The End of History in EU Law and Politics?
Challenging Founding Narratives with a New Research Agenda

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Abstract

We reassess two foundational narratives of European legal integration that appeared to corroborate "end of history" claims in post-Cold War international and comparative politics research. The first narrative asserts that EU law was locked-in by a virtuous cycle of cooperative national courts applying international rules and governments increasingly deferring to judges. The second narrative posits that the enlargement of the EU bolstered states' commitment to the rule of law and the European Commission's resolve to act as "Guardian of the Treaties." Drawing on dozens of recent studies and novel data, we demonstrate that judicial and political conflicts continue to destabilize the EU legal order and that the on-the-ground authority of EU law has become more uneven over time. To overcome teleological theories of a more institutionalized and law-abiding EU, we propose a new agenda anchored in the concept of "intercurrence:" the overlapping and often conflictual operation of politically-embedded legal orders.

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"*The weaknesses of [the EU's enforcement capacity] are remedied to an extent by judicial review within the judicial systems of the Member States in collaboration with the European Court of Justice…the fact that the national court renders the final judgment is crucial to the procedure… A state, in our Western democracies, cannot disobey its own courts.*"

~Joseph Weiler, "The Transformation of Europe," 2420-2421

"*[C]oncerns that enlargement inevitably weakens the EU's legal system through increasing non-compliance by the new member states are unfounded. The net effect of the EU's enlargement rounds has instead been to improve compliance in the enlarged EU."*

~Tanja Börzel & Ulrich Sedelmeier, "Larger and More Law Abiding?," 211

"In recent decades, the European house has shown serious cracks… contemporaries of European integration should revisit the key foundational narratives about the EU and how they continue to shape EU politics. Now that history is back, Europeans need to confront their past…to critically revisit past connections and to uncover blind spots."

~Catherine De Vries, "How Foundational Narratives Shape European Union Politics," 1-4.

Cracks at the End of History: Revisiting Founding Narratives in EU Law and Politics

Three decades have passed since Francis Fukuyama identified the European Union (EU) as the exemplar of the "end of history" – the post-Cold war convergence of countries across the world on the model of liberal democracy, market capitalism, and the rule of law. "Flabby, prosperous, self-satisfied" European states whose "grandest project was nothing more than the creation of the Common Market" had forged the legal infrastructure necessary to "turn popular passions away from national self-assertion into economic activity" and "discredit" disruptive ideologies like fascism, communism, and nationalism (Fukuyama 1989: 5, 14-16; Fukuyama 1992: 270). The EU's "web of binding legal agreements which regulate […] mutual economic interactions" cultivated a single market "full of entrepreneurs and managers but lacking in princes or demagogues" (Fukuyama 1992: 283, 265-272). As European integration "gained momentum," perhaps only the "prospect of centuries of boredom" could "get history started once again" (Fukuyama 1992: 270; Fukuyama 1989: 18).

Although scholars of EU law and politics seldom cite Fukuyama directly, his "end of history" thesis cultivated the intellectual milieu for theorizing "the judicial construction of Europe" after the Cold War (Stone Sweet 2004). Some studies shared Fukuyama's embrace of modernization theory, presuming that economic growth fosters and entrenches liberal democracy and the rule of law (Hirschman 1977; Przeworski & Limongi 1997; Inglehart 1997; Boix and Stokes 2003). Stone Sweet and Sandholz (1997: 299, 312), for instance, posited a "self-sustaining dynamic" between intra-European trade and supranational law-making by the European Court of Justice (CJEU) and the European Commission that "is difficult, and sometimes impossible, for governments to reverse" (see also Stone Sweet and Brunell 1998; Fligstein and Stone Sweet 2002). Most agreed that the EU legal order had been locked-in, even as they fiercely disagreed about everything else. For instance, Andrew Moravcsik pronounced the EU's "Constitutional Settlement – a stable endpoint of European integration" where incremental change would occur "within the existing constitutional contours of European institutions" (Moravcsik 2005: 159). Alec Stone Sweet, who seldom agreed with Moravcsik, concurred: "the process of constitutionalizing European law has not only begun, it is irreversible" (Stone Sweet 2000: 1). Furthermore, Karen Alter posited that by the 1990s member states had accepted the supremacy of EU law as a *fait accompli* (Alter 1996; Alter 2001).

Fast forward two decades: Europe is the exemplar of "the end of the end of history" (Scheppele 2016), and the EU legal order is the poster child of rule of law backsliding (Pech and Scheppele 2017). Mounting calls to take stock and re-evaluate what we think we know about the judicial construction of Europe have proliferated hand-in-hand with economic crisis (Scicluna 2018),

backlash to the primacy of EU law (Kelemen 2019), the constitutional breakdowns of Hungary and Poland (Sadurski 2019), and intergovernmental efforts to restrain the Commission as "Guardian of the Treaties" (Kelemen and Pavone 2023). Most pointedly, Scicluna and Auer (2023: 770) argue that because "the process of court-driven constitutionalization [in the EU] was less complete and more contested than is often presented," scholars should redirect their gaze to Europe's "constitutional unsettlement." In a similar vein, De Vries calls on political scientists to critically "revisit the key foundational narratives about the EU," including the "foundational narrative… that the law could replace power politics" (De Vries 2022: 3, 10).

In this article, we answer these calls. We revisit two foundational narratives in EU law and politics scholarship that posited a premature "end of history:" (1) that the judicial construction of Europe has been locked-in by cooperative national courts and deferential governments; (2) that the EU has become "larger and more law-abiding" and the European Commission has remained steadfast and relatively apolitical in its role as "Guardian of the Treaties." By drawing on novel research and empirical data, we critically reassess these narratives, probe their taken-for-granted assumptions, and identify where these assumptions were dubious to begin with or have become empirically untenable over time. We demonstrate that judicial and political conflicts continue to destabilize the EU legal order and that the on-the-ground authority of EU law has become more uneven over time. In so doing, we do not seek to replace optimistic teleologies about a more institutionalized and law-abiding EU with pessimistic ones predicting European disintegration. Rather, our goal is to propose that international and comparative researchers have already begun to form a more nuanced and empirically grounded research agenda in EU law and politics. We argue that this new agenda would benefit not by discarding past research *tout court*, but rather by drawing on a theoretical concept that political scientists developed to challenge "end of history" teleologies in real time: *intercurrence*, or the simultaneous, overlapping, and often conflictual operation of politically-embedded legal orders. Although intercurrence is primarily associated with studies of American political development (ex. Orren and Skowronek 1996; 2004), we demonstrate that this concept can also advance comparative and international relations research grappling with the 'end of the end of history' in Europe.

Our argument proceeds as follows. We first situate the EU in comparative and international research in the 1990s to identify the intellectual milieu in which foundational narratives about European legal integration took hold. We then critically revisit the narrative that the judicial construction of Europe has been locked-in by a virtuous cycle of cases referred to the CJEU by an array of cooperative national (lower) courts enjoying minimal political interference from national governments. Next, we challenge the narrative that the EU legal order has continued to strengthen thanks to a larger and more law-abiding cohort of member states and a rigorous Commission pursuing its prosecutorial role as "Guardian of the Treaties." Finally, we conclude by anchoring recent research within a theory of intercurrence in EU law and politics that can better account for the cracks and enduring political contestations shaping European legal integration.

EU Law at the End of History: Its Place in International and Comparative Politics

Before we reassess foundational narratives about law and politics in the EU, we should recognize the historical and intellectual context that made them appealing in the first place. By the 1990s, the EU legal order gained a special place in international and comparative politics research.

For many IR scholars, the EU was "near the ideal type of full legalization, as in highly developed domestic legal systems," thus representing an international legal regime with real bite and an ambitious international court capable of achieving state compliance (Abbott et al. 2000: 405). The legalization of the EU challenged realist arguments that the international system is anarchic (not rule-bound) and that it is power politics (not liberal institutions) that drive international policymaking (Staton & Moore 2011; Carrubba & Gabel 2017). After being "deemed politically dead" in the 1970s

and 1980s, European integration accelerated at end of the Cold War (Burley & Mattli 1993: 41), and the notion that the EU had been held together by a Cold-War balance of power logic fell out of fashion (Legro & Moravcsik 1999). Instead, IR theorists looked to the EU's legal infrastructure to theorize how international law can become the cornerstone of a "new world order" (Slaughter 2004).

Specifically, liberal theorists posited that EU law gained real bite because it succeeded in converting subnational and supranational actors into "compliance constituencies" (Keohane, Moravcsik, & Slaughter 2003: 476). First, the Treaty of Rome empowered national judges to directly apply EU law in the cases before them and to refer cases exposing state noncompliance to the CJEU. Second, decentralized subnational enforcement was complemented by centralized supranational enforcement. The Treaties empowered the European Commission to take noncompliant member states before the CJEU (via 'infringement actions') and to seek penalty payments for beaches of EU law. In post-Cold War Europe at the end of history, liberal theorists assumed that states would be reluctant to disobey their own courts (Burley & Mattli 1993; Alter 1996; Alter 2001) and suffer the financial and reputational damage of being sued by the Commission (Borzel 2001; Tallberg 2002). By drawing on the legitimacy of national judiciaries (Alter 1996), the capacity of law to serve as a "mask for politics" (Burley & Mattli 1993: 43-44; Slaughter & Mattli 1998), and the Commission's entrepreneurship as "Guardian of the Treaties" (Tallberg 1999), the CJEU became "the most effective supranational judicial body in the history of the world" (Stone Sweet 2004: 1). This diagnosis of EU law's effectiveness tapped a high demand market amongst international policymakers. From 1992 to 2002, 10 international courts (ICs) were created as "operational copies" of the CJEU by empowering national judges to refer cases to ICs and enabling international secretariats to sue noncompliant states (Alter 2012, 2014).

Complementarily, some scholars of comparative politics looked to the EU to theorize how the consequences of democratic consolidation might spill beyond state borders. Alongside a revival of modernization theory (and the rush to solve the puzzle of "getting to Denmark" (Fukuyama 2011: 14)), comparativists saw Europe as a laboratory to understand how the rule of law becomes entrenched, how politics are judicialized, and how the nation-state's preeminence is challenged – or its politics transposed on a continental scale (Hix 1994: 12-22). Drawing on the European experience, regime theorists and transitologists derived the proposition that "to achieve a consolidated democracy, civil and political society must be embedded in, and supported by...the rule of law" (Linz & Stepan 1996: 17-18). In turn, the rule of law could induce states to "mov[e] rapidly to shed sovereignty" and "constitutionalize" an "international state" (Fukuyama 1992: 272; Caporaso 1996: 37-39).

This twin process of liberal constitutionalization and de-centering of the nation-state was most evident in the "judicialization of politics" sweeping Europe at the close of the Cold War (Vallinder 1994: 97; Shapiro & Stone Sweet 2002). By the 1990s, even France, where political elites had long guarded against a *gouvernement des juges*, begrudgingly embraced a variant of American-style judicial review (Stone 1992: 102; Stone Sweet 2003). As national courts began cooperating across borders and with their supranational counterparts at the CJEU and European Court of Human Rights, they exercised ever-greater (and purportedly irreversible) policymaking authority (Stone Sweet 2000). Judges used international law to claim judicial review powers denied under state constitutions (Alter 1996; Alter 2001), and they wielded these powers to broaden the economic and liberal rights that businesses, NGOs, and citizens could claim against their states (Conant 2002; Cichowski 2004). Political elites committed to liberal norms were forced to learn how to "govern with judges" at home and abroad (Stone Sweet 2000). European states and the EU became "juristocracies" at the *avant garde* of a new, liberal-democratic constitutionalism (Hirschl 2004; Goldstein 2004).

For many post-Cold War comparativists and IR theorists alike, the EU and its legal order was a springboard to probe the causes and consequences of the end of history. While not all political scientists embraced this agenda, a conventional wisdom crystallized that EU law had grown into a

truly effective international legal system because it tapped the liberal consolidation and judicialization of European states. In particular, political scientists developed two "foundational narratives" to corroborate these conclusions. As we will now show, both narratives are challenged by a growing body of research and evidence.

A Virtuous Circle? The Court of Justice and the National Courts

Alexander Hamilton argues in *Federalist 78* that the judiciary "has no influence over either the sword or the purse… and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." As a result of "the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches." Much research on EU law and politics, in contrast, built itself upon Weiler's (1991, 2421) foundational claim that "[a] state, in our Western democracies, cannot disobey its own courts." From this premise, several influential studies of European legal integration argued that lower national courts became willing accomplices in the European project by referring cases of state noncompliance to the CJEU and eagerly circumventing their superiors to exert judicial review. Combining these two insights, policy entrepreneurs in the form of interest groups and willing substate actors brought litigation to their domestic courts to gain legal victories on the European stage, paving the way for future cases to deepen European integration in a "virtuous circle" (Stone Sweet 1999).[1]

We first recap the particulars of this narrative, arguing 1) that empirical evidence suggests that lower courts do not engage with the preliminary reference system to the extent scholars claim, eroding their capacity to "lock-in" the judicial construction of Europe; and 2) that high courts, subsequently, have become the primary linchpins of the CJEU into national judiciaries, yet they are precarious partners for the CJEU and not optimal to drive forward EU law. The core insights are that, not unlike other domestic and international regimes (Staton & Moore 2011; Huneeus 2011), national judges in Europe continue to face steep political pressures to avoid and contest international law, and that these dynamics are not endemic to autocratizing regimes – they can also arise in liberal democracies.

The assumption that domestic courts can create policy without fear of retaliation from governments or their judicial hierarchies is central to the story of the EU's "preliminary reference procedure" as a driving force of European integration. The procedure (under Article 267 of the Treaty on the Functioning of the EU) allows national judges to refer cases to the CJEU – often cases exposing noncompliance with EU law – and seek a preliminary ruling before implementing the decision. With the help of private litigants invoking EU law before national courts and the "empowerment" of judges by "the facility to engage with the highest jurisdiction in the Community and thus [having] de facto judicial review of legislation" (Weiler 1991, 2426), the CJEU was able to partner with domestic judiciaries and substate actors to advance European integration. Simply put, "without individual litigants, there would be no cases presented to national courts and thus no basis for legal integration" (Mattli and Slaughter 1998, 186). This process allows the number of actors benefiting from EU legal integration to grow and subsequently place more pressure on their domestic governments to expand their EU legal rights through the expansion of the EU's regulatory and constitutional competences. This virtuous cycle fused and synchronized civil society, national judges, and the CJEU, becoming the central driver of European legal integration (Stone Sweet and Brunell 1998, 64; Cichowski 2004).

Critical to this narrative is that national courts are eager and politically uninhibited to refer cases to the CJEU and apply its rulings. Burley and Mattli (1993, 64) argue that national court referrals enabled the CJEU to strengthen "its own legal legitimacy by making it appear that its own authority

[1] Stone Sweet (1999) provides a theory of judicialization where contracting and rule-making create social pressure for third-party dispute resolution, leading to judicial precedents that then affect future legislating and contracting. We focus on this theory's application to European integration.

flows from the national courts. It is the national courts, after all, who have sought its guidance; and it is the national courts who will ultimately decide the case, in the sense of issuing an actual ruling on the facts." As Helfer and Alter (2013, 491) note, "governments could not defy the CJEU without also calling into question the independence and authority of their own courts." But this became more difficult – if not impossible – as liberal democracy consolidated in Europe alongside member governments' commitments to the rule of law. "Under the prevailing legal culture of the postwar decades," noncompliance with the law "was clearly frowned upon" when governments targeted their "own" national courts (Lindseth 2010, 134-135; Weiler 1991). Alter (2001, 190) thus concluded that "once national judiciaries had accepted European law supremacy, national courts would not let politicians ignore unwanted [CJEU] decisions…national court support of [CJEU] jurisprudence effectively closed the option of exit through non-compliance with [a CJEU] decision."

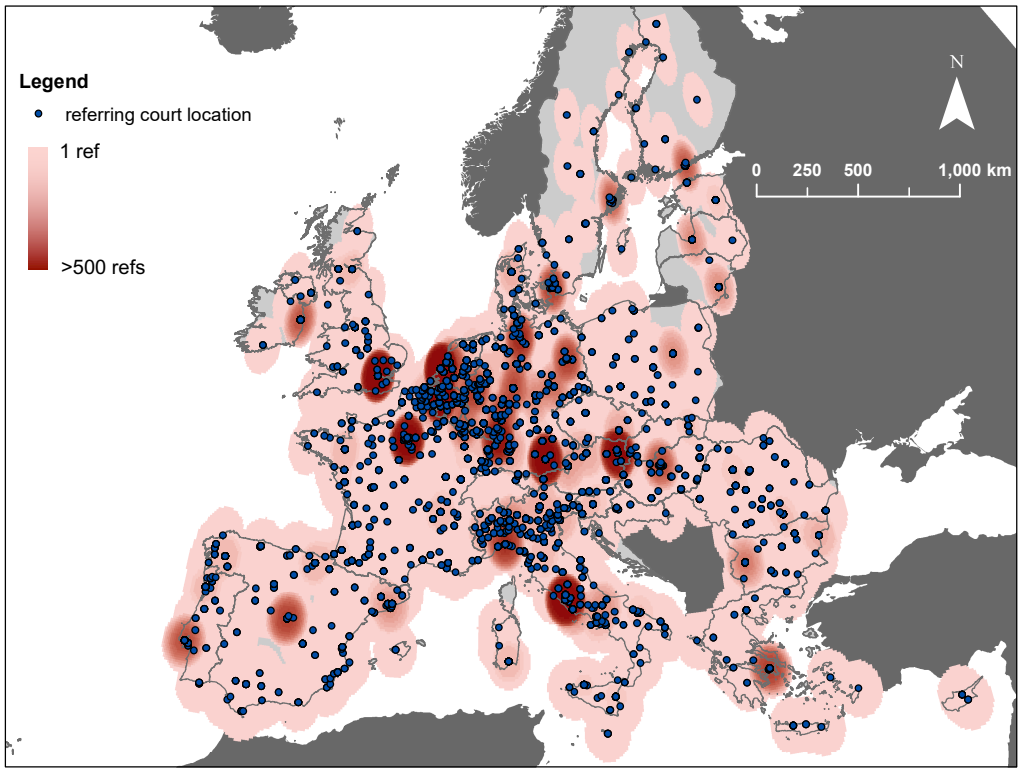
Under the influence of "end of history" narratives in comparative and international politics, EU law and politics scholars had good reasons to be optimistic that domestic courts would willingly embrace EU law and the CJEU, meaningfully constraining governments in the process. As Tate and Vallinder (1995) argued, a "global expansion of judicial power" was taking place, with liberal democracies in particular witnessing "rights revolutions" and "the judicialization of politics" Epp 1998; Stone Sweet 2000). Leveraging both abstract and concrete review (depending on the country), judiciaries in Germany, Spain, France, and Italy began to cast a shadow over legislation, almost akin to "specialized legislative chamber[s]" (Stone Sweet 2000, 61). Eager to accede to the EU by embracing its liberal and rule of law norms, even post-soviet states established constitutional courts capable of creating new rights, influencing legislation, and applying international law (Schwartz 2000). Courts could play such an active role because "a vigilant opposition will actively monitor the governing majority's compliance" with constitutional and international law, inducing parliamentary majorities to "autolimit" their ambitions in anticipation of judicial review (Stone Sweet 2000, 75; Stone Sweet 1994). Increasingly, judicial review meant a rising tide of national courts holding their governments accountable to their EU legal obligations. As Stone Sweet (2000, 1) starkly concluded: "parliamentary supremacy…a constitutive principle of European politics, has lost its vitality. After a polite, nostalgic nod across the Channel to Westminster, we can declare it dead."

Crucial to the foregoing claims is the assumption that national lower courts in particular seized opportunities to act as "wide and enthusiastic" motors of referrals to the CJEU, generating a "whack-a-mole" dynamic that made it impossible for governments to control or evade the judicial enforcement of EU law (Weiler 1991, 2426; Alter 1996, 467). Yet this assumption received little empirical scrutiny until recent studies began to call it into serious question. Hubner (2016) was among the first to raise doubts using the national decisions database (Dec.Nat) maintained by the Association of Councils of States and Supreme Administrative Jurisdictions of the European Union. These data revealed that "between 1959 and 2003, national courts in the EU member states submitted, in total, 3847 preliminary references to the CJEU. By comparison, between 1959 and 2003, the Dec.Nat database provides details of 22,003 national court decisions relating to European law" Hubner (2016, 329). While these data are limited by inconsistent reporting across national courts, they do suggest that national courts usually decide *not* to refer cases to the CJEU.

Building on this insight, Kelemen and Pavone (2016; 2018) and Pavone (2021, 2022) demonstrate that the few national courts that do refer to the CJEU are geographically clustered in just a few economically prosperous cities wherein "Euro-lawyers" (Vauchez 2015) and larger corporate law firms mobilize litigation. Figure 1 leverages data from Dyevre and Lampach (2021) to visualize which courts submit referrals to the CJEU from its founding to 2017. Only a few courts have submitted the vast majority of references to the CJEU, with most of these "hot spots" being spatially clustered in trade hubs and capital cities like Paris, Rome, and London where national high courts are located. Instead of a self-reinforcing cycle (ex. Stone Sweet & Brunell 1998; Fligstein & Stone Sweet

2002; Cichowski 2004), EU law litigation struggles to "spill over" beyond these sites. Most of the EU's territory – where most lower court judges are based – registers minimal judicial participation in the preliminary reference procedure, with EU law remaining unmobilized. If we draw on Mann (1984)'s concept of state "infrastructural power" and O'Donnell (2004)'s concept of "brown areas" – geographic regions where a legal system fails to penetrate – we might say that the CJEU's judicial authority rests on very uneven foundations. Even as Lord Denning famously described the diffusion of EU law and national court referrals as a uniformly rising "tide" that "cannot be held back" (quoted in Kelemen & Pavone 2018: 362-363), the empirical reality these maps reveal is that participation in the preliminary reference system is more akin to a few concentrated flash floods of activity surrounded by a sprawling desert of judicial apathy.

Figure 1 – "brown areas" in the CJEU's authority: *There is stark subnational variation in preliminary references to the CJEU from 1961-2017; instead of a broad base of judicial enforcement of EU law, most regions comprise "brown areas" with little participation that are punctuated by a few concentrated hot spots of activity.*



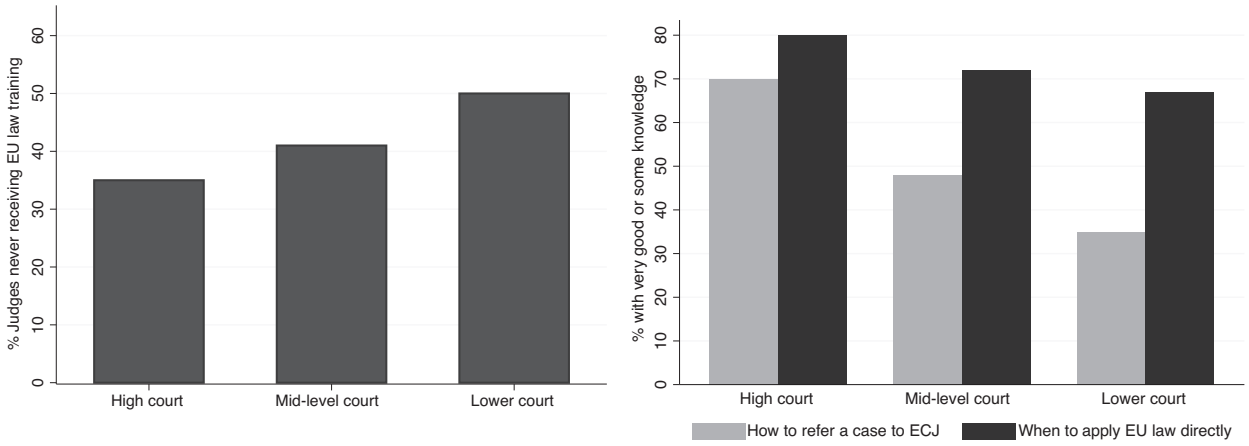
Notes: Heat maps are created using a kernel density function, using geocoded point data capturing the total number of preliminary references to the CJEU from a given location.

Data source: Preliminary reference data is drawn from the GeoCourt Dataset by Dyevre and Lampach (2021).

Recent scholarship also reveals that judges face potentially steep costs when they apply EU law, unearthing the bureaucratic inertias at the lower rungs of state judiciaries that foster gaps in the authority of international law and courts (e.g., Krehbiel and Cheruvu 2022; Pavone 2020; Tridimas and Tridimas 2004). Drawing on over a year of field research and hundreds of interviews with national judges and lawyers in Italy, France, and Germany, Pavone (2018; 2022, 70) highlights that domestic lower courts are often overworked and under-trained, making them ill-quipped to refer cases to the CJEU: as a lower court German judge put it, "it takes a long time to prepare a referral to Brussels, and

while you wait, the case is in your register, it becomes two years old!" In addition to misidentifying the location of the CJEU (Luxembourg), the quote is emblematic of the workload pressures that prohibit lower court judges from participating in EU legal training and taking the time to draft referrals to the CJEU (e.g., Roussey and Soubeyran 2018). These findings are not unique to founding member states like Italy or Germany; they seem to travel to most EU member states. In a 2011 survey of over 6,000 national judges across all EU member states fielded by the European Parliament (2011: 114-115), 50% of lower court judges admitted to having never received *any* legal training in EU law, and only 35% responded that they possessed at least "some knowledge" of how to refer a case to the CJEU (see Figure 3). Leveraging interview and survey evidence with judges in one 1995 accession member state – Sweden – and two post-2004 accession member states – Slovenia and Croatia – Glavina and Leijon confirm that a combination of knowledge gaps, workload pressures, passivity, and deference to their national supreme courts renders lower court judges broadly reluctant to apply EU law and solicit the CJEU (Glavina 2020; Leijon & Glavina 2022).

Figure 3 – the travails of national lower courts: *Lower court judges report receiving significantly less training in EU law compared to high court judges, and a significant majority of lower court judges do not know how to refer a case to the CJEU if the occasion required it*



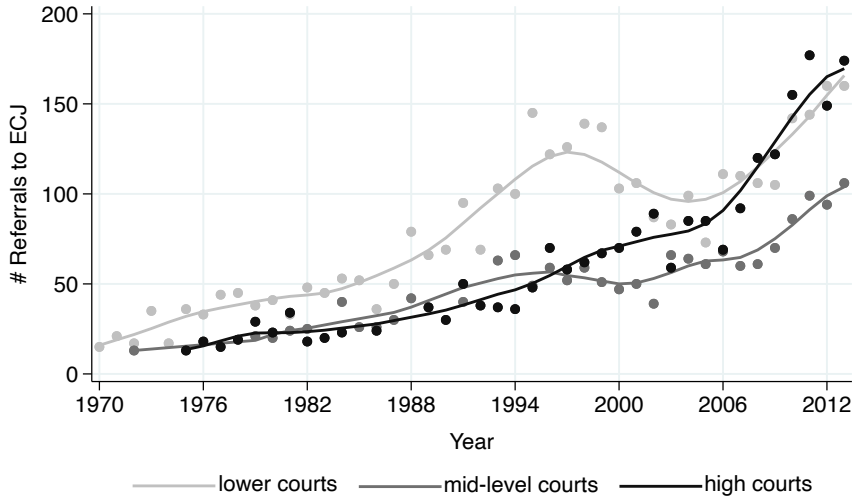
Notes: Adapted from Pavone (2022: 63-66).

Data source: European Parliament (2011: 114-115).

The bureaucratic travails afflicting lower court judges are far less acute for national high courts, and their judges know it. Over the past three decades, national high courts have seized the opportunity to displace lower courts and assert themselves as the CJEU's primary interlocutors. Pavone and Kelemen (2019) provide evidence that higher courts are increasingly referring cases to the CJEU, a finding that Dyevre et al. (2020) confirm. Furthermore, fieldwork and interview evidence suggests that some high courts – like the French Conseil d'Etat – leverage their top-down influence over lower court judges and their careers to dissuade them from circumventing their superiors and controlling the dialogue with the CJEU (Kelemen & Pavone 2018; Pavone 2022). Figure 4 visualizes these trends, providing descriptive evidence that a few dozen higher courts now account for the same share of referrals to the CJEU as tens of thousands of lower courts. Today, supreme court judges wield disproportionate influence over the trajectory of EU law, bolstering their capacity to shape the CJEU's on-the-ground authority. If lower courts ever proved eager and effective on-the-ground agents of EU law and CJEU authority in the early decades of the EU legal order – a highly questionable assumption (Rasmussen

& Martinsen 2019; Pavone 2022) – this founding narrative concerning the "judicial construction of Europe" cannot be empirically sustained today. Instead, lower courts are broadly reluctant magistrates that appear more concerned with increasingly deferring to national high courts and managing their daily workload than cooperating with the CJEU to advance EU law.

Figure 4 – the ascendance of national high courts: *Particularly since the 1990s, a few dozen high courts have come to rival tens of thousands of lower courts in the number of cases they refer to the CJEU*



Notes: Lines depicting time trends are computed using a lowess function with a bandwidth of 0.5.

Data source: Preliminary reference data is drawn from Kelemen & Pavone (2019).

If lower courts are not the eager drivers of European legal integration they were made out to be, high courts may seem like an ideal alternative vehicle. After all, recent experimental survey evidence demonstrates that high courts can increasing public support for EU law. Cheruvu and Krehbiel (2023a) found that informing survey respondents in Germany that their Federal Constitutional Court is involved in the preliminary reference procedure significantly increases support for the decision relative to when only the CJEU is involved. Crucially, these results are strongest among respondents who would have otherwise opposed further European integration. In contrast to Mattli and Slaughter (1998, 199), who posit that public support for EU law is exogenous to national judiciaries, constitutional courts in liberal democracies can shape public support for European integration.

Yet national supreme courts – even those in liberal democracies – prove an unstable foundation for the EU legal system. First, since referring cases to the CJEU implicitly erodes high courts' authority in their domestic legal orders (e.g., Alter 2001), many high courts continue to push back at the CJEU's jurisprudence. For example, the Supreme Court of Denmark explicitly defied the CJEU's caselaw in the 2016 *Ajos* case, highlighting "institutional frictions which have been building for some time, and [providing] an example of irreconcilable judicial perceptions of the relationship between national and EU law" (Madsen et al. 2017, 141). The German Constitutional Court has long had a testy relationship with the CJEU and often resists its rulings when they impinge on fundamental rights or the democratic process, including in its 2020 *Weiss* decision (e.g., Burchardt 2020; Lohse 2015). The Czech Constitutional Court declared the CJEU's judgment in the 2012 *Landtova* case *ultra vries*, stating that the CJEU "had overstepped the boundaries of the powers transferred to the

European Union by the Czech Republic" (Dyevre 2016, 107). Such overt defiance by high courts can lead to public backlash against the CJEU, especially when citizens do not agree with the substantive content of a decision (e.g., Madsen et al. 2022; Turnbull-Dugarte and Devine 2021). High courts may be best-positioned to synchronize domestic and EU law, but they are also the least likely to consistently submit to the CJEU's authority.

Second, pressuring or packing a few high courts is substantially easier than co-opting countless lower courts. This tactic is precisely what some European governments have done to harness support from populist parties and Eurosceptic social movements. Chocking off the dialogue between thousands of lower court judges and the CJEU would indeed be akin to playing "whack-a-mole" – a fool's errand. But obstructing this dialogue when it is increasingly monopolized by just a few high courts is much easier (Pavone & Kelemen 2019). In Poland, the ruling PiS party engaged in court-packing following its electoral victory in 2015, quickly gaining a majority on its Constitutional Tribunal (Sadurski 2019). Poland's Constitutional Tribunal went on to declare in 2021 that it is not subject to the supremacy of some EU laws, in open defiance of CJEU jurisprudence (Wanat 2021). A similar story is relevant to Hungary, where the Fidesz party has systematically eroded the rule of law by packing the Constitutional Court with loyalists (Scheppele 2018; Epperly 2019). Finding allies on apex courts is a tenuous proposition for the CJEU when court-packing is now part of a script that "autocratic legalists" use to spearhead democratic backsliding (Bermeo 2016; Scheppele 2018). Indeed, Mayoral and Wind (2022) provide statistical evidence that when high courts are politically captured, they become significantly less likely to refer cases to the CJEU. This strategy is a tried-and-true preemptive challenge judicial authority: a government need not evade a court's rulings if it can starve judges of politically-sensitive cases (Pavone & Stiansen 2022).

Third, even where high courts accept the supremacy of EU law, it is far from a forgone conclusion that governments would obey their decisions (Staton & Moore 2011). Comparative political scientists have extensively pushed back at the notion that courts – even in consolidated European democracies – can drive forward policy and expect legislative compliance. Research on comparative judicial politics scholarship is replete with examples courts acting strategically to avoid government defiance and facing massive resistance to their decision-making (Rosenberg 1991; Vanberg 2015). National judges are often forced to cultivate social support via public outreach (e.g., Krehbiel 2016; Staton 2010), delay decisions until the political environment is more favorable (Krehbiel 2021), issue vague decisions to provide the appearance of policymakers' compliance (Engst 2021; Staton and Vanberg 2008), or issue rulings that allow noncompliance to continue (Helmke 2005; Schroeder 2022).

For instance, a number of studies analyzing Germany – perhaps the exemplar of a strong federal judiciary in a liberal democracy committed to the rule of law – have demonstrated political constraints on judicial decision-making. Vanberg (2005) exemplifies these constraints by tracing what happened when the Federal Constitutional Court (FCC) declared the display of the crucifix in Bavarian elementary school classrooms unconstitutional. Following public protests, the Bavarian parliament passed an ordinance mandating crucifixes in classrooms, with one FCC judge quipping: "there are more crucifixes hanging in Bavarian schoolrooms now than before the decision" (Vanberg 2005, 4). Vanberg (2005) concludes that the FCC is constrained by public support for its decision-making, which is hardly guaranteed. Indeed, Krehbiel (2021) demonstrates that the FCC strategically delays making decisions when it anticipates that the political environment will be more favorable in the future. Schroeder (2022) highlights that when lawmakers in the Bundestag threaten noncompliance by dismissing advice that their decision-making is unconstitutional, the FCC is less likely to strike down the law as unconstitutional. Finally, Engst (2021) builds on Staton and Vanberg (2008) arguing that the FCC only specifies implementation criteria when the government faces sufficient political

costs from evading an FCC ruling. In other words, the efficacy of a court's decision-making is not guaranteed, even in European liberal democracies.

In short, recent empirical evidence challenges the foundational assumptions necessary for national courts to embrace EU law and cooperate with the CJEU in a "virtuous circle." For one, only a few lower courts account for the vast majority of referrals to the CJEU, with most judges succumbing to the steep opportunity costs of referring cases to Luxembourg. For another, while high courts increasingly assert themselves and the CJEU's domestic interlocutors, they often contest the European Court's authority, can be co-opted by autocratizing governments, and are subject to government constraints even in liberal democracies. By pushing back against these foundational assumptions and placing them in comparative perspective, we can substantiate Hamilton's departing claim in *Federalist 78*: "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."

Larger and More Law Abiding? The Commission and the Politicization of Enforcement

As De Vries (2022: 10) argues, the competences of EU institutions "are not simply regulatory: they are deeply political." This may seem like an uncontroversial claim. Yet, when it comes to the Commission's role as "Guardian of the Treaties" – its role as the sole supranational institution charged with enforcing EU law and taking noncompliant member states to the CJEU via infringement proceedings – a powerful narrative formed that the Commission acts as a vigorous and apolitical regulator. From this premise, scholars derived another claim: that infringement proceedings launched by the Commission are an unbiased indicator of member state noncompliance with their Treaty obligations. And from that claim, a final conclusion was deduced: since infringements lodged by the Commission have declined in tandem with successive enlargements, the EU has paradoxically become "larger and more law-abiding" (Börzel & Sedelmeier 2017; see also Levitz & Pop-Eleches 2010). While scholars had good reasons to embrace parts of this argument into the early 2000s, a growing trove of evidence complicates this thesis and suggests that in some circumstances, the EU is becoming larger and *less* law abiding.

There are at least four reasons why scholars embraced the twin "Commission as rigorous and impartial law enforcer"/ "member states becoming more law-abiding" thesis. First, reliably measuring member state (non)compliance with EU law is very difficult, justifying a turn to infringement statistics. As Börzel (2001: 808) has long and persuasively argued, "we have no data… of the *actual* or a*bsolute* level of non-compliance in the EU." Despite scholars acknowledging that Commission enforcement likely understates the 'true' level of noncompliance, the availability of infringement data – and the absence of alternative measures – made infringements a low-hanging fruit for compliance studies. Scholars thus concluded that infringements "can serve as an important indicator for *relative* non-compliance as long as we carefully control for potential selection bias" (Ibid: 813).

Second, qualitative evidence from the 2000s suggested that while the Commission has strategic discretion in enforcement, it acted as a diligent prosecutor without being "systematically biased toward particular member states or policies" (Börzel 2022: 22). Börzel conducted interviews with the enforcement unit of the Commission's Secretariat General (SG) in 2001, with interviewees relaying that member states seldom "secretly evade" EU law "by cheating," suggesting that serious EU law violations were systematically detected by the Commission (Börzel 2003: 208). And in a 2007 expert survey with member state representatives in COREPER, "more than two-thirds of the respondents did not think that infringement data contained any systematic bias," suggesting that the Commission was impartial in pursuing EU law violations (Börzel et al. 2010: 1374).

Third, since the early 2000s the Commission publicly emphasized a shift in priorities towards enforcing EU law (in its role as "Guardian of the Treaties") over proposing new laws (in its role as

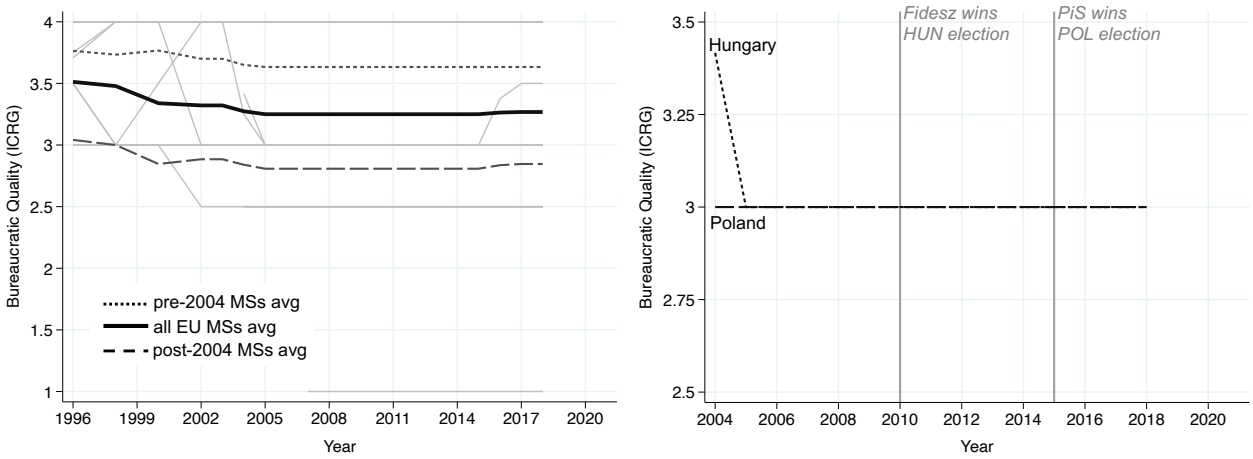
"engine of integration" (Pollack 2003)). The Commission issued a growing stream of press releases and annual reports claiming to prioritize "stepping up enforcement" over proposing new policies (Commission 2016), leading Commission observers to conclude that it was hardly "pull[ing] its punches in enforcement" (Kassim and Laffan 2019: 1015; Becker et al. 2016: 1015; Scholten 2017). Based on a systematic content analysis of the Commission's annual reports on monitoring the application of EU law, Pircher (2023: 763-764) confirms a shift "towards an almost exclusive emphasis on top-down enforcement," concluding that the Commission "has become a more authoritarian prosecutor." Given these forceful public assertions, it seems natural to conclude that a decline in infringements signals that EU member states have become more law-abiding.

Finally, scholars drew on managerial theories of compliance (Chayes and Chayes 1993) to stress the impact of the Commission's collaborative efforts to bolster member states' administrative capacity to comply with EU law. Through financial and technical assistance – such as the disbursement of EU Cohesion Funds – the Commission "orchestrate[d] transgovernmental networks that bring together national administrators in charge of implementing EU law to foster… best practices on how to achieve compliance" (Börzel 2022: 55). In particular, as the EU imposed pre-accession conditionality on candidate countries (the so-called "Copenhagen criteria" adopted in 1993 by the European Council) and the Commission worked with acceding member states to transpose the EU's *acquis communautaire*, states joining the EU since the 2004 enlargement built "specialized administrative and legislative capacities… to transpose large amounts of EU law" (Börzel & Sedelmeier 2017: 210; Börzel and Schimmelfennig 2017). As a result, "the net effect of the EU's enlargement rounds has… been to improve compliance" (Börzel & Sedelmeier 2017: 211) via "the specific capacity that [states] built for implementing EU law" (Börzel 2022: 90).

Taken together, the foregoing four logics appeared to justify treating infringements as unbiased indicators of noncompliance, the Commission as an impartial and rigorous enforcer of EU law, and a decline in infringements as reflecting "capacity building through EU funds, funding programs, and trans-governmental networks [that] ha[ve] increased over time" (Börzel 2022: 118). We argue, however, that there are four counter-reasons to reject these conclusions. First, the data used in prominent studies supporting the "larger and more law-abiding" thesis is problematic, in that it does not vary over time. Second, once we gather more reliable data, the picture that emerges is that member states' compliance capacity has declined and diverged over time. Third, Commission enforcement is inversely related to these trends and to the expectations of capacity-building theories: as member states' compliance capacities declined and diverged, Commission enforcement has declined and converged. Fourth, qualitative and quantitative data suggests that Commission enforcement became deeply politicized beginning in 2004, eroding the Commission's propensity to enforce EU law and inducing it to adopt political strategies that introduce systematic bias in enforcement statistics.

First, we found that more than a half-dozen studies (Perkis and Neumayer 2007a, 2007b; Ugur 2013; Börzel and Schimmelfennig 2014; Börzel & Sedelmeier 2017; Börzel 2022; Sczepanski and Börzel 2023) arguing that member states have improved their capacity to comply with EU law have relied on problematic data to support their case. Instead of relying on public data widely used to measure bureaucratic effectiveness and administrative compliance with the law – such as data on government effectiveness from the World Bank's Worldwide Governance Indicators (Kauffman et al. 2013), or data on the rigor and impartiality of the public administration from the Varieties of Democracy (VDem) project (Coppedge et al. 2022) – these studies leverage proprietary data on bureaucratic quality from the International Country Risk Guide (ICRG) compiled by the PRS group, a geopolitical risk ratings firm. These data purport to capture a bureaucracy's autonomy from political pressure, the presence of impartial training and recruiting, as well administrative strength, expertise, and stability. But there is a glaring problem with these data: at least for EU member states, their "bureaucratic quality" variable is so crude that it does not vary over time.

Figure 5 – problematic compliance capacity data: *Data used in studies suggesting improved member state bureaucratic quality fails to capture temporal variation (left), even for autocratizing Poland and Hungary (right)*



Notes: Light grey lines on left panel indicate scores for individual member states, but given no variation they overlap.

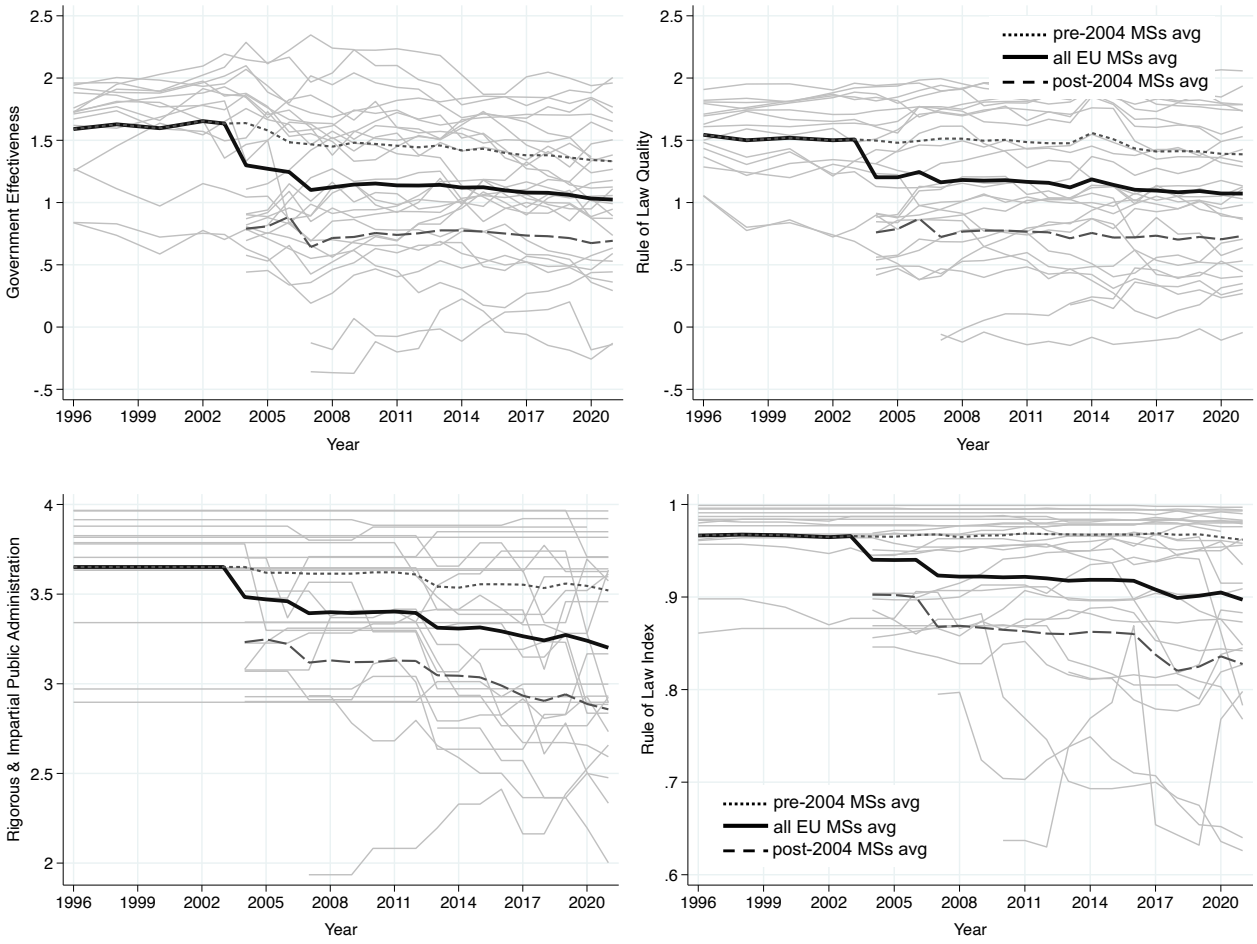
Data source: Data is from the International Country Risk Guide (ICRG). Bureaucratic quality (based on the "bureaucracy quality" variable ranging from a minimum score of 0 to a maximum score of 4) captures the degree to which the bureaucracy is autonomous from political pressure and an impartial training and recruitment mechanism, as well as bureaucratic strength, expertise, and stability.

As Figure 5 captures, from 1996 to 2018, we found that the ICRG bureaucratic quality data exhibits zero temporal variation for 22 of 28 member states (79% of member states), and includes only 11 year-to-year changes out of 644 country-year observations (i.e. variation for less than 1.7% of the data). These data even fail to capture temporal changes for Hungary and Poland –the world's fastest autocratizing states (VDem 2022), whose public administrations have been politically co-opted, packed with partisan loyalists, and instructed to flout their constitutional and EU legal obligations since Fidesz assumed power in Hungary in 2010 and PiS in Poland in 2015 (Pech & Scheppele 2017; Scheppele 2018; Sadurski 2019; O'Dwyer and Stenberg 2022). That these two states – which have been plagued by widely-publicized and full-fledged "constitutional breakdowns," massive increases in public corruption, and described as "mafia states" (Magyar 2016) – would not register any change in the ICRG's bureaucratic quality scores is a glaring red flag as to their quality and ability to proxy for states' compliance capacity. Even if we were to trust these data's accuracy, Figure 5 shows that they neither support the claim that member states have become more law-abiding, nor that post-2004 accession states had built similar or better bureaucratic capacity compared to older member states. The most salient point, however, is methodological: data that does not vary over time (where the only variance captured by panel regression analyses is cross-sectional) cannot be wielded to make a temporal argument.

When we turn to data that are widely used by political scientists to measure cross-national and temporal variation in bureaucratic capacity and legality, a very different picture emerges: instead of EU member states converging towards being more law-abiding, member states are drifting apart, and their compliance capacity has generally been declining over time. Figure 6 captures the decline and divergence amongst EU member states' compliance capacities using World Bank data (on government effectiveness and rule of law quality) and VDem data (on rigorous and impartial public administration

and rule of law quality). These data indicate that both pre-2004 and post-2004 accession member states have witnessed declines in bureaucratic quality and their commitment to the rule of law on average.

Figure 6 – declining & diverging state compliance capacity: *Bureaucratic quality (left panels) and rule of law (right panels) has declined across member states, with growing variation since the 2004 enlargement (upper graphs display World Bank data; lower graphs display Varieties of Democracy (VDem) data)*



Notes: Light grey lines indicate scores for individual member states.

Data sources: Data for the upper two graphs is from the World Bank's Worldwide Governance Indicators. Government effectiveness (based on the "government effectiveness: estimate" variable ranging from a minimum score of -2.5 to a maximum score of 2.5) captures the quality of state bureaucracies, include its independence from political interference and its capacity to formulate and implement policy. Rule of law quality (based on the "rule of law: estimate" variable ranging from a minimum score of -2.5 to a maximum score of 2.5) captures a state's commitment to contract enforcement, property rights, and the quality and independence of the courts and police. Data for the bottom two graphs is from the Varieties of Democracy (VDem) dataset. Rigorous and impartial public administration (based on the "rigorous and impartial public administration" variable ranging from a minimum score of 0 to a maximum score of 4) captures the extent to which public officials generally abide by the law and the bureaucracy is free of arbitrariness and biases. Rule of law index (based on the "rule of law index" variable ranging from a minimum score of 0 to a maximum score of 1) captures the extent to which laws are transparently, independently, predictably, impartially, and equally enforced, combined with the extent to which government officials comply with the law.

The face validity of World Bank and VDem data is bolstered by several factors. First, unlike the ICRG data, these data *do* capture temporal variation within member states. Second, the underlying trends in Figure 6 are plausible since they coincide with several cross-national crises plaguing the EU during this period – such as the Eurozone crisis, refugee crisis, and COVID-19 pandemic – leading to generalized and highly-publicized waves of noncompliance (Genschel and Jachtenfuchs 2018; Scicluna 2021; Thym and Bornemann 2020). For instance, during the 2015-2016 refugee crisis, human rights NGOs "increasingly denounced EU member states' violations of the right of asylum and accused the EU of turning a blind eye to non-compliance with the CEAS [Common European Asylum system]" (Schmalter 2018: 1330). Today, member states from France, Malta, Italy, Greece, and Hungary institutionalize deliberate "implementation gap[s]" of EU migration and asylum rules, "with fundamental rights violations in some member states…characterized as systemic or reaching the level of a humanitarian emergency," exposing "one of the many faces of rule of law backsliding" in Europe (Tsourdi 2021: 472-473). Adding to these compliance-eroding crises was the 2004 enlargement, which significantly increased inter-state variation in compliance capacity, as newer states tended to score lower in their bureaucratic quality and rule of law.

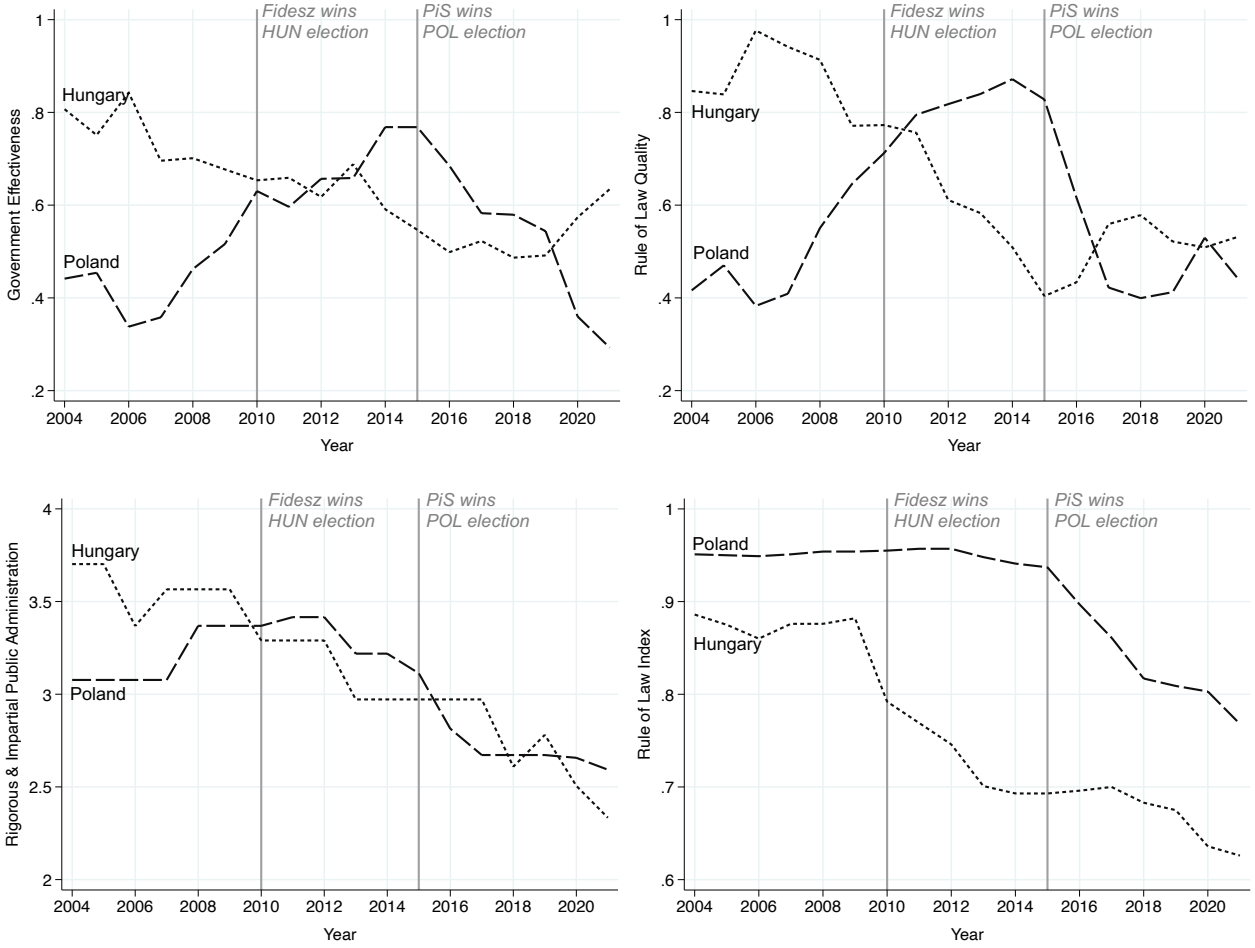
Finally, unlike the ICRG data, these data do capture sharp fluctuations and declines in both bureaucratic quality and the rule of law in two post-2004 accession states – Hungary and Poland – that coincide with Fidesz and PiS' electoral wins and the process of autocratization that followed. Figure 7 visualizes these temporal shifts in bureaucratic capacity and rule of law in Hungary and Poland: the contrast with the static picture suggested by the ICRG data in Figure 5 is striking. Taken together, these data suggest a clear story. The EU certainly became larger in the past two decades, but the very indicators often invoked to claim that member states have become more law-abiding suggest that they have become less law-abiding instead.

If Commission enforcement reflects member states' administrative effectiveness and commitment to legality, the fact that both variables have declined and diverged across member states begets a clear expectation: the Commission should respond by launching more infringements, with growing cross-national variation in enforcement over time. In fact, since 2004 the opposite occurred: Commission enforcement has cratered and converged on a minimal level of enforcement that treats all (unlike) member states alike. Figure 8 captures this clear decline in Commission enforcement, which across all member states can be dated roughly to the mid-2000s (see also Kelemen and Pavone 2023). This trend is striking because the mid-2000s is precisely when the EU almost doubled in size and the "violative opportunities" (Börzel 2022: 25) – the number of member states multiplied by the number of new EU laws that can be broken – spiked. Kelemen and Pavone (2023) show that controlling for violative opportunities and parsing infringements into discretionary and automatic (non-transposition) infringements does little to alter the story of declining Commission enforcement. Furthermore, notice how Figure 8 captures a uniform decline in Commission enforcement regardless of member states' pre/post-2004 accession status and varied compliance capacities. Today the EU includes member states whose compliance capacities and commitment to legality are as divergent as Denmark and Hungary, yet this reality is difficult to detect in the Commission's enforcement approach: Hungary might as well be Denmark, Poland might as well be Sweden.

This post-2004 inverse relationship between indicators of noncompliance and Commission enforcement is further highlighted by Figure 9. One indicator of noncompliance that is as revealing as it is often neglected by EU law and politics scholars is complaints that citizens, NGOs, and businesses file with the Commission alleging state violations of EU law. Figure 9 demonstrates that as complaints to the Commission reached record levels post-2004 (as would be expected given enlargement and the erosion of state compliance capacities traced in Figure 6), the number of infringements opened cratered. Through the early 2000s there was a positive and intuitive correlation

between complaints and infringements: more alleged violations, more enforcement. But since 2004 that correlation has reversed: more alleged violations, less enforcement.

Figure 7 – declining compliance capacity in Hungary and Poland: *Bureaucratic quality (left panels) and rule of law (right panels) have declined in Poland and Hungary hand-in-hand with the electoral wins of the Fidesz and PiS parties (upper graphs display World Bank data; lower graphs display Varieties of Democracy (VDem) data)*

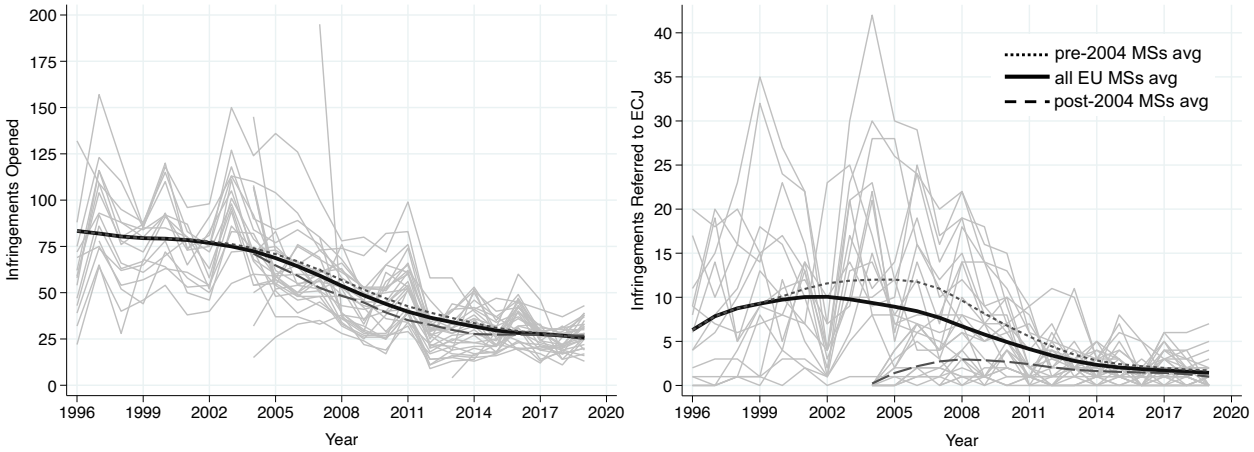


Notes: For more information on the data sources and variable codings, see the notes for Figure 6.

Although some scholars neglected the sudden reversal in the relationship between compliance and enforcement, NGOs and investigative journalists working across policy fields noticed. In the migration field, Amnesty International (2014: 29) deplored how even as "EU member states are violating their international regional human rights obligations… the EU itself appears to have abandoned its founding principles and values by turning a blind eye." In the environmental field, the European Environmental Bureau (2020: 5) lamented how "reports from national NGOs and the media show that several severe cases are ongoing for a long time without seeing concrete enforcement action… many detailed and actionable complaints… [are] not taken up by the Commission at all," "threatening respect for EU law and the Commission's credibility." And in 2022 *Politico* dispatched teams of investigative journalists across several member states and found that "defiance against EU law is on the rise" in the consumer protection, privacy, food safety, and environmental fields, yet

"[there is] a gradual trend towards weaker enforcement of EU rules" (Vinocour & Hirsch 2022). They titled their lead story "Lawless Europe: How EU states defy the law and get away with it" (Ibid).

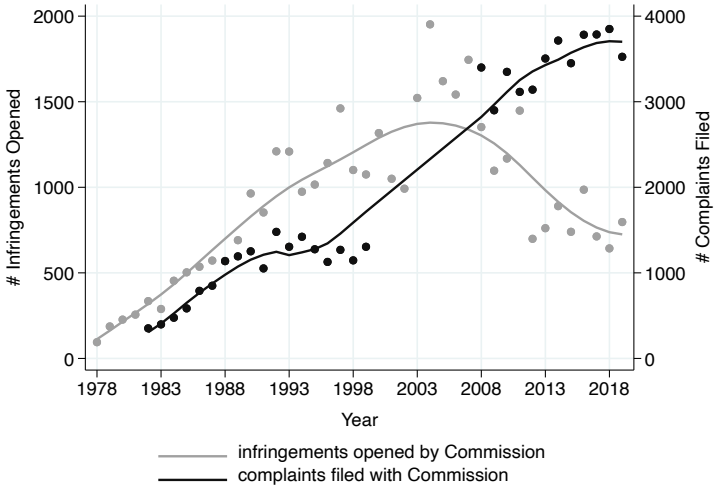
Figure 8 – declining & converging Commission enforcement: *The Commission is opening fewer infringements (left) and pursuing fewer referrals to the CJEU (right), with declining variation since 2004*



Notes: Light grey lines indicate yearly infringements for individual member states. Time trends for pre-2004 states, post-2004 states, and all EU member states are computed using a lowess function with a bandwidth of 0.6.

Data source: Kelemen and Pavone (2023), based on data drawn from the European Commission's infringement database.

Figure 9 – rising citizen complaints, declining Commission enforcement: *Since 2004, the Commission is opening fewer infringements even as citizen complaints alleging state noncompliance rose to record levels*



Notes: Time trends are computed using a lowess function with a bandwidth of 0.5.

Data source: Kelemen and Pavone (2023), based on data drawn from the European Commission's infringement database and from the Commission's Annual Reports on Monitoring the Implementation of EU law.

These on-the-ground dispatches, combined with a comparison of Figures 6, 8, and 9, suggests that instead of reflecting bottom-up trends in state (non)compliance, Commission infringements are converging on an equilibrium of minimal enforcement because of a top-down shift in enforcement

strategy. Drawing on semi-structured interviews with Commission insiders with varying seniority and careers spanning the pre- and post-2004 periods, Kelemen and Pavone (2023) trace a sudden politicization of enforcement and a strategic turn to "supranational forbearance" – the deliberate and revocable under-enforcement of the law. While historically it was lawyers in the Commission's Legal Service who informally pushed through enforcement actions, in a climate of growing Euroscepticism, government leaders in the European Council grew increasingly irritated at being sued. Sensing that he had been thrown "in the bear pit" during Council summits (quoted in Ibid: 21), new Commission President José Manuel Barroso (2004-2014) worried that the Commission's policy agenda was being jeopardized by overzealous attorneys in the Legal Service. Barroso, thus, worked with the Commission's Secretariat General – historically a technocratic coordinator of the Commission services, but now reformed as a "Prime Minister's office" – to "control this process of infringement procedures" (Kelemen & Pavone 2023: 23).

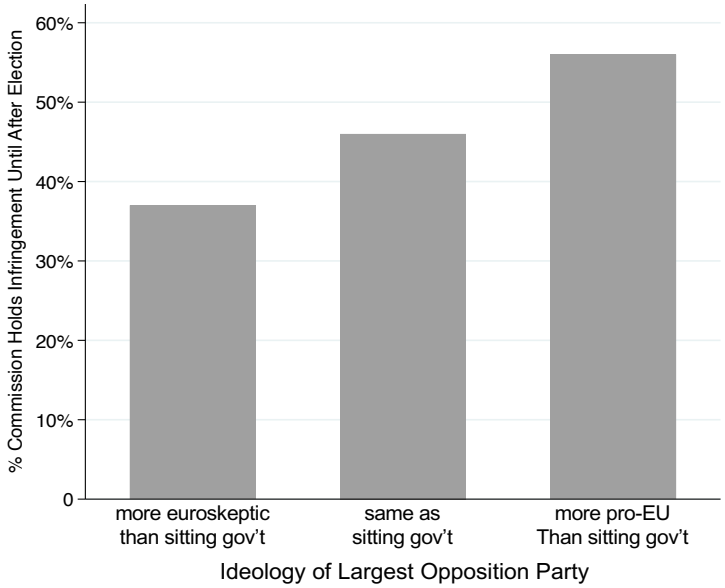
One key reform catalyzing the politicization of Commission enforcement was the EU Pilot procedure (proposed in 2007 and implemented in 2009). Publicly hailed by the Commission and some researchers as a pre-infringement "problem-solving tool" to dialogue with governments to address complaints and boost compliance (Börzel 2022: 110-112), in practice EU Pilot facilitated top-down political control over enforcement and dropping investigations. The Barroso Presidency's informal direction to the various Directorates General (DGs) was to use EU Pilot "not to go ahead with infringement proceedings and to try to find a friendly solution with member state administrations," often by rubber-stamping governments' claims to be complying with EU law (quoted in Kelemen & Pavone 2023: 26). In the words of a senior Commission official, EU Pilot was used to communicate to member governments that "we're not looking to score high case numbers in the CJEU… [so] they would see that we're not just blind lawyers, but that we would have had a chance to sort something out" (quoted in Ibid: 30). The Presidency and Commissioners wielded EU Pilot's bilateral, private dialogues with governments to sideline Commission lawyers as well as complainants, to "'kill' or at least slowdown such an efficiency of Commission Services in pursuing infringements" (quoted in Ibid: 27). Although the Juncker Commission revoked the sweeping use of EU Pilot, interviewees suggest that Commission civil servants "are still living this second era, this second [politicized] stage of the Commission's infringement policy… and this very negative mood lasts still now" (Kelemen & Pavone 2023: 32-33).

Once again, complainants sounded the alarm. NGOs made clear that the politicization of infringements – and the secretive EU Pilot dialogues with governments – weaken enforcement and undermine civil society's capacity to pressure states into compliance. While some studies claim that EU Pilot "assist[s] citizens and businesses" (Börzel 2022: 54), complainants appear to claim the opposite. One of ClientEarth's directors (Kramer 2016: 7, 3) minced no words: "by introducing the Pilot system, the Commission deliberately intended to deter complainants… and thereby avoid the obligation to start formal proceedings against a member state." An NGO lawyer told Kelemen and Pavone (2023: 75) that "the lack of transparency in [EU Pilot] is really not helping…if NGOs…had access… they could support the European Commission at the national level… it's clearly a political decision…to keep it confidential… [but] you shouldn't be negotiating with the member states if they are in violation of the law." Frustrated, citizens and NGOs filed complaints to the European Ombudsman decrying the Commission's new enforcement approach (European Ombudsman 2017).

These qualitative findings suggest that since 2004, enforcement was restrained as the Commission's political leadership asserted control over prosecutorial decision-making. One observable implication of this shift is that enforcement should be driven by the increasingly political calculations of the Commission's political leadership. That the Commission would act strategically in its enforcement choices – weighing the costs of pursuing an infringement and the probability of noncompliance – is not a new finding, although it already problematizes infringements as a proxy for

noncompliance (see König and Mäder 2014; Fjelstul and Carrubba 2018). What is new is the pervasiveness and sophistication of these political choices. For instance, in his analysis of Commission enforcement since 2004, Cheruvu (2022) finds that the Commission systematically puts infringements on hold against member states in the weeks before an election (see Figure 10). But the Commission's political calculus is even more sophisticated: the Commission only freezes enforcement actions against member states when the largest opposition party expected to win the election is more pro-EU in ideology than the sitting government (and thus more predisposed to rectify the infringement). As an ex-Commissioner conveyed to Kelemen & Pavone (2023), "there is an internal politicization… you don't want to come with an infringement… just before a political election." The risk in these political machinations is that they "may erode the already-precarious enforcement of international law" if taken too far (Kelemen & Pavone 2023; Scheppele 2023). At the same time, the politicization of supranational enforcement can sometimes expedite infringements and limit unnecessary clashes with Eurosceptic national governments (Cheruvu 2022; Cheruvu & Fjelstul 2022).

Figure 10 – enforcement awaits the election returns: *The Commission is much less likely to advance infringements before an election in a member state when the opposition party is more pro-EU than the sitting government*



Notes: Adapted from Cheruvu (2022: 389), Figure 3.

Data source: Cheruvu (2022). Comparison of opposition party ideology vis-à-vis the sitting government is drawn from the ParlGov Project data (specifically the "eu anti pro" variable). Infringement data is drawn from Fjelstul and Carrubba 2018, supplemented with data from the European Commission's infringement database.

These novel studies call into question the sweeping narrative that the EU has become "larger and more law-abiding," suggesting that its assumptions are flawed and increasingly groundless. The qualitative and quantitative empirical record indicates that the compliance capacities of EU member states have drifted apart and eroded, while the Commission has grown increasingly political – and restrained – in its enforcement decisions. To be fair, proponents of the "larger and more law-abiding" narrative acknowledge that that the dynamics they posit are "difficult to explain" and "particularly puzzling" (Börzel & Sedelmeier 2017: 211). But this puzzle only exists if we continue to assume that the Commission's declining enforcement activity must reflect improvements in member states' legal

commitments, despite evidence to the contrary. If we reject this assumption – and treat enforcement as a political product forged by the strategic interests of politicians at the helm of the Commission – we can confirm what scholars of the EU's "rule of law crisis" have long argued (Pech & Scheppele 2017; Emmons & Pavone 2021; Kelemen 2022; Scheppele 2023; Kelemen & Pavone 2023). Today, the EU faces a rising stream of systemic legal violations by some member states, and the response of the EU's "Guardian of the Treaties" is often mired in political trepidation.

A New Research Agenda: Towards a Theory of Intercurrence in EU Law and Politics

The "end of history" in EU law and politics was comprised of two foundational narratives. Those narratives posited that the foundations of the "judicial construction of Europe" were sound, and getting more robust by the day. National courts – particularly countless lower courts eagerly mobilizing European law across the territories of the member states –locked-in the CJEU's authority, with member governments and national high courts adjusting to this reality. In fact, member governments labored successfully to boost their own regulatory capacities to comply with EU law, under the watchful and rigorous eye of Commission acting as "Guardian of the Treaties." With a committed and impartial supranational law enforcer, a subnational army of enthusiastic and autonomous state courts, and national administrations increasingly capable of honoring their treaty obligations, it is little wonder that Fukuyama's "end of history" thesis suffused much EU law and politics research by exalting "law" and expunging "politics". Given the problems with this approach noted by De Vries (2023) and Scicluna and Auer (2023) that we substantiated here, what does an alternative and more nuanced research program in EU law and politics look like?

Instead of discarding past research, we argue for recovering and building upon the dissonant theories that challenged "end of history" narratives in real time. One particularly fruitful avenue is to draw upon theories of *intercurrence* developed by historical institutionalists in the late 1980s and 1990s. This concept was developed precisely to challenge teleological arguments that "[political] order presumes institutions synchronized with one another" (Orren and Skowronek 1996: 111). Instead, intercurrence "directs researchers to locate the historical construction of politics in the simultaneous operation of older and newer instruments of governance, in controls asserted through multiple orderings of authority whose coordination with one another cannot be assumed" (Orren and Skowronek (2004: 113).

Intercurrence is related – yet distinct – to several concepts in international and comparative law and politics. On the one hand, intercurrence implies legal pluralism: the simultaneous operation of multiple legal orders in a given territory (Merry 1988). As international regimes like the EU develop incrementally, supranational rules are "layered" atop pre-existing state and local legal orders (Kelemen & Pavone 2018). Yet intercurrence is a thicker concept than legal pluralism because it treats national and international laws as deeply embedded in the "the ongoing push and pull" of competing political orders (Orren and Skowronek 1996: 111; King and Smith 2005; Sheingate 2015). These pushes and pulls can create legal conflicts that erode the authority of some legal and judicial institutions (Lazarev 2019). Yet intercurrence is not "mean[t] to suggest a pathological condition" (Orren and Skowronek 1996: 111) or imply reverse-teleologies like "dejudicialization" (Abebe and Ginsburg 2019). Instead, intercurrence treats the political tensions within overlapping legal orders as open-ended and generative: creating spaces for political entrepreneurship and struggles over the course of institutional change whose outcomes are uncertain (Orren and Skowronek 1996; 2004).

Perhaps because of its anti-teleological thrust, its almost exclusive association with studies of American political development, and the allure of "end of history" arguments, the concept of intercurrence has had little traction in comparative and international politics. This is unfortunate, for it helps us place in starkest relief the blind spots of foundational narratives of EU law and politics. By positing a self-reinforcing cycle synchronizing domestic and international courts, those narratives left

little room to explain enduring competitions and tensions in EU judicial politics. By positing a larger and more law-abiding EU and claiming that the spread of liberal democracy would abate political and legal conflicts, those narratives wrongly presumed that liberal democracies are conflict-free and that in Europe the rule of law would become the only game in town. Taking intercurrence seriously helps us retrieve and valorize the dissonances and conflicts that attract much EU law and politics research.

In this paper we cited dozens of new studies and leveraged original quantitative and qualitative data to highlight intercurrence in EU law and politics. This research agenda centers on probing the enduring and re-emergent political conflicts that have destabilized the EU legal order: between high courts and lower courts, judges and their national governments, and member states and Commission policymakers. While challenging the progressive thrust of much EU law and politics research, this agenda *does not* imply a regressive dynamic of European disintegration. What it highlights is that instead of a convergence of socio-legal forces propping-up the EU legal order and insulating it from political conflict, the transnational, multi-level judiciary that the CJEU has sought to lead is increasingly stress-tested by political chasms that are simultaneously eroding and reconstituting EU law. To be sure, European legal integration has always had shaky and unbalanced foundations, as state bureaucracies, national judiciaries, and political parties have always shaped, mediated, and resisted the development of EU law and the authority of the CJEU (Davies 2012; Fritz 2015; Fritz 2018; Rasmussen & Martisen 2019; Kelemen and McNamara 2022; Pavone 2022). Yet in decades past these conflicts often took place behind-the-scenes. Today, political contestations of EU law often play out in broad daylight, facilitating systematic empirical measurement and analysis.

On the side of political erosion, recent studies reveal clear evidence of enduring "brown areas" of national court apathy vis-à-vis EU law that foster gaps in the CJEU's on-the-ground authority, a growing recalcitrance of some national high courts eager to challenge the supremacy of EU law, the willingness of some government to capture their judiciaries and national administrations to obstruct the implementation of EU law, and a politicized Commission that views law enforcement as negotiable. These intertwined political developments suggest that the EU as a "community based on the rule of law" faces a number of serious threats, demonstrating that "even seemingly deep [supranational legal orders] with well developed, and seemingly effective, adjudicating mechanisms can suffer from severe enforcement problems" (Carrubba 2005: 669). The European house is hardly locked in a virtuous path towards a larger, more law-abiding end of history.

Yet, these developments have also provoked a wave of political mobilization in defense of the rule of law and the CJEU's authority. From the apex of the Eurocracy, CJEU President Koen Lenaerts broadcast a series of calls-to-action to defend judicial independence and the Court's authority within member states (Van Dorpe 2021). From within civil society, associations of lawyers and judges mobilized across national borders to pressure the Commission to take law enforcement seriously, call out national governments who undermine the rule of law, and come to the defense of their colleagues under political attack (Matthes 2022). And under this growing stream of pressure from civil society, the European Parliament, and some member governments committed to the rule of law, a reluctant Commission finally took the unprecedented step of freezing hundreds of billions in EU funds to Hungary and Poland for violating the EU's legal and democratic values (Morijn & Scheppele 2023).

Empirical evidence also illuminates intercurrence in the legitimating capacity of EU law. While Cheruvu and Krehbiel (2023a) find that the German Constitutional Court's implementation of preliminary rulings increase support for CJEU decisions among people that generally *do not* support EU law, Cheruvu and Krehbiel (2023b) find that Hungarian courts' implementation of preliminary rulings *decrease* support for CJEU decisions amongst people supportive of EU law. In other words, in resilient liberal democracies, domestic courts appear to be deepening integration by increasing public support for the CJEU, whereas in autocratizing member states that have politicized their judiciaries,

citizens committed to the rule of law have grown skeptical of their decisions – including those that apply EU rules.

These dissonances eschew teleological narratives, and they would never have arisen if the EU truly had become larger, depoliticized, and more law-abiding international regime. We are struck by how closely research exposing cracks in the EU legal order mirror recent studies problematizing the post-Cold War notion that states could "consolidate" into "self-sustaining" democracies (Linz and Stepan 1996; Fukuyama 2005). While in the 1990s prominent comparative political scientists argued that it was possible to speak of a "completion" of democracy where liberal constitutionalism becomes "the only game in town" (Linz and Stepan 1996: 14-16; though see Pharr & Putnam 2000 for a contrary perspective) today scholars recognize that enduring and new political conflicts ensure that even longstanding democracies are never 'complete' (Slater 2013; Levitsky and Ziblatt 2018; Corbett 2020). This same anti-Whiggish spirit now suffuses research on EU law and politics. Just as democratic theorists now recognize that "we need to stop taking for granted that constitutions can defend themselves" (Scheppele 2018: 583; see also Gamboa 2022), so too have EU law and politics scholars come to recognize that EU law needs to be continuously mobilized and defended by political elites and civil society if it is to be made real within member states.

These conclusions suggest important insights for the study of intercurrence in EU law and politics. The EU cannot grow into a depoliticized and synchronized polity, because the authority of EU law is shaped by enduring political cleavages and conflicts that continue to play out within liberal democracies (Hooghe & Marks 2018). As a result, instead of treating the politicization of EU law as a necessarily constraining force – as in postfunctionalist theories (Hooghe and Marks 2009; Leuffen, Rittberger, and Schimmelfennig 2022) – a theory of intercurrence would distinguish amongst types of politicization and the conditions under which they construct or destruct the authority of international law (Pavone 2019; Cheruvu & Krehbiel 2023a; 2023b). To this end, closer engagement with research probing the erosion and resilience of constitutional systems (e.g., Ginsburg & Huq 2020; Dixon & Landau 2021; Daly 2022; Gamboa 2022) and international regimes (Gonzalez-Ocantos & Sandholz 2022) beyond Europe would be fruitful. For as in other multi-level legal orders (Gibson 2013; Kelemen 2017), both constructive and destructive processes of politicization are at play in the EU and neither is likely to gain the hegemonic foothold necessary to 'end history'. Where Viktor Orbán sabotages the CJEU's authority, members of the European Parliament mobilize to withhold EU funds to systemic non-compliers. Where recalcitrant constitutional courts resist the primacy of EU law, associations of European judges and allies at the CJEU band together in its defense. Where efforts to politically reign-in the Commission's enforcement of EU law arise, counter-movements organize to bolster the effectiveness of the EU's rule of law toolkit. We are witnessing history all right, but it is hardly Whiggish history. Truth be told, in EU law and politics we doubt that history ever really ended in the first place.

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