Articles

Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?

By Pedro Caro de Sousa[*]

A. Introduction

It is a generally held assumption that the EU economic free movement rights[1] are tools in the creation of a European internal market; and that their main goal is the (negative) market integration of different national markets. Yet these freedoms do not determine how market integration is to proceed, or which kind of integrated European market will emerge. The resulting market may be more or less regulated, and the creation of the relevant regulatory rules may be allocated to a variety of sources. These options are reflected in the different proposed tests used to determine whether a national measure prima facie infringes one of the market freedoms.[2] The proposed tests fall into two main categories—broad tests and narrow tests—and each type has its own implications for European integration. Broad tests, usually associated with obstacle tests or even with economic due process clauses, tend to be seen as having three main outcomes. One result of broad tests is centralization, implying that ultimate decisions concerning the legitimacy of national law rests with EU institutions, and particularly with the Court of Justice of the European Union ("the Court" or "CJEU"). Another outcome of broad tests is the possible harmonization of national laws through the European political process by increasing the amount of national legislation susceptible to being harmonized under Articles 114 to 118

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[1] These are the Treaty rules concerning the free movement of goods, services, establishment, capital and workers. They are usually also known as fundamental freedoms, but I call them market or economic freedoms so as to expressly exclude from the scope of this paper European Citizenship, which deals with non-economic free movement.

[2] As has been noted elsewhere, these tests have normally been put forward from both a normative and a descriptive standpoint, assuming that they are not just normatively correct but also descriptively true. Part of what this paper attempts is to disentangle the normative justifications from the descriptive claims.

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on the Treaty on the Functioning of the European Union[3] ("TFEU").[4] A third consequence of broad tests is deregulation through the elimination of national rules creating obstacles to trade.[5] Alternatively, narrow approaches—usually associated with discrimination or typological tests—are usually coupled with regulatory pluralism via a greater degree of control of the harmonization competences of the EU, decentralization through the protection of a greater sphere of Member States' autonomy, and economic agnosticism.[6] Views on the potential outcomes of broad and narrow tests are, in turn, related to normative debates about the ideal levels of centralization, harmonization, and regulation in the internal market.

The main argument that follows is that these normative debates about the nature of the economic freedoms tend to be insular in relation to each other while also disregarding relevant institutional considerations. The goal here is not to disparage the relevance of such normative debates; it is merely to argue that, if the proponents of certain positions adopted under a specific normative framework considered the impact of their suggestions on other normative debates, while also taking into account the existence of certain institutional realities, these debates would be richer from a normative standpoint and would eventually lead to better descriptive frameworks. The first advantage of this approach is that it allows us to focus squarely on the question of what roles negative and positive integration should play in European integration[7] and to make clear that behind that question lie serious constitutional concerns about both models of integration and the allocation of competences within the EU.[8] The second advantage is that by recognizing the specific limitations of courts (particularly the CJEU) in pursuing negative integration and

[3] Consolidated Version of the Treaty on the Functioning of the European Union, Sep. 5, 2008, 2008 O.J. (C115) 47 [hereinafter TFEU].

[4] *See* Matej Avbelj, *European Court of Justice and the Question of Value Choices* 19 (N.Y.U. Law Sch. & The Jean Monnet Program, Working Paper No. 06/04, 2004).

[5] *See* ELEANOR SPAVENTA, FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 85 (2007).

[6] *See* Nicolas Bernard, *Discrimination and Free Movement in EC Law*, 45 INT'L & COMP. L.Q. 82, 102–08 (1996*); see also id.* at 85–86.

[7] Integration theories distinguish between positive and negative integration. Positive integration is where common rules are provided by a higher authority to iron out regional and other inequalities. Negative integration refers to the removal of barriers between countries. The balance between these types of integration is a question which any trade system must face. *See* JOSEPH WEILER, MUTUAL RECOGNITION, FUNCTIONAL EQUIVALENCE AND HARMONIZATION IN THE EVOLUTION OF THE EUROPEAN COMMON MARKET AND THE WTO IN *THE PRINCIPLE OF MUTUAL RECOGNITION IN THE EUROPEAN INTEGRATION PROCESS* 25 (Fiorella Kostoris & Padoa Schioppa eds., 2005); *see also* TAMARA PERISIN, FREE MOVEMENT OF GOODS AND LIMITS OF REGULATORY AUTONOMY IN THE EU AND WTO 9 (2008).

[8] MIGUEL POIARES MADURO, WE, THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 67 (1998).

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dealing with these questions, we should be better able to understand the nature and logic of judicial tests.

This paper begins with descriptions of the implications of adopting a certain test to determine whether a national measure restricts economic free movement[9] and of the mainstream normative debates concerning such a test.[10] It then analyzes how these normative debates are limited by their de-contextualization and lack of concern for institutional realities[11] and describes how the incorporation of these elements could enrich those debates.[12]

B. What Do the Market Freedoms Do?

What is the impact of adopting a specific test to determine whether a national measure infringes a market freedom? Most obviously, such a test identifies the national measures that will be subjected to a proportionality assessment by courts, particularly the CJEU, to establish whether they are justified. But this apparently simple consequence has a variety of implications for State autonomy, for the EU's competence to legislate, and for the level and kind of regulation left in the market. It is to these implications, and to their usual understanding in the literature, that this section is devoted. A framework will be developed which incorporates both these implications and the relevant literature, starting with a description of what the consequences are usually understood to be from a static perspective, and then reviewing the implications of adopting a more complex dynamic model.

I. Static Perspectives

Through the market freedoms, a large number of State actions become subject to review by the Court. This review can occur regardless of whether those national measures fall within the scope of Union legislative competences.[13] When the Court decides that a national rule falls within the scope of the market freedoms, it makes an institutional choice: the Court takes the rule away from the ordinary national legislative process and subjects it to the jurisdiction of the courts.[14] Even if a prima facie restrictive measure is

[9] *See infra* Part B.

[10] *See infra* Part C.

[11] *See infra* Part D.

[12] *See infra* Part E.

[13] *See*, *e.g.*, Case C-438/05, Int'l Transp. Workers' Fed'n and Finnish Seamen's Union v. Viking Line ABP and OU Viking Line Eesti, 2007 E.C.R. I-10779.

[14] *See* Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Centre of the GMO Case*, 41 N.Y.U. J. INT'L L. & POL. 1, 4 (2008).

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deemed to be justified, the Court will have the ultimate say about its validity, thereby centralizing the ultimate decision-making power at the EU level. This has consequences both vertically, concerning the division of regulatory competences between the Union and Member States, and horizontally, concerning the level of regulatory options left open both to Member States in non-harmonized areas and to the Union in harmonized ones.

Vertically, the market freedoms are instrumental in granting competences to the Union: the broader the concept of restriction applied, the larger the number of rules susceptible of being deemed contrary to EU law or of being harmonized under TFEU Articles 114 to 118.[15] Nonetheless, it should be noted that deciding that a national rule falls within the scope of the market freedoms does not per se lead to the replacement of national measures with EU measures, nor does the adoption of Union measures depend only on the finding that national measures present forbidden obstacles to economic free movement.[16] To begin with, the Union has a variety of legislative competences that are not related to the market freedoms or even to the internal market. But even if Article 114 TFEU was the only positive competence rule in the Treaty, allowing for re-regulation at a European level of what the market freedoms deregulated, this provision would also seem to have within its scope the power to remove obstacles to trade which do not fall under the remit of the market freedoms, such as those arising from non-restrictive discrepancies between national laws.[17] Even a perfect correspondence between the provisions on negative and positive integration would not automatically lead to harmonization, as the Union's political process must intervene and Article 5 TFEU requires that a harmonizing measure must respect both proportionality and subsidiarity. Whatever similarities between the scope of market freedoms (i.e., the potential for centralization) and the extension of Union competences under Article 114 TFEU (i.e., the potential for harmonization) seem to result from both the absence of ex ante restraints by Member States and EU institutions in adopting harmonized rules and from the Court's timid approach to reviewing Union legislation under the principles of proportionality and subsidiarity set forth in Article 5(3) of the Treaty on European Union ("TEU")[18] ex post.[19] The scope of the market freedoms is

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[15] *See* Avbelj, *supra* note 4, at 19. Evidence that litigation and negative integration led to an increase in EU legislation, presumably to replace regulatory holes left in the Member States by the negative integration that preceded it, has been empirically observed. *See* Alec Stone Sweet & Neil Fligstein, *Institutionalizing the Treaty of Rome*, *in* THE INSTITUTIONALIZATION OF EUROPE 45–53 (Alec Stone Sweet et al. eds., 2001).

[16] *See* Loïc Azoulai, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization*, 45 COMMON MKT. L. REV. 1335, 1341 (2008); *see also* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494–502 (2008).

[17] *See* Gareth Davies, *Can Selling Arrangements Be Harmonised?*, 30 E.L. REV. 370, 375–78 (2005). This is also apparent from Case C-380/03, Germany v. Parliament, 2006 E.C.R. I-11573 [hereinafter *Tobacco Advertising II*].

[18] Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C83) 1.

[19] *See* Stephen Weatherill, *Better Competence Monitoring*, 30 E.L. REV 23, 25–28 (2005); *see also* PERISIN, *supra* note 7, at 91-108. *See also* Case C-376/98, Germany v. Parliament, 2000 E.C.R. I-8419 [hereinafter *Tobacco*

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instrumental to the vertical allocation of competences because a finding that a national measure is restrictive is a sufficient, but not necessary, trigger for harmonization. Nevertheless, centralization and harmonization—in particular, the impact of the scope of the market freedoms on Union competences and on any increased recourse to Article 114 TFEU—must be distinguished, even if the Union's legislative competence is triggered each time a measure is deemed restrictive.[20]

Horizontally, the market freedoms set substantive limits on the exercise of legislative powers, at both the national and the Union levels.[21] At the national level, when a measure is caught within the scope of the market freedoms, the ultimate decision as to its legitimacy falls to the Court, which may, by means of a proportionality test, determine whether the manner by which the measure protects a legitimate State interest is acceptable. Furthermore, in certain cases—namely those concerning justifications not provided for by the Treaties—the Court may even determine what public interests a State may legitimately pursue. The result is that a Member State loses part of its autonomy to legislate, and Member States other than the one subject to the Court's decisions that have similar measures in place will find themselves under the "shadow of the law" and under pressure to amend their out-of-step rules in accordance with the Court's case law.[22]

In short, when determining the scope of the market freedoms and the legitimate justifications to their restrictions, the Court's decisions have two major types of

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Advertising I], Case C-491/01, The Queen v. Sec'y of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, 2002 E.C.R. I-11543 [hereinafter *British American Tobacco*]; Case C-210/03 The Queen v. Sec'y of State for Health, ex parte Swedish Match, 2004 E.C.R. I-11893 [hereinafter *Swedish Match*]; *Tobacco Advertising II*; Case C-58/08 Vodafone Ltd and Others v. Sec'y of State for Business, Enterprise, and Regulatory Reform, 2010 E.C.R. I-04999 [hereinafter *Vodafone*].

[20] This explains why there is no equivalence between a test where a market freedom would have a vast scope and be subject to light review at the justification stage, and a test imposing a stricter scope for the market freedoms but applying a stricter review at justification stage, even when the final decision of the cases by the Court would be the same.

[21] *See* Michael Schillig, *The Interpretation of European Private Law in the Light of Market Freedoms and EU Fundamental Rights*, 15 MAASTRICHT J. EUR. AND COMP. L. 285, 296–97 (2008). In practice, Union legislation is seldom reviewed—and even more seldom invalidated—under the market freedoms. *See* Joined Cases 80 and 81/77, Commissionnaires Réunis v. Receveur des douanes, 1978 E.C.R. 927; Case 41/84, Pinna v. Caisse d' Allocations Familiales de la Savoie, 1986 E.C.R. 1 [hereinafter *Pinna*]; Case 20/85 Roviello v. Landesversicherungsanstalt Schwaben, 1988 E.C.R. 2805 [hereinafter *Roviello*]; Piet Eeckhout, *The European Court of Law and the Legislature*, 18 Y.B. EUR. L. 1, 12–14 (1998). Nonetheless, Union legislation can be indirectly reviewed by the Court assessing whether a national measure compliant with Union legislation still infringes upon the fundamental Treaty provisions. *See* Case C-208/07, Petra von Chamier-Glisczinski v. Deutsche Angestellten-Krankenkasse, 2009 E.C.R. I-06095 [hereinafter *Chamier-Glisczinski*].

[22] *See* Alec Stone Sweet & James Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration*, *in* EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE 128 (Wayne Sandholtz & Alec Stone Sweet eds., 1998).

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implications. From a vertical perspective, the market freedoms act as positive competence rules, with the Court being instrumental in the allocation of competences between the Union and the Member States. From a horizontal perspective, the market freedoms operate as negative competence rules: What matters is not the allocation of competences within the EU and the States, but the scope of EU law itself, and here the Court's role looms even larger as it becomes the ultimate decider of what regulatory options are available within the Union. From the interplay of vertical and horizontal outcomes arises the functional consequence that the market freedoms have inherently deregulatory effects, since the Court can only strike down legislative measures but cannot legislate itself. In other words, the greater the degree of centralization, the greater the prospect of deregulation of national markets becomes. On the other hand, this also creates a possibility for the EU political process to step in, so that the prospect of re-regulation at the EU level also increases. This re-regulation, however, will be different from national regulation, inasmuch as the participants in the regulatory process are more numerous and diverse, including previous market outsiders, leading to a potential change in regulatory goals and methods.[23]

II. A Dynamic Perspective

The recent importation of American teachings on economic federalism concerning "regulatory competition" created an opportunity to analyze the impact of the market freedoms through a dynamic perspective that accounts for the existence of the internal market itself and for the possibility of the free movement of economic agents between jurisdictions.[24]

Regulatory competition depends on federal or quasi-federal entities creating and enforcing exit and entry rights for products and production factors without interfering with the regulatory autonomy of States, so that regulators are able to react to competition in the market for legal rules. In the EU, the market freedoms create the conditions for the existence of regulatory competition, namely by making available comparative information and creating the ability for economic agents to both exert their voices and exit within different jurisdictions. This allows consumers to show their preferences in products and services (voting with their wallets), businesses to relocate to more favorable environments (voting with their feet), and private agents to vote or lobby their public authorities for

[23] This might paradoxically lead to greater formal regulation, since as the social distance and distrust between regulators and regulated actors in liberalized markets increases, laws and regulatory processes tend to become more formal, transparent, and legalistic. *See* DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION 23 (2011).

[24] This theory originates from Charles Tiebout, *A Pure Theory of Local Expenditures* 64 J. POL. ECON. 416 (1956). *See* Simon Deakin, *Reflexive Governance and European Company Law*, 15 EUR. L.J. 224, 231 (2009) (arguing that this pure theory is too abstract even for the U.S. reality).

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different rules (voicing their concerns). In turn, this forces different rule-making entities to compete in a market for legal rules, which may theoretically lead to a convergence of standards.[25] Some argue that this convergence results in a race-to-the-bottom in regulation—effectively, deregulation—while others argue that it leads to optimal levels of regulation.[26]

The dynamic perspective adds to the static perspective in a variety of ways. It points to the fact that the market freedoms change the incentives of market and political agents within Member States, and thus affect State autonomy in ways unforeseen from a static perspective. It demonstrates that a dynamic process of regulatory competition may lead to the creation of common rules throughout the internal market, which do not come down from European institutions at the top, but arise instead from the bottom up, as a result of competitive pressures in the market for legal rules that lead to (a different kind of) harmonization of national rules. Additionally, it focuses on the fact that, even if the adopted tests seek to protect existent levels of regulation put in place by States, deregulation may still emerge as a consequence of economic agents searching for the least onerous regulatory regime, and subsequent race-to-the-bottom.

C. What Ought the Market Freedoms to Be Doing?

The above review of the practical implications of the market freedoms allows us to map out three different ways to approach them from a normative perspective—concerning, respectively, the desirability of centralization, deregulation and harmonization.

First, one can focus on the impact of the market freedoms on centralization at the EU level and on State autonomy at the national level. From this perspective, normative positions vary in a continuum between defending extreme centralization of ultimate regulatory competences with EU bodies, and particularly the CJEU,[27] proponents of which will usually

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[25] *See* Jeanne-Mey Sun & Jacques Pelkmans, *Regulatory Competition in the Single Market*, 33 J. COMMON MARKET STUDS. 67, 69–77 (1995); Catherine Barnard & Simon Deakin, *Market Access and Regulatory Competition* (N.Y.U. Law School and The Jean Monnet Working Program, Working Paper No. 9/01, 2-4, 2001). On the origin of these concepts, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[26] This is an empirically debatable question, particularly in the EU context. *See, e.g.*, Fritz Wilhelm Scharpf, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 86–101 (1999); Catherine Barnard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?*, 25 EUR. L. REV. 57 (2000).

[27] *See* Laurence W. Gormley, *Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods*, 9 Y.B. EUR. L. 197 (1989); Anthony Arnull, *What Shall We Do on a Sunday?*, 16 EUR. L. REV. 112 (1991); Wouter Wils, *The Search for a Rule in Article 30 EEC: Much Ado About Nothing?*, 18 EUR.L. REV. 475 (1993).

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favor a broad approach, and arguing for decentralization and the maximization of State autonomy, which will usually lean towards a narrow test.[28]

Secondly, one can look into the deregulatory effects of the market freedoms, with the normative positions varying from defending the market freedoms as neo-liberal tools protecting the unencumbered pursuit of economic activity by eliminating unjustified rules at the national level, which would point towards a very broad test, or seeing them merely as a means to remove obstacles to inter-State trade and protectionist measures that are otherwise economically agnostic, a position traditionally associated with a narrower test.[29]

A third perspective, which seems to have replaced the second debate in the literature, concerns the balancing of the virtues of regulatory competition when compared to harmonization.[30] One side of the argument is that regulatory pluralism is more desirable than centralized regulations, because centralized regulations are more distant from regulated entities, tend to reduce opportunities for meaningful political participation, are more subject to capture by particular groups, imply severe procedural costs inherent to implementing common rules in a large, heterogeneous space, and pre-empt regulatory competition in the areas in which they are adopted.[31] Regulatory pluralism is said to allow the content of rules to be matched more effectively to the preferences of citizens by taking into account local specificities, and to promote diversity and innovation in legal solutions, flows of information on effective law-making, and competition between legal orders.[32] Against this it is argued that regulatory competition can be sub-optimal, not only because of the risks of a race-to-the-bottom and concomitant deregulation, but also because it can lead to market failures being left unattended.[33] Furthermore, since governments regulate

[28] *See* Gustavo Marenco, *Pour une Interprétation Traditionelle de la Notion de Mesure d'Effet Equivalent à une Restriction Quantitative*, 20 CAHIERS DE DROIT EUROPÉEN 291 (1984); Bernard, *supra* note 6. It should be noted that this perspective also overlaps with debates on the value of judicial review as opposed to legislative autonomy. I thank Damian Chalmers for his comments on this point.

[29] A question first faced by the Court in Advocate General Tesauro's Opinion in Case C-292/92, Hünermund v. Landesapothekerkammer, 1993 E.C.R. I-6787 [hereinafter *Hünermund*]. On broad tests leading to deregulation, see SPAVENTA, *supra* note 5. On the debate, see WOLF SAUTER & HARM SCHEPEL, STATE AND MARKET IN EUROPEAN UNION LAW: THE PUBLIC AND PRIVATE SPHERES OF THE INTERNAL MARKET BEFORE THE EU COURTS 4–15 (2009).

[30] Following the express disavowal of ordoliberal views advocating deregulation and economic freedoms as normative goals of the market freedoms in Advocate General Tesauro's Opinion in *Hünermund* and by the Court in Joined Cases C-267/91 and 268/91, Criminal Proceedings Against Keck and Mithouard, 1993 E.C.R. I-6097 [hereinafter *Keck*].

[31] *See* GIANDOMENICO MAJONE, DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH 145 (2005); JUKKA SNELL, GOODS AND SERVICES IN EC LAW: A STUDY OF THE RELATIONSHIP BETWEEN THE FREEDOMS 38–40 (2002).

[32] Although some authors have pointed to discrepancies between economic models and empirical results, see Sun and Pelkmans, *supra* note 25, at 83–85.

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a number of economic activities not handled satisfactorily by competitive markets in the first place, it has been argued that regulatory competition may lead to the re-emergence of market failures that were previously solved by corrective regulation at national level.[34] Normative arguments for harmonized rules emanating from the EU institutions tend to be based not only on these arguments, but further hold that harmonization is useful as a means of reducing transaction costs and better-placed to deal with natural monopolies, systemic risks, and regulatory drift.[35]

One can thereby, for heuristic purposes, develop a taxonomy of the mainstream debates on the scope of the market freedoms as concerning themselves with the balancing of centralization versus decentralization, deregulation versus economic agnosticism, and harmonization versus regulatory pluralism. These debates about the ideal form of negative integration are, in turn, part of wider debates about the more general goals and ideal models of European integration. For simplification and exposition purposes, this paper will have recourse to a taxonomy of three different models of integration which have been identified in the literature, each carrying its own implications as to the preferred ideology of European integration and institutional allocation of competences:[36] (1) A centralized constitutional model, essentially concerned with the allocation of competences within the EU, which reacts to the perceived deregulation at the national level by defending centralized positive integration; (2) a competitive constitutional model defending the constitutionalization of negative integration as a means of limiting unnecessary regulation of the market and thereby of protecting economic liberty by leaving the market to its own self-regulatory devices; and (3) a decentralized constitutional model that sees the legitimacy of EU law as deriving from States and thus defends the notion that the regulatory autonomy of States should be maximized by limiting the scope of EU integration and minimizing the impact of EU law in national systems.

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[33] These can traditionally be distinguished among externalities, market power, and asymmetric information. *See* JOHN KAY & JOHN VICKERS, REGULATORY REFORM: AN APPRAISAL IN DEREGULATION OR RE-REGULATION, 225–30 (Giandomenico Majone ed., 1990); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE, 47–73 (1990); ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 30–46 (2004); Andrew Johnston & Phil Syrpis, *Regulatory Competition in European Company Law After* Cartesio, 34 EUR. L. REV. 378, 392 (2009).

[34] Hans-Werner Sinn, *The Selection Principle and Market Failure in Systems Competition*, 66 J. PUB. ECON. 247 (1997).

[35] Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?* 12 EUR. L.J. 440, 441–43 (2006); Neil Fligstein & Alec Stone Sweet, *Constructing Polities and Markets: An Institutionalist Account of European Integration*, 107 AM. J. SOC. 1206, 1312 (2002).

[36] MADURO, *supra* note 8, at 108–49. *See also* Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in International Goods and Services*, 2 J. INT'L ECON. L. 49 (1999) (distinguishing between models advancing regulatory harmonization, mutual recognition and policed de-centralization in international economic law); Armin von Bogdandy, *Legitimacy of International Economic Governance*, *in* INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS (Stefan Griller ed., 2003) (identifying a federal model, a coordinated interdependence model, and a liberal model).

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These overarching heuristic models incorporate views on the ideal extent of both positive and negative integration. When dealing with the latter, they tend to be connected to a specific understanding of what the concept of restriction should be and what it should achieve. The centralized constitutional model allows for political and economic stability by defusing horizontal friction between Member States through the creation of mechanisms for the peaceful resolution of disputes and the creation of centralized, harmonized rules.[37] It will tend to side with broad tests, which catch as many national rules as possible and imply that the ultimate decision as to the legitimacy of an increased number of national laws rests on the EU, particularly with the Court, and that the area where EU harmonization is possible increases proportionally.[38] The de-centralized constitutional model favors the maintenance of Member States' autonomy, arguing that this would be the best approach to co-ordinate national systems by allowing for regulatory pluralism. From this perspective, only protectionist rules should be removed, and the Court's tests should be economically agnostic and focus on ensuring that products from other Member States are able to compete on truly equal terms with domestic products. This would point towards a more decentralized system where Member States' competences are preserved and the quest for regulatory uniformity through European courts and institutions is abandoned.[39] This model thus sides with a narrow anti-protectionist test, on the grounds that it would prevent the Court from adopting decisions under a proportionality test which are best left for national legislatures, while reducing the positive competences of the Union to override the choices of those same legislatures. Lastly, the competitive constitutional model is subject to a sub-distinction as to whether it favors competition at the national or at the EU level.[40] The former model advocates deregulation of national markets and accordingly tends to be associated with broad tests through which the basic tenets of ordoliberalism—increasing individual autonomy, controlling abuses of government, and maximizing economic welfare—can be enforced by courts through the elimination of unnecessary national regulation.[41] The latter model favors regulatory competition and will tend to prefer a narrow test that protects regulatory pluralism,

[37] Erbsen, *supra* note 16, at 534–72.

[38] Avbelj, *supra* note 4, at 19.

[39] Bernard, *supra* note 6, at 102–08.

[40] This version of the model is not developed by Maduro, but I add it here because it helps fill what I perceive to be a gap in his taxonomy, which seems to result from an assumption that regulatory competition will lead to a race-to-the-bottom and thereby equates it with deregulation.

[41] *See* SPAVENTA, *supra* note 5, at 85. On the influence of ordoliberals at the inception of the European project, see Miguel Poiares Maduro, *Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights*, 3 EUR. L.J. 55, 55–56 (1997); David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25 (1994).

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similarly to the decentralized model, but only as long as it ensures that free movement, and the conditions for the creation of regulatory competition is possible.[42]

D. Towards a Contextualized Perspective

This section critically analyzes the traditional understandings of the implications of the market freedoms reviewed in Part A and their influence on the normative positions reviewed in Part B. It begins with a critical review of the static and dynamic models presented above, followed by an attempt to deconstruct how the different normative models of European integration interact with the judicial formulas developed to identify national measures that restrict free movement.

I. Refining Our Understanding of the Impact of the Market Freedoms

The above analysis of the impact of the market freedoms from both static and dynamic perspectives offers important insights. In particular, the static perspective allows us to understand that choices concerning the concept of restriction will be relevant in determining the level of centralization of powers at the EU level and the deregulatory impact of the market freedoms in national markets. The dynamic perspective, in turn, points to the impact of the market freedoms in the development of common European standards and illustrates the parameters of the choice between harmonization and regulatory competition.

Nonetheless, these perspectives seem to be somewhat lacking. From a static perspective, we have seen above that the market freedoms may be seen as deregulatory because the Court can strike down but not create regulations *ex novo*; but they may also be looked at as favoring harmonized regulation, whereby the market freedoms effectively become re-regulatory instruments. If there are good reasons behind arguments for the market freedoms being both deregulatory and re-regulatory devices, the prevailing element seems to be the result of specific institutional realities. When the Court replaces the parameters of acceptability of a certain regulatory scheme, this will have a deregulatory effect if the different options for re-regulation at both the national and EU level are blocked, as occurred commonly prior to the adoption of the Single European Act.[43] If this is not the case and the re-regulatory channels are open, the preponderant effects of a prima facie deregulatory decision may well be re-regulatory.

What is more, a closer look at the way the market freedoms operate demonstrates that the market freedoms need not be deregulatory at all even if the channels for re-regulation

[42] *See* Bernard, *supra* note 6, at 102–08; SPAVENTA, *supra* note 5, at 85–86. *But see* MADURO, *supra* note 8, at 109 (arguing that it tends towards a broad test).

[43] Single European Act, Feb. 17, 1986, 1987 O.J. (L169) 1, 25 I.L.M. 506.

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are closed. It was in such a context where the mechanisms of re-regulation were foreclosed that the Court first developed a tool for changing the criteria for acceptability of regulation in Member States without deregulating national markets: mutual recognition. The concept of mutual recognition was first adopted in the *Cassis de Dijon* case, where a national measure prohibiting the importation of "Cassis de Dijon" liqueur from France into Germany, on the grounds that it had an alcoholic content less than the minimum allowed for the marketing of alcoholic beverages in Germany, was deemed restrictive.[44] The Court held that disparities between national laws concerning a product's technical standards were contrary to the free movement of goods because they could hinder trade between Member States, and that the host-State should recognize the technical standards set by the home-State unless the host-State's rules were justified.[45] On the one hand, this extended the concept of restriction to encompass disparities in national laws concerning products' technical requirements, a vast extension on the scope of that concept as understood until then, but in a way that did not lead so much to deregulation as to the transfer of regulatory authority from one jurisdiction to another. As stated by Nicolaïdis:

> If a professional can operate, a product be sold or a service provided lawfully in one jurisdiction, they can operate, be sold or provided in any other participating jurisdiction, without having to comply with the regulations of those other jurisdictions. The "recognition" involved here is the "equivalence," "compatibility" or at least "acceptability" of the counterpart's regulatory system; the "mutual" part indicates that the reallocation of authority is reciprocal and simultaneous.[46]

In the context of the internal market, the principle of mutual recognition typically means that an economic agent is only subject to the rules of its home State, even when in a host State, and is thereby freed from the onus of complying with two or more sets of rules.[47] Underlying this is the idea that if the standards of different Member States are functionally equivalent, there is no good reason to exclude products coming from another State. By mandating that standards of a home-State be accepted as functionally equivalent to its

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[44] *See* Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 [hereinafter *Cassis de Dijon*].

[45] *See id.* at para. 8.

[46] *See* Kalypso Nicolaïdis, *Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals*, *in* THE PRINCIPLE OF MUTUAL RECOGNITION IN THE EUROPEAN INTEGRATION PROCESS 133 (Fiorella Kostoris & Padoa Schioppa eds., 2005).

[47] *See* DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW 764 (2010).

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own by a host-State, the Court replaced the deregulatory effects of the freedoms with the imposition of different regulatory standards coexisting in the market of each State depending on the origin of the products marketed there.[48]

In other words, whatever simple equivalence one may find between the scope of judicial tests and deregulatory or re-regulatory effects will tend to be the result of ignoring the relevant institutional context. Looking at the application of the market freedoms by the Court and seeing judicially mandated deregulation of national markets as a tool for increased EU-dictated harmonization would not, strictly speaking, be wrong, but by overlooking the diverse consequences of negative integration and the complex mechanisms and triggers of positive integration, it would grossly misunderstand the case law's true effects.[49] The Court's role may be better described as overruling Member States' value choices for its own and creating a framework for re-regulation than leading to either deregulation or re-regulation per se.[50]

The dynamic model is obviously more sophisticated, inasmuch as it takes the existence of a federal or quasi-federal system as a relevant consideration in attempting to identify the effects unleashed by the market freedoms. However, it is still insufficiently contextualized, taking as a given the existence of an ideal federal system without looking into the specific characteristics of the EU. Any complex market system effectively requires the establishment of a system of rules that ensures at least a minimum degree of order and security, allowing for the enforcement of market arrangements. Rules promote and facilitate certain kinds of exchange, but may also raise costs or prevent other types of exchange.[51] As Deakin stated:

> All markets rest on institutional foundations. These "rules of the game" are not solely concerned with protecting existing markets, by enforcing contracts and penalizing collusion. At a more basic level, they constitute markets by defining the elements of

[48] *See* Kalypso Nicolaïdis, *Mutual Recognition of Regulatory Regimes* 2–14 (Jean Monnet Working Papers, 1997). Even if it may, occasionally, lead to harmonization through regulatory competition, see Miguel Poiares Maduro, *So Close and Yet So Far: The Paradoxes of Mutual Recognition*, 14 J. EUR. PUB. POL'Y 814 (2007).

[49] On similar terms concerning international economic laws, see Alan O. Sykes, *Regulatory Competition or Regulatory Harmonization? A Silly Question?*, 3 J. INT'L ECON. L. 257 (2000).

[50] Stephen Weatherill, *Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation*, 36 COMMON MKT. L. REV. 51 (1999).

[51] DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 47 (1990). In effect, most systems require much more than this. *See* OGUS, *supra* note 33, at 16–28. On the other hand, in an ideal neoclassical world without information costs, rules would be largely irrelevant, as per the Coase Theorem.

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> exchange, and in so doing inevitably frame the process of competition. The market for laws is no different.[52]

In particular, "pure" regulatory competition requires that all relevant products and production factors be equally mobile—or at least be able to credibly threaten to move—to a State which better meets their preferences, and that market failures be aptly dealt with.[53] This ideal framework does not actually occur in practice; since ideal parameters are almost never met, they cannot be assumed but must be assessed in each particular case.[54] Optimal results, even if their content could be agreed upon under ideal conditions, would not be reached in the real world.[55] The abstract model of regulatory competition is a heuristically useful device, but idealized abstract models, even in their more complex, dynamic versions, necessarily fail to identify some relevant characteristics of the institutional framework. For example, traditional regulatory competition debates focus on whether decentralization, ensuring regulatory heterogeneity, and protecting local peculiarities are preferable to centralization through judicial or legislative balancing. But should a market failure (re-)emerge in the EU by means of regulatory competition, it could be dealt with not only through harmonization, but also by ensuring that national standards of protection are equivalent through mutual recognition. Mutual recognition not only created the conditions for wider regulatory competition in the EU, but also set forth mechanisms to prevent the re-emergence of the market failures that national measures were dealing with in the first place.[56] Also, it is generally accepted that labor is far less mobile than capital in the EU, which would seem to indicate that centralized action might be required in this field because the requirements for the proper functioning of the market for rules on the free movement of workers are not met.[57]

II. Contextualizing Normative Debates

The taxonomy presented above of "ideal" models of European integration also constitutes a useful heuristic device that identifies different visions present in EU integration.

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[52] Deakin, *supra* note 35, at 440; *see also* Neil Fligstein, *Markets as Politics*, 61 AM. SOC. REV. 656, 658 (1996).

[53] *See* Deakin, *supra* note 35, at 442 (pointing out that Tiebout's work was an application of theories of general equilibrium typical at the time, where ideal conditions were assumed and institutional considerations ignored).

[54] Joel Trachtman, *Regulatory Competition and Regulatory Jurisdiction*, 3 J. INT'L ECON. L. 331, 332 (2000).

[55] On particular rules defining and limiting regulatory competition in the EU, see MADURO, *supra* note 8, at 133–35.

[56] *See* Deakin, *supra* note 35, at 452; *see also* Jacques Pelkmans, *Mutual Recognition in Goods and Services: An Economic Perspective, in* THE PRINCIPLE OF MUTUAL RECOGNITION IN THE EUROPEAN INTEGRATION PROCESS 92, 115 (Fiorella Kostoris & Padoa Schioppa eds., 2005).

[57] Johnston & Syrpis, *supra* note 33, at 392. For a general criticism of adopting any ideal measure for the EU as being based on unreal assumptions, see OGUS, *supra* note 33, at 100–01.

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Simultaneously, we should acknowledge that, on its own, each model can be criticized as descriptively inapt, inasmuch as each fails to take into account some realities of EU integration, in particular those present in the other models.[58] The centralized constitutional model disregards that the Treaties merely provide the Union with a limited set of competences. The competitive constitutional model in its ordoliberal version ignores the fact that the Union does not have a strictly deregulatory bent, which is made clear by the existence of derogations to the Treaty freedoms and of harmonization competences attributed to the Union. In its regulatory competition guise, in turn, it fails to recognize both the relevance of the political goals of the Union beyond efficiency or market integration and the role of centralized rules in both creating the possibility of regulatory competition and remedying its defects. Finally, the de-centralized constitutional model sees the Treaties and the EU as little more than free-trade agreements, which is given the lie not only by the extent of Union's competences, but also by political developments, particularly since the Single European Act and the Maastricht Treaty[59].

Naturally, the descriptive limitations of these "ideal" models are at least partially the result of their purity. On its own, each normative "ideal" may still be valid and attractive. But we must question how helpful they may be in helping us find the normative underpinnings of market freedoms developed and applied in the real world. To begin with, while these models partially overlap, inasmuch as they agree on the desirability of some sort of European integration, they answer different questions concerning the nature of European positive and negative integration. This can be exemplified by bringing together these models with the different normative debates identified above concerning the scope of the market freedoms. The centralized constitutional model takes a position on the harmonization versus regulatory pluralism debate in favor of harmonization, and on the centralization versus decentralization debate in favor of centralization, but none on the deregulation versus economic agnosticism debate. The competitive constitutional model in its "ordoliberal" mode takes a position on the deregulation versus economic agnosticism debate in favor of deregulation, and on the centralization versus decentralization debate in favor of centralization, but none on the question of harmonization versus regulatory pluralism. In its "regulatory competition" variant, this model takes a position on the harmonization versus regulatory pluralism debate with a presumption in favor of pluralism, and on the centralization versus decentralization with a presumption in favor of decentralization, but does not take any express position on the deregulation versus economic agnosticism debate. Lastly, the de-centralized constitutional model takes a position on the deregulation versus economic agnosticism debate in favor of economic

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[58] MADURO, *supra* note 8, at 109.

[59] Treaty on European Union (EU), Feb. 7 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253.

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agnosticism, and on the centralization versus decentralization debate in favor of decentralization, but on the harmonization versus regulatory pluralism, while it is arguable that it would favor regulatory pluralism,[60] it seems completely oblivious to the question of how regulatory competition may impact the relevant choice.

This partially overlapping pattern reflects the fact that, like the "ideal" models of European integration, the normative debates about the scope of the market freedoms—centralization versus decentralization, deregulation versus economic agnosticism, and harmonization versus regulatory pluralism—themselves overlap partially but are effectively autonomous. They are heuristic simplifications of a much more complex reality, developed to try to make sense of specific questions raised during the process of European integration that reflect the different cognitive frameworks available to those looking into those questions at the time.[61] This shows that the main problem of trying to find a single normative underpinning for the various tests proposed by the Court is that these tests are effectively no more than crude types of shorthand allowing courts and lawyers to pursue their activity, while carrying with them a multiplicity of possibly conflicting meanings and normative concerns.[62] To illustrate this, remember that broad tests are usually related to centralization, harmonization, and deregulation; while narrow tests, on the other hand, are associated with State autonomy, regulatory pluralism, and economical agnosticism. Concerning the ideal models of European integration, we have also pointed out that the centralized constitutional model can and is usually connected with broad tests; the de-centralized constitutional model tends to be associated with narrow tests; and the competitive constitutional model does not necessarily favor either a broad or a narrow test, even if its ordoliberal version was traditionally associated with broad tests, while its regulatory pluralistic version was associated with narrow, economically agnostic tests. In short, this means that tests are adopted as reflections of specific positions in each of the centralization versus decentralization, harmonization versus regulatory pluralism, and deregulation versus economic agnosticism debates; and they are usually also used as projections of a certain "ideal" model of European integration. However, as we have seen, these debates are autonomous, and they only partially match the "ideal" models of

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[60] This seems to be because this model expressly defends the maintenance of the maximum State autonomy possible, and the different normative debates focus precisely on the impact of negative integration on State autonomy.

[61] On the concept of cognitive frameworks as interpretive systems through which individuals process information and make sense of their experiences, see KARL E. WEICK, MAKING SENSE OF THE ORGANIZATION (2001). For a review of current research on this topic, see Judith A. Howard & Daniel G. Renfrow, *Social Cognition*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 262–69 (John Delamater ed., 2006).

[62] This is related to the indeterminacy of any concept. As remarked by Joseph Raz, explanations such as normative theories may strive to replicate the indeterminacies of the concepts they explain, but it is almost impossible to achieve a perfect replication. *See* Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003 (2006).

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European integration. The result is that tests carry different, sometimes conflicting, normative concerns.

This mix of normative foundations is further complicated by the fact that the institutional context matters for the normative connotations of each test. Should the context change, someone's position concerning the relevant test could change as well, even if the underlying normative position did not. For example, broad limits to national regulation can be argued in favor of either a nationally deregulated or a European re-regulated market. This means that some supporters of deregulation would support broad tests because they saw them as leading to the advancement of economic liberalization, while those same tests could also be defended by someone who would favor them as a means to centralization—say, as a proponent of a unified European State—but did not care particularly about the level of regulation in the internal market. Ordoliberals and proponents of a centralized European State could find common ground when most or all regulation was produced at State level and the EU's political process was blocked. But when Treaty amendments resuscitated the EU's political process and started propounding a European social model, leading to an increase in EU legislation, ordoliberals might have found that deregulatory approaches could be more successfully pursued at the national level and started to support a restrictive reading of the market freedoms, while centralizers would have suddenly found themselves in the company of proponents of a well-regulated market in supporting a broad test.

This shows that debates on judicially activity are related to, and influenced by, the overall context in which the Court operates. This can be seen, for example, in the change from a deregulation-based to a regulatory, competition-based debate. With the Single European Act and the Maastricht Treaty, the channels for re-regulation at EU level were facilitated, and a multiplicity of EU legislation started being produced; furthermore, the Court itself explicitly disavowed that the market freedoms had a purely deregulatory purpose in *Keck and Mithouard*.[63] Since a broad test was suddenly no longer susceptible to being expressly used as an ordoliberal tool while also becoming much more susceptible to creating EU-wide rules, the regulation versus deregulation debate changed into focusing on whether harmonized rules should be adopted or not, and in particular on whether regulatory competition—with its potential deregulatory effect—or EU-wide harmonization were to be preferred.[64]

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[63] *See Keck*, 1993 E.C.R. I-6097; Case C-276/91, Comm'n v. French Republic, 1993 E.C.R. I-4413 n.30, paras. 13–17.

[64] This would explain the recent dearth of normative arguments for using the market freedoms as de-regulatory tools compared to the pre-Maastricht era. *See, e.g.*, Manfred Streit & Werner Mussler, *The Economic Constitution of the European Community*, 1 EUR. L.J. 5 (1995). On the impact of *Keck*, see Case C-292/92, Hünermund v. Landesapothekerkammer Baden-Wurttemberg, 1993 E.C.R. I-6787 n.29 (Advocate General Tesauro's Opinion); *infra* notes 108–11.

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Specific approaches thus seem to be sustained by a coalition of persons and agents with different normative agendas coalescing around a test in a specific context. Underlying each normative concern is a theory—on protecting international trade, on the constitutional division of competences in the EU, or on the appropriate level of regulation in the market—that is a heuristic simplification of reality requiring transposition into legal criteria through the judicial interpretation and application of rules. Different normative goals will tend to be compatible in certain settings, and will give rise to coalitions of proponents for a common approach even though those proponents have disparate normative concerns, but the world may change, and it might be found that apparently compatible goals are in fact contradictory after all. In other words, the same test can be used to defend completely different, usually unrelated, and sometimes contradictory normative concerns. Defending a specific normative position in terms of the test to be adopted by the Court ignores the limitations of a specific formula in encapsulating a whole normative theory. More importantly, it also prevents a reflection on how multiple normative concerns interact in practice, leading to a misunderstanding of the case law, inasmuch as it ignores other relevant historical and institutional settings under which a decision was adopted by focusing on the supposed economic or ideological factors found in the case law.

E. Towards a Context-Sensitive Concept of Restriction?

This section contextualizes the normative debate on the concept of restriction of free movement by placing that debate within a specific institutional environment. It will not suggest what that concept should be, nor will it try to sketch a full picture of how a contextualized approach might look, which would require a full-fledged book. It will merely try to demonstrate that adding some institutional considerations to the picture helps make sense of the overall normative debate, and actually enriches it.[65] I do not propose to provide a comprehensive list of relevant institutional constraints, but merely an illustration of the insights that can be provided by taking some oft hem into account. For definitional purposes, institutional constraints are those constraints in a certain time and space arising from the existence of:[66]

• Rule-systems, or institutions per se. These include formal rules, such as constitutions, statutes, common law, regulations and even contracts; but they also include informal rules, such as: "(1) extensions, elaborations and

[65] In using the concept of institutional consideration, I follow Howard B. Kaplan, who argues that the measure of a concept is not its truth, but its usefulness in relating data to each other and in orienting the researcher to profitable modes of gathering and organizing the data. *See* Howard B. Kaplan*, The Concept of Institution: A Review, Evaluation, and Suggested Research Procedure*, 29 SOC. FORCES 176 (1960).

[66] I here follow the systematization developed by Sweet, Sandholtz and Fligstein. *See* Sweet & Fligstein, *supra* note 15, at 6–8.

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modifications of formal rules; (2) socially sanctioned norms of behavior; and (3) internally enforced standards of conduct."[67] Informal rules tend to be disregarded in legal discussions, but they are arguably as important as formal rules (if not more), containing socially transmitted information resulting from a common culture. Local cultures contain cognitive elements which allow for the definition of social relationships and the creation of interpretative frameworks rendering meaningful to actors the actions of others while letting them interpret their own position in social relationships.[68] Informal rules are instrumental to the existence of these shared cognitive frameworks by providing the structure in which social interaction occurs, and they make purposive action possible by providing individuals with a framework of shared expectations.[69]

• Organizations, meaning groups of individuals more or less formally constituted in specific times and places that pursue a set of collective purposes. They coordinate between individual actors and the rule setting in which they operate;

• Actors, or those individuals who act with some purpose in mind within a specific institutional framework.

The starting point of this exercise is to acknowledge that the Court is a very specific kind of organization. Like other judicial bodies, the Court is simultaneously empowered and constrained by both formal rules—the Treaties and the Court's specific procedural rules—and informal rules. These rules constitute the framework of constraints and opportunities for actors who want to enhance their social, economic, or political positions.[70] On the other hand, the Court is a skilled social actor, able to

> generate or manipulate frames that make sense of institutional or policy problems and offer persuasive solutions. Frames can help mobilize cooperation among diverse actors by linking their interests and identities to a set of ideas—symbols, theories, models—that allow for further institutional development. We see skilled action, and sometimes new frames, in many situations, such as [when] the

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[67] *See* NORTH, *supra* note 51, at 40; *see also* Fligstein, *supra* note 52, at 658.

[68] *See* NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST CENTURY CAPITALIST SOCIETIES 15 (2001).

[69] *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1414 (1996). On the concept of cognitive frameworks, see *supra* sources cited note 51.

[70] *See* Sweet & Fligstein, *supra* note 15, at 10.

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> Court finds principles of mutual recognition in the Rome Treaty.[71]

This description of the Court goes beyond the traditional legal perspective that distinguishes between political and judicial domains, and acknowledges the Court's role as a rule-maker. In effect, when trying to understand how different normative positions end up coexisting in the same judicial test in the first place, it is fundamental to understand that the choice between these normative positions is a political act of the utmost importance, implying value judgments with constitutional implications. The Court was set as the authoritative interpreter of EU law in the Treaty of Rome, many of the original provisions of which were very loosely worded in order to enable political agreement, and is thus empowered to judicially clarify the rules ex post.[72] Furthermore, for a long time the Court operated in an environment where EU rules had to be adopted by unanimity.[73] Even today, the reversal by political means of the Court's interpretation of Treaty articles can be achieved only by Treaty amendment, allowing the Court to develop Treaty provisions, and particularly the market freedoms, in such a way that their study is now to a large extent the study of the relevant case law.[74] This rule governing the reversal of the Court's interpretations of the Treaty is a weak form of control favoring the Court's dominance over the constitutional development of the EU, particularly in light of the limited threat posed by other potential court-curbing mechanisms.[75]

Counterbalancing this is the fact that the Court's decisions have to be applied by national courts and administrations. In effect, it does not matter what the Court may say if its decisions are not followed.[76] As Weiler once noted:

> Constitutional actors in the Member States accept the European constitutional discipline not because, as a matter of legal doctrine, as is the case in the federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal

[71] *See id.* at 12.

[72] *See* Takis Tridimas, *The Court of Justice and Judicial Activism*, 21 EUR. L. REV. 199, 204 (2006).

[73] *See* CHALMERS ET AL., *supra* note 47, at 20–21.

[74] FRITZ SCHARPF, LEGITIMACY IN THE MULTI-LEVEL EUROPEAN POLITY IN THE TWILIGHT OF CONSTITUTIONALISM? 93 (Martin Loughlin & Petra Dobner eds., 2010).

[75] Such as withdrawing resources, jurisdiction stripping, court packing, and judicial selection and reappointment, which all face the same difficulties as those inherent to overriding Court decisions. *See* R. Daniel Kelemen, *The Political Foundations of Judicial Independence in the European Union,* 19 J. EUR. PUB. POL'Y 43 (2012).

[76] *See* KAREN ALTER, THE EUROPEAN COURT'S POLITICAL POWER 92–109 (2009).

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> people, the constitutional demos. They accept it as an autonomous voluntary act, endlessly renewed on each occasion . . . [t]he French or the Italians or the Germans are told: in the name of the peoples of Europe, you are invited to obey . . . [t]his process also operates at the Community level. Think of the European judge . . . who must understand that, in the peculiar constitutional compact of Europe, his decision will take effect only if obeyed by national courts . . . . This, too, will instill a measure of caution and tolerance.[77]

Since it is the Court's legitimacy, and that of EU law, that generally ensures the cooperation of national courts and administrations—alongside the empowering effect EU law has on lower courts that are granted a prima facie legitimate tool with which to contradict higher courts and national legislatures—concerns about this legitimacy feed into the institutional incentives for the Court to strictly abide by the commonly accepted precepts of legal reasoning.[78] It is a common understanding of a shared "story" about the contents and existence of a legal order which makes such an order authoritative within a community; similarly, it is the abeyance to social practices and shared understandings by a legal community, which is in turn in accordance with the more general common understanding of what is legitimate law, that determines what and how judges can legitimately decide.[79] If courts, and particularly higher courts, can generate and manipulate the institutional frames in which they operate, the way they do so is effectively constrained by that same institutional framework. Judicial decisions are not valid because they are issued by a judge, but because they are issued by a judge within a specific setting in a duly reasoned manner.[80] In this cognitive setting, judicial decisions are arrived at through deliberation and analogical reasoning and presented as relatively redundant, self-evident, incremental extensions of available legal materials. Control of whether the relevant parameters of legal reasoning have been complied with in a legal decision is ensured by the interactive nature of law practice. Such control takes place both ex ante*,* because cases are brought and argued before courts by lawyers trained in and imbued with the spirit and grammar of

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[77] *See* Joseph Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7, 21–22 (Joseph Weiler & Marlene Wind eds., 2003).

[78] *See* KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2003). This is not to say that all that motivates lower courts is legitimate legal reasoning and concern for the law; there are a number of empirical studies pointing to lower courts referring questions when they hope it will help reverse national rules and refusing to do so when they wish to shield national systems. *See* LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 86–87 (2002).

[79] *See* Gerald Postema, *Implicit Law*, 13 L. & PHIL. 361, 369–71 (1994).

[80] Adjudication is thus a device giving formal and institutional expression to reasoned argument. *See* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978).

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a specific legal community, and ex post, through systems of appeal and as a result of criticisms from an interpretive community recognizing a number of commonly accepted parameters as to the correctness of legal interpretation.[81]

The above elements represent the constraints usually identified in the literature as interacting to determine the institutional ability of the Court's adjudicative process (i.e., the institutional barriers to the overturning of the Court's decisions, how those decisions empower national courts against national administrations, and the Court's need to operate within the accepted parameters of legal reasoning).[82] The fact that, to a large extent, the Court creates EU law, regulates litigants' access to it, and makes decisions subject only to a weak form of political control, creates a "zone of discretion" where it can operate.[83] But even within this zone, the Court must operate in a specific environment which limits its discretion through formal and informal constraints, such as the fact that the Court must operate under the "mask of law."[84] One way to minimize the implicit political impact of judicial decision-making within this institutional environment is for courts to focus narrowly on the outcomes of individual cases, producing "incompletely theorized agreements on particular outcomes."[85] These will be solutions which are acceptable on results and on low-level principles without expressly taking sides in large-scale controversies, setting forth rules of such limited normative content that individuals with different normative backgrounds may agree to them, but also strong enough for any discussion abiding by them to be acknowledged as rational and therefore legitimate by the ideal (legal) audience.[86] If adopting certain normative positions implies taking sides on potentially controversial issues of constitutional importance, one should not be surprised to find the Court eschewing fully theorized decisions while leaning heavily on anchors to its legitimacy, such as abiding by recognized forms of legal reasoning and devotion to precedent, in order to ensure its decisions are found persuasive and obeyed by the relevant agents.

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[81] *See* Gerald Postema, *"Protestant" Interpretation and Social Practices*, 72 L. & PHIL. 283, 310–12 (1987). For the EU, see Ham Schepel & Rein Wesseling, *The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3 EUR. L. J. 165 (1997).

[82] *See* CONANT, *supra* note 78, at 38–45.

[83] *See* ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 23–26 (2004).

[84] Walter Mattli & Anne-Marie Slaughter, *Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts* (Jean Monnet Center, Working Paper No. 6/96, 1996); *see also* Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 INT'L J. CONST. L. 69, 79 (2007).

[85] *See* CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 4–5 (1996).

[86] *See* Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 743–45 (1982); *see also* ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 19, 288 (Ruth M. Adler & Neil MacCormick trans., 1989).

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The relevance of taking these institutional constraints into account in order to produce a better descriptive model of the concept of restriction is exemplified by reference to mutual recognition. Mutual recognition is usually ignored as such in debates about the concept of restriction, being either associated with normative theories advocating broad, obstacle-based tests, in particular economic due-process clauses,[87] or with narrow tests, such as discrimination-based approaches.[88] Concerning the latter, it should be noted that discrimination is associated with purely anti-protectionist clauses, but that mutual recognition eliminates obstacles to trade which go well beyond the traditional conception of a liberal trade regime. In effect, the "dual-burden" thesis is wholly alien to classic trade law: it requires the assumption, unnecessary under classic trade law, that a set of regulations in a State provides adequate protection for consumers in a second State. This means, innovatively, that obstacles resulting from disparate rules restrict free movement and can be challenged. Mutual recognition effectively increased the scope of measures deemed to have a detrimental effect on intra-Union trade way beyond the traditional normative scope of discrimination tests. But even the most extreme form of mutual recognition—a country-of-origin principle requiring all goods produced in accordance with home-State rules to be able to be sold in host-States regardless of the latters' national rules—, does not lead to the extreme centralization of powers in the EU and its courts that results from the adoption of an economic due-process clause—which requires virtually all national rules to be subject to review by courts, which will then assess whether their restrictive effect on free movement is justified.

Mutual recognition is better understood as an under-theorized judicial tool that refuses to decide between opposing normative concerns while producing a pragmatic solution acceptable by all parties on the facts. Nonetheless, it is arguable that, descriptively, the application of the mutual recognition test led to an economic due-process clause, at least in the field of goods.[89] Is this an argument for the normative underpinning of mutual recognition being the same as for economic due-process clauses? The answer is: Not really. The reality is more complicated than that.

For purposes of access and rationalization of the case law, participants in a legal community will tend to develop propositions that will serve as classification devices framed in such a way as to explain the underlying logic of previous case law and predict the

[87] Understandable, since both mutual recognition and the economic due-process clause originated in the same two cases. *See* Case 8/74, Procureur du Roi v. Benoît and Gustave Dassonville, 1974 E.C.R. 837; *Cassis de Dijon*, 1979 E.C.R. 649.

[88] Marenco, *supra* note 28.

[89] Starting with the evolution from *Cassis de Dijon* to the *Sunday Trading* cases, see Case 145/88, Torfaen Borough Council, 1989 E.C.R. 765 [hereinafter *Torfaen*]; Case C-312/89, Union Departmentale des Syndicats CGT de L'Aisne v. Sidef Conforama, 1991 E.C.R. I-00997; Case C-332/89, Beglium v. Marchandise, 1991 E.C.R. I-1027; Joined Cases 60/84 and 61/84, Cinéthèque SA v. Federation Nationale des Cinemas Francaises, 1985 E.C.R. 2605.

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outcome of hypothetical future cases.[90] This, however, only holds if the legal system develops a principle akin to stare decisis by adopting a case-by-case adjudication method.[91] This is arguably the situation the Court finds itself in regarding the market freedoms.[92] The empowerment of the Court was, to a large degree, a story of the correlated empowerment of private litigants to plead in EU law: legal actors had to be able to identify the type of dispute in which they were involved, the potentially applicable legal rules, and the consequences of their application. Argumentation frameworks provided a measure of stability and certainty allowing for this.[93] Even in the absence of a formal stare decisis rule, legal principles vaguely defined by the Court were then given full effect in decisions following those in which they were first identified, thereby grounding them in settled precedent.[94] This reflects not only the Court's tendency to adopt incompletely theorized outcomes but also the tension between the judge's law-making role and the need for certainty and law-abeyance, which the existence of precedent helps resolve: precedent arises as an inherently legal constraint on discretion and law-making while also allowing judges to portray their decisions as self-evident, redundant, deductive extensions of pre-existing law.[95] Thus, incomplete theorization of decisions leads to a case-by-case adjudicative strategy which has the advantage of assuaging misgivings about granting too much discretion to courts by hiding and minimizing the impact of the exercise of that discretion. At the same time, precedent effectively entrenches the jurisdiction a court may have obtained by deciding a previous case, by both providing a reason for such powers and restricting the reasons which can be used by its opponents.[96]

This is not without its consequences, as precedent-based systems tend to be path-dependent.[97] Legal rules gradually build upon one another over time, with the consequence that an earlier decision influences the later decisions of courts. A cognitive framework favoring precedent and allowing for path-dependency generates adaptive expectations with litigants arguing within the bounds of existent law. Simultaneously, it

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[90] *See* GEORGE CHRISTIE, PHILOSOPHER KINGS? 133–34 (2011)

[91] *See id.* at 132.

[92] On how the Court, even though not de jure bound by precedent, mainly acts as if it was in practice, see ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 627 (2006).

[93] *See* SWEET, *supra* note 83, at 35.

[94] *See* MADURO, *supra* note 8, at 10, 20.

[95] *See* SWEET, *supra* note 83, at 10.

[96] In the US context, see Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1188–92 (2011).

[97] For a discussion of different models of path-dependency, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 606–23 (2001).

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may also give rise to positive feedback for certain lines of case law by creating incentives for potential beneficiaries of new precedent to push the law further in certain directions.[98] This can be said to lead to three autonomous, if not interconnected, phenomena which are observable in the case law of the Court.[99] The first phenomenon is non-ergodicity, meaning that the development of the case law is not necessarily incremental and that not all developments are equally likely, but that instead small, early events can have a disproportionate impact on the eventual direction the case law takes. In short, apparently irrelevant decisions may have large, unexpected consequences.[100] The second effect is lock-in, or inflexibility.[101] Once the Court has taken a decision on a legal question, precedent and other informal rules lock in that legal rule, even if there are ways for judges to eschew precedent within the accepted scope of judicial reasoning, such as relying on different precedents, on linguistic imprecisions, and on factual distinctions.[102] The third consequence is indeterminacy of outcome:[103] A decision choosing between different solutions which were possible at an initial stage is adopted on the basis of imperfect information as to its consequences and ends up affecting the subsequent development of the case law.[104] Even if a certain line of case law has been kick-started by accident, or as a result of work pressure, lack of communication between different chambers, or of genuine disagreements within the Court, path dependence and lock-in are still bound to kick in.

Moreover, the path adopted will depend on the type of questions reaching the Court, and this will in turn depend on who the litigants are and what questions the referring courts decide to send the Court. Litigants will usually be those who can prospectively benefit from the case law and possess sufficient resources to spend in litigation. It is to be expected that the existence of different rates of participation and representation of interests in litigation will push the case law in a direction that benefits repeat players who have both the means and the incentives to participate in it. In this regard, it has been noted that the Court serves as a battleground for States, corporate actors—particularly the wealthier industry players—and societal interest organizations, a result of their resources

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[98] *See* SWEET, *supra* note 83, at 35, 627–30. On the role of litigants in shaping the development of the European economic freedoms, see MADURO, *supra* note 8, at 25.

[99] Susanne K. Schmidt, *Who Cares About Nationality? The Path-Dependent Case Law of the ECJ from Goods to Citizens*, 19 J. EUR. PUB. POL'Y 8, 10 (2012); *see also* Hathaway, note 97, at 630–34.

[100] *See* Hathaway, *supra* note 97, at 629–30.

[101] *See id.* at 631–32.

[102] *See* Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. Rev. 813, 824–25 (1998); *see also* Hathaway, *supra* note 85, at 624–25.

[103] *See* Hathaway, *supra* note 85, at 633–634.

[104] On the fitness of these phenomena to describe the evolution of the case law on the market freedoms, in particular the free movement of goods, see SWEET, *supra* note 83, at 118–44.

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and organizational capacity to pursue litigation and obtain information on EU law when compared with other groups pursuing diffuse and widely distributed interests.[105]

This model seems to fit the development of the case law and the transformation of mutual recognition in *Cassis* into an economic due-process clause. In *Cassis*, the outcome was an incompletely theorized mix of traditional normative ideas about anti-protectionism and innovative ideas about European integration. This decision was rationalized in accordance with certain classificatory frameworks ex post by the European Commission,[106] by legal academics, by potential litigants, and finally by the Court itself when deciding similar cases. The case law developed from a relatively small change of the traditional anti-protectionist underpinnings of the law in *Cassis,* and became locked in in subsequent cases.[107] Nonetheless, the case law was still normatively under-theorized, allowing litigants to argue, and the Court to conclude, that a judgment such as *Cassis* requiring that national measures preventing the sale of products coming from one State in another State on the basis of non-compliance with the latter's product requirements further implied that all national measures prohibiting the marketing of certain products, regardless of them being imported or not, needed to be justified.[108] Subsequently, this development allowed fort he Court to move on to the conclusion that any measure which could potentially restrict the volume of sales of imported and domestic products alike was a restriction unless justified,[109] and thereby to turn from mutual recognition into an economic due-process clause.[110]

More than any specific normative underpinning, these developments can be seen as a result of litigants arguing within the bounds of existing law, with the potential beneficiaries of new precedent generating further positive feedback by following through on incentives to push the law within a context of normative under-determination towards broader tests. A similar observation can be made for the development of the market access test in *Alpine*[111] and its subsequent drift into something akin to an economic due-process

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[105] *See* CONANT, *supra* note 78, at 21, 28–29.

[106] See, famously, Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in *Cassis de Dijon* and the Commission's White Paper, *Completing the Internal Market* (1985)

[107] For a famous example, see Case 178/84, Commission v. Germany*,* 1987 E.C.R. 1227, the so-called "German beer purity law" case.

[108] Joined Cases 60/84 and 61/84, Cinéthèque SA v. Federation Nationale des Cinemas Francaises, 1985 E.C.R. 2605, *see also* cases cited *supra* note 89.

[109] *See* Case 145/88, Torfaen Borough Council, 1989 E.C.R. 765, para. 12.

[110] As acknowledged by the Court in *Keck*, 1993 E.C.R. I-6097 at paras. 13–14.

[111] Case C-384/93, Alpine Investments, 1995 E.C.R. I-01141.

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clause,[112] and for the case law on goods post-*Keck.*[113] It is perhaps arguable that the reason why the case law seems to evolve towards broader tests is that the entities more likely to plead on the basis of the market freedoms are those benefitting from increased inter-State movement and economic freedom and also have the means to pursue their preferences in the adjudicative arena. Not all possible paths are, after all, as likely to be followed: litigants only follow those paths that are likely to benefit them. Those entities enjoying direct benefits from free movement are more likely to plead in court and try to extend those benefits. Simultaneously, it is arguable that the costs of increased free movement are likely to be diffuse, with those suffering from reduced freedom of movement not having sufficient incentives to start judicial actions. Such diffuse costs are arguably better addressed by political processes, and particularly by States; hence, the relevant interests would tend to be protected through national laws. And even if States reflect these interests by intervening in procedures before the Court to try to limit what they perceive to be unjustified extensions of the market freedoms, these interventions are merely reactive and are not the same as consistent attempts to advance stricter tests *motto proprio*. If this description of the existing system of judicial incentives is accurate—and it is at the very least consistent with findings that corporations, public interest groups, and enforcement agencies tend to be repeat players in starting legal procedures under the market freedoms[114]—it points toward a situation where a stream of cases arguing for the market freedoms' extension will take place without any equivalent counterbalancing pressure at the judicial level other than those resulting naturally from the institutional environment in which the Court operates.

This focus on path dependence need not blind us to the role of the law and legal communities in creating a cognitive framework, and on the impact of that framework in the development of the law independently from path-dependency. Normative theories rationalizing the case law influenced developments in free movement law by providing greater levels of theorization in the form of normative and explanatory theories to the concept of restriction to free movement, which could then be adopted—alongside theories of normative unity or disunity of the freedoms and related requirements of systemic interpretation—by courts and litigants when deciding and pleading cases.[115] Normative theories and proposals can, in effect, be so relevant as to buck established path-dependencies. The case law on goods again provides a good example. The adoption of an

[112] *See, e.g.*, Case C-442/02, CaixaBank, 2004 E.C.R. I-08961.

[113] *See* Case C-265/95, Comm'n v France, 1997 E.C.R. I-6959.

[114] *See* CONANT, *supra* note 78, at 21, 28–29.

[115] For the most relevant examples of these theories, see Marenco, *supra* note 28 (discrimination); Gormley, *supra* note 27 (economic due-process); Eric L. White, *In search of the Limits to Article 30 of the EEC Treaty*, 26 COMMON MKT. L. REV. 235 (1989) (in setypological approaches); Stephen Weatherill, *After Keck: Some Thoughts on How to Clarify the Clarification,* 33 COMMON MKT. L. REV. 885 (1996) (market access).

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economic due-process clause was subject to severe criticism from a normative standpoint.[116] The main question, as Advocate General Tesauro put it, was:

> Is Article [34] of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States? . . . [The latter option] means that any measure which might potentially reduce the volume of trade, however minimally, would be prima facie a restriction on the free movement of goods . . . . [In the former option, on the other hand] the purpose of Article [34] [would be] to ensure the free movement of goods in order to establish a single integrated market, eliminating therefore those national measures which in any way create an obstacle to or even mere difficulties for the movement of goods; its purpose is not to strike down the most widely differing measures in order, essentially, to ensure the greatest possible expansion of trade.[117]

Following Advocate General Tesauro's lead, a number of tests were proposed with the goal of distinguishing between measures that merely reduce the economic attractiveness of pursuing a given activity and those measures that effectively restrict the free movement rights within the framework of the Treaty.[118] The Court eventually adopted one of these tests, first proposed by White and then seemingly followed by some Advocates General,[119] restricting the scope of the free movement of goods in *Keck and Mithouard*[120]. This test is built on a distinction implicit in some interpretations of *Cassis* between rules concerning product requirements—meaning "rules that lay down requirements to be met by [goods coming from other Member States where they are lawfully manufactured and marketed]

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[116] *See* Marenco, *supra* note 28; Bernard, *supra* note 6; *see also* White, *supra* note 115.

[117] *See Hünermund*, 1993 E.C.R. I-6787 at paras. 1, 10, 28 (Advocate General Tesauro's Opinion).

[118] *See* White, *supra* note 115; *see also* Kamiel Mortelmans, *Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?*, 28 COMMON MKT. L. REV. 11 (1991); Jo Steiner, *Drawing the Line: Uses and Abuses of Article 30 EEC*, 29 COMMON MKT. L. REV. 749, 769–72 (1992); *and* Norbert Reich, *The "November Revolution" of the European Court of Justice:* Keck, Meng *and* Audi *Revisited*, 31 COMMON MKT. L. REV. 459, 467 (1994).

[119] *See* White, *supra* note 115; *see also Torfaen*, *supra* note 89 (Advocate General van Gerven's Opinion); *Hünermund*, *supra* note 29 (Advocate General Tesauro's Opinion).

[120] *See Keck*, 1993 E.C.R. I-6097.

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(such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging),"[121] which were deemed restrictive regardless of being indistinctly applicable to national and foreign products alike—and rules concerning certain selling arrangements, which did not infringe the rules on free movement of goods unless they discriminated, in law or in fact, between the marketing of domestic and foreign products.[122] In the Court's view, measures that respect these principles "do not prevent access to the market, nor impede access any more than it impedes the access of domestic products."[123]

Keck was expressly presented as a reaction against litigant pressure towards an ever-expansive test and as a reversal of precedent, which indicates that this case was a retrenchment not due to institutional pressures such as prior precedent or pressure by litigants.[124] It is rather plausible that the Court may have been instead reacting to academic criticism by the legal community focusing on the lack of normative anchoring of the case law. This lack of normative anchoring may have led to concerns about the Court's ability to control its docket and about the increased scope of the Court's jurisdiction and possible reactions by politically powerful entities.[125] Normativity, in other words, does seem to have its pull.

On the other hand, a case such as *Keck* is not likely to create a positive feedback in what concerns litigation, with the result that the case law is likely to remain static or, as it arguably happened, renewed pressure for the extension of the free movement of goods will surface under new guises as litigants continue to try to increase the scope of their free movement rights.[126] This, alongside the decision's normative indeterminacy, can help explain the growing expansion of the scope of the free movement of goods in the post-*Keck* case law, which can be seen in: (1) the concept of product requirements being

[121] *See id.* at para. 15

[122] *See id*. at para. 16.

[123] *See id*. at para. 17.

[124] The Court stated that "[i]n view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case law on this matter," before going on to decide that"contrary to what has previously been decided." *See id*. at paras. 14, 16.

[125] Arguably, the best (anecdotal) evidence that all of these elements had a role to play is that the Court reacted to increased academic and judicial criticism about its case law, particularly in light of being flooded with identical cases during the *Sunday Trading* saga, by adopting a theory which was advanced in an academic journal by one of the Commission's agents with the Court while justifying its actions as needed to check the amount of cases reaching its docket. To verify this empirically would be, assuming it is possible, outside of the scope of this study.

[126] *See* sources cited *supra* note 86; *see also* CONANT, *supra* note 78, at 19, 21–38; Schmidt, *supra* note 99, at 11.

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extended beyond its original boundaries, to the point where it includes certain measures regulating the marketing of a product that may have an impact on its actual content or packaging;[127] (2) the use of discrimination in what concerns selling arrangements in an extremely controversial manner, such as when dealing with general restrictions on advertising or requirements of presence in local markets;[128] (3) the *Keck* typology being avoided in a variety of cases where it arguably did not fit the measures at issue,[129] such as rules on inspections of imported products,[130] restrictions on transport,[131] obligations to collect data for statistics[132] and State omissions[133]; and finally (4) a number of cases where the focus was on the effects of a measure instead of trying to apply the *Keck* typology[134]. Eventually, under pressure from systemic developments in what concerns the other market freedoms that had adopted a "market access" test as they developed from non-discrimination towards obstacle approaches, a number of recent decisions on restrictions on the use of goods implicitly acknowledged the overcoming of *Keck* by adopting an access to market test for goods as well.[135]

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[127] *See* Case C-315/92, Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH, 1994 E.C.R. I-00317; *see also* Case C-470/93, Verein Gegen Unwesen in Handel und Gewerbe Koln eV v. Mars GmbH, 1996 E.C.R. I-1923; Case C-368/95, Vereinigte Familiapress Zeitungsverlags-ud vertirebs GmbH v. Henriech Bauer Verlag, 1997 E.C.R. I-3689; Joined Cases C-158/04 and C-159/04, Alfa Vita Vassilopoulos AE v Greece, 2006 E.C.R. I-8135 (arguably related).

[128] For restrictions on advertising, see Joined Cases C-34/95, 35/95, and 36/95, De Agostini, 1997 E.C.R. I-3843. *See also* Case C-405/98, Gourmet Int'l Products, 2001 E.C.R. I-1795; Case C-239/02, Douwe Egberts NV v. Westrom Pharma, 2004 E.C.R. I-7007. For requirements of presence in local markets, see Case C-254/98, Schutzverband v. TK-Heimdienst, 2000 E.C.R. I-151; Case C-322/01, Apothekerverband v. DocMorris NV, 2003 E.C.R. I-14887; Case C-141/07, Comm'n v. Germany, 2008 E.C.R. I-06935. *See also* Daniel Wilsher, *Does* Keck *Discrimination Make Any Sense? An Assessment of the Non-Discrimination Principle Within the European Single Market*, 33 EUR. L. REV. 3 (2008).

[129] For an instance where it did fit but the Court nevertheless ignored the typology, see Case C-337/95, Parfums Christian Dior BV v. Evora, 1997 E.C.R. I-6013. *See also* Case C-358/95, Tommaso Morellato v. Unita sanitaria locale (USL) n. 11 di Pordenone, 1997 E.C.R. I-1431.

[130] *See* Case C-105/94, Ditta A. Celestini v. Saar-Sektkellerie Faber, 1997 E.C.R. I-2971.

[131] *See* Case C-350/97, Wilfried Monsees v. Unabhangiger Versaltungssenat Fur Karten, 1999 E.C.R. I-2921.

[132] *See* Case C-114/96, Criminal Proceedings Against Kieffer and Thill, 1997 E.C.R. I-3629.

[133] *See* Case C-265/95, Comm'n v. France, 1997 E.C.R. I-6959.

[134] *See* Case C-189/95, Criminal Proceedings Against Franzén, 1997 E.C.R. I-5909.

[135] *See* Case C-110/05, Comm'n v. Italy, 2009 E.C.R. I-519; Case C-142/05, Mickelsson and Roos, 2009 E.C.R. I-4273; Case C-108/09, Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete, 2010 E.C.R. I-____; *see also* Niamh Nic Shuibhne, *The Free Movement of Goods and Article 28 EC: An Evolving Framework*, 27 EUR. L. REV. 408, 411 (2002); Jukka Snell, *The Notion of Market Access: A Concept or a Slogan?*, 47 COMMON MKT. L. REV. 437, 460 (2010). For a more extensive discussion of the use of market access in what concerns goods, see my Pedro Caro de Sousa, *Through Contact Lenses, Darkly: Is Identifying Restrictions to Free Movement Harder Than Meets the Eye? Comment on* Ker-Optika, 37 EUR. L. REV. 79 (2012).

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A retrenchment such as the one in *Keck* seems to be an outlier, and arguably it will tend to be so whenever a decision cannot lead to positive feedback in litigation. But if nothing else, it is an outlier that expresses the continuing relevance of normative considerations alongside institutional ones.

F. Conclusion

Arguing that adding institutional insights improves the descriptive adequacy of existing, purely normative models should not be understood as dismissive of those "pure" models. It is also not being argued that institutions must be considered to have normative value in themselves, even though that may very well be the case, as results from the imperatives of legal certainty and security arising from the mere existence of stable rules. What is being submitted is merely that, while classic legal normative theorization is relevant to the development of the law, the prevailing theories on this topic can be enriched by the addition of institutional insights. As we have seen, a variety of normative questions on the nature and course of European integration are implicit in the choice of any concept of restriction. On the other hand, there is no pre-determined best normative outcome that the Court must apply. When choosing a test, the Court arbitrates between various models of European integration, on which the Treaties provide no greater guidance than the goal of creating an internal market.[136] But there is nothing fixed about an internal market; most sovereign States have one, and the models vary as much as the patterns of regulation and centralization that underpin them differ. When Article 3(3) TEU sets about the creation of an internal market which is supposed to contribute, simultaneously, to balanced economic growth and price stability, a highly competitive social market economy, a high level of protection for and improvement of the quality of the environment, and social justice, *inter alia*, it should be clear that, apart from the different meanings which can be attributed to expressions such as a "competitive social market economy", the exclusive pursuit of one goal, such as economic growth, might undermine the achievement of goals of social justice or protection of the environment.[137] Their balancing, a task of the utmost political significance, is thereby required, but no information is provided as to the division of competences between the Member States and the EU or between the Court and the EU legislature in doing so.[138]

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[136] Treaty on the Functioning of the European Union, art. 26(2) December 2007, 2010 O.J. (C083) 1 ("The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.").

[137] *See* Kamiel Mortelmans, *The Common Market, the Internal Market and the Single Market: What's in a Market?*, 35 COMMON MKT. L. REV. 101, 118 (1998).

[138] I thank Stephen Weatherill for having pointed this out to me.

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From a descriptive standpoint, it follows the Court must choose between one of multiple and contentious normative views on what the EU and its internal market should be. If these normative views are contested, however, a preliminary question must be asked: Why should the Court make that choice to begin with? The answer to this question is comparative. Courts need not be perfect to be the preferable organization to make a certain political choice; they merely need to be better than any other institution available. Deciding when the Court should have jurisdiction is thus not a question that can be answered in the abstract: The specific context in which the Court operates is relevant; and what is more, that context not only changes, but it also does so by Court action, by reactions to such actions, and by autonomous initiatives of other relevant actors. The introduction of institutional elements into traditional normative debates on the concept of restriction enriches them not only by forcing them to look into other normative concerns disregarded by specific approaches, but also by incorporating realities that the Court, as a decision-making body, must face.

The Court operates in an institutional environment which might dispute the Court's assessment and react to it. The historical interaction between Member States, the Court, and other EU institutions and the result of tensions between positive and negative integration determines the on-going and ever-(slightly)-changing balance of powers in the EU. The level of regulation and the attribution of competences in the internal market is thereby the result of a discursive process between all the relevant institutional agents and the normative theories they defend over time. It is the very nature of this discursive process that may make the Court an apt forum to take decisions in certain situations but not in others. The Court is institutionally inept in taking into account all the relevant public interests in the way more representative political bodies can, but it may provide a forum for voices unable to be otherwise adequately represented in national and European political processes, and thereby serve an important corrective role to processes which are prima facie more representative.[139] The Court has formal legitimacy granted by the Treaties, but it cannot effectively impose its views on the rest of the European Union, since it is arguably its least dangerous branch.[140] Its institutional limitations may point towards the Court being a better comparative option for allocating competences between the relevant decision-makers, including itself, since those same limitations prevent it from obtaining excessive power as a result of the abuse of this role. And the Court's decisions, as incompletely theorized agreements, are not the last word in the development of European integration, but merely a voice in the conversation, which require, for procedural reasons, reasoned argument, and which usually lead to a possible consensus solution. This does not point to any specific concept of restriction, but it does allow the normative

[139] *See* MADURO, *supra* note 8.

[140] In the context of the Union, however, it is doubtful whether such a distinction should not be granted to the European Parliament.

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approaches that purport to find such a concept to think contextually about how to better fit their proposals for what the law should be within their specific normative agendas.

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