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The Price of Letting Courts Value Solidarity:
The Judicial Role in Liberalizing Welfare

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1. Introduction

Welfare states have traditionally had a high degree of closure, not just to persons, but to providers. On the supply side, it is not easy to enter the market either because of very strict, sometimes exclusionary regulations, or because the field is dominated by (quasi-) monopolistic, (quasi-) public institutions. One cannot simply open a university or hospital in the way that one could open a shop, and even if one could, one probably would not get any customers because established financial incentives would steer them towards existing players. On the demand side, consumers usually have a limited amount of choice of provider, and even when consumer choice is a principle built into the system, it is often deprived of some of its substance by rules severely standardizing the range of services which may be offered; you can have any treatment you want as long as it’s the one that the state approves. And if one can and does simply opt-out and go to a foreign or alternative or simply new provider of services then the chances are that this has dire financial consequences; the state only pays if you use its preferred institutions.

These regulatory and institutional aspects of the welfare state restrict competition and free movement of services, something of increasing importance now that the concept of economic activity in the relevant law—that of the EU internal market—is coming to encompass activities that not very long ago were seen as


inherently non-market.³ That change is likely to snowball since the potential markets involved, for health, education, and social insurance, are vast. Health and social insurance dwarf any other industry found in the developed world.⁴ This ensures that lobbying for increased opportunities to participate in that market—to share in the potential profits—will be intense and well-backed. Since liberalization—used here to mean an increase in the scope of free choice allowed to providers and consumers—can also be presented as a force for increased efficiency and empowerment of individual consumers, there is a conjunction of perspectives and interests that seems likely to keep the process going for some way yet.⁵

The initial fears that such a process arouses are that consumers who are either poor or particularly needy of services—for example the chronically ill—will be unable to get what they need. Free markets means free pricing which means that not everyone will have the same purchasing power, and some will not have enough. Hence if the widely shared European ideal of universal access to important welfare services, on more or less equal terms, is to be maintained there is a need for policies balancing, limiting, or managing the relevant market.⁶

In practice, the powers-that-be have taken this lesson to heart. In the Treaty, secondary legislation, and case law of the Court of Justice there is repeated acknowledgment that both free movement and competition may be limited where this is necessary to protect other important social interests, notably universal access to solidarity-based welfare services or the maintenance of the institutions that provide them. One may think here of the acknowledgment that paying for hospital treatment abroad at the will of the patient could undermine the stability of health systems, and the subsequent partial subordination of free movement to that latter interest, or the restrictions on competition accepted in a number of social insurance cases in the interests of maintaining solidarity-based systems, but there are also numerous other examples of careful balancing and acknowledgment of the risks of over-liberalization.⁷

However, the justifications that are acknowledged here could be described as ‘functional’ and contrasted with more subtle social justifications which have not been explicitly addressed. It is the contrast between these two types of justifications which is the subject of this chapter. It will be suggested that the latter

⁴ ibid 81–83.
sort—which might perhaps be called communitarian, given their valuing of unity and mutual obligation over individual choice⁸—are simply too amorphous for judicial review, and that this raises severe problems for the application of internal market law, with the risks involved being on the one hand a possible collapse into protectionism, or even nationalism, and on the other a dismantling of social cohesion which threatens quality of life, solidarity, and ultimately identity.

2. The role of institutions

Restrictions on market freedom serve to reduce diversity and restrict innovation—that is one objection to them. However, it is also an advantage. They create a degree of uniformity and of institutional stability. They also create a sense of institution; even if on a formal legal level providers of services are independent or diverse, if regulation constrains them so tightly that they are forced to operate in the same way, offer the same services at the same prices, and treat their clients identically, then the distinction between the providers becomes less apparent to the client and accordingly less important. The more these providers are regulated, the more they seem to customers to be part of a single body. This explains why continental social-insurance based systems, where provision of services is privatized but highly regulated, are nevertheless perceived as containing public welfare institutions.⁹ This institutional perception, and reality, has (at least) three consequences for the public which are worth noting: uniformity, shared experience, and aligned interests.

2.1. Uniformity

Equality is a nebulous concept, most significantly because it acquires useful meaning only if one can answer the question ‘equality of what’ with reasonable precision.¹⁰ It is a transitive concept that is often used intransitively, with a consequent loss of clarity. In the context of welfare, the view that all citizens should be treated as ‘equal’ by the system is usually uncontroversial. However, translating this into concrete policy immediately raises less easily resolved issues.¹¹ Do

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student loans violate equality, or reflect the idea of ‘equal opportunity’? Can ‘equality’ in healthcare be coherently limited to ensuring everyone has basic essential services, or must it entail ensuring identical services to all citizens, and perhaps even prohibiting the purchase of extra luxury? Does a desire for equality for all children in the education system mean that there must be compulsory mixing of different social groups to avoid ghettoization, or does freedom of choice for every parent, the same terms offered to all, best embody the ideal? The risk of discussing such issues in terms of equality, particularly in its more complex forms, is that informed consideration of substantive social issues comes to be displaced by sterile theory. It may then become attractive to retreat, or advance, to an apparently simpler and more formal notion of equality, that of uniform treatment, a value found to a great extent in continental European social-democratic welfare states.¹² Although it is well-known that treating all the same works to the advantage of some and the disadvantage of others, nevertheless the attractiveness of uniformity is the high level of transparency, predictability, and certainty that it brings.¹³ The idea that all children, patients, and students will have the same rules, treatment, and principles applied to them is relatively easy to build a social consensus around, and by making equality functional and comprehensible—if arguably less equal—can turn it into a collective value that has a social as well as functional role. It minimizes group identity in favour of broader collective identity. That is controversial, but in some societies attracts support that is not purely majoritarian assertiveness.¹⁴ A republican uniform treatment ideal can help us feel bonded with our fellow denizens, whoever they may be and however we may differ from them, as well as reinforcing, in some eyes, an image of the state as neutral between groups.

This uniformity is much easier to achieve in a tight, institutionalized welfare system. Diverse provision and consumer choice can be defended and explained in equality terms, but it is the more amorphous ‘equality of opportunity’ or ‘freedom of choice for everyone on the same terms’ which comes into play. The reality is that diversity will result in different qualities of service and experience, and those differences will be understood as part of the system rather than merely a defect in it. The social value which markets embody is, of course, individualism more than equality; they allow us to emphasize what makes us different, not what makes us the same. The role of a market-based welfare system in social cohesion and community-building is distinctively different from that of a uniformity-based one.

2.2. Shared experience

In a modern European welfare state almost all citizens participate in recognizably similar institutions and have a similar relationship with them. It is hard to think of any other institution or socially constructed context which is shared in the same way by people of almost all incomes, classes, races, religions and lifestyles. The media is more divided, and public transport is less used by the rich, and neither, in any case, touch on the crucial and vulnerable moments of life in the way that welfare services do. There was, briefly, perhaps a time when all Britons watched the BBC, but within the realm of the social and governmental it is now probably the institutions of the welfare state that offer the broadest and deepest shared experience. If we look for a project that we are all participating in, an interaction with the state that is common to us all, and a positioning in the public sphere that does not depend upon our background or social position, then the institutionalized, uniform, welfare state provides this. This is a political sphere where we can recognize the experiences of others whose life is otherwise dramatically different from our own, and as such it contributes to our sense that we are part of a community, doing something together, and living linked lives.¹⁵

2.3. Aligned interests

There is an obvious conflict of interests between those who have money and those who do not. In the context of welfare that conflict can be extended to those who have a limited need for welfare services—perhaps no longer in need of education, or work-related social insurance, or apparently in good health—and those with a particularly high need—the chronically ill being a notable example. Creating a system in which privileged groups agree to subsidize others is a political challenge that has to be met in order for ideals of universality to be maintained.

One way of doing this is to appeal to morality or philanthropy. Another way is to create shared institutions that service all groups. Of course, some groups would be advantaged by creating separate institutions for themselves, but this requires an extra energy or initiative. If they are already invested in the shared institution, part of it, used to it, comfortable with it, then the chance is greater that they will be prepared to fight for its maintenance and improvement—which then also benefits the less privileged users too.¹⁶ By contrast, if there is fragmentation of service provision, then it is likely that providers will partly come to service consumer groups defined along the lines of social division, wealth and class and religion and race and so on. Moreover, the links between the groups are then embodied only in the system of taxation and redistribution, not in shared institutions. In these more distanced circumstances it is a smaller intellectual leap for some groups to

¹⁵ B. Rothstein, n 9 above, 234.  
¹⁶ ibid.
imagine being cut free, able to invest only in themselves. Fragmentation threatens political support for solidarity.¹⁷

It does this in one more way too. In many contexts people are prepared to pay for security and predictability. It is a truism that insurance is a bad buy except when it is for catastrophic events—losses which one could not otherwise afford. Apart from these, it is better value to bear the risk oneself, since insurance companies will always take care that their premiums on average amount to more than one is likely to receive. Yet people buy insurance even for affordable risks, because it brings a certainty and predictability which reduces stress and improves quality of life. And why not? What better thing to spend money on?

Monopolistic welfare institutions can be understood partly in similar terms. Individuals might be able to get a better deal if they were not part of the bigger system and did not have to subsidize the less fortunate. However, they cannot be sure that their own good fortune will continue. Moreover, most people have some others that they care about. They cannot be sure that these will also continue to be light users of the welfare state. Paying over the odds today is also paying an insurance premium in a broad sense; contributing to the political sustainability of a system which ensures that one does not need to worry about the financing of one’s future welfare. By contributing to solidarity now, one strengthens a social norm, and strengthens a system embodying that norm, which one may need in the future.¹⁸

The greater the sense of institution, or of system, the better this works.¹⁹ The individual’s financial contribution to solidarity is the same in a market or a non-market system, but this is not all that matters. They also make a participatory contribution, by using an institution that others use. Here they can stand among those they do not know and feel a sense of belonging and connection. A system in which bad luck might well project them into different schools, hospitals, systems, is one they will feel less inclined to invest in. Those different institutions may be nominally ‘equivalent’—access to basic services may be guaranteed—but there is fear of the unknown and there is the fact that different is never quite equal. Knowing that a particular, known, trusted, institution is yours and your family’s whatever your circumstances—that can motivate a privileged individual to buy into the system now and keep defending it. And one may note here that the privileged can be good at defending; they have political ability and power. If they opt out, they care less.

Groups whose interests are apparently opposed can therefore come to perceive that they have a shared self-interest, the one group because they need now, and the other group because they realize that they may need tomorrow. This virtuous position relies on trust that ‘philanthropy’ today will be returned tomorrow if it


¹⁹ ibid 3.
is needed, and that trust is strengthened when institutions are shared. There is no other service provider to which the privileged can turn; they have to maintain this one. That serves as a guarantee for the future. Of course, systems can be changed, but this takes time and energy. No-one wants to be the first to opt-out, because being alone outside the system is not advantageous even for most net payers. Inertia, and the risk entailed in being the first to try and exit the system, mean that the guarantee entailed in the monolithic system is not empty, albeit not cast-iron either.

2.4. An insight from Hirschman’s voice and exit

Hirschman described how customers of an organization have two tactics they can use to influence its behaviour; voice or exit. Which of these they are likely to choose for in particular circumstances, and which choice leads to more desirable results for themselves or the organization, was described in his classic *Voice, Exit and Loyalty*, which was partly intended as a rebuttal of economists’ tendency to adopt the over-simplified assumption that markets always work by customers switching provider (exiting) when they are not satisfied.²⁰ He suggested that they might also remain as customers but try and persuade the organization to change (voice), and that this might sometimes be an efficient and desirable course of action.²¹

One of the points he makes in the course of his discussion is that exit can actually be a boon to monopolists.²² One might assume that any business desires as many customers as possible, and the monopolist is particularly happy to have all of them, with the extra pricing opportunities that this entails. Yet he suggests that there is often a minority of customers who are particularly demanding, and a majority who are somewhat more inertial, more likely to accept whatever service they are offered without fuss. This comment certainly resonates in an analysis of welfare states. He then points out that if these demanding customers are denied exit—as for example where education or healthcare is provided via a single homogenous and quasi-monopolistic provider or system—they are likely to channel their energies into voice, demanding that the organization improve its services. Their complaints use up resources, and can be costly and tiresome, and may put the organization in the position of either having to spend much money on rebutting and defending—and in the modern world dealing with lawsuits—or improve quality, which is likely to reduce profits, since the organization has all the customers it can get anyway.

By contrast, if there is a certain limited exit option—not too easy or widespread perhaps, but possible, one geared to the wishes of the demanding customers—then these may well take it. The organization is then left with the

²¹ ibid ch 3 (30–43).
²² ibid ch 5 (55–61).
majority of passive customers, whom it can milk for high profits while offering second-rate services. In other words, losing your most expensive and difficult customers is not always bad news, if profit is what you care about.

Hirschman, an organizational scientist, is interested in the possibilities for business organizations to recover and improve, and this concern resonates once again in the context of welfare. He sums up the possibility of limited competition in a largely monolithic system in terms of ‘freedom to deteriorate’ for the dominant institution: there is no longer anyone forcing it to maintain quality.²³ Limited competition ‘comforts and bolsters’ the ‘lazy monopolist’.²⁴

It hardly seems controversial to suggest that this may be very relevant to welfare services. If limited competition is introduced, the customers who may take advantage of it are the same ones who are most able to look after their own interests, most demanding of the system, and most capable of wielding political power and influence to force that system to improve. Others, probably the majority, will be inclined to accept what they get, stick with the institution they know, and will experience slowly degrading services.

This is particularly so as a result of the complex and sensitive nature of welfare services. This makes it hard for a customer to truly judge the quality of what he receives. Hospitals simply wanting to come high in customer satisfaction rankings would probably do better to teach their staff to smile a lot and provide free tea than invest in the latest treatments and advances. An analogous statement could be made of education. Secondly, because of the importance of the services to the individual, there will be a high motivation for customers to stick with what they know; the natural reaction to risk is to be conservative. Only those very confident with the system and the issues will trust their judgement enough to change. Finally, it is the nature of these services that they change with society. Both education and healthcare are quite different now than even a few decades ago. This means that deterioration can take the form of standing still or even improving slowly, since it may be that technological and social changes mean that the potential is there for rapid and significant improvement. But like a frog in slowly warming water, the customer whose welfare services slowly improve, and only degrade in a relative sense, is even less likely to be provoked to resistance than Hirschman’s passive customer prepared to accept slow deterioration in absolute terms. Unless very well informed about the possibilities, and able to understand them, how is the relative victim even to know he is a victim?

The argument above does not hold if those exiting instead of using voice would in fact have used voice to further their own interests only. Then they were selfish participants, and their loss is no loss to others.²⁵ However, while specific patient groups do have specific interests, they also have many shared ones, and a generally

²³ ibid 60.
²⁴ ibid 59.
²⁵ I am grateful to Georgio Monti for drawing my attention to this caveat.
well-working system benefits all. It is therefore assumed here that reforms that active and politically agile patient groups would like would also, on the whole and on balance, tend to benefit more passive groups too, so that the exit of these reform forces could work as described above.

3. Courts and welfare systems

3.1. Judicial review of welfare regulation

Governments making policy should be concerned with more than the most immediate and direct issues, but also with longer term ones. In designing welfare systems the most effective treatment and teaching right now is important, but so is ensuring that the system is stable, enjoys support, and can go on developing and surviving. Further, the system is part of society as a whole, and contributes to its cohesion and identity. Governments concerned about the quality of life of their citizens—which might be influenced by trust in society, social division and the criminal and social costs it brings, and the perception and actual pursuit of equality—must look at welfare institutions in context, and consider the contribution they make beyond the concrete services they provide.

They therefore have many legitimate reasons to structure their systems in ways which may be, to some extent, restrictive of change and individual freedom—of competition therefore—yet not all of those reasons can be expressed in terms of the narrowly functional requirements to provide the highest-quality services at the lowest cost to all customers now. The ‘communitarian’ reasons described above are broader, less direct, and to do with building relations and cohesion in society. They are well expressed in terms of social capital.²⁶

Can courts review such reasons? The structure of EU law is such that it falls to the Court of Justice, and national courts acting under its supervision, to decide whether public measures restricting competition and free movement (or entry and exit, as one could put it) are justified by sufficiently weighty reasons of policy.²⁷ They must balance the pros and cons to decide if a measure is to be struck down. Yet communitarian reasons are subtle, non-quantitative, subjective, unprovable—the very essence of the kind of judgements that politicians make and courts rightly shy away from. In any other judicial review context it would probably be beyond question that judges would not second guess the judgement of authorities on such issues.²⁸ They would engage in marginal, or purely procedural, review.

²⁸ See C. Newdick, n 8 above, 1651–1653.
However, marginal review in the context of EU law brings its own problems. Deferral to authority is not a ‘safe’ option here, because there is authority on two levels, and public authorities with policy interests in either possible decision. The European public authority’s choice to pursue open markets because of the social and economic advantages these bring confronts the national public authority’s choice to close the markets in the name of other social interests. Both are legitimate political policy-makers. Each accepts that they must sometimes bow to the other, the EU via its exceptions to economic law, and states via their acceptance of the supremacy of EU law.²⁹ Hence a judicial deference to policy choices and enthusiasm for marginal or procedural review offers no way out. Even though the Court of Justice pays intermittent lip service to deference to member states, notably in the context of Article 106 TFEU, marginal review is a structurally inadequate response to the situation, which cannot be made adequate by judicial repetition.³⁰ Marginal review of which authority? Marginal review of national decisions amounts to marginalization of EU ones, overruling the legislator on the importance of entry and exit. It creates incentives for misuse of national discretion at the cost of EU law, and is a non-sustainable legal position. On the other hand, marginal review of EU choices disregards complex policy balancing done by national authorities, and is ultimately destructive of good policy and inefficient. What is judicial deference from one perspective is judicial activism from the other. A substantive engagement with the balancing process is unavoidable if law is to be a constructive social tool and if Treaty goals are to be taken seriously.

The conventional language of the internal market might speak of protectionism in a context like the above. This is one of the bogeymen of integration, and given the many social and economic dangers it brings, quite rightly so. Overcoming it has always been at the heart of EU policy, is one of the reasons for the existence of the EU, and so any judge should, and will, assume that public authorities at all levels, including the national—they joined the EU—must be taken to reject it. A strict line against protectionism is deferential, not activist.

Yet from the ‘outside’ it is difficult to determine whether restrictions on entry and exit are motivated by protectionism or legitimate social concerns. This is precisely what a judge cannot be expected to get to the bottom of, because the line between the two is itself contestable and because of evidential reasons. However, if a governmental assurance that motives are good is sufficient, then adjudication of the issue becomes a farce. This would effectively give member states an opt-out, and so undermine the effectiveness of EU law that this fact alone could provide a challenge to the legality of such limited review.³¹ There is implicitly a requirement to examine national measures more substantively and critically.

3.2. Essentialism in judicial reasoning

At the moment the Court is fairly deferential to member state concerns in this area, and uses three particular legal arguments to express that deference. One is the old but still oft-repeated rule of thumb that it is for member states to determine what sort of social welfare system they wish to have, while the Court will merely decide whether the operation of that system is compatible with the requirements of EU law. Of course, this distinction between the nature of the system and its operation cannot withstand a moment’s rigorous thinking. If a system is required to operate differently, its nature changes, however marginally. The Court seems to be trying to express some kind of essentialism, a doctrine that the core principles and structures of the system are for the member states to determine, while others may be subject to market law requirements. Essentialism is always a philosophically troublesome doctrine, and no less here than elsewhere. In particular, the vulnerability of welfare systems to financial pressure means that tinkering with what, conceptually or philosophically, seems a non-core element of the system may well have effects that touch the core deeply, via the banal mechanism of significantly increasing costs.

Yet, despite its intellectual problems one could understand the Court’s approach as an attempt to respect the social concerns around welfare. It is a recognition that the ‘nature’ of the system embodies concerns judges cannot meaningfully engage with, and so they will confine themselves to more practical, functional, measurable, reviewable issues—the ‘operation’. In practice, the Court’s nature/operation distinction appears to have no obvious impact on its judgments—the cases where member states have (partially) lost can certainly not be explained on the basis that the judgments did not affect core aspects of the principles or practice of the system: they did. However it does provide a peg on which judgments can be hung, a way of putting judicial deference in the less defeatist language of the division of competences.

3.3. The use of evidence

A second technique that the Court is fond of is the acceptance of unpersuasive evidence. When it finds that a measure is necessary or unnecessary, justified or unjustified, it does so in sonorously objective tones, as if its decision is the inevitable

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35 C. Newdick, n 8 above.
conclusion of careful perusal of the evidence. However, a quick look at the cases on welfare, particularly those concerning free movement, reveals that it makes highly speculative and controversial assertions. The claim, for example, that allowing patients to travel at will for non-hospital medical treatment will not significantly undermine the finances of health systems, whereas allowing them to travel at will for hospital treatment would, may be true, but one can be quite sure that it is not self-evidently so on the basis of the evidence presented. There is still plenty of research to be done on this issue, and frankly nobody knows quite what would happen. The Court decided on what seemed like a reasonable middle position on the basis of evidence that may have been suggestive, but was not conclusive. Perhaps one should understand this—certainly as a UK lawyer—as a simple application of the civil law ‘balance of probabilities’ approach to deciding a case. An alternative interpretation is that in these complicated welfare contexts states discharge their evidential duty if they can make a reasonable case, or raise a presumption, that their measures are necessary and justified. They do not have to prove it; that would be too hard. The question that remains open is how courts would respond to counter-evidence from litigants—they do not appear to have seriously attempted to rebut state claims of necessity in cases so far, at least insofar as one can judge from the opinions of Advocate Generals and the judgments. The question is made more complex by the fact that formally it is for national courts to assess evidence, according to national rules. Although in practice the Court of Justice often does decide issues of fact, it also often expressly refers them back. Not just the how, but the who, of determining what is in reality necessary or not remains legally ambiguous.

Both of these techniques of reasoning give judges room for flexibility. But that flexibility is only in a good cause if the judges do in fact judge, at least to some degree, the substantive issue. They do have to decide whether measures really are socially important or just protectionist, and implicitly this is what they are doing when they decide cases nominally on a functional basis, but with gaps in logic and evidence. Those gaps are where the other, judicially unnameable, subjective and political, arguments do their work. Judges are therefore deciding on the social value and social sustainability of welfare systems, and weighing this against other interests, and they are probably aware that they are doing so, but they admit none

37 See Watts, ibid para 75; Müller-Fauré and van Riet, ibid para 93; See also Commission v Austria, ibid paras 64–66; G. Davies, ‘Health and efficiency: Community law and national health systems in the light of Müller-Fauré’ (2004) 67 MLR 94, at 104.


39 See n 37 above.


of it; they speak exclusively the language of functional requirements—quality of service, accessibility, price—and of competence and evidence.

3.4. Solidarity as a legal justification

The third legal technique that the Court (increasingly) relies on is the reference to solidarity. This has been used in a number of cases as a justification for restrictive measures. The Court understands the concept in a narrowly functional way, using it simply to mean redistribution within the system. It has found at times that systems founded ‘on the principle of solidarity’ are therefore not economic activities, and so not subject to internal market rules.

This is not particularly persuasive. Neither solidarity nor compulsory membership make an activity non-economic in the normal—economic—sense of the words. The fact that a system entails redistribution certainly does not, for example, mean that it is not an economic activity. There are few more redistributive activities than flying, in which business class passengers pay most of the costs of those sitting in the cheaper seats behind them. The Marxist ‘from each according to his abilities’ approach is now conventional business technique, more often criticized as abuse of capitalist power, under the label of ‘price discrimination’, than as incipient socialism. Compulsory membership is more interesting, but even this need not render an activity non-economic; the fact that an individual is required to purchase a service from a given provider does not mean that there is not a genuine exchange of value, or that the provider is not engaging in an activity which could take place on a market, the two core elements which the Court uses in defining economic activity. The same argument holds when looked at from a more everyday perspective; the fact that an organization has a monopoly over certain customers does not mean that it does not behave in a ruthlessly commercial way—in fact it may well encourage it—and that it redistributes between those customers does not affect this logic in the least. Thus compulsory participation in a system based on solidarity provides no rational reason to classify the system as non-economic.

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44 ibid.


46 See G. Davies, ‘The process and side effects of harmonisation of European welfare states’, n 3 above, 18–21.
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More importantly, compulsory membership and internal solidarity do not provide functional reasons for restricting competition. Solidarity can be achieved quite straightforwardly in a system without compulsory membership, and without shared institutions, by requiring everyone to pay tax, which is then redistributed. For example, subsidized health insurance and commercial provision of healthcare, or subsidized education vouchers and commercial provision of education, achieve the core solidarity effect of ensuring universal access with differing degrees of financial contribution. Yet such approaches do not replace markets for healthcare and education by monopoly institutions, or even public institutions. Solidarity as such, in a functional sense, does not steer policy away from or towards markets and competition, except where the extremes of market freedom are approached. It is organizationally neutral. It does not therefore, if understood functionally, provide a coherent argument against the claimed merits of liberalization and fragmentation of welfare.

Thus when the Court says that economic law does or should not apply because an institution embodies solidarity, it makes no sense to interpret this as meaning that the application of economic law would undermine this solidarity; in most cases it need not do this at all. Nor does it make sense to interpret the statement as meaning that where solidarity is present there is no economic activity; this is not true either, as the Court in fact recognizes in other cases. Solidarity—often in the form of public subsidy—can be importantly present even while individuals also provide remuneration that covers a great deal, perhaps the majority, of the value of the service, or while an organization engages in activity on a market. Subsidy does not have to be a hundred per cent of cost to matter.

The remaining, and best interpretation of the use of solidarity is that it serves as a cipher for communitarian reasons; where institutions embody solidarity this both reflects, demonstrates, and bestows, a special social value and role. This is why, at least sometimes, economic law should not be allowed to deconstruct them, and so why it should not apply, or its application should be restricted. On this reading of the cases the Court, when it allows restrictions on economic law, is implicitly acknowledging the communitarian reasons for restricting competition and prizing monopolistic institutions, even though it cannot voice those reasons explicitly, lacking the vocabulary to do so, and perhaps aware of the controversy it would arouse.

Thus, a judicial awareness of subtle social values is again to be found in the gaps in judicial reasoning, and in the fact that social values often do prevail over purely economic ones, without the reasons provided for this being fully convincing;

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50 Case C-41/90 Höfner and Elsner [1991] ECR I-1979; cases in n 43 above.
there is more going on in the case law than judges choose to say. Solidarity is the blanket under which this furtive communitarianism takes place.

4. Conclusions

There is much to be said for courts saying openly what they are doing, but the fact that the Court of Justice does not is the result of the difficult position it has been put in. Decisions have been placed in the judicial sphere which do not ideally belong there. It can ignore communitarian justifications, leading to bad decisions, or it can consider them but mask them in conventional legal language, or it can start speaking in the language of social capital, cohesion, voice and exit, and such social-theoretical terms. It is not hard to see why it avoids this latter path. It is interesting language, but it is not easy language to rest a proof on—judicial authority is quite possibly maintained more by tactical omissions than by full but subjective explanations, particularly in a court that often seems to have difficulty expressing itself clearly anyway and is heir to, among others, minimalist and legalist continental traditions.⁵¹

The major reason why the Court has been lumbered with its difficult task is the diversity of national welfare systems and rules, which makes detailed regulation at EU level practically impossible.⁵² EU law in this area is inevitably at a relatively abstract and principled level, with the consequence that judges have lots of work left over to do.

This provides a reason to be sceptical of proposals for legislation on Services of General (Economic) Interest.⁵³ The fact that there is a problem, a conflict of interest, and a dissatisfaction with leaving these matters to courts, does not mean that legislation is a solution. It will run up against the same diversity of systems, and very likely be forced into the same kind of relatively abstract rules as the Court has developed. The consequence will be that the nature of the judicial balancing required does not really change.

The parties who could do more to ‘solve’ the problem of balancing the immeasurable are member states. If the Advocate General’s opinions and the judgments are a fair guide then the nature and quality of their arguments in the cases are unimpressive, and suggest some branches of government are not engaging with the obligations EU membership entails. On the contrary, EU demands are neither new nor unpredictable, and it is surely reasonable to expect states to proactively look for a defensible compromise between their own social policy and the EU policies of openness and integration. A true picture of the extent to which

⁵² F. Scharpf, ‘The European social model’ n 6 above.
they are doing this would require an extensive—but very worthwhile—empirical survey. A survey of the case law provides many examples of manifestly indefensible practices, and suggests that more could certainly be done. Taking subtle concerns about exit seriously will be easier if judges, and the Commission, can see that states are genuinely attempting to engage with the positive aspects of it too.

It would be a shame to see the picture solely in terms of the tensions between openness and cohesion, liberty and solidarity, welfare and the market, however. There are at least two other interpretations possible which deserve consideration. The liberalization of welfare can be understood as a statement or suggestion that Europe is politically mature, and no longer needs closed institutions to maintain its social cohesion—it can now have the best of both worlds, of freedom and solidarity. The compulsory, institutional maintenance of certain values treats these as delicate flowers, and is prepared to sacrifice other interests to protect them. But if those flowers are surprisingly robust and have grown strong roots the sacrifice may be redundant, and even harmful; a system that restricts freedom unnecessarily comes into discredit. Whether solidarity is a sufficiently rooted value that citizens will maintain their commitment to each other even if given the freedom to fragment and reorganize is of course difficult to predict. Ultimately the answer will be known only by experiment, and the cautious liberalization that the EU is imposing may be that experiment. The fear that it evokes may then be understood as a fear of ourselves, that we are in fact not ready for freedom—perhaps given the chance we will rush off and be selfish and abandon the weak to their fate. To use the European’s (unjustified) stereotype of the United States; are we just Americans waiting to be released, or do we really have rooted European social values?

The liberalization project can also be understood as part of the creation of a Europe-wide expression of welfare solidarity, which is less the creation of an EU welfare empire than an attempt to place national societies firmly in the context of neighbouring ones that share similar values, and thereby to turn the logic of communitarian monopoly on itself; if shared participation in a common project strengthens bonds, then making states transparently part of a wider community of states committed to welfare and solidarity should perhaps achieve the same effect on a larger scale. Reaching the right compromise between national openness and national institutions is not a balance between cohesion and freedom, but about trying to use freedom to actually strengthen that cohesion—at least that may be the dream.

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54 No competent lawyer could have advised the Dutch, British, Greek, or German governments that they had a reasonable chance in Müller-Fauré, Watts, Case C-444/05 Stamatelaki [2007] ECR I-3185, Case C-8/02 Leichtle [2004] ECR I-2641, Schwarz, and many others.

55 G. Davies, ‘The process and side-effects of the harmonisation of European welfare states’, n 3 above, 63–64.