not occur in a vacuum, that a state system depended in fact on an underlying common sense of values and a preexisting community of tradition and custom.<sup>7</sup> The international order itself, and the balance within it, depended on the assumption that all the participants were akin to members of the same club to which loyalty was owed: the enlightened egotism of states—as opposed to self-righteous proselytism—meant that they should rise if ‘their’ international order were threatened.

The most successful instantiation of the this idea had been the Concert of Europe conceived in 1814 at the Congress of Vienna and founded by the 1815 Treaty of Hertslet, whereby the great powers in Europe laid the foundations of a European peace that would last for a century (although arguably the Concert itself formally ended in 1856 with the Crimean War). The new order was made possible when Britain announced its preparedness to relinquish military gains won in the course of the Napoleonic War in order ‘to promote the general interest’.<sup>8</sup> This is the argument offered by French opinion-makers

<sup>6</sup> *ibid.*      <sup>7</sup> *ibid.*

<sup>8</sup> Cabinet Memorandum (26 December 1813), cited in Louise Richardson, ‘The Concert of Europe and Security Management in the Nineteenth Century’ in Helga Haftendorn, Robert O Keohane, and Celeste A Wallander (eds), *Imperfect Unions: Security Institutions over Time and Space* (Oxford University Press 1999) 48–79, at 48.

pleading with the British public to remain in the EU: 'Waterloo marked the beginning of an unprecedented era of peace, stability and development in Europe. Waterloo marked the end of the political cycle of the French Revolution and the beginning of the industrial revolution in Britain. For the next century, no major European war would erupt. After the Congress of Vienna, European monarchs took to meeting regularly to solve tensions and crises: a new system of collective security had emerged'.<sup>9</sup>

How did the Concert of Europe ensure peace-without-dominion? This was not a victor's peace as witnessed by France's rapid integration in the system. To use the language of contemporary international relations scholars, the leaders of the great powers created a loose institutional arrangement able to sustain cooperation between states and facilitate peaceful adaptation to changing relative power in the international system thanks to 'a set of habits and practices shaped towards the realization of common goals'.<sup>10</sup> Their relations were thus mediated by a complex set of norms included self-restraint, consultation in terms of crisis, no unilateral action, and affirmation of pacific intent, and initially at least bolstered by constant communication. They respected each other's prestige requirements and all came to consider maintenance of the concert as part of their 'national interest'. As a result and for four decades, the Concert 'served as an arena for the exercise of influence, constrained bargaining strategies, facilitated side payment, enabled signalling, enhanced predictability and specified obligations guiding state actions'.<sup>11</sup>

Sounds familiar? Of course, the new order did not end well in 1914. But to treat 20th century European integration as if it was uniquely a reaction against the 19th century European system, overlooks the thread that links Westphalia to Vienna and Vienna to Brussels, and the importance of power as the dominant currency of the historical search for peace in Europe. Has the EU done much more than cleverly institutionalize the balance of power on the continent initially between France, Italy, and Germany, eventually joined by the UK?

It can be argued that, by joining the EU in 1973, the UK entered a system of institutions that was to a great extent doing its bidding, designed to contain any potential hegemonic aspirations on the continent and to give small states disproportionate power in terms of representation (Commissioners, parliamentarians, representatives in Council meetings, and, of course, the rotating

<sup>9</sup> 'Editorial' *Le Monde* (18 June 2015).

<sup>10</sup> Hedley Bull, *The Anarchical Society: A Study of World Order in Politics* (Macmillan 1977) 74. On an institutionalist reading of the Concert see Richardson (n 8).

<sup>11</sup> See Richardson (n 8) 56.

presidency) and voting power.<sup>12</sup> In the process, trade access would be guaranteed through shared rules that had replaced even the remotest possibility of bilateral deals, arbitrary moves and blackmail between Britain and continental powers, thus granting the former what I earlier referred to as reciprocal control. And on the external front, Britain more often than not was able to harness the EU's collective trade power (or control) to its benefit.

This did not mean of course that the system failed to reflect asymmetries of power. But in short, Britain quickly became everyone's favourite balancer, of Germany on behalf of France, of France on behalf of the Germans, and of both on behalf of the so-called periphery. With France and Germany together encompassing 30 percent of the EU's population and almost half of its GDP, the UK's role in balancing their combined weight in the system was crucial from the view point of the many small and medium-sized Member States, from Denmark to the Baltics, from the Central European Visegrad Four to the Netherlands. After all, by 2016 the UK was equal to the twenty smaller states in the EU measured by GDP.

Things did change in the run up of the Brexit vote. While the system has continued formally to accommodate power imbalances between big and small states, it is no longer clear whether the 'institutionalised' part of the balance of power continues to mitigate the underlying power asymmetries between Member States or has instead come to magnify them. Britain has remained one of the core states around which others coalesce, but balancing has become a more arduous game. Particularly after the euro crisis, many states and not only Britain have felt that the EU's balance of power set-up is no longer in equilibrium. The choice seemingly offered by pre-Brexit Europe presents powerful echoes of the past: resist German preponderance from within, including through selective bandwagoning or resist and retreat outside its reach.<sup>13</sup> The later, however, might be illusionary.

## 2.2 The EU as a Differentiated Legal Order

But how constrained has Britain truly been as an EU member? In order to bring the question of control into focus substantively we would need to examine in detail the more fine-tuned features of inter-state law and politics in the EU. I can only provide some basic highlights from the relevant literature which is much too vast to summarize.

<sup>12</sup> Kalypso Nicolaidis and Paul Magnette, 'Coping with the Lilliput Syndrome: Large vs. Small Member States in the European Convention' (2004) 13 *Politique Europeene* 69.

<sup>13</sup> As usually presented in the many dystopian novels published since the post-Maastricht year. See inter alia Andrew Roberts, *The Aachen Memorandum* (Weidenfeld & Nicolson 1995).



The first paradox of our story is that when the UK joined in 1973, the EU had already undergone its first mutation away from the traditional albeit highly cooperative inter-state system which the Treaty of Rome had codified. It had already been a decade since the European Court of Justice (ECJ, now the Court of Justice of the European Union (CJEU)) established in its early case law that *once* a state had voluntarily signed up to the Treaties, it would be subject to the CJEU interpretation of what these obligations entailed.<sup>14</sup> Such 'direct effect' of EU norms conferred rights on individuals, which the Member States' courts were bound to recognize and enforce, thus empowering (some) individuals and firms against their own state and shifting control not only upwards but downwards as well. To be sure, there were caveats or conditions established by the Court. Nevertheless, this move alone, which cannot be found in any other regime of inter-state law sets the EU apart in its approach to sovereignty.

Much has been written since then on the EU's emerging constitutional order, the autonomy of EU law, and the departure from classic international relations which these developments have entailed. EU legal theory has explored the need to revisit reigning legal paradigms beyond mere conceptual tweaking, through discussions of 'supranationality' or 'constitutional pluralism'.<sup>15</sup> Some have plausibly argued that EU law does not determine its own structure and is a result of the joint application of EU, national, and international law, thus making it far from a typical constitutional model—still to a great extent an international organization.<sup>16</sup> But at the same time, it can be argued that the EU's constitutional DNA whereby its powers are purposive and functional, leads to the pre-emption of essential choices through the normal course of politics within and between state.<sup>17</sup>

Why then could this early state of affairs be considered by the UK as falling under an acceptable equilibrium between the benefits of cooperation and the cost of national relinquishing of control, especially with the subsequent expansion of EU competences? One answer rests with the disaggregation of control into two separate dynamics, namely the realms of law and politics. Accordingly, while the CJEU's interpretation of the law's constraining effect made selective exit from these constraints harder, the political

<sup>14</sup> Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, [1970] CMLR 1.

<sup>15</sup> Gráinne de Búrca and J H H Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012).

<sup>16</sup> Pavlos Eleftheriadis, 'The Structure of European Union Law' (2010) 12 *Cambridge Yearbook of European Legal Studies* 121.

<sup>17</sup> Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21(1) *European Law Journal* 2.

(or intergovernmental) side compensated for these developments through Member State veto capacity. The continued assertion of state ‘voice’ balanced the loss of legal exit capacity to sustain the EU constitutional equilibrium.<sup>18</sup>

Britain was of course a key agent in these developments, in particular in the crucial distinction between primary (eg Treaty) and secondary law which, albeit established clearly in the Treaties had been resisted by De Gaulle. In contrast, Margaret Thatcher so valued the benefits of cooperation in bringing about (‘completing’) the single market that she agreed to relinquishing control over secondary legislation by generalizing qualified majority voting (QMV) through the 1987 Single Act—without of course giving up control where it really mattered (eg Treaty change and in practice Council decisions). And while in the twenty-five intervening years since the Maastricht Treaty this equilibrium was stretched to its limits, three points can be highlighted in particular:

- First, and in spite of repeated attempts by euro-federalists to do away with the unanimity requirements for treaty reform, including during the 2002–2003 constitutional convention, these pressures were always resisted. The Member States remain collectively and individually masters of the treaty. One exception, however, is notable, namely the adoption of the 2012 Treaty on Stability, Coordination and Governance (otherwise known as the Fiscal Compact), in spite of British opposition.<sup>19</sup> While this Treaty was motivated by Germany’s insistence on the introduction of a balanced budget rule in national constitutional arrangements for all Member States and not only EMU members, Britain did not like the idea of granting new powers to Brussels over national economic policy, unless compensated by assurances for the City of London. While the UK’s veto was formally respected since the other states proceeded outside the confines of EU Treaties, new powers were nevertheless conferred on EU institutions through a veto override.
- Secondly, over the intervening period, the UK was able to retain more control over its policy domain than any other Member State, save Denmark, through the systematic use of opt-outs, or what Adler-Nissen calls selected ‘outsiderness’, which allow states to draw a line in the sand, as it were, and establish an area where they are to remain sovereign.<sup>20</sup> While asymmetric federalism can be found in many other polities across the globe, it generally

<sup>18</sup> See inter alia Weiler (n 2).

<sup>19</sup> Paul Craig, ‘The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism’ (2012) 37 *European Law Review* 231.

<sup>20</sup> Rebecca Adler-Nissen, ‘Organized Duplicity? When States Opt Out of the European Union’ in R Adler-Nissen and Thomas Gammeltoft-Hansen (eds), *Sovereignty Games* (Palgrave Macmillan 2008) 81–103.

does not concern the core elements of the shared polity. But as the EU's remit progressively expanded in areas of core state powers from economic governance to the area of justice and home affairs (JHA), the resort to variable geometry' allowed it to accommodate the different cooperation-control trade-offs of its Member States.<sup>21</sup> Given her experience in negotiating dozens of specific opt-ins and opt-outs in her prior responsibilities for JHA affairs, it is no surprise that Theresa May has envisaged Brexit in the same light.

- Thirdly then, and most crucially, the introduction of a formal exit clause in the Lisbon Treaty erected sovereign control as the Union's *sine qua non*, a move of crucial symbolic as well as material importance (even if only formalized a pre-existing right). For the essence of a Union is defined by the way one may leave it: that you can leave tells us something about the EU irrespective of who leaves or the circumstances of this leaving. This is the intuition that led to the drafting of Article 50 of the TEU during the 2002 European Convention, which meant that the EU would never cross the Rubicon to become a (federal) state as the United States did in 1861, when 'secession' was redefined as 'civil war'. Selective exit could now be turned into wholesale withdrawal unilaterally on the basis of a Member State's own constitutional rules.

These developments illustrate not only the continuing concern for control among EU states but also what could be termed the *paradoxes of control*.

For one, it is a basic fact of interdependence, especially of the deep kind practised in the EU, that carving out formal jurisdictional autonomy does not protect a state from the externalities produced by other states individually and by their cooperative endeavours collectively. In areas of variable geometry, what other Member States did together affected the UK anyway, before Brexit, and it will continue to do so after Brexit. The UK–EU deal negotiated by David Cameron with regard to Eurozone externalities on non-Member States was a case in point. This has led some analysts to argue that 'the management of opt-outs reflects a retreat from national sovereignty rather than an expression of it'.<sup>22</sup>

Secondly, in spite of their own country having opted out, members of the public can sometimes perceive other countries' evident loss of control over

<sup>21</sup> Dirk Leuffen, Berthold Rittberger, and Frank Schimmelfennig, *Differentiated Integration: Explaining Variation in the EU* (Palgrave 2013); Philipp Genschel and Markus Jachtenfuchs, 'More Integration, Less Federation: The European Integration of Core State Powers' (2016) *Journal of European Public Policy* DOI: 10.1080/13501763.2015.1055782.

<sup>22</sup> Rebecca Adler-Nissen, 'Opting Out of an Ever Closer Union: The Integration Doxa and the Management of Sovereignty' (2011) 34(5) *West European Politics* 1092.

their own affairs as a kind of ‘loss of control by proxy’. The plight of the Greeks under the thumb of the Troika was often invoked during the Brexit campaign.

Thirdly, the real issue confronting control maximizers is to compare the domains where formal control over the rules applied within one’s territory will be regained and those where EU rules will continue to apply for the sake of trade, but without a ‘seat at the table’ (*reciprocal control*)—turning the UK from rule-maker into rule-taker. Where EU standards continue to apply, the only question will be whether their enforcement by the ECJ will be ‘indirect’ instead of ‘direct’ in order to satisfy the theatre of sovereignty.

Finally, there is the value of *potential* rather than *actual* actions in assessing what ‘control’ really means, the kernel of the Brexit paradox. Brexit ought to demonstrate both to British and other EU citizens that this is a Union that you can leave under conditions of your own choosing—in the first instance. If this is the case, it is this very freedom to leave that ought to entice ‘freedom loving’ people to stay. This is the obvious contradiction in the pro-leave rhetoric: if the EU is a supranational Leviathan clipping Britain’s sovereign wings, how can it be so easy to detach ourselves from it?

### 2.3 The EU as the Anointer of ‘Home States’

When we turn to secondary legislation (directives and regulations), the picture is perhaps more complicated, but no less favourable to British concern for control. To be sure, as the scope of QMV increased along with the reach of cooperation, so did the potential for national interest over-ride. Member of the voting public in the UK understood that the other Member States could outvote the UK when discussing common standards, and that the CJEU could rule against it in any dispute arising. And indeed, CJEU jurisprudence has been one of the main target of the leavers’ discontent.

But much of the EU’s legislative and judicial developments can be seen as attempts to maintain the equilibrium. For one, the CJEU has more often than not sided with the UK—as with its hugely significant rebuttal of French and ECB attempts to prohibit euro-clearing in the City of London.<sup>23</sup> Moreover, a number of Treaty revisions have sought to allow for greater ‘national control’ in EU law-making by empowering either national parliaments (subsidiarity protocol) or national courts (national identity clause), with various degree of success. Most importantly, it would be an understatement to note that, in spite of the loss of formal veto, the UK has retained throughout a vast amount of influence over the design of single market rules.<sup>24</sup>

<sup>23</sup> Judgment of 4 March 2015 in Case T-496/11 *United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB)* ECLI:EU:T:2015:133.

<sup>24</sup> See the contribution of Catherine Barnard in this volume.

Perhaps as important, however, is to consider the structure of state control that, once agreed, is set in place by single market rules. In a nutshell, the operating pattern of single market legislation has been to shift the control of economic agents operating transnationally from host to home country legislators and regulators. This is the familiar story of mutual recognition.<sup>25</sup>

In truth, mutual recognition in action in the EU was not supposed to entail a wholesale horizontal transfer of sovereignty, but was a kind of exercise in legal empathy on the part of the host state: the 'taking into account' of home rules—through principles known in the legal jargon as proportionality, balancing and the rule of reason. In my own work, I label this more complex version as 'managed mutual recognition', a management meant to mitigate the open-ended character of recognition.<sup>26</sup>

However 'managed', the principle of home country control has greatly benefited the UK in areas where it stands to gain as an exporter including to ensure the now infamous passporting rights for London-based banks operating across the EU. At the same time, in areas where it might have been reluctant to recognize other state standards (such as with the European arrest warrant which it has used extensively) it has generally availed itself of residual rights of host country control or safeguards: the best of all worlds!

### 3. *Ius Cosmopolitanum*: The Transformation of European Boundaries

Arguably, the most potent variation on 'taking back control' during the Brexit debates concerned the most basic meaning of sovereignty in the eyes of many citizens: national control over territorial borders, and in particular over the movement of people. There is no denying that the rights and obligations conferred by EU law have eroded such national control. But it can also be argued that this is the case to a great extent due to choices made in the UK itself.

<sup>25</sup> See Christine Janssens, *Mutual Recognition in the European Union* (Oxford University Press 2013); Kalypso Nicolaidis, 'Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition' in L Azoulai and M Maduro (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010).

<sup>26</sup> Kalypso Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14(5) *Journal of European Public Policy* 682; Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005–2006) 68 *Michigan Review of International Law* 267; Kalypso Nicolaidis, 'Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects Jean Monnet Paper Series No 7 (1997).

### 3.1 To Be or Not to Be a Cosmopolitan Federation

Kant's advocacy of *jus cosmopolitanicum* as the glue that would sustain the aspiration to perpetual peace between independent states meant codifying these states' obligations to treat foreign nationals with respect, what we may think of as the basic obligations of hospitality. Much has been written to tease out Kant's idea of cosmopolitanism, but what seems clear is that for him, porous borders did not mean borderlessness, nor did hospitality amount to unqualified non-discrimination between nationals and non-nationals. Can we interpret the EU as an approximation of this Kantian ideal?

To be sure, for all the talk of the EU not being a state itself, when it comes to the control of national territorial borders, it seems to approximate something close to a state-like form: borderless inside, bordered outside. But while the ideal of free movement has become an EU mantra, this was not always the case, nor is it unqualified. In the abstract, free movement in the EU is cast as a humanist ideal defined as an exercise in individual freedom and a corresponding duty of non-discrimination vis-à-vis 'European citizens'. In practice and in law, free movement is an exercise in economic agency, a component of the free operation of (labour) markets. As discussed by Catherine Barnard in this volume, the indivisibility between the four freedoms has been constructed late in the day after decades of piecemeal and separate progress across these four realms in order to cement this part of the *acquis* and to turn the figure of the alien aspiring to become a settled migrant into the figure of the 'mobile Europeans' taking advantage of all the EU has to offer.

However, the problem of control arises because borders between countries actually correspond to an array of different kinds of boundaries between different kinds of realms, spatial but also functional. The lack of congruence between national, regulatory, jurisdictional, and political boundaries within the EU has always created a tension between free movement on the one hand, and the very real nature of these functional boundaries, on the other. Managing these borders is about providing criteria for determining who is and who is not entitled to participate within a particular scheme for producing such fundamental social goods as liberty, security, justice, and economic prosperity, and to reap the resulting benefits. Any appraisal of the EU will turn on how far it does or can retain those separations required for diversity or the sustainability of the welfare state, while removing those that involve unfair discrimination through a fine balance between inclusion and exclusion.<sup>27</sup> And because preferences regarding this balance vary significantly

<sup>27</sup> For a recent overview see Richard Bellamy, Joseph Lacey, and Kalypso Nicolaidis, 'European Boundaries in Question?' (2017) *Journal of European Integration* <http://www.tandfonline.com/doi/full/10.1080/07036337.2017.1333118> (last accessed 11 July 2017).

between Member States—as well of course as among stakeholders within Member States—the EU sets a high bar for openness, while recognizing that local conditions and state discretion will prevail. In spite of the Eurocrisis and the exodus of the young from South to North, only 3 per cent of Europeans avail themselves of the free movement rights.

### 3.2 Britain's Fatal Attraction

Is Britain an outlier against this backdrop? And if so, why? Sociologists, historians, and pollsters may have pondered extensively about the idiosyncratic 'island mentality' prevailing in vast swathes of the British population, but we have yet to be presented with conclusive evidence on the presumed mismatch between the UK and the continent. Whatever the case may be in terms of popular *sensitivity*, what concerns us here is Britain's *vulnerability* to EU constraints as a result of both contingent mismanagement and structural characteristics.

The point can be made by distinguishing between, on one hand, border control *per se* and, on the other hand, the right to reside, work, and access certain goods such as social welfare across Member States.

On the first count, *eg* border control *per se*, the most potent image of the EU's internal borderlessness is the ability of European citizens to cross-national borders freely as temporary travellers. And yet, in this case, the UK simply retained control of its borders by opting out of the 1985 Schengen Agreement. However, opt-out provisions may serve the theatre of sovereignty for local audiences, but they do not preclude the British and Danish governments from circumventing the legal obstacles to cooperation over border control.

The second dimension is of course at the heart of the Brexit decision. The Treaty of Rome focused on free movement of labour, that is, the right for workers to seek employment in other EU Member States, referred to ambiguously as 'free movement of people'. After much uncertainty over what this right entailed, a 2004 directive spelled out the extent and limits of this right, including the obligation either to work or have sufficient means of subsistence after a three-month stay, notwithstanding other rights linked to European citizenship.<sup>28</sup> When it came to the EU enlargement to Eastern Europe in the same year, most Member States availed themselves of a seven-year grace period

<sup>28</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

before extending these free movement rights to the new-comers. Ironically, in light of the concerns leading to Brexit, the UK under Tony Blair both championed enlargement and decided to forego the transition period. To be sure, this was taking into account the features of an economy characterized by labour shortages and heavily reliant on low-cost low-skill labour, rather than investment in productivity.

As a result, the fateful political choice was to locate ‘territorial control’ in the UK’s labour market and its capacity to match high levels of both supply and demand, irrespective of other domestic considerations such as state capacity to adapt to increased demand for its services. Britain was especially vulnerable to the translation of EU legal constraints into popular domestic rejection, owing to a particular mix of national factors: (a) the openness and relative lack of regulation of its labour market, combined with the attractiveness of its ‘anglo’ environment; (b) its relatively low level of funding for public services compared, for instance, with its Scandinavian neighbour and a general lack of concern for regions subject to the steepest increase in ‘migrant’ numbers; (c) the absence of the kind of informal national job preference prevalent in other countries from apprentice schemes to the informal ring-fencing of professions including the infamous French *notaire* or Austrian tour guide; and (d) a general lack of state intrusiveness, from the lack of identity card to the ease of registration for the provision of public services, such as health or education. In other words, at least during the 2004–2016 period, the UK was more prone than any Member State to attract high levels of migrants from poorer Member States while privatizing the gains and socializing the costs that this entailed.

One could argue that EU law could not be blamed for this very British pattern. But we still must ask, given this very British pattern, whether EU law could have more flexibly allowed for taking into account the very differential impact of EU obligations on different Member States, especially Member States such as the UK, which take their legal commitments seriously. Arguably, the British government could have taken the initiative and made use of judicial safeguards to claim the right to restrict free movement under the ‘public interest clause’ in EU law—although such a move was rejected in the pre-referendum agreement over in-work benefits negotiated by then Prime Minister Cameron.<sup>29</sup> That this legal approach may have been receivable is underscored by recent judicial developments, with the CJEU leaning towards allowing greater leeway to Member States in determining access by

<sup>29</sup> Gareth Davies, ‘Brexit and the Free Movement of Workers: A Plea for National Legal Assertiveness’ (2016) 41(6) *European Law Review* 925.



non-citizens to their welfare systems.<sup>30</sup> Even if the CJEU had not been on board, it is hard to see what could have stopped the UK from asserting control in this way—an option more palatable to many than asserting control by quitting the EU altogether.

When it comes to the movement of third-country nationals, the refugee saga of 2015–16 reveals all too tangibly how the removal of some borders invariably involves the creation of others. Having matured under the shadow of the Berlin wall and the Cold War, the EU never formulated an equivalent ideal of freedom to cross external boundaries as it had internally. With the prospect of enlargement post-1989, however, the open-endedness of its membership conjured up an entity that could not be defined once and for all by the kind of boundaries that we associate with sovereign states. If there was no ultimate territorial reach of the polity, then it was harder to imagine the kind of fixed and solid external boundaries which provide ontological security by excluding outsiders from entering. Like the limes of the Roman Empire, Member States whose borders correspond to an external boundary of the EU have been expected to deal with the lure, not of their own territory, but of the overall European space only protected by its weakest link. The British paradox in this realm is that, by not taking part in Schengen, it does not constitute a point of entry *for* other Member States, nor can it be an easy target for migrants entering *from* other Member States. Nevertheless, the UK is the most open EU Member State when it comes to non-EU migrants (short of refugees), owing above all to its migration policy vis-à-vis Commonwealth states. In other words, in the realm where it has the most control, it is not clear that it has chosen to exercise it for the purpose of closure.

To conclude, our European predicament today lies with free movement as both the best of things and the worst of things. The ideal of a Europe without borders has sustained the enthusiastic support of generations of students, pensioners, and tourists within Europe. But it has also become synonymous in many a citizen's mental maps with 'welfare tourism', face-to-face social dumping, and even invasion—feelings of insecurity on which populist campaigns thrive.<sup>31</sup>

Ironically, we are likely to observe in the next few years that the contestation of the ideal of a borderless Europe does not need to be as dramatic as wholesale withdrawal. Somehow, a European Union that has been built

<sup>30</sup> The latest judgment in a series of CJEU judgments on this issue rules that Member States may exclude Union citizens who go to that Member State to find work from certain non-contributory social security benefits. Judgment in Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* EU:C:2015:597, [2015] WLR (D) 384.

<sup>31</sup> For a discussion of the term see Nicolaïdis, 'Trusting the Poles?' (n 23).

around the idea of ‘space’, space for free trade and free movement, needs to rediscover the value of ‘place’ and local belonging.<sup>32</sup> Conversely, Brexit will not necessarily bring about dramatically greater control over national boundaries as Britain may need to recover some of its lost power of attraction and reinvent itself as a cosmopolitan state, in or outside the EU.

#### 4. *Ius civitatis*: The Transformation of the State

Arguably the most radical transformation spearheaded by European integration is not that of the overall state system but that of the units that compose it.<sup>33</sup> While Brexit was undoubtedly a vote for popular democratic control, here again the question arises: where and who is control supposed to be taken back from?

##### 4.1 From Nation States to Member States

If we believe that the EU story has been about transforming rather than transcending the nation state, this transformation has in fact strengthened European Member States as attested by the spectacular growth of welfare states in the first three decades of European integration.<sup>34</sup>

Does this mean that there has been no significant trade-off between cooperation and national control? Not if we open the black box of the state itself. If we ask *who* has been in control within the state, there is little doubt that European integration has empowered national executives and administrations in charge of the integration process against their own legislatures and other agencies of domestic control. International cooperation always brings about domestic power shifts. The twist in the EU case is how deeply entrenched this shift has been leading some analysts to assert that European integration has changed the very *nature* of the state itself, that while the EU is based on state-driven processes, they are driven ‘by states that are fundamentally different from the traditional, egoistical bourgeois nineteenth-century nation states’.<sup>35</sup> To characterize the process of state transformation ushered in by European integration as moving from a Europe of traditional nation-states to one of ‘member-states’ is meant to express a fundamental change in the political

<sup>32</sup> David Goodhart, *The Road to Somewhere: The Populist Revolt and the Future of Politics* (C Hurst & Co 2017).

<sup>33</sup> Chris J Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press 2013) 4.

<sup>34</sup> A S Milward, G Brennan, and F Romero, *The European Rescue of the Nation-state* (2nd edn, Routledge 2000).

<sup>35</sup> Chris J Bickerton, *European Integration*, (n 32) 4.

structure of the state, with horizontal ties between national executives taking precedence over vertical ties between governments and their own societies.<sup>36</sup> Accordingly, the EU has set in motion a fundamental process of social and political change that may appear as an apolitical, essentially technical, matter of institutional reform, but which actually sidesteps domestic politics in favour of EU networks which become constitutive of statehood.

Britain clearly played a leading role in this story, under the leadership of both Margaret Thatcher and Tony Blair. If Thatcher's premiership was predicated on the partial dismantling of the Keynesian national corporatist state, this was made possible in great part by the adoption of a neo-liberal agenda in the rest of Europe in the wake of the 1987 Single Act.<sup>37</sup> Even if it is overly simplistic to state that the completion of the single market amounted to deregulation writ-large (after all, mutual recognition does not necessarily lead to a race to the bottom), European integration also induced widespread privatization of public services. And even if the most dramatic reforms took place in the UK, national failures to come to terms with the economic crisis of the 1970s and 1980s ensured that all Member States followed suit and mobilized EU policies to this effect. British and German interests converged in shifting money creation functions from national central banks to the private sector, resulting in both lower inflation and the dramatic financialization of the economy.

In effect, the story goes, European executives led by Britain were in part freed by the EU from societal control only to turn around and relinquish state control to global markets.

To the extent that citizens care about control in the form of public power, some would argue that it is less relevant for our societies to ask whether this public power is exercised domestically or through the EU, than to ask whether it is exercised at all in the face of corporate and private power.<sup>38</sup> Accordingly, the EU and European Member States have the same *raison d'être*, namely to protect citizens, physically and economically, while protecting their private sphere and individual freedoms. In other words, Hobbesian regal powers are not a matter of level of competence in a system of multilevel governance but a matter of the effectiveness of the *puissance publique*, wherever it is exercised.<sup>39</sup> On this count, it is hard to deny that the EU has curbed some state power against markets while reinforcing it at the same time through enforcement of competition law.

<sup>36</sup> *ibid* 51.

<sup>37</sup> Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press 2013).

<sup>38</sup> Thierry Chopin, 'Europe: la paix, le marché et après?' *Telos* (25 March 2017).

<sup>39</sup> This sentiment seems to be covered by Eurobarometer data, which, in June 2016, reported that 82% of citizens thought that Europe should do more to control terrorism, 75% to control tax

## 4.2 The Arrested Transformation of Transnational Democracy

However, the defence of public against private power was not where the core Brexit debate lay. Instead, the analysis of the emasculation of nation states into Member States is now part of the public sphere as the EU comes to be seen by swathes of the public in the UK and elsewhere as a danger to self-government, a pre-empter of national democracies, an instrument of integration by stealth.

Does this matter? Yes, if we believe in the transformation of democracy the better to manage democratic interdependence and hope that national and European democracy should not be a zero sum game.

Has this been the case? There are obviously many facets to this debate. In some countries, majorities believe that the trade-off between cooperation and popular control may be clear but is worth it. Alternately, the Greeks recognize their dramatic loss of democratic control but this cannot justify giving up the economic and psychological benefits they draw from keeping euros in their pocket. The Baltic states are macroeconomic rule-takers but these concerns are dwarfed by the need to be shielded from their overbearing Russian neighbour.

The most ardent defenders of the compatibility of the EU and democracy, however, will deny the trade-off itself. They will argue that the EU has helped to redistribute control to the people, empowering people as consumers, human rights advocates, or environmental activists, or defending them as victims of cartels, corporate power, and private property theft. They will point to the ways in which EU membership has enabled a better control of elite obfuscation, nepotism, and corruption by empowering civil society actors and monitory democracy at the national level. They will say that it has helped entrench democracy in Southern, Central, and Eastern Europe and further afield. And they will note that it is governed by democratically elected and accountable governments and national parliamentarians who, thanks to the imperative of cooperation, are able to resist capture by special interests at the national level and better represent their median voters.<sup>40</sup>

In this latter perspective, Brexit is a product of British eccentricity. It speaks to the incapacity of remain campaigners to sell this version of the story to the electorate. And this in turn has to do with the British mindset, which we could call 'splendid democratic isolation', which harps back to

evasion, 71% to control external borders, and 66% in security and defence. See Eurobaromètre spécial du Parlement européen (juin 2016).

<sup>40</sup> Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Routledge 2013).

the idiosyncrasies of the British political tradition and contemporary English nationalism.<sup>41</sup>

Alternatively, this is a story of EU disequilibrium, whereby cooperation has called for sacrifices of control beyond the threshold of public tolerance. Those who voted for Brexit in the name of democratic control belong to two broad categories of voters, demonstrators or simply citizens we can find across Europe: (a) protesting *against* Brussels for London, Budapest, or Athens; or (b) *against* London, Rome, or Paris *through* their no to Brussels.

In the first case, control is about recovering national sovereignty. The discourse about democracy is not about how much sovereignty is 'objectively transferred'. The UK government's 2017 white paper admits as much when it states that: 'Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that'.<sup>42</sup> We cannot but conclude that Britain left the EU because of a 'feeling' about sovereignty. In this light, the EU's sin is its very *raison d'être*, to tame nationalism through agreed constraints as if not the slightest concession over control could be justified by the benefits of cooperation.

And yet is it not right to ask which of the existing EU constraints is necessary and which might not be, in the pursuit of the worthy goal of perpetual peace? What do you do when people feel they have lost something (eg their country) and want it back? Could they be on to something? Concerns about something called sovereignty must be taken seriously when they mean a yearning for a sense of place, for local autonomy, and collective control. International relations demonstrate daily the difficulties in disentangling self-determination and nationalism. But, in the face of Brexit, the EU needs to resist the temptation to put all the onus of the vote on British exceptionalism, the British obsession with 'the sovereignty of Parliament', and century-old papal edicts. The resistance to being governed at a distance is a universal trope.

In the second case, control is about popular sovereignty. For this cohort, the true target of 'a people's Brexit' or Grexit or Frexit, is the insurgents' own national establishment, the system nurtured by their elites. Sovereignty will no longer be kept out of the hands of the people, a very long delayed corrective to England's 1688 glorious revolution and Europe's post 1789 not so glorious counter-revolution. But Euroscepticism is not simply the collateral

<sup>41</sup> See inter alia B Wellings, 'Losing the Peace: Euroscepticism and the Foundations of Contemporary English Nationalism' (2010) 16(3) *Nations and Nationalism* 488; E Vines, 'Reframing English Nationalism and Euroscepticism: From Populism to the British Political Tradition' (2014) 9(3) *British Politics* 255.

<sup>42</sup> HM Government, 'The United Kingdom's Exit from and New Partnership with the European Union' Cm 9417 (February 2017).

damage of the *malaise* of national democracy *tout court*. The EU has allowed the political class across Europe to escape domestic political constraints and hide behind EU law and decisions. For many, that national elected representatives meet in Brussels to pursue the greater good sounds more like co-optation than popular sovereignty writ large.

If national popular democracy as the constitutive bond is being replaced by transnational networks of cooperation, the ability to resist capture domestically is no match for the capture by global firms supranationally; and domestic accountability through national elections is annulled by the ‘one size fits all’ policies concocted in Brussels. The more the issues at stake are sensitive and entail redistributive choices, the less tolerance there is from the public in having the issues resolved outside their purview.

While we may be witnessing an anti-elite backlash worldwide, Europe’s establishment is seen as top of the class, having managed to build the infamous Weberian iron cage of bureaucracy, but a cage even more remote than elsewhere, out of reach of the electoral cycles in its Euro-bubble: an iron cage in a bubble!

It is clear that these perceptions are real, whatever the extent of elite capture of the EU system. If this is the case, the challenge raised by Brexit is to reverse such capture and engage in a new ‘transformation of democracy’, which finds its resources in the process of European integration itself and its promise to eschew traditional forms of democracy at the EU level. It is this promise that I have tried to capture under the idea of *demoicracy*, that is a polity where the imperative self-government of the *demoi* is respected, *provided* these *demoi* are able and willing to conduct their affairs with utter regard for the interests of those with whom they share a deep interdependence.

In this perspective, the liberal account of European democracy needs to rely not only on the health and liberal credentials of its national democracies but on their radical openness to each other politically. More to the point, if the Brexit process is conducted in an authoritarian manner which ignores vast pluralities of disenfranchised citizens, this process which I have argued defines the essence of the EU, will itself be tainted as non-democratic. This is the ultimate aporia of Brexit, which now puts in British hands the democratic credentials of the EU as a whole.

By the same token, it is unclear whether Brexit is going to serve the people who feel they lack real control in an economy that does not work for them and whose problems run much deeper than the straightjacket of EU standards. As Marc Stears argues: ‘Ultimately, Britain’s crisis of control will not be addressed by Brexit. We urgently need change far removed from the mission to leave the European Union. We need most of all to change our economy so that people are really able to take control. That means working

with communities, businesses, unions and public institutions to give people the tools they need to shape their lives for the better'.<sup>43</sup>

In the end, the profound problem in the EU today is not that of unaccountable governments in Brussels but that of discredited governments at home. The currency of power inside the EU is no longer between big and small countries or even creditor and debtors but in the divide between those who feel 'in control' and those who don't, which in turn threatens the kind of political mutual recognition that underpins the Community or Union paradigm. The euro crisis, the migration crisis, and, above all, Brexit have stretched the potential for sustainable EU transformation to its limits. The question of the democratic anchoring of the EU at national and local level has become both the deepest source of Europe's current *malaise* and the potential source of its most transformative promise yet. We can only engage with the promise if our political imagination enables us to recover the open-ended nature of European transformation.

## 5. Conclusion

There was of course nothing inevitable about Brexit—contingency reigns supreme with referenda. Indeed, as explored in the next part of this volume, the story looks utterly different seen from Scotland, Northern Ireland, or England. In this chapter, I did not set out to explain Brexit but instead to provide a conceptual bridge between the history of the UK in a transforming Europe and the specifics of the upcoming negotiations as analyzed by other contributors. I did so through a simple, in fact a simplistic, benchmark against which we may read the decision to join in and remain within a club such as the EU over time, that is the evolving balance between requisites of cooperation and the technologies of control. Normatively, I do believe that the EU's sustainability has been predicated on this 'equilibrium', but such a statement does not mean the same thing for different states and polities.

In this light, the pattern of arguments exchanged during the referendum campaign on the desirability of withdrawal is likely to endure after the deed. Remainers will continue to emphasize the theme developed in section 1 of this chapter, namely that given how much jurisdictional control Britain had managed to retain as an EU member, taking back control over border-crossers (section 2) and over 'our' laws (section 3) has entailed a disproportionate loss of cooperation benefits. Leavers will continue to believe and argue that where

<sup>43</sup> Mark Stears, 'Brexit is the Wrong Answer to Our Crisis of Control' *The Times* (28 March 2017).

control has been taken back, the loss of cooperation benefits, whatever they may be, is worth it, or, better still, that the trade-off is illusory. The Brexit paradox will endure too, whereby the act of giving up membership of the club will have illustrated that much control had been retained all along and, yet, can never entirely be recovered.