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Internal Market Adjudication and the Quality of Life in
Europe

Gareth Davies

European University Institute
Department of Law

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Abstract

The cases decided by the Court of Justice concerning free movement of goods and services are often seen in terms of a difficult balance between trade and consumer protection. This paper suggests that their major consequences are not for the consumer at all, but for quality of life in European societies. Legislation which restricts what can be sold, and who can sell it, has consequences for equality, autonomy, social cohesion, and identity which are greater in importance than any consumer-protective effect. That the Court's focus is so unbalanced – it ignores these social concerns - is to do with several factors. Firstly, the Court has a transactional fixation, seeing contracts as essentially private matters which are of no concern to wider society. This view point is common in economic law, but unrealistic, and embodies some very controversial implicit political standpoints. Secondly, when the Court approaches the judicial review of national measures which restrict free movement it does not in fact engage in balancing at all, but seeks to reconcile interests, and to push integration forward. The ability of a national community to determine its own quality of life and express its values is something which evades easy reconciliation with a single market. On the contrary, integration brings unavoidable costs in autonomy and social concerns, and denial of this fact is harmful to both Europe and the EU. This argument proceeds by an examination of the case law concerning free movement, and the process of judicial review found within that law.

Keywords

Internal Market; Court of Justice; balancing interests; diversity in Europe; proportionality

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INTERNAL MARKET ADJUDICATION AND THE QUALITY OF LIFE IN EUROPE

Gareth Davies

Introduction

Free movement of goods, persons, services and capital between the Member States of the EU are freedoms enshrined in the EU Treaties,¹ but ones that are often threatening to national policies and interests.² The European Court of Justice has developed a jurisprudence of free movement, which at first glance takes account of those national concerns and where necessary allows free movement to be restricted to some extent.³ The rhetoric of the law is not one of free trade at all costs, or the sacrifice of national interests, but of compromise between the two, and above all, of their reconciliation.⁴

Nevertheless, it is the first claim of this paper that the type of interest that is in fact most threatened by free movement is systematically ignored by the Court. The judgments focus on essentially contractual issues, to do with the quality of the particular goods or services being traded, and the quality of the relationship between the parties to the transactions in question. Yet the most fundamental changes wrought by free movement are on the texture of national life, on the wider social relations between individuals and between individuals and their state. These are not captured just by looking at the parties to transactions, but by understanding how market regulation affects society more broadly, for example by creating shared experiences, a sense of equality, and social bonds. Economic transactions are not just private matters, but socially embedded.⁵

The second claim of the paper is that this is not just a contingent neglect. That is to say, it is not just a case of bringing these matters to the attention of the Court so that they can be thrown into the soup of compromise. The structure and process of judicial review of national measures hinders the very voicing of such concerns, the way that interests are presented and weighed being such that to incorporate the social would require a different kind of judicial review. The transactional concerns that are the conventional subject of the case law can be reconciled with free trade, and the case law is essentially about the best way to achieve this – should it be by directly applying the Treaty articles, or by harmonisation?⁶ By contrast, the social interests at stake in a limited marketplace are more about local autonomy, cultural particularity, and about the social and psychological merits of limiting choice. This means that they are existentially threatened by free trade, and to speak of complete reconciliation with an open single market is oxymoronic. As a result, their recognition by the Court as legitimate reasons to restrain movement would change judicial review from a process of steering integration into a process of determining its limits.

¹ Consolidated Version of the Treaty on the Functioning of the European Union, art. 20, 21, 34, 45, 49, 56, 63, Mar. 30, 2010, 2010 O.J. (C 83)

² See, e.g., F.W. Scharpf, *The asymmetry of European integration, or why the EU cannot be a 'social market economy'*, 8 SOCIO-ECONOMIC REVIEW 211 (2010).

³ See generally Chapter 20, Public Goods, in D. CHALMERS, G. DAVIES, AND G. MONTI, EUROPEAN UNION LAW (3d ed. 2014).

⁴ See below.

⁵ See M. Granovetter, *Economic action and social structure: The problem of embeddedness*, 91 AMERICAN JOURNAL OF SOCIOLOGY 481 (1985); K. POLANYI, THE GREAT TRANSFORMATION (1944); G. BECKER, SOCIAL ECONOMICS: MARKET BEHAVIOR IN A SOCIAL ENVIRONMENT (2003)

⁶ See G. Davies, *Is mutual recognition an alternative to harmonisation?* in REGIONAL TRADE AGREEMENTS AND THE WORLD TRADE ORGANISATION (F. Ortino and L. Bartels eds., 2007).

A transformed judicial review of this kind is imaginable, but the third task of the paper is to consider what it would involve, and what costs and benefits it would bring. While the neglect of these “quality-of-life” interests is harmful in various ways – both to those interests and to the EU - the full-blooded adjudication of them may be harmful too, if those interests are so imprecise and value-laden and context-specific that the law then succumbs to apparent arbitrariness or becomes over-politicized.⁷ The right approach to adjudicating interests is therefore a difficult thing to find. It depends on what Europeans want their internal market to entail and what the role of the Court is accepted to be in constructing it, political questions whose answers will depend on the prevailing political mood. The challenge is therefore not to reach a utopian state of judicial review that can persist for all time, but to find, perhaps by trial and error, the kind of internal market law which suits the Union now.

The paper proceeds in three broad stages, corresponding to the tasks outlined above. The first stage consists primarily of an attempt to describe the kinds of interests under discussion. The social consequences of trade are of course not a new object of study, but attention has tended to focus on redistributive effects, or on access to goods and services for particular vulnerable groups, or on the undermining of specific institutions as a result of capital or customer flows. Concrete, measurable, harm has been at the fore. This paper rather attempts to describe the ways in which trade may impact on certain styles of society, how market-restricting regulation may preserve a certain togetherness – call it social cohesion, or equality, or identity-building – while that very same regulation will be seen just as an obstacle to movement by EU law. The emphasis here is on togetherness at the national level, because that is what may be challenged by the internal market. This is not to claim that national communities are the only ones that count, or that wider or narrower communities cannot be meaningful. It is just that social cohesion on a national level is shaped and formed to some extent by national economic law, and will thus be affected by the impact of the internal market. Hence it is the subject here.

The challenge of the first part is to show that this impact deserves a voice in the law: that it is a legitimate interest, deserving of recognition and weighing in the judicial review process. That is partly done through discussions of examples, personal and from the case law, and then to a certain extent the interests are categorised, analysed and placed in the context of wider sociological discussions of the economy and society. Yet the most important part of meeting this challenge is this simple claim: that the quality-of-life changes wrought on society by trade are ones that people care about. For whether it is economics, politics, or policy, it is the subjective importance accorded to certain issues – health, security, or quality of life, for example – that makes them matter. If, therefore, people care about the way society’s texture changes when borders open then this becomes an interest deserving of recognition in exactly the same way as an impact on health, the environment, or public safety.

None of this is to take a stance on the objective merits of certain styles of market regulation, either at national or European level. This is not a paper which makes an argument about what markets do to society in some general sense. On the contrary, its very point is that societies vary, and Member States may quite understandably experience internal market law in different ways. For some its deregulatory impact may seem marginal, or welcome. For others it may seem threatening to social values. It may perhaps be worth debating about who is ‘right’ or whether free trade or restricted markets are socially ‘good’ or ‘bad’, but such debates are not a part of this paper. The normative stance here is a narrower one: some states might understandably take the view that restricting goods and services contributes to social cohesion and quality of life, and if they do take that view, then it should be heard, acknowledged, and weighed in the law. If the paper is normative towards trade, or market regulation, then its standpoint is not that there should be more or less of either in some general sense, but rather that decisions about these things should better take account of local preferences, impacts, and variations. This is above all a paper about judicial review, whose aim is not to advocate a certain

⁷ See H. Schepel, *Constitutionalising the market, marketising the constitution, and to tell the difference: On the horizontal application of the free movement provisions in EU law*, 18 EUROPEAN LAW JOURNAL 177 (2012).

socio-economic model in Europe, but to advocate a Union in which those who are affected by the law are sufficiently heard.

Accordingly, the second part of the paper moves on to consider why it is that quality-of-life concerns are absent from the case law. This part consists of a fairly detailed examination of how the Court weighs interests when it reviews national measures which are claimed to obstruct movement. Which assumptions and orientations are explicitly or implicitly present in the law? There may seem to be a sudden change of register between the two parts, a disjunction between the discursive and broad ranging first part of the paper, and the legal-technical analysis of cases and of proportionality-balancing in the second. Yet having identified a failure of representation in the law, the obvious next step is to consider how that is caused, and how it may be solved, and these are what the second part is for.

One of the difficulties, identified in the second stage, is that the tension between the social virtues of a certain kind of closure, and the European virtues of a certain kind of openness, is not easily resolvable. It is more of a choice than a balance. This invites some kind of structural solution, some systematic limitation of the scope of EU law, for example. Yet this would be a failure: the very essence of the integration process is an ongoing attempt to try and open borders without harming the societies, values and institutions protected by those borders. Success lies not in reconciling the irreconcilable, but in finessing that opposition; voicing and discussing concerns in a way that causes attitudes, and indeed laws, to slowly soften and change, until compromise, if not harmony, occurs. The question is then where this process should take place: who is qualified to hear, discuss, and weigh concerns about impact on quality of life, the political fora or the courts? The position ultimately advocated by this paper is that it belongs to both. The defects of European politics, and the potential expository power of the dialogue between the Court of Justice and national courts, mean that both should play a role. At the current state of European integration, the conflicts inherent to that process need all the reasoned, careful, and thoughtful recognition they can get.

Free movement law as constructed by the Court

The Treaty on the Functioning of the European Union contains a series of Treaty articles providing for the free movement of goods, persons, services, companies and capital between the Member States of the EU.⁸ For this article, the ones of most direct relevance are those allowing trade in goods and services, and the migration of companies.⁹ They have been found to have direct effect, meaning they are directly enforceable in national courts, and they take precedence over conflicting national law.¹⁰

The most fundamental and controversial question in the body of free movement law is what exactly the Treaty requires: is free movement achieved when discrimination against foreign goods services and companies is removed or is free trade also about ensuring national markets are sufficiently open and dynamic?¹¹

⁸ Consolidated Version of the Treaty on the Functioning of the European Union, art. 20, 21, 34, 45, 49, 56, 63, Mar. 30, 2010, 2010 O.J. (C 83)

⁹ *Id.* art. 34, 49, and 56.

¹⁰ Case 74/76, Iannelli, [1977] ECR 557; Case 33/74, Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, [1974] ECR 1299; Case 2/74, Reyners, 1974 ECR 631; Case 6/64, Costa v ENEL, [1964] ECR 585; Case 106/77, Simmenthal, 1978 ECR 629.

¹¹ See I. Lianos, *Shifting narratives in the European internal market: Efficient restrictions of trade and the nature of economic integration*, 21 EUROPEAN BUSINESS LAW REVIEW 705 (2010); J. Snell, *The notion of market access: a concept or a slogan?* 47 COMMON MARKET LAW REVIEW 437 (2010); S. Weatherill, *After Keck: Some thoughts on how to clarify the clarification*, 33 COMMON MARKET LAW REVIEW 885 (1996); N. Bernard, *Discrimination and free movement in EC law*, 45 INT'L & COMP. L.Q. 82 (1996); G. Davies, *Understanding market access. Exploring the economic rationality of different conceptions of free movement law*, 11 GERMAN L.J. 470 (2010).

The Court has constructed a body of case law partially, if ambiguously, answering these questions.¹² Using various legal tools, phrases, and concepts it has established two principles which recur in the cases and may be said to underlie the market. One is that if goods or services are produced and marketed in a Member State, and comply with the laws in that Member State, then they should be accepted on the markets of all other Member States.¹³ Thus France should not ask whether wine imported from Spain meets French standards, but whether it meets Spanish ones, and if so it should be admitted onto the French market. It is, in general, not permitted to apply local standards to imported services or goods (although they may still be applied to local services or goods).¹⁴ This rule of mutual recognition is not absolute – as will be seen below – but it is a robust presumption.¹⁵ It has the consequences that market places become far more diverse, as the goods and services available do not necessarily comply with the standards in force in the state of marketing. All of Europe’s various approaches to quality and production regulation may be visible on the shelves or service markets of any single Member State.

A second principle found in the cases, similar to the first but perhaps not co-extensive, is that measures which restrict or obstruct inter-state movement should be removed, or at least should not be applied to goods, services or companies coming from other states if such application would tend to obstruct or deter movement.¹⁶ Again, this is not absolute, but it is broad. The fact that a company may have to change its business model to comply with social, environmental, or other regulations has been found to be an obstacle to movement.¹⁷ The fact that rules on using goods –for example restricting where or how they can be used – may make them less attractive to consumers and therefore, in the eyes of the Court, obstruct their sale in that state and so, as a corollary, in fact deter their import.¹⁸ Measures which restrict the prices that can be charged for professional services,¹⁹ or the kinds of bodies which can provide such services (partnerships or firms: large or small practices),²⁰ or the location of service providers relative to each other and to population centres (cases have concerned matters such as rules aiming to ensure that pharmacies do not flee small villages, or that dentists do not merge into large practices which may be less accessible for some) have all been found to be restrictions on free movement,²¹ since they might tend to discourage the foreign market entrant.

¹² See, e.g., Case C-8/75, *Procureur du Roi v Dassonville*, [1974] ECR 837; Case C-120/78, *Cassis de Dijon*, [1979] ECR 649; Joined Cases C-267 and 268/92, *Keck and Mithouard*, [1993] ECR I-6097; Case C-110/05, *Commission v. Italy (Trailers)*, [2009] ECR I-0519; Case C-188/04, *Alfa Vita v. Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, [2006] ECR I-8135; Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165; Case C-544/03, *Mobistar v Commune de Fléron*, [2005] ECR I-7723; Case C-442/02, *Caixabank France*, [2004] ECR I-8961; Case C-518/06, *Commission v Italy (Insurance)*, [2009] ECR I-3491.

¹³ See Case C-120/78, *Cassis de Dijon*, *supra*; Case C-518/06 *Commission v Italy (Insurance)*, *supra*.

¹⁴ See Case C-355/85, *Driancourt v Cagnet*, [1986] ECR 3231.

¹⁵ See N. Nic Shuibhne and M. Maci, *Proving public interest: The growing impact of evidence in free movement case law*, 50 COMMON MARKET LAW REVIEW 965 (2013).

¹⁶ See above, esp. Case C-8/75, *Dassonville*, *supra*; Case C-55/94, *Gebhard*, *supra*; Case C-110/05, *Commission v Italy (Trailers)*, *supra*; Case C-442/02, *Caixabank*, *supra*; see also S. Enchelmaier, *Always at your service (within limits): The ECJ’s case law on article 56 TFEU (2006–11)*, 36 EUROPEAN LAW REVIEW 615 (2011).

¹⁷ See Case C-400/08, *Commission v Spain*, [2011] ECR I-1915; Case C-518/06, *Commission v Italy (Insurance)*, *supra*.

¹⁸ See Case C-110/05, *Commission v Italy (Trailers)*, *supra*; Case C-142/09, *Lahousse*, [2010] ECR I-11685; Case C-433/05, *Sandström*, [2010] ECR I-2885; Case C-142/05, *Áklagaren v Mickelsson and Roos*, [2009] ECR I-4273.

¹⁹ See Joined Cases C-94/04 and C-202/04, *Cipolla and others*, [2006] ECR I-11421; Case C-565/08, *Commission v Italy*, [2011] ECR I-2101; Case C-602/10, *Volksbank România*, Judgment of 12 July 2012.

²⁰ See Case C-357/10, *Duomo*, Judgment of 10 May 2012; Case C-169/07, *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung, Oberösterreichische Landesregierung*, [2009] ECR I-1721.

²¹ See Case C-169/07, *Hartlauer*, *supra*; Case C-217/09, *Polliseni*, [2010] ECR I-175; Case C-570/07, *Blanco Perez*, [2010] ECR I-4629;

Yet many such rules and standards have a genuine function, and such a broad free movement law represents a threat to national policy and interests. Overtly, the Court acknowledges this, and since its very first judgments on free movement has acknowledged that free movement might have to bow for certain national concerns, if that is necessary to prevent harm being done.²² In its famous *Cassis de Dijon* judgment, the foundation of mutual recognition, it also noted that national measures necessary to protect certain ‘mandatory requirements’ ‘must be accepted’, and since then its rhetoric has always maintained that free movement is not to be extended to the point that it harms other, legitimate, interests.²³ It is a conventional, and fair, summary of the current doctrine that where a national measure pursues a legitimate public interest objective in a proportionate way, that measure will take precedence over the free movement articles of the Treaty – or at least, those articles will not be used to set it aside.²⁴

This does not mean that the raising of a public interest serves as a trump card. Proportionality is central to free movement law, and entails that free movement may only be restricted insofar as genuinely necessary.²⁵ The question is therefore often whether the interest at stake could be protected in another way, which has a less restrictive effect on movement.²⁶ In the majority of cases before the Court it finds this to be the case. Many of the goods cases have concerned foodstuffs, often ones with cultural significance.²⁷ These have typically been subject to strict standards governing the way they are made and their ingredients, but these standards have had the effect of keeping out imports made in different ways. The standards have been defended as consumer protection measures, guaranteeing the quality of the goods, but the Court has repeatedly found that the consumer can be protected by requiring foodstuffs to list their ingredients, permitting the consumer herself to decide whether she wishes to take the traditional product or a slightly different foreign one. Thus whereas it used to be the case that all beer on sale in Germany, all pasta in Italy, all chocolate in Spain, all foie gras in France, was required to comply with strict, in some cases ancient, rules, this is no longer so.²⁸ Local production is still often required to comply with these rules, but imports made according to the laxer standards of other Member States are now also available too. Similarly, in cases on services and establishment, the Court has tended to find that strict rules governing, in particular, professional services and their location, competition, and means of provision, are disproportionate: the goals in question could still be met, it often finds, by rules which were more flexible, and which allowed other business models, more competition, and different styles of provision.²⁹

While consumer protection is perhaps the most often litigated reason for restricting movement, it is by no means the only one: the class of legitimate interests which states may pursue, and which may in

²² See van Case C-8/75, *Dassonville*, *supra*; Case 33/74, *van Binsbergen*, *supra*.

²³ See Case C-120/78, *Cassis de Dijon*, *supra* ¶8.

²⁴ Case C-384/08, *Attanasio Group Srl v. Comune di Carbognano*, [2010] ECR I-2055; *see also* N. Nic Shuibhne and M. Maci, *supra*, at 971.

²⁵ See N. Nic Shuibhne and M. Maci, *supra*; D. CHALMERS, G. DAVIES, AND G. MONTI, *EUROPEAN UNION LAW* (3d ed. 2014), at 914-922.

²⁶ *Id.*

²⁷ See Case C-286/86, *Deserbais*, [1988] ECR 4907; Case C-788/79, *Gilli and Andres*, [1980] ECR 2071; Case C-12/00, *Commission v Spain (Spanish Chocolate)*, [2003] ECR I-459; Case C-14/00, *Commission v Italy (Chocolate)*, [2003] ECR I-513; Case C-407/85, *Drei Glocken (Pasta)*, [1988] ECR 4233; Joined Cases C-158/04 and C-159/04, *Alfa Vita v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, [2006] ECR I-8135; Case C-314/89, *Rauh*, [1991] ECR I-1647; Case C-178/84, *Commission v Germany (German Beer)*, [1987] ECR 1227; Case C-184/96, *Commission v France (foie gras)*, [1998] ECR I-6197. *See also* Case C-8/75, *Procureur du Roi v Dassonville*, *supra*; Case C-120/78, *Cassis de Dijon*, *supra*; Joined Cases C-267 and 268/92, *Keck and Mithouard*, [1993] ECR I-6097, *supra*.

²⁸ See Case C-178/84, *Commission v Germany (German Beer)*, *supra*; Case C-407/85, *Drei Glocken (Pasta)*, *supra*; Case C-184/96, *Commission v France (foie gras)*, *supra*; Case C-12/00, *Commission v Spain (Spanish Chocolate)*, *supra*.

²⁹ See Case C-169/07, *Hartlauer*, *supra*; Case C-357/10, *Duomo*, *supra*; Case C-570/07, *Blanco Perez*, *supra*; Case C-518/06, *Commission v Italy (Insurance)*, *supra*.

principle justify restricting movement, is an open one, and indeed a fairly wide variety have been acknowledged in the law, varying from traditional derogations such as environment and public health, to more practical governance issues such as the preservation of institutional stability and policy coherence, or the preservation of agricultural communities, and continuing on to more lofty concerns such as public morality and the preservation of constitutional values.³⁰ On the face of it, this is a Court seeking to take account of all the interests at stake in a situation and reach a reasonable compromise, not a Court that wishes to sacrifice the non-economic on the altar of free trade.

What is at stake in free movement law?

Regulation, trade and the quality of life

I remember travelling around West Germany for the first time in the late nineteen eighties and being struck by what seemed to me – as someone who had grown up in the United Kingdom – a paradoxical combination of soberness and wealth which defined public spaces, and in particular public commercial life. Shops, restaurants, and cafes seemed to have a limited range of products, and a high degree of uniformity, yet this was not the Spartan sameness which popular imagery had taught me to associate with the Eastern bloc (as it then still was). Again, as an Englishman I was struck by the discreet yet distinct signs that West Germany was a more prosperous country than the UK, the way that things – buildings, products, almost anything - seemed well-put together, comfortable, simply of a higher quality in most cases than I was used to. But there seemed to have been a sort of decision not to explore the limits of what could be done with that prosperity, not to see how many different things could possibly be bought, sold and advertised. On the one hand, it could be frustrating, this sameness and this limitation, and it could be difficult to find things that I took for granted at home. On the other hand, it was revelatory to discover that even as a teenager with not much cash, eating and staying in the cheapest places, I was not condemned to junk, did not apparently fall outside the sphere of civilised society and its concern for standards. The universality of a certain minimum quality gave a feeling of safety, almost of family, and a distinct texture to economic life. It made some decisions much easier, and less stressful.

Later, learning European law, I realised that much of this atmosphere that I had tasted was produced by, or protected by, regulatory choices.³¹ Collective decisions had been taken to avoid the chaotic exuberance of the Anglo-Saxon marketplace, with all its colours and lies, its abundant junk and its over-marketed gimmicks.³² Regulation limited what could be bought and sold, who could buy and sell it, and how they could buy and sell it, and this affected not just the consumer as consumer, but also the consumer as citizen, or as human being.³³ This regulation affected what it felt like to live in that state. Each country makes its own decisions – consciously or unconsciously – on the character of its

³⁰ See Case C-67/97, *Bluhme*, [1998] ECR I-8033; Case C-379/98, *Preussen Elektra*, [2001] ECR I-2099; Case C-209/08, *Sayn Wittgenstein*, [2010] ECR I-13693; Case C-36/02, *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609; Case C-370/05, *Festersen*, [2007] ECR I-1129; Case C-41/02, *Commission v Netherlands (Dutch Vitamins)*, [2004] ECR I-11375; Case C-204/90, *Bachmann v Belgian State*, [1992] ECR I-249; Case C-385/99, *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen*, [2003] ECR I-4509.

³¹ See generally E. Colla, *The outlook for European grocery retailing: Competition and format development*, 14 INTERNATIONAL REVIEW OF RETAIL, DISTRIBUTION, AND CONSUMER RESEARCH 47 (2004).

³² On the contrast between the Anglo-Saxon and continental approaches to economic regulation, see C. Offe, *The European model of 'social' capitalism: Can it survive European integration?*, 11 JOURNAL OF POLITICAL PHILOSOPHY 437 (2003).

³³ See J.Q. Whitman, *Consumerism versus producerism: A study in comparative law*, 117 YALE LAW JOURNAL 340 (2007); A. Bagchi, *The political economy of regulating contract*, 62 AMERICAN JOURNAL OF COMPARATIVE LAW (2014).

commercial life, not just moving along a sliding scale from paternalistic product regulation to consumer choice, but involving more subtle variations concerning the kinds of choices, the kinds of freedoms, the matters that are left to the individual and the matters that are decided collectively via the state. A preference for deregulation in one area may be matched by intense regulation in another, to do with factors such as tradition, lobbies, public preferences, or political accident.³⁴ Each combination, in its own particular context, gives a certain character to that nation's public space – since such space is, in practice, largely filled with economic activity.

These choices, these differences, are what is at stake in *Cassis de Dijon* and its spawn, in the proposition that products made in one Member State of the EU should be permitted to be sold in all others, because this proposition is directly opposed to the idea of a limited marketplace, of the collective decision-making about individual transaction possibilities that is described above.³⁵ The cases in question are often viewed in terms of a balance between trade and consumer protection but this does not capture what is at stake.³⁶ The societal changes, the changes to the character of life which deregulation can bring are of far greater importance, and are what Europeans, and the law, should be concerned with.

A similar story can be told about the law concerning free movement of services and the freedom of establishment. Concerning freedom of establishment, there have been a spate of cases in recent years addressing what may be called ‘high street health services’ – pharmacies, opticians, and dental clinics.³⁷ National rules which limit the number of establishments in a given population area, or which limit the number of establishments that a single person may own or operate, or rules which favour the establishment of small dental practices over larger clinics, have all been found, quite plausibly, to discourage establishment.³⁸ Member States have defended their rules with more or less serious arguments, offering considerations such as the need to ensure universal access to pharmacies, which is addressed by preventing their concentration in population centres; the need to guarantee quality of service, by ensuring that a professional optician is onsite, and not running between his various shops; and, somewhat obscurely, the concern that large dental clinics would lead to simultaneous over-supply, with an impact on the public finances, and reduced access, because supply would be concentrated.³⁹ Some of the arguments failed outright, but in some cases the Court was more flexible, particularly where rules limiting the number of establishments in a given area were concerned. Here it conceded that these might be acceptable, provided they could be shown to be necessary to ensure access to the services.⁴⁰ The Court invited national courts to assess the proportionality of national rules in this light, assessing the policy consistency of all the relevant national rules, and looking perhaps at ‘specific statistical evidence’.⁴¹ In other words, some of the rules could remain provided they could be translated into the language of concrete and quantifiable risk. The condition for maintaining the

³⁴ *Id.*

³⁵ See Case C-120/78, *Cassis de Dijon*, [1979] ECR 649.

³⁶ See, e.g., the discussion in P. CRAIG AND G. DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* (2011), at 877-889.

³⁷ See Case C-570/07, *Blanco Perez*, [2010] ECR I-4629; Case C-169/07, *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung, Oberösterreichische Landesregierung*, [2009] ECR I-1721; Case C-539/11, *Ottica*, Judgment of 26 September 2013; Case C-140/03, *Commission v Greece*, [2005] ECR I-3177; Case C-531/06, *Commission v Italy*, [2009] ECR I-4103. See also *Joined Cases C-171/07 and C-172/07, Apothekerkammer des Saarlandes*, [2009] ECR I-4171. See for discussion R. Cisotta, *Limits to rights to health care and the extent of member states, discretion to decide on the parameters of their public health policies*, in *SERVICES AND THE EU CITIZEN* 113 (F. Benyon ed., 2013).

³⁸ *Id.*

³⁹ See Case C-570/07, *Blanco Perez*, *supra*; Case C-539/11, *Ottica*, *supra*; C-140/03, *Commission v Greece*, *supra*; Case C-169/07, *Hartlauer*, *supra*.

⁴⁰ See Case C-570/07, *Blanco Perez*, *supra*; Case C-539/11, *Ottica*, *supra*.

⁴¹ See Case C-539/11, *Ottica*, *supra* ¶ 56.

traditional way of regulating was that it could be recast as a systematic and scientific public services policy.

Europe, particularly Southern Europe, is still the domain of the boutique health professional, to an extent striking to someone from another region. The high streets are sprinkled liberally with individual pharmacies, opticians, and similar specialists, often tiny, sometimes exquisite, manned by white-coated professionals whose qualifications are prominently on display. These shops are expensive and relatively inconvenient, but a visit is a quite different kind of experience from the industrialised, impersonal, always-open, selling-everything, supermarket-like chains of some of the countries of the North or the US. Those wanting maximum purchases for the minimum price in the minimum time will be driven mad, infuriated by the sense that each transaction is being approached individually, as if the wheel is being reinvented for each new car. Those who want to feel that they are not on a conveyer belt, and that their situation is a unique one, that for a few moments someone is taking them entirely seriously, may well treasure the sense of stepping out of everyday life into a hushed world of quiet rituals and beautiful packages handed over ceremoniously. Such a sensation is not a crazy thing to spend money on – or no more crazy than the other ways we buy peace and attention and beauty, with our visits to spas and art galleries and concerts. It is a choice. Given the documented power of the placebo effect, where illness and pharmacies are concerned it may even be quite a powerful policy: there is nothing implausible in thinking that the personal attention and assurance of the pharmacist himself, whose name is above the door, emphasised by the sanctity of the environment, will improve the health of some.⁴²

In any case, it is a form of interaction which seems to be valued by those who use it. While this small-scale provision is kept in place by networks of regulation which undoubtedly comprise restrictions on establishment in the EU legal sense, to treat these rules as pure protectionism, or to attribute them just to successful professional lobbying is too simple. Wherever they may have come from, historically, they now play a role in the way that people live, and there appears to be a public contentment with this form of service provision, at least as evidenced by national political resistance to deregulatory change.⁴³ It is individual traders and the European Commission who have been pushing for change, not the populations as represented in their political fora.

As with the case of product regulation, it does not take a huge effort of empathy to understand why someone might prefer, even passionately, the boutique way of life, nor indeed, why someone else might prefer, even passionately, the alternatives. They are choices reflecting and fitting with different preferences, values, ways of living. The continuation of those styles of life is what is at stake in the cases here. While the arguments put forward by the Member States were less silly than some of those in the product cases – which will be returned to below – it is clear that the concrete concerns at issue – universal access to safe, high-quality, financially reasonable services – could be guaranteed in a way which also allows increases of scale, commodification, chains, and the combination of services into pharmo-opto-medico-dental supermarkets, should that be the way of doing things that the market prefers. These hard, functional, immediate concerns are important, but they are not really threatened. A certain style of society is.

As well as the aesthetics, clumsily discussed above, the choice for small-scale provision is also about the relationship between commerce and care. Each shop and its owner may be furiously desirous of profit, but the de facto exclusion of chains and the resulting personalisation of the establishment make the interactions within it more like those between professional and client, and less like those between

⁴² See T.J. Kaptchuk, *The placebo effect in alternative medicine: can the performance of a healing ritual have clinical significance?* 136 ANNALS OF INTERNAL MEDICINE 817 (2002).

⁴³ See, e.g., the cases *supra* in note 37.

business and customer. There is certainly an implicit message: some things do not belong to the world of big business, perhaps only reluctantly to commerce at all.⁴⁴

The policy of a limited marketplace

The very slipperiness of these concerns may tempt their dismissal as trivial, sentimental matters. If one is inclined to only value the concrete, the economic, the quantifiable, and the immediate then the fact that they are relatively hard to describe and even harder to measure may make them seem almost inappropriate for integration into serious policy or law. Yet to take this approach is to trivialise the decisions people make, and the preferences they have, merely because they are complex, and despite the fact that people and societies apparently care about these things. It is to trivialise their humanity.

In any case, the ways in which product regulation affects society beyond the transaction can be concretised to some extent. The interests involved are diffuse, and the effects are often quite indirect, but one does not need to see the texture of society as a mystical matter, beyond analysis or reduction.

Firstly, product regulation creates a particular kind of equality. The difference between what the rich consume and what the poor consume is less when the range of possible goods is restrained. This elimination of the underbelly of the product market is an expression of a certain kind of solidarity, and it also creates shared experience, which contributes to social bonds. Food, drink and other products are a large enough part of life that the sense of eating, drinking and using the same things, of inhabiting the same sensory world – and in particular, the sense of not being excluded from some fundamentally different product worlds – is a meaningful expression of community. The relationship between material wealth and happiness is complex and contested, but relative wealth plays some role,⁴⁵ and when communities eat and drink the same things it is reasonable to think that the sense of wealth differences may be reduced. At any rate, standardisation is an attempt to avoid inflicting the humiliation of the junk product market on any members of society, and also, perhaps, an attempt to remind those with more purchasing power of their connection with others. The symbolic restraint of the rich can be a worthwhile contribution to social contentment.

Alongside this cultivation of horizontal social bonds – between those living now – regulation, by preserving a certain stability and tradition, preserves bonds with the past.⁴⁶ The value attached to this may vary greatly, but public discourse suggests that all communities attach some worth to the sense of continuity and feel some link to their ascendants, even their ancestors. For academics the more abstract forms of tradition, constitutional values and stories about deeds or social change, may be more accessible and apparently more important, but much of life for the non-academic is physical, tangible, sensual, and for the citizen in their home or café the eating of the same bread, meat and beer as those who came before them is plausibly a part of how they place themselves in the world, of who they are. My country is not just its kings and revolutionaries, but its tastes too.

Product regulation also frees the consumer from choice, perhaps the greatest and most ubiquitous side-effect of markets, both an enormous transaction cost, and in the bad temper it engenders and time it

⁴⁴ See, for a related claim, although in a more formalised economic context, the literature of public goods, starting from P.A. Samuelson, *The pure theory of public expenditures*, 36 *REVIEW OF ECONOMICS AND STATISTICS* 387 (1954).

⁴⁵ See, e.g., C.K. Hsee, Y. Yang, N. Li, and L. Shen, *Wealth, warmth and wellbeing: Whether happiness is relative or absolute depends on whether it is about money, acquisition or consumption*, 46 *JOURNAL OF MARKETING RESEARCH* 396 (2009); C. Boyce, S. Brown, and S. Moore, *Money and happiness: Rank of income, not income, affects life satisfaction*, 21 *PSYCHOLOGICAL SCIENCE* 471 (2010). See also T. VEBLÉN, *A THEORY OF THE LEISURE CLASS* (1899).

⁴⁶ This is an expressive function: See C. Sunstein, *On the expressive function of law* 144 *U. PA L. REV.* 2021 (1995); W. Van der Burg, *The expressive and communicative functions of law, especially with regard to moral issues*, 20 *LAW AND PHILOSOPHY* 31 (2001).

takes – which take their toll on others - an externality too.⁴⁷ Taking fundamentally unimportant decisions out of the hands of individuals is a gift of society to its members, of time and mental space, freeing them to think and care about other things. In this sense, product regulation is an expression of values: a collective preference not to seek wellbeing in great deals on novelty breakfast cereals, but in other aspects of life.⁴⁸ This freedom is not a freedom from risk: where products may genuinely be dangerous a different kind of regulation is involved than the quality standards under discussion here, and that safety regulation is not threatened by *Cassis de Dijon*.⁴⁹ It is, on the contrary, more like a freedom from the pressure of having to decide without risk. It is precisely when the consequences of a decision are trivial, when nothing is at stake, that there ceases to be any rational basis for decision-making, and so that decision-making becomes most burdensome and utterly unsatisfying.⁵⁰ However, it is hard for human beings to behave arbitrarily, and so we still waste time deciding ‘this packet or that packet? This product or that product? The red ones for ten cents more and a free button, or the blue ones for ten cents less and a re-sealable pack?’ when in fact the gains or losses which the choice may bring are less than what is lost in the very process of deciding.⁵¹ This filling of our life with trivia, which few would consciously choose for, but which is imposed upon us by a free market, is one of the things that a more regulated market place helps save us from.

Limiting the market place is also a policy decision, whether conscious or not, about how an economy should and will best function, and where creativity and energy should be channelled towards.⁵² States regularly take policy stances on matters which are essentially social engineering, trying to nudge their population to use its energy and talents in directions which are expected to bring prosperity and contentment: whether to use funding tricks to encourage students to study engineering or marketing, whether to put emphasis on technical skills or creative ones in schools, whether to support hi-tech industries or artisanal ones, and so on. A decision to make the market place a relatively dull one, where the possibilities for innovation and exploitation are limited, may well channel the most creative and free-thinking minds away from the retail world and its disciples in advertising, marketing and so on. Some may think that bad policy, some good, but it is a policy decision of the kind that states take and are expected to take, and it is understandable.⁵³

None of the above is meant to fetishize or glorify a certain approach. Alternatives may well be preferred by many. Behind deregulation may lie a principled liberalism, a joy in market creativity, a faith in the robust and self-sufficient consumer, and a desire to reward and nurture that independence of spirit.⁵⁴ The actual nature and quality of what is bought and sold may matter less in most situations than the messages sent, the stories we tell about why we are buying and selling, and in that sense the deregulated market place has a gloriously anti-materialist side, a willing sacrifice of substantive quality to the sheer fun of the market place as playground, experiment, place of unrestrained communication.⁵⁵

⁴⁷ See B. SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004).

⁴⁸ See the discussion of identity and consumer regulation in J.Q. Whitman, *supra*.

⁴⁹ See D. CHALMERS, G. DAVIES, AND G. MONTI, *EUROPEAN UNION LAW* (3d ed. 2014), at 781.

⁵⁰ See G. Low, *The psychology of choice of laws*, 24 *EUROPEAN BUSINESS LAW REVIEW* 363 (2013), 367.

⁵¹ See B. SCHWARTZ, *supra*

⁵² See C. Offe, *The European model of ‘social’ capitalism: Can it survive European integration?*, 11 *JOURNAL OF POLITICAL PHILOSOPHY* 437 (2003).

⁵³ See generally, e.g., W. Streeck, *German capitalism: Does it exist? Can it survive?* 2 *NEW POLITICAL ECONOMY* 237 (1997).

⁵⁴ See for a balanced discussion of what standards, in particular, mean for society: S. Timmermans and S. Epstein, *A world of standards but not a standard world: Towards a sociology of standards and standardization*, 36 *ANNUAL REVIEW OF SOCIOLOGY* 69 (2010).

⁵⁵ See, e.g., H. Dittmar, *Material and consumer identities*, in *HANDBOOK OF IDENTITY THEORY AND RESEARCH* 745 (S.J. Schwartz, K. Luyckx, and V.L. Vignoles eds., 2011). See also T. VEBLÉN, *supra*.

Nor is the intention to stereotype Germany, England or any other European state as a Platonic ideal of a particular form of market. The types of regulation that can be used to regulate markets are varied, and the meaning of each is often context-dependent, so that no two states send exactly the same messages to their consumers, and inevitably, given complexity, no state is a pure example of anything but itself. The point here is that the differences are real, and therefore so are the choices, and because these choices do much to shape the quality of public economic life, they matter.

The market in social context

The interests or concerns described in the discussions above are, it is hoped, not just a list but a group. There are common factors which justify calling them a type, and contrasting them with other non-economic interests. Firstly, they are immaterial, in that they are not about wealth or even distribution. The equality consequences of market-limiting regulation may have a distributive element – the poor are protected from second class goods and services, but they may have to pay more – but it is not an absolute increase in amount or quality that is claimed here to be at stake, rather a change in relative market positions.⁵⁶ Moreover, there is no claim that the rich are rendered less rich; rather, the ways their wealth manifests itself in public are constrained. It is the human reaction to such constraints which may create the benefits or consequences described above, and such reactions, and their value for well-being, are in practice unquantifiable. That makes them hard to weigh and assess in a way that will not incite accusations of arbitrariness or political bias. The only way for courts to give authority to decisions weighing matters such as these is by careful and thorough reasoning. The final moment of ‘weighing’ is inherently mystical and obscure but it is possible to display recognition of what is at stake and which parties are concerned in the process leading up this moment, and that may help inspire trust in, and acceptance of, the final decision.

Secondly, these interests are essentially external to any individual transaction. They are about the consequences of the possibility of transactions for wider society, embodying the idea that what we buy and sell and do affects others not just if they are party to our deals, but because we affect the mood of society, and they are also a part of that.⁵⁷ The suggestion is that because people are interconnected, the wealth, status, freedom and choices of one person matter for the wellbeing of others even if there are not direct or absolute material consequences. This creates a certain tension with much thinking about economic law, which tends to assume that individual welfare is isolated and isolatable from the community.⁵⁸ The suggestion that every transaction necessarily has some kind of social externalities (because I do care what others have) is therefore threatening.

Another factor which creates tension with many economic perspectives is the recognition that maximising choice and freedom is not in all contexts desirable. Economic law, and certainly the Court’s approach to free movement, often embodies the idea that extending choice is inherently beneficial.⁵⁹ Yet the concerns described here reflect the downsides of economic freedom and choice as such – not just the avoidable side-effects, but the extent to which these things are in themselves potentially harmful to wellbeing, even if in other ways they may also do good.

Lastly, limiting economic freedom is a form of collective self-definition. By excluding, a community gives a distinctive shape and form to its economic life, and defines itself against others, helping to

⁵⁶ Although see C. Offe, *supra*: Economic arguments can be made in favour of market-restrictive measures; W. Streeck, *Beneficial constraints: On the economic limits of rational voluntarism*, in CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS (J.R. HOLLINGSWORTH and R. BOYER eds., 1997); J. BECKERT, *BEYOND THE MARKET: THE SOCIAL FOUNDATIONS OF ECONOMIC EFFICIENCY* (2002).

⁵⁷ *Id.*

⁵⁸ See the critiques in J. BECKERT, *supra*.

⁵⁹ See H.W. Micklitz and S. Weatherill, *Consumer policy in the European Community: Before and after Maastricht*, 16 JOURNAL OF CONSUMER POLICY 285 (1993).

construct an identity.⁶⁰ It does not much matter for this purpose what is excluded: the point is that something is, and that the control over that exclusion is local. It is precisely when regulation is arbitrary – serves no particular practical need – that it becomes maximally an expression of collective freedom and autonomy. The freedom of a lower community in a federal context to protect health, fairness, or cleanliness is hardly freedom – it is merely the allocation of a necessary executive power. It is the freedom to draw a line for the sake of drawing a line, just because we want to, or just because we like the kind of public sphere it gives us, that demonstrates the autonomy of the community and thereby fuels a sense of freedom and control of collective destiny. This is part of the quality of national life.

Taken together, these factors justify describing the interests in question as social ones – as the social importance of economic regulation. Economic activity impacts on the way that people in a society relate to each other and to outsiders, and do things together, and share territory, and it is these matters that are at stake.

The theoretical context

The aim of the description above is to provide the background for a critique of EU judicial review, by describing what it misses and why that matters. However, that narrow legal argument is connected to broader theoretical discussions in ways worth briefly indicating. Most directly, this discussion relates to the on-going debate about the separation of the economic and the social in the EU.⁶¹ That debate is rooted in sociological arguments about the nature of the economy, and its embeddedness in social relations, arguments most often associated with Polanyi, but also found in modern sociological analyses of the economy, and even in economics itself, where the behavioural trend is to engage ever more with human, and even social, complexity.⁶² In the context of EU studies the social-economic relation is relevant for the competences of the EU, and their proper extent.⁶³ As a creature of limited powers, part of the rationale of the EU is that it addresses primarily cross-border economic issues, leaving the core elements of social policy, indeed social design, in the hands of Member States, yet this article implies that the distinction is incoherent, so that the EU's economic policies should be seen as indirect social policy too – of a fairly radical, and on some views un-European kind.⁶⁴ That this matters not just to society but also to law is shown by the Bundesverfassungsgericht's recent remark that the limits of EU powers – the point at which it would no longer recognise the authority of EU law in Germany – are reached when Member State populations no longer have the capacity to determine

⁶⁰ See also J.Q. Whitman, *Consumerism versus producerism: A study in comparative law*, 117 YALE LAW JOURNAL 340 (2007).

⁶¹ See A. Moravcsik, *Reassessing legitimacy in the European Union*, 40 JOURNAL OF COMMON MARKET STUDIES 603 (2002); G. MAJONE, *RETHINKING THE UNION OF EUROPE POST-CRISIS: HAS INTEGRATION GONE TOO FAR?* (2014); M. Dani, *Rehabilitating social conflicts in European public law*, 18 EUROPEAN LAW JOURNAL 621 (2012).

⁶² See KARL POLANYI, *THE GREAT TRANSFORMATION* (1944); L. BOLTANSKI AND L. THÉVENOT, *ON JUSTIFICATION: ECONOMIES OF WORTH* (2006); C. Offe, *supra*; G. BECKER, *SOCIAL ECONOMICS: MARKET BEHAVIOR IN A SOCIAL ENVIRONMENT* (2003); M. Granovetter, *Economic action and social structure: The problem of embeddedness*, 91 AMERICAN JOURNAL OF SOCIOLOGY 481 (1985); P. BOURDIEU, *THE SOCIAL STRUCTURES OF THE ECONOMY* (2005).

⁶³ See Case C-376/98, *Germany v Parliament and Council (Tobacco advertising)*, [2000] ECR I-8419; Case C-158/96, *Kohll v. Union des caisses de maladie*, [1998] ECR I-1931; G. Davies, *Democracy and legitimacy in the shadow of purposive competence*, EUROPEAN LAW JOURNAL (2014, forthcoming).

⁶⁴ See W. Streeck, *Beneficial constraints: On the economic limits of rational voluntarism*, in CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS (J.R. HOLLINGSWORTH and R. BOYER eds., 1997); A. Picchieri, *Social cohesion and economic competitiveness: Tools for analysing the European model*, 16 EUROPEAN JOURNAL OF SOCIAL THEORY 85 (2013).

their own socio-economic environment.⁶⁵ The argument here implicitly raises the question whether the Bundesverfassungsgericht's point of rebellion may be reasonably suggested to be near.

One way of dealing with the social side-effects of economic integration is by harmonisation, but Fritz Scharpf has most prominently argued that this is in practice an inadequate answer: the diversity of social and welfare systems in Member States, and the difficulties of the EU legislative process, make this an impractical solution.⁶⁶ His work is primarily about welfare states and social protection, and his claim that the EU is imbalanced is primarily a functional one. This article makes an analogous argument, but the practical critique is replaced by a principled one: harmonisation cannot be the solution to the social side-effects of deregulating markets, not because of the practical difficulties, but because local autonomy over market character is part of the very virtue to be preserved. One might be able to imagine a perfect European welfare state, if one could overcome all the hurdles that Scharpf describes, but one cannot imagine a perfect and uniform European market, because anything which suppresses the expression of values and preferences in the public economic sphere on all scales smaller than the European is inherently deeply flawed – indeed, destructive of the very character of the continent and its parts.⁶⁷ Marks and Hooghe suggested some time ago that debate about the EU would polarise around two axes: left and right, but also autonomy versus centralisation.⁶⁸ The attempt to address social consequences of trade by harmonisation is an attempt to avoid the second of these axes. If, by contrast, one thinks that local autonomy is, at least to some extent, a good on its own, then these two axes become interrelated, with the capacity to express local preferences bringing a price either in free trade, or in history and identity, depending what whose preferences turn out to be, in a manner analogous to Rodrik's trilemma of globalisation.⁶⁹

The silence of the Court

The social consequences of deregulation – in the sense that they have been introduced here - are almost entirely absent from the judgments.⁷⁰ While the Court professes openness to legitimate national concerns, these quality-of-life and societal issues are not raised, not discussed, simply ignored. Nowhere in the case law on free movement is there an acknowledgment that removing restrictions on free movement changes the nature of society, threatening certain values and choices. There are a small number of cases in which national values have been successfully pleaded against free movement, but always where the threat is concrete and to do with the particular goods, transactions, or actions in question: pornographic or offensive products, or use of aristocratic titles which offends a sense of equality.⁷¹ This is something different than the desire to limit choice as such, to exclude products or

⁶⁵ See 2 BvE 2/08 Treaty of Lisbon, Judgment of 30 June 2009, ¶ 249: European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. See also ¶ 257-259.

⁶⁶ See F.W. Scharpf, *The European social model: Coping with the challenges of diversity*, 40 JOURNAL OF COMMON MARKET STUDIES 645 (2002).

⁶⁷ See C. Offe, *The European model of 'social' capitalism: Can it survive European integration?*, 11 JOURNAL OF POLITICAL PHILOSOPHY 437 (2003).

⁶⁸ See G. Marks and L. Hooghe, *The making of a polity: The struggle over European integration*, 1 EUROPEAN INTEGRATION ONLINE PAPERS 4 (1997).

⁶⁹ See D. RODRIK, *THE GLOBALISATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011). See also M. Höpner and A. Schäfer, *Integration among unequals: How the heterogeneity of European varieties of capitalism shapes the social and democratic potential of the EU*, MPfG DISCUSSION PAPER 12/5 (2012).

⁷⁰ There are certain oblique remarks and hints in a few cases: Case C-148/02, Garcia Avello, [2003] ECR I-11613; Case C-147/03, Commission v. Austria, [2005] ECR I-5969; Case 186/87, Cowan, [1989] ECR 195.

⁷¹ See, e.g., Case C-34/79, Henn and Darby, [1979] ECR 3795; Case C-36/02, Omega Spielhallen und Automatenaufstellungen GmbH v Oberbürgermeisterin der Bundesstadt Bonn, [2004] ECR I-9609; Case C-209/08, Sayn Wittgenstein, [2010]

services not because there is something inherently wrong with them, but because there cannot be unending diversity or commercial freedom without this bringing a price which not all communities wish to pay.

By contrast with this perspective, the focus in the judgments is overwhelmingly on narrow and immediate interests concerning the direct parties to the transactions in question, or directly affected by the measures challenged. Free movement and its restriction is seen as primarily a private matter, about the contracts people make and whether state intervention in those contracts is justified protection of a weaker party, or unjustified obstruction of economic exchange.

This narrowness of vision sometimes gives the case law an air of unreality, as major changes are discussed and weighed exclusively in terms of their least important consequences. *Cassis de Dijon* and the free movement of goods provide the best example of this. Here the Court presents the issue as one of a possible threat to consumer protection, and goes on, in case after case, to conclude that the consumer could be protected by means less restrictive than compulsory standards, such as labelling.⁷² That is the entire discussion. This leads to the almost bizarre situation that a law with hundreds of years of history behind it, and a role in culture, society and identity – the Rheinheitsgebot – is treated in exactly the same way as a rule on the packaging of butter, as if both were just inconvenient practicalities, and the destruction of standards concerning pasta and chocolate – products not without cultural and symbolic importance in some Member States – follows the same analytic path as a decision on prizes for crosswords in magazines.⁷³

The greater part of academic commentary, even where it is critical, confines itself to the some issues that occupy the Court. Do consumers read labels? There has been a significant and often heated reaction to the entrenchment of the mutual recognition principles in *Cassis*, in which the virtues and problems of regulatory competition are discussed, the sacrifice of the consumer to free trade is posited, and the colonisation of Europe by Anglo-Saxon market practices is intermittently bemoaned.⁷⁴ Yet even from this last, broader, perspective, it is still the protection of the consumer that is put central: should he be protected by standards, or abandoned to the market? There is a transactional fixation which fits the judgment, but does not, upon reflection, fit the substance of the case.

For what is the risk to the consumer? That they may buy a product and be disappointed? That it will not taste as good as they had hoped? That upon discovering that their beer is not made according to the Rheinheitsgebot, or that their chocolate contains non-dairy fats, they will feel defrauded? How often is this actually likely to happen? How bad will those consumers feel? It is almost inconceivable that this very minor degree of human suffering, while regrettable, could motivate the reactions and literature that *Cassis de Dijon* has done.

(Contd.) _____

ECR I-13693. See generally L. Azoulai, *The European Court of Justice and the Duty to Respect Sensitive National Interests*, (B. DE WITTE, M. DAWSON AND E. MUIR, supra) 167.

⁷² See Case C-14/00, *Commission v Italy (Chocolate)*, [2003] ECR I-513; Case C-407/85, *Drei Glocken (Pasta)*, [1988] ECR 4233; Case C-178/84, *Commission v Germany (German Beer)*, [1987] ECR 1227. See also D. CHALMERS, G. DAVIES, AND G. MONTI, *EUROPEAN UNION LAW* (3d ed. 2014), at 781.

⁷³ See Case C-178/84, *Commission v Germany (German Beer)*, supra; Case C-98/86 *Mathot* [1987] ECR 809; Case C-407/85, *Drei Glocken (Pasta)*, supra; Case C-14/00, *Commission v Italy (Chocolate)*, supra; Case C-368/95, *Familiapress v Heinrich Bauer Verlag*, [1997] ECR I-3689.

⁷⁴ A small selection of the vast literature on *Cassis de Dijon*: S. Weatherill, *Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation*, 36 *COMMON MARKET LAW REVIEW* 51; P. CRAIG AND G. DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* (2011); K.P. Purnhagen, *The virtue of Cassis De Dijon 25 years later – It is not dead, it just smells funny*, in *VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION* (K.P. PURNHAGEN and ROTT eds., 2014, forthcoming); R. Van den Bergh, *Towards an institutional legal framework for regulatory competition in Europe*, 53 *KYKLOS* 435; M. Höpner and A. Schäfer, *A new phase of European integration: Organised capitalisms in post-Ricardian Europe*, 33 *WEST EUROPEAN POLITICS* 344 (2010).

Implicitly, it is of course the social change that is being addressed, and which motivates critique. It is the transition from one kind of society to another which *Cassis* drives forward that is being resisted. Yet that social critique remains implicit, with commentary, like judgments, continuing to hang on the consumer protection issue, the injustice of the case being seen in terms of the relation between the buyer and seller, and not in terms of the relation of all potential buyers to each other. This artificial peg distorts discussion, and means that the real issues at stake are not addressed, or only obliquely. We should be less worried about whether the buyer is getting what they think they have chosen, and more worried about the fact that the law is changing what they are able to choose. The risk is not that they get what they don't want, but that they get what they do: *Cassis* releases material desire from the straightjacket of standardisation. Is it implausible to consider this a question not just of trade, not even just of social relations, but of Europe's soul?⁷⁵

The character of judicial review of national measures in free movement law

One possible reaction to the social interests discussed above is that they are too indeterminate to be realistically incorporated into the law. Not only can they not be measured, either in general or in a specific case, but arguments about the importance of a measure, or the particular value or interest that it involves, will be hard to objectively ground, perhaps opening the door to opportunistic protectionism. The Court's silence could be seen as simply a judicial hard-headedness, a reluctance to engage with the wishy-washy and a preference for serious and concrete problems.

This is ultimately unconvincing, at least as a complete explanation. There are many contexts where courts are required to address the immeasurable and the human, from tort to criminal law, and the Court of Justice, in its cases on citizenship, has shown itself capable of capturing nebulous values in pithy phrases.⁷⁶ Traditions, equality in the marketplace, culture, the diversity of commercial life – labels can be thought up for the matters at stake, and there is no reason to think this Court less capable than others. If it is ignoring social interests it is not because they are too difficult to work with.

Four reasons are suggested below why social interests are unrepresented in the free movement case law concerning national measures claimed to restrict free movement. One is that states do not argue these issues. Another is that the Court's assessment of national measures focuses on their 'purpose', which is a poor proxy for their importance. A third is that contrary to much discussion, the Court rarely balances interests, instead, in the overwhelming majority of cases, finding ways to claim that it has reconciled them. That would not work with social interests. Finally, where the Court does concede precedence to a national measure, it is not usually surrendering free movement but merely passing the ball to the Commission, to address the issue via harmonising legislation. That would not work with social interests. Thus incorporating social interests would entail a different kind of judicial review, in which the official rhetoric of shared purpose, reconciliation of interests, and the endless progress of free movement would have to be replaced to some extent by the acknowledgment of hard limits to free movement, and unavoidable conflicts.

It is not suggested that these features of the Court's case law are part of a conscious intention to exclude social interests. Case law rhetoric builds up by an accidental, reactive, process, and consequences emerge more than they are planned. It is not even suggested that the features are entirely causal of that exclusion: the chain may run the other way, with the absence of anyone arguing these issues leading to a certain style of rhetoric becoming the norm. Rather, the claim is more limited: these

⁷⁵ See U. Haltern, *Pathos and patina: The failure and promise of constitutionalism in the European imagination*, 9 EUROPEAN LAW JOURNAL 14 (2003); M. Everson, *European citizenship and the disillusion of the common man*, in CONFLICT OF LAW AND LAWS OF CONFLICT IN EUROPE AND BEYOND (R. NICKEL ed., 2009).

⁷⁶ See, e.g., Case C-85/96, *Martínez Sala v. Freistaat Bayern*, [1998] ECR I-2691; Case C-184/99, *Grzelczyk*, [2001] ECR I-6193; Case C-224/98, *D'Hoop*, [2002] ECR I-6191; Case C-200/02, *Chen*, [2004] ECR I-9925; Case C-34/09, *Ruiz Zambrano*, [2011] ECR I-1177.

structural aspects of the way the Court presents the law on free movement mean that social interests cannot simply be slotted in, in the way that a new environmental or health risk could be. Most free movement judgments stick very close to a certain template, and one can almost cut and paste the names of states, products and ‘legitimate objectives’ to create the next ruling.⁷⁷ That could not be done with these social interests. A new template, a new structure for the law, would be needed. Part of the function of this section is to show that this is the case, and how the template would have to change.

The reasons for making that argument are twofold. One aim is to reveal certain values and attitudes that are embedded in the law, a certain structural bias, which lawyers need to be aware of if they are to think constructively about how the law should change.⁷⁸ The other aim is to prepare the ground for the next section, which asks what the problems and advantages of incorporating social interests would be, for it turns out that while excluding them is problematic, including them is not without its problems too. Both are part of a broader agenda, which is to think about how EU law affects the lives of Europeans, and how it could be used and changed to become a more positive social force.

Limited arguments by Member States

An examination of the arguments filed by Member States in free movement cases falls outside the scope of this paper.⁷⁹ However, it appears from the opinions of Advocates General and from the judgments of the Court that Member States almost never argue the social importance – in the sense described here - of economic rules.⁸⁰ They are silent on what a rule may mean for quality of life or social cohesion or the texture of public life. To some extent this may be because governments, and in particular the lawyers and civil servants responsible for managing cases going to the Court of Justice are not used to seeing measures in this light, and feel uncomfortable with formulating such arguments on their own initiative, making claims about the role of a measure which are outside of their own expertise, essentially political. Who is to say how important a product standard is to society? Not a government lawyer. It is far easier and safer to formulate a case on the basis of demonstrable and concrete externalities.

Yet these reasons are not the whole story: anecdotal evidence suggests that lawyers and governments do, in private, see many of the rules in question in terms of their cultural and social significance, but are reluctant to foreground these arguments for fear that they will not be taken seriously, or even that they will undermine other, more concrete arguments. As a result, the concrete is often made the basis of the defence, even when this is remarkably implausible, as in the arguments in *Cassis de Dijon* and the *German Beer* case that a move to labelling rather than compulsory standards would represent a public health risk.⁸¹

The purpose fallacy

Another reason why Member State lawyers may hesitate before arguing too broadly in defence of their measures is that such arguments do not fit easily with the well-established structure of free movement

⁷⁷ See N. NIC SHUIBHNE, *THE COHERENCE OF FREE MOVEMENT LAW: CONSTITUTIONAL RESPONSIBILITY AND THE COURT OF JUSTICE* (2014), at 24.

⁷⁸ See D. Kennedy, *Form and substance in private law adjudication*, 89 *HARVARD L. REV.* 1685 (1976).

⁷⁹ The Member State arguments are summarised in the report of the hearing produced by the Judge-Rapporteur in each case. These are however not easily available online. Where arguments are influential they are however invariably referred to in the opinions of the Advocate General and/or the judgment of the Court, both available on www.curia.eu

⁸⁰ See, however, Case C-209/08, *Sayn Wittgenstein*, [2010] ECR I-13693; Case C-148/02, *Garcia Avello*, [2003] ECR I-11613; Case C-147/03, *Commission v. Austria*, [2005] ECR I-5969.

⁸¹ See Case C-120/78, *Cassis de Dijon*, [1979] ECR 649; Case C-178/84, *Commission v Germany (German Beer)*, [1987] ECR 1227.

law. Since *Cassis de Dijon* national measures have been assessed in the light of their alleged purpose, something that has become more and more explicit through the years, so that a conventional formulation of the law would now be that national measures must ‘pursue a legitimate objective, and be proportionate’.⁸² The kinds of concerns discussed in this paper are more naturally described as the consequences of a law or its removal, rather than the objective of the law: they are second-order consequences, positive side-effects, the result of social adaption and internalisation, not necessarily the goals that the legislator set out to achieve when the law was made. Thinking just about purpose will tend to promote the concrete and practical, the issues in the forefront of the administrator’s mind, and sideline the more subtle and complex, the social value which a rule may slowly acquire.⁸³

Purpose is a wider problem in EU law,⁸⁴ and used in this way in judicial review it is both bad logic and bad policy. It is bad logic because it anthropomorphises the law. People have purposes. Objects do not, and neither do laws. Laws are the product of politics, which entails compromise between people having many different ambitions, purposes and strategies, so that to think that all the people involved in making a law shared a single purpose is often unrealistic. Attributing a single purpose to that law then denies the political nature of law-making, reducing it to an administrative practice, seeing law as merely a tool of the apolitical policy-maker. In some cases that may be a fair approximation, but many of the laws involved in free movement cases are distinctly political in character, meaning they are not just expert regulation. They may have a history – meaning that attributing purpose is particularly artificial – or they may clearly have multiple roles and many political aspects, as in the regulation of small businesses.⁸⁵ Moreover the role that they now play in society, and the benefits that they provide or the costs that they impose, may be quite different from anything that was ever consciously intended when they were adopted.

In any case, apart from the dishonesty and illogicality of treating all law as merely administration, it is bad policy. It is consequences which matter, not intentions. If the Court is concerned, rightly, to prevent free movement law doing excessive harm to other interests then the question to ask of national law is not what it was intended to achieve, but what it actually does achieve – that is to say, who would be affected, harmed or benefitted, by its removal. To conflate the two is to over-estimate the direct and obvious consequences of a law, the importance of its immediate effects, and to underestimate its indirect, second-order consequences, the way it may relate to other laws, institutions, people and interact with wider law and society.⁸⁶ Purpose is a narrow lens to look at the world through. Indeed, although purpose is a distinctively EU lens, it may be noted that when one is considering whether national law should be considered a restriction on movement – rather than the later stage of whether it should be found to be justified – the Court is quite consistent that it is *not* purpose that counts, but effects: it is a cliché of free movement law that it is effects-based, so that the fact that a law is not intended to regulate cross-border trade is quite irrelevant if it does, in fact, have some consequences for such trade.⁸⁷ *Cassis* is of course the perfect example. Here the Court considers that to look just at what the purpose of the law would be to ignore the other effects that it may have,

⁸² See N. NIC SHUIBHNE, *THE COHERENCE OF FREE MOVEMENT LAW: CONSTITUTIONAL RESPONSIBILITY AND THE COURT OF JUSTICE* (2014), at 24.

⁸³ See G. Davies, *Democracy and legitimacy in the shadow of purposive competence*, *EUROPEAN LAW JOURNAL* (2014, forthcoming).

⁸⁴ *Id.*

⁸⁵ See L. BOLTANSKI AND L. THÉVENOT, *ON JUSTIFICATION: ECONOMIES OF WORTH* (2006), on the many ‘orders of worth’ associated with standards.

⁸⁶ See generally L. Green, *The functions of law*, 12 *COGITO* 117 (1998); C. Barnard and S. Deakin, *Market access and regulatory competition*, *JEAN MONNET WORKING PAPER* 9/01 (2001), at 34-38.

⁸⁷ See, e.g., Case C-8/75, *Procureur du Roi v Dassonville*, [1974] ECR 837; Case C-442/02, *Caixabank France*, [2004] ECR I-8961; Case C-110/05, *Commission v. Italy (Trailers)*, [2009] ECR I-0519; N. NIC SHUIBHNE, *supra*, at 209-256.

with resulting harm to those impacted by those wider effects – cross-border traders, and EU policy.⁸⁸ Fine, one might say, but then apply the same logic to justification: the value of a law, its weight in the scales, is to be judged not by the label the administration attach to it but by its actual consequences.

In taking an effects-based approach to restrictions, the Court is suggesting that laws may have undesirable side-effects (restricting trade). That is the kind of problem that a regulator can deal with, encouraging him to get to work tidying up the laws to correct the defect. It does not challenge the fundamental model of law as a tool, that *ought* to fit a coherent set of pre-defined authorial intentions.⁸⁹ But that the disjunction between intention and consequence might sometimes be positive is a suggestion somewhat more challenging for the EU. This is no longer just about incompetence, but about the limited power of government, its temporariness, its embeddedness in society and history; law is made, but then it is set free. It offers a vision of government as more the parent of law than its owner, creating it, moulding it, but ultimately having to accept that it takes on a life of its own, and will, for better or worse, shape society in ways that were not expected. Some people will regard this as a positive thing: we may not wish to think that our governments are even potentially all-knowing and all-managing, nor that they aspire to this goal. However, it is not a model of law-making that encompasses the regulator, except in some subordinate corner of the messy, political, temporally contingent whole. The EU, as that paradoxical creature a supreme expert regulator would rightly be threatened by a legal acknowledgment that consequences and purpose are not even ideally co-extensive. If conferral is to be a meaningful principle, containing EU powers in a serious way, then the limited purposes to which the EU is confined need to correspond to limited consequences. They do not, of course,⁹⁰ but perhaps the EU institutions need to believe that they do. The focus on purpose in justification is a projection onto the Member States of the state of denial in which the EU regulator is compelled to live.

It may however be hard for the Member States to resist this projection. To do so would require admitting their own smallness and ineffectiveness, and that the role of government is not just as leaders and deciders but also as guardians, observers, agents. Discussion around purpose implies a dialogue between policy-makers, people in control. This will be particularly attractive to those involved in lawsuits, who are drawn from the legal services and civil services of the states, on the administrative not the political side of laws. To see law as the extension of their policy plans is likely to be more attractive – and more easily understandable – than to see themselves as subordinate contributors to a process of social formation in which no actor is really in control. Moreover, as agents of their state, they will be concerned to maintain their status and impact within the EU legal system, to meet it on its own terms in order to avoid marginalisation. To switch to discussion of consequences of removal is a form of delegation of the self to a weaker role, admitting a lack of control, and thereby inviting exclusion from the European legal conversation: if you aren't the ones in charge, why are you here? Who should the Commission or the Court call instead?

From reconciliation to concession

In academic, legal and policy discussion about the internal market the rhetoric of balancing interests is common.⁹¹ It is a cliché that the internal market is about balancing interests. However, balance is

⁸⁸ Case C-120/78, *Cassis de Dijon*, *supra* ¶¶ 12-14.

⁸⁹ See for discussion L. Green, *Law as a means*, in *THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY* (P. CANE ed., 2010).

⁹⁰ See G. Davies, *Democracy and legitimacy*, *supra*

⁹¹ See critically, however: W. Sauter, *Proportionality in EU law: A balancing act?* 15 *CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES* 439 (2013); J.H. Jans, *Proportionality revisited*, 27 *LEGAL ISSUES OF ECONOMIC INTEGRATION* 239 (2000); M. Andenas and S. Zleptnig, *Proportionality and balancing in WTO law: A comparative perspective*, 20 *CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS* 1474 (2007).

rarely mentioned in cases, and almost never in the sense of “compromise”.⁹² There are a small number of free movement cases where Member States win, and the interest they put forward prevails over free movement. This is a sort of balance, in the sense that the national interest has been found to weigh more heavily. However, in the majority of cases where Member States lose this is not presented as a mirror image, as a similar balancing process in which free movement weighs more heavily. Such an approach would entail a judgment whose substance was ‘your concern is legitimate, but in the circumstances free movement weighs more heavily, and should prevail, and therefore certain concessions must be made in the form of reduced consumer/health/environmental protection...’ On the contrary, such acknowledgment that there is any price to free movement is as good as absent from the case law, which instead employs the rhetoric and reasoning of reconciliation. Wherever a state loses on proportionality grounds, which happens in many, perhaps most, free movement cases, the argument form which prevails is: ‘indeed, your interest is very important, and would have to take precedence if there was no way to reconcile it with free movement, but in fact your policy goes beyond what is necessary to achieve its goals of consumer/environment/health protection. If you do it differently, you can achieve your goals AND have free movement. The national measure must therefore be changed and then the outcome will be win-win for all sides’.⁹³ The necessity part of proportionality dominates the true proportionality part.⁹⁴ This is most explicit in the cases on goods, but in services it is implicit in the repeated finding that Member States have not shown that their measures are actually necessary: hence an alternative, less restrictive approach could also be used.⁹⁵

There are a few cases which overtly refer to balance, and suggest more explicitly that the law is not just about reconciling interests, but sometimes about making choices between inevitably conflicting ones. *Stoke-on-Trent* (one of the Sunday Trading cases), *Carpenter*, *Schmidberger*, and *Viking* and *Laval* all refer to balancing interests in a way that makes clear that there is potential conflict.⁹⁶ It is notable that these are all very controversial cases. Some, like *Stoke-on-Trent* turned out to be a legal dead end. Sunday trading rules are an example of measures protecting a social interest of the kind discussed here, the significance or value of non-commercial Sundays being far beyond those who actually buy or sell, and the Court more or less acknowledged this in its discussion of the socio-economic conditions of society, in this and other similar Sunday Trading cases, and then quickly afterwards, in *Keck*, decided that rather than having to balance such things – and probably let the states win each time, since society trumps trade – it was better to just not go there, and put ‘selling arrangements’ outside of the law.⁹⁷

Carpenter, which concerned the family rights of European citizens, spoke of the fair balance between rights, national immigration policy and free movement law. It was also intensely controversial.⁹⁸ Although the case remains good law, the explicit balancing approach has not been taken in later cases

⁹² See J.H. Jans, *supra*.

⁹³ See, e.g., Case C-120/78, *Cassis de Dijon*, [1979] ECR; Case C-178/84, *Commission v Germany (German Beer)*, [1987] ECR I-2227; Case C-147/03, *Commission v Austria (universities)*, [2005] ECR I-5969; Case C-140/03, *Commission v Greece*, [2005] ECR I-3177.

⁹⁴ See J.H. Jans; J. Snell, *True proportionality*, 11 EUROPEAN BUSINESS LAW REVIEW 50 (2000).

⁹⁵ See Case C-147/03, *Commission v Austria (universities)*, *supra*; Case C-140/03, *Commission v Greece*, *supra*.

⁹⁶ See Case C-169/91, *Stoke on Trent and Norwich City Council v B & Q*, [1992] ECR I-6635; Case C-60/00, *Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279; Case C-112/00, *Schmidberger v Austria*, [2003] ECR I-5659; Case C-438/05, *International Transport Workers’ Federation and others v Viking Line*, [2007] ECR I-10779; Case C-341/05, *Laval v Svenska Byggnadsarbetareförbundet*, [2007] ECR I-11767. See also Case C-302/86 *Commission v Denmark*, [1988] ECR 4607; Case C-76/90, *Sager*, [1991] ECR I-4221.

⁹⁷ See Joined Cases C-267 and 268/92, *Keck and Mithouard*, [1993] ECR I-6097.

⁹⁸ See A. Tryfonidou, *Jia or ‘Carpenter II’*: *The edge of reason*, 32 EUROPEAN LAW REVIEW 908 (2007); *Freedoms unlimited? Reflections on Mary Carpenter v. Secretary of State* (Editorial Comments), 40 Common Market Law Review 537 (2003); E. Spaventa, *From Gebhard to Carpenter: Towards a (non-)economic European constitution*, 41 COMMON MARKET LAW REVIEW 743 (2004).

in the same field, which have reconstructed the same rights in other terms, which no longer require any weighing of interests.⁹⁹

Schmidberger was fiercely criticised by some for its balancing of free movement law against the right of association – was Austria right to allow environmental demonstrators to temporarily obstruct the free movement of goods?¹⁰⁰ It is notable that the use of balance in this case is to prevent human rights from running rampant over free movement. It would have been legally impossible to dismiss the right to demonstrate as not a good reason to restrict free movement, but it would have been problematic for the Court to make it a licence for unlimited obstruction of roads.¹⁰¹ Hence the use of balancing to demand a bit of give and take from each policy concern.

Viking and *Laval* are superficially similar, in their opposing of the right to demonstrate by trade unions and free movement, which raises analogous issues.¹⁰² However, while there is discussion of balance in these judgments, the judgment is ultimately closer to the logic of reconciliation. The Court does not find that the legitimate worker-protection goals of trade unions must be sacrificed, to some extent, to free movement. Rather it denies that the actions in question meet the standards of legitimate worker protection policy, emphasising their discriminatory or arbitrary character, and the broader context of worker protection, in order to find that they do not have the normative status to stand up to free movement. This is not a compromise between legitimate objectives or actions, but the reasoned delegitimation of the standpoint of one party, in order to preserve the fiction that there is no underlying conflict. These cases, like *Schmidberger* and *Stoke-on-Trent*, are about autonomy: it is not so much an objective level of worker protection, environmental protection, or Sunday peace, which is at issue as the freedom to hold and express a standpoint on these questions whether or not others, even the majority, think that this standpoint is the objectively justified. By rhetorically recasting the issue, in *Viking* and *Laval*, in terms of worker protection, rather than trade union freedom, the Court objectivises the problem, and dodges the tricky question of the value of subjective preferences and whether the market should defer to them.

Of course, the Court's reconciliatory approach is not ultimately convincing: no-one really believes that different always is equal, and it is widely argued that the Court has reduced levels of protection of the consumer, sometimes the environment, sometimes of the employee, and of diffuse social interests.¹⁰³ There are often-trade offs, whether admitted or not.¹⁰⁴ In EU law, however, the choice is for 'not'. The point here is that the Court chooses to present and justify its decisions as examples of reconciliation.

⁹⁹ See Case C-457/12, S. and G., Judgment of the Court (Grand Chamber) of 12 March 2014.

¹⁰⁰ See J. Morijn, *Balancing fundamental rights and common market freedoms in Union law*, 12 EUROPEAN LAW JOURNAL 15 (2006).

¹⁰¹ See D. CHALMERS, G. DAVIES, AND G. MONTI, EUROPEAN UNION LAW (3d ed. 2014), at 772-3.

¹⁰² See Case C-438/05, International Transport Workers' Federation and others v Viking Line, *supra*; Case C-341/05, Laval v Svenska Byggnadsarbetareförbundet, *supra*.

¹⁰³ See, e.g., H.C. von Heydebrand, *Free movement of foodstuffs, consumer protection and food standards in the European Community: Has the Court got it wrong?*, 16 EUROPEAN LAW REVIEW 391 (1991); C. Barnard, *Employment rights, free movement under the EC Treaty and the Services Directive*, MITCHELL WORKING PAPER No. 5/08 (2008); N. Reich, *Free Movement v Social Rights in an Enlarged Union: The Laval and Viking Cases before the ECJ*, 9 GERMAN LAW JOURNAL 125 (2008); J. Malmberg and T. Sigeman, *Industrial actors and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice*, 43 COMMON MARKET LAW REVIEW 1115 (2008); T. Novitz, *A human rights analysis of the Viking and Laval judgments*, 10 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 541 (2007); C. Kaupa, *Maybe not activist enough? On the Court's alleged neoliberal bias in its recent labour cases*, in JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE (M. DAWSON, B. DE WITTE, AND E. MUIR eds., 2013), at 56; H. Temmink, *From Danish bottles to Danish bees: The dynamics of free movement of goods and environmental protection – A case law analysis*, 1 Yearbook of European Environmental Law 61 (2000).

¹⁰⁴ See generally, A. Stone Sweet and J. Matthews, *Proportionality balancing and global constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 73 (2008), especially at 89.

The social interests which are the subject of this paper fit this rhetorical model particularly badly. They are different from the kinds of concrete concerns which the Court addresses in that they cannot be reconciled with free movement, or at least to a far lesser extent.¹⁰⁵ Partly this is because they are autonomy-based interests, in which it is not that one way or another is objectively better, but the value is in being able to express and maintain collective choices. To compel a Member State to do thing differently is to attack precisely the interest at stake. It is also because they are to do with the maintenance of the status quo as it is, because of things that it has come to protect and embody, and so to compel openness, or openness to change, is to undermine that choice. Taking account of these interests would thus require a real balancing: something has to give, something has to lose – or they both have to lose a bit. Judging social interests would inevitably entail an admission, almost unprecedented in the law, at least explicitly, that there is in fact a conflict between free movement and some national interests which cannot be talked around or reasoned away, but is real and must be faced.¹⁰⁶ In politics, it would be a banality to say that economic freedom creates conflicts with other, social, concerns, and that either compromise or choice is necessary. EU law has been able to avoid this, and maintain a resolutely blithe approach by ignoring the interests which expose these simple truths.

The continuation of adjudication by other means

Another difference between these social interests and concrete, transaction-based ones, is in their relationship to EU competences, and the consequences of allowing them to prevail. When the Court lets Member States win as part of its existing case law logic it is just passing the ball to the Commission, identifying an obstacle to movement which it would be appropriate to harmonise away.¹⁰⁷ The very fact of the Member State win is an argument that there is a sufficient legal basis: look, these national measures are creating obstacles to movement. In this sense, a Member State win is a step towards deeper integration than that achieved when a Member States loses. In the latter case, one rule is set aside. In the former, a process is begun towards common EU rules. Showing respect for national interests is, in this light, a form of elevation of those interests to the status of EU concerns, a colonisation of them, not at all a defeat for the internal market but merely a choice for a different process of building that part of it.¹⁰⁸

By contrast, this double act of positive and negative integration does not work with social concerns; autonomy is the issue. If these are recognised, then sometimes they must prevail, and that does not just redirect market-building to another place but provides a hard limit to it, a permanent stop which cannot be removed by other EU tricks or tools. Recognising social interests would change the law from its current role as an exploration of how the internal market should best be pursued, to an exploration of where the internal market comes to an end. Outside the quasi-sacred fields of constitutional symbolism, official violence and morality,¹⁰⁹ it would be the first expression of the idea

¹⁰⁵ See however L. Azoulay, *The European Court*, *supra*, at 176-179.

¹⁰⁶ See G. Davies, *Subsidiarity, the wrong idea, in the wrong place, at the wrong time*, 43 COMMON MARKET LAW REVIEW 63 (2006).

¹⁰⁷ See G. Davies, *Is mutual recognition an alternative to harmonisation?* in REGIONAL TRADE AGREEMENTS AND THE WORLD TRADE ORGANISATION (F. Ortino and L. Bartels eds., 2007).

¹⁰⁸ *Id.*

¹⁰⁹ See Case C-209/08, Sayn Wittgenstein, [2010] ECR I-13693; Case C-36/02, Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn, [2004] ECR I-9609; Case C-160/08, Commission v Germany, [2010] ECR I-3713; Case C-258/08, Ladbrokes, [2010] ECR I-4757. See also G. Straetmans, *Note on Case C-124/97 Läära and Case C-67/98 Zenatti*, 37 COMMON MARKET LAW REVIEW 991 (2000), at 1002-5; L. Azoulay, *The European Court*, *supra*.

that the particular may survive the general, that EU law is not just a story of the Member States always giving way to EU concerns, but sometimes the other way round.¹¹⁰

One would expect this kind of balance from a normal constitutional court. One would expect it to locate itself between the EU and the Member State, to protect the autonomy of both sides from over-expansive interpretations by the other. Sometimes it would go one way, sometimes the other, and it would not have any sense that it was the guardian of the purposes of one party more than of the other. By contrast, the Court of Justice has always been very much an agent of the EU.¹¹¹ Indeed, in the Treaty until recently it was co-entrusted, along with the other institutions, with the purposes of the EU.¹¹² Its primary role has usually not been seen by it or others as adjudicating between competing interests and jurisdictions, but as seeking to find the most acceptable and responsible way to pursue EU goals.¹¹³ The absence in the Treaty of any sense of possible structural conflict between levels – apart from the tragi-comedy of subsidiarity, sufficiently analysed elsewhere,¹¹⁴ and the new, and potentially intriguing, national identity clause¹¹⁵ – has always been a positive encouragement not to look too deeply for what may be autonomous and inconvenient Member State concerns.

The price of change

The very structure of EU competences is premised on the idea that economic regulation is related to non-economic matters in precise and identifiable ways, so that the EU can pursue economic policies and enforce economic laws, and leave the social and political largely to the Member States.¹¹⁶ Where the social and economic meet the EU needs to believe that the problems raised will be specific and concrete, addressable by limited corrective measures. If, by contrast, the economic is wholly social and wholly political, then rather than the EU being a creature whose powers are confined within a certain sphere, and complement or replace Member State powers, the EU is better described as an alternative social regulator, competing with the Member States, it having the advantage of legal supremacy, they having the advantage of inertia and accumulated regulatory mass. Since this would undermine the essence of conferral it would be embarrassing to admit, and threaten the legitimacy of European integration itself.

This fundamental challenge to economic integration, raised by the incorporation into the law of the social interests discussed in this paper, inspires an equally fundamental – although ultimately misguided – rebuttal of such incorporation. That rebuttal rests on the claim that the Treaty entails

¹¹⁰ See also A. von Bogdandy and S. Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 COMMON MARKET LAW REVIEW 1417 (2011).

¹¹¹ Both critics and supporters tend to share this view. See D. CHALMERS, G. DAVIES, AND G. MONTI, EUROPEAN UNION LAW (3d ed. 2014), 177-178.

¹¹² See G. Davies, *Subsidiarity, the wrong idea, in the wrong place, at the wrong time*, 43 COMMON MARKET LAW REVIEW 63 (2006), at 64; Treaty Establishing the European Economic Community, Mar. 25, 1957, Art. [7], 298 U.N.T.S. 11.

¹¹³ See G. CONWAY, THE LIMITS OF LEGAL REASONING AND THE EUROPEAN COURT OF JUSTICE (2012), at 274-5; J. BENOÛT, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE (1993).

¹¹⁴ See G. Bermann, *Taking subsidiarity seriously: Federalism in the European Community and the United States*, 94 COLUMBIA LAW REVIEW 331 (1994); G. Davies, *Subsidiarity*, *supra*; F. Fabbrini and K. Granat, *Yellow card, but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike*, 50 COMMON MARKET LAW REVIEW 115 (2013); P. Craig, *Subsidiarity, a Political and Legal Analysis*, 50 JOURNAL OF COMMON MARKET STUDIES 72 (2012).

¹¹⁵ See Consolidated Version of the Treaty on the Functioning of the European Union, art. 4, Mar. 30, 2010, 2010 O.J. (C 83) [hereinafter TFEU]. See A. Von Bogdandy and S. Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 COMMON MARKET LAW REVIEW 1417 (2011).

¹¹⁶ See A. Moravcsik, *Reassessing legitimacy in the European Union*, 40 JOURNAL OF COMMON MARKET STUDIES 603 (2002).

consent to its social consequences. Objections based on the kind of interests discussed in this paper are just objections to free trade, and as such cannot be used as arguments against a free trade agreement to which the state is party. Concrete externalities resulting from the removal of a specific measure should be taken account of, but the social changes which result from more open economies are a part of that openness, and to use them as arguments to obstruct trade is just to try and undo the Treaty. They are inherent in it, relevant to whether or not it should be amended, but not how it should be read.

This argument however overstates the inevitability of the Court's reading of the Treaty. There is nothing in the text which inherently takes the law as far as the Court has taken it. It did not have to be read to include measures and rules which one would not on a simple reading think of as trade restrictions – or measures equivalent to a quantitative restriction, to use the Treaty language itself.¹¹⁷ *Cassis de Dijon*, which brought equally applicable marketplace regulation within the definition of a trade restriction is an example of a judicial policy choice that is not without merits, but no more inherent in the very imprecise Treaty text than several alternative paths would also have been.¹¹⁸ When it chose to stretch the meaning of a restriction in this case the Court was undoubtedly aware of the policy risks, and chose therefore to invent a new category of derogations – the mandatory requirements – to manage and limit these.¹¹⁹ That stretching, more than the idea of free trade itself, is what created the great threat to social interests. That threat is not a necessary part of the Treaty, it is part of the Court's interpretation, and so there is no a priori reason why the interests threatened should be ignored, particularly when the need to take account of the consequences of far-reaching interpretations is such a cornerstone of the reasoning of the Court itself.

Indeed, it is a mistake to think that rejecting social interests is a part of protecting economic integration.¹²⁰ Their neglect may be even more threatening to that goal than their inclusion. If social interests continue to be harmed, and socially embedded measures are set aside without any recognition of the consequences, then this will continue to harm the social legitimacy of the EU.¹²¹ It is already at a very low level, and it is hard to see how hearts and minds can be won as long as its major policy field and the law founding that policy refuse to recognise their own consequences. One should expect a continuing backlash, fuelled by a sense that the EU does not speak for the values of the national publics, and does not accord those values respect.

The fundamental victims of the current state of the law are however the Member States and their institutions and populations. The neglect of social interests amounts to an entrenchment of individualism, a denial of a form of inter-relation between members of society that networks of national law had both created and protected, and which free movement law now seeks to dismantle.¹²² That affects society, but it also affects the role and status of law.¹²³ Even regulation can be expressive, performing a social function of communicating and reinforcing values and identity.¹²⁴ That function is denied and reduced when it is treated as purely an administrative tool, and there is no equivalent expressivity in the relatively sterile and rootless body of EU law, so that law as such in Europe, as it is reduced to shallow instrumentality, ceases to become something which can bind, inspire, unite, reflect

¹¹⁷ See TFEU, Art. 34

¹¹⁸ See D. Regan, *An Outsider's View of "Dassonville" and "Cassis de Dijon": On Interpretation and Policy*, in *THE PAST AND FUTURE OF EU LAW* (POIARES MADURO AND AZOULAI eds., 2010), at 465.

¹¹⁹ See D. CHALMERS, G. DAVIES, AND G. MONTI, *EUROPEAN UNION LAW* (3d ed. 2014), at 779.

¹²⁰ See C. Offe, *The European model of 'social' capitalism: Can it survive European integration?*, 11 *JOURNAL OF POLITICAL PHILOSOPHY* 437 (2003).

¹²¹ See G. Davies, *Democracy and legitimacy in the shadow of purposive competence*, *EUROPEAN LAW JOURNAL* (2014, forthcoming).

¹²² See A. SOMEK, *INDIVIDUALISM: AN ESSAY ON THE AUTHORITY OF THE EUROPEAN UNION* (2008).

¹²³ See G. Davies, *Democracy and legitimacy*, *supra*.

¹²⁴ See R.H. Pildes and C.R. Sunstein, *Reinventing the regulatory state*, 62 *U. CHI. L. REV.* 1 (1995), at 66-71.

and create loyalty. This is what an extrapolation of the ideology of current free movement law will do. One should expect a loss of respect for legal systems, and a search for other forms of symbolic community.

Yet none of this answers the how: if there is a need to take account of the social consequences of free movement, the question remains whether this should be done by bringing the interests that this paper discusses within the judicial review process, lining them up alongside consumer protection and the environment and health, or whether instead the notions of free trade and trade restrictions need to be redefined – by either the Court or the legislator – so that certain kinds of rules and institutions are simply left undisturbed. This is what was done in *Keck*, when the Court decided that selling arrangements, because they were essentially socio-economic measures, whose social importance outweighed their economic, would be presumptively outside of the law.¹²⁵ There may be more ways of drawing such lines, not beyond the wit of judges or law-makers.

The merit of bringing these social interests into the current law is that it creates a dialogue about the issues at stake, and exposes the conflicting interests and desires which populations have. For while this paper argues that populations sometimes value their restrictions, they also value their material prosperity, and even their openness, and the need is fundamentally for an awareness of how these things relate so that decisions can be made which are intelligent, and not the result of political accident or legal ritual. The importance of this dialogue is increased by the fact that neither national nor European politics are well suited to provide it: the national has only limited engagement with EU policy, while the European level is not the place to discuss and evaluate local particularities. The reference procedure is unusual in straddling levels, and bringing them together within a single evaluative framework.

The risk is however is that these interests are impossible to adjudicate in a way that preserves the legitimacy of the Court. Weighing social interests against free movement would require the Court to engage in a balancing process that would inevitably be highly politicised and tending towards the apparently arbitrary.¹²⁶ Once the Court openly rules on the relative importance of tradition, social bonds, public feeling, and wealth increase it releases itself from all but the very shallowest pretence of formal legal constraints, and such overt value-choices, on a continent where judges are still considered to be limited by law, may undermine support for their judgments and authority.

There is also the problem of maintaining the uniformity of law while adjudicating social interests. The importance given to them varies from state to state, so that the meaning of a rule in one state is not the same as the meaning of a similar one in another. The social importance of regulation is context specific: both the social context and the context of the wider national law. That raises the possibility of EU law apparently varying between the Member States. To stereotype, Germany might be able to keep some of its standards, because some of them are important to it, and reflect certain shared values and preferences, but the UK might not be able to keep similar ones, if it had them, because they would just represent administrative accident or successful lobbying. This context-specificity is a problem inherent in applying proportionality to national law, a potentially serious legal problem that has lain dormant, and is perhaps only kept in check by the nature of the preliminary reference procedure and the cross-border invisibility of the national court's ultimate answer.¹²⁷ However, the threat of unequal unmanageable legal variation becomes more urgent the more the law goes beyond the concrete and specific concern towards the social, inter-subjective, collective preference. The different social, and

¹²⁵ See Joined Cases C-267 and 268/92, *Keck and Mithouard*, [1993] ECR I-6097.

¹²⁶ See H. Schepel, *Constitutionalising the market, marketising the constitution, and to tell the difference: On the horizontal application of the free movement provisions in EU law*, 18 EUROPEAN LAW JOURNAL 177 (2012); J. Snell, *True proportionality and free movement of goods and services*, EUROPEAN BUSINESS LAW REVIEW 50 (2000).

¹²⁷ See generally G. Davies, *Abstractness and concreteness in the preliminary reference procedure*, in REGULATING THE INTERNAL MARKET (N. NIC SHUIBHNE ed., 2006), at 210-145, also available as *The division of powers between the European Court of Justice and national courts*, CONWEB WORKING PAPER 2004/3 (2003).

therefore legal, value of similar laws in different states would threaten to undermine the sense of non-reciprocity which is one of the most distinctive features of the EU legal regime, setting it apart from ordinary international law, and being key to its functional success.¹²⁸ States accept non-retaliation for the violations of others because they believe that the EU will enforce the law, via direct effect or otherwise, rendering the vigilantism of international law unnecessary.¹²⁹ If, however, the law contains too many preference-based opt-outs, so that its shape in each state is different, then the question of fairness may raise its head, and states may become reluctant to do business on these terms.

Conclusion

This paper does not aim to promote restrictive market regulation. The argument here is not that such regulation is a good thing, but that there are legitimate reasons why some people and communities might prefer it, and that if European law ignores those reasons then (i) it will be harmful to the quality of life of Europeans, and (ii) that law will fail to meet its own professed standards for balancing and respecting interests. There is an absence in the law, which can be explained to some extent by its structural features, but which is causing social harm.

That is the diagnosis. The treatment is somewhat harder. The opposite of ignoring something is not conceding to it, but taking account of it. This paper does not suggest that because local regulatory preferences are legitimate they should always and automatically trump free movement. The need, by contrast, is for a legal process in which interests are voiced and made explicit, and balances and choices are then made in an informed way. That, one may hope, can contribute to intelligent policy formation, at state and EU level, as well as helping populations accept the results.

Should that voicing and balancing of interests be something that occurs primarily in the courtroom, or entirely outside of it, or throughout the legal and legislative system? The later parts of the paper argue that if the social interests described here were adjudicated by the Court of Justice that would lead to a different kind of judicial review, one that would be challenging both to the integration process and, thanks to its political nature, to the legitimacy of the courts. There is thus something to be said for taking such issues away from courts and returning them to politics. Yet this seems unrealistic in the short term, and would bring a high price in free movement, as well as depriving Member States of a judicial analysis and dialogue which, at its most complete, could help them achieve constructive change.

The right path forward is a finely balanced choice, the balances being social - between the advantages of open markets and the advantages of maintaining local ways of life – and institutional – between the use of courts, and the use of politics. This article does not advocate any particular position on the spectrum of possibilities, because that choice depends on the preferences of Europeans. It would, it is true, be a great and in some ways tragic step to let go of local ways of life in favour of greater integration and material prosperity. Yet populations should have that choice as much as they should be able to choose the alternative paths. The normativity of this paper is not in an attachment to any model of economic integration, but in an underlying insistence that any process of integration should contain adequate representation of all interests, and be one that shows respect to local diversity and variations in preference. I do not wish Europe's character to be sacrificed to its market – unless that is what Europeans clearly want.

Perhaps in an ideal world the choices involved would be the stuff of electoral politics, but in the current EU that seems an unlikely possibility. This means that there is a diffuse responsibility on all

¹²⁸ See W. Phelan, *The troika: The interlocking roles of Commission v. Luxembourg and Belgium, Van Gend en Loos and Costa v. ENEL in the creation of the European legal order*, EUROPEAN LAW JOURNAL (2014), forthcoming (available online on early view).

¹²⁹ See W. Phelan, *id.*

the actors involved – Court, Member States, Commission, even Council and Parliament, and academics and lobbyists too – to try and steer the law in ways that may be more balanced and more complete and achieve greater public acceptance.

In matching the law better to the preferences of the people these actors may help achieve a more socially beneficial and legitimate EU. Yet the laws they make will also leverage change, and take place in social contexts which are themselves changing as a result of other factors. Preferences are never static. It is therefore important to escape the trap of seeking a permanent settlement. What the internal market should be and require, and how the Court should adjudicate it, may have different answers in one phase of integration than they do in another. In particular, to conceive of the market as something which can only become deeper, ever more uniform, ever more perfect, is intolerant and unrealistic. There will and should always be room for local policy variations, and those variations will inevitably disturb economic activity to some extent.

Indeed, in a mature polity it is normal for controversial policy questions to swing to and fro with the political mood, rather than policy proceeding permanently in one direction. Conflicts of interest and perspective are ever present, and resolutions are temporary, contingent, and vary with each new political phase. The last four decades have been a story of the disorderly retreat of state policy in the face of internal market law but we should expect, and hope, that at some point this will change into a standoff, and this will be a sign that European law, or at least the internal market, is maturing. Thus the intensity and scope of EU judicial review, the rights of Member States to assert policy interests, and the extent of the demands of the internal market, will at some point begin fluctuating around an equilibrium. Perhaps the disgruntlement around economic law is not a sign of its failure or impending collapse, but rather that this phase of fluctuating equilibrium is near.

