

Re-generating Europe through Human Rights? Proceduralism in European Human Rights Law

By Mark Dawson*

A. Introduction

The present-day EU, as is well known, faces a serious crisis. As contributions to this volume make clear, that crisis is political as much as it is economic. Developments such as the limitations on national democracies established via the *golden rule*, as well as the exclusion of parliaments from EU decision-making, illustrate the grave challenges to democracy brought about by the EU's response to the euro crisis.¹ Given this context, the task of regenerating Europe is primarily a political task. It would be strange indeed to address such a crisis by turning to a seemingly apolitical tool, such as human rights. Accordingly, human rights—anti-majoritarian and legalistic—seem to be in full retreat from the kind of adversarial politics needed to reorient the European project along more democratic lines.

This essay will certainly not portray human rights discourse as a panacea for the EU's present-day ills; its aim, however, will be to argue that there is a meaningful role for human rights in regenerating Europe. This role requires viewing human rights protection not as an apolitical check on majority rule but as a mechanism to forge a more politically responsive and citizen-oriented EU project. In doing so, this essay will defend a vision of human rights, both in conceptual terms and in terms of their practical application in the context of the EU, that considers human rights as a pathway to greater political engagement and contestation.

Such a view relies on three claims. The first concerns the classical tension between human rights protection and democratic rule. While human rights may—in the EU polity as well as any other—limit democratic choices, human rights norms also serve an important procedural role in guaranteeing individuals access to the democratic process on an equitable basis. This point will be demonstrated in (C) wherein some important examples

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¹ MARK DAWSON & FLORIS DE WITTE, CONSTITUTIONAL BALANCE IN THE EU AFTER THE EURO CRISIS (forthcoming) (on file with author); CHRISTIAN JOERGES, FROM INTEGRATION THROUGH LAW TO FINANCIAL CRISIS: WHAT IS LEFT OF EUROPE'S ECONOMIC CONSTITUTION (forthcoming) (on file with author).

are presented, namely the case law of the ECJ on access to information, and on political citizenship—an area of the Court’s caselaw that has been evolving rapidly.

The second claim concerns human rights and disagreement. While it may be true that there is no consensus among Europeans about the scope of basic rights, it will be argued that precisely such disagreement over what human rights entail, and who is entitled to them, is an important trigger for political discourse. Using the example of labor law, (D) will argue that human rights should not be considered only in legal and formalistic terms, but are also capable of sustaining and encouraging public discourse. Human rights can sustain and activate public discourse *precisely because* there is significant disagreement on how they can best be protected.

The final claim concerns human rights and European civil society. While human rights discourse may be seen as inhibiting civic bonds, and promoting a self-centered and atomistic view of EU citizens, the history of fundamental rights protection in the EU demonstrates the opposite. The task of enforcing fundamental rights in the EU has led to the establishment of a politically dynamic and properly European community of actors committed to holding national and EU institutions accountable for rights abuses. Using the example of strategic litigation in fields such as anti-discrimination and minority rights protection, (E) of this paper will demonstrate that human rights discourse may not only atomize but bring otherwise disparate communities together at the EU level to contest and affirm basic political values.

In sum, this essay will argue that human rights can aid Europe’s regeneration by contributing to an adversarial and open public discourse about common values. A political discourse centered on, as the editors of this volume have put it “who we are, what we want[,] and how we can actually achieve it” seems to be at least part of what *regenerating* Europe for a new generation of citizens requires.²

B. EU Human Rights Skepticism

Let us start by considering the various objections to a robust role for the EU in fundamental rights protection. The critical literature is of course vast, so any overview must be selective.³ I would like here to focus on two main critiques. The first critique reflects a critique of human rights that is prevalent in all jurisdictions. This is the claim that the pursuit of human rights, enforced by independent judiciaries, conflicts with the

² See, e.g., *Ending the Honeymoon: Constructing Europe Beyond the Market*, REGENERATION EUROPE (Feb. 1, 2012), <http://regenerationeurope.eu>.

³ For two excellent overviews, see MARIE-BÉNÉDICTE DEMBOUR, *WHO BELIEVES IN HUMAN RIGHTS?* (2006); TOM CAMPBELL, KEITH D. EWING & ADAM TOMPKINS, *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* (2011).

democratic will.⁴ At the national level this has often been described, in the words of Alexander Bickel, as the “counter-majoritarian difficulty.”⁵ How can human rights be seen as consistent with democratic principles if upholding human rights requires consistently over-turning the will of the democratic majority?

At the EU level, this critique has often been given an additional flavor. The EU Courts—distanced from the polities they rule upon—may carry even less popular legitimacy in enforcing human rights norms than national judiciaries. They face the additional difficulty that—even if all Member States of the Union can agree upon the same set of enumerated rights—they are likely to differ significantly on the interpretation and scope of these rights. To give one oft-cited example, Catholic Ireland may have a very different view of the scope of the right to life in relation to the fetus than secular France. Human rights, for all their universalist pretensions, may reflect distinct political choices that only make full sense in a national context.⁶

There may be a certain appeal to rights discourse at the EU level because of the EU’s ability, through its association with “universal values,” to bind Europeans to a common normative discourse. Disagreements over the scope of rights, however, can only be resolved through democratic processes.⁷ Ironically, such robust political institutions, fully engaged in the business of deliberating tradeoffs between different political claims and legitimizing the outcomes, is precisely what the present-day EU lacks. Far from serving as a normative basis for a nascent EU identity, EU fundamental rights ever more enmesh the Union in the counter-majoritarian difficulty.⁸ Any attempts by the Union to develop a strong discourse of rights will tend, by this view, to constrain national democracies without sustaining the development of democratic discourse at the EU level. Given this paradox, human rights are likely to drain, rather than bolster, the legitimacy of the EU project.

The second critique I would like to comment upon is related to the first but is somewhat more complex. It also finds some resonance at the national level. This is the

⁴ See e.g., Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346, 1346–1406 (2005).

⁵ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986).

⁶ See Joseph Weiler, *Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in European Space*, in AN IDENTITY FOR EUROPE, THE RELEVANCE OF MULTICULTURALISM IN EU CONSTRUCTION 73 (Riva Kastoryano ed., 2009) (detailing the important distinction between fundamental rights and fundamental boundaries where fundamental rights may be a product and lever for both fundamental unity and fundamental disagreement between polities).

⁷ Richard Bellamy, *Still in Deficit: Rights, Regulation and Democracy in the EU*, 12 EUR. L.J. 725 (2006).

⁸ See the variation of this argument in relation to subsidiarity advanced by Armin von Bogdandy. See Armin von Bogdandy, *The European Union as a Human Rights Organization: Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1316–18 (2000).

communitarian critique of human rights: The view that rights discourse encourages an overly atomistic and depoliticized view of the person. The Marxist critique of human rights, for example, has often portrayed human rights as an attempt to obscure stark economic inequalities that only radical political action can overcome.⁹ Human rights, by this view, encourage us to see ourselves as selfish and atomized citizens pitted against the state, while doing little to address underlying structural inequalities of power and opportunity.¹⁰ Many of these inequalities, e.g. in relation to property, are legally and ideologically enshrined through rights discourse itself.¹¹

While hardly identical, the communitarian argument finds its echo in a number of critiques of contemporary EU fundamental rights policy. These critiques see EU fundamental rights as either encouraging an overtly individualist conception of EU citizenship, or as tying fundamental rights too closely to fundamental freedoms and hence to economic capital. Discussing human rights in relation to citizenship, Joseph Weiler has advanced this communitarian argument. The spread of human rights discourse—a discourse that Weiler himself famously forwarded—has increasingly, Weiler argues, eaten away at its own foundations, establishing rights without the necessary sense of solidarity and responsibility between citizens needed to deliver them. As Weiler writes, discussing the Lisbon Treaty's new citizenship clauses:

In bestowing European Citizenship on all Member State nationals it subjects them to all the rights and duties to follow. But when one peruses the list that follows, duties somehow evaporate. European citizenship is a category which comes with rights but no active (or even passive) duties. The Union does indeed place the individual in the center, but at one and the same time puts into place a culture which cultivates self-centered individuals.¹²

To use the language of this volume, the language of citizenship and rights is indeed *regenerating* Europe, but along individual and egocentric lines.¹³ To again use Weiler's

⁹ Karl Marx, *On the Jewish Question*, in KARL MARX: SELECTED WRITINGS 21 (David McLellan ed., 2000).

¹⁰ See MARIE-BÉNÉDICTE DEMBOUR, *The Convention in a Marxist Light*, in WHO BELIEVES IN HUMAN RIGHTS? (2006) (providing an overview).

¹¹ One must note that 'realist' critiques also often follow a similar logic, i.e. that rights discourse encourages rights without concomitant responsibilities. See e.g., JEREMY BENTHAM, SELECTED WRITINGS ON UTILITARIANISM 458 (2000) (noting the classical objection of Jeremy Bentham to the idea of 'natural' rights: "From real law comes real rights; but from imaginary laws come imaginary rights").

¹² Joseph Weiler, *Individuals and Rights—The Sour Grapes*, 21 EUR. J. INT'L L. 277, 278 (2010).

¹³ See Moritz Hartmann & Floris de Witte, *Regeneration Europe: Towards Another Europe* (in this issue).

language, they are promising *values* without the individual and societal *virtues* necessary to sustain those values in the long-term.¹⁴

This critique finds an equal resonance in more detailed accounts of ECJ case-law. To take one example, Alexander Somek has argued in a recent monograph that EU anti-discrimination laws displace attention from the more robust forms of social intervention that would truly *rebalance* the EU's existing market biases, while doing little to address existing structural patterns of distribution.¹⁵ One can find variations of this argument in relation to a number of areas of EU law in which fundamental rights have played an increasing role. Most famously in the field of labor law, the use of fundamental rights in the *Laval*¹⁶ and *Viking*¹⁷ cases has been seen as an archetype for the subordinate role fundamental rights play in the EU *vis-à-vis* the market.¹⁸

By elevating the right to strike to the status of a fundamental value in those cases, the Court's critics have seen the ECJ not as strengthening fundamental rights protection but exposing it to perverse logic.¹⁹ Rather than act as a check on other policies, fundamental rights in the EU too often must be assessed in light of their impacts on free movement. Through such techniques, fundamental rights are either subordinated, or used to unravel collective solutions to public problems. In this case, the delicate balance between the interests of workers and employees is represented through the Nordic system of collective bargaining.²⁰

¹⁴ See Joseph Weiler, On the Values, Virtues (and Vices) of the European Construct: What We Can Learn from Aristotle, Aquinas, and Maimonides, Presentation at the Hertie School of Governance (Mar. 13, 2012).

¹⁵ See ALEXANDER SOMEK, ENGINEERING EQUALITY: AN ESSAY ON EUROPEAN ANTI-DISCRIMINATION LAW 15 (2011) (arguing that, by "engineering" equality, EU fundamental rights aim to create a Europe "inhabited by *better people*—and not a world where power differentials in the relation of capital and labor have been readjusted such as to approach evermore closely a sustainable equilibrium").

¹⁶ Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767 [hereinafter *Laval*].

¹⁷ Case C-438/05, *Int'l Transp. Fed'n v. Viking Lines*, 2007 E.C.R. I-10779 [hereinafter *Viking*].

¹⁸ See e.g., Anne C.L. Davies, *One Step Forward, Two Steps Back: The Viking and Laval Cases in the ECJ*, 37 *INDUS. L.J.* 126 (2008); Silvana Sciarra, *Viking and Laval. Collective Labour Rights and Market Freedoms in the Enlarged EU*, 10 *CAMBRIDGE Y.B. OF EUR. LEGAL STUD.* (2007–2008).

¹⁹ See Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union—the Laval and Viking Cases before the ECJ*, 2 *GERMAN L.J.* 125, 125–161 (2009).

²⁰ See Mia Rönnmar, *Laval Returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms*, 39 *INDUS. L.J.* 280 (2010) (detailing the domestic impacts of *Laval* in Sweden).

Such analysis is not confined to the field of labor law. In areas as diverse as healthcare,²¹ consumer protection,²² education,²³ and home affairs,²⁴ fundamental rights have been seen as strengthening individuals. Such strengthening came only at the expense of collective forms of problem solving and in doing so trampled over carefully negotiated political solutions crafted at the national level. While these criticisms have various elements—from a concern regarding the balance between national and EU competences, to substantive concerns with the impact of EU rulings on complex systems of social protection—at their core is a fear that fundamental rights are protecting individuals only by undermining the bonds of collective solidarity necessary to deliver public goods.

While the two critiques outlined above emerge from a broad range of commentators, one should not overlook their common starting points. Both critiques in fact share two common concerns. The first is a concern with *de-politicization*. Clearly the claim of a tension between EU human rights and democratic legitimation is based on the belief that fundamental rights inhibit the development of the EU as a political entity. The second *communitarian* critique is also based on a belief that human rights discourse in the EU has the capacity to corrode social and political bonds. The very idea of *given* rights, by this view, suggests an abdication of social and political responsibility; a view of European society as less of a society and more as a bundle of isolated individual claims, to be defended one by one.

The second is a concern with *individualization*. In the case of the first democratic concern, this concern is manifested in the belief that the veneration of the individual conducted by human rights discourse is likely to lead to collective solutions, agreed upon by national or European political majorities, being overturned. In the case of the second, atomistic concern, it is based on the view that EU human rights are likely to encourage citizenship, but a debased version of that concept; one in which the individual as a market citizen displaces other elements which membership of a political community entails—from involvement in the political process to common forms of culture, social organization, and identity.²⁵

²¹ Christopher Newdick, *Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity*, 43 COMMON MKT. L. REV. 1645, 1645–68 (2006).

²² Hans Micklitz & Iris Benöhr, *Consumer Protection and Human Rights*, in HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 18, 28–35 (Geraint Howells, Iain Ramsay & Thomas Wilhelmsson eds., 2010).

²³ SACHA GARBEN, *EU HIGHER EDUCATION LAW: THE BOLOGNA PROCESS AND HARMONIZATION BY STEALTH* (2011).

²⁴ Sionaidh Douglas-Scott, *Freedom, Security and Justice in the European Court of Justice: The Ambiguous Nature of Judicial Review*, in THE LEGAL PROTECTION OF HUMAN RIGHTS: SKEPTICAL ESSAYS 268, 268–296 (Tom Campbell, Keith D. Ewing & Adam Tompkins eds., 2011).

²⁵ See Niamh Nic Shuibhne, *The Resilience of EU Market Citizenship*, 47 COMMON MKT. L. REV. 1597, 1597–1628 (2010).

These twin concerns—de-politicization and individualization—animate much, if not all, of the conceptual critique of human rights as a central part of the EU's future. To what extent are they convincing when applied to the contemporary EU context?

C. Human Rights in EU Policy-Making: The Example of Political Citizenship

The critical view of human rights sketched above tends to assume a certain tension or opposition between judicial review based on human rights concerns and democracy as expressed via the collective political process. Human rights review is predicated upon the need to define spheres of action into which the state may not step, or to otherwise defend a set of particularly “fundamental” values. There is thus a limitation of politics based on standards that are largely pre-political.

To what extent is this a correct characterization of human rights review in general, or human rights in the European context in particular? It is certainly a view that would be challenged by what I will term a *procedural* understanding of transnational rights jurisprudence. Two powerful defenders of judicial review have provided its theoretical underpinnings: Jürgen Habermas and John Hart Ely.

Ely's famous book, *Democracy and Distrust*, was intended as a rebuke to those who saw judicial review as requiring conformity to the original intent of the framers of the US Constitution.²⁶ It was also, however, a defense of a process-oriented vision of judicial review, in which judges intervene less to defend fundamental values than to ensure an equitable and robust political process. Looking back at the supposed “judicial activism” of the famous Warren Supreme Court, Ely argued that this Court's interventionism:

[W]as fueled not by a desire on the part of the Court to vindicate certain fundamental values . . . but rather by a desire to ensure that the political process—which is where such values *are* properly identified, weighed[,] and accommodated—was open to those of all viewpoints on something approaching an equal basis.²⁷

By this view, judicial review on grounds of fundamental rights is conducted not to limit political choices, but precisely to open up channels of political communication. Judicial review reflects the fact that an equal and fair political process cannot be achieved by electoral processes or divided government alone but requires judicial interventions designed to ensure that those who are subject to endemic discrimination or who are

²⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11–43 (1980).

²⁷ *Id.* at 74.

otherwise undercounted are entered into the political process. Human rights norms are a vehicle to achieve this. They serve to define who is a legitimate member of the polity, tying the fate of the majority to that of the political outsider. To use one of Ely's examples, the First Amendment of the United States Constitution protecting freedom of speech is not just a defense of a fundamental value but a political commitment to an open and accountable democratic process in which political decisions can be properly scrutinized and minority viewpoints heard.²⁸

While emerging from a different disciplinary and political tradition, there is much to connect Ely with Jürgen Habermas' insistence on an *internal relation[ship]* between the rule of law and democracy.²⁹ Like Ely, Habermas rejects the idea of an inherent tension between popular democracy and fundamental rights protection. Instead, these two values exist in a mutual reinforcing reciprocal relation. The validity of law, and indeed of human rights, for Habermas, is grounded not in some external morality but in democratic authorship—i.e. the political process.³⁰ At the same time, however, human rights and the rule of law are precisely the instruments that guarantee that process, ensuring that its outcomes are the result of free democratic communication rather than strategic power and influence.

The very ability of individuals to participate in the democratic process as free citizens requires that certain conditions are met, particularly that their private autonomy is secured. Citizens who are imprisoned without due process, who are endemically discriminated against, who do not have access to basic social provision or who are unable to vote or express themselves politically can hardly contribute to popular will formation. Yet how does one achieve these basic requirements bar through minimum standards of fundamental rights protection enforced through judicial institutions? As Habermas describes:

Citizens can make adequate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; on the other hand, they can arrive at a consensual regulation of their private autonomy only if

²⁸ ELY, *supra* note 26, at 93–94.

²⁹ Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, in *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* (Ciaran Cronin & Pablo De Greiff eds., 1998); JÜRGEN HABERMAS, *Private and Public Autonomy, Human Rights and Popular Sovereignty*, in *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 84, 84–103 (1996).

³⁰ Habermas, *supra* note 29, at 258.

they make adequate use of their political autonomy as enfranchised citizens.³¹

In simple terms, human rights and democracy are not external to one another; rather democracy requires human rights protection precisely as a precondition for fully democratic discourse to take hold—just as human rights protection requires public engagement and citizenship.

Habermas himself has written extensively about the EU case.³² What, however, do his and Ely's conception of human rights have to tell us about human rights in the EU context? While human rights in an EU context are, of course, quite different in nature to those national examples discussed by Habermas and Ely, EU human rights also often play a procedural role. Human rights—both as an element of the political culture of the EU and as enforced by the European Courts—not only limit political conduct on behalf of individuals, but also play an important role in defining the contours of EU political citizenship, thereby entering individuals into the political process.³³ In this sense, while there may be certain categories of rights—e.g. right to abortion or right to strike—that are the subject of disagreement and thus result from a democratic process, there are others that may be preconditions for the effective operation of the democratic process itself.

An important first example of this is EU norms related to political citizenship and participation.³⁴ Let us take first the example of access to documents. The right to access official documents of the Union is protected under Art. 42 of the Charter; a right that is given concrete expression through legislation predating the Charter's drafting. In particular Regulation 1049/2001 grants EU citizens rights of access to "all the documents held by an institution that is to say, documents drawn up or received by it and in its possession."³⁵ This extremely broad right is tempered by derogations provided for under Art. 4 of the Regulation, some of which are mandatory, e.g. in areas such as public security, and some of which are discretionary, e.g. where release of documents might have the capacity to

³¹ *Id.* at 261.

³² See JÜRGEN HABERMAS, *THE CRISIS OF THE EUROPEAN UNION* (2012).

³³ See also EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN (Michael Dougan, Niamh NicShuibhne & Eleanour Spaventa eds., 2012).

³⁴ See e.g., Charter of Fundamental Rights of the European Union, of 18 Dec. 2000, ch. V, 2000 O.J. (C 364) 1, 18, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

³⁵ Commission Regulation 1049/2001, Regarding Public Access to European Parliament, Council and Commission Documents, art. 2(1), 2001 O.J. (L 145) 43, 44, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:145:0043:0048:EN:PDF>.

undermine the decision making process of the EU institutions.³⁶ Discretionary derogations may be overcome “where there is an overriding public interest in disclosure.”³⁷

The European Courts have played a significant role in defending such access rights—and in paroling the boundaries between the public interest in disclosure and the list of justified exemptions.³⁸ As the ECJ has argued, even the list of mandatory exceptions may be limited with reference to Charter rights. In *Sweden v Commission*, for example, the ECJ argued that the Commission could not simply rely on the fact that a document originated from a Member State to refuse a request—even though this is a mandatory derogation under Art. 4(5) of the Regulation.³⁹ Instead, the Commission was under a duty to engage in a dialogue with the Member States, by which Member States were first under a duty to justify why document access should be restricted.

In *Sweden and Turco v Council*, the ECJ also adopted a liberal approach in rejecting the Council’s claim that it could rely on an exception in Regulation 1049/2001 for legal advice.⁴⁰ Rather than reject all document requests relating to legal advice, the Council was under an obligation, the Court insisted, to establish whether the specific document requested fell within the general category of documents which had to be classified in order to protect the integrity of legal advice. This was especially the case with regard to advice on legislative proposals:

Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.⁴¹

The opinion of the Court mirrors closely the procedural role that judicial review on the grounds of fundamental rights can play. Rights-based claims need not be claims for

³⁶ *Id.* at art. 4(1).

³⁷ *Id.* at art. 4(2).

³⁸ See Dariusz Adamski, *Approximating a Workable Compromise on Access to Official Documents: The 2011 Developments in the European Courts*, 49 COMMON MKT. L. REV. 251 (2012) (providing a useful recent overview of the case-law).

³⁹ Case C-64/05, *Sweden v Comm’n*, 2007 E.C.R. I-11389.

⁴⁰ Joined Cases C-39 & 52/05 P, *Sweden & Turco v. Council*, 2008 E.C.R. I-4723.

⁴¹ *Id.* ¶ 46.

individual protection only but are often oriented towards including individuals within the political process, or opening-up channels of political communication. This is precisely the role that judicial review in this field has often played.

In such situations Courts may not only grant and defend rights of access in relation to the political process but also define who the legitimate bearers of particular rights are. This was part of Ely and Habermas' claim—judicial review for the purposes of human rights protection may also be needed to ensure or contest the representation and inclusion of outsiders or those who are undercounted in the normal political process.⁴²

There are also interesting strands of the ECJ's case law which relate to this function. Two cases of the Court dealing with voting rights may be paradigmatic. In 2006, the ECJ was asked to decide on two cases regarding voting rights for citizens of territories on the EU's margins. In the case of *Spain v United Kingdom*, at issue was the inclusion of Gibraltar citizens—including a number of non-UK citizens resident in Gibraltar—in the voting rolls for elections to the European Parliament (EP); a move instituted by the UK in order to comply with an earlier judgment of the European Court of Human Rights.⁴³ In *Eman and Sevinger*, at issue was the denial by the Netherlands of the right to vote in EP elections to citizens of Aruba, a territory part of the Kingdom of the Netherlands but not the EU.⁴⁴ These were classic cases concerning the boundaries of political citizenship. In both cases prior legislative practice had served to exclude citizens who were deeply implicated in EU regulatory policies, some of them EU citizens, some of them not, from having a direct say in EU policy-making through parliamentary elections.

In both cases, the ECJ chose to extend voting rights. In the Gibraltar case, the Court rejected the opinion of its Advocate-General that the UK's decision to include non-UK nationals in the electoral register would violate reciprocal obligations owed to other Member States.⁴⁵ The Court argued that the UK Parliament was free to extend voting rights as it saw fit. In the absence of harmonizing rules, EU citizenship and voting rights were not *per se coterminous*.⁴⁶ In the Aruban case, the Court went further, arguing that it was arbitrary discrimination to allow Aruban nationals who left Aruba to carry voting rights to the European Parliament but to deny those same rights to residents remaining on

⁴² Ely, *supra* note 26; Habermas, *supra* note 29.

⁴³ Case C-145/04, *Spain v. United Kingdom*, 2006 E.C.R. I-07961, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CJ0145:EN:PDF>.

⁴⁴ Case C-300/04, *Eman & Sevinger v. College van Burgemeester en Wethouders van Den Haag*, 2006 E.C.R. I-8055 [hereinafter *Eman & Sevinger*].

⁴⁵ *Spain v. United Kingdom*, *supra* note 43, ¶ 78.

⁴⁶ *Spain v. United Kingdom*, *supra* note 43, ¶ 79.

Aruban territory.⁴⁷ As the Netherlands failed to adequately explain this differential treatment, a presumption in favor of inclusion applied.

While stopping short of arguing for a harmonized set of rules on rights of political citizenship, the Court, and its Advocate General, made significant steps in these cases to expand the personal scope of political citizenship.⁴⁸ In extending voting rights to individuals who were outside the EU's formal territory, like Arubans, but effected by its policies, the Court's jurisprudence makes an essential procedural point. As stated by the Advocate-General in the Gibraltar case:

The democratic principle of universal suffrage upon which the EU is based ... militates in favor of recognizing voting rights for the largest possible number of persons, and there possibly also for foreigners established in a particular state, who, like citizens, are effectively subject to the measures approved by the national and Community legislative authorities.⁴⁹

Just as Ely argued for judicial review based on human rights as a mechanism to tie the interests of the majority to those excluded from the political process, so here citizenship rights are used to ensure that those affected by EU policies have the means of accessing EU politics. Human rights in this sense need not be oppositional to politics and the collective interest, but may act as a means of keeping political pathways open; or ensuring that political decisions reflect the full polity rather than segmented and privileged parts of it.

One should not, of course, overstate the significance of this case law. Much of the Court's case law *vis-à-vis* human rights does not carry this political dimension.⁵⁰ Equally, there is no guarantee that the European Courts will always play the role of referring the political process effectively or fairly. A human rights discourse in Europe that relied excessively on judicial institutions to patrol and enforce human rights norms would surely run the risk of overreaching itself; either by overlooking important human rights violations, or interfering in sensitive areas of policy where judicial actors may not have the democratic legitimacy to

⁴⁷ Eman & Sevinger, *supra* note at 44, ¶ 61.

⁴⁸ See J. Shaw, *The Political Representation of Europe's Citizens: Developments*, 4 EUR. CONST. L. REV. 162, 168 (2008) (detailing the extent (and limits) of this extension).

⁴⁹ Spain v United Kingdom, *supra* note 43, ¶ 77.

⁵⁰ *Id.* ¶ 77.

meaningfully act.⁵¹ In the field of political citizenship itself, there is an obvious example of this dilemma: The reluctance of the EU Courts to extend rights of EU migrants to vote in general elections in their host state.⁵²

These limits, however, also point to a second claim about European human rights to be explored in the next two sections. The European Courts may not only have a role in patrolling political processes but may also be objects of political contestation, because of the European Courts role in overseeing other governance structures in the field of fundamental rights or in prompting political engagement emerging from disagreement on the material scope of human rights themselves. This point must be explained with reference to one of the more controversial episodes concerning the substantive standards of EU human rights protection—the cases of *Viking* and *Laval*.

D. The Political Contestation of EU Human Rights: The Example of Collective Bargaining

As stated in section B above, one of the most powerful objections to a more developed EU fundamental rights policy concerns disagreement. Given that Europeans may reasonably differ over the scope of rights, human rights policies can often serve to divide Europeans from one another rather than foster political engagement. This is often accompanied by the claim that European human rights too often supplant national collective solutions to public policy problems without being able to foster European solutions in their place.

A foremost example which bundles these complaints together concerns the *Laval* and *Viking* cases decided by the ECJ in 2008.⁵³ These cases not only mired the Court in deep controversy but illustrated deep divisions between Western European concerns that Eastern enlargement might lead to a “race to the bottom” in standards of social protection and Eastern European desires to have access to Western service and labor markets on nondiscriminatory terms.⁵⁴ By using free movement law to limit the scope of the right to strike, the Court seemed to satisfy few of the relevant stakeholders. For many, the Court undermined Nordic collective bargaining in circumstances where the possibility of EU legislation on workers’ rights is limited by the delimitation of EU competences provided by the European Treaties.

⁵¹ See e.g., Joseph Weiler & Philip Alston, *An “Ever Closer Union” in Need of a Human Rights Policy*, 9 EUR. J. INT’L L. 658, 665–67 (1998).

⁵² D. Kochenov, *Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: an Ignored Link?*, 16 MAASTRICHT J. OF EUR & COMP. L. 197 (2009).

⁵³ *Laval*, *supra* note 16; *Viking*, *supra* note 17.

⁵⁴ See Uladzislau Belavusau, *The Case of Laval in the Context of the Post-Enlargement EC Law Development*, 9 GERMAN L.J. 2279, 2279–2307 (2008).

The story above, while accurate in many respects, also downplays an important factor: The normative value of disagreement.⁵⁵ While disputes regarding the scope of particular human rights can indeed draw attention to normative fault-lines between Europeans, they can also draw individuals and groups into the political process. While on the one hand, case law can be seen as determining the scope of rights, configuring a balance between different claims and thus depoliticizing the issues involved, precise disagreement over the nature of that balance can encourage the politicization of social and political choices. In simple terms, it is precisely because Europeans *disagree* about fundamental rights, that they may be motivated to politically contest and reshape core EU policies.

The *Laval-Viking* saga is an example of the ambiguous role of ECJ jurisprudence on human rights issues. These cases not only prompted consternation, but also considerable political activism to recast the balance being sought by the ECJ, either at the national or the EU level. The national side of this story is well described in a recent article by Michael Blauberger on the response to *Laval* and *Viking* across different EU Member States.⁵⁶ Blauberger's analysis rests on the different strategies that governments choose when a decision of the European Courts disturbs national policy. As well as emulating practices in other states, governments often seek an inclusion strategy, identifying those most affected by the policy at issue, or those most likely to litigate, and attempting to satisfy their demands or bring them into the dialogue.⁵⁷

The *Laval* saga is emblematic of such strategies at work. The importance of the collective bargaining system to Nordic identity created a strong non-compliance pressure balanced with the threat of de-stabilizing further litigation from private employers sensing an opportunity to curb collective bargaining rights. As a result, the Swedish and Danish governments both established *Laval* commissions, which included trade union and employer representatives and were tasked with suggesting reforms to the labor code in respect of these judgments.⁵⁸ The eventual legislative reforms based on the ensuing reports left essential elements of the pre-Laval collective bargaining structure in place while addressing those parts of the judgments, e.g. the use of strike action to impose standards going beyond statutory minimum standards, which could form the basis of future litigation by foreign or domestic service providers. Here we have a fundamental rights claim that certainly disturbed existing policies. Yet, rather than trump national

⁵⁵ Such a point is of course the subject of wide-ranging philosophical debate. As a starting point, see JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

⁵⁶ Michael Blauberger, *With Luxembourg in Mind . . . the Remaking of National Policies in the Face of ECJ Jurisprudence*, 19 J. EUR. PUB. POL'Y 109, 109–26 (2012).

⁵⁷ *Id.* at 113.

⁵⁸ See Jonas Malmberg, *Posting Post Laval: International and National Responses* 5 (Uppsala Ctr. for Lab. Stud., Working Paper No. 2010:5, 2010) (detailing the work of the Commissions).

solutions, ECJ jurisprudence triggered a process of adjustment, contestation, and negotiation between affected parties—one that resulted in a precarious yet workable compromise.

A similar process of contestation and adjustment can be observed at the EU level. Laval certainly caused a storm of controversy. At the same time, however, this controversy quickly prompted political reactions, both mobilizing the European trade union movement⁵⁹ and forcing official EU institutions, including the Parliament⁶⁰ and the Commission to respond.⁶¹ The Commission's response eventually prompted two pieces of draft legislation dealing with the fundamental rights of posted workers. First, a proposal for Directive "concerning the enforcement of the provision applicable to the posting of workers in the framework of the provision of services,"⁶² and a second proposal for a Regulation "on the exercise of the right to take collective action within the context of the economic freedoms of the single market."⁶³ The Commission dropped these proposals, condemned by the political left as being insufficiently ambitious, after 12 national Parliaments expressed concerns that the proposals would violate the principle of subsidiarity.⁶⁴

While at one level, this failure to agree on legislation at the European level seems to indicate the problems that human rights jurisprudence can bring, it also illustrates the machinery the EU carries to politicize, discuss, and contest fundamental rights issues. While indeed the ECJ's judgment provoked disagreement, it also provoked political bodies and movements, from civil society organizations such as the European Trade Union Confederation (ETUC), to the plenary of the European Parliament, to consider how the

⁵⁹ See EUROPEAN TRADE UNION CONFEDERATION, *ETUC Response to ECJ Judgments Viking and Laval* (Mar. 10, 2008), <http://www.etuc.org/a/4704> [hereinafter ETUC].

⁶⁰ See e.g., Exchange of Views on the Laval and Viking Rulings of the ECJ, Comm. on Emp't & Soc. Aff. (Mar. 12, 2008), <http://www.europarl.europa.eu/document/activities/cont/201005/20100527ATT75143/20100527ATT75143EN.pdf> (detailing the extensive discussions of the standing committee of the European Parliament on Employment).

⁶¹ See e.g., José Manuel Barroso, President, the European Commission, *Passion and Responsibility: Strengthening Europe in a Time of Change* (Sept. 15, 2008) (transcript available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/391>).

⁶² *Commission Proposal for a Directive of the European Parliament and of the Council on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services*, COM (2012) 131 final (Mar. 21, 2012).

⁶³ *Commission Proposal for a Council Regulation on the Exercise of the Right to Take Collective Action Within the Context of the Freedom of Establishment and the Freedom to Provide Services*, COM (2012) 130 final (Mar. 21, 2012).

⁶⁴ See Benjamin Fox, *EU Anti-Strike Rules Sink as Parliaments Wield Lisbon powers*, EU OBSERVER, Dec. 9, 2012, <http://euobserver.com/news/117523>.

balance between free movement rights and the right to strike should be drawn.⁶⁵ Far from individualizing political claims, the very framing of *Laval* as a human rights dispute served to politicize the issues involved, drawing in a wide range of stakeholders, and building a common, if messy, discussion on what remains a truly transnational problem.⁶⁶ We await the outcome of this discussion—one to which the courts will continue to contribute.

The *Laval* dispute alludes to a larger and final point to be developed. *Laval* illustrates the close links between human rights policies and civil society: While the *Laval* dispute was primarily fought in the context of official institutions, it also activated a discourse among organized and disorganized civil society groups. The use by such groups of rights discourse both challenges the critical claim of human rights as individualistic and points ahead towards the future use of human rights as facilitating transnational belonging and dialogue. The final section of the paper will also use an example to explore this claim, the relation between EU human rights policy and the fate of minorities.

E. The Governance of EU Human Rights: The Example of Anti-Discrimination and Minority Rights

The claim that human rights promote individualism has to be understood in a particular EU context, which is the significant reliance of EU law in general on individual enforcement. A large part of the EU's founding story rests on the decision of the ECJ in *Van Gend* to make individuals bearers of rights under the EU's founding Treaties.⁶⁷ In many ways, this has caused a structural bias—the tendency of the EU to advance individual claims that could unravel collective approaches to public problems.⁶⁸

This was never, however, the full story. While a perusal of the Curia database of the ECJ seems to indicate a litany of private individual claims, often the origins of these claims in fact lie in a wider web of societal interests that have gathered together to support a particular case. What appears to be individualizing may be merely the end product of a collective process of choosing political priorities that are then pursued through judicial, as well as legislative, means.

⁶⁵ ETUC, *supra* note 59.

⁶⁶ See also Press Release, Business Europe, Commission Proposals on Posting of Workers Undermines the Development of the Single Market (Mar. 21, 2012), available at <http://www.buinessurope.eu/content/default.asp?PageID=568&DocID=30033>.

⁶⁷ Case C-26/62, *Van Gend en Loos v. Nederlands Administratie der Belastingen*, 1963 E.C.R. I-1.

⁶⁸ Mark Dawson, *The Political Face of Judicial Activism: Europe's Law/Politics Imbalance*, in *JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE* 11-31 (Mark Dawson, Elise Muir & Bruno de Witte eds., 2013).

This insight has been tracked by a growing band of literature focusing on strategic litigation and the collective enforcement of European law.⁶⁹ The founding premise of this literature is that Courts have become forums for political mobilization by organized groups who seek to use legal opportunities to fulfill collective and political claims. This will often involve the selection and support of promising litigants in national jurisdictions. By bringing test cases, these litigants may encourage the resolution of rights claims before higher international Courts. The advantage of such a strategy is considerable: While a ruling by a lower Court may only provide relief to the affected individual, higher Court rulings, including from the ECJ, may carry effects across a wide jurisdiction.⁷⁰

An important example in this regard is anti-discrimination. Pioneering cases in this field such as the *Defrenne*⁷¹ judgments were brought by female activists seeking not just to protect themselves but to use the new vehicle of EU law to challenge entrenched national practices.⁷² What was once the work of lonely jurists—like the Belgian labor lawyer, Elaine Vogel-Polsky, who encouraged Gabrielle Defrenne to bring her case—has gradually evolved into something larger: Small social movements, led by larger umbrella organizations using both legal and political channels to advance equality rights. One foremost example has been the European Women's Lobby (EWL), an umbrella organization representing over 4000 grass-roots women's organization, which was first established in 1990.⁷³ The EWL is just one example of many organizations (see e.g. EAPN, the Starting Line Group, the European Roma Rights Centre and others) that have been established with the aim of protecting the disadvantaged through legal as well as political means.⁷⁴

One of the crucial aspects of this story is the use of human rights discourse as a trigger for legal and political mobilization. A useful example of this is the Race Directive, which was established in 2000 and establishes the principle of equal treatment with respect to race and ethnic origin.⁷⁵ In a recent article in the *Journal of Common Market Studies*, Rhonda

⁶⁹ See e.g., RACHEL A. CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (2007); LOVEDAY HODSON, *NGOs AND THE STRUGGLE FOR HUMAN RIGHTS IN EUROPE* (2011); Dimitrios-Panagiotis Tzakas, *Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?*, 48 *COMMON MKT. L. REV.* 1125, 1125–74 (2011).

⁷⁰ See Mark Dawson, Elise Muir & Monica Claes, *Enforcing the EU's Rights Revolution: The Case of Equality*, 3 *EUR. HUM. RTS. L. REV.* 276, 286–90 (2012).

⁷¹ Case C-80/70, *Defrenne v. Belgium*, 1971 E.C.R. I-445.

⁷² CICHOWSKI, *supra* note 69, at 171–206.

⁷³ See EUROPEAN WOMEN'S LOBBY, <http://www.womenlobby.org/> (last visited May 13, 2013).

⁷⁴ See e.g., EUROPEAN ROMA RIGHTS CENTRE, *Strategic Litigation*, <http://www.errc.org/strategic-litigation> (last visited May 13, 2013).

⁷⁵ Council Directive (EC) 2000/43 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22 [hereinafter Race Directive].

Evans Case and Terri Givens explored the decisive role that an umbrella civil society group, the Starting Line Group (SLG), played in the Directive's creation.⁷⁶ This group, established in 1991, explicitly embraced a rights-based strategy for the advancement of racial equality, targeting the establishment of an EU Directive promoting racial equality in all Member States. After successful lobbying, many of the provisions in the first Commission draft of the Directive replicated SLG proposals, such as the expansion of the directive's scope to include private employers and the demand that Member States establish specific equality bodies to monitor discrimination on the ground of race.⁷⁷

Interestingly, a core part of the SLG's strategy maintained in the final Directive was a focus on subsequent legal remedies and enforcement.⁷⁸ The directive, for example, reversed the burden of proof in racial discrimination litigation⁷⁹ and also demanded that Member States allow civil society organizations to assist individual litigants in prosecuting race discrimination claims.⁸⁰ A key element of the directive is therefore its capacity to allow civil society groups to advance strategic litigation in the Member States designed to elaborate and enforce the directive's content, thereby, in the words of this literature, establishing a *legal opportunity structure* within which such litigation is possible.⁸¹

Interestingly, the EU has itself devoted resources towards encouraging civil society groups to monitor and enforce human rights claims in this way. The European Commission has promoted strategic litigation, partially as a way of overcoming its own resource limitations in enforcing EU law effectively. In 2005, for example, it sponsored a program, SOLID: Promoting Strategic Litigation, designed to inform and create a network of civil society groups able to legally assist victims of discrimination.⁸² The Commission is also currently exploring whether to go much further, developing rights of collective redress or class action through which collective bodies could enforce EU law directly; a proposal at the moment confined to the field of economic and consumer law.⁸³

⁷⁶ Ronda Evans Case & Terri E. Givens, *Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive*, 48 J. COMMON MKT. STUD. 221, 221–41 (2010).

⁷⁷ *Id.* at 230–31.

⁷⁸ On this element of the Race Directive, see MARK BELL, *ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION* 391 (2002).

⁷⁹ See Race Directive, *supra* note 75, art. 8, at 25.

⁸⁰ See Race Directive, *supra* note 75, art. 7(2), at 25.

⁸¹ See e.g., Lisa Vanhala, *Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK*, 46 L. & SOC'Y REV. 523, 523–56 (2012).

⁸² See Case & Givens, *supra* note 76, at 236.

⁸³ *Commission Staff Working Document: Public Consultation: Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 final (Feb. 4, 2011).

The Union has also supported civil society involvement in human rights monitoring in other ways. In fields like discrimination and minority rights it has, in the words of Grainne de Burca, developed a “hybrid” structure in which legal rights are accompanied by monitoring and reporting instruments designed to investigate how EU rights are compiled.⁸⁴ To give an example from the field of minority rights protection, the Commission responded to the significant controversy in 2011 over the deportation of Roma minorities from France, by setting up a “EU Framework for Roma Integration Strategies” which combines EU level priorities and guidelines, with a process of national monitoring and reporting which also includes a platform for NGOs engaged in minority protection.⁸⁵ The platform is designed to monitor national performance, include the voice of Roma in guideline setting, and exchange national best practices.⁸⁶

These examples demand revisiting the claim that EU human rights policies carry a depoliticizing or individualizing effect. While the activities of sectional interest groups are certainly no substitute for larger democratic institutions, they are at the same time a vital ingredient in establishing a robust political process. The weaknesses of European civil society, and the inability of Europeans to politically engage outside of the national sphere, has often been cited as inhibiting the development of a more robust European polity.⁸⁷

The development by the EU of a serious human rights policy is not only a means of advancing particular fundamental values but of encouraging some of the basic institutions of transnational civil society, such as common discussions, monitoring structures, and fully developed non-governmental organizations. The interaction of civil society groups able to defend, channel and contest societal values—engaging both in legal claims and in political debates—is both an important ingredient in shifting the EU from a technocratic or market view of its own make up and an indication of the role that human rights can play in the EU’s regeneration.

⁸⁴ Grainne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 97–120 (Grainne de Búrca & Joanne Scott eds., 2006).

⁸⁵ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Framework for National Roma Integration Strategies up to 2020*, COM (2011) 173 final (Apr. 5, 2011) [hereinafter *Roma Integration Strategies*]. On the need for a governance framework to tackle minority rights abuses, see Mark Dawson & Elise Muir, *Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma*, 48 *COMMON MKT. L. REV.* 751, 751–75 (2011).

⁸⁶ *Roma Integration Strategies*, *supra* note 85, at 12.

⁸⁷ Jürgen Habermas, *Why Europe Needs a Constitution*, 11 *NEW LEFT REV.* 5, 5–26 (2001); Olivier de Schutter, *Europe in Search of its Civil Society*, 8 *EUR. L.J.* 198, 198–217 (2002). For a contrary view, see Ulrike Liebert, *The Contentious Role of Civil Society in Reconstituting Democracy in the European Union*, 28 *POL. & Soc’y* 71, 71–86 (2008).

While human rights in this sense do not of themselves bind Europeans, the structures, rules, and institutions of human rights protection can serve to protect and activate political debate. Discrimination and minority rights protection are but two examples of the substantive and institutional evolution of this debate in recent years.

F. Conclusion

The article to which I have been asked to respond, *Regeneration Europe*, is a call for the renewal of the European project along three axes: Trust, aspiration, and the regeneration of European public space. To conclude it may be useful to consider these three elements in the context of EU human rights.

According to the critical approach to EU human rights outlined in the earlier parts of this paper, present EU human rights policy fails on all three of these fronts. In terms of trust, human rights impose an individualist and self-centered paradigm that makes the idea of trust, as a common bond among citizens, redundant. In terms of aspiration, human rights in their EU formulation are the subject of irreversible disagreement such that human rights law can only ever forward the aspirations of particular national communities at the expense of others, or advance a minimal level of human rights protection that aims well below what any European could legitimately expect. In terms of public space, EU human rights law is not about constructing the public but defeating and unraveling it: Replacing publicly agreed solutions to common problems with a myriad of individual claims.

While none of these claims are entirely without foundation, a different procedural view of EU human rights is also possible. This view sees human rights law and policy as geared towards entering individuals into the political process on a fairer and more equitable basis. If measured on such scales, what were once disadvantages, i.e. the capacity of EU rights to provoke disagreement or destabilize existing policy solutions, can equally be seen as strengths, encouraging individuals and civil society groups to enter the legal and political process precisely *in order to* redefine what were once seen as given political claims.⁸⁸ Under the procedural view, what matters in measuring the success of EU human rights policy is not its ability to defend particular fundamental values alone, but its capacity to ensure that a full range of viewpoints are able to define and advance the EU's basic values. While this viewpoint certainly does not explain all of the EU's human rights policies or case law, the particularly advanced development of EU policies in fields such as document access, political participation, and antidiscrimination points to the capacity of EU human rights to play a procedural role.

⁸⁸ See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1015–1101 (2004) (detailing the value (and limits) of rights discourse in 'de-stabilizing' entrenched public policies).

A final example in this regard might be political developments in two EU Member States, Hungary and Romania.⁸⁹ Concerns over depletion of rule of law safeguards in both of these states—for the former, through a new constitution; in the latter, resulting from a battle between the Prime Minister and the President— have led to both specific action from the EU authorities, and numerous academic proposals to allow a legal basis for EU intervention where basic fundamental rights have been breached.⁹⁰ Such intervention can also be understood in the context of the arguments of this paper. While Member States are free to elaborate political and social rights through the democratic process, their very ability to do so depends on a particular baseline of democratic and procedural safeguards. Intervention by the EU in such situations—if properly justified and limited—need not be seen as a usurpation of national democracy but precisely as a means of safeguarding the underpinnings of democracy at both the national and the EU level.

Looking at EU human rights in this manner can contribute to Europe's regeneration along all three of the categories discussed in our lead article. In terms of trust, a procedural vision of human rights seeks to set out essential procedural rules and standards through which substantive conflicts can be mediated and trust between citizens built. In terms of aspiration, while EU human rights do not establish a single vision of what European integration is for, they may contribute to a common discourse over the ends of European integration that transcends individual, self-interested, or market goals. Finally, the openness of a procedural vision of human rights disagreement encourages discussion to be public, to be pursued not just in Courts, but in NGOs, parliaments, trade unions, and other public fora.

Given the present day Union's obsession with safeguarding the Economic and Monetary Union, one should be skeptical as to whether this procedural vision can be fully realized in the coming decade. The basic contours of a governance framework for EU human rights policy, from accession to the ECHR, to new agencies and networks, are in the process of being established. The ability of human rights discourse to promote a discussion about common values at the European level makes that framework, in the view of this author, at least, one that is fundamentally worth advancing.

⁸⁹ See M. Dawson & E. Muir, *Enforcing Fundamental Values: EU Law and Governance in Hungary and Romania*, 19 MAASTRICHT J. EUR. & COMP. L. 469, 469–76 (2013) (providing a summary).

⁹⁰ Press Release, European Commission, Hungary—infringements (Apr. 25, 2012), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/395&type=HTML>. See also Armin Von Bogdandy et al., *Reverse Solange—Protecting the Essence of Fundamental Rights Against EU Member States*, 49 COMMON MKT. L REV. 489, 489–519 (2012). For a more skeptical view, see J.W. Müller, *Beyond Militant Democracy?*, 73 NEW LEFT REV. 45 (2012).