I. Introduction

There are various criticisms made of the European Court of Justice (the Court), of which the most common tend to share a lot of ground: they cluster around the idea that the Court pushes EU law too far. This chapter does not make an argument about whether those criticisms are fair or justified. Rather, the chapter tries to unpack the nature of the criticisms, and consider what kind of action or change would disarm them.

The core point of the chapter is to challenge the coherence of a common narrative about the Court. That narrative would present the Court as activist, and integrationist, and purposive, and complain that it behaves more like a political organ than a legal one, constantly pushing the text beyond what it can bear. The narrative would then go on to suggest that in order to have a more legitimate and limited legal order, one which respects divisions of power between the EU and Member States, the Court needs to become more cautious and disciplined, and behave more like a traditional court, sticking to the letter of the law and leaving politics to politicians.

On the contrary, it is suggested here that defining characteristics of the Court’s approach to EU law are that it is backward-looking, static and unresponsive to social change. It is based on a vision of the Treaties which was bon ton in right-thinking EU circles 60 years ago – when these were the circles that mattered – but resonates rather weakly with the general public now. If one objects to the undoubtedly far-reaching, disruptive and integration-oriented

1 The author’s view, in the interests of transparency, is that sometimes they are and sometimes they are not.


approach to EU law which the Court takes then one is in substance calling for it to come into
the present: to abandon its original conception and develop a new one, more in tune with the
times. To become, in short, politically responsive and dynamic in its approach to the law. In a
neat reversal of the American debate, Eurosceptics and conservatives really want – whether
they know it or not – a more contemporary and political court. Europhile integrationists, by
contrast, want a court that continues to adhere to the principles and vision which it developed
half a century ago and has been applying ever since.

The American debate is mentioned because an essentially American constitutional idea
will be used here to develop the argument – the idea of originalism. Originalist interpretations
of the constitution are often contrasted with those which treat it as a living document, and
when those approaches are compared with Europe it is treated as self-evident that the Court of
Justice’s teleological interpretative style is almost opposite to originalism. Conservative, often
textualist, American originalists are seen as judicial mirror images of the progressive,
purposive, European Court. Here it will be argued, as the paragraph above suggests, that the
Court of Justice is closer to the originalist end of the judicial scale than to that of the living
constitution. Its most striking characteristic is a refusal to change.

Why does this matter, beyond the obvious and significant pleasure of making a
counterintuitive academic argument? It matters partly because the diagnosis affects the
treatment. Whether one takes the view that it is important to expand the scope of EU law, or
to rein it in, this has institutional consequences. The various tools potentially available to steer
the law – textual change, appointments to the Court, political pressure, judicial resistance,
amendment of institutional competences – can only be effectively deployed if the causes of
EU law’s current state are understood. It matters also because it shines a certain light on the
nature of debates about the Court and its law. Institutional and social conservatism are allied
with legal dynamism and politicisation, whereas the desires for social and institutional
deepening of the EU are allied with legal consistency and conservatism. In a time of
populism, these links are not entirely strange – formalism as a way of resisting autocracy’s
tendency to instrumentalise and politicise law has a long and distinguished history – but they
are not fully appreciated in EU law’s internal debate, where the self-understanding of each
side is sometimes as misguided as their understanding of the other.

The chapter proceeds in steps. The following section sketches the contrast between
originalist and other approaches to interpreting constitutions. The next section outlines
common criticisms of the Court. The following two show what is meant by the static and
backward-looking nature of EU law. A conclusion suggests policy consequences.

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4 Conway, above n 2; Sankari, ibid 63.

5 M Bobek, ‘Conclusions: Of Form and Substance in Central European Judicial Transitions’ in M Bobek (ed),
Central European Judges Under the European Influence: The Transformative Power of the EU Revisited
University of Chicago Law Review 636.
II. Originalism and Living Constitutionalism

Originalism, in the context of constitutional interpretation, is, most simply, the idea that the constitution should continue to bear the meaning that it had when it was first adopted unless and until it is amended by the appropriate procedure. It is quite often contrasted with the most obviously opposing position, living constitutionalism, which claims that constitutions should be interpreted in their current social and political context, so that their meaning may change as the world around them changes.

There are of course infinite varieties of originalism and of anti-originalism, addressing matters such as how the original meaning is to be defined or determined, or, on the other side, the extent and manner in which context should be injected into interpretation. There are also rich scholarly debates on the relationship between these interpretative approaches and other legal doctrines, such as precedent, formalism and textualism. The variety of possible positions and nuances is considerable, and probably all of them are adhered to by someone, and most American constitutional scholars and judges would not consider themselves either unmitigated originalists or anti-originalists.

However, most would agree that there is a central dichotomy around which these debates revolve, and that at the heart of this is the role of the judge. For an originalist, when a text is adopted it bears a certain meaning, and that is the law, and it is for judges to apply that law, but not to change it: change is for the legislature. The fear, often voiced, is that if judges can reinterpret to reflect social change then this will in practice amount to giving judges personal power over the law, and turning it into no more than a vehicle for their political views. Originalists often present their standpoint as a democratic one, reflecting the distinction between those who make the law, and those who apply or adjudicate it.


8 See works, above n 7.


10 ibid.
The alternative view regards the rule of the dead as normatively unacceptable and suggests that a constitution needs to be read in its current social context, reflecting current social understandings and attitudes. Partly this is because constitutions are hard to change, so originalism amounts to a significant constraint on majoritarian democracy, and sometimes a bizarre one, for example, were a contemporary American judge to take a seventeenth-century American nobleman’s view of privacy or cruel punishment as the basis for current constitutional interpretation of those ideas. However, it is also a discussion about the nature of law: for the believer in a living constitution, the meaning of a legal text changes as the meanings of words and principles change in the world. Thus, while the legislature fixes the text, it is the task of the judge in a case to interpret – to give that text meaning, drawing on the context as a whole. Law is constructed by legislatures and courts, and perhaps even by society, together.

Originalism is generally associated with social conservatism, because the United States in the seventeenth century was broadly more conservative than it is now, and because it protects certain attitudes from social developments which threaten them, by entrenching those attitudes in law and denying the legitimacy of change – unless that change comes via the extremely difficult route of constitutional amendment. As such, it is part of the culture wars, a way of resisting the ascendance and dominance of the values and social understandings of those viewed as a liberal elite.

All this is however contingent. It is quite possible that a meaning which at the time of adoption was orthodox and unproblematic comes, as a result of social change, to be radical. Understandings of privacy and individual freedom might, in an age of internet and the security-oriented state, come to threaten business models and surveillance institutions, and it might be the left pleading for originalist interpretations and the right for new understandings to reflect the new age. The principled constitutional scholar may accept that their constitutional philosophy can lead to legal conclusions that they personally regret – but the law is the law. The political activist may, by contrast, see constitutional approaches as tools to be deployed to achieve desirable social change. The ‘right’ approach to interpretation is the one that achieves the ‘right’ result.

III. The Criticisms of the Court: Activism and More

The Court has been called activist – meaning something like that it reads the Treaty in a way that prioritises certain political goals, rather than the most plausible or clear meaning of the

11 See above, n 7.


13 Ackerman, above n 7.
text.\textsuperscript{14} It is also sometimes accused of having insufficient reasoning – its judgments are concise, to some readers cryptic, and while they invariably refer to other past judgments they do not contain a full analysis of the different possible legal perspectives or all the interests at stake.\textsuperscript{15}

It is also, implicitly, accused of over-constitutionalising.\textsuperscript{16} That is a currently fashionable critique of the state of EU law, but it is one where the Court must surely share the blame. The essence of the critique is that too many policy choices are fixed in EU law, because they are embedded in Treaties which are very hard to change. Matters which ought to be the subject of political debate are instead constitutionalised, and then no longer meaningfully contestable.

To the extent that this is true, it is because the Court has chosen to interpret the Treaties in a certain way. It is hardly controversial to claim that most of the salient Treaty articles are relatively open in their wording, and could plausibly bear different meanings. What is a market? What is free movement? What, indeed, is necessary? The Court might have reacted to this open texture by declaring that it was for the legislature – perhaps in conjunction with itself – to fill in these meanings, and that it would defer to political interpretations, perhaps within limits. Instead, it chose to provide its own definitions, to gradually refine them, and to expect the legislature to be constrained by them.\textsuperscript{17} It claimed ownership of the text. That the Treaties have taken certain matters out of politics is because of the way the Court has understood the Treaties: if the EU is over-constitutionalised in this sense, it is because the Court has over-constitutionalised it.\textsuperscript{18} A constitution with an open and contestable meaning would not have been a political or democratic problem.

All three criticisms portray the Court as a bull in a political and constitutional china shop. It charges forward, pushing an integrationist agenda that is hardly inevitable from the text, and without considering social or political context, nor legitimising its actions by the

\begin{itemize}
\item \textsuperscript{14} See above, n 2; see also M Poiares Maduro, ‘In Search of a Meaning and not in Search of the Meaning: Judicial Review and the Constitution in Times of Pluralism’ (2013) 54 Wisconsin Law Review 541.
\item \textsuperscript{15} See Conway, above n 2.
\item \textsuperscript{17} G Davies, ‘The European Union Legislature as an Agent of the European Court of Justice’ (2016) 54 Journal of Common Market Studies 846.
\item \textsuperscript{18} G Davies, ‘Does the Court own the Treaties? Interpretative pluralism as a solution to over-constitutionalisation’ (2018) 24 European Law Journal 358.
\end{itemize}
traditional judicial discursive route of providing persuasive reasons. It does not seem to be constrained by the literal words of the Treaty, nor by the views of society or the legislature, nor by any sense that it must justify its decisions in a non-self-referential way.

It must be noted that the claim discussed here is that the Court *pushes* an agenda – not that it achieves it. For whatever it may decide, Member States have techniques much discussed in the political science literature for resisting its pressure.\(^\text{19}\) Compliance and the capacity of law to cause societal change are another issue. However, if we regard the Court as a constructor of doctrine, whatever the extra-legal consequences of that doctrine, then most of the traditional lawyers’ criticisms portray it exceeding, or at least stretching, its mandate.

It is then not surprising that studies of the Court’s interpretative style have tended to put it far away from originalism on the scale of possibilities.\(^\text{20}\) Its teleological interpretation prizes the effectiveness of the law above all else, and in this sense is forward-looking, and unfettered by the practices and constraints of the past.\(^\text{21}\) As a court which accepts partial responsibility for a political, integrative, mission, subordinating text to policy imperatives in that aim, it seems an originalist’s bogeyman.

IV. The Static Nature of EU Law

And yet, it is also true that while EU law’s effects march on, the law itself is remarkably static, in several ways. Taking the internal market as an example, instances of the Court changing its mind, or adopting a new direction in the law are extremely rare. *Keck* is the most famous, and it is striking that it is a case almost without consequences: the reason why the Court excluded selling arrangements from the category of obstacles to free movement was because they almost always had a minimal effect on trade while serving a legitimate social purpose which justified their existence.\(^\text{22}\) To engage in endless judicial review of national


\(^{20}\) See Conway, above n 2; Sankari, above n 3, 63.


measures which would almost always turn out to be compatible with the Treaty was a waste of judicial resources. Keck is not really a rule about what kinds of things are allowed or prohibited, but about evidential presumptions. Contrary to the Court’s suggestion that it was changing its mind, it did not really change very much. We see this in the fact that the principles in the major cases which preceded it, Dassonville and Cassis, survived and continued and have never been called into question.

Another example where change is sometimes claimed is in the law on citizenship, where it has been suggested that Dano and Alimanovic represented a move away from a deeper, more expansionist vision of citizenship expressed in the earlier Martinez-Sala and Grzelczyk. This is contested, yet the fact that a shift in legal approach was arguable made the cases stand out, and is part of the reason for the intense discussion around them. This was fuelled by the fact that they seemed to be in tune with the political mood, and to show a certain responsiveness (perhaps regrettable) by the Court. If so, these cases might indeed be an example of a living constitution approach to the law.

However, these are isolated examples in a general trend in which most of the law, and most of its impact, comes from repeated application of old-established principles. Where there is controversy, it is usually because the Court is sticking to a rule, not because it is going in a

23 ibid.

24 Case C-8/74 Procureur du Roi v Benoît and Gustave Dassonville EU:C:1974:82; C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein EU:C:1979:42.


new direction. Dassonville expressed the idea that it is not form, but effects which matter, and that effects should be understood in a commonsensical way: is there, or might there be, an actor whose movement is made more difficult? Laval, Viking, the free movement of medical patients, and the cases on Free Movement of Capital are just applications of this simple approach.\(^{28}\) Cassis expressed the idea that each actor in the market should be regulated by their home state.\(^{29}\) The law on services, the Services Directive and Centros are applications of this.\(^{30}\) In all of these controversial situations arguments were made that the situation was different – trade unions were special, medical care was special, free choice of company location threatened models of incorporation, services deregulation would undermine society, removing all obstacles to investment would amount to dis-embedding capitalism. Whatever one might think about the merits of these arguments, or about the Court’s final decisions, the characteristics of the judgments are that faced with a new context, and a plausible argument for a new approach, the Court instead stuck to its old one. Free movement law is really just footnotes to Dassonville.\(^{31}\)

Even in the law of citizenship and resources, where, as discussed above, there is the suggestion of different phases in the law with different approaches, it is hard to see that any of the twists and turns are not comfortably encompassed by the Court’s first substantive judgment on the issue, Baumbast, where it stated its vision:

In any event, the limitations and conditions which are referred to in Article 18 [TEU] and laid down by Directive 90/364 [now copied into 2004/38] are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. In that regard, according to the fourth recital in the preamble to Directive 90/364 beneficiaries of the right of residence must not become an ‘unreasonable’ burden on the public finances of the host Member State.


\(^{29}\) Case C-120/78 Rewe-Zentral, above n 24.


However, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality.  

Nothing since could be described as a break with this approach, or even an amendment of it.

This is not to say that there are no doctrinal developments. Ruiz Zambrano, U-turns, the cases on use of goods, all brought new situations before the Court and resulted in new rules being added to the law. However, they were extensions, not contradictions, of what came before. They do not represent a turning away from earlier law or ideas, but a continuation of them. Criticism of those judgments would not be ‘why is the Court taking this new direction?’ but ‘why is the Court still following the path of ever-more and ever-deeper?’

For underlying the fundamentally static nature of the substantive law is a deeper stasis: that of the underlying vision of the market and of free movement. The Court’s understanding of this field of law is driven by the idea of ongoing and open-ended integration. Interpretation is guided by the idea of effectiveness – that the law should mean whatever is necessary to get its job done. Free movement is understood as imperative, as urgent, and the burden of adaption to its requirements is placed on the Member States, either directly, through negative harmonisation, or through positive harmonisation. There is an absence in the case law of any suggestion that there should be limits to movement – except in de minimis situations, which, by definition, barely matter – or that we should accept that the existence of diverse institutions and regimes is a good in itself which entails certain constraints on ease of movement. Sometimes movement gives way to national institutions in the law, but this is contingent and temporary, not a desirable end point. The vision of the Court is one in which States redesign themselves, or are redesigned, to fit the requirement of complete inter-State openness. This may happen slowly and carefully, with respect for important interests, but the goal is clear.

V. The Choice for Europe

The argument above can be extrapolated and made more general. It is not just the Court’s vision of the market which is static, but its vision of the nature of EU law, and indeed of the

32 Case C-413/99 Baumbast v Secretary of State for the Home Department EU:C:2002:493, paras 90–91.

33 Case C-34/09 Ruiz Zambrano EU:C:2011:124; Case C-256/11 Dereci EU:C:2011:734; Case C-82/16 K A EU:C:2018:308; Case C-370/90 Singh EU:C:1992:296; Case C-127/08 Metock EU:C:2008:449; Case C-110/05 Commission v Italy EU:C:2009:66.

European Union. The narrative would then be something like this: although the Treaties could be read in different ways, early in its career, the Court made a central interpretative choice. It chose to read them as the expression of a policy programme, a legal plan to achieve change, rather than as a mere statement of rules. By signing, the Member States wished to commit to self-transformation, away from their nationalistic, self-destructive past and their damaged present. The means of this was to be integration, and the individual articles were there, in the Court’s eyes, to achieve this broader goal. Implicitly, the Treaties were a legal mandate to do what was necessary to make a wounded Europe whole again, and enable it to achieve its destiny, or at the very least to be peaceful, prosperous and free.

This teleological understanding, as it is usually described, has the distinctive consequences so familiar to EU lawyers: Treaty articles (serving integration) are read broadly, whereas exceptions (limiting it) are read narrowly; the law is read holistically, so that the interpretation of a provision may be influenced by very different provisions elsewhere, because each part is understood as contributing to a single whole, and must be made coherent with that whole; and where the Treaty fails to provide explicitly for a rule that the Court considers necessary to make the whole function properly, that rule will then be found, as a matter of logic, to be present by implication – for it would be nonsensical to read the Treaty so that it did not work. And even while a rejection of constitutional primacy pur sang becomes the orthodoxy in every court and textbook in Europe, the Court does not budge an inch: the constitutional principles of EU law are non-negotiable, whatever the constitutional responses – coming from the Europe which must be changed – to these may be.


All this is quite defensible – indeed, EU lawyers have defended it with great success for decades.\(^3\) For one thing, there are textual invitations to this approach in the Treaty, such as the preambles, the commitment to creating a Union of certain values, the broad statements of Union purposes, and the ‘ever-closer Union’ provision now in Article 1 TEU. It is one thing to be suspicious of ‘intention’ as discovered in travaux préparatoires, but when the intention of a Treaty is expressed within that Treaty it is hard to blame judges for taking it into account. Teleology and textualism are sometimes contrasted, but here the teleology is founded in the text.

However, the point of this chapter is that the Court’s vision of EU law, just as the vision of the market which corresponds to it, is rooted in the past and not the present. When the Court first formulated its understanding, it would have been a reasonably orthodox one among the relevant legal community of the time – not the understanding shared by all, certainly, but a mainstream one held by many reasonable and informed people involved in EU law, and one which quickly became predominant.\(^4\) The first judges of the European Court of Justice – just like the first leaders of the Commission – were drawn from a pool of educated, internationally oriented Europeans and among these the view that European integration was a moral imperative, and the Treaties were tools to achieve this vital goal, would not have been strange.\(^5\) Certainly there will have been diversity of opinion, and some will have disagreed while others will have been nuanced. However, the Court’s early understanding was rooted in its moment, in the relevant legal community, and in the text.

The trouble is, in the meantime more than half a century has passed and the politics of Europe have changed. If the Treaties were adopted today, and a court was formed from internationally minded European lawyers to adjudicate them, it seems very likely that a more restrained, more technical, less messianic and more balanced approach to the text would be taken, in which the policy freedom of Member States, and the precise wording of articles, carried greater weight. Europe would then not be built as it has been, but the prevailing social mood and attitudes towards international law and organisations would probably be reflected in the law.

Part of that change, at least among lawyers, may be because of the very success of the Court’s law: it is because integration has gone so far that some feel it should be stopped. A broad reading in the past leads some to conclude that it is time for a narrower reading now. Thus among the many effects of EU law, it has shaped European society to the extent that

\(^{3}\) See generally Poiares Maduro, ‘Interpreting European Law’, above n 35; Sankari, above n 3.


\(^{5}\) ibid.
reactions to that same law are now different, in a sort of constitutional reflexivity. One does not, therefore, have to think that the Court was ‘wrong’ in its early approach to the Treaties to think that a different approach would be better today. Rather we might say, if we were living constitutionalists, that each reading has its time, and that now it is time to revisit some of the constitutional choices which have served so well.

VI. Conclusion

When critics complain that EU law seems never to stop invading new fields, they are really complaining that it never changes. Rather than constantly expanding its interpretations, the Court takes fixed and long-standing interpretations and constantly applies them to new situations. It hammers away with its post-war constitutional tools at the rock of Member State law, and with each blow it exposes new substrates and creates new fissures. The cry of the critic is that surely it is time to pick up a new tool, to polish and repair, to smooth over. A sculpture is not made with one technique alone. By contrast, the Court goes deeper and deeper with its beloved constitutional hammer and chisel, as if no other way of working could ever cross its mind. The power of free movement law, for example, is simply that its rules are widely applicable, strict and unchanging. It is not judicial activism that is putting Member States on the back foot – it is dogged judicial consistency.

If, by contrast, the Treaties were a living constitution, the Court would be asking whether its ideas should change; whether the constitutional reading which fitted the mood, the consensus and the needs of the post-war period is necessarily the one which best fits society today. If changing circumstances may justify changing constitutional interpretations then the importance of the insight that integration proceeds in stages – which the Court intermittently notes\(^{42}\) – would lie in the corollary that constitutional law may do so too. There would be adaption of the law and of the rules – or there would be at least recognition of the possibility, and discussion of why the old readings still fit the present day.

This is not what we see. The Court is path-dependent, loyal to its original readings of the law, and does not recognise any reasons why this might be different. To the frustration of those who want a European Union that is contemporary, adaptive and politically constituted, and the fury of those who above all love national law, it adheres to the original understanding of the Treaties even as the consequences of that understanding become ever harder to bear. It is, in this sense, an originalist court, and therein lies the crisis of European law. That is not to say that the judges would self-identify with this philosophy – although many might acknowledge their loyalty to the original ideas of Europe – but that in practice it behaves in this way.

There is a lesson here for those would like to see the Court reined in. They tend to accuse it of being activist, or political, and wish it were more conservative. What they miss is that a reading and a Court which may have been activist in the 1960s have become, through

\(^{42}\) Case C-283/81 Cilfit and Others EU:C:1982:335; Case C-379/15 Association France Nature Environnement EU:C:2016:603.
time and the absence of change, conservative. The case law has taken on a nostalgic tone, and
the Court has become a backward-looking organ. If we think it should not be, then we need to
inject it with activism once again – appoint more activist judges. It is only when the law
becomes political, and the constitution comes to life, that it is likely to respond and adapt to
the Europe of today.