

## Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law

By Daniel Augenstein\*

### A. Introduction

Some years back, Philip Alston argued that processes of globalization, such as the privatization of state functions and the deregulation of private power, while purportedly value-neutral, have “acquired the status of values in and of themselves.”<sup>1</sup> The market is increasingly seen as “the most efficient and appropriate value-allocating mechanism.”<sup>2</sup> As a consequence, human rights become subjected to a litmus test of their “market-friendliness.”<sup>3</sup> As Alston puts it:

In the world of globalization, a strong reaction against gender and other forms of discrimination, the suppression of trade unions, the denial of primary education or health care, can often require not only a showing that the relevant practices run counter to human rights standards but also a demonstration that they are offensive to the imperatives of economic efficiency and the functioning of the free market . . . In at least some respects the burden of proof has been shifted—in order to be validated, a purported human right must justify its contribution to a broader, market-based “vision” of the good society.<sup>4</sup>

The aim of my contribution to this collection is to inquire how the described contingency of human rights protection on the promotion of market values manifests itself in a European

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<sup>1</sup> Philip Alston, *The Myopia of Handmaidens: International Lawyers and Globalisation*, 3 EUR. J. INT'L L. 435, 442 (1997).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Union that was founded on a common market and that owes much of its legal integration to the implementation of four fundamental market freedoms—the freedom of movement of goods, capital, services, and people. I contend that given the economic *and* supra-national nature of the European polity, the EU’s internal market is not simply a constraining factor in the effective realization of fundamental rights, but provides the very foundation of their autonomous interpretation in the European legal order. In short, the substance of EU fundamental rights derives from a form of economic rationality that is the rationality of the internal market.

Section B lays out the role of fundamental market freedoms and fundamental rights in the European integration process. Section C dwells on the implications of disagreements about rights within and between national and European polities for an autonomous interpretation of EU fundamental rights law. Section D contends that the default setting for such autonomous interpretation is the internal market that constitutes the fundamental boundary of the European polity. Section E concludes by briefly considering the implications of the diagnosed market-contingency of EU fundamental rights for the European Union as a “post-national” human rights organization.

## **B. Fundamental Freedoms and Fundamental Rights**

Despite the bold language of Article 2 of the Treaty on European Union (TEU) that represents the Union as “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,” there is little doubt that the main engine of European integration has been, and continues to be, an economic one. In the early days of the European Community, economic integration was considered both an end in itself and a means to the end of political stability, as reflected in Article 2 of the 1958 European Economic Community Treaty that envisaged the establishment of a common market to “promote . . . closer relations between the States belonging to it.” The *telos* of economic integration also furnished the building blocks of the EU’s constitutional architecture: It was the goal of establishing “a common market, the functioning of which is of direct concern to interested parties in the community” that justified elevating the Treaty above an international agreement to directly confer rights upon individuals as “part of their legal heritage.”<sup>5</sup> With historical hindsight, it appears no coincidence that the first litigant ever to benefit from the direct effect of these rights was not a natural person but a corporate national. The ramifications of the expansionist tendencies of market integration on the Member States—competence creep, functional spill-overs, and the like—also drove the new Maastricht agenda of “creating an ever closer union among the peoples of Europe”<sup>6</sup> that initiated the EU’s transition from economic policy to constitutional polity.

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<sup>5</sup> NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, CJEU Case 26/62, 1963 E.C.R. 1.

<sup>6</sup> See Treaty on the European Union art. 1, Feb. 7, 1991, 1992 O.J. (C 191) 29 [hereinafter TEU].

Thus, and notwithstanding the broader political vision espoused by the Lisbon Treaty,<sup>7</sup> the integration of Member States and their citizens through the internal market, propelled by fundamental freedoms, casts a long shadow on the economic pedigree of today's European Union.

If fundamental freedoms have long been a main engine of European integration, fundamental or human rights—I shall use these terms interchangeably for the present purpose—made their legal appearance on the European stage much later and in a less majestic manner. Ever since their discovery as “general principles of Community law” by the European Court of Justice (CJEU), EU fundamental rights have been subject to sustained critique—a critique that has not fallen silent with the conferral of legally binding status on the Charter of Fundamental Rights of the European Union (EU Charter) by the Lisbon Treaty.<sup>8</sup> Indeed, given the *ad hoc* and incremental nature of their development, their uncertain conceptual underpinnings and their contested scope, it seems unlikely that legal codification alone could render EU fundamental rights determinate and consistent.

It has been convincingly argued that an important rationale for EU constitutional (self-) constraint in the area of fundamental rights is that any attempt to turn the Union into a full-fledged human rights polity would run the risk of the “wholesale destruction of the jurisdictional boundaries between the EU and its Member States.”<sup>9</sup> After Lisbon, the EU thus continues to lack “any general powers to enact rules on human rights,”<sup>10</sup> and Article 52(2) EU Charter reiterates that fundamental rights “do not establish any new power or task for the Community or the Union.” Yet it is doubtful whether this *de lege* delimitation of competences will put a hold to the further *de facto* expansion of EU fundamental rights supervision over the Member States, thus amounting to more than mere political appeasement.<sup>11</sup> The EU Charter ostensibly fails to clarify the jurisdictional reach of EU fundamental rights. While the Charter text limits their application to EU institutions and Member States “implementing” European law,<sup>12</sup> the explanations suggest that Member States shall be bound by EU fundamental rights whenever “they act in the context of

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<sup>7</sup> Pursuant to TEU art. 2, the European Union is an economic *and* political union.

<sup>8</sup> See, e.g., Sionaidh Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 HUM. RTS. L. REV. 645 (2011).

<sup>9</sup> Philip Alston & J.H.H. Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, in THE EU AND HUMAN RIGHTS 3, 23 (Philip Alston, Mara Bustelo & James Heenan eds., 1999).

<sup>10</sup> Opinion of the Court of March 28, 1997 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, para 27.

<sup>11</sup> See Allard Knook, *The Court, the Charter, and the Vertical Division of Powers in the European Union*, 42 COMMON MKT. L. REV. 367 (2005).

<sup>12</sup> See E.U. Charter art. 51(1) (the so-called “Wachauf” situation).

Community law,” thus including situations in which they derogate from EU fundamental freedoms.<sup>13</sup> Finally, it would appear that should the CJEU ever run out of Charter rights, it can still find refuge in Article 6(3) TEU that maintains a reference to fundamental rights as “general principles of the Union’s law.”

For many observers, this jurisdictional jigsaw has also impaired the substance of EU fundamental rights law, whose main drivers were less a genuine commitment on the part of the European institutions than private litigation and a mutual empowerment of European and national courts vis-à-vis Member State governments. The former resulted in a piecemeal approach to fundamental rights protection, evinced in a “mismatch” between the range and depth of EU powers and the marginal number of fundamental rights cases brought.<sup>14</sup> The latter gave rise to reasoned suspicions that the true *telos* of EU fundamental rights was less individual well-being than a power struggle between the EU and the Member States. As Mancini noted in the early days of EU fundamental rights, while their introduction into the EC legal order was “the most striking contribution the Court has made to the development of a constitution of Europe,” their protection was “forced on the Court by the outside, by the German, and, later, the Italian constitutional courts.”<sup>15</sup> But the recognition of fundamental rights as general principles of Community law not only served to pacify Member States’ judiciaries but also shielded the unity of the internal market against the diversity of Europe’s national constitutional human rights traditions. In many ways, the ECJ’s early dictum in *Hauer* still holds true today:

The question of a possible infringement of fundamental rights by a measure of Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the

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<sup>13</sup> *Explanations Relating to the Charter of Fundamental Rights of the European Union*, art. 51, 2007 O.J. (C 303) 17. The Court of Justice of the European Union’s (CJEU) post-Charter case law suggests that the Court favors a wide interpretation of EU Charter article 51, according to which the Charter must be complied with whenever national legislation falls “within the scope” of EU law, meaning that “the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.” See also *Åklagaren v. Fransson*, CJEU Case C-617/10, para 21.

<sup>14</sup> Armin von Bogdandy, *The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1321 (2000).

<sup>15</sup> Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 611 (1989).

Common Market and the jeopardizing of the Cohesion of the Community.<sup>16</sup>

Thus tying EU fundamental rights to the common market, the CJEU has been accused of instrumentalizing them to extend its jurisdiction and accelerate the process of European economic integration:

Evidently it is economic integration, to be achieved through the acts of Community institutions, which the court sees as its fundamental priority. In adopting and adapting the slogan of protection of human rights the court has seized the moral high ground. However, the high rhetoric of human rights protection can be seen as no more than a vehicle for the court to extend the scope and impact of European law.<sup>17</sup>

This charge of instrumentalism certainly involves some second-guessing of the Court's motives and has not gone uncontested.<sup>18</sup> Indeed, Andrew Williams more modest "preservation thesis" may come closer to the truth.<sup>19</sup> According to Williams, the respect of fundamental rights "is necessary if the EU is to avoid fundamental challenges through law. The scope of their application is to be determined by the preservation of the EU and, in particular, the constructed internal market."<sup>20</sup> A more recent line of cases in the area of labor protection has fuelled new concerns that fundamental freedoms have come to dominate fundamental rights, with some commentators associating the CJEU's jurisprudence with the infamous *Lochner*-era of the United States Supreme Court.<sup>21</sup> If nothing else, these concerns may be read as a late confirmation of Coppel and O'Neil's thesis that the CJEU has failed to develop a robust substantive account of EU fundamental

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<sup>16</sup> *Hauer v. Land Rheinland-Pfalz*, CJEU Case 44/79, 1979 E.C.R. 3727, at para. 14 [hereinafter *Hauer*].

<sup>17</sup> Jason Coppel & Aidan O'Neil, *The European Court of Justice: Taking Rights Seriously?*, 12 *LEGAL STUD.* 227, 245 (1992).

<sup>18</sup> See the lengthy response by J.H.H. Weiler and Nicolas Lockhart, *'Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence* (pts. 1 & 2), 32 *COMMON MKT. L. REV.* 51 (1995), 32 *COMMON MKT. L. REV.* 579 (1995).

<sup>19</sup> ANDREW WILLIAMS, *THE ETHOS OF EUROPE* 267 (2010).

<sup>20</sup> *Id.*

<sup>21</sup> See Danny Nicol, *Europe's Lochner Moment*, 2 *PUB. L.* 308 (2011) (referencing *Lochner v. New York*, 198 U.S. 45 (1905)); see also *infra* Part D.

rights law,<sup>22</sup> and instead engages in a human rights discourse “based on consequence rather than value.”<sup>23</sup>

What transpires from these critiques is a conceptual linkage between the structural and systemic limitations of EU fundamental rights and their “market-friendly” interpretation in the supra-national EU legal order. Faced with morally and politically charged issues that are contested within and between the Member States, it appears—if nothing else—prudent for the CJEU to adopt an overtly narrow economic interpretation that does not (directly) “substitute its assessment for that of the legislature in those Member States where the activities in question are practiced legally.”<sup>24</sup> Yet below this prudential surface lies the substantive problem of providing an autonomous account of EU fundamental rights that would not be rooted in market values. Unlike fundamental freedoms, fundamental rights don’t integrate particularly well. To revert to Dehousse and Weiler’s famous agent/object distinction,<sup>25</sup> neither are fundamental rights an attractive instrument to integrate the Member States, nor are they easily integrated into the European legal order. The reason—as I shall argue in the following section—is that fundamental rights are fundamental not only for the individual rights holder but also for the self-understanding of the polity as a whole.

### C. From Indeterminacy to Autonomy: Why (Legal) Boundaries Matter

What is sometimes overlooked in the burgeoning literature on conflicts of rights between European and national legal orders is that fundamental rights are also and already contested within each of these legal orders. People disagree about the proper ambit of rights—e.g., what interests are protected by freedom of “religion”?—the best interpretation of their limitation clauses—e.g., what is entailed in the protection of “public order”?—and about their most beneficial arrangement in case of conflict—e.g., what is the relationship between freedom of expression and privacy? As Waldron puts it in his seminal contribution to this debate, while much of the attractiveness of rights-talk lies in “insisting that certain basics are to be secured and certain atrocities prohibited, come what may,” the implied simplicity and self-evidence of rights is deeply misleading.<sup>26</sup> Under conditions of political pluralism, “any theory of rights will face disagreements about the interests it

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<sup>22</sup> Coppel & O’Neil, *supra* note 17.

<sup>23</sup> WILLIAMS, *supra* note 19, at 267.

<sup>24</sup> Soc’y for the Prot. of Unborn Children Ireland Ltd. v. Grogan, CJEU Case C-159/90, 1991 E.C.R. I-4685, at para. 20 [hereinafter *Grogan*].

<sup>25</sup> Renauld Dehousse & J.H.H. Weiler, *The Legal Dimension*, in *THE DYNAMICS OF EUROPEAN INTEGRATION* 242 (William Wallace ed., 1990). For a recent reassessment, see the contributions to *INTEGRATION THROUGH LAW REVISITED: THE MAKING OF THE EUROPEAN POLITY* (Daniel Augenstein ed., 2012).

<sup>26</sup> Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 29 (1993).

identifies as rights, and the terms in which it identifies them. Those disagreements will in turn be vehicles for controversies about the proper balance to be struck between some individual interest and some countervailing social considerations.”<sup>27</sup> In circumstances of disagreement, a monolithic “I know it when I see it” approach to fundamental rights is of as little help as a “literal” interpretation of their textual sources. This problem lies at the roots of a second predicament with fundamental rights, namely that they are often considered to be too indeterminate to provide clear normative guidance. For Robert Alexy, for instance, the problem with interpreting fundamental rights resides in the fact that they regulate “in a highly open manner what are in part deeply controversial questions about the basic normative structure of state and society.”<sup>28</sup>

Whatever one’s view on the true nature of human or fundamental rights and their single best interpretation, what interests me for the present purpose is how they become determinate and consistent within concrete legal-political orders. For the domain of ethics, John Griffin has shown how human rights are rendered determinate by virtue of the “formal and material constraints” imposed upon them.<sup>29</sup> In the division of labor between constitutional and international human rights law, the imposition of such constraints has traditionally been the primary task of the nation-state. Ronald Dworkin—unsuspicious of pluralist ambitions—acknowledges as much in his writings on human rights:

Nevertheless, we must now notice that nations differ strikingly about which political rights to recognize in that way. Even those nations that belong to the same political culture as our own disagree with us in important matters. In Britain and several other European nations, for example, people have a legal right not to be publicly insulted because of their race; that right is protected by laws making ‘hate speech’ a crime. In the United States, on the contrary, people have a constitutional right publicly to insult anyone they like, by denigrating that person’s race or any other group to which he belongs, so long as they do not provoke a riot or incite others to criminal acts.<sup>30</sup>

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<sup>27</sup> *Id.* at 30.

<sup>28</sup> ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 2 (2002).

<sup>29</sup> JAMES GRIFFIN, ON HUMAN RIGHTS 174 (2008).

<sup>30</sup> RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 32–33 (2008).

In such and similar cases of what Dworkin terms “good-faith differences” all we can expect is that governments act consistently, that is, that they do not treat anyone in a way that contradicts their own understanding of the values embedded in their constitution.<sup>31</sup>

The problems of fundamental rights determinacy and consistency take on a particular significance in a European Union that continues to navigate between its inter-national roots and its constitutional ambitions. I shall not even attempt to do justice here to the rich literature depicting the European Sonderweg of legal integration paved by the Court’s early discovery of the principles of supremacy and direct effect.<sup>32</sup> As Williams notes, one complication that arises for EU fundamental rights “revolves around the degree to which [the European] institutions assume responsibility akin to that possessed by a state, with all the constitutional implications attached, or to that of an international organization.”<sup>33</sup> Once the received distinction between the national-constitutional and the international becomes blurred, different authoritative definitions of fundamental rights overlap and compete in the same supra-national European legal space. The ensuing difficulties in developing a substantive account of EU fundamental rights “in the light of Community law itself”<sup>34</sup> are nicely illustrated by Joseph Weiler’s account of fundamental rights and fundamental boundaries.<sup>35</sup> Similarly to Dworkin, Weiler sets out by noting that “the definition of fundamental human rights differs from polity to polity,” which reflects “fundamental societal choices [that] form an important part in the different identities of polities and societies.”<sup>36</sup> This embeddedness of fundamental rights in concrete legal-political orders is depicted in terms of a relationship between fundamental rights and fundamental boundaries: “If fundamental rights are about the autonomy and self-determination of the individual, fundamental boundaries are about the autonomy and self-determination of communities.”<sup>37</sup> The interrelation of fundamental rights and fundamental boundaries, in turn, espouses the core identity of the polity. To disperse the appearance of communitarianism: It is not the case that fundamental boundaries would *a priori* delimit the scope of fundamental rights. Rather, disagreements about fundamental rights are resolved in relation to the fundamental boundaries of the polity. In this sense, fundamental rights and fundamental boundaries operate on each other: Fundamental

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<sup>31</sup> See *id.* at 36, 43–45.

<sup>32</sup> *Flaminio Costa v. E.N.E.L.*, CJEU Case C-6/64, 1964 E.C.R. I-585, para. 5 [hereinafter *Flaminio Costa*].

<sup>33</sup> See WILLIAMS, *supra* note 19, at 111.

<sup>34</sup> *Hauer*, CJEU Case 44/79 at para. 14.

<sup>35</sup> J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, in *THE CONSTITUTION OF EUROPE* 102 (J.H.H. Weiler ed., 1999).

<sup>36</sup> *Id.* at 102.

<sup>37</sup> *Id.* at 104.

rights are both determined by, and contribute to the determination of, fundamental boundaries.<sup>38</sup>

The upshot of Weiler's subsequent analysis of the interrelation of fundamental rights and fundamental boundaries in the supra-national European polity is that the boundedness of fundamental rights in the Member State legal orders prevents the CJEU from adopting a pan-European (maximum/minimum) standard of human rights protection as derived from their constitutional traditions.<sup>39</sup> EU fundamental rights must safeguard the unity of European law within the Member State legal orders while at the same time respecting their diverse national constitutional traditions. As the CJEU held in *Internationale Handelsgesellschaft*, "recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law."<sup>40</sup> Accordingly, "the validity of such measures can only be judged in the light of Community law . . . [as] an independent source of law."<sup>41</sup> If a main rationale for incorporating fundamental rights into the EU legal order was thus to assert the autonomy of the European legal order vis-à-vis the Member States, this entailed the development of autonomous fundamental rights standards as derived from EU law itself—circularity as usual.<sup>42</sup> It follows that the determinacy and consistency of EU fundamental rights law can only "be ensured within the framework of the structure and the objectives of the Community."<sup>43</sup> My query with this approach is that the asserted autonomous interpretation of EU fundamental rights law is anything but straightforward. If disagreements about rights are settled in relation to the fundamental boundary of a discrete polity which, in turn, renders fundamental rights determinate and consistent within this polity, an autonomous interpretation of EU

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<sup>38</sup> I cannot dwell on the theoretical implications of this approach to fundamental rights here, but to give an—admittedly rather simplistic—example: An alleged violation of the fundamental right to freedom of expression is assessed in relation to the fundamental boundaries of a concrete legal-political order. These boundaries are reflected in the legal-political order's embedded understanding of, say, "public morals" or "public order." If the claim is successful, it transforms these very fundamental boundaries and issues in a new self-understanding of what the polity takes freedom of expression to be about.

<sup>39</sup> On the maximum/minimum standard conundrum, see Leonard Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35 COMMON MKT. L. REV. 629 (1998). See Matej Avbelj, *European Court of Justice and the Question of Value Choices* (Jean Monnet Working Paper 06/04, 2004), available at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040601.pdf>; see also *infra*, part D.

<sup>40</sup> See *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, CJEU Case C-11/70, 1970 E.C.R. I-1125 [hereinafter *Internationale Handelsgesellschaft*].

<sup>41</sup> See *id.*

<sup>42</sup> On the CJEU's circular reasoning in bootstrapping the principles of supremacy and direct effect in *Van Gend en Loos* and *Costa*, see generally Hans Lindahl, *The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union*, 20 *RATIO JURIS* 485 (2007).

<sup>43</sup> See *Internationale Handelsgesellschaft*, CJEU Case C-11/70 at 3.

fundamental rights cannot be divorced from a substantive account of the fundamental boundary of the European polity. More simply put: What constitutes the fundamental boundary of the European polity that renders fundamental rights determinate and consistent as a matter of EU law?

According to Weiler, we should conceive of the EU “as a polity with its own separate identity and constitutional sensibilities which has to define . . . its own core values even if these cannot be dissociated entirely from the context in which the Community is situated.”<sup>44</sup> However, it is precisely this “context” in which the EU is situated that creates difficulties. Rather than expressing the “separate identity” of the European polity, EU fundamental rights appear primarily defined with reference to what they lack. It is somewhat trite to note how little thought we give to what is entailed in an “autonomous” interpretation of, say, French or Slovenian fundamental rights law. Yet the important point is that while the correlation of fundamental rights and fundamental boundaries espouses the core identities of the Member State polities, it is the absence of a European equivalent to a national constitutional tradition that engenders the very debate about the autonomous interpretation of EU fundamental rights law. This is not to suggest that we could not make sense of an “EU constitutional tradition,” nor is it to propose an essentialist reading of what makes Europe’s national constitutions traditional.<sup>45</sup> It is merely to point to an asymmetry between the EU and its Member States that structures the CJEU’s interpretation of fundamental rights on the basis of the European legal order as an “independent source of law.”<sup>46</sup> In what follows, I shall elucidate how the CJEU, rather than laying claim to a constitutional tradition in its own right, seeks refuge in commonalities between the Member States via the ECHR and their national constitutional traditions. Yet commonality in the face of diversity cannot ground a claim to autonomy as distinctiveness. The Court bridges this gap between commonality and autonomy with an appeal to uniformity as a functional imperative of economic integration that displays the internal market as the fundamental boundary of the European polity.

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<sup>44</sup> See Weiler, *supra* note 35, at 117.

<sup>45</sup> Weiler’s assessment that defending the constitutional identity of the state and its core values turns out in many cases to be a defense of some hermeneutic foible adopted by five judges voting against four. See, e.g., J.H.H. Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7, 17 (J.H.H. Weiler & Marlene Wind eds., 2003). I am grateful to Dimitry Kochenov for having raised this issue with me.

<sup>46</sup> This asymmetry is ultimately rooted in the broader institutional problem; namely that the EU lacks political institutions with a sufficient range of competences to carve out a constitutional tradition that would not have to fall back on its market origins.

#### **D. From General Principles to the EU Charter: Fundamental Rights and the Fundamental Boundary of the European Polity**

The early case of *Nold* captures the essence of the CJEU's approach to fundamental rights as "general principles of Community law":

Fundamental rights form an integral part of the general principles of law, observance of which [the CJEU] ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties . . . The European Convention on Human Rights (ECHR) has special significance in this regard.<sup>47</sup>

Article 6 TEU retains a reference to the general principles as sources of EU fundamental rights law next to the EU Charter:

(1) The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union . . . which shall have the same legal value as the Treaties . . . (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.<sup>48</sup>

No matter how the CJEU will further develop the systematic relationship between the EU Charter and general principles,<sup>49</sup> its interpretation of EU fundamental rights will continue to draw on the ECHR and Member States' constitutional traditions. That is to say, even if with its legal codification the EU Charter has become the Court's primary formal reference point, the substantive meaning and scope of EU fundamental rights cannot be divorced from these other sources. One reason is that the EU Charter was meant to codify the CJEU's

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<sup>47</sup> See *J. Nold, Kohlen- und Baustoffgroßhandlung v. Comm'n*, CJEU Case C-4/73, 1974 E.C.R. I-491.

<sup>48</sup> See TEU, *supra* note 6, at art. 6.

<sup>49</sup> See, e.g., Leonard Besselink, *The Protection of Fundamental Rights post-Lisbon: The Interaction Between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, in REPORTS OF THE FIDE CONGRESS TALLIN 1, 10–16 (2012), available at [http://www.fide2012.eu/index.php?doc\\_id=94](http://www.fide2012.eu/index.php?doc_id=94).

previous case-law on fundamental rights as general principles of Community law.<sup>50</sup> More importantly, Article 52 provides that the EU Charter shall be interpreted in accordance with the European Convention and “in harmony” with the constitutional traditions common to the Member States. It is against this background that I now want to inquire the putative contribution of these sources to demarcating the fundamental boundary of the European polity as a prerequisite for an autonomous interpretation of EU fundamental rights law.

### *I. The ECHR*

Article 52(3) of the EU Charter provides that:

[I]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

This corresponds to the prevailing view according to which the European Convention merely establishes a common minimum standard or “floor” of human rights protection as reflected in Article 53 ECHR. I cannot go into any detail here,<sup>51</sup> yet given that disagreements about rights are resolved differently in relation to the fundamental boundaries of discrete polities, it appears difficult—to say the least—to determine which legal order provides the “more extensive” protection. Accordingly, a better view of what the European Court of Human Rights (ECtHR) does under the veil of implementing a “common minimum standard” of protection is to generate commonality between Convention states by incorporating—to a greater or lesser extent—national diversity into Convention law. This is the upshot of the well-known interplay between the Court’s “comparative method,” the margin of appreciation doctrine, and the proportionality principle: Where a majority of Convention states appears to converge on a particular interpretation of any given human right, the Court’s proportionality scrutiny enhances as

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<sup>50</sup> According to its Preamble, the EU Charter “reaffirms . . . the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on the European Union, the Community Treaties, . . . and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.” E.U. Charter preamble, *available at* [http://www.eucharter.org/home.php?page\\_id=7](http://www.eucharter.org/home.php?page_id=7).

<sup>51</sup> For different accounts of the problems involved in defining a “common minimum standard” of protection where rights conflict across jurisdictional boundaries, see AIDA TORRES PEREZ, *CONFLICTS OF RIGHTS IN THE EUROPEAN UNION: A THEORY OF SUPRANATIONAL ADJUDICATION* (2009). See also Besselink, *supra* note 49, at 39, 46.

the margin of appreciation of the remaining states shrinks.<sup>52</sup> Conversely, where Convention states diverge on a contentious issue, the Court's proportionality test is informed by a wide margin of appreciation that accommodates diverse national interpretations of the same Convention right.

The ECtHR's "comparative method" does not easily lend itself to an autonomous interpretation of EU fundamental rights law—and this also beyond the obvious point that borrowing human rights standards from the European Convention can hardly qualify as "autonomous." The underlying problem is a systemic one: If the ECtHR generates commonality among Convention states by accommodating national diversity as a matter of ECHR law, the CJEU builds its fundamental rights jurisprudence on perceived existing commonalities between Member States' constitutional traditions, which is antagonistic to recognizing national diversity as a matter of EU law. On the contrary, the appeal to autonomy functions as a hermeneutic device to insulate the unity of the European legal order from national diversities.

Compare by way of example the ECtHR's judgment in *Open Door* with the CJEU's judgment in *Grogan* that both center on the relationship between freedom of expression and the right to life.<sup>53</sup> Irish pregnancy counseling agencies had complained about restrictions imposed by Irish law on providing information about the availability of lawful abortion services in third countries. The Irish Supreme Court's resolution of the putative conflict between freedom of expression and the right to life of the unborn was unequivocal:

The performing of an abortion on a pregnant woman terminates the unborn life which she is carrying. Within the terms of Article 40.3.3 it is a direct destruction of the constitutionally guaranteed right to life of that unborn child. It must follow from this that there could not be an implied and unremunerated constitutional right to information about the availability of a service of abortion outside the state which, if availed of, would have the direct consequence of destroying the

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<sup>52</sup> See, e.g., Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court* 6 (Yale L. Sch. Fac. Scholarship Series Paper 71, 2009). Stone Sweet, however, believes that this approach results in higher standards of protection across the board. For a critical assessment in the area of the protection of freedom of religion, see Daniel Augenstein, *Normative Fault-Lines of Transnational Human Rights Jurisprudence: National Pride and Religious Prejudice in the European Legal Space*, 2 GLOBAL CONSTITUTIONALISM 469 (2013).

<sup>53</sup> See *Open Door & Dublin Well Woman v. Ireland*, ECHR App. No. 14234/88, [1992] Eur. Ct. H.R. 68 [hereinafter *Open Door*]; *Grogan*, CJEU Case C-159/90 at 24.

expressly guaranteed constitutional right to life of the unborn.<sup>54</sup>

Accordingly, the Irish government contended before the ECtHR that the applicants' right to impart and receive information (Article 10 ECHR) was delimited by the state's duty to protect the life of the unborn (Article 2 ECHR). It was not for the European Court to impose a different view on Ireland that would derogate from the higher standard of protection provided by the Irish constitution (Article 53 ECHR) and destroy the core of the right to life of the unborn (Article 17 ECHR).<sup>55</sup> The ECtHR sidestepped the thorny questions whether the protection of Article 2 ECHR extends to the fetus or whether the Convention entails a right to abortion. Instead, it confined itself to verifying that the government's restrictions on freedom of expression were necessary in a democratic society for the "protection of morals" (Article 10(2) ECHR). In this context, the Court "acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life."<sup>56</sup> Having thus accommodated diverse national "beliefs" about the rights of the unborn via the limitation clause of Article 10(2) ECHR, the Court proceeds with a purely formal proportionality analysis: The Irish ban on pregnancy counseling did not reach its purported aim because information about abortion facilities outside Ireland was also available from other sources; and it was disproportionate because too broad and indiscriminate, failing to take into account the different needs of different women at different stages of their pregnancy.

In *Grogan*—decided prior to *Open Door*—the CJEU adopted a very different interpretative strategy of avoidance.<sup>57</sup> Via a preliminary reference from Ireland, the Court was *inter alia* asked to rule whether the medical termination of pregnancy, performed in accordance with the law of the state where it is carried out, constitutes a service within the meaning of Article 60 EEC Treaty (now Article 56 TFEU). Again, it was submitted to the Court that abortion was "grossly immoral" and involved "the destruction of life of a human being, namely the unborn child."<sup>58</sup> At first, the CJEU appears to dismiss the legal relevance of the

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<sup>54</sup> See *Open Door*, ECHR App. No. 14234/88, at para. 19.

<sup>55</sup> *Id.* at paras. 54, 65.

<sup>56</sup> *Id.* at para. 68; see also *Vo v. France*, ECHR App. No. 53924/00, 2004-VIII Eur. Ct. H.R. 82 (concluding that "the issue of when the right to life begins comes within the margin of appreciation . . . [because] there is no European consensus on the scientific and legal definition of the beginning of life"). In a more recent case, the majority of the Court avoided finding the Irish prohibition of abortion in direct violation of Article 8 ECHR by emphasizing the freedom of movement Irish women have under EU law to seek abortions in third countries. See *A, B & C v. Ireland*, ECHR App. No. 25579/05, 2010 Eur. Ct. H.R. 2032.

<sup>57</sup> See *Grogan*, CJEU Case C-159/90.

<sup>58</sup> *Id.* at para. 19.

submission altogether: “[W]hatever the merits of those arguments on a moral plane, they cannot influence the answer to the national court’s . . . question.”<sup>59</sup> Of course, such a neat separation of law and morality won’t do given that from the perspective of the Irish legal order, what is at stake is not simply a moral issue but the “direct destruction of the constitutionally guaranteed right to life of [the] unborn child.”<sup>60</sup> The Court acknowledges as much when it subsequently relinquishes any substantive evaluation of what is considered “lawful” in the Member States for the purpose of Article 60 EEC Treaty: “It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practiced legally.”<sup>61</sup> This, however, entails that national (moral/legal) diversity is *irrelevant* for determining what constitutes a service under European law. So long as the relevant activity is practiced legally somewhere in the Union,<sup>62</sup> EU law kicks in provided the internal market conditions—a commercial activity with a cross-border element—are met. In *Grogan*, the CJEU found the former condition wanting: While “the medical termination of pregnancy . . . constitutes a service within the meaning of Article 60 of the Treaty,”<sup>63</sup> *Grogan* could not benefit from the protection of the fundamental market freedoms because he lacked economic motivation. Instead, he was “left with” his fundamental rights the protection of which, however, fell outside the scope of EU law.

Admittedly, the presented comparison is somewhat uneven given that *Grogan* was not decided on its merits. Yet this should not distract from the way in which the internal market regime shapes the CJEU’s approach to fundamental rights. On the one hand, the application of EU fundamental rights is contingent on the exercise of fundamental freedoms.<sup>64</sup> Considering that fundamental rights are to reveal something “fundamental” about the European polity endowed with a “separate identity,”<sup>65</sup> it is somewhat telling that for *Grogan*, their protection turned on whether he had asked money for value. Yet on the other hand, it is difficult to see how the CJEU could move beyond this market paradigm without surrendering its claim to autonomy vis-à-vis the ECtHR and the Member States.

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<sup>59</sup> *Id.* at para. 20.

<sup>60</sup> See *Open Door*, ECHR App. No. 14234/88 at para. 53.

<sup>61</sup> See *Grogan*, CJEU Case C-159/90 at para. 20.

<sup>62</sup> According to the Court’s rather obscure reasoning in *Josemans*, an activity (specifically, marketing of Cannabis products in the Netherlands) cannot be considered a service under EU law if it is prohibited in *all* Member States. See *Josemans v. Burgemeester van Maastricht*, CJEU Case C-137/09, 2010 E.C.R. I-13019.

<sup>63</sup> *Grogan*, CJEU Case C-159/90 at para. 21.

<sup>64</sup> For a more detailed discussion of the implications of this contingency for fundamental rights protection in the EU legal order, see Mark Dawson & Elise Muir, *Hungary and the Indirect Protection of EU Fundamental Rights*, 14 GERMAN L.J. 1959 (2013).

<sup>65</sup> Weiler, *supra* note 35, at 117.

Having disqualified national fundamental rights standards as criteria for assessing the “lawfulness” of a service under EU law altogether, the Court’s examination of the autonomous “meaning and scope” of EU fundamental rights needs to fall back onto the internal market. Accordingly, what renders EU fundamental rights determinate and consistent is not an appeal to substantive convergence between diverse national constitutional traditions—the ECtHR’s “comparative method”—but a concern with the unity of the European legal order as a functional imperative of market integration.

## *II. The National Constitutional Traditions*

While in its early case-law the CJEU found “inspiration” in the constitutional traditions “common” to the Member States, Article 52(4) EU Charter now tasks the Court with interpreting EU fundamental rights “in harmony with those traditions.” It has often been noted that the invocation of national constitutional traditions adds precious little to the Court’s substantive interpretation of EU fundamental rights law.<sup>66</sup> The underlying reason is once again the EU’s “unity in diversity” conundrum. As Craig and de Burca note, while “the idea of ‘common constitutional traditions’ as a foundation for the general principles of EU law is an attractive one in principle, it is unquestionably true that the differences between specific national conceptions of particular human rights are often great.”<sup>67</sup> Moreover, even where a particular right is recognized in all Member States, “it seems inevitable that there will be no consensus as to how that right should be interpreted and ‘translated’ into a general principle of EU law.”<sup>68</sup> Accordingly, once the Court moves from the abstract recognition of a fundamental right “common” to the Member States to its concrete interpretation as a matter of EU law, the unity of the European legal order risks falling prey to national diversities.

Where Member States differ as regards the existence or scope of particular rights the CJEU, in its pre-Charter case law, either refused to recognize these rights as a matter of EU law,<sup>69</sup> or re-interpreted them as general principles “common” to the Member States. In *Omega*, the Court was asked to rule on the compatibility of a human dignity-based prohibition of laser games involving simulated killings in Germany with the EU fundamental

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<sup>66</sup> See, e.g., Besselink, *supra* note 39, at 647.

<sup>67</sup> PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES AND MATERIALS 371 (5th ed. 2011).

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., *Hoechst AG v. Comm’n*, CJEU Cases 46/87 & 227/87, 1989 E.C.R. 2859, para. 17 (illustrating that the CJEU refused to extend the protection of Article 8 ECHR to business premises “because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded”). The required “commonality” was later supplied by the European Court of Human Rights in *Niemietz v. Germany*, ECHR App. No. 13710/88, 251 EUR. Ct. H.R. (ser. A) (1992), and the CJEU changed its approach accordingly. See, *Roquettes Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes*, CJEU Case C-94/00, 2002 E.C.R. I-9011.

freedom to provide services.<sup>70</sup> The Court abstracted from the particular conception of human dignity entrenched in the German constitution to a more general concept of human dignity that was said to be shared among all Member States and inherent in the EU legal order itself:

[T]he Community legal order undeniably strives to ensure human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.<sup>71</sup>

While this brings *Omega* under the purview of EU fundamental rights, it does little to substantiate the autonomous interpretation of human dignity as a matter of EU law. Remarkably, the Court's proportionality analysis does emphatically not draw on a "common' conception" of human dignity that could function as a "general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity."<sup>72</sup> Instead, what is being "balanced" in scrutinizing the German prohibition order is, on the one hand, "the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany" and, on the other hand, the EU fundamental market freedoms.<sup>73</sup> Hence, whereas in *Grogan* the fundamental market freedoms delimit the CJEU's human rights jurisdiction, in *Omega* they directly shape, via the proportionality principle, the Court's substantive interpretation of human dignity as a matter of EU law. Disagreements about the meaning and scope of human dignity in the EU legal order are not resolved on the basis of perceived commonalities between the Member States but by placing human dignity in relation to the internal market as the fundamental boundary of the European polity.

If Article 52(4) EU Charter is thus of little avail in substantiating EU fundamental rights standards, it plays an important negative role in delimiting the CJEU's interpretative autonomy. Absent commonality, the Court is bound to pay due tribute to national diversity. This is the upshot of Article 53 EU Charter and Article 4(2) TEU that requires the Union to "respect" Member States "national identities, inherent in their fundamental

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<sup>70</sup> See *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeister der Bundestadt Bonn*, CJEU Case C-36/02, 2004 E.C.R. I-9609.

<sup>71</sup> *Id.* at para. 34.

<sup>72</sup> *Id.* at para. 37.

<sup>73</sup> *Id.* at para. 39.

structures, political and constitutional.” Accordingly, whereas in *Omega* the Court conjures an EU conception of human dignity to justify German exceptionalism, the bulk of case law concerns the EU fundamental rights compatibility of derogations from fundamental freedoms that are justified on the basis of national public policy and human rights standards.<sup>74</sup> As Weatherill sums up the Court’s approach:

The more sensitive and the more remote from commercial considerations the matters advanced in the context of justification of trade barriers are, the more generous the Court is to the available scope for justification and also to the breadth of the margin of appreciation enjoyed by the regulator—sometimes too, but not always, the more sensitive it is to the authority of the national court to make the final judgment on whether the challenged practices are in fact justified.<sup>75</sup>

However, the CJEU granting Member States exceptions from EU free movement law on the basis of national public policy and fundamental rights standards, and deferring for that purpose to the decisions of Member State authorities and judiciaries, contributes nothing to substantiating the autonomy of EU fundamental rights law itself. At the same time, whether or not such exceptions shall be granted, and deference conceded, must be decided autonomously by the CJEU on the basis of the EU legal order. As the Court says in *ERT*: Where a Member State relies on EU law to justify “rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights . . . the observance of which is ensured by the Court.”<sup>76</sup>

In *Schmidberger*, Austria directly relied on fundamental rights—freedom of expression and assembly—to justify a temporary closure of roads between Austria and Italy for an environmental demonstration.<sup>77</sup> The CJEU thus had to:

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<sup>74</sup> Pursuant to the CJEU’s *ERT* ruling, Member States are bound by EU fundamental rights when they claim national public policy exceptions to EU fundamental freedoms. *Elliniki Radiophonia Tileorasse AE v. Dimotiki Etaria Pliroforissis*, CJEU Case C-260/89, 1991 E.C.R. I-2925 [hereinafter *ERT*]. Whereas the following examples focus on *ERT*-type situations, the broader conceptual point—that EU fundamental rights are rendered determinate and consistent in relation to the internal market as the fundamental boundary of the European polity—arguably also applies to cases in which the CJEU reviews the fundamental rights compatibility of EU law itself.

<sup>75</sup> Stephen Weatherill, *From Economic Rights to Fundamental Rights*, in *THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AFTER LISBON* 11, 25 (Sybe de Vries, Ulf Bernitz & Stephen Weatherill eds., 2013).

<sup>76</sup> *ERT*, CJEU Case C-260/89 at para. 43.

<sup>77</sup> *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, CJEU Case C-112/00, 2003 E.C.R. I-5659.

[R]econcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly . . . and of the free movement of goods, where the former is relied upon as a justification for the latter.<sup>78</sup>

Indeed. Yet instead of carving out the substance of freedom of expression and assembly as a matter of EU law, the Court immediately proceeds to consider whether “a fair balance was struck” between the conflicting “interests” at play. While the national authorities were accorded a “wide margin of discretion,” it was ultimately for the CJEU to decide “whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.”<sup>79</sup> *Schmidberger* is revealing in a number of regards. Not only is the protection of EU fundamental rights contingent on the exercise of fundamental freedoms (*Grogan*), fundamental rights also operate as exceptions to fundamental freedoms. This entails a reversal of the rule/exception logic as compared to the national constitutional traditions and the ECHR. While for the purpose of the latter, economic interests need to be justified in the light of fundamental rights, the opposite holds true as a matter of EU law. This may cast some doubts on the fundamental importance of fundamental rights in the European legal order.<sup>80</sup> Yet, more importantly, it is the assessment of fundamental rights in light of the fundamental market freedoms that renders them determinate and consistent as a matter of EU law. Only imagine *Schmidberger’s* case had not been dealt with under Community law but under Austrian constitutional law or the ECHR—both systems of human rights protection to which the very notion of a “fundamental freedom of movement of goods” is alien! My concern here is not with outcome of the case but with the way different courts—tasked to do different things differently in different legal orders—may arrive at that outcome. On its professed self-understanding, the CJEU has to resolve the disagreement about the “meaning and scope” of freedom of expression and assembly autonomously, in the light of the European legal order as an “independent

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<sup>78</sup> *Id.* at para. 77.

<sup>79</sup> *Id.* at para. 82.

<sup>80</sup> As Brown comments, “Using the language of *prima facie* breach or restriction of economic rights suggests that, even if the restriction is ultimately justified, it remains something which is at its heart ‘wrong,’ but tolerated. This sits rather uneasily with the state’s usually paramount constitutional obligation to protect human rights.” Christopher Brown, *Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*, *Judgment of 12 June 2003, Full Court*, 40 COMMON MKT. L. REV. 1499, 1508 (2003).

source of law.”<sup>81</sup> The Court does so—predictably, inevitably—by placing fundamental rights in relation to the internal market as the fundamental boundary of the European polity.

The linkage between an autonomous interpretation of EU fundamental rights and the internal market is perhaps most explicit in the CJEU’s judgments in *Viking* and *Laval*.<sup>82</sup> Both cases revolved around the question whether the applicant undertakings’ fundamental freedoms had been unduly restricted by trade union collective action as protected by Article 28 EU Charter. Unlike the EU Charter that only provides for the indirect protection of fundamental rights between private parties,<sup>83</sup> fundamental market freedoms have direct horizontal effect. This is, the Court says in *Viking*, necessary to protect the unity of the internal market:

[T]he abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of state barriers could be neutralized by obstacles resulting from the exercise, by associations or organizations not governed by public law, of their legal autonomy.<sup>84</sup>

The ensuing structural asymmetry between fundamental freedoms and fundamental rights leads to a situation in which the trade union—a non-state actor—needs to justify the exercise of its right to collective action as a direct constraint of the market freedom of a corporate citizen. As a consequence, fundamental rights come to operate as a putative justification for the restriction of private free movement rights under EU law, rather than as a “constitutional” yardstick of the legality of EU law itself.<sup>85</sup> This structural asymmetry perpetuates itself in the Court’s substantive proportionality analysis. If, in a judgment comparable on the facts, the ECtHR ruled that exceptions to the lawfulness of strike action

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<sup>81</sup> *Internationale Handelsgesellschaft*, CJEU Case C-11/70 at 1134.

<sup>82</sup> *Int’l Transp. & Workers’ Fed’n v. Viking Line ABP*, CJEU Case C-438/05, 2007 E.C.R. I-10779 [hereinafter *Viking*]; see also *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, CJEU Case C-341/05, 2007 E.C.R. I-11767.

<sup>83</sup> That is, it imposes obligations on public authorities to protect fundamental rights in the relationships between non-state actors. This indirect horizontal protection of fundamental rights needs to be distinguished from the direct application of human rights standards in the private sphere via EU legislation. See, e.g., *Mangold v. Helm*, CJEU Case C-144/04, 2005 E.C.R. I-9981; *Kücüdeveci v. Swedex GmbH & Co. KG*, CJEU Case C-555/07, 2010 E.C.R. I-365.

<sup>84</sup> *Viking*, CJEU Case C-438/05 at para. 57.

<sup>85</sup> Alicia Hinarejos, *Laval and Viking: The Right to Collective Action Versus EU Fundamental Freedoms*, 8 Hum. Rts. L. Rev. 714, 725 (2008).

had to be construed narrowly,<sup>86</sup> the CJEU instead found that EU fundamental rights could not justify the restriction of Viking's freedom of establishment because the collective action was disproportionate. The Court's "single market approach" in *Viking* and *Laval* does not reflect well on the state of EU fundamental rights law. As Danny Nicol remarks, human and corporate citizens become depicted as "rights-bearing market actors rather than members of a political community," concerned with the advancement "of their individual rights through litigation rather than of the collective interest through political action."<sup>87</sup> Yet, to simply blame this on a perceived market-ideology of the Court somewhat misses the point. What is at stake are the conditions for an autonomous interpretation of the substance of EU fundamental rights law. Where, as in *Viking* and *Laval*, the invocation of commonalities between the Member States is a far cry from the reality of diverging national models of social protection across the Union, it is the unity of the internal market that renders fundamental rights determinate and consistent as a matter of EU law.

#### **E. Impasse "sui generis": EU Fundamental Rights in the Internal Market**

With the adoption of the EU Charter, the fundamental market freedoms have become incorporated into the body of EU fundamental rights law.<sup>88</sup> For some, this joining of the "fundamentals" is justified for the fact that both aim at protecting individual interests against state power.<sup>89</sup> Whatever the merits of such arguments, they should not distract from the way fundamental rights and fundamental freedoms operate on each other in the EU legal order. The foregoing analysis suggests that this operation is structured by fundamental rights' contingency on, and subordination to, fundamental freedoms, as well as by a subversion of their constitutional logic in the EU legal order. This predicament with EU fundamental rights law cuts deeper than Alston's concern with surrendering international human rights to the market as "the most efficient and appropriate value-allocating mechanism."<sup>90</sup> It is rooted in the systemic conditions for an autonomous interpretation of fundamental rights in a supra-national European polity whose fundamental boundary is the internal market. What renders the interpretation of EU fundamental rights autonomous in relation to Europe's diverse national constitutional traditions are precisely the formal—jurisdictional—and substantive—proportionality—constraints imposed upon them by the fundamental market freedoms.

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<sup>86</sup> *Demir v. Turkey*, ECHR App. No. 34503/97, 2008 Eur. Ct. H.R. 1345.

<sup>87</sup> Nicol, *supra* note 21, at 324.

<sup>88</sup> Article 15(2) of the EU Charter provides that "[e]very citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State." Pursuant to Article 45 of the EU Charter: "[E]very citizen of the Union has the right to move and reside freely within the territory of the Member States."

<sup>89</sup> Besselink, *supra* note 49, at 19.

<sup>90</sup> Alston, *supra* note 1, at 442.

Accordingly, the challenge the CJEU faces is more profound than a mere “instrumentalization” of fundamental rights in the service of the market. For Douglas-Scott, the Court’s task post-Lisbon is “to move beyond an instrumental, *ad hoc*, market-led mentality towards a mature conception of fundamental rights as goods in themselves.”<sup>91</sup> Yet, under conditions of disagreement about rights that are resolved differently in relation to the fundamental boundaries of discrete polities, it is difficult to see how an autonomous conception of EU fundamental rights as “goods in themselves” could be divorced from the internal market. At the same time, this does not preclude the evolution of the European polity into a genuine “post-national human rights institution”<sup>92</sup> with a robust value-based “institutional ethos” that transcends the narrow confines of economic and technocratic rationality.<sup>93</sup> Only, it is submitted that this process is not accomplished by the proclamation of values and the legal entrenchment of rights but requires the very transformation of the internal market as the fundamental boundary of the European polity. In the 1990s, Joseph Weiler famously remarked that:

A ‘*single European market*’ is a concept which still has the power to stir. But it is also a ‘*single European market*.’ It is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicized choice of ethos, ideology, and political culture: the culture of ‘the market.’<sup>94</sup>

Post-Lisbon, the question that arises is whether the EU will continue to be dominated by an economic concern with fundamental rights in the common market, or whether fundamental rights will succeed in giving voice to a genuine political debate about what is entailed in having a market in common.

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<sup>91</sup> Douglas-Scott, *supra* note 8, at 681.

<sup>92</sup> Samantha Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution?*, 6 HUMAN RIGHTS. L. REV. 323, 323 (2006).

<sup>93</sup> See WILLIAMS, *supra* note 19, at 283–313.

<sup>94</sup> JOSEPH H. H. WEILER, *The Transformation of Europe* (1991), reprinted in THE CONSTITUTION OF EUROPE 10, 89 (Joseph H. H. Weiler ed., 1999).