

Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms

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This Article uses major and recent CJEU labor law case as a springboard to examine and critique the CJEU's doctrinal frameworks, conceptual constructs and decision-making practice. It analyzes the institutional, legal, political and other consequences of the CJEU's Viking judgment as a means of critiquing the Court's increasingly profligate yet systematic approach to fundamental rights and freedoms. The resulting description claims that the European legal order is increasingly characterized by omnipresent layers of powerful judges who explicitly "balance" fundamental rights and freedoms to resolve hotly contested social issues, even when those issues manifest themselves as private law disputes.

The Article explains how the imposition of the CJEU's "fundamentalist" framework impacts powerfully upon, and increasingly threatens, the domestic labor law regimes of Europe. The Article leverages this example to advance several general critiques of the Court's increasingly dominant "fundamentalist" approach. The Court's approach fails to treat fundamental rights as fundamental in any meaningful sense. It tramples unnecessarily on important institutional and jurisdictional distinctions, mistakenly redistributing competences not only between Member States and the European Union, but also within the Member States themselves. Finally, the Court's approach increasingly subsumes all domestic institutions and individuals under a single, undifferentiated and ultimately simplistic normative schema that preempts many of the institutional structures and solutions that might — and in many cases, recently did — skillfully govern significant portions of the European legal field.

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INTRODUCTION

In 2008, the Court of Justice of the European Union (CJEU) handed down its stunning decision in the *Viking* case.¹ This seminal judgment not only continued to develop and entrench the Court's jurisprudence on fundamental rights and fundamental freedoms, but also continued to rework the public/private distinction in European law.

Viking presented the CJEU with a series of patently explosive issues. A Finnish firm that ran ferries between Finland and nearby Estonia wanted to increase its competitiveness by reflagging its vessels in Estonia, whose labor costs are a small fraction of those in Finland. When the union representing the Finnish sailors accordingly threatened to strike at the conclusion of their collective bargaining agreement (CBA) and notified their international trade organization to ask sister unions abroad to respect their action, the Viking firm had a brilliant idea: to sue the unions for violating the firm's fundamental freedom under European law to move freely within the European Union to establish its business where it wished. In response to this sweeping claim, the unions had one of their own, namely, that they possessed a fundamental right under European law to engage in collective action, including both the right to strike and the right to engage in secondary action (sympathy/boycott). The CJEU was going to have to resolve these conflicting claims to fundamental rights and freedoms; and it was going to have to do so in the context of this *private* dispute. And decide it did: despite recognizing for the first time that collective action is indeed a fundamental right under European law, the Court ruled that the unions could not exercise that right in a manner that impinged upon the firm's freedom of establishment unless they satisfied a strict application of the Court's "proportionality analysis." The unions would now be hard-pressed to strike, even to save their members' very jobs.

Viking and its sister cases² have been heavily analyzed as a clash between the European Union's economic and social missions, and rightfully so.³ On

1 Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line*, 2007 E.C.R. I-10779.

2 See Case C-341/05, *Laval v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767 (holding that the right to collective action could not be used to strike against a Latvian firm posting workers in Sweden because Sweden's system of collective bargaining was too imprecise); Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-01989 (holding that Member States may not adopt legislative measures that require contractors for public works to agree to pay workers no less than the amount set by a sectoral collective agreement).

3 See, e.g., Nikitas Aliprantis & George Katrougalos, *The Judgments in the Context of the Social Jurisprudence of the ECJ, in THE LAVAL AND VIKING CASES: FREEDOM OF SERVICES AND ESTABLISHMENT V. INDUSTRIAL CONFLICT IN THE*

the one hand, the European Union (originally the European Community) was designed to create a common market in which goods, persons, services and capital could move freely within its borders. On the other hand, the European Union has long been invested in counterbalancing these market imperatives with “social” goals more in tune with the welfarist traditions that characterize the great majority of its longstanding Member States. The *Viking* scenario vividly encapsulates the tensions between these two core E.U. goals.

Viking and its sister cases have also been fruitfully studied as a clash between the old and new members of the European Union, especially on the labor law front.⁴ The cases stem quite clearly from the European Union’s aggressive expansion into southern and Eastern Europe, whose labor costs and social protections mesh relatively poorly with those of its wealthier and more established northern European counterparts. The cases therefore symbolize the pressures that E.U. expansion has placed on the existing Member States, whose working classes often fear that they must bear the lion’s share of the costs associated with so-called “social dumping.”

Viking and its sister cases have not, however, been seriously examined as indicative of the state of European law. The CJEU’s *Viking* judgment frames and resolves the underlying controversy in a distinctive and now highly recognizable manner, one that encapsulates the essence of European legality as it currently exists. *Viking* deploys a series of characteristic doctrinal tools, adopts a recognizable conceptual apparatus, and yields a familiar institutional structure. This distinctive combination of doctrinal, conceptual and institutional features summarizes quite effectively the nature of contemporary European

EUROPEAN ECONOMIC AREA AND RUSSIA 73 (Roger Blanpain ed., 2009); Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 EUROPEAN L.J. 279 (2007); A.C.L. Davies, *The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences*, 35 INDUS. L.J. 75 (2006); Jon Erik Dølvik & Jelle Visser, *Free Movement, Equal Treatment and Workers’ Rights: Can the European Union Solve Its Trilemma of Fundamental Principles?*, 40 INDUS. REL. J. 491 (2009); Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases Before the European Court of Justice*, 9 GERMAN L.J. 125 (2008); Stefano Guadagno, *Viking, Laval and All That: Consequences of ECJ Rulings and Developments in the Area of Industrial Conflict in an Enlarged EU* (2012) (unpublished Ph.D. dissertation, Università degli studi di Milano), available at http://air.unimi.it/bitstream/2434/169976/4/phd_unimi_R07986.pdf.

4 See, e.g., GUGLIELMO MEARDI, SOCIAL FAILURES OF EU ENLARGEMENT: A CASE OF WORKERS VOTING WITH THEIR FEET 171-75 (2011); Rebecca Zahn, *The Viking and Laval Cases in the Context of European Enlargement*, 3 WEB J. CURRENT LEGAL ISSUES (2008), <http://webjcli.ncl.ac.uk/2008/issue3/zahn3.html>.

law at the supranational and, as we shall see, at the domestic level as well. It yields an increasingly uniform European legal order in which increasingly powerful courts wield increasingly penetrating fundamental norms in an ever greater range of conflicts between an ever wider array of parties.

This Article is a work in the discipline of European law. It uses an emblematic and hotly contested CJEU controversy as a springboard to examine the CJEU's decision-making practice, doctrinal and conceptual constructs. It analyzes the institutional, legal, political and other consequences of the CJEU's *Viking* judgment as a means of critiquing the Court's increasingly profligate yet systematic approach to fundamental rights and freedoms. The resulting description claims that this new European legal order is increasingly characterized by omnipresent layers of powerful judges who explicitly balance fundamental rights and freedoms to resolve hotly contested social issues, even when those issues manifest themselves as private law disputes.

This is also a labor law Article. It studies one of the most important and high-profile labor law judgments handed down in Europe in recent memory, one that simultaneously strikes fear in the heart of the Western European labor movement and yet gives it some reason for hope. It explains the ongoing salience of labor law to the European legal and political arenas, where the so-called "death of labor law" — so commonly described in the U.S. context⁵ — though hardly a foregone conclusion, has now become distinctly more plausible. It examines how the CJEU's fundamental rights framework impacts powerfully upon, and increasingly threatens, the domestic labor law regimes of Europe. In essence, European labor law may be entering a seemingly benevolent, but potentially terminal, transition towards a regime of fundamental rights and freedoms.

Finally, this Article is also a work of legal and political theory. It not only identifies, but also assesses and critiques the now-dominant European regime of fundamental rights and freedoms on conceptual, institutional and pragmatic grounds. It cautions against the adoption of an all-encompassing European-style fundamental rights/freedoms approach, one that increasingly (though only partially) collapses the public/private divide and governs ever larger swaths of the legal order. The growing dominance of this fundamental rights/freedoms approach has generated what might be (half-jokingly) described as the new European fundamental rights fundamentalism, a formulaic and totalizing mode of legal analysis that threatens to mask — rather than address

5 See, e.g., Cynthia Estlund, *The Death of Labor Law?*, 2 ANN. REV. L. & SOC. SCI. 105 (2006); Matthew W. Finkin, *The Death and Transfiguration of Labor Law*, 33 COMP. LAB. L. & POL'Y J. 171 (2011) (book review).

and privilege — the social, historical and institutional stakes in play in the ongoing reconstruction of Europe.

This Article cautions especially against the normative turn that has swept through the domestic and transnational legal orders of Europe. This increasingly dominant judicial approach regulates primarily by normative means: judges simply apply fundamental normative rules, which increasingly preempt many of the institutional structures and solutions that might — and in many cases, recently did — govern significant portions of the legal order. This Article argues that such institutional approaches should, at the very least, be treated as a viable means of satisfying the normative demands imposed by the increasingly dominant fundamental rights and freedoms.

The Article is organized as follows. Part I gives an overview of the *Viking* controversy. Although this Article is by no means a case commentary, it must nonetheless explain the basic nature of the conflict sufficiently to ground the ensuing discussion. This Part therefore briefly introduces the facts and procedural history of the *Viking* controversy and summarizes the CJEU's ruling. It then explains how Finnish labor law and institutions would have handled the dispute had the CJEU not intervened. Part II traces the rise and development of the Court's increasingly dominant "fundamentalist" approach, which the *Viking* judgment further extends. Part III offers a range of critiques of the Court's fundamentalism. The Court's approach fails to treat fundamental rights as truly fundamental. It tramples unnecessarily on important institutional and jurisdictional distinctions, mistakenly redistributing competences not only between Member States and the European Union, but also within the Member States themselves. Finally, the Court's approach increasingly subsumes all domestic institutions and individuals under a single, undifferentiated and ultimately simplistic normative schema that preempts many of the institutional structures and solutions that might — and in many cases, recently did — skillfully govern significant portions of the European legal field.

I. IN BRIEF: THE *VIKING* CASE

A. Facts and Procedural History

Viking Lines is a Finnish firm that runs seven ferries on Baltic Sea routes between Finland, Sweden and Estonia. The labor dispute centered on one of Viking's smaller ferries, the *Rosella*, which ran the two hour and thirty minute route between Helsinki and Tallinn.⁶ The *Rosella* was having trouble competing

6 See *Distance Between Helsinki Finland and Tallinn Estonia*, MAPCROW — TRAVEL DISTANCE CALCULATOR, http://www.mapcrow.info/Distance_between_Helsinki_

with its Estonian-crewed counterparts, whose labor costs were approximately four times less than those in Finland.⁷ In the fall of 2003, Viking management decided to move forward with plans to reflag the *Rosella* in Estonia: this would free the *Rosella* of both Finnish labor law and a relatively expensive Finnish crew working under a Finnish CBA. Viking would be able to negotiate a new agreement with Estonian unions at significantly reduced cost.

In accordance with Finnish labor law requirements, Viking gave notice to the *Rosella* crew and to its union, the Finnish Seamen's Union (FSU), of its desire to reflag the vessel. Viking indicated that it was prepared, as is required under Finnish labor law, to negotiate with the FSU over the terms of this reflagging.⁸ As might have been expected, the FSU objected strongly to management's plans. It threatened to strike two weeks after the impending expiry of its current agreement with Viking. As a condition for renewing the agreement, it demanded that Viking not only give up its plans to reflag the vessel, but also *increase* the manning of the *Rosella* by eight crewmembers. Finally, the FSU notified its international federation — the International Transport Workers' Union (ITF) — about the matter and asked it to request all affiliated unions to refuse to enter into negotiations with Viking.⁹

FI_and_Tallinn_EN.html (last visited June 13, 2013) (indicating that the two capitals are barely fifty miles apart, as the seagull flies). The *Rosella* has since been transferred to a different route. It can carry 1700 passengers and 340 cars, and its total crew numbers approximately 185, *M/S Rosella*, VIKING LINE, <http://www.sales.vikingline.com/en/international/find-your-trip/our-ships/ms-rosella/> (last visited June 13, 2013); see *Viking Line v. Int'l Transp. Workers' Fed'n*, [2005] EWHC 1222 (Comm) [21] (Eng.).

7 See [2005] EWHC (Comm) 1222, [23]. The price of labor is somewhat difficult to quantify, although labor statistics can help. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, International Comparisons of Hourly Compensation Costs in Manufacturing, 2011 (Dec. 19, 2012), available at <http://www.bls.gov/news.release/pdf/ichcc.pdf> (suggesting, in the manufacturing sector, that the hourly compensation costs in Finland and Estonia differ by a factor of four). Weekday roundtrip fares charged by Viking Lines and by the Estonian ferry group Tallink Silja Line each run about seventy Euros. See *Helsinki-Tallinn Oneway Rates*, TALLINK SILJA LINE, <http://www.tallinksilja.com/en/productsAndPrices/routeTrips/hel-tal/default.htm> (last visited June 13, 2013).

8 Issues for negotiation included, for example, whether a partly Finnish crew might be retained, or whether the Finnish crew might be phased out over time, and the like. See [2005] EWHC (Comm) 1222, [20-23].

9 The ITF agreed. On November 6, it sent a circular to all affiliates informing them of the Finnish labor dispute and asking them not to negotiate with Viking. See [2005] EWHC (Comm) 1222, [24-26]; *Int'l Transp. Workers' Fed'n v. Viking Line* [2005] EWCA Civ 1299 [24].

Viking management ran to the Finnish Labor Court and the Finnish District Court for help, to no avail. Neither would intervene in time to avert the threatened FSU strike. Having insufficient bargaining power, Viking eventually gave in to the FSU's demands. It agreed to the increased manning of the *Rosella*. It discontinued all proceedings before the Finnish courts. Finally, it agreed to halt its plans to reflag until February 2005.

In August, 2004, however, Viking changed the parameters of its engagement with the unions. In a brilliant legal stroke, it sued for declaratory and injunctive relief before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court): the unions, it claimed, had violated Viking's fundamental freedom of establishment under E.U. law to relocate wherever it chose within the European Union.

The English Court exercised jurisdiction in the case on the grounds that the ITF is domiciled in London. Furthermore, it claimed jurisdiction over the FSU under the European Union's Brussels Regulation, which, for the sake of procedural expedience, allows suit to be brought against "one of a number of defendants" wherever "any one of them is domiciled."¹⁰ As a result, an English court would determine "in relation to a Finnish vessel, Finnish crew, a Finnish employer and a Finnish union, whether or not [under Finnish and European law] industrial action [i.e., a strike] can take place principally, but not exclusively, in Finland."¹¹

The English court granted the relief sought by Viking management on June 16, 2005. It held that the actual and threatened collective action by the ITF and FSU imposed unjustified restrictions on Viking's freedom of establishment, contrary to Article 43 of the Treaty Establishing the European Community.¹² The unions quickly appealed before the Court of Appeal (England and Wales) (Civil Division) (United Kingdom).¹³ In order to help it decide the case, the English Court of Appeal made use of the "preliminary reference" procedure established by Article 234 of the Treaty: it referred to the CJEU a series of

10 Council Regulation 44/2001, art. 6(1), 2001 O.J. (L 12) (EC).

11 See [2005] EWHC (Comm) 1222, [55].

12 Treaty Establishing the European Community art. 43, Mar. 25, 1957, O.J. (C 321), available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>. Under the new numbering of the Treaty of Lisbon (which postdates the *Viking* judgment), the freedom of establishment appears in Article 49. See The Consolidated Version of the Treaty on the Functioning of the European Union [hereinafter TFEU] art. 49, Dec. 13, 2007, O.J. (C 326), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF>.

13 [2005] EWCA Civ 1299.

questions regarding the proper interpretation of European law.¹⁴ The *Viking* dispute thus found itself before the CJEU in Luxembourg.

As we shall see in further detail, the Court ruled in a striking and telling manner. Although the Court recognized that collective action constitutes a “fundamental right” under European law, it held that a private union exercising that right must nonetheless safeguard the firm’s “fundamental freedom” of establishment to move the firm’s business out of Finland in search of cheaper labor. Any collective action that impinged upon the firm’s fundamental freedom would have to satisfy a strict application of the Court’s “proportionality test.”¹⁵

B. The *Status Quo Ante* (or “What if Finnish Law Applied?”): A Quick Primer on Finnish Labor Law and Institutions

This Section explains how the controversy would have been handled prior to the CJEU’s *Viking* judgment. Simply stated, the case would have fallen strictly within the regulatory framework of the Member State concerned: the political organs of the European Union have refused to tread on the Member States’ widely divergent approaches to the contentious labor law field. *Viking* would therefore have been governed primarily by the domestic law and institutions of Finland.

The Finnish legal order, for its part, would have handled the controversy via specialized institutions governed by distinct legal categories and norms: Civilian (and Nordic¹⁶) legal systems have almost universally treated labor law

14 TFEU, *supra* note 12, art. 267 (ex art. 234) reads:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning . . . the interpretation of this Treaty Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

15 *Viking* management and the FSU eventually reached a confidential settlement. See Press Release, International Transport Workers’ Federation, *Viking Case Settlement* (Mar. 3, 2008), available at <http://www.itfglobal.org/press-area/index.cfm/pressdetail/1831%22>.

16 The comparative law discipline has long debated whether Nordic systems (such as those of Sweden, Norway, Denmark, Iceland, and Finland) are distinct from — or merely a sub-genre of — the Civilian systems of Continental Europe. See, e.g., RENÉ DAVID & JOHN BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 31-141 (2d ed. 1978); KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 286-95 (2d ed. 1993). This taxonomic debate is largely irrelevant for the purposes of this Article.

as a rather autonomous branch of the domestic legal order.¹⁷ The specialized and distinctive quality of the Finnish labor regime is best summarized by the cardinal notion of *autonomy*. This autonomy plays out in two related ways. First, the Nordic legal tradition has long stressed the autonomy of the labor market parties. As a result, the Finnish state would effectively have left Viking management and the Finnish labor union to resolve their collective bargaining dispute amongst themselves, subject only to very limited legal and quasi-judicial oversight by labor-specific legal rules and institutions.

In accordance with this autonomy, management and labor traditionally have no obligation to enter into a CBA, to compromise over a proposed CBA's terms, or even to be *willing to consider* compromising or reaching common ground.¹⁸ "Strength at the bargaining table," writes Reinhold Fahlbeck, "does not stem from legal requirements on bargaining behavior but on willingness and ability on the part of unions [and employer associations] to resort to industrial action."¹⁹ And the weapons that are available to labor and management in labor disputes are studiously parallel: both sides are entitled to engage in secondary/sympathy actions, both can launch offensive strikes/lockouts, and so on.²⁰

Crucially for European legal purposes, the zealously guarded autonomy of the labor market parties has meant that Finnish labor and management have both pointedly refused to accept to be bound by a principle of "proportionality." Proportionality, which might require a reasonable relationship between the actions taken by the parties and the results they seek to achieve by taking those actions, would limit their cherished freedom of action and self-regulation. Furthermore, "[s]ubjecting themselves to some kind of proportionality would also entail jurisdiction *by the courts* in assessing industrial actions undertaken by them. They have not wanted that either."²¹

This refusal of judicial oversight highlights the second key component of autonomy in the Finnish labor relations context. Autonomy means not only the freedom of the parties to self-regulate, but also the freedom of the labor regime from normal legal institutional structures. Most importantly, Finnish collective bargaining is not regulated at all by the ordinary judiciary, not even

17 The level of insulation of the labor law field from the rest of the domestic legal order traditionally varies somewhat from state to state.

18 There exists no obligation equivalent to the duty imposed on U.S. labor market participants to engage in "good faith bargaining." See Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

19 Reinhold Fahlbeck, *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, 43 SCANDINAVIAN STUD. L. 87, 120 (2002).

20 *Id.* at 101-02.

21 *Id.* at 103 (emphasis added). Denmark provides the exception to the rule.

at the appellate level.²² Instead, collective bargaining disputes are referred to a specialized Labor Court. This Finnish Labor Court is composed of sixteen members chosen in the spirit of “tripartism”: 1) six are lay judges nominated by the central employer associations; 2) six are lay judges nominated by the central employee associations; and 3) only four are independent judges who must possess the law degree required for judges in Finland.²³ Even when labor and management have failed to negotiate a solution to a given labor dispute and must therefore turn to a quasi-judicial state institution, that institution is composed overwhelmingly of members chosen by labor and management. And as if this measure of autonomy and control were not enough, the decisions of this institution are simply not subject to appeal, be it to the ordinary judiciary or elsewhere.²⁴

In sum, the Nordic labor law tradition prizes autonomy above almost all other values. This results in the autonomy of the labor market participants, who zealously guard their freedom to self-regulate. And it manifests in the autonomy of the labor regime and of its specific institutions and principles from the rest of the legal and judicial order.

Given these background conditions, the *Viking* dispute would have been easily resolved within the Finnish domestic context. Not to put too fine a point on it: the unions would have roundly defeated Viking’s plans to reflag the *Rosella* in Estonia in search of cheap Estonian labor. The FSU clearly had the right to engage in a strike action against Viking under the circumstances of the case.²⁵ Indeed, as the U.K. trial court itself concluded, the right to engage in such industrial action is so robust under Finnish law that the FSU could have taken strike action against the *Rosella* even if Viking had reflagged the vessel in Estonia, even if it had manned the vessel with unionized Estonian labor, and even if the reflagging had not cost any FSU members their jobs, whether on the *Rosella* or elsewhere in the Viking fleet.²⁶ Indeed, the same probably holds true for the ITF’s action, as management and labor hold —

22 See *Competence*, LABOUR COURT, <http://www.oikeus.fi/tyotuomioistuin/2023.htm> (last visited June 9, 2013).

23 *Composition*, LABOUR COURT, <http://www.oikeus.fi/tyotuomioistuin/2024.htm> (last visited June 9, 2013). All the judges serve three-year terms.

24 In theory, it is possible to lodge “extraordinary appeals” to the Supreme Court. But as the Labour Court’s official website goes out of its way to state with dismissive terseness: “Thus far such appeals have not been successful.” *Competence*, *supra* note 22.

25 Even the English Commercial Court, which granted Viking its injunction, readily conceded this. See *Viking Line v. Int’l Transp. Workers’ Fed’n*, [2005] EWHC 1222 (Comm) [60] (Eng.).

26 *Id.* [61].

under Nordic legal systems' "mutuality" principle — parallel rights to engage in secondary and sympathy actions.²⁷

In short, the FSU had satisfied its only obligation under Finnish law: to give two weeks' notice of its intent to strike.²⁸ Having done so, it would have been entitled to engage in strike action, free of supervision from the ordinary courts and free of substantive review by anyone on any basis (such as proportionality): under Finnish law, the seamen's unions and Viking management — subject to very limited oversight by the specialized Labor Court — would have been the only players with a say in resolving the *Viking* controversy.

Viking management was doomed to fail under these classic domestic legal parameters. By bringing its complaint against the ITF before the English courts, however, and by thereby bootstrapping jurisdiction over the FSU, the firm effectively opted out of this unfavorable regulatory regime. The case would now be litigated in London on the grounds of generally applicable E.U. law, the meaning of which would ultimately be controlled by the CJEU in Luxembourg. The entire cast of the *Viking* dispute had been fundamentally altered.

II. THE RISE OF EUROPEAN FUNDAMENTALISM

The CJEU's *Viking* judgment is a fine exemplar of contemporary European legality. First, it epitomizes the institutional and doctrinal structures that now dominate the European legal order. The E.U. doctrine of "direct effect" empowers individuals — including natural persons (i.e., humans) and legal persons (i.e., corporations and associations) — to invoke E.U. law before European and Member State courts.²⁹ Furthermore, the "primacy" doctrine holds that European law takes precedence over domestic law.³⁰ The interaction of these two doctrines has made E.U. law an integral component of the domestic legal order of each of the E.U. Member States: competent counsel can increasingly frame domestic legal controversies — including private disputes — in such a manner as to intersect with, or be governed directly by, E.U. law. Once E.U. law has been invoked, litigants can and frequently do request that questions of E.U. law be referred to the CJEU by Member State courts; as a result, the CJEU has become a ubiquitous judicial force throughout the domestic and supranational legal fields.

27 Fahlbeck, *supra* note 19, at 101-02.

28 See Niklas Bruun, *Finland*, 69 BULL. COMP. LAB. REL. 49, 60 (2009).

29 See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

30 See Case 6/64, *Falminio Costa v. ENEL*, 1964 E.C.R. 585, 593.

Second, *Viking* exhibits quite clearly the conceptual and analytic structure that now governs ever larger swaths of the European legal domain. I am teasingly calling this structure “European fundamentalism.” It is a very well developed — and even rather formalized — mode of analysis that 1) explicitly recognizes certain core norms as “fundamental”; 2) acknowledges that these fundamental norms can nonetheless be legitimately restricted in certain circumstances; and 3) sets out a highly patterned examination to determine whether such restrictions are legally justified in particular cases.

As *Viking* demonstrates, this “fundamentalist” analytic structure is gradually overtaking more and more of the European domestic and supranational legal orders. The first vector of expansion has been the Court’s “direct effect” jurisprudence. The CJEU has gradually developed that jurisprudence in such a manner as to allow plaintiffs to invoke ever more European law against ever more defendants, thereby subverting ever more thoroughly whatever state action principles the Treaty of Rome may have taken for granted. To begin with, the CJEU expanded the types of E.U. law that individuals could invoke. As a result, individuals could increasingly claim rights under an ever-broader range of European legal norms. Although the E.U. Treaty seemed to suggest that only a particular class of legislative enactments (“regulations”) would be “binding in [their] entirety and directly applicable in all Member states,”³¹ the Court boldly held that particular treaty provisions and framework legislative enactments (“directives”) seemingly addressed only to E.U. and domestic state actors could also be directly invoked.³² Furthermore, the Court has interpreted its direct effect jurisprudence in a decidedly relaxed and generous fashion over time, thereby increasing the amount of Treaty law and directives that individuals could invoke.³³ Crucially, this liberal approach eventually empowered individuals to invoke all four of the E.U. Treaty’s fundamental market freedoms (the freedom of movement of goods, persons, services and capital) in suits brought in the domestic courts.³⁴

31 Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326).

32 See, e.g., Case 43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455, ¶ 31.

33 See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 186 (1st ed. 2003).

34 See Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000 E.C.R. I-04139; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, 1995 E.C.R. I-04921; Joined Cases C-163, C-165 & C-250/94, *Criminal Proceedings Against Sanz de Lera, Díaz Jiménez & Kapanoglu*, 1995 E.C.R. I-04821; Case 2/74, *Reyners v. Belgium*, 1974 E.C.R. 00631; Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

Second, the CJEU broadened the types of defendants against whom such law could be invoked. It adopted, for example, liberal definitions of the state and its agents, often in direct opposition to the restrictive definitions offered by domestic constitutional law.³⁵ It elaborated its doctrine of “indirect horizontal effect,”³⁶ which imposed a duty on the domestic courts to interpret domestic law in such a manner as to bring it into line with European law, thereby making E.U. law highly relevant even when it is technically not directly effective.³⁷ The CJEU also extended direct horizontal effect to nongovernmental actors that function in a quasi-regulatory manner, such as sports federations.³⁸ Finally, in specific circumstances and in the context of specific Treaty provisions, it even extended direct horizontal effect to private actors (usually employers, such as banks or airlines) who, though they do not exercise state-like regulatory powers, nonetheless enter into contracts or agreements (usually employment contracts) “intended to regulate paid labor collectively.”³⁹

In *Viking*, the CJEU takes the next — and quite dramatic — step in its expansive development of the direct effect doctrine. For the first time, the Court permits a private party (the Viking firm) to invoke one of the E.U. Treaty’s “fundamental freedoms” “horizontally” against private unions (the FSU and ITF). Needless to say, this doctrinal development generates a broad range of serious policy implications for unions, employers, employees and private actors generally, who must increasingly take the four fundamental market freedoms into account in their seemingly private interactions.

Before launching into a sustained examination of the pros and cons of the CJEU’s expansion of its direct effect doctrine, it is important first to recognize that the *Viking* judgment does not only subject private unions to European

35 See, e.g., Case C-188/89, *Foster v. British Gas*, 1990 E.C.R. I-03313; Case 152/84, *Marshall v. Southampton*, 1986 E.C.R. 723, ¶ 49.

36 If a legal norm possesses “vertical” direct effect, it can be invoked against the state; if it possesses “horizontal” direct effect, it can be invoked against a private party.

37 See Case C-106/89, *Marleasing SA v. La Comercial Interacional de Alimentacion SA*, 1990 E.C.R. I-4135. The effect is considered “indirect” because it is imposed on the domestic court, which must interpret domestic law in such a manner as to bring it in line with the European norm. The effect would be considered “direct” if the European norm were straightforwardly applied to the defendant. On the significance of the distinction (or lack thereof), see Mathias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

38 *Bosman*, 1995 E.C.R. I-04921; Case 36/74, *Walrave v. Ass’n Union Cycliste Internationale*, 1974 E.C.R. 1405.

39 Case 43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455, ¶ 39; see *Angonese* ¶ 34.

norms protecting the fundamental freedoms of economic actors such as Viking. The judgment also has a bone to throw to those unions. Although the Court grants the firm a cause of action to defend its fundamental freedom (of establishment) against the private unions, it also breaks new ground by declaring collective action (including the ability to strike) to be a fundamental right guaranteed by the general principles of E.U. law.⁴⁰

The *Viking* judgment accordingly transforms a rather traditional domestic labor dispute between two private actors (management and unions) into a clash between two fundamental European norms: the fundamental freedom of establishment (now horizontally effective against unions) and the fundamental right to collective action (now available to unions). Constructed as such, the dispute can be resolved on strictly European legal terms: the CJEU can apply its highly patterned proportionality analysis to balance these fundamental norms against the justifications given for their restriction. Indeed, the CJEU can even balance the fundamental norms against each other. *Viking's* classic labor dispute, once the province of domestic institutions and categories, accordingly gets overtaken by an ever-expanding European institutional, doctrinal and analytic frame.

III. CRITIQUING THE EUROPEAN FRAMEWORK

This Part analyzes and critiques European fundamentalism. The critique proceeds on several interrelated fronts. First, the Court's fundamentalist approach tramples unnecessarily on important institutional and jurisdictional distinctions, recklessly redistributing competences not only between Member States and the European Union, but also within the Member States themselves. Second, the Court's approach fails to treat fundamental rights as truly fundamental. Third, the Court's seemingly universalist expansion of its "direct effect" doctrine actually functions selectively, thereby subjecting the acts of some private actors — but not others — to searching judicial review. Finally, the Court's approach increasingly subsumes all domestic institutions and individuals under a single, undifferentiated and ultimately simplistic normative schema. This normative turn unnecessarily forestalls many of the institutional structures and solutions that might — and in many cases, recently did — shrewdly govern significant portions of the European legal field.

40 See Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line*, 2007 E.C.R. I-10779, ¶ 44.

A. Compromising Barriers and Competences

1. Vertical Transfer of Authority

The first critique is obvious, though it carries far-reaching implications. The Member States have — as a group — repeatedly and explicitly opposed granting the European Union the power to modify their respective (and often quite divergent) approaches to labor relations in general and to collective action (i.e., strikes) in particular. For the CJEU suddenly to deploy the Treaty’s free movement provisions as a backdoor mechanism for regulating labor disputes represents a rather dramatic and unapproved “vertical” shift in competences between the European Union and its Member States. True, *Viking* hardly represents the first time that the CJEU has expanded the European Union’s competences at the expense of the Member States; nor is this the first time that the CJEU has done so through such heavy-handed use of negative integration doctrines.⁴¹

But the *Viking* judgment and its sister cases offer not only a rather stark example, they also do so in a particularly politically sensitive area, one that directly implicates job security and working conditions, welfare policy, social dumping, and the like. Indeed, it is difficult to imagine a more striking image of the European Union’s liberal economics seemingly crushing the enlightened welfarist traditions of its longstanding Member States. *Viking* thus presents a new and vivid iteration of the ongoing competence battles between the European Union and its Member States, battles that necessarily affect the relationship between European and domestic economic and social policies.

2. Horizontal Transfer of Authority

This “vertical” shift in competences, complete with its social overlay, is supplemented by a second. The CJEU’s mere handling of the *Viking* case also marks a significant “horizontal” shift in competences. The CJEU’s new fundamental role in the labor arena not only transfers significant regulatory

41 Christian Joerges & Florian Rödl, *On De-Formalisation in European Politics and Formalism in European Jurisprudence in Response to the “Social Deficit” of the European Integration Project: Reflections After the Judgments of the CJEU in Viking and Laval*, 4 HANSE L. REV. 2 (2008). “Negative integration” refers to the process by which the CJEU integrates the E.U. Member States’ legal regimes by aggressively interpreting the Treaty’s “negative” commands regarding impermissible restrictions on the free movement of goods, persons, services and capital. While this is not the same as integrating through positive means, i.e., by agreeing to common policies, such negative integration nonetheless removes barriers between European states.

power from the domestic to the European plane; it also transfers it “horizontally” from political and specialized labor institutions to the judiciary (i.e., the CJEU).

This horizontal shift to the judiciary is then compounded and entrenched by the CJEU’s solution: *Viking* extends the CJEU’s fundamentalist proportionality approach to the labor law field, thereby requiring all appropriate domestic institutions to do the same. In other words, the *Viking* judgment *judicializes* labor law conflicts *domestically* by requiring all domestic institutions to adopt and apply the CJEU’s well-established proportionality analysis when resolving labor disputes. As such proportionality analysis represents a prototypically judicial exercise, *Viking* effectively inserts the judiciary and its norms into the middle of all domestic European labor disputes. And, of course, the CJEU stands as the final judge in such proportionality determinations.

Such a horizontal transfer of competences towards the judiciary is not inherently problematic. But in the labor law context, it usually is. As any student of labor history recognizes, almost the first regulatory demand of organized labor worldwide has long been to get as far away as possible from ordinary courts and from generally applicable law. Budding unions often learned the hard way that private law judges were rarely their allies when labor locked horns with management.⁴² As a result, labor did all in its power to ensure that labor disputes would be handled by specialized, knowledgeable and representative institutions applying norms specifically designed to resolve labor-management conflicts.

Viewed from this historical perspective, three things become clear. First, the horizontal shift towards judicial control via the application of a standardized and generally applicable proportionality analysis represents, in and of itself, a dramatic transformation of most legal regimes’ treatment of labor disputes. Second, the resulting institutional and normative structure represents quite literally a historic defeat for organized labor.⁴³ And third, the CJEU gives the impression of having been stunningly blind to its own fashioning of this defeat: at no point does the Court ever indicate awareness that the judicialization of

42 See, e.g., WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 33, 52-53, 151-52, 199-201 (1991); FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 200-05 (1930); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994). For an interesting attempt to use empirical methods to quantify judicial opposition to labor union claims, see James Brudney, Sara Schiavoni & Deborah Merritt, *Judicial Hostility Toward Labor Unions — Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999).

43 This is not to say that this historical defeat might not be counterbalanced by other victories, such as gaining the status of a European fundamental right for collective action, including the right to strike.

labor law regimes might be objectionable, never mind that it might be so for reasons specific to the labor law field.

3. Collapsing Internal Member State Structures

This remarkable judicial blindness is, however, but a symptom of a larger and more important phenomenon: the collapsing of the structural distinctions that traditionally defined most domestic European legal orders. The *Viking* judgment treats Finnish labor law (and, in particular, the unions' actions under that law) as just another market obstacle, i.e., as an encroachment on the firm's freedom of establishment. It accordingly subjects it to the Court's standard and well-trod proportionality analysis for reviewing encroachments on fundamental rights and freedoms. This standardization process explains the CJEU's otherwise baffling indifference to — and seeming ignorance of — labor law history and concerns, never mind of Finnish labor law norms, institutions and practices. Further reflection suggests that this indifference is not accidental: the Court's proportionality analysis offers precisely a unitary and off-the-rack methodology that can be applied across the board to an enormously wide range of issues. That methodology is — at least on its face — studiously indifferent to the particularities of institutions, norms, practices, etc.

While this intentionally undifferentiated approach offers the tremendous advantage of subjecting any and all obstacles to the same set of governing norms, it also deprives most domestic European legal and political orders of one of their traditional defining characteristics: their strongly differentiated internal structures. Civilian legal systems (including Nordic ones) have traditionally believed in normative, procedural and institutional specialization: not only do they tend to draw sharp distinctions between public and private law, but they also tend to design significantly different norms, procedures and institutions to govern different areas of the law.⁴⁴

The Finnish labor law regime is a particularly clear case in point. First, it is governed by subject-matter specific norms and procedures whose aim is to grant the “social partners” (i.e., management and labor) as much leeway as possible in their dealings with each other. Second, labor disputes are resolved by a specialized Labor Court that, unlike the ordinary courts, is composed primarily of lay judges who, furthermore, are nominated by labor and management. And third, the judgments of this Labor Court are unreviewable by any judicial court. To impose generally applicable judicial norms on such

44 See JOHN MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN-AMERICA* (3d ed. 2007).

a specialized institution, to require it to internalize and apply them, and to subject it to regulation in the final instance by the CJEU and its interpretation of those generally applicable norms is therefore to compromise a great deal of the independence and specificity that traditionally defined and legitimated the institution.

B. Critiquing European Fundamentalism

Viking not only offers a fine example of the CJEU's willingness to cause large-scale disruption of domestic structural arrangements; it also furnishes a good occasion to critique the two central doctrinal tenets of the CJEU's "fundamentalist" approach: its proportionality-based mode of judicial "balancing" and its expansive approach to the "direct effect" of European law.

1. False Balancing: The Fundamental Hierarchy

The first critique is relatively straightforward: the CJEU's free movement jurisprudence fails to treat fundamental rights as fundamental in any useful sense. This development can be traced back almost a dozen years, to Advocate General Sir Francis Jacobs' Opinion in the *Schmidberger* case, in which he explicitly argued that Member State protection of fundamental rights should be subjected to the same two-step analysis that the CJEU applies to all justifications advanced by Member States for restricting the freedom of movement of goods, persons, services and capital. The Member State must have a "legitimate objective" for restricting these fundamental freedoms of movement; and the restriction must satisfy the CJEU's proportionality test.⁴⁵ The mere fact that the Member State has created such restrictions as a byproduct of protecting fundamental rights, argued Jacobs, was no reason for granting Member States greater leeway.

In 2004, the CJEU took a major step in the direction of Jacobs' proposal. In its *Omega* judgment, the CJEU decided to strictly construe Member State claims that their restrictions on the freedom of movement were justified on the grounds of "public policy."⁴⁶ As a result, a Member State could only use the protection of fundamental rights as a public policy justification for

45 Opinion of AG Sir Francis Jacobs, Case C-112/00, *Schmidberger v. Austria* 2003 E.C.R. I-05659, ¶ 95.

46 Case C-36/02, *Omega Spielhallen v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609, ¶ 30 (ruling that the E.U. Treaty recognizes "provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health").

restricting one of the four market freedoms if the fundamental rights protection was “necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.”⁴⁷ The CJEU had decided to safeguard the four market freedoms by applying its proportionality analysis in such a manner as to strictly scrutinize Member State protection of fundamental rights.

This strict CJEU stance undermines the orthodox claim that proportionality analysis is a “balancing” exercise.⁴⁸ Although the Court’s proportionality analysis does indeed place two competing legal norms or justifications in relation to each other in order to determine whether one can legitimately be used to validate exemption from the other, this hardly represents balancing. It is instead a straightforward threshold determination about whether an exception to a rule is justified. More importantly, the stricter the standard for justifying such an exception to a given rule, the clearer it becomes that this rule is hierarchically superior to its potential exceptions.

The *Viking* judgment demonstrates this hierarchical relationship quite clearly. *Viking* does not balance the unions’ fundamental right (to collective action) against the firm’s fundamental freedom (of establishment). It simply decides whether the unions’ exercise of their fundamental rights justified an infringement on the firm’s fundamental freedom to move its place of incorporation within the European Union. The key to grasping the hierarchical nature of the CJEU’s analysis is to recognize that this “balancing” is never conducted in the opposite direction: the Court never examines whether the exercise of the firm’s fundamental freedom (of establishment) justified an infringement on the unions’ fundamental right (to collective action).

This important asymmetry demonstrates not only that the CJEU’s proportionality method should not be conceptualized as balancing, but also — and more importantly — that the Court has established a straightforward hierarchy between the types of “fundamental” norms in play: contrary to what the uninitiated might suppose, fundamental rights (in this case, the right to collective action, including the right to strike) clearly carry lower status than fundamental market freedoms (i.e., the free movement of goods,

47 *Id.* ¶ 36.

48 The leading theorist of proportionality-based balancing or “optimization” is undoubtedly Robert Alexy. *See, e.g.*, ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2003); Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, 16 *RATIO JURIS* 433 (2003). For a nuanced account assessment of the global spread of proportionality balancing, see Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 73 *COLUM. J. TRANSN’L L.* 165 (2008).

persons, services and capital). In the case of a conflict, the fundamental right can at best hope to justify an exception to the fundamental freedom; it cannot hope that the courts will require the fundamental freedom to justify its own infringement on the exercise of the fundamental right. This hierarchy, when combined with the strict scrutiny of fundamental rights exceptions, deprives fundamental rights of any meaningful “fundamental” status.

This fundamental asymmetry (so to speak) is hard to justify. After all, if a Member State restricts the exercise of either a European fundamental right or a fundamental freedom, the CJEU automatically subjects the Member State action to proportionality review to justify the infringement.⁴⁹ The same holds true for the restriction of such fundamental rights or freedoms by E.U. institutions.⁵⁰ Indeed, the *Viking* case demonstrates that the CJEU will even protect a fundamental freedom from a restriction caused by the exercise of a fundamental right. Why, then, would a fundamental right not be similarly protected? At the very least, should not both sets of fundamental norms (i.e., fundamental rights and fundamental freedoms) be subject to parallel proportionality analyses?

The CJEU never meaningfully addresses — never mind openly resolves — such questions. It simply applies its proportionality analysis in one direction: it shelters the fundamental market freedom by requiring that the exercise of the fundamental right pass strict scrutiny under its proportionality test. As can readily be seen, this imbalanced approach to proportionality operates to shield one type of norm from the other, subject to limited exceptions. In the *Viking* case, it yields a clear, if woefully unexplained, hierarchy: the CJEU makes little or no effort to explain why it refuses to grant fundamental rights the same degree — never mind a greater degree — of solicitude as fundamental market freedoms.

2. False Universalism: Selective Use of Proportionality Analysis

The second critique is that the CJEU aggravates this imbalanced approach to proportionality “balancing” by the manner in which it has expanded its doctrine of “direct effect.” The CJEU has long elaborated this doctrine in an increasingly expansive manner; by doing so, it has sidestepped the nagging problem that much of E.U. law appears — as does much international law generally — to be addressed to states rather than individuals. By expanding

49 *See, e.g.*, Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155; Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis*, 1991 E.C.R. I-2925.

50 *See, e.g.*, Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727; Case 181/84, *R. v. Intervention Board, ex parte E.D.*, 1985 E.C.R. 2889.

the “direct effect” doctrine, the CJEU has effectively empowered more individuals to invoke more E.U. law against more and more defendants, including private parties.

At an abstract theoretical level, it is hard to decry the CJEU’s expansion of “direct effect.” As many jurists have long argued, the public/private divide is difficult to sustain as an intellectual matter: public regulation and enforcement shapes almost all private action, and almost all private action generates public effects.⁵¹ This is not to mention the elegant simplicity of making all law applicable to — and enforceable by — all. A complete or total doctrine of direct effect would thus yield a pleasingly universal approach both to norms and to parties that might sidestep the clumsy public/private distinction altogether.

The normative result of such a universal approach to direct effect would be simple, but colossally important: the Court’s proportionality analysis would apply across the board to all actors and acts that might restrict any other’s fundamental interests. In keeping with the Court’s proportionality test, such a universal approach would mean that *any* act that restricts a fundamental right or freedom would only be justified if that act 1) has a legitimate aim compatible with the E.U. Treaty; 2) is justified by overriding reasons of public interest; 3) is suitable for securing attainment of its objective; 4) does not go beyond what is necessary to attain that objective (i.e., there exists no less restrictive means of attaining it); and 5) has only been taken after the exhaustion of all other alternatives.⁵²

Such a universal proportionality approach would represent a major reworking of the public/private distinction, although it would not do away with the distinction altogether. After all, the second prong of the proportionality test queries whether the challenged act “is justified by overriding reasons of public interest.”⁵³ All acts that restrict a fundamental right or freedom would therefore have to be justified by reference to the public interest, regardless of the public or private status of their authors. But the public nature of the justification would remain, both as a key intellectual construct and as a crucial normative and justificatory demand. The universal normative result would therefore be

51 See, e.g., Leora Bilsky & Talia Fisher, *Rethinking Settlement*, 15 THEORETICAL INQUIRIES L. 77 (2014); Yishai Blank & Issi Rosen-Zvi, *The Persistence of the Public/Private Divide in Environmental Regulation*, 15 THEORETICAL INQUIRIES L. 199 (2014); Robert C. Hockett & Saule T. Omarova, “Private” Means to “Public” Ends: Governments as Market Actors, 15 THEORETICAL INQUIRIES L. 53 (2014); Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1 (2014).

52 Case C-438/05, *Int’l Transp. Workers’ Fed’n v. Viking Line*, 2007 E.C.R. I-10779, ¶¶ 75-87.

53 *Id.* ¶ 75.

that all acts — public or private — would have to be justified by reference to the public interest. The public/private distinction, though remaining, would thus be significantly reworked; and to the extent that the “reasons of public interest” would be explicitly balanced against the challenged (and potentially private) act, the refashioning of the public/private distinction would be all the more evident.

Of course, the communitarian tinge to this universal approach might come at a price. Part of that price would be that private acts would not only have to be justified, but to be justified by reference to the public interest. In some sense, then, the realm of the private would no longer be particularly private. And another part of that price would be that all fundamental rights and freedoms would in fact be subject to encroachment, so long as the resulting restriction could be justified in terms of the public interest. In some sense, then, the privileged status of fundamental rights and freedoms would forever be subject to compromise, if only in the name of the public interest. The underlying liberty interest in the private exercise of fundamental rights and freedoms would thus be twice compromised: first, because the private would need to be justified in terms of the public; and second, because the public would perpetually threaten to override the fundamental.

But here is the key: the CJEU’s unbalanced approach to fundamental rights and freedoms demonstrates that the CJEU has *not* in fact adopted such a universalist methodology. Yes, *Viking* does expand the Court’s direct effect doctrine to cover the acts of admittedly private parties (the unions). But no, *Viking* does not expand it to cover other acts by other private parties (Viking management).

Another way to represent this imbalance is to describe it as a mode of *selective universalism* (with all the paradoxes that such an odd term might suggest). True, more and more acts and interests qualify as “fundamental.” And true, proportionality analysis is accordingly applied in more and more instances by more and more judges and, derivatively, must be internalized by more and more public and private actors. As a result, the logic of holding private exercises of power responsible to the public interest might be understood as expanding. But the incidence of this burden falls selectively. Hence, the restriction of some fundamental interests must now be “justified by overriding reasons of public interest.”⁵⁴ But others do not. Thus, the unions’ restriction of management’s fundamental freedom of establishment is subject to such justification, but not management’s restriction of the unions’ fundamental right to collective action. Some private acts, one might say, are treated as more private than others.

54 *Id.*

This analysis demonstrates that the *Viking* Court does much more than simply develop and extend its direct effect doctrine: it compounds this development by taking the truly extraordinary step of strictly applying all aspects of its proportionality test to the actions of certain private actors. Unions must henceforth internalize proportionality analysis when considering the actions they may pursue in their conflicts with management. As a result, a union must now be so solicitous of management's fundamental freedoms (including the freedom to pull up stakes and leave the jurisdiction altogether) that it must protect those freedoms from the exercise of the union's own fundamental rights.

By simultaneously expanding its direct effect doctrine and imposing its strict proportionality analysis on unions, the CJEU accordingly overrides the public/private divide in a particularly troublesome manner. First, the CJEU places a tremendous burden on unions, who must now treat the exercise of their own fundamental rights as secondary to the firm's fundamental market freedoms. Imposing such a burden may well make sense as a means of dissuading public authorities from adopting courses of action that take an unjustifiable toll on the citizenry's exercise of fundamental rights and freedoms. But to burden the private exercise of fundamental rights in such a manner is something else altogether.

Second, the imposition of this burden is not generalized to apply to all private actors who tread on the fundamental interests of others. As we have seen, the CJEU does not require the *Viking* firm to shoulder a similar responsibility relative to the unions' fundamental rights. As a result, the Court neither bridges nor destroys the public/private divide; it merely overrides it selectively.

Third, the *Viking* Court by no means does away with the notion that there exists a difference between the public and private spheres. It simply forces certain avowedly private entities (the unions) to renounce exercising their fundamental rights in a manner that burdens other private entities' (*Viking's*) fundamental freedom of movement unless doing so is "justified by overriding reasons of public interest." In other words, the CJEU treats the unions (but not the firm) as if they were public (state) actors, thereby forcing them to behave in the public interest despite the fact that they do not exercise regulatory power.

By applying its strict proportionality standard in such a selective manner, the CJEU has effectively decoupled the burden of having to justify actions on public interest and efficiency grounds from the power to exercise regulatory authority. For the unions, this combination of the Court's newly expanded direct effect doctrine with its newly applicable proportionality analysis represents the worst possible solution: in dealing with management, the unions gain all of the burdens — but none of the advantages — of being treated as if they were a public entity. And given the CJEU's longstanding tendency to expand the applicability of its direct effect and proportionality doctrines, there is little

reason to believe that the selective imposition of this burden will be limited to unions rather than expanded to cover an ever greater range of seemingly private actors.

3. *The Simplistic Rule of the Normative: Intentionally Ignoring Context*

Finally, the third problem with the Court's approach rests on a broader theoretical critique of the Court's "fundamentalist" methodology. The critique focuses on the unified normative approach that the Court continues to elaborate and deploy (however selectively) in cases such as *Viking*. This increasingly undifferentiated approach imposes an expanding fundamentalist normative framework on ever larger segments of the domestic legal and political orders. This unified normative methodology unnecessarily undermines domestic institutional structures and needlessly limits the range of European and domestic regulatory options.

At the most general level, the problem with the Court's fundamentalist approach is that it increasingly subsumes all domestic institutions and individuals under a single and undifferentiated normative schema. This approach treats a legal order as if it were fractal, at least with respect to fundamental rights and freedoms: each part and subpart, each actor and act, is increasingly treated as severable from the rest and held individually to account before fundamental norms.⁵⁵

The CJEU's fundamentalist approach thus functions as a severing process that increasingly treats almost every act, actor, procedure or institution as a freestanding entity subject to the same normative review, regardless of how it actually fits and interacts with its surrounding structures. Such severing could eventually allow governing norms to be applied across the board to any and all subparts of the legal order. The *Viking* case represents the next step in the CJEU's gradual adoption of such an approach: the CJEU now requires not only that all state institutions and state law conform to European free

55 This fractal approach can be analogized to "conceptual severance" in the U.S. constitutional takings context, which Margaret Radin describes as follows:

To apply conceptual severance one delineates a property interest consisting of just what the government action has removed from the owner, and then asserts that that particular whole thing has been permanently taken. Thus this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.

MARGARET RADIN, REINTERPRETING PROPERTY 127-28 (1993).

movement norms, but also that the particular actions of individual unions (and increasingly of particular individuals⁵⁶) do so as well.

There are at least two ways of conceptualizing the problem posed by the CJEU's imposition of this unified normative approach to European fundamental rights and freedoms, i.e., by its "fundamentalist" approach. The first is to think of the problem as an issue of zoom or resolution. In cases such as *Viking*, the CJEU zooms into the micro level to examine whether a particular act of a given private actor violates European free movement norms. Such a high-resolution approach to assessing the legality of actions under E.U. law offers the advantage of simplicity and consistency: everything in the legal order must abide by fundamental E.U. legal norms. Unfortunately, it also offers a debilitating disadvantage: it is inherently blind to context. This problem should be evident. The actions taken by the unions in their labor dispute with Viking management were part of a much larger Finnish labor relations structure. To focus narrowly on the particular acts of particular unions, especially when those acts are perfectly legal under domestic law, is to ignore quite intentionally all relevant context.

To apply fundamental norms in such a myopic fashion cannot help but lead to arbitrary results. As a quick comparative example, think of the American criminal jury. It makes a great deal of sense — in fact, it is extremely important — to require that a jury (or at least the venire) and the process used to select it satisfy the Impartiality Clause of the U.S. Constitution by yielding a "fair cross section" of the community.⁵⁷ But does it make sense to require that every single juror independently satisfy the Clause on his or her own? At such a high level of resolution, the application of the "fair cross section" norm borders on the nonsensical.⁵⁸

To make matters worse, the CJEU's high-resolution approach does more than excessively narrow the focus of the Court's examination, yielding partial views that ignore adjacent — and highly relevant — contextual features of the

56 See, e.g., Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000 E.C.R. I-04139.

57 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

58 This is the dilemma posed by "conceptual severance": in theory, one could apply the takings clause to any miniscule subcomponent of any given property interest. But such an approach leads quickly to absurdities: given that just about every state act affects some property interest in one way or another, state action of *any* kind would effectively be foreclosed if every state act were subject to constitutional review for encumbering the utility of any portion of any property interest whatsoever. See RADIN, *supra* note 55.

legal orders under review. This approach also meshes particularly poorly with the penchant of Civilian legal systems (which comprise the overwhelming majority of the Member States of the European Union) for maintaining highly internally variegated legal orders. Most Civilian systems can be visualized as mosaics, not as monochromatic paint: they tend to go out of their way to distinguish between their assorted component parts, such as their public, private, criminal, constitutional and other doctrines and institutions.⁵⁹ This compartmentalization yields a highly differentiated mosaic of legal norms, processes and institutions within a single domestic European legal system.

In contrast, the CJEU increasingly applies a high-resolution approach that insists that every subpart of the legal order conform to the same fundamental norms. This intentionally and aggressively undifferentiated approach is potentially debilitating for a mosaic-style legal order: it zooms into each individual tessera of the mosaic, insisting that it conform individually and independently to a given rule. Needless to say, such an insistence undermines one of the primary advantages of a mosaic, namely the richness that can be produced from the heterogeneity of its component parts. By bringing its scrutiny to bear on individual pieces, the CJEU threatens the mosaic's ability to create complex composite colors and varied features (such as a distinctive labor regime and its component parts) that can function productively within the legal order's larger scheme.

Another way to describe this problem is by analogizing it to electoral or administrative districting exercises. There exist, of course, countless ways of parceling up an electorate into subparts for the purposes of electoral representation or administrative management. Among other prominent possibilities, one option is to insist that each district be, insofar as possible, a microcosm of the overall population. A very different option is, to the contrary, to design districts in such a manner as to maximize the distinctive electoral or administrative power of disparate groups (including minorities) both at the local and at other levels. Both options yield defensibly democratic — but significantly different — forms of representation.⁶⁰

59 See MERRYMAN & PÉREZ-PERDOMO, *supra* note 44; see also *supra* Sub-Section III.A.3.

60 Needless to say, political theorists disagree strongly on which of these options (and their innumerable variants) yields a more representative electoral, administrative or political system. See, e.g., ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2d ed. 2003); HEATHER GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009); LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).

When it comes to designing their legal orders, Civilian jurisdictions tend to favor the latter, more variegated, approach. Different parts of the legal order are understood to serve very different purposes and interests and are designed and insulated accordingly. Far from taking a generalist or unitary approach, civil law regimes tend to adopt different norms to govern different subject matter areas, deploy dedicated institutions staffed by specialized agents, utilize different and subject-specific procedures, and organize the resulting suborders according to their respective rationales. Thus, for example, public law questions are rarely governed by the same norms, procedures or institutions as those that govern private law issues. Similarly, private entities may be given relatively little standing in regulatory decision-making, but relatively great control in defining private disputes in civil litigation, and so on. For the CJEU to focus its attention on subcomponents of the legal order — namely, the particular acts and interests of particular actors in particular labor disputes — is therefore to miss the legal order’s larger architecture, which may well be designed to take those interests into account in other ways and in certain institutional settings rather than others.

The oddity is that the CJEU refused to recognize such systemic considerations in the *Viking* case, despite the fact that labor regimes represent perhaps the clearest example of how modern legal systems have consciously adopted such specialized institutional approaches to help manage specific and enduring social conflicts. Labor regimes the world over tend to be established as quasi-independent structures within the legal order. They are routinely governed by distinct norms, managed by specialized institutions, administered through distinctive procedures; and they are routinely designed to enable labor and management — insofar as possible — to regulate their own affairs. Needless to say, there always exist difficult boundary issues between labor regimes and the legal orders in which they function; and different jurisdictions grant greater or lesser autonomy to those labor regimes and to the players who operate within them. But modern legal orders almost always prefer to dedicate a specific sphere in which labor and management can work out their own differences, even to the point of empowering them to take measures that would otherwise run afoul of assorted tort, contract and antitrust norms. This grant of autonomy empowers management and labor to regulate their own affairs while simultaneously subjecting them to the pressures they can exert on each other. The CJEU’s excessively narrow focus on particular acts in a particular labor dispute fails miserably to take this broader institutional and systemic context into account.

The CJEU’s failure to examine the *Viking* dispute in a broader and more holistic manner accordingly reveals a key flaw of another kind. This shortcoming rests on the “fundamentalist” nature of the Court’s approach. The CJEU’s

review of the unions' actions is above all *normative* in nature: it asks whether the assorted tactics employed by the unions against Viking management run afoul of fundamental E.U. free movement norms. This straightforward normative inquiry leads to the Court's deployment of its generic proportionality analysis. The problem is that the unions' acts are a product — and for that matter, an authorized and highly foreseeable product — of the Finnish labor regime's *institutional design*: it is the construction of that labor regime, the relative independence granted to it, the autonomy and authority delegated to management and labor, and so on that yield and even foster the unions' actions. To apply free movement or other fundamental norms in an unreflective manner to particular acts generated within that institutional structure is to miss (and thus to threaten) the very institutional nature of the regime in question. The problem, in short, is that the *Viking* Court blithely applies a normative approach to an institutional byproduct.

This uncomfortable relationship between the normative and the institutional demonstrates the tremendous difficulty of the CJEU's task. If the CJEU is to protect fundamental rights and freedoms, against whom should it do so and how? Which acts should be treated as private and which should be held to account before the public interest, and why? There are simply no easy answers to these simultaneously theoretical and pragmatic questions, contrary to what the Court's seemingly rote application of its standardized proportionality analysis would suggest.

Of course, one can readily venture a general prescription to help guide future debates about how the European courts should apply fundamental rights and freedoms. This pragmatic prescription would simply ask the courts (including the CJEU) to *take institutional design issues into account when applying fundamental norms*. But if this prescription is to perform any real work in bridging the normative and institutional dimensions of the problem — that is, if the prescription is to operate as something other than a bromide — then it will have to be addressed in a sustained and rigorous manner.

The institutional dimension of the Court's normative review must address a series of major issues. First, institutional design cannot function as an all-purpose excuse that automatically settles the legal controversy to the plaintiff's disadvantage. In *Viking*, for example, the unions' actions undoubtedly made it more challenging for the Viking firm to exercise its fundamental freedoms (in particular, its freedom of establishment). It would be disingenuous to claim that the unions did not in fact intend to make it difficult, if not impossible, for Viking to transfer its Finnish-Estonian operations from Finland to Estonia: this was obviously the whole point of their collective action. That said, the existence of the Finnish labor regime should matter for the purposes of

determining (and perhaps limiting) the fault of the unions.⁶¹ In other words, the CJEU must zoom out from the unions' acts in order to scrutinize the labor regime itself, for it is the labor regime that authorized the unions to act as they did. The Court's normative review must therefore be projected onto the institutional plane; and this shift suggests the usefulness of liability theories that hold Member States liable for breaching free movement norms when they fail to take adequate measures to prevent private parties from creating obstacles of their own.⁶² This is not to suggest that the unions must not themselves be subjected to scrutiny for the breach of free movement norms. It only means that the institutional design of the Finnish labor regime should figure prominently in the Court's review.

Second, if the state's institutional design must not function as an all-purpose excuse that automatically settles the legal controversy to the plaintiff's disadvantage, nor should it function as a fatal factor that automatically settles the controversy to the plaintiff's advantage. The existence of the relevant institutional structure should instead trigger a mode of analysis that is distinctly more contextually aware. After all, the very establishment and maintenance of the institutions in question strongly suggest that the state has made a calculated judgment to structure those institutions in their current forms. This should induce judicial scrutiny into the historical, economic, political, cultural, and other factors underlying the existence and structure of the institutions under review. If the CJEU were to strive to reach a more panoramic view of these institutions, it would likely become much more sensitive to the contextual factors that have motivated their design and operation.

Such a contextualized approach should not only help to remedy the CJEU's characteristic indifference to, and seeming ignorance of, domestic legal arrangements (in the *Viking* case, its unconcern for almost all labor law history and concerns, never mind for Finnish labor law norms, institutions and practices) — although remedying this seeming indifference would already represent a major improvement. Institutional contextualization should also provide meaningful help in determining the merits of claims such as those raised in the *Viking* litigation. Thus, for example, the collective action taken by the unions was strictly and unquestionably legal under Finnish labor law.⁶³

61 The CJEU explicitly refused to accept this proposition, albeit without explanation. See Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line*, 2007 E.C.R. I-10779, ¶ 63.

62 See Case C-112/00, *Schmidberger v. Austria*, 2003 E.C.R. I-5659, ¶¶ 57-60; Case C-265/95, *Comm'n v. France*, 1997 E.C.R. I-6959, ¶¶ 30-32.

63 For an excellent assessment of Finnish domestic law as it applies to the *Viking* controversy, see Bruun, *supra* note 28.

Indeed, the availability of such action has been an integral part of the Finnish collective bargaining system, which specifically empowers union and employer groups to negotiate over terms and conditions of employment to their mutual advantage, and to do so relatively free from governmental interference.

The key to grasping the institutional logic of such a collective bargaining system is to recognize that the autonomy it grants empowers both management and labor, even as it subjects each to pressures mounted by the other. This autonomy enables management and labor to enter into agreements and engage in practices that would otherwise run afoul of contract, tort, antitrust and other norms that would ordinarily apply. The deliberate specificity of this regime is such that it even removes industrial disputes altogether from the purview of the Finnish courts. For both labor and management, this state of institutional affairs represents a mixed but generally favorable bag that offers tremendous opportunities (quasi-autonomous self-regulation through collective bargaining, lockout and strike powers, antitrust exemptions, self-selection of Labor Tribunal judges, long-term industrial peace, and so on), even as it levies some costs (exposure to strikes and lockouts, susceptibility to bargaining leverage, loss of access to the ordinary courts and otherwise generally applicable legal norms, labor deradicalization, and so on).

To fail to take account of this institutional context by severing a single act and subjecting it to normative review is to miss the whole point of the regime. In the *Viking* case, it offers a stunning windfall for management: not only does management continue to benefit from all the special advantages granted by the Finnish labor regime, but it now gains a fundamental and judicially enforceable freedom to move any portion of its operations from any E.U. Member State to another, despite its long-term bargaining and contractual relationship with a local union. Even more, that fundamental freedom is now so robust that the firm's union partner may not — except in highly circumscribed and strictly construed circumstances — adopt a bargaining position, backed up by collective action, that the firm should forego the exercise of that freedom. In essence, the firm's fundamental *freedom* has been transformed into a justiciable Hohfeldian *right* as against the union.⁶⁴ Whether such a fundamental alteration of the Finnish collective bargaining regime was really necessary to support the firm's free movement, especially at the expense of the unions' fundamental right to collective action, is of course an open question. But at the very least, the CJEU should have adopted a methodology that overtly addresses the systemic and institutional dimensions of that question.

64 See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

CONCLUSION

This Article has argued that the CJEU's *Viking* judgment exemplifies the Court's misguided approach to fundamental rights and freedoms, which I have been calling *European fundamentalism*. First, this increasingly dominant approach tramples unnecessarily on important institutional and jurisdictional distinctions, recklessly redistributing competences not only between Member States and the European Union, but also within the Member States themselves. This jurisdictional grab opens the European Union to unnecessary (though largely warranted) critique; and it does terrible damage to the internal institutional and political arrangements of most European Member States. Second, the Court's approach fails, even on its own fundamentalist terms, to treat fundamental rights as truly fundamental. It merely establishes a hierarchy of norms that allows fundamental market freedoms to trump fundamental rights. Third, the Court's seemingly universalist expansion of its "direct effect" doctrine actually functions selectively, subjecting the acts of some private actors — but not others — to searching judicial review. Finally, the Court's approach increasingly subsumes all domestic institutions and individuals under a single, undifferentiated and ultimately simplistic normative schema. This normative turn unnecessarily forestalls many of the institutional structures and solutions that might — and in many cases, recently did — govern significant portions of the European legal field. And needless to say, this normative restructuring represents a tremendous windfall to management, which now benefits not only from the compromising of specialized domestic legal arrangements, but also from the reinforcement of European fundamental market freedoms.

This Article has suggested that the CJEU should instead be constructing a far more contextually sensitive approach. Indeed, such a methodology could in theory be constructed under the prized European rubric of "proportionality analysis."⁶⁵ But this would necessitate a major analytic shift: the Court would have to demonstrate a willingness to break away from the rigidly normative approach of its fundamentalist methodology. In particular, it would have to be prepared to contextualize the application of its hard and fast rules in a manner that accounts meaningfully for the design and operation of domestic and other institutional structures. Only by adopting a relatively holistic analytic approach can the Court hope to resolve insightfully the difficult question of

65 Proportionality could be interpreted and applied so as to address the institutional and systemic issues of the type I have been foregrounding. Such issues could readily be incorporated into the "justification" prong of the Court's traditional proportionality test.

whether a private bargaining position, backed up by collective action, actually constitutes a justiciable violation of a firm's freedom of movement.

In essence, the Court would have to wrestle openly with the public/private distinction. As between the acts legally undertaken by assorted private actors, which must satisfy the proportionality test in general and the public interest requirement in particular, and why? How should responsibility be distributed between the state and private actors for actions legally undertaken by private actors under the state's own regulatory regimes? How does the judicial assignment of responsibility in such cases shape and reshape not only the classification of public and private actors, but also the definition of what public and private mean in the legal and political systems in play? In short, the Court would have to address the nagging suspicion that there may be no inherent way to divvy up, negotiate, or even theorize the relationship between the state and private actors: it is the Court itself that must determine the answer to such questions, and by so doing, make it so.