Articles

Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law

By Francesco de Cecco[*]

A. Introduction

The relation between internal market freedoms (the so-called *"fundamental freedoms"*) and fundamental rights is a recurring question in EU law.[1] In recent years, after rulings such as *Schmidberger*, *Omega*, *Viking*, and *Laval*, attempts to provide a framework for approaching and resolving clashes between fundamental freedoms and fundamental rights have acquired a special urgency.[2] Less attention, however, has been devoted to capturing the different nature of fundamental freedoms and fundamental rights, and to evaluating the implications of the choice whether or not to include fundamental freedoms in the same category as fundamental rights. The dominant focus in the literature is on what happens when free movement and fundamental rights pull in different directions. Yet, the question of whether fundamental freedoms should be regarded as fundamental rights also deserves close scrutiny. It is especially important to understand the implications of this classification since the EU Charter of Fundamental Rights appears to treat some, but not all, fundamental freedoms as fundamental rights.[3] In particular, the Charter seems to

[*] Newcastle University, UK. I am greatly indebted to Eleanor Spaventa, Niamh Nic Shuibhne, Sylvia de Mars, Dimitry Kochenov, and Andrea Biondi for their comments on an earlier draft. I am also grateful to Richard Mullender, and to various participants at the "Integration or Disintegration?" conference (hosted by Birmingham Law School in June 2012) for helping me to pin down the ideas developed here. The usual disclaimer applies.

[1] The term "fundamental freedoms" captures the EU internal market freedoms enshrined in the provisions on free movement of goods, free movement of persons, services, and capital in Title II and IV of Part Three ("Union Policies and Internal Actions") of the Treaty on the Functioning of the European Union. Consolidated Version of the Treaty on the Functioning of the European Union, pt. 3, tit. II & IV, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

[2] Schmidberger v. Österreich, CJEU Case C-112/00, 2003 E.C.R. I-5659 [hereinafter *Schmidberger*]; Omega Spielhallen v. Oberbürgermeisterin der Bundesstadt Bonn, CJEU Case C-36/02, 2004 E.C.R. I-9609; Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, CJEU Case C-341/05, 2007 E.C.R. I-11767; Int'l Transp. Workers' Fed'n v. Viking, CJEU Case C-438/05, 2007 E.C.R. I-10779. There is a rich literature on this issue. Among the most recent contributions, see generally, OXFORD INST. OF EUR. AND COMPARATIVE LAW, THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AFTER LISBON (Sybe de Vries, Ulf Bernitz & Stephen Weatherill eds., 2013); Verica Trstenjak & Erwin Beysen, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU*, 35 EUR. L. REV. 293 (2013).

[3] *See*, Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

regard the free movement of persons[4] and services[5] as fundamental rights, but not the free movement of goods or the free movement of capital. A similar approach is exhibited in the case law: While the Court recognizes the fundamental rights character of free movement of persons, it does not appear to extend that characterization to the entirety of free movement law.[6] This article attempts to make sense of this dichotomy by relying on an account of fundamental rights that adopts a non-instrumental focus on the right-holder. It argues that certain free movement provisions, namely the free movement of goods and capital, cannot be characterized as fundamental rights because they are inherently instrumental—they are a means to the internal market end. By contrast, the other free movement provisions appear to match the account of fundamental rights adopted here. As this article aims to show, the classification of certain, or all, fundamental freedoms as fundamental rights is a question that affects the interpretation of the *scope* of the free movement provisions. Moreover, as will be seen, the question is closely related to the debate on the convergence between the free movement provisions, and on the persistence of the "wholly internal rule," the rule that requires a cross-border connection to trigger the application of free movement law.

The article proceeds in the following way. The first part begins by setting out the normative framework that informs the discussion. It then examines the case law to find answers to the question whether (and, if so, which) fundamental freedoms are to be regarded as fundamental rights. The second part considers—and rejects—those approaches that hold that fundamental freedoms as a whole can be conceptualized as fundamental rights. The final part explains how these different theoretical constructions may impact on the way in which the scope of the free movement provisions is understood and interpreted.

B. The Dichotomy

For decades, the Court has employed the term fundamental freedoms to capture the four freedoms. Naturally, given the similarities between the two terms, the question has arisen whether the Court's terminology intends to convey that free movement rights are fundamental rights. Today, the Charter appears to suggest that some fundamental freedoms are fundamental rights, whereas others are not. In particular Article 15 of the Charter covers free movement of persons and services, and Article 45 of the Charter (which partially reproduces Article 21 TFEU) covers the rights of freedom of movement and residence arising from EU citizenship.[7] There is no mention of the free movement of goods,

[4] *Id.* art. 45, at 19.

[5] *Id.* art. 15, at 11.

[6] Some Advocates General have advanced the view that fundamental freedoms can, at least in part, be formulated as fundamental rights, but this does not appear to have been confirmed by the Court.

[7] Charter of Fundamental Rights of the European Union, arts. 15, 45, Dec. 18, 2000, 2000 O.J. (C 364) 1, 11, 19.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

nor of the free movement of capital, apart from a negligible reference in the Preamble, which simply states that securing the four freedoms is an objective of the Union.[8] Before going on to explore the extent to which the internal market case law is compatible with a fundamental rights account of free movement law, it will be useful to pin down the central features of the concept of fundamental right.

I. What Makes Rights Fundamental?

There are a number of different theoretical approaches to fundamental rights[9] and it is beyond the scope of this article to explore these in detail. However, one account that seems particularly fruitful as far as we are concerned posits that a right is fundamental if the right-holder's interest is considered to be "of ultimate value," that is, an interest that "does not derive from some other interest of the right-holder or of other persons."[10] Furthermore, the values protected by fundamental rights are those that "need not be explained or be justified by (their contribution to) other values."[11] If this is the case, when determining whether a certain right is a fundamental right, it is necessary to separate out those interests that are protected for their intrinsic value from those interests that are protected for their instrumental role. The implication of this view is that rights that are protected because of their instrumental role in advancing a common purpose or collective good, such as the internal market, should not be regarded as fundamental.

One of the key advantages of this definition is that it seems capable of elucidating the Court's approach to fundamental rights. Take, by way of illustration, the evolution of the jurisprudence on sex equality, which the Court explained in *Lilli Schröder*.[12] There, the Court recalled that the initial approach in the case law to (what is now) Article 157 TFEU was aimed at avoiding distortions of competition between undertakings. However, the case law subsequently recognized the right not to be discriminated against on grounds of sex as a *fundamental human right*. In view of this evolution, the Court held that the economic aim pursued by Article 157 TFEU was now a secondary aim of that provision, which, instead, was the expression of a fundamental human right. It seems clear, then, that central to the Court's reasoning is the assumption that a fundamental (human) right cannot have as its primary justification the pursuit of an economic aim which is external to the right-holder's interest.

[8] *Id.* pmbl., at 8.

[9] *See*, JEREMY WALDRON, THEORIES OF RIGHTS (Jeremy Waldron ed., 1984).

[10] JOSEPH RAZ, THE MORALITY OF FREEDOM 192 (1988). Note that the account of fundamental rights proposed here does not seek to do justice to Raz's theory of rights. It is not, and does not pretend to be, a "Razian account."

[11] *Id.* at 200.

[12] Deutsche Telekom AG v. Lilli Schröder, CJEU Case C-50/96, 2000 E.C.R. I-743, paras. 55–59.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

However, the Court's non-instrumental conception of fundamental rights is not limited to fundamental *human* rights, but also extends to certain free movement rights that, without being human rights, the Court regards as fundamental. These rights are not universal in scope or in aspiration, but are nonetheless fundamental.[13]

The association between free movement and fundamental rights has a long pedigree in the case law. The term fundamental right was already present in the preamble to Regulation 1612/68, which states in its third recital: "Freedom of movement constitutes a fundamental right of workers and their families."[14] That language did not go unnoticed. First the Commission, then Advocates General, and eventually the Court placed significant emphasis on the characterization of free movement of workers as a fundamental right.[15] As Advocate General Jacobs explained in *Bettray*: "The recital makes it clear that labour is not, in Community law, to be regarded as a commodity and notably gives precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States."[16] For this reason, the Court has, on a number of occasions, expressly recognized that (now) Article 45 TFEU confers a fundamental right on individual workers.

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[13] The key difference between human rights and fundamental rights is that while the former are universal, the latter are grounded in a specific political and legal context. This explains the variation in the substantive interests that are regarded as fundamental among different political and legal systems. As far as the EU context is concerned, there are rights that are peculiar to the EU and are not (in any meaningful way) expressions of human rights. Of course, this is true only of a minority of EU fundamental rights, the majority being derived either from the ECHR or from domestic constitutions.

[14] Council Regulation 1612/68, pmbl., 1968 O.J. (L 257/2) 475, 475 (EC) (replaced by Council Regulation 492/2011, 2011 O.J. (L 141) 1 (EU)).

[15] The preamble was repeatedly relied on by the Commission in its submissions before the Court, and was eventually adopted by the Court itself. In *Levin*, both the Commission and the Advocate General emphasized the characterization by Regulation 1612/68 of free movement of workers as a fundamental right, and later, in *Forcheri*, the Court itself adopted that terminology. Opinion of Advocate General Slynn at para. 8, Levin v. Staatssecretaris van Justitie, CJEU Case C-53/81 (Mar. 23, 1982), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61981CJ0053:EN:PDF; Forcheri v. Belgian State & asbl Institut Supérieur de Sciences Humaines Appliquées, CJEU Case C-152/82, 1983 E.C.R. 2323, para. 11. In *Heylens*, the Court held that access to employment was a fundamental right conferred by the Treaty:

> Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right.

UNCTEF v. Heylens, CJEU Case C-222/86, 1987 E.C.R. 4097, para. 14.

[16] Opinion of Advocate General Jacobs at para. 29, Bettray v. Staatssecretaris van Justitie, CJEU Case C-344/87 (Mar. 8, 1989), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987CC0344:EN:PDF.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

This approach starkly contrasts with the original blueprint offered by the Spaak Report.[17] In line with the neo-functionalist logic that prevailed in the early stages of economic integration, the Report treated labor in instrumental terms, as a "factor of production" that would move across borders to meet demand.[18] In light of this evolution, it is plain that the right to free movement of workers protects even those workers that move from countries with low unemployment to countries with high unemployment levels, in the same way that sex discrimination breaches Article 157 TFEU even where no distortion of competition can be discerned.

Other areas of free movement witnessed a similar departure from the logic of pure market instrumentalism: Already from the 1980s, when the case law recognized that tourists were protected by the Treaty as service recipients, it was clear that persons could not be considered as mere agents of economic integration.[19] A similar understanding of the concept of fundamental right underlies the case law on citizenship. This meaning was captured by Advocate General Cosmas in *Wijsenbeek*.[20] The effect of the introduction of the EU citizenship provisions, he argued, was that EU citizens became "holders of a specific right . . . *irrespective of whether the enjoyment of this right is accompanied by the promotion of other Community aspirations or objectives*."[21] He went on to contrast the "functional" nature of the free movement provisions enshrined in the Treaty of Rome with the "substantive" nature of the right to free movement stemming from EU citizenship, the latter being "a right, in the true meaning of the word, which exists with a view to the autonomous pursuit of a goal, *to the benefit of the holder of that right and not to the benefit of the Community and the attainment of its objectives*."[22]

The words of Advocate General Colomer in *Baldinger* characterized the impact of EU citizenship in similar terms:

> [T]he creation of citizenship of the Union, with the corollary of freedom of movement for citizens

[17] Paul-Henri Spaak, Intergovernmental Comm. on Eur. Integration, Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères (Apr. 21, 1956).

[18] *Id.* On the limitations of this blueprint, see, Siofra O'Leary, *Free Movement of Persons and Services*, *in* THE EVOLUTION OF EU LAW 503 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011).

[19] Cowan v. Trésor Public, CJEU Case C-186/87, 1989 E.C.R. 195.

[20] Criminal Proceedings against Wijsenbeek, CJEU Case C-378/97, 1999 E.C.R. I-6207.

[21] Opinion of Advocate General Cosmas at para. 83, Criminal Proceedings against Wijsenbeek, CJEU Case C-378/97 (Mar. 16, 1999) (emphasis added), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997CC0378:EN:PDF.

[22] *Id.* para. 84 (emphasis added).

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> throughout the territory of the Member States, represents a considerable qualitative step forward in that it *separates that freedom from its functional or instrumental elements* (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union. Evidence of that qualitative development lies in the fact that freedom of movement and of residence, as an independent right, has been enshrined in Article 45(1) of the Charter of Fundamental Rights of the European Union.[23]

By the time that citizenship had come to fruition, the Court had already stated that persons—not just workers—were holders of a "fundamental right . . . to move freely" within the EU.[24] The advent of EU citizenship meant that the rights to free movement and residence, shorn of any economic purpose, were characterized as fundamental rights stemming from the status of Union citizenship. This happened, first, in the case law, then in Directive 2004/38, and, finally, in Article 45 of the Charter.[25] While differences between economic free movement and non-economic free movement remain significant, as the latter comes with substantial strings attached, much cross-fertilization has occurred between economic free movement and EU citizenship.[26] Article 15 of the Charter re-emphasizes the link by stating, "*every citizen of the Union* has the freedom to seek employment, to work, to exercise the rights of establishment and to provide services in any Member State."[27]

II. The Enduring Instrumentalism of Free Movement Law

[23] Baldinger v. Pensionsversicherungsanstalt der Arbeiter, CJEU Case C-386/02, 2004 E.C.R. I-08411, para. 25 (emphasis added).

[24] El-Yassini v. Secretary of State for Home Department, CJEU Case C-416/96, 1999 E.C.R. I-1209, para. 45.

[25] *See*, Zhu & Chen v. Secretary of State for the Home Department, CJEU Case C-200/02, 2004 E.C.R. I-9925, para. 33; Council Directive 2004/38, pmbl., 2004 O.J. (L 158) 77, 81 (EU); Charter of Fundamental Rights of the European Union, art. 45, Dec. 18, 2000, 2000 O.J. (C 364) 1, 19.

[26] *See*, O'Leary, *supra* note 18.

[27] Charter of Fundamental Rights of the European Union, art. 15, Dec. 18, 2000, 2000 O.J. (C 364) 1, 11 (emphasis added). This does not mean that citizenship is the foundation of all fundamental rights. Citizenship is a status, not a right. As a status, citizenship gives rise to certain rights—the right to move and to reside throughout the territory of the EU—and, to a certain extent, colors the interpretation of pre-existing *free movement* rights.

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What has emerged so far is that the primacy of the person is a feature of certain free movement provisions. Also, the introduction of EU citizenship has strengthened the centrality of the individual in free movement law. Yet, not all free movement law lends itself to this account. If the defining feature of fundamental rights is their non-instrumental focus on the individuals that they protect, it seems clear that the instrumental nature of a considerable section of free movement law precludes the attachment of the fundamental rights label to all free movement law. From an early stage in the process of European legal integration, it was clear to observers of, and participants in, that process that free movement law had a distinctly instrumental nature. As Mertens de Wilmars (then a judge at the European Court of Justice) remarked in the 1970s, the Treaty rules expressed an "instrumentalist" conception of economic liberalism.[28] This line of thinking found explicit confirmation in the case law on the free movement of goods. In his Opinion in *Hünermund*, Advocate General Tesauro famously suggested that the Court should decide whether Article 34 TFEU was "a provision intended to liberalise intra-Community trade" or "to encourage the unhindered pursuit of commerce in individual Member States."[29] That question received a prompt answer in *Keck*, where the Court premised its reasoning with the remark that a redefinition of the scope of Article 34 TFEU was needed in view of the increasing tendency of traders to invoke that provision "as a means challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States."[30] Even in *Schmidberger*, the case that is often cited as evidence of a fundamental rights turn in free movement of goods—given that the Court referred to free movement of goods as a "fundamental principle"[31]—the Court did not abandon its instrumental conception of free movement of goods. According to the Court, the provisions on free movement of goods were to be "understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, *to trade flows* in intra-Community trade," and that Article 34 TFEU was "an *indispensable instrument* for the realisation of a market without internal frontiers."[32]

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[28] Josse Mertens de Wilmars, *La Jurisprudence de la Cour de Justice comme Instrument de l'Intégration Communautaire*, 1 CAHIERS DE DROIT EUROPÉEN[CDE] 135, 147 (1976) ("Les conceptions économiques qu'expriment nombre de règles du traité correspondent à une conception instrumentaliste du libéralisme économique et non à l'idée qu'il est l'*Ordnungsprinzip* des économies intégrées.").

[29] Opinion of Advocate General Tesauro at para. 1, Hünermund v. Landesapothekerkammer Baden-Württemberg, CJEU Case C-292/92 (Oct. 27, 1993), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992CC0292:EN:PDF. *See also*, Opinion of Advocate General Tizzano at para. 68–78, France v. Ministère de l'Économie, des Finances et de l'Industrie, CJEU Case C-442/02 (Mar. 25, 2004), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CC0442:EN:PDF.

[30] Criminal Proceedings against Bernard Keck & Daniel Mithouard, CJEU Joined Cases C-267/91 & C-268/91, 1993 E.C.R. I-6097, para. 14.

[31] *Schmidberger*, CJEU Case C-112/00 at para. 51.

[32] *Id.* paras. 56–57 (emphasis added).

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The Charter's silence in respect of free movement of goods and free movement of capital confirms what was already implicit—though not transparent—in the case law. Those free movement provisions that cannot be readily linked to a person, do not lend themselves to being treated as fundamental rights.[33] It is true that the Court uses the term "fundamental freedoms,"[34] or the term "fundamental principles" in relation to all four internal market freedoms.[35] Yet, nothing appears to turn on this form of words, except the fundamental importance of free movement in the scheme of the Treaty, and the emphasis on the narrow interpretation to be given to derogations/justifications.

Granted, even in the free movement of goods case law there are snippets that could be relied on to argue, as some have done in a more or less sanguine manner, that Article 34 TFEU gives rise to fundamental rights.[36] Yet, closer analysis of these linguistic associations between free movement of goods and fundamental rights reveals—with the benefit of hindsight—that these are unreliable precedents or no precedents at all. In *ADBHU*, the Court held: "It should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance."[37] It is clear from the structure of the sentence that only freedom of trade, as opposed to "free movement of goods and freedom of competition," is labeled as a "fundamental right." Of course, freedom of trade was one of the first fundamental rights stemming from the national constitutional traditions to receive recognition as a matter of Community law.[38]

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[33] Jukka Snell, *And Then There were Two: Products and Citizens in Community Law*, *in* EU LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER Vol. II 49 (Takis Tridimas & Paolisa Nebbia eds., 2004).

[34] In *Brokmeulen*, the Court held that the free movement of persons, freedom of establishment, and free movement of services were "freedoms which are fundamental to the system set up by the Community" and in *Casati* it added free movement of capital to the category—though, it added, unlike the other free movement provisions, free movement of capital did not enjoy direct effect. C. Broekmeulen v. Huisarts Registratie Commissie, CJEU Case C-246/80, 1981 E.C.R.-2311, para. 20; Criminal Proceedings against Guerrino Casati, CJEU Case C-203/80, 1981 E.C.R. 2595, para. 8. Since then, the use of the term has become established in the case law to cover the four freedoms. *See, e.g.*, Petersen v. Finanzamt Ludwigshafen, CJEU Case C-544/11, http://curia.europa.eu/juris/document/document.jsf?text=&docid=134372&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=297580, para. 28.

[35] Comm'n v. Luxembourg & Belgium, CJEU Joined Cases C-2/62 & C-3/62, E.C.R. 425, 433 (1962) (referring to the "fundamental principle of the free movement of products"). The term has since appeared in relation to all free movement provisions and is still commonly used. *See, for instance*, with regard to free movement of capital, Comm'n v. Belgium, CJEU Case C-387/11, para. 43 (Oct. 25, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=128907&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=787482.

[36] *See, e.g.*, SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 435 (2002); Peter Oliver & Wulf-Henning Roth, *The Internal Market and the Four Freedoms*, 41 COMMON MKT. L. REV. 407 (2004); ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY 262 (2012).

[37] Procureur de la République v. ADBHU, CJEU Case 240/83, 1985 E.C.R. 531, para. 9.

[38] *See, e.g.*, Nold v. Comm'n, CJEU Case 4/73, 1974 E.C.R. 491.

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Yet, it is evident from both the Advocate General's Opinion and from the Judgment that freedom of trade was not a right conferred by the Treaty, and was distinct from the Treaty provisions on free movement.[39]

Even the *Dounias* case, in which the Court actually appeared to use the term "fundamental right" in relation to free movement of goods, is an isolated and dubious reference point.[40] It is clear from the context that the question concerned effective judicial protection of an EU right.[41] The reference to "a fundamental right conferred by the Treaty" was the result of a partial reproduction of the wording of *Heylens*, a case in which the Court held that Article 45 TFEU conferred a fundamental right on migrant workers and asserted the principle of effective judicial protection in relation to this right.[42] Yet, it is also clear that the principle of effective judicial protection does not follow from the classification of a right as a fundamental right, but from its nature as a *Community right*—indeed, some language versions of the Judgment do not contain the term "fundamental right," but the term "Community right."[43] The existence of a fundamental right, therefore, was not integral to the Court's reasoning.[44]

C. Beyond the Dichotomy?

Our concern so far has been to try to explain the lack of consistent evidence in the case law on free movement, and in the Charter of Fundamental rights, to support the ascription of *all* fundamental freedoms to the category of fundamental rights. We have concluded that the existence of a dichotomy in this respect is compatible with a view that privileges the non-instrumental nature of fundamental rights. Yet, the fact that the Charter of Fundamental Rights has made clear that not all internal market freedoms are fundamental

[39] The fact that in *ADBHU* the Court designated free movement of goods as a *general principle* does not necessarily imply that it is also a fundamental right; similarly, the principle of free competition is not a fundamental right. A provision's fundamental importance and its status as a general principle are not decisive factors in deciding that a fundamental right exists. This remark remains unchanged even in the presence of provisions that have direct effect, such as Article 34 TFEU or Article 101 TFEU.

[40] Dounias v. Minister for Economic Affairs, CJEU Case C-228/98, 2000 E.C.R. I-577, para. 64.

[41] *Id.* para. 64 ("[T]he Court has consistently held that the existence of a judicial remedy against any decision of a national authority refusing the benefit of a fundamental right conferred by the Treaty is essential in order to secure for the individual effective protection for his right.").

[42] UNCTEF v. Heylens, CJEU Case 222/86, 1987 E.C.R. 4097, para. 14.

[43] Namely, the Italian, Spanish, and Portuguese versions. It is possible to infer that if the Court had wished to emphasize the "fundamental rights" status of the "Community rights" at issue, those language versions would have paid greater attention to that—not insignificant—detail.

[44] A fact that is confirmed by the absence of any reference to fundamental rights in all the instances in which the Court has subsequently relied on paragraph 64 of *Dounias*.

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rights does not pre-empt the Court from adopting a different position in the future. Fundamental rights are not set in stone and it is entirely possible that the Court may reconsider the issue and eliminate the dichotomy.[45] It is therefore useful to consider whether fundamental freedoms ought to be considered as fundamental rights. In doing so, this section deals with two doctrinal positions that favor treating all fundamental freedoms as fundamental rights. The first position views fundamental freedoms, fundamental rights, and human rights as resting on *common ground*, to such an extent that they can be assimilated to one another. The second, the *convergence thesis*, holds that the EU citizenship status allows one to re-conceptualize free movement rights as fundamental rights of EU citizens and to kill two birds with one stone: Obtain convergence between the free movement provisions and confine reverse discrimination to obsolescence.

I. The Common Ground Thesis

The common ground thesis can be described in the following terms. The fundamental rights nature of fundamental freedoms derives from those freedoms' link to universal values and to universal human rights, and from the fact that they are based on other fundamental rights. According to Petersmann, "[t]he market freedoms guaranteed by the EC Treaty can be understood as specific manifestations of 'freedoms of trade' deriving ultimately from a n indivisible, basic 'right to liberty.' "[46] Relying on the preamble to the Charter, he writes that:

> [T]he EU Charter of Fundamental Rights bases the human rights approach to European economic law, and to the rights-based conception of the EC's internal 'market freedoms' as fundamental freedoms of individuals to be protected by national and European courts, on 'the indivisible, universal values of human dignity, freedom, equality and solidarity.'[47]

[45] Indeed, some influential views reject the presence of a dichotomy. Advocate General Trstenjak suggested that "the relationship between fundamental freedoms and fundamental rights is characterised by a broad convergence both in terms of structure and content." Opinion of Advocate General Trstenjak at para. 187, Comm'n v. Germany, CJEU Case C-271/08 (July 15, 2010), http://curia.europa.eu/juris/document/document.jsf?text=&docid=84096&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=789688. *See also*, Vassilios Skouris, *Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance*, 17 EUR. BUS. L. REV. 225 (2006). Note, however, that neither of these views are—necessarily—reflective of the Court's approach.

[46] Ernst-Ulrich Petersmann, *International Trade Law, Human Rights and Theories of Justice*, *in* LAW IN THE SERVICE OF HUMAN DIGNITY 49 (Steve Charnovitz, Debra P. Steger & Peter Van den Bossche eds., 2005).

[47] PETERSMANN, *supra* note 36, at 307.

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Moreover, the Charter recognizes in Article 16 the "freedom to conduct a business in accordance with Union and national laws and practices."[48] This, according to Petersmann, is the basis for a fundamental rights construction of free movement law.

On this account, the internal market freedoms, which are the expression of a specific, *local* political project, are regarded as the expression of *universal* values.[49] The problem with this view is not that the link is absent, but that it is remote. Of course, freedom in its manifold manifestations is protected at both the national and international level. However, the level at which this link is traced is so abstract as to have no bearing on the grounding of rights. To say that a provision enshrined in a legal system is an expression of universal values does not tell us if that provision is a fundamental right in that legal system, even if that legal system makes express reference to those values. The transition of universal values to their instantiation into rights is not necessarily warranted, nor is it uncontroversial. For instance, the step between asserting the universal value of individual freedom—at a very abstract level, which is generally accepted—and arguing that free movement of capital is a universal human right, or even a fundamental right, is a very steep one indeed. Few would claim with confidence that free movement of capital is universally recognized as a human right, and few would even claim that it is a fundamental right in the EU context. Moreover, if we accept that the internal market is not only, or even primarily, concerned with protecting economic freedom per se, the whole construction of fundamental freedoms as fundamental rights immediately loses its appeal.[50]

Attempts to argue that free movement of goods and free movement of capital are based on other fundamental rights are also open to criticism because they fail to capture the full complexity of these internal market provisions. In other words, they lead to a reductivist understanding of internal market law. Consider Article 16 of the Charter. It is clear from the Explanations to the Charter that this provision harks back to the very roots of the case law on EU fundamental rights. The Court has, since the 1960s, recognized freedom to exercise an economic or commercial activity, and freedom of contract as fundamental rights drawn from national constitutional traditions. [51] These rights, albeit fundamental,

[48] Charter of Fundamental Rights of the European Union, art. 16, Dec. 18, 2000, 2000 O.J. (C 364) 1, 12.

[49] It should be clear that we are not arguing in favor of an "isolationist" position. The argument advanced here is not that the EU is, or should be, isolated from international human rights law. This would be an absurd position, especially in light of the EU's forthcoming accession to the ECHR. It goes without saying that internal market law is bound by international human rights law; but, that is not to say that the EU's internal market provisions are an expression of universal human rights.

[50] It should be clear that this article does *not* make the general claim that economic rights are incapable of constituting fundamental rights. The claim advanced here is that those rights that are inextricably, and instrumentally, linked to the realization of the internal market are not fundamental rights.

[51] Nold v. Comm'n, CJEU Case 4/73, 1974 E.C.R. 491, para. 14; Germany v. Council, CJEU Case C-280/93, 1994 E.C.R. I-4973, para. 78; Bank Melli Iran v. Council, Case C-548/09 P, 2011 E.C.R. I-11381, para. 114.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

are distinct from free movement rights. They are rights that existed in national constitutions independently of European legal integration and, initially, the "common market" existed independently of them. It is true, as Trstenjak and Beysen point out, that there may be overlaps between Article 16 of the Charter and Article 34 TFEU.[52] Yet, the possibility of overlaps between two provisions does not necessarily mean that one provision is based on the other or that the provisions are mutually reinforcing. Overlaps are entirely consistent with the fact that the provisions pursue separate purposes.[53]

Trstenjak and Beysen have advanced a somewhat similar view in relation to Article 17 of the Charter. They argue that there is much common ground between fundamental freedoms and EU fundamental rights, to the extent that it is possible to construct fundamental freedoms as being based on fundamental rights. For instance, the fundamental right to property enshrined in Article 17 of the Charter can be viewed as "the foundation on which free movement of goods" is based.[54] That is because free movement of goods "applies in essence to goods that are owned by a natural or legal person."[55] Of course, no one can deny that someone owns the goods that move across Member States protected by Article 34. Yet, Article 34 TFEU protects the flow of goods between Member States rather than a person's (exclusive) relationship with an object—as protected by the right to property. If it were otherwise, it would not be possible to explain why measures which appear to directly interfere with the right to property fall outside of the scope of Article 34, whereas measures that have a more indirect impact on property are caught by that provision.

Another version of the common ground approach to free movement and fundamental rights may be found in the notion that fundamental freedoms are the expression of the general principle of non-discrimination. As much as the positions examined so far, though, it offers a reductivist understanding of the free movement provisions. In *Omega Spielhallen*, Advocate General Stix-Hackl stated that:

> [F]undamental freedoms themselves can also perfectly well be materially categorised as fundamental rights — at least in certain respects: in so far as they lay down

[52] Trstenjak & Beysen, *supra* note 2, at 311.

[53] For instance, in *Association Kokopelli*, the Court found that a piece of secondary legislation, while constituting a (justified) restriction of the freedom to pursue an economic activity, was at the same time a means of advancing free movement of goods. Ass'n Kokopelli v. Graines Baumaux SAS, CJEU Case C-59/11, paras. 77–81 (July 12, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=125002&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=870746. In other words, the two rights pulled in opposite directions.

[54] Trstenjak & Beysen, *supra* note 2, at 310.

[55] Trstenjak & Beysen, *supra* note 2, at 309–310.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

> prohibitions on discrimination, for example, they are to be considered a specific means of expression of the general principle of equality before the law. In this respect, a conflict between fundamental freedoms enshrined in the Treaty and fundamental and human rights can also, at least in many cases, represent a conflict between fundamental rights.[56]

There is no doubt that the prohibition of discrimination on grounds of nationality is at the heart of much of free movement law. Yet, as the Advocate General appears to concede, discrimination is only part of the picture in free movement law. If so, then, proponents of this approach would have to find another fundamental rights prop in those cases in which no intelligible connection with the prohibition of discrimination can be detected.

II. The Convergence Thesis

The view that fundamental freedoms should be linked to fundamental rights, as we have seen, is buttressed by the introduction of EU citizenship, which has placed individuals qua citizens at the heart of free movement law. This brings us to the second thesis, which we have named the convergence thesis, as it encapsulates the views of those who see in that link a strong argument in favor of convergence between the four freedoms. The other crucial contention that can be derived from this view is that it—apparently—allows one of the traditional constraints of free movement law—the wholly internal rule—to be loosened.

Maduro is a prominent proponent of the convergence thesis. In *We the Court*, he offers an original account of Article 34 TFEU, which is conceived as the source of EU citizens' fundamental political right to extend their voice into the political processes of other Member States, in which their interests would otherwise remain neglected or be under-represented.[57] "In this way," Maduro claims, "the free movement rules will also promote the development of and criteria for solidarity among the Member States, while building upon the concept of European citizenship."[58] While this theory was originally formulated around Article 34 TFEU, both in *We the Court* and in his role as Advocate General, Maduro has made clear that it is intended to apply to the general area of free movement. In *Alpha-Vita* he argued that: "[T]he freedoms of movement must be understood to be one of the essential elements of the 'fundamental status of nationals of the Member States'. They

[56] Opinion of Advocate General Stix-Hackl at para. 50, Omega Spielhallen v. Oberbürgermeisterin der Bundesstadt Bonn, CJEU Case C-36/02 (Mar. 18, 2004), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CC0036:EN:PDF.

[57] MIGUEL Poiares MADURO, WE THE COURT (1998).

[58] *Id.* at 168.

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represent the cross-border dimension of the economic and social status conferred on European citizens."[59]

Other authors have followed Maduro in attempting to construct a coherent account of free movement law centered around EU citizenship. Tryfonidou views EU citizenship as a keystone for the four freedoms.[60] Drawing on the *A-Punkt* judgment,[61] in which the Court appeared to consider the movement of the individual trader, rather than an actual movement of goods, as sufficient to trigger the cross-border dimension required by Article 34 TFEU, she claims that this may be the harbinger of a new citizenship-based approach to free movement.[62] In particular, she argues that it may be possible to interpret Article 34 TFEU in conjunction with Article 21 TFEU and in the light of Article 20(2) TFEU "in order to protect the free movement of all Union citizens when their movement has as its main aim the sale (or purchase) of goods."[63] "This," she adds, "would mean that any national measures that impede either the importation of goods into a Member State . . . or the access of *traders* or consumers into the market of a Member State" would fall within the scope of EU law.[64] In this way, she concludes, "convergence is achieved as regards the *personal* scope of application of the persons market freedoms, on the one hand, and the law on the free movement of goods, on the other."[65]

There is no doubt that Union citizenship has reshaped, or confirmed, our understanding of free movement of persons. Persons are conceived as bearers of individual non-instrumental rights. However, that approach cannot be extended to all free movement rights without leading to a radical shift in the constitutional boundaries of the internal market. There are significant differences between free movement of goods and free movement of capital, on the one hand, and free movement of persons and services, on the

[59] Opinion of Advocate General Poiares Maduro at para. 40, Alfa Vita Vassilopoulos AE & Carrefour Marinopoulos AE v. Elliniko Dimosio & Nomarchiaki Aftodioikisi Ioanninon, CJEU Joined Cases C-158/04 & C-159/04 (Mar. 30, 2006), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004C0158:EN:HTML.

[60] Alyna Tryfonidou, *Further Steps on the Road to Convergence among the Market Freedoms*, 35 EUR. L. REV. 36 (2010).

[61] A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, CJEU Case C-441/04, 2006 E.C.R. I-02093.

[62] Tryfonidou claims that there is no indication that the Court considered inter-state movement of goods as the determining factor. As a matter of fact, she adds, it seems that, for Article 34 TFEU to apply, "it may now be sufficient that a situation involves goods that are in a wholly internal situation . . . provided, however, that the trader involved has moved between Member States." Tryfonidou, *supra* note 60, at 43. However, this interpretation seems hard to reconcile with the Court's conclusion that the national court must verify whether the measure has a disparate effect on *imported* and domestic *products* in terms of their market access.

[63] *Id.* at 47.

[64] *Id.*

[65] *Id.*

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other. This is especially true in terms of their respective personal and geographical scope. Once third country products are imported into the EU, they enter into free circulation, which means that they enjoy exactly the same protection under Article 34 TFEU as EU products; naturally, third country nationals are able to invoke Article 34 in the same circumstances as nationals of an EU Member State. As to free movement of capital, Article 63 TFEU can be invoked by non-EU nationals and applies to movements originating from outside the territory of the EU. To treat these provisions as fundamental rights *of EU citizens* would introduce fragmentation in the internal market, because the same right would lose its fundamental status when relied on by non-EU nationals. Yet, it is practically unthinkable to separate cases that involve third country nationals from those that involve EU citizens.[66]

D. What is at Stake

One may object at this point that the discussion of different theoretical positions regarding the nature of fundamental freedoms is a matter of pure taxonomy. After all, in the absence of a constitutional hierarchy between free movement provisions and fundamental rights, the distinction seems to be of limited significance, as fundamental rights and freedoms enjoy the same formal legal status as primary law.[67] Yet, the reason why this discussion matters, beyond its theoretical interest, is that an approach that conceptualizes fundamental freedoms as fundamental rights may lead to a substantial redrawing of the *scope* of free movement law. Two examples from the internal market case law may help to illustrate this point. The first is *Commission v. Greece*, in which the question was whether a Greek regulation that required baby formula to be sold exclusively in pharmacies amounted to an obstacle to the free movement of goods.[68] The Court, applying the *Keck* doctrine, found that the measure did not obstruct trade between Member States. It held that "rules which restrict the marketing of products to certain points of sale, and which have the effect of *limiting the commercial freedom of economic operators*, without affecting the actual characteristics of the products referred to" were selling arrangements that fell outside the scope of Article 34 TFEU.[69]

[66] One could conceive of free movement of goods and of capital as fundamental rights that are not limited to EU citizens. This is a possible—albeit questionable—interpretation, as the majority of EU fundamental rights do not have a necessary connection with EU citizenship, but this is not the interpretation advanced by the convergence thesis, which relies heavily on EU citizenship.

[67] Trstenjak, *supra* note 45, paras. 183–199. Opinion of Advocate General Mengozzi at para. 84, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, CJEU Case C-341/05 (May 23, 2007), http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30db58f10b73461a487e8298f2ef31f0734c.e34KaxiLc3qMb40Rch0SaxuKbNb0?text=&docid=62532&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=189144.

[68] Comm'n v. Greece, CJEU Case C-391/92, 1995 E.C.R. I-1621.

[69] *Id.* para. 31 (emphasis added).

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

The second example is *Blanco Pérez*, in which the Court considered whether Spanish rules that laid down planning criteria for the licensing of pharmacies amounted to restrictions to freedom of establishment within the meaning of Article 49 TFEU.[70] The criteria consisted of a minimum population threshold to be served by each pharmacy—each pharmacy had to serve at least 2000 inhabitants—and a requirement of a minimum distance between pharmacies—at least 250 meters between each shop. The Court found these rules to be restrictions—albeit justified—on freedom of establishment. Their effect was "to hinder and render less attractive the exercise by pharmacists from other Member States of their activities on Spanish territory through a fixed place of business."[71] In particular, the prior authorization requirement was per se a hindrance to free movement in that it prevented an undertaking from freely pursuing its activities through a fixed place of business. Moreover, the exercise of establishment was made less attractive, inter alia, by the minimum distance requirement which precluded pharmacists from being able to pursue an independent economic activity in the premises of their choice.

The significant difference in scope between the two fundamental freedoms considered in these cases is the most obvious observation that one can make in comparing these judgments. On the one hand, limiting the commercial freedom of traders by restricting the outlets in which a product can be sold is said to be *prima facie* irrelevant as far as Article 34 TFEU is concerned.[72] On the other hand, any limit on the exercise of a commercial activity exercised by a self-employed person falls within the scope of Article 49 TFEU and requires a justification. The point of these examples, however, is that they can be drawn on to illustrate how these differences would be substantially less pronounced if we considered *all* free movement provisions as fundamental rights. Fundamental rights discourse demands that close attention be paid to the impact of regulation on *individuals*. Instead, the case law on the free movement of goods only considers the impact on individuals where they can demonstrate that the restriction on their freedom amounts to a restriction on the flow of goods across borders. If the approach to Article 34 TFEU was to morph into a fundamental rights approach, the change in legal reasoning would be momentous and the consequences on national regulatory autonomy equally significant. The existence of an obstacle to free movement would no longer turn on evidence of an impact on the flow of goods across borders. Instead, any impact on the trader's opportunity to market her products would fall under Article 34 TFEU.

[70] Pérez & Gómez v. Consejería de Salud y Servicios Sanitarios & Principado de Asturias, CJEU Joined Cases C-570/07 & C-571/07, 2010 E.C.R. I-4629.

[71] *Id.* para. 59.

[72] That is, unless the case can be made that the measure impedes foreign products' access to the market more than it impedes the access of domestic products.

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I. What Would be Lost

Proponents of the common ground or of the convergence thesis may still object that the approach adopted here is based on the current rationale for the internal market case law. They may argue that the internal market rationale could become ancillary once a fundamental rights approach to free movement was endorsed. What, then, are the reasons for retaining the instrumental dimension of free movement alongside its fundamental rights dimension? That question is best addressed by considering what would be lost if we followed a uniform, fundamental rights based, approach. A uniform approach would cause the Court's focus to shift away from the internal market as the main prism through which to interpret the scope of the free movement provisions. What would be lost, therefore, would be the Court's ability to shape the Treaty provisions on the free movement of goods and capital in such a way as to define from the outset the balance between integration and national regulatory autonomy. Naturally, that balance is associated with questions of derogation or justification. Yet, each redefinition of the scope of the free movement provisions *itself* entails a reassessment of that balance. In free movement law, the public interest in market integration informs the scope of the individual provisions. By contrast, fundamental rights reasoning examines public interest considerations only at a separate stage—that is, the stage at which justifications to a restriction on an individual right are examined.[73] A fundamental rights approach may pre-empt the interest in market integration from determining the scope of fundamental freedoms. It would, in other words, pre-empt the operation of what Horsley has called "exclusionary rules," which are "judicial devices that the Court has developed and applied in order to manage the scope" of the free movement provisions "and, ultimately, draw a line between Union and Member State competence for the regulation of the internal market as a shared regulatory space."[74]

Yet, even the most baffling line of free movement of goods case law is inextricably linked to an internal market rationale. Even in these cases, the scope of the right to free movement is primarily determined by an implicit understanding of the market as a shared regulatory space. The case law on restrictions on use illustrates the point.[75] According to the Court, a restriction on the use of a certain product is significant where it affects—to a

[73] *See*, Eleanor Spaventa, *Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU*, *in* 50 YEARS OF THE EUROPEAN TREATIES 343 (Michael Dougan & Samantha Curri, eds., 2009).

[74] Thomas Horsley, *Unearthing Buried Treasure: Art.34 TFEU and the Exclusionary Rules* 37 E.L. REV. 734 (2012).

[75] Comm'n v. Italy, CJEU Case C-110/05, 2009 E.C.R. I-519; Åklagaren v. Mickelsson & Roos, CJEU Case C-142/05, 2009 E.C.R. I-4273. *See*, Eleanor Spaventa, *Leaving Keck Behind? The Free Movement of Goods After the Ruling in Commission v. Italy and Mickelsson and Roos*, 34 EUR. L. REV. 914 (2009); Peter Oliver, *Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?* 33 FORDHAM INT'L L.J. 1423 (2010); Laurence Gormley, *Free Movement of Goods and their Use—What is the Use of It?* 33 FORDHAM INT'L L.J. 1589 (2010); Pål Wennerås, *Selling Arrangements, Keeping Keck*, 35 EUR. L. REV. 387 (2010).

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

considerable extent—the behavior of consumers, thus impacting on the availability of a market for that product. Clearly, the notion of "restriction on use" is not a function of the trader's individual freedom. The Court does not consider how a restriction on use affects a trader's ability to trade across borders. Instead, it considers the impact of the restriction on the flow of goods into that market.[76] The essential rationale for extending the scope of Article 34 TFEU to include restrictions on use is that such restrictions may reach a critical point at which they effectively cause a national market to become isolated from the rest of the internal market.[77]

Moreover, to focus on the individual right-holder, rather than on the wider context of the internal market, is to lose sight of the fact that market integration is a process, not an event; it is a process marked by different priorities and distinct shifts in emphasis, by phases of increased urgency of certain areas as opposed to other areas. Consider, for instance, the evolution of the case law on free movement of capital. The Treaty of Rome cautiously provided that restrictions on the free movement of capital were to be abolished "to the extent necessary to ensure the proper functioning of the common market." The reason for this limited liberalization of capital movements was due, among other things, to the need for Member States to maintain capital controls and monetary policy autonomy. The assumption, backed by economic theory, was that it would be impossible for Member States to liberalize capital movements, maintain fixed exchange rates and, at the same time, retain an autonomous monetary policy.[78] These concerns were alluded to in *Casati*, a judgment in which the Court made clear that free movement of capital had a narrower scope than the other fundamental freedoms.[79] As the Court explained, complete free movement was premature at that moment in time, as it could undermine the economic policy of one of the Member States or create an imbalance in its balance of payments, thereby impairing the proper functioning of the common market. It was for this reason, the Court went on, that the Treaty had limited capital market liberalization; and that restriction turned on an assessment of the requirements of the common market, and on an appraisal of the advantages and risks entailed by liberalization, "having regard to the stage that it has reached and to the level of integration attained in matters in respect of

[76] This is not to deny the individual empowerment that results from free movement law (including from free movement of goods), on which, see Floris de Witte, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, 18 EUR. L.J. 694 (2012).

[77] The trouble, though, is that the Court is unclear as to how to identify that critical point. This uncertainty was exacerbated by *Philippe Bonnarde v. Agence de Services et de Paiement*, CJEU Case C-443/10. 2011 E.C.R. I-9327, para. 30.

[78] The so-called "impossible trinity" theorem (severally) attributed to Fleming and Mundell. Marcus Fleming, *Domestic Financial Policies Under Fixed and Floating Exchange Rates*, 9 IMF STAFF PAPERS 369 (1962); Robert Mundell, *Capital Mobility and Stabilization Policy Under Fixed and Flexible Exchange Rates*, 29 CAN. J. ECON. & POL. SCI. 475 (1963).

[79] Criminal Proceedings against Guerrino Casati, CJEU Case C-203/80, 1981 E.C.R. 2595.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

which capital movements are particularly significant."[80] Yet, in subsequent decades, as technological and economic changes made capital controls increasingly ineffective, and the prevailing political and ideological climate became favorable to capital liberalization, capital controls were gradually loosened and eventually abolished by the Member States. By the time of the Maastricht Treaty, capital liberalization had become an imperative both for the single market and for monetary union, and the EC Treaty was amended to reflect this and to extend the liberalization of capital movements to movements between third countries and the Member States.

These developments created the space for the Court to realign free movement of capital with the other freedoms.[81] At the same time, free movement of capital has come to occupy a peculiar place in that the Treaty extends its benefits to non-EU nationals and beyond the territory of the EU; this is an instrumental choice based, as the Court has explained, on the need "to ensure the credibility of the single currency on global financial markets and on maintaining financial centres with a world-wide dimension within the Member States."[82]

It seems clear that market integration is a political project that concerns a collective good—the internal market; the Court's role in furthering the shifting agenda of integration is also, in a broad sense, political. Yet, the language of fundamental rights and citizenship has an aura of inevitability about it, a sense that "there is no going back." Market integration, however, does not proceed in such a way. The history of the judicial construction of the United States Constitution's Commerce Clause, and the more recent and modest *Keck* evolution, show that there are points in which courts do recognize the need to restrict the scope of economic free movement rights, especially where the level of economic integration achieved warrants a more relaxed attitude to decentralized regulatory intervention.[83] The lack of full integration *is* the reason for the existence of a

[80] *Id.* para. 10.

[81] Alongside direct and indirect discrimination, the Court now applies a broad "restrictions" test. *See, e.g.*, Klaus Konle v. Republik Österreich, CJEU Case C-302/97, 1999 E.C.R. I-3099; Comm'n v. Germany, CJEU Case C-112/05, 2007 E.C.R. I-8995; Staatssecretaris van Financiën v. Orange European Smallcap Fund NV, CJEU Case C-194/06, 2008 E.C.R. I-3747. *See*, Jukka Snell, *Free Movement of Capital: Evolution as a Non-Linear Process*, *in* THE EVOLUTION OF EU LAW 547 (Paul Craig & Gráinne de Búrca eds., 2011).

[82] Skatteverket v. A., CJEU Case C-101/05, 2007 E.C.R. I-11531, para. 31. However, the Court has also pointed out that, even allowing for this difference in purpose, the Member States have chosen to enshrine free movement of capital in the Treaty "in the same terms for movements of capital taking place within the Community and those relating to relations with third countries." *Id. But see*, Martha O'Brien, *Taxation and the Third Country Dimension of Free Movement of Capital in EU Law: The ECJ's Rulings and Unresolved Issues*, 6 BRIT. TAX REV. 628 (2008).

[83] *See*, Catherine Barnard, *Restricting Restrictions: Lessons for the EU from the US?* 68 CAMBRIDGE L.J. 575 (2009). As the Monti Report recognises, "in some sectors, such as in the single market for goods, market integration reached a mature stage." MARIO MONTI, A NEW STRATEGY FOR THE SINGLE MARKET: AT THE SERVICE OF EUROPE'S ECONOMY AND SOCIETY 37 (2010), *available at* http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

far-reaching yet flexible system of free movement rights in EU law. By contrast, in a truly integrated market, in which the barriers to free movement were virtually absent, an expansive interpretation of the economic free movement provisions would no longer be warranted.

II. What Would (Not) be Gained

Earlier we have alluded to one of the main attractions of the convergence thesis as consisting in attempts to overcome reverse discrimination by linking together free movement, fundamental rights, and Union citizenship. Reverse discrimination is one of the paradoxes of internal market law, which, as Advocate General Tesauro once put it, arises from the fact that "barriers to trade between Portugal and Denmark are prohibited, whilst barriers to trade between Naples and Capri are immaterial."[84] This paradox is considered to result from the instrumental link between free movement and the internal market. As many have argued convincingly over a number of years, it is only natural to expect that Union citizenship, as the fundamental status enjoyed by individuals, should mark the end of reverse discrimination.[85] If the Court were to accept this argument, a unitary approach to free movement based on the idea that fundamental freedoms are fundamental rights of EU citizens would become—superficially, at least—more appealing. Still, the Court does not seem ready—so far—to accept this argument.[86]

Optimism regarding the Court's willingness to take full stock of the implications of its repeated commitment to Union citizenship as a fundamental status was first fuelled and then dampened by the evolution of a new strand of the citizenship case law. Hopes were significantly raised by *Ruiz Zambrano*, in which the Court addressed the possibility that Article 20 TFEU could be relied on by minors who were nationals of a Member State in which they lived, but who had never exercised their free movement rights, if their father, a

[84]Opinion of Advocate General Tesauro at para. 31, Lancry v. Direction Générale des Souanes and Société Dindar Confort, CJEU Joined Cases C-363/93, C-407/93–C-411 (June 28, 1994), http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99235&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=878125.

[85] *See*, Niamh Nic Shuibhne, *Free Movement of Persons and Wholly Internal Rule: Time to Move On?*, 39 C.M.L. REV. 731 (2002); Eleanor Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, 45 C.M.L. REV. 13 (2008); Dimitry Kochenov, *A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, 18 COLUM. J. EUR. L. 55 (2011). See also the Opinion of Advocate General Sharpston, *Government of the French Community and Walloon Government v. Flemish Government*, CJEU Case C-212/06 (June 25, 2009), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CC0073:EN:PDF and her (equally thoughtful and compelling) Opinion in *Ruiz Zambrano v. Office National de l'Emploi*, CJEU Case C-34/09 (Sep. 30, 2010), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0034:EN:HTML. For a recent and insightful reappraisal of the issue see NIAMH NIC SHUIBHNE, THE COHERENCE OF FREE MOVEMENT LAW (2013), especially chapter 4.

[86] *See*, Siofra O'Leary, *The Past, Present and Future of the Purely Internal Rule*, *in* EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN (Michael Dougan, Niamh Nic Shuibhne & Eleanor Spaventa eds., 2012).

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third country national, was denied residence and a work permit by that same Member State.[87] The Court, in a very significant move, held that Article 20 TFEU precluded national measures that had the effect of "depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."[88] If the father were forced to leave the EU, the children would also have to follow their parents, and in those circumstances they would be "unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union." Yet, subsequent case law, namely, *McCarthy*, *Dereci*, *Iida*, and *Ymeraga*, have made clear that this approach only applies to very specific set of circumstances, in which the application of a national measure would "undermine the effectiveness" of the fundamental rights that a national derives from her citizenship status.[89] It now appears that the "substance of the rights" is to be linked to the availability of *cross-border* movement.

The irony of this new line of case law is that it may give the wholly internal rule a new lease of life, by providing it with a new rationale.[90] At the same time, however, the Court's approach resonates with the constitutional orthodoxy of EU law. It is true that the letter of the Treaty refers to the "right to move and reside freely within the territory of the Member States," thus suggesting that no cross-border movement is required. Yet, the wording introduced by the Treaty of Amsterdam in what was then Article 17(2) EC, to the effect that Union citizenship complements but does not replace national citizenship, which the Lisbon Treaty turned into "shall be additional to and not replace national citizenship," reflects the Member States' anxieties with regard to the expansive potential of the citizenship provisions.[91] There are clear parallels with the scope of EU fundamental rights law. In both areas, the principle of conferral finds expression in the logic of *additionality*, whereby Union citizenship does not replace national citizenship and EU fundamental rights do not replace national fundamental rights but only come into play where a situation falls

[87] Ruiz Zambrano v. Office National de l'Emploi, CJEU Case C-34/09, 2011 E.C.R. I-1177.

[88] *Id.* para. 42.

[89] McCarthy v. Sec'y of State for the Home Dep't, CJEU Case C-434/09, 2011 E.C.R. I-3375; Dereci v. Bundesministerium für Inneres, CJEU Case C-256/11, 2011 E.C.R. I-11315; Iida v. Stadt Ulm, CJEU Case C-40/11 (Nov. 8, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=129461&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=879625; Ymeraga v. Ministre du Travail, de l'Emploi et de l'Immigration, CJEU Case C-87/12 (May 8, 2013), http://curia.europa.eu/juris/document/document.jsf?text=&docid=137302&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=879836.

[90] Stephanie Reynolds, *Exploring the "Intrinsic Connection" Between Free Movement and the Genuine Enjoyment Test: Reflections on EU Citizenship after* Iida, 35 EUR. L. REV. 376 (2013).

[91] Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, (Univ. of Edinburgh Sch. of Law, Working Paper No. 2010/14, 2010), *available at* ssrn.com/abstract=1585938.

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within the scope of EU law.[92] Thus, reliance on EU citizenship, while at first sight promising, runs into very familiar—and controversial—constitutional constraints.

Another irony is that market integration may turn out to yield a more liberal approach to the wholly internal rule than the Court's current case law on EU citizenship and fundamental rights. In areas of the internal market where the logic of *complementarity* or *additionality* does not operate, simply because there is no domestic equivalent of EU law which EU law can complement or add to, the Court may be more prepared to contemplate the partial demise of the wholly internal rule. This can be seen in *Carbonati*, in which the Court found that a tax imposed by the municipality of Carrara, Italy, on marble that was transported across the boundaries of that municipality to the exclusion of marble that remained within that territory was a charge having effect equivalent to a customs duty on exports.[93] What is striking about this case is that the Court found that Article 28 TFEU applied to an internal border rather than a border between Member States. The justification for this approach lay in the fact that Article 18(2) TFEU "defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured', without drawing any distinction between inter-State frontiers and frontiers within a State."[94] The Court then went on to add that the situation was not wholly internal as the marble tax was imposed on all marble from Carrara that crossed that municipality's territorial boundaries, without drawing a distinction between marble destined for Italy and marble destined for export. In other words, in the presence of a customs union, the logic of *complementarity* could not operate for the simple reason that the State's power to manage its internal frontiers had been made redundant by the EU's exclusive competence in the customs union, which—in practice—included regional borders.[95]

Interestingly, Advocate General Geelhoed suggested a similar approach in relation to free movement of capital. In *Reischl*, drawing a parallel with the customs union, he argued, "the unity of the capital market that has emerged within the completed Economic and Monetary Union means that a wholly internal situation can no longer be said to exist in respect of the free movement of capital."[96]

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[92] That is not to say that determining what falls within the scope of EU law is a straightforward matter.

[93] Carbonati Apuani Srl v. Comune di Carrara, CJEU Case C-72/03, 2004 E.C.R. I-8027 [hereinafter *Carbonati*]. The Court's approach was partly based on the one adopted in *Lancry v. Direction Générale des Souanes and Société Dindar Confort*, CJEU Joined Cases C-363/93, C-407/93–C-411, 1994 E.C.R. I-3957.

[94] *Carbonati*, CJEU Case C-72/03 at para. 23.

[95] That is, because internal borders undermine in practice the integrity of the customs union.

[96] Opinion of Advocate General Geelhoed at para. 104, Reisch v. Bürgermeister der Landeshauptstadt Salzburg, CJEU Joined Cases C-515/99, C-519/99–C-524/99, C-526/99–C-540/99 (Nov. 20, 2001), http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30db8876f7bb6e7248ee80019a5fe928e51c.e34Kaxi

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In some areas of the internal market, the wholly internal rule seems gradually to be losing its grip. Nonetheless, where physical persons are involved, and where the anxieties of the Masters of Treaties are at their most acute, the logic of *complementarity/additionality* continues to hold sway. That logic is resistible; yet, it is possible to resist it without endorsing the convergence approach to free movement. In other words, we may continue to maintain the dichotomous approach outlined in these pages, without undermining a progressive move towards addressing the iniquities of reverse discrimination that the Court has so far been so reluctant to address in the area of free movement of persons. To do so, we must acknowledge the distinct reasons that may be relied on to address reverse discrimination in the two respective fields of the dichotomy: Where citizens are involved, reverse discrimination can be resisted on the basis of the arguments put forward by Advocate General Sharpston in *Ruiz Zambrano*, which link together citizenship and fundamental rights; where free movement of goods and free movement of capital are concerned, the arguments that lead to an equivalent outcome are necessarily instrumental and economic in nature.[97]

E. Conclusion

The purpose of this article was to demonstrate that the arguments in favor of considering fundamental freedoms as fundamental rights run into considerable difficulties once we consider their implications. The current dichotomy in the case law and in the Charter, whereby only those fundamental freedoms that can be clearly linked to EU citizenship are regarded as fundamental—though not human—rights, turns out to have a stronger normative basis. It also has the advantage of avoiding the practical drawbacks that would mar a uniform, fundamental rights based, approach to free movement. Choosing between these competing approaches is not a trivial exercise. As has been argued here, the choice may have a bearing on the scope of internal market law and on its evolution. Naturally, the normative framework proposed in this article is itself a matter for debate. There may be more fruitful ways of addressing the distinction between fundamental freedoms and fundamental rights, and more attractive accounts of fundamental rights than the one

Lc3qMb40Rch0SaxuKbxb0?text=&docid=102242&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1030241.

[97] *See*, Opinion of Advocate General Sharpston at para. 139–77, Ruiz Zambrano v. Office National de l'Emploi, CJEU Case C-34/09 (Sep. 30, 2010), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0034:EN:HTML.. More specifically, following AG Sharpston's approach, the most blatant cases of reverse discrimination in the area of free movement of persons would be addressed as a matter of EU law where such discrimination amounted to a violation of fundamental rights and where the domestic legal order did not offer equivalent protection to the one provided by EU fundamental rights. By contrast, in the areas of free movement of goods and free movement of capital, reverse discrimination may be disposed of in those instances in which economic reality suggests that obstacles to movement, albeit geographically circumscribed, are likely to have a potential cross-border dimension.

https://doi.org/10.1017/S2071832200018964 Published online by Cambridge University Press

advanced here. Whether this normative framework determines the way in which clashes between free movement and fundamental rights are approached is a matter that lies beyond the scope of this article, but one that also deserves to be addressed.

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