Schengen's Ambivalent History

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Isaac Stanley-Becker, *A Europe Without Borders* (Princeton University Press 2025)

Introduction

During a radio broadcast commemorating the fortieth anniversary of the Schengen Agreement, Robert Goebbels, a former State Secretary at Luxembourg's Ministry of Foreign Affairs, reflected on how he organised the Agreement's signing ceremony on 14 June 1985. The event took place in Schengen, a Luxembourgish village situated amid rolling vineyards along the banks of the Moselle River. Despite Schengen's symbolic significance – being located at the tripoint where the borders of France, Germany, and Luxembourg converge – the village lacked a suitable venue for a formal multilateral signing ceremony. Consequently, Mr Goebbels opted to host the event aboard the riverboat *Princesse Marie-Astrid*. When questioned by a journalist about the absence of European leaders at the signing ceremony of such a significant treaty, Mr Goebbels explained: 'The truth is, when we launched the process, in the five concerned capitals nobody really believed in it. For this reason, all the foreign ministers delegated [the signing ceremony] to their number two.'[1] The Schengen Agreement reduced the formalities of borders checks between the five Schengen countries (Germany, France, Luxembourg, Belgium, and the Netherlands) with immediate effect and envisaged the removal of border controls in the long term. Nonetheless, Mr Goebbels himself, who signed the

[1]BBC, *Witness History: The Schengen Agreement* (13 June 2025), https://www.bbc.co.uk/programmes/w3ct743w, visited 10 February 2026.

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Agreement on behalf of Luxembourg, did not anticipate that it would ultimately lead to the complete abolition of internal borders within the signatory countries. Indeed, it was not until a decade later, with the conclusion of another international treaty – the 1990 Convention Implementing the Schengen Agreement – that border checks were ultimately abolished between the Contracting Parties in 1995.

In spite of the initial suspicion of the treatymakers, Schengen, especially the removal of internal border controls, became 'one of the main achievements of the European Union'.[2] The principle that there shall be no controls at internal borders constitutes one of the fundamental objectives of the EU's constitutional framework,[3] and public support for the removal of internal border control remains strong.[4] Yet, despite the paramount legal and sociological importance of Schengen, political developments over the past decade have resulted in a crisis of the Schengen project. In the autumn of 2015, several member states – including Germany, Austria, Denmark, Sweden, and France – reintroduced controls at their internal borders in response to a significant increase in asylum applications and, in the case of France, a series of terrorist attacks. Although the Schengen Borders Code permits only the temporary reintroduction of internal border controls in instances of a serious threat to public policy or internal security, these controls were repeatedly extended at six-month intervals. Despite these enduring violations of EU law by several member states, the Commission remains inactive and has neither politically reprimanded nor decided to take legal steps against member states unwilling to abide by their obligations under EU law. In several member states civil society organisations and individual citizens challenged the member states' policies of quasi-permanent border controls. Yet, even where national courts have found member states practices of prolonged reintroductions of border controls to be unlawful, governments failed to implement these judgments in good faith. How did we arrive at this point?

The nationalist turn in European politics certainly has profoundly affected the functioning of the Schengen regime, illustrating the broader consequences of the current resurgence of nationalism for the EU legal order.[5] Yet, to explain

[2]ECJ 26 April 2022, Joined Cases C-368/20 and C-369/20, *Landespolizeidirektion Steiermark*, para. 65.

[3]Art. 3(2) of the Treaty on European Union.

[4]European Commission, Special Eurobarometer 474 Report (December 2018) p. 39-40, 48, https://data.europa.eu/data/datasets/s2218_89_3_474_eng?locale=en, visited 16 June 2025.

[5]Border controls as instruments of nationalist political discourse function as symbolic instruments that aim at reassuring domestic constituencies. The *locus classicus* on the current resurgence of practices of rebordering is: W. Brown, *Walled States, Waning Sovereignty* (Princeton University Press 2010). On Schengen specifically *see* D. Thym and J. Bornemann, 'Schengen and Free Movement Law during the First Phase of the COVID-19 Pandemic: of Symbolism, Law and

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the current Schengen crisis only by the nationalist resurgence in European politics would be too simple. Every crisis has a history. Likewise, the current Schengen crisis has a history. Despite the importance of Schengen in the EU's legal order and in public discourse, surprisingly little has been written on the history of Schengen.[6] *A Europe without Borders*, by Isaac Stanley-Becker, provides a timely and much needed scholarly contribution to fill that gap.[7] Based on archival material, thick reading of case law, and numerous interviews with former judges and government officials, *A Europe without Borders* presents a fine and original argument about the origins of the legal structure that governs the absence of internal border controls. By emphasising the tensions and contradictions that undergirded the early years of the Schengen project, Stanley-Becker not only dispels some of the myths and misconceptions about Schengen but may also help us to better grasp the historical ramifications of the current crisis.

Schengen's dual paradigm: market freedoms and a Citizens' Europe

On 14 June 1985, high level officials from Germany, France, and the Benelux countries gathered onboard the riverboat *Princesse Marie-Astrid*, sailing along the Moselle River towards Schengen. The riverboat stopped the tripoint where the German, Luxembourgish, and French borders touch and the officials signed the Schengen Agreement. Robert Goebbels, the Luxembourgish representative, explained the aspirations of the treatymakers:

Politics', 5 *European Papers* (2023) p. 1143 at p. 1143-1145. For evidence on the argument that border controls are not genuine and effective measures to respond to concrete threats, but rather symbolic measures, *see* for instance, F. Gülzau, 'A "New Normal" for the Schengen Area. When, Where and Why Member States Reintroduce Temporary Border Controls?', 38 *Journal of Borderland Studies* (2023) p. 785 at p. 797-798; A. Naghipour et al., 'The Compatibility of German Internal Border Controls with the Schengen Borders Code', expert opinion for The Green/EFA faction at the European Parliament (30 April 2024), https://erik-marquardt.eu/en/study-shows-german-internal-border-controls-partially-illegal/, visited 10 February 2026; J. Pettersson Fürst, 'Defensive Integration through Cooperative Re-bordering? How Member States use Internal Border Controls in Schengen', 31 *Journal of European Public Policy* (2024) p. 478 at p. 495.

[6]Two exceptions are R. Zaiotti, *Cultures of Border Controls* (Chicago University Press 2011); S. Salomon and J. Rijpma, 'A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship', 24 *German Law Journal* (2023) p. 281.

[7]I. Stanley-Becker, *A Europe Without Borders* (Princeton University Press 2025).

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> Together we have been able to take a step forward on the path traced by the Treaties of Rome … in the matter of the movement of people, goods, capital, and services, … bringing us closer to what is fitting to call the 'Europe of Citizens'.[8]

Even though the Schengen Agreement was concluded as a treaty under international law, outside the framework of Community law, government officials considered the Schengen Agreement as a 'laboratory for the free movement of persons',[9] as a blueprint for the development of free movement under Community law. Yet, if Schengen was considered as laboratory, as Stanley-Becker astutely asks, what sort of laboratory was it?

One, still widely held, view in the literature on Schengen is that the abolition of internal border controls was functional to the establishment of the internal market and unimpeded free movement across borders for economic purposes.[10] Schengen, in this view, served as a laboratory for fully realising the internal market freedoms. This view, however, is incomplete as it lacks a thicker contextualisation in preceding political and legal developments. Rather, as Stanley-Becker argues, the creation of Schengen was underpinned by two different but related paradigms: a market paradigm which aimed at advancing the internal market; and a political paradigm which pursued the making of European citizens.[11] Each of these paradigms involves different rationales.[12]

In the market paradigm, the rationale for abolishing border controls derives from economic necessities. The Commission's 1985 White Paper on Completing the Internal Market includes the perhaps clearest expression of the market paradigm's economic rationale. In the market paradigm, border controls are conceived as inefficient means of controlling substantive policy domains, such as public health, veterinary inspections, VAT collection, and transport safety, which are more efficiently governed through harmonisation and administrative cooperation.[13] In the economic idiom of the market paradigm, border controls

[8]Stanley-Becker, *supra* n. 7, p. 59.

[9]Ibid, at p. 62.

[10]S. Peers, *EU Justice and Home Affairs Law: Vol. I. EU Immigration and Asylum Law* (Oxford University Press 2023); G. Cornelisse, 'What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders', 51 *Common Market Law Review* (2014) p. 741 at p. 743; K. Groenendijk and E. Guild, 'In Search of Europe's Borders: Article 62 EC, Visas and European Community Law', in K. Groenendijk et al. (eds.), *In Search of Europe's Borders* (Brill 2003); D. Thym, 'Entry and Border Controls', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law: a Commentary* (Beck 2016) p. 31; D. O'Keeffe, 'The Free Movement of Persons and the Single Market', 17 *European Law Review* (1992) p. 1 at p. 18.

[11]Stanley-Becker, *supra* n. 7, p. 62.

[12]On these two paradigms *see* Salomon and Rijpma, *supra* n. 6, p. 288-291.

[13]European Commission, White Paper on Completing the Internal Market, COM (85) 310 final (14 June 1985) at paras. 12-15, 24-43.

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feature as economic figures and are calculated as direct and indirect costs.[14] The need, then, to abolish border controls derives from structural changes in the global economy and the necessity to maintain economic competitiveness by reducing costs. In the political paradigm, the rationale for abolishing border controls is an end in itself – and not functional to the realisation of market freedoms. As borders are constitutive of a political community,[15] the abolition of internal borders and their projection to the common external borders seeks to redraw the very boundaries of political community – from national political communities separated by national communities to a European political community.

The Schengen Agreement incorporated both rationales. The Preamble of the Schengen Agreement states that it aims to 'remove obstacles to free movement at the common borders' and 'facilitate the movement of goods and services'.[16] At the same time, the drafters of the Schengen Agreement traced their work to the Fontainebleau European Council in 1984 which envisaged 'to establish on the pillars of the common market a Citizens' Europe'.[17] The Conclusions of the Presidency at the Fontainebleau European Council emphasised the importance of adopting measures to strengthen and promote the identity of European citizens, enumerating a number of measures that would bind European citizens closer to each other, such as an anthem, a flag, and the abolition of police and customs formalities at the common borders of member states.[18] The idea of a Citizens' Europe did not emerge in Fontainebleau, but had been developing for years. The notion of Citizens' Europe was first coined by Leo Tindemans, a former Belgian prime minister, who proposed in his 1975 report on the European Union the establishment of a passport union enabling free movement of European citizens. Tindemans' was convinced that this would foster a common experience of European life that ultimately would bind citizens closer together.[19] Subsequent initiatives – the Commission's proposal for a passport Union, the European Council's plans on creating a uniform travel document, and Altiero Spinelli's Draft Treaty on the European Union which included the establishment of European citizenship, *inter alia* – developed Tindemans idea to strengthen supranational identity through facilitating free movement.

[14]*See* European Council, 29-30 March 1985, SN 1381/2/85, p. 5, https://www.consilium.europa.eu/media/20653/1985_march_-_brussels__eng_.pdf, visited 10 February 2026.

[15]*See*, *inter alia*, H. Arendt, *On Revolution* (Penguin Books 1965) p. 275; M. Walzer, *Spheres of Justice* (Basic Books 1983), especially ch. 2.

[16]Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 14 June 1985, O.J. 2000, L 239, p. 1.

[17]Stanley-Becker, *supra* n. 7, p. 10.

[18]Ibid., p.12.

[19]Ibid., p. 15-16.

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Stanley-Becker considers the aspiration of creating a Citizens' Europe as reflection of Enlightenment ideas of cosmopolitan community and its revived versions of a Pan-European unity that emerged after the First World War (for example, Richard Coudenhove-Kalergi's vision of a Pan-Europa and Aristide Briand's ideas of a federation of European states).[20] However, these plans for a supranational political body ran aground after the Second World War and the Treaty of Rome institutionalised an economic alliance between member states, which conceived free movement in a market logic as the removal of economic obstacles. Yet, Stanley-Becker argues that the Treaty of Rome's political aspiration, reflected in its Preamble to establish a closer union among European peoples, 'became a lodestar of more humanist notions of intergovernmental cooperation'.[21] While several initiatives to establish a peoples Europe in the 1970s failed, ideas of advancing European unity through expanding free movement for non-economic reasons gained currency through a Franco-German initiative in the early 1980s. French President Francois Mitterand, who held the presidency of the European Council in Fontainebleau, and West German Chancellor Helmut Kohl, pushed the idea of a Citizens' Europe. On the one hand, Mitterand's and Kohl's proposals to advance European political unity was the result of domestic political concerns: Mitterand considered European unity as an antipode to the rise of the far-right Front National in France, while Kohl considered European unity and free movement as an ideological counterprogram to Communist restrictions of free movement, especially the restrictions imposed by the German Democratic Republic on its citizens to leave the country. However, Stanley-Becker emphasises that it was not only domestic political concerns, but also personal convictions, held by Mitterand and Kohl, that reflected ideas of a 'European cosmopolitanism'.[22]

The Conclusions of the European Council in Fontainebleau recommended the setting up of an ad hoc Committee on a People's Europe to further study measures that would develop these cosmopolitan ideas on free movement into concrete rules and procedures. Stanley-Becker argues that the ad hoc Committee understood its mandate explicitly in political and not merely technocratic terms.[23] The ad hoc Committee's final report in June 1985 included a broad understanding of free movement. It proposed the easing of border checks by introducing green car stickers that would enable citizens to cross internal borders without checks; it also suggested the introduction of a right of residence for non-economically active European citizens. Even though subsequent European

[20]Ibid., p. 19-22.
[21]Ibid., p. 30.
[22]Ibid., p. 14.
[23]Ibid., p. 35.

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Councils summarily endorsed the report by the ad hoc Committee, the summary approval masked underlying political tensions between member states, especially on the removal of internal border controls. Political gridlock between member states eventually paved the way for the adoption of the Schengen Agreement outside Community law.

If the treatymakers of the Schengen Agreement sought to create a 'cosmopolitan European community' by untethering free movement from its purely economic rationale, as Stanley-Becker argues, what is the specific link between the creation of a 'cosmopolitan European territory' and the establishment of a political community? How does, in the eyes of the Treaty makers, the creation of a common space translate into a common political identity? Although Stanley-Becker remarks that the abolition of borders sought to change citizens' 'everyday experience of free movement',[24] the link between the construction of a common space and European citizenship remains underexplored. I suggest that the removal of border controls aimed to transform citizens' spatial experience by removing the visible boundaries of the state. For instance, the White Paper on Completing the Internal Market, which drew on the work of the ad hoc Committee on a People's Europe, stated that:

> It is the physical barriers ... which to the ordinary citizen are the obvious manifestation of the continued division of the Community – not the 'broader and deeper Community' envisaged by the original Treaties but a Community still divided. Even though these controls are often no more than spot checks, they are seen as the outward sign of an arbitrary administrative power over individuals and as an affront to the principle of freedom of movement within a single community.[25]

Taking that wording seriously means that the removal of border controls aimed at changing the way citizens would *see*, literally, the European Community. This is what I call the epistemic aspect of borders. Edmund Husserl reminds us that spatial experience is one of the constituents of human cognition.[26] At the same time, experienced space has a concrete material dimension. The materiality of border posts, barriers and tollhouses are not merely material objects, but also concepts that have specific meanings: they signify the limits of the political realm and the operation of the law. The transformation of materiality thus restructures the meaning of political concepts through everyday lived experiences and changes

[24]Ibid., p. 89.

[25]White Paper on Completing the Internal Market, *supra* n. 13, paras. 46-47.

[26]On Edmund Husserl's phenomenology of space *see* J. Dünne and S. Günzel (eds.), *Raumtheorie* (Suhrkamp 2006) p. 109-112.

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the way citizens would experience and relate to the European Community in the longue durée. This, I submit, was the radical vision in the Schengen project.[27]

Who constructed Schengen?

Schengen is often presented as the outcome of a linear process whose actors were visionary and brave diplomats and politicians.[28] Stanley-Becker challenges this narrative by highlighting the role of citizens and migrants in the construction of Schengen,[29] which reflects a broader turn in the recent literature on EU law emphasising the role of 'Euro-lawyers' and citizens in mobilising the law to further European integration.[30] Shifting the focus from politicians and government officials to the actions of citizens and migrants advances a new narrative on the construction of Schengen and illuminates how the mobilisation of the law by citizens and migrants can have a profound impact on legal arrangements and institutional change. Throughout the book, Stanley-Becker emphasises three different actors that had a profound impact on the development of Schengen.

A crucial impetus for the removal of border controls came from an unlikely group: truck drivers. For one week in February 1984 long-distance truck drivers blocked highways and border crossings from Paris to the Austrian alps, halting the movement of people and goods across Europe. The truck drivers' protests were directed against long delays at border crossings, sometimes up to 20 hours, and the 'dillydallying of customs officers'.[31] As an article in the German magazine *Der Spiegel* aptly described, the truck drivers' protests tapped into a broader public sentiment of the unfulfilled promises of European integration: the border blockages reflect the 'state of Europe 26 years after the foundation of the European Community. Because the chaos has been triggered by a group that, according to the intention of the EC founding fathers, should have ceased to exist: custom officers.'[32] The truck drivers' protests created public pressure for policymakers to quickly advance plans on removing border controls and they eventually resulted in the conclusion of the Saarbrücken agreement between France and Germany in July 1984, which eased border checks between these two

[27]For an elaborated analysis, *see* Salomon and Rijpma, *supra* n. 6, p. 299-305.

[28]For instance, European Commission, State of Schengen Report, COM(2025) 185 final (23 April 2025), https://eur-lex.europa.eu/resource.html?uri=cellar:3daaaadb-2021-11f0-b1a3-01aa75ed71a1.0001.02/DOC_1&format=PDF, visited 10 February 2026.

[29]Stanley-Becker, *supra* n. 7, p. 73.

[30]*See* for instance T. Pavone, *The Ghostwriters* (Cambridge University Press 2022).

[31]Stanley-Becker, *supra* n. 7, p. 64.

[32]'Ziviler Ungehorsam' (*Der Spiegel*, 5 March 1984), https://www.spiegel.de/politik/ziviler-ungehorsam-a-452c7a3d-0002-0001-0000-000013507898?context=issue, visited 10 February 2026. Also other newspapers adopted a similar view: 'Unterwegs ins Mittelalter' (*Die Zeit*, 2 March 1984).

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countries, and served as blueprint for the Schengen Agreement in 1985.[33] Looking at these protests – truck drivers essentially demanding the abolition of border checks – from today's perspective, they seem like a different political universe. A number of specific historical conditions facilitated the success of the truck drivers' protests. First, the magnitude of the protests was enormous. As Stanley-Becker recalls, the protests took place from the English Channel to the Austrian alps: they were 'a siege that extended for many miles, on roads covered with ice and snow'.[34] Second, the protests were taken up widely by media. Newspapers from New York to Mumbai reported about the protests and, importantly, the reporting about the protests was largely sympathetic to the demands of the truck drivers. Third, truck drivers' demands were supported by powerful political figures at the national and European level, such as the powerful conservative Bavarian minister-president Franz Josef Strauss[35] and the Kangaroo group, a pro-trade faction in the European Parliament.[36]

The second actor that shaped the development of Schengen, as Stanley-Becker argues, were individuals litigating before the Court of Justice. Stanley-Becker focuses on the case of *Gravier* v *City of Liège*,[37] which unfolded during the negotiations of the Schengen Agreement, and provides a thick reading of that case, based *inter alia* on interviews with the plaintiff. The case concerned Françoise Gravier, a French national who studied cartoon art at a Belgian university. Under Belgian law, non-Belgian nationals were required to pay a tuition fee, which Ms Gravier could not afford. *Gravier* v *City of Liège* was a textbook example of Euro-lawyers using EU law strategically to advance European integration through court-driven change. When Ms Gravier searched for a lawyer, contacts in the Belgian labour movement connected her to a lawyer who was seeking a test case to challenge discriminatory rules before the Court of Justice.[38] In its judgment, the Court of Justice held that because art studies constitute a form of vocational training, Ms Gravier would be protected under the free movement of workers rules and the Belgian enrolment fee constituted a prohibited direct discrimination on grounds of nationality.[39] Stanley-Becker emphasises the ambivalent effects of the *Gravier* decision. While, on the one hand, *Gravier* expanded the scope of free movement to students, the decision would have also, as Stanley-Becker argues, 'laid bare the limits of Community

[33]Stanley-Becker, *supra* n. 7, p. 72.

[34]Ibid., at p. 65.

[35]'Der Knüller' (*Der Spiegel*, 9 April 1984), https://www.spiegel.de/spiegel/print/d-13508573.html, visited 10 February 2026.

[36]Stanley-Becker, *supra* n. 7, p. 72.

[37]ECJ 13 February 1985, Case 293/83, *Gravier* v *City of Liège.*

[38]Stanley-Becker, *supra* n. 7, p. 42.

[39]*Gravier* v *City of Liège*, *supra* n. 37, para. 26.

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authority' to regulate free movement of persons unconnected to economic activity.[40] The Court, in Stanley-Becker's opinion, remained stuck in the market paradigm of free movement: because the Treaty of Rome framed free movement only in economic terms, the Court conceived free movement exclusively in the market paradigm. The Court's conception of free movement in strictly economic terms in *Gravier* presented, as Stanley-Becker argues, 'a problem for the realization of Citizens' Europe'[41] and the realisation of free movement outside the market sphere. The realisation of free movement uncoupled from economic considerations would have thus required a Treaty change – something that especially the UK government strictly opposed. In combination with the UK government's opposition, the *Gravier* decision was thus, as Stanley-Becker points out, an important factor that provided the impetus to advance Schengen outside the Community legal framework.

Another case that played an important role in the construction of Schengen is the *Wijsenbeek* decision by the Court of Justice,[42] a case that is not discussed by Stanley-Becker. While *Gravier* concerned the unintended effects of strategic litigation on the construction of Schengen, *Wijsenbeek* was an attempt to judicially enforce the abolition of border controls through strategic litigation before the Court of Justice. The facts of the case concern Mr Wijsenbeek, a lawyer and liberal member of the European Parliament, who challenged Dutch border controls by refusing to show his passport upon entering the Netherlands. Mr Wijsenbeek argued that Article 8a of the European Economic Community Treaty (Maastricht), which envisaged the right to free movement of European citizens, required member states to abolish border controls. The Court of Justice saw the matter differently. It held that Article 8a did not have direct effect and that the removal of border controls presupposed the adoption of compensatory measures on asylum, visa, and immigration, as envisaged by the Schengen Implementing Convention.[43] The common reading of the *Wijsenbeek* case is that the Court of Justice did not accord direct effect to EU citizens' right to free movement. In this view, the litigation was unsuccessful as it did not result in advancing citizens' free movement rights. Limiting the effects of the *Wijsenbeek* decision to the immediate legal outcomes, however, misses the more nuanced and fine-grained arguments that opened the space for future legal discussions. I suggest that the importance of *Wijsenbeek* lays in argumentatively connecting free movement rights in the market sphere to free movement rights in the political

[40]Stanley-Becker, *supra* n. 7, p. 57.
[41]Ibid., p. 57.
[42]ECJ 21 September 1999, Case C-378/97, *Wijsenbeek*.
[43]Ibid., paras. 40-41.

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sphere and thus creating a dogmatic link between Maastricht's – intergovernmental– third pillar on justice and home affairs and its – supranational – Community pillar.[44] The inclusion of the *Wijsenbeek* case would have certainly added to Stanley-Becker's otherwise insightful analysis of the role of legal mobilisation in the construction of Schengen.

Stanley-Becker reminds us of a third, and often overlooked, actor that played an important role in the construction of Schengen: asylum seekers and unauthorised migrants. To illustrate the role of unauthorised migrants in the construction of Schengen, Stanley-Becker focuses on the protests of *sans-papiers* that took place in Paris in 1996. In June 1996, a group of *sans-papiers* occupied several churches in Paris, supported by the priests and parishes. After migrants were expelled by force from the churches, protests swept to the streets. One year before the Paris protests, the Schengen Implementing Convention had entered into force on 26 March 1995 and internal border controls were finally lifted. The Schengen Implementing Convention included, *inter alia*, rules that limited the right to asylum of third country nationals by allocating responsibility for the examination of an asylum application to a single member state. Moreover, the Schengen Implementing Convention had resulted in the adoption of restrictive legislation on asylum and immigration that aimed to offset the alleged security deficits that would result from the abolition of border controls. In France, the so-called Pasqua laws were adopted, named after the Gaullist minister of interior Charles Pasqua, who pursued a restrictive immigration policy, that restricted asylum seekers' possibilities to apply for asylum, if they had entered France through another European country.[45] As Stanley-Becker points out, the objective of the protests of the *sans-papiers* was not only to challenge the Pasqua laws, but also the rules of the Schengen system: 'Schengen was its terrain'.[46] The protests questioned the (still prevalent) official script of Schengen as a liberal project by showing its exclusionary dimension. Moreover, the protests drew broad social mobilisation in France, including trade unions, priests, doctors, civil liberty groups, theatre directors, and academics such as Jacques Derrida, Paul Ricoeur, and Didier Fassin. Social mobilisation was not limited to France. Stanley-Becker shows that the Paris protests resulted in the formation of transnational networks challenging restrictive migration laws and leveraging cultural capital, *inter alia*, with exhibitions at the German art exhibition *Documenta X* and the production of films.[47] Although the protests did not result in any changes to existing immigration laws, they became, as Stanley-Becker states, 'jurisgenerative outside

[44]Salomon and Rijpma, *supra* n. 6, p. 296.
[45]Stanley-Becker, *supra* n. 7, p. 140, 153.
[46]Ibid., p. 208.
[47]Ibid., p. 220-230.

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the formal space of courtrooms', recasting common understandings of the right to free movement.[48] Yet, the reader wonders whether these protests were indeed, as claimed by Stanley-Becker, jurisgenerative. If jurisgeneration describes a process in which the meaning of legal principles – here: the right to free movement – is reshaped in iterative processes of interpretation by different actors in society,[49] these processes must ultimately be tied back to interpretation in the court room. Certainly, courts are not the only actors that engage in legal hermeneutics. But the crucial difference from other actors is that courts have the final word in the interpretation of the law. This means that legal meaning is only changed authoritatively when linked to legal interpretation in the courtroom. This did not happen with the *sans-papiers* movement in Paris. Although the *sans-papiers* movement resulted in proceedings before French courts and eventually reached the European Court of Human Rights, none of these cases concerned the interpretation of the right to free movement.[50] From a legal perspective, the absence of free movement in the case before the European Court of Human Rights is not surprising. The European Convention on Human Rights does not include a right to free movement; hence a legal claim cannot be based on such a right, because it does not exist in the Convention. The absence of such a right illustrates the limitations of translating valid justice claims into formal legal claims – and therefore the limits of authoritatively transforming legal meaning through jurisgenerative processes.

While Stanley-Becker's specific argument on the jurisgenerative transformation of the meaning of free movement may be unconvincing, his broader methodological move to study the potential of asylum seekers' and unauthorised migrants' agency to impact the construction of Schengen is highly incisive for the analysis of the current Schengen crisis. First, Stanley-Becker's analysis shows the historical continuities of conflicts over the mobility of asylum seekers that underlie Schengen – conflicts that are inherent to the legal structure of Schengen and regularly result in crises in the Schengen system,[51] including the current Schengen crisis.[52] Second, Stanley-Becker's methodological focus on the political agency of asylum seekers points to the dynamic between exercising political

[48]Ibid., p 248.

[49]S. Behabib, 'Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty', 103 *American Political Science Review* (2009) p. 691 at p. 696.

[50]ECtHR 16 January 2001, No. 51346/99, *Cissé* v *France*.

[51]Cornelisse, *supra* n. 10, p. 757-759.

[52]The major reason for the quasi-permanent border controls maintained by member states is, according to member states' notifications, 'unauthorised secondary migration' by asylum seekers. *See* European Commission, 'Notifications of the Temporary Reintroduction of Border Control', https://home-affairs.ec.europa.eu/policies/schengen/schengen-area/temporary-reintroduction-border-control_en, visited 10 October 2026.

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agency by and the transformation of legal rules. Existing rules in the Asylum and Migration Management Regulation – the successor of the Dublin III Regulation on the allocation of responsibility for examining an asylum application – barely take into account asylum seekers' cultural (language, education) and social ties (relatives residing in other member states) that inform their choices of destination country.[53] Asylum seekers react to these restrictive rules by moving to another member state and evading (forced) transfer procedures. Member States, in turn, react to these movements by reintroducing border controls with the aim of curbing asylum seekers' movements. If maintained over a longer period of time, these controls transform the legal reality from an area without internal frontiers into an area with quasi-permanent border controls. The implication of Stanley-Becker's analysis is that free movement of EU citizens and the mobility of asylum seekers in the Schengen area mutually impact each other and cannot be considered in isolation from each other. Extending the scope of free movement rules to asylum seekers was indeed, as the next section discusses, one of the proposed options in the early days of Schengen.

Schengen's dark side

The entry of undesired third country nationals, especially asylum seekers, was at the core of the negotiations at the Schengen Implementing Convention to abolish border controls. Treatymakers were convinced that the complete removal of internal borders would require the adoption of a set of complementary measures flanking the abolition of border controls. Already the Schengen Agreement envisaged a few complementary measures, such as police cooperation and exchange of information to combat crime.[54] These were, however, deemed insufficient by the treatymakers. By 1988 the working group on persons on the Schengen Implementing Convention had drawn up a broader list of 'indispensable conditions' that were considered necessary to abolish border controls.[55] Chief among these measures were the harmonisation of national laws on asylum, visa, and irregular migration. On its face, the harmonisation of

[53]Regulation (EU) 2024/1351 on asylum and migration management, O.J. 2024, L 2024/1351. On a critique of the Dublin-III Regulation that still applies, *see* M. Takle and M.L. Seeberg, 'All European Countries Are Not the Same! The Dublin Regulation and Onward Migration in Europe', *Norwegian Social Research Rapport No. 12* (2015) p. 170 ff.; European Parliament Research Service, 'Secondary Movements of Asylum Seekers in the EU Asylum System' (June 2014) p. 3 (with further references to asylum seekers motivations for secondary movements), https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762326/EPRS_BRI(2024)762326_EN.pdf, visited 10 February 2026.

[54]Schengen Agreement, Art. 17.

[55]Stanley-Becker, *supra* n. 7, p. 107.

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national laws does not require any particular substantive choice – rules could be more or less restrictive – but only the adoption of common rules. Stanley-Becker, however, shows how a number of factors – an economic downturn in Europe, a series of terrorist bombings, increasing numbers of asylum seekers, and the emergence of far-right nationalist parties – changed the political climate and set the frame for the adoption of harmonised rules.[56] When the Schengen Implementing Convention was adopted in 1990, it set forth a securitised version of free movement based on the exclusion of unwanted third country nationals, especially the growing number of asylum seekers. Although these issues were already included in existing literature on the construction of Schengen,[57] Stanley-Becker provides a more nuanced and comprehensive analysis by including hitherto unpublished archival material and showing the transnational effects in national legal orders that resulted from the adoption of the Schengen Implementing Convention. I focus in the following on three aspects of the dark side of Schengen, discussed by Stanley-Becker.

The first aspect concerns stricter visa requirements on third country nationals that were adopted as part of the compensatory measures for abolishing border controls. The Schengen Implementing Convention thus made it harder for most third country nationals to legally enter the EU. Relying on hitherto unpublished archival material, Stanley-Becker shows the secrecy of governments negotiations, reminiscent of the dark ages of European powers' secret diplomacy. Back in 1985, treatymakers included a secret annex to the Schengen Agreement, which consisted of a list of 'countries whose nationals were classified as undesirables'.[58] Upon request of the German government, which feared negative diplomatic repercussions, the annex was kept confidential.[59] The lists specified countries whose nationals would be subject to stricter visa requirements. During the negotiations on the Schengen Implementing Convention, the secret lists served as a point of departure for drafting the rules on harmonising national visa requirements. The result was the lowest common denominator: if even one member state had imposed visa requirements on nationals of a given country, those nationals would now require a visa for all other Schengen states.[60]

The second aspect concerns the limitation of the right to seek asylum. One undisputed aim during the drafting process of the Schengen Implementing Convention was to avoid refugees in orbit and multiple asylum applications. Only one member state ought to be responsible for the examination of an asylum application. Yet, as Stanley-Becker shows, Germany and France were split about

[56]Stanley-Becker, *supra* n. 7, p. 107.
[57]*See* Zaiotti, *supra* n. 6; Groenendijk et al., *supra* n. 10.
[58]Stanley-Becker, *supra* n. 7, p. 102.
[59]Ibid., p. 85.
[60]Ibid., p. 103-104.

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the regulatory approach. While the West German government sought a restrictive approach on the mobility of asylum seekers in the Schengen area 'in order to stop the attraction effect', the French government favoured a 'wide latitude for asylum seekers once inside Schengen' and considered that asylum seekers should be able to freely 'circulate on the territory of all states party to the Schengen Agreement'.[61] Germany's position prevailed. The Schengen Implementing Convention included a set of rather restrictive rules governing the responsibility of states to examine an asylum application. With the exception of a few rules that took into account (narrowly defined) family ties, the majority of the rules set out the responsibility of the state that caused the presence of the asylum seeker.[62]

Third, restricting the movement of 'undesired persons' was linked from the outset to considerations on collecting and exchanging data on these persons and enhancing transnational collaboration of law enforcement authorities. Before the signing of the Schengen Agreements in June 1985, treatymakers discussed how data sharing would be a 'weapon against unwanted movement'.[63] In 1988, the Standing Working Group on the Schengen Information System (SIS) was established, composed of information technology experts and officials of ministries of interior. The working group soon agreed on the technical architecture of SIS: national databases connected to a central database in which information on visa, residence status, and criminal records would be stored and exchanged. National authorities could enter alerts on a person into their national databases, which were then uploaded into the central database, and search the central database for any alerts entered by other member states. After initial technical problems, which essentially consisted of pairing French software with German hardware,[64] SIS became operational in 1995. In terms of scope and depth of data collection and exchange, SIS became the world's most comprehensive surveillance architecture. What emerged, as Stanley-Becker says, was 'a transnational panopticon of the information age – a security instrument that substituted for control at territorial borders with cross-border information flows augmenting the state's police power'.[65]

These restrictive rules in the Schengen Implementing Convention were compounded by the absence of harmonisation of substantive national asylum laws that would avoid a race to the bottom, the absence of any effective supervisory mechanism and parliamentary oversight that would harness the surveillance and police powers in SIS, as well as the lack of human rights obligations in that

[61]Ibid.

[62]For an early critique, *see* E. Guild, 'The Europeanisation of Europe's Asylum Policy', 18 *International Journal of Refugee Law* (2006) p. 630 at p. 637.

[63]Stanley-Becker, *supra* n. 7, p. 170.

[64]Ibid., p. 169.

[65]Ibid., p. 166.

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Convention to limit the application of the responsibility criteria if the transfer of an asylum seeker to the responsible state were to result in a human rights violation.[66]

Stanley-Becker provides a nuanced analysis of the various challenges to these rules. On the one hand, the widespread criticism by human rights organisations to the adoption of the Schengen Implementing Convention fell on deaf ears. Stanley-Becker argues that the Schengen Implememting Convention reflected a vision of human rights in which migrants were excluded from the scope of human rights. As Catherine Lalumière, the French state secretary in charge of the Schengen negotiations, stated in regard to the Convention: 'We tend to keep human rights for our own nationals'.[67] On the other hand, Stanley-Becker recounts the various legal struggles at the national level against the rules on responsibility allocation. For instance, in France, migrant rights groups challenged before the French *Conseil Constitutionel* the restrictive Pasqua laws that limited asylum seekers possibilities to apply for asylum, if they had entered France through another European country. The *Conseil* held that the Pasqua laws would be contrary to the right to asylum in the French Constitution.[68] In the Netherlands, the Dutch Council of State advised the government not to ratify the Schengen Implementing Convention, because it would permit the Netherlands to 'delegate to another state the task of determining whether an individual is a refugee'.[69] And in Germany, a divisive debate on Schengen's asylum rules and the constitutional right to asylum in Article 16 of the *Grundgesetz* (Basic Law) occurred in the *Bundestag*, underlain by a German reckoning with its Nazi-past.[70] While the Conservative Christian Democrats in government had pushed for the restrictive first country of entry rule during the Schengen negotiations, opposition parties from the left considered Article 16 *Grundgesetz* as a moral imperative that followed from the direct historical 'experiences of guilt, persecution, and suffering'.[71]

[66]For instance, the transfer of Tamil asylum seekers to Germany regularly resulted in violations of Arts. 2 and 3 ECHR. The German authorities and courts did not consider Tamil asylum seekers as refugees and regularly deported Tamils to Sri Lanka, where they faced a real risk of being tortured or killed. *See* G. Noll, 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law', 70 *Nordic Journal of International Law* (2001) p. 161 at p. 177-179.

[67]Stanley-Becker, *supra* n. 7, p. 124. Lalumière's statement could also be seen as reflecting a broader genealogy of the idea of human rights in the ECHR that are limited to nationals of the contracting states. *See* M. Dembour, *When Humans Become Migrants* (Oxford University Press 2015) p. 24.

[68]Stanley-Becker, *supra* n. 7, p. 153 ff.

[69]Ibid., p. 155.

[70]Ibid., p. 156.

[71]Ibid., p. 159.

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However, legal challenges to the restrictive fallout of the Schengen Implementing Convention resulted, as Stanley-Becker shows, in a backlash. Instead of implementing the constitutional courts' judgments, member states simply amended their constitutions.[72] These constitutional amendments reinforced and expanded the power of the executive branch over national borders that would otherwise been limited by constitutional protection of asylum seekers. The SIS expanded executive powers over national borders by providing law enforcement authorities with a common technical infrastructure, institutionalised cooperation, and the legal capacities to expand both the scope and the geographic reach of bordering practices. The SIS eventually gave rise to a broader 'European security architecture' that relies on the extensive use of personal data, including biometric data, collected in large-scale, supranational databases, which are rendered interoperable and searchable through modern and potentially self-learning technologies, in order to automatically predict threats to public security.[73] Stanley-Becker thus convincingly discards the myth that the removal of border controls functions as an antipode to national sovereignty. Rather, Schengen simultaneously limited national sovereignty in a few fields and reinforced and expanded it in many others.

Conclusion

So which lessons can we draw from Stanley-Becker's history of Schengen for the current state of Schengen? Although Stanley-Becker claims that *Europe without Borders* is a book about 'origins, not outcomes', it nevertheless offers a rich source to help better grasp the current state of affairs in Schengenland. Three lessons can be drawn from *Europe without Borders*. First, Stanley-Becker's account that the abolition of internal border controls is based both on an economic rationale (the establishment of the internal market) and a political rationale (the construction of a Europe of citizens) offers a robust historical basis for a doctrinal reinterpretation of the absence of border controls in light of EU citizenship. In this regard, the right to move freely in the area without internal borders and not being subject to border checks at internal borders would constitute an integral part of EU citizens'

[72]Ibid., p. 155-161. In France, Art. 53-1 was added to the constitution, which permitted the government to enter into treaties allocating asylum responsibility to another country. In Germany, the conservative Christian Democrats, together with Social Democratic Party, amended the constitutional right to asylum in the *Grundgesetz*, excluding from its scope persons who entered from another European country where the rights in the ECHR would be guaranteed. And in the Netherlands the government simply pressed ahead, and the Council of State eventually revised its opinion.

[73]C. Tönnes et al., 'The Future of the European Security Architecture', *Verfassungsblog* (8 May 2023), https://verfassungsblog.de/pnr-debate/, visited 10 February 2026.

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right to move freely.[74] This is related to the second point: the opening of borders in Europe, as Stanley-Becker shows, never was a linear development, but a process in which various actors advanced and contested different narratives, *inter alia* through legal mobilisation, that impacted the legal framework. Seen in this light, Schengen is a space in the making, which opens new horizons for exercising political and legal agency to contest current legal arrangements. The final, and perhaps most important, point that we can draw from Stanley-Becker's historical analysis concerns the tensions that arise from the limited conception of free movement in the Schengen treaties: while European citizens ought to enjoy free movement, undesired third country nationals were excluded from it: 'From its inception, Schengen paired cosmopolitan freedom with exclusion enforced by sovereign nations.'[75] These tensions are both normative and very practical. Normatively, the very essence of the cosmopolitan aspirations of free movement is that they cannot be limited to European citizens only, but necessarily extend – albeit to different degrees – to everyone.[76] Practically, the dissident stories of migrants claiming a right to free movement, recounted by Stanley-Becker, suggest that those excluded eventually oppose restrictive rules with their feet: they evade administrative procedures and move to different member states. Indeed, irregular secondary migration is the principal factor of the current, as well as past, Schengen crises in which border controls became a quasi-permanent feature of the area without internal borders. These tensions will remain so long as mobility preferences of asylum seekers remain largely excluded from free movement.

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[74]This of course raises further doctrinal questions on the personal scope of the right to free movement in Art. 21 TFEU. For a detailed account on how to address these doctrinal questions, *see* Salomon and Rijpma, *supra* n. 6, p. 302-303.

[75]Stanley-Becker, *supra* n. 7, p. 272.

[76]I. Kant, *Perpetual Peace, the Third Definitive Article on Perpetual Peace* (1903 [1795], transl. by M. Campbell Smith) p. 137 ff.

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