Fordham International Law Journal

Volume 35, *Issue* 5 2017 *Article* 6

Invisible Cities in Europe

Nicola Fernanda*

*Washington College of Law, American University

INVISIBLE CITIES IN EUROPE

Fernanda Nicola[*]

---

* Associate Professor, Washington College of Law, American University. This Essay was presented as a paper at "Teaching European Law in the United States," Boston University Law School in 2009, at the panel "From Maastricht to Lisbon: The Evolution of European Union Institutions and Law" at Fordham Law School in 2011, and at "The European Legal Project: New Approaches at Harvard Law School in 2012." The Author is grateful for wonderful research assistance from Tudor Farcas, Colten Hall, and Shannon Ramirez, and to the stellar assistance of William Ryan, librarian at the Pence Law Library. All errors are the Author's alone.

INTRODUCTION

> *With cities, it is as with dreams: everything imaginable can be dreamed, but even the most unexpected dream is a rebus that conceals a desire or, its reverse, a fear. Cities, like dreams, are made of desires and fears, even if the thread of their discourse is secret, their rules are absurd, their perspectives deceitful, and everything conceals something else.*[1]

The recent movements of Occupy Wall Street in London and Paris, and Los Indignados in Madrid, demonstrate that not only the European internal market but also global markets are under attack from social movements promoting alternatives to neoliberalism. These movements, which are geographically rooted in cities, yet politically situated between the national and global markets, promote an alternative political ethos founded on direct democracy and locally based self-determination.[2] Such groups' critique of contemporary financial capitalism is but one example of a broader phenomenon explored in this Essay: the place of local actors and local politics in the jurisprudence of European market integration. This jurisprudence views cities, whether resisting or fostering European capitalism, as either mere subsidiaries of states or as mere private market actors.[3]

---

1. ITALO CALVINO, INVISIBLE CITIES 44 (William Weaver trans., Harcourt Brace Jovanovich, Inc. 1974) (1972). Italo Calvino's book *Le Città Invisibili* is a narrative of different cities that enables Marco Polo and the emperor Kublai Khan to begin their long conversation, despite linguistic barriers and different mentalities between the two. *See generally id.* Likewise, despite highly technical EU law doctrines that often overlook city power, this Essay aims to make more visible the local effects of European integration on those local services, from education to waste management, that impact our everyday life.

2. *See* Kyle Bella, *Bodies in Alliance: Gender Theorist Judith Butler on the Occupy and SlutWalk Movements*, TRUTHOUT (Dec. 15, 2011), http://www.truth-out.org/bodies-alliance-gender-theorist-judith-butler-occupy-and-slutwalk-movements/1323880210 (interviewing Judith Butler, who said: "I know that the three Occupy movements that I have spoken to are all trying to figure out how to develop an ethos in the movement so that the people there are not just fighting economic inequality and injustice, but are trying to produce a community that manifests the values of equality and mutual respect that they see missing in a world that's structured by neoliberal principles.").

3. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1099–1109, 1150–52 (1980) (concluding that the limited ability of cities to solve their own

This Essay argues that when internal market[4] rules conflict with city policies in Europe, judges ought to hear their voices. Even if such views are not ultimately embraced, they are the expression of political communities, whether resisting or fostering European capitalism,[5] which ought not be collapsed with the states nor reduced to private market actors.

European integration is no longer merely driven by markets but also by its people. The 2010 Treaty of Lisbon introduced numerous institutional innovations with the goal of democratizing European governance, such as the European Citizens' Initiative.[6] Almost twenty years earlier, the Maastricht Treaty of 1992 marked an important moment in the process of democratization of the European Union when it officially created EU citizenship.[7] Since then, EU citizens have been able to vote in foreign local elections and participate more actively in local politics. In addition, through an activist jurisprudence interpreting the free movement of EU citizens, the Luxembourg courts have created strong incentives for workers, students, and

---

problems or control their own development can be solved by giving them real power—not concentrated power, but varied so as to reach all those "affected by organized social life").

4. Consolidated Version of the Treaty on the Functioning of the European Union art. 26, 2010 O.J. C 83/47, at 59 [hereinafter TFEU].

5. *See* DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION 138–39 (2012) ("The right to the city is not an exclusive individual right, but a focused collective right. It is inclusive not only of construction workers but also of all those who facilitate the reproduction of daily life: the caregivers and teachers, the sewer and subway repair men, the plumbers and electricians, the scaffold erectors and crane operators, the hospital workers and the truck, bus, and taxi drivers, the restaurant workers and the entertainers, the bank clerks and the city administrators. . . . But, for obvious reasons, it is a complicated right partly by virtue of the contemporary conditions of capitalist urbanization, as well as because of the nature of the populations that might actively pursue such a right. . . . It is at this point that the world of practical politics fruitfully intersects with the long history of largely anarchist-inspired utopian thinking and writing about the city.").

6. The European Citizens' Initiative confers on EU citizens the right to directly request the European Commission ("Commission") to submit a proposal to the European Union for a legal act required for the purpose of implementing the Treaties, after the Commission has examined an initiative that has received the support of at least one million citizens from at least one quarter of the EU Member States. Council Regulation No. 211/2011 on the Citizens' Initiative, O.J. L 65/1, art. 2(1), at 3; *see* Consolidated Version of the Treaty on European Union art. 11(4), 2010 O.J. C 83/13, at 21 [hereinafter TEU post-Lisbon]; *see also* TFEU, *supra* note 4, art. 24, 2010 O.J. C 83, at 58.

7. Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1.

families to relocate and gain access to local welfare benefits. Additionally, the Brussels strategy to integrate the markets was intended to increase people's mobility while at the same time fostering greater participation in both European and local policies.

Even though subnational actors are at the forefront of this bottom-up approach to European integration, cities and local policies disappear in the jurisprudence of the courts. In interpreting internal market rules, the local scale is irrelevant to the Luxembourg courts concerned with balancing Member States versus European interests or domestic policies versus individual rights of EU citizens.

Since cities control municipal services that are increasingly regulated by the internal market, they are often actors in the proceedings before the Court of Justice of the European Union ("CJEU" or "Court") and the General Court of the European Union (collectively "European Courts").[8] At times these courts have limited cities' abilities to deviate from national welfare policies; at other times, they have empowered them to transform a local policy into a statewide one. Rather than inquiring into the local effects of each case, European judges have signaled that they are not willing to intervene explicitly and directly to change the existing distribution of power between state and local actors. Such behavior reinforces the idea that the European Union is either an international law creature that only deals with the Member State governments, or that the European Union is a quasi-federal polity according to which the only relevant actors for its governance are the states and the federal government. A different understanding of European multilevel governance should entail not only a deep link between the Union and its Member States, but also with their subnational actors.

In reality, the legal construction of the internal market, which is based on a doctrinal architecture including free movement of goods, capital, services, and workers together with competition and public procurement rules, has already

8. EU law affects municipal power through its internal market provisions that are EU competition and public procurement rules, the free movement of goods, workers, services, and the freedom of establishment. *See* TFEU, *supra* note 4, arts. 5(3), 6, 2010 O.J. C 83, at 52–53 (enumerating EU internal market shared competences).

empowered the European Courts to intervene in state-local matters. European judges have explicitly empowered Member States and EU-wide policies, with the result of implicitly favoring or hindering local interests. In foregrounding the connection between internal market and subnational actors, which I label "cities" for the sake of simplicity, this Essay shows how European adjudication constrains and transforms local actor responses to the project of market integration. Local policies are either subsumed into national agendas or reduced to the expression of profit-seeking corporations. Irrespective of the local stakes in each decision, cities remain invisible as political communities to the European judiciary.

By analyzing free movement provisions, competition law, and public procurement rules, this Essay shows that each judicial decision involving city policies inevitably redistributes power and resources between subnational actors and the states. With this in mind, judges can make cities visible: they can address the normative and distributive impact of their decisions rather than relying on a fiction of nonintervention in state-local matters.

Part I of this Essay analyzes the fiction of nonintervention, according to which the European Courts supposedly do not intervene in state-local matters. In interpreting the doctrine of "wholly internal"[9] situations, judges have carved out a purely domestic sphere in which EU law cannot intervene. Such interpretation promotes an understanding of the European Union and its Member States as two independent and autonomous spheres of power.[10] The policy arguments that judges have used to interpret internal market rules have construed cities as subdivisions of the state rather than self-

9. *See* Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, 39 COMMON MKT. L. REV. 731 (2002) (discussing the "wholly internal" rule employed by the Court of Justice of the European Union ("CJEU" or "Court") and the General Court of the European Union (collectively "European Courts")); *cf.* Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, 35 LEGAL ISSUES ECON. INTEGRATION 43 (2008) (referring to this principle as "purely internal").

10. *See generally* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).

governing bodies, or as private actors competing for services in the internal market rather than political communities.[11]

Part II shows how, in their free movement jurisprudence, the European Courts initially limited the ability of cities to deviate from national welfare policies but later demonstrated greater sensitivity to the internal conflicts in Member States over particular social policies. More recently, in the notorious *Maastricht Coffee Shop* case, the CJEU confused a specific city and European goal, the elimination of drug tourism, with a national Netherlands goal, triggering considerable municipal opposition.[12]

In their competition and public procurement jurisprudence, the European Courts have conceived cities as private actors subject to all internal market constraints. The private actor analogy used by the Courts has discouraged municipal public-private cooperation and city collaboration with unions.[13]

Part III of this Essay illustrates how at times judicial decisions favoring free movement have strengthened Member State power at the expense of city power, while at other times, they have favored city policies that depart from state policies when the latter conflict with EU goals. As a consequence, EU adjudication has dramatically affected local policies by shrinking local subsidies or by empowering a particular city policy to overcome the internal opposition in influencing the outcomes of statewide legislation.

Despite the fiction of nonintervention in state-local matters, by empowering or limiting cities' abilities to adopt welfare

---

11. In the United States at the beginning of the twentieth century, the Supreme Court developed a similar legal interpretation in *Hunter v. Pittsburg*, in which it defined cities as "subdivisions of the state" while granting autonomy to cities only when acting in their proprietary rather than their governmental capacity. 207 U.S. 161, 178 (1907). For a comparative analysis, see Fernanda G. Nicola, *'Creatures of the State': Regulatory Federalism, Local Immunities, and EU Waste Regulation in Comparative Perspective*, *in* COMPARATIVE ADMINISTRATIVE LAW 161, 161–81 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

12. Josemans v. Burgemeester van Maastricht, Case C-137/09, [2010] E.C.R. I____ (delivered Dec. 16, 2010) (not yet reported); *see* Suzanne Daley, *A Dutch City Seeks to End Drug Tourism*, N.Y. TIMES, Aug. 18, 2010, at A1.

13. *See, e.g.*, Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti, Case C-231/03, [2005] E.C.R. I-7287; Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA (*Merci*), Case C-179/90, [1991] E.C.R. I-5889.

legislation, European adjudication has dramatically reshaped the powers and redistributed the resources of cities vis à vis other municipalities, regions, and their central governments.

I. *INVISIBLE CITIES IN EU LAW*

> *Contemplating these essential landscapes, Kublai reflected on the invisible order that sustains cities, on the rules that decreed how they rise, take shape and prosper, adapting themselves to the seasons, and then how they sadden and fall in ruins.*[14]

Two main theories of European integration view the European Union as either an intergovernmental organization based on states' bargaining,[15] or as a quasi-federal union driven by supranational institutions.[16] According to the intergovernmentalist theory, the key actors of EU law are the states whose goals shape but are at the same time in tension with the international institutions they have created.[17] Likewise, the quasi-federal narrative, which resonates with the US "dual federalism" doctrine, has singled out the states and the federal government as the main actors of the supranational legal order. In both theories, the impact of European adjudication on cities remains an invisible factor, because subnational governments do not receive or shape the interpretation of EU law. This is a matter of Member States, supranational institutions, such as the European Commission ("Commission"), the Council of the

---

14. CALVINO, *supra* note 1, at 122.

15. *See generally* ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT (1998); Andrew Moravcsik, *Preference and Power in the European Community: A Liberal Intergovernmental Approach*, 31 J. COMMON MKT. STUD. 473 (1993).

16. *See generally* EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE (Wayne Sandholtz & Alec Stone Sweet eds., 1998); J. H. H. WEILER, THE CONSTITUTION OF EUROPE (1999).

17. For a discussion of this traditional approach in international law, see generally Srilal M. Perera, *State Responsibility: Ascertaining the Liability of States in Foreign Investment Disputes*, 6 J. WORLD INVESTMENT & TRADE 499 (2005). For an alternative approach to advocating that subnational actors are increasingly becoming actors of international law, see generally Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263 (2006); Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875 (2006); Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

European Union, or the European Parliament, and more recently of European citizens when bestowed with individual rights by EU law. Even though subnational policies often encroach upon the functioning of the internal market so that cities become actors in the judicial proceedings before the European Courts, judges have either collapsed local into state interests or they have reduced cities to mere private actors.[18] In balancing the conflicting interests of the European Union and its Member States, judges have rendered cities invisible in the internal market.

In interpreting the Treaty on the Functioning of the European Union ("TFEU") provisions on the four freedoms of movement (capital, goods, services, and workers), competition law, and public procurement rules,[19] European Courts have made clear their reluctance to intervene in state-local matters. On several occasions, the CJEU has expressed its reluctance to intervene in state-local matters by failing to recognize the authority of local actors to act independently from their respective Member States. The Court has interpreted the provisions of the initial 1957 Treaty of Rome as crafting a "new legal order of international law" that creates obligations for the Member States vis à vis the Union while also creating individual rights for European citizens that are directly effective in the domestic legal orders.[20] In this triangular relationship connecting the Union with its Member States and their citizens, judges have portrayed EU law as shaped only by two autonomous spheres of power: the Union and the Member States.

---

18. *See* Frug, *supra* note 3, at 1063, 1100–08 (explaining how the invisibility of cities in the US constitutional structure has influenced Supreme Court jurisprudence to reduce cities to either public actors as "creatures of the State" or as private actors but mere market participants).

19. TFEU, *supra* note 4, arts. 26, 37, 101–02, 2010 O.J. C 83, at 59, 61, 88–89.

20. In creating the European Community ("Community") doctrine of Direct Effect, the CJEU has confirmed that the Treaty of Rome, as well as regulations and in certain cases European directives, directly confer individual rights to persons who can enforce those rights before their domestic court. *See* Costa v. Ente Nazionale per l'Energia Elettrica (ENEL), Case 6/64, [1964] E.C.R. 585, at 597–98; Van Gend en Loos v. Nederlandse Administratie der Belastingen (*Van Gend en Loos*), Case 26/62, [1963] E.C.R. 3, at 12–13 (describing the "new legal order of international law" in which states have limited their rights and where the subjects are both the Member States and their nationals).

A. *Two Types of Invisibility*

The invisibility of cities in European adjudication has two different aspects: a substantive and a procedural one. The substantive aspect concerns the fact that public associations and local governments that have important regulatory powers are invisible to the legal order of the internal market. There is no intermediate group straddling economic and social relations between the Union and, the Member States.

Consider European directives, which are a form of legislation that allow Member States to have some flexibility in choosing which type of national instrument to implement in order to achieve a prescribed goal.[21] While Member States are legally bound to attain the goal set up by the directives, they maintain discretion over implementing measures. Despite the obligations and rights created by EU directives,[22] a major problem today is the noncompliance with directives, especially in the environmental field.[23] The Commission spent years addressing how to improve Member State compliance with its directives and finally in 1993, the Maastricht Treaty introduced a penalty for failure to comply.[24] In a case involving the Commission against Greece for noncompliance with several waste directives, the CJEU rejected the Greek government's excuse that its internal allocation of power prevented it from implementing the directives. The Court held that "[a] Member State may not plead internal circumstances, such as difficulties of implementation which emerge at the stage when a [European Community ("Community")] measure is put into effect, to justify a failure to comply with obligations and time-limits laid down by Community law."[25] This response shows the

---

21. *See* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 106 (5th ed. 2011).

22. *See* Van Duyn v. Home Office, Case 41/74, [1974] E.C.R. 1337.

23. For a more in-depth analysis of this problem, see generally Nicola, *supra* note 11.

24. TFEU, *supra* note 4, art. 160, 2010 O.J. C 83, at 118–19; *see* Commission of the European Communities, European Governance: White Paper, COM (2001) 428 (July 2001) [hereinafter White Paper] (discussing the introduction of enforcement proceedings to pursue Member States' noncompliance with Community law).

25. Commission v. Greece, Case C-387/97, [2000] E.C.R. I-5047, ¶ 4.

unwillingness of the Court to intervene directly in national-local matters.[26]

Likewise, France was sanctioned for the nontransposition of Directive 2001/18,[27] which seeks to harmonize Member States' rules regulating the use of genetically-modified organisms ("GMOs") and the marketing of GMO-based food products.[28]

The French government excused itself for not putting the transposition of the directive on the agenda of the National Assembly stating that "the outdoor cultivation of GMOs has provoked and continues to provoke violent demonstrations in France, entailing, inter alia, the uprooting of plants."[29] In response, the CJEU held that "a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under Community law."[30]

In both the Greek and the French cases, the Court did not recognize local disobedience or internal resistance as a valid excuse for not implementing the directives. Instead, it punished the Member States for their noncompliance with monetary penalties.[31] The Court made clear that it was not willing to intervene in state-local matters and that EU law only recognized the relationship between the Union and the Member States.

The procedural aspect of the invisibility of city power concerns whether subnational actors have standing to challenge EU acts or legislation before the Luxembourg courts.[32] While city ordinances are often challenged because they conflict with

---

26. *See* Nicola, *supra* note 11. Despite the local noncompliance, the Greek government was the only entity liable vis à vis the Commission so that in practice, the penalty became an immunity for local governments that could refuse to cooperate with the implementation of an EU directive without suffering any retaliation from Brussels but certainly not from Athens. *See id.*

27. Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2001 O.J. L 106/1.

28. *See* Commission v. France, Case C-121/07, [2008] E.C.R. I-9159, ¶ 72.

29. *Id.*; *see* INF VEILLE CITOYENNESUR LES OGM [CITIZEN'S WATCH GROUP FOR INFORMATION RELATING TO GMOS], THE FRENCH LAW ON GMOS: "BALANCED" OR BIASED? 2 (2008), *available at* http://www.infogm.org/IMG/docnonprot/BrochureLoi_vEnglish.pdf.

30. *France*, [2008] E.C.R. I-9159, ¶ 72.

31. *See id.* ¶¶ 80–89; *Greece*, [2000] E.C.R. I-5047, ¶¶ 7–8

32. *See* TFEU, *supra* note 4, art. 263, 2010 O.J. C 83, at 162–63 (conferring jurisdiction upon the CJEU).

internal market rules, under the Treaty, subnational actors do not have privileged standing to review EU law.[33] Futhermore, the CJEU has denied standing to local actors in the context of state-aid policies,[34] and more recently in cases involving regional or cohesion policy.[35]

For instance, in cohesion policies when regions are in noncompliance with an approved development plan, the Commission, which is in charge of disbursing funds, can suspend or reduce the funding of a project. The Commission's decision is susceptible to judicial review before the courts if the applicants have standing.[36] Several of these cases were raised in the context of Commission decisions about the allocation or suspension of payments from the European Regional Development Fund or other types of EU funds to beneficiary regions.[37] As to the general standing of municipalities, local entities and regions, the CJEU has been consistent in holding

---

33. *Id.* art. 263, at 162. Like private individuals, local governments are not privileged actors because they need to show "direct and individual concern." *Id.*

34. *See* Consorzio Gruppo di Azione Locale "Murgia Messapica" v. Commission, Case T-465/93, [1994] E.C.R II-361, ¶ 57.

35. Cohesion policies link Brussels to its regions by allocating EU funds to regional actors to address the economic imbalances between richest and poorer regions heightened by the functioning of the internal market. Since the mid-1990s, in the framework of cohesion policy, the General Court of the European Union has reviewed the decisions that the Commission adopted during the different implementation phases of the structural funds. *See* Paul Craig, *Shared Administration, Disbursement of Community Funds and the Regulatory State, in* LEGAL CHALLENGES IN EU ADMINISTRATIVE LAW: TOWARDS AN INTEGRATED ADMINISTRATION 34 (Herwig C.H. Hofmann & Alexander H. Türk eds., 2009); Francesca Strumia, *Remedying the Inequalities of Economic Citizenship in Europe: Cohesion Policy and the Negative Right to Move,* 17 EUR. L.J. 725 (2011).

36. *See* Joanne Scott, *Regional Policy: An Evolutionary Perspective, in* THE EVOLUTION OF EU LAW 625, 636–37 (Paul Craig & Gráinne de Búrca eds., 1992) (commenting on the lack of legal standing in the General Court of the European Union of the applicants in Greenpeace & Others v. Commission, Case C-321/95 P, [1998] E.C.R. I-1651, and in Greenpeace & Others v. Commission, Case T-585/93, [1995] E.C.R. II-2205).

37. *See* Regione Toscana v. Commission, Case C-180/97, [1997] E.C.R. I-5245; *see also* Ente per le Ville Vesuviane v. Commission, Case T-189/02, [2007] E.C.R. II-89, *followed by* Commission v. Ente per le Ville Vesuviane, Joined Cases C-445/07 P & C-455/07 P, [2009] E.C.R. I-7993; Regione Siciliana v. Commission, Case C-15/06, [2007] E.C.R. I-2591; Regione Siciliana v. Commission, Case C-417/04 P, [2006] E.C.R. I-3881; Regione Siciliana v. Commission, Case T-60/03, [2005] E.C.R. II-4139; Regione Toscana v. Commission, Case T-81/97, [1998] E.C.R. II-2889. On cohesion funds, see Koinotita Grammatikou v. Commission, Case T-13/08, [2008] E.C.R. II-211, and Município de Gondomar v. Commission, Case T-324/06, [2008] E.C.R. II-173.

that local governments, unlike the Member States or supranational institutions, are not privileged applicants to review Community acts.[38]

In interpreting state aid policy, the CJEU laid down the conditions for the legal standing of the regions. In a well-known state-aid case, *Regione Toscana v. Commission*, the Court was adamant that the region did not have standing to challenge a decision of the Commission withdrawing funding for a project without informing the beneficiary.[39] The Court explained that the possibility for subnational actors to challenge community acts is so subversive as to potentially undermine the entire EU architecture.

Ironically, legal standing is generally conceived as a way to increase democracy, pluralism, and decentralization, and the Committee of the Regions has long advocated that regions with legislative powers be able to bring a suit against those Community acts that impinge on their regulatory ability.[40] Scholars have written in favor of expanding *locus standi* to local governments to ensure better involvement of the regions and to

---

38. *See* TFEU, *supra* note 4, art. 263, 2010 O.J. C 83, at 162 (stating that the CJEU only has "jurisdiction in actions brought by a Member State, the European Parliament, the Council, or the Commission"); *see also Regione Siciliana*, [2006] E.C.R. I-3881; Nederlandse Antillen v. Council, Case C-452/98, [2001] E.C.R. I-8973; Région Wallonne v. Commission, Case C-95/97, [1997] E.C.R. I-1787.

39. *See Regione Toscana*, [1997] E.C.R. I-5245, ¶ 6 (holding that:

> [I]t is clear from the general scheme of the Treaties that the term Member State, for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or of autonomous communities, irrespective of the powers they may have. If the contrary were true, it would undermine the institutional balance provided for by the Treaties, which determine the conditions under which the Member States, that is to say the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established.).

40. *See* Opinion of the Committee of the Regions on the Treaty Establishing a Constitution for Europe, 2005 O.J. C 71/1, ¶ 1.28; *see also* Koen Lenaerts, Access of Regions with Legislative Powers to the European Court of Justice 1 (unpublished manuscript) (delivered at the REGLEG Conference in Brussels, Belgium, May 20, 2008). As to different conceptions of pluralism in constitutional litigation, see David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 MOD. L. REV. 44 (1992).

give greater voice to subnational actors within the European judicial process.[41]

According to Stephen Weatherill, the lack of local representation before the courts is problematic because it reinforces centralization by strengthening the role of the states as gatekeepers of the relationship between the regions and Brussels while simultaneously excluding regional participation in the judicial process.[42] Scholars have addressed the question of *locus standi* in their effort to reconceptualize the role of the judiciary in the new governance project.[43] Through an analysis of the case law of the CJEU, Joanne Scott and Susan Sturm concluded that judicial review would allow courts to play a catalytic role by enhancing participation in governance.[44] According to these authors, opening the judiciary to local bodies will generate new information for the implementation of EU policies among participants that will democratically organize their participation in new governance processes.[45] Daniela Caruso has made a plea for *locus standi* for peripheral regions in the realm of cohesion policy, particularly with respect to southern Italian regions, which are traditionally underdeveloped relative to the rest of Italy and Europe.[46] In her view, such a

---

41. For instance, Stephen Weatherill denounced the fact that regions have "no direct access to the [European Community] law-making processes, and, moreover, that they have little opportunity to challenge the validity of acts before the European Community's judicature, where they have no better standing under Article 230 than a private individual." THE ROLE OF REGIONS AND SUB-NATIONAL ACTORS IN EUROPE 5 (Stephen Weatherill & Ulf Bernitz eds., 2005).

42. *See id.* at 6; *see also* Piet Van Nuffel, *What's in a Member State? Central and Decentralized Authorities Before the Community Courts*, 38 COMMON MKT. L. REV. 871 (2001).

43. *See* Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 575 (2007).

44. *Id.* at 575–76. Courts, according to Joanne Scott and Susan Sturm, also increase information in decision making and ensure "principled decision-making through transparency and accountability." *Id.* at 575.

45. *See id.* at 576 ("Courts as catalysts can hold new governance institutions accountable for providing adequate participation, based upon the criteria specified or implicit within the new governance framework.").

46. *See* Daniela Caruso, *Direct Concern in Regional Policy: The European Court of Justice and the Southern Question*, 17 EUR. L.J. 804, 823–25 (2011) (addressing in particular the relation between Brussels and southern Italy, and stating that "[t]he fact that the day-to-day life of structural funds is something the ECJ tends not to talk about, by holding firmly the reins of standing, has important repercussions beyond the technical sphere of regional policy. Judicial silence, in a court-centred discipline,

procedural remedy would not only allow regions to bring regional policy cases before the courts but also enable EU lawyers to grapple with redistributive and development problems.[47]

Despite these calls to expand the standing of local governments before the European Courts,[48] judges have denied standing to subnational entities.[49] At the moment, local governments are not privileged applicants[50] because this would open up the possibility for the European Courts to decide cases in which a region or a city could challenge its central government.[51] Thus, allowing a city to sue the state, which also provides the source of its authority, would trigger a paradoxical situation that the European Courts are careful to avoid.[52]

---

confirms the impression of legal scholars that cohesion policy may be crucial to political science or macroeconomics but hardly qualifies as law").

47. *See id.*

48. *See* Koen Lenaerts & Nathan Cambien, *Regions and the European Court: Giving Shape to the Regional Dimension of the Member States*, 35 EUR. L. REV. 609, 609 (2010) (arguing that the EU treaties recognize the regional dimension of subnational entities, explicitly citing Article 4(2) of the Treaty on the Functioning of the European Union: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, *inclusive of regional and local self-government.*" (emphasis added)).

49. *See* Caruso, *supra* note 46, at 810. The Court of First Instance was more generous in finding the admissibility of the regions to challenge the Commission withdrawal of the regional funds, but its decisions were quickly overturned by the European court. *See id.*

50. TFEU, *supra* note 4, art. 263, 2010 O.J. C 83, at 162.

51. *See id.* art. 263, at 162–63 (limiting CJEU jurisdiction to Member States, the European Parliament, the Council of the European Union, and the Commission, while giving quasi-privileged standing to the European Central Bank, the Economic and Social Council, and the Committee of the Regions). For further support of this thesis, see generally Van Nuffel, *supra* note 42.

52. In the United States, courts have generally denied such possibility for exactly the same reason. *See, e.g.*, Williams v. Mayor & City Council of Baltimore, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."); Hatley v. City of Charlotte, 826 F. Supp. 2d 890, 902 (W.D.N.C. 2011) ("A city's violation of its own charter does not amount to a cause of action under state law . . . ."); Barrios-Barrios v. Clipps, 825 F. Supp. 2d 730, 740 n.5 (E.D. La. 2011) ("[U]nder Louisiana law, a police department is not a juridical entity capable of being sued."); Branson v. Newburgh Police Dep't, 3:09-CV-00154-RLY-WGH, 2011 WL 2845589, at *3 (S.D. Ind. July 18, 2011) ("Under Indiana law, a municipal police department is neither established as a separate legal entity nor granted the capacity to sue or be sued."); Bonillas v. Harlandale Indep. Sch. Dist., No. SA-10-CV-1053-XR, 2011 WL 2173620, at *3 (W.D. Tex. June 2, 2011) ("Governmental immunity is distinct from sovereign immunity. While sovereign

This procedural aspect of the invisibility of cities is consistent with the substantive aspect that EU law should not, in principle, intervene directly in state-local matters.

B. *Beyond the Fiction of Nonintervention in State-Local Matters*

Through the fiction of nonintervention in state-local matters, judges have portrayed EU law as having no impact on the redistribution of power and resources between the Member States and their subnational actors.[53] Member States can structure their relationship with subnational actors as they wish, completely autonomous from EU law. Local actors, in turn, are shielded from the effects of EU law.[54] Despite these assumptions, the CJEU has occasionally departed from the fiction of nonintervention. As this Section explains, in "wholly internal" situations in which domestic legislation creates reverse discrimination among a Member State's citizens, the CJEU has evaluated the impact of EU law on different local communities in order to clarify which cases might be outside the scope of EU law. In some of these cases, judges have had to consider the economic and political tensions arising from the national legislative scheme to understand its effects on different local communities.

This Section further explains that the ideological structure of arguments that judges use in interpreting internal market rules leaves little room for policy arguments about local

---

immunity protects the state and its divisions from suit and liability, governmental immunity extends to political subdivisions such as counties, cities, and school districts." (citations omitted)); Henry-Lee v. City of New York, 746 F. Supp. 2d 546, 559 n.11 (S.D.N.Y. 2010) ("Under New York law . . . 'a department of a municipal entity is merely a subdivision of the municipality and has no separate legal existence.'" (quoting Hoisington v. Cnty. of Sullivan, 55 F. Supp. 2d 212, 214 (S.D.N.Y. 1999))).

53. *See* Fernanda Nicola, *The False Promise of Decentralization in EU Cohesion Policy*, 20 TUL. J. INT'L & COMP. L. 65 (2011) (demonstrating that even EU cohesion and regional policies foster renationalization and stronger ties between Brussels and the Member States rather than decentralization of power).

54. Likewise, the US Supreme Court has interpreted federal constitutional law so as not to impose any limitation on how states allocate or restrict the power of local governments. *See id.* (explaining that neither federalism in the United States nor subsidiarity in the European Union have "done much to resolve the basic problem that the complexity of the concept of local autonomy poses: there is no clean way to divide matters into discrete 'local' and 'central' spheres. . . . In fact, both concepts have been used to justify denying power to localities").

interests. These are either conflated with Member States' interests or reduced to the interests of private market actors. In foregrounding the tacit existence of a "third level"[55] Europe, this Essay enriches our understanding of the stakes in judicial preferences, which are often reduced in policy arguments to pro-Europe versus pro-Member States.[56]

1. Reverse Discrimination for Which Communities?

While the 2009 Treaty of Lisbon and numerous directives and case law have strengthened the rights of European citizens, the "wholly internal" situation doctrine has become an important shield to protect Member States from the expansion of EU powers. This doctrine allows Member States to maintain reverse discriminatory schemes because they have no nexus to EU law. Member States can insulate a territory or a community of people residing in a particular place by treating them differently from others located in the same state.

Recent case law on EU citizenship has granted immigrant status to non-EU-nationals by partially limiting the extent of the wholly internal situation doctrine vis à vis European citizens.[57] In line with this development, scholars have argued that the wholly internal situation doctrine is a specter of the past and therefore a truly integrated union should move beyond it.[58]

---

55. *See* THE REGIONAL DIMENSION OF THE EUROPEAN UNION: TOWARD A THIRD LEVEL IN EUROPE? (Charlie Jeffery ed., 1997)

56. *See* R. Daniel Kelemen, The Political Foundations of Judicial Independence in the European Union (Aug. 22, 2011) (unpublished manuscript) (paper prepared for presentation at the European Union Studies Association Biennial Convention, Boston, Massachusetts, March 3–5, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914516 (exploring the political foundations of judicial independence in the European Union and to what degree is the ECJ remains insulated against court curbing mechanisms that might otherwise threaten judicial independence) .

57. *See* Opinion of Advocate General Sharpston, Zambrano v. Office Nat'l de l'Emploi, Case C-34/09, [2011] E.C.R. I____, ¶¶ 91–102 (delivered Sept. 30, 2010) (not yet reported) (finding that Belgium violated EU law with respect to applicant's citizenship over Belgium's objections that the applicant's situation was "purely internal"); *see also Zambrano*, [2011] E.C.R. I____ (Mar. 8, 2011) (not yet reported). *Contra* McCarthy v. Sec'y of State for the Home Dep't, Case C-434/09, [2011] E.C.R. I____, ¶ 41 (delivered May 5, 2011) (not yet reported); Uecker & Jacquet v. Land Nordrhein-Westfalen, Joined Cases C-64–65/96, [1997] E.C.R. I-3171, ¶ 16 (holding that citizenship rights do not arise in the wholly internal situation).

58. *See* Shuibhne, *supra* note 9, at 733; *see also McCarthy*, [2011] E.C.R. I____, ¶ 42; Opinion of Advocate General Sharpston, Gov't of the French Cmty. & Walloon Gov't v.

Although there are still issues that do not have any cross-border implications, in recent years increasing EU regulatory power and the sanctioning of discriminatory behavior by the European Courts have resulted in reducing considerably the amount of purely internal issues.[59] An expression of this trend can be found in Alina Tryfondou's argument that:

> Since reverse discrimination arises as a result of the process of constructing an internal market and the limited scope of application of EU law, it should now be considered a difference in treatment that falls within the general scope of EU law, as it impedes the Community's now all-important aim of ensuring that no discrimination arises as a result of the process of European integration.[60]

Despite this important trend in legal scholarship, today Member States often successfully rely on the wholly internal situation doctrine to show that their policy is not discriminatory because it only discriminates in domestic situations, a right afforded where there is no link with EU law. In this sense, the wholly internal situation doctrine has a strong "states rights" bent, strengthening a federalist or a Euro-skeptic position.[61] In contrast, those who favor federal powers, or Europhiles, have argued that links with EU law can be found in every domestic scenario, often in connection with the expanding notion of European citizenship.[62]

Reverse discrimination cases with a territorial dimension have sometimes obliged judges to unpack the effects of domestic legislation on different local communities. Because Member States can allow redistributive schemes that favor only a specific group of residents rather than the entire population, localities

---

Flemish Gov't, Case C-212/06, [2008] E.C.R. I-1683, I-1687, ¶¶ 39–40; *Uecker*, [1997] E.C.R. I-3171, ¶ 23.

59. *See* Shuibhne, *supra* note 9, at 741–62 (describing the gradual erosion of purely internal market issues by the CJEU); *see also* Opinion of Advocate General Mischo, Nederlandse Bakkerij Stichting & Others v. Edah, Joined Cases 80/85 & 159/85, [1986] E.C.R. 3359, 3369, ¶¶ 20–21 (holding that a true internal market "must of necessity be based on the principle of equal treatment").

60. *See* Tryfonidou, *supra* note 9, at 63–64.

61. *See* Ernest Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002).

62. *See generally* Alina Tryfonidou, *Purely Internal Situations and Reverse Discrimination in a Citizens' Europe: Time to "Reverse" Reverse Discrimination?*, *in* ISSUES IN SOCIAL POLICY: A NEW AGENDA 11 (Peter G. Xuereb ed., 2009).

are often at the center of cases involving the wholly internal situation doctrine. For example, in *Government of the French Community & Walloon Government v. Flemish Community*,[63] the French Community in Belgium challenged an insurance scheme adopted by the Flemish government that was open only to individuals who both lived and worked in the Flanders region and not to those working in Flanders but residing in Wallonia.[64]

Within this politically charged context, Belgium's national court referred a preliminary question to the CJEU to address the issue of whether the scheme contravened the EU principle of nondiscrimination or whether it fell within a wholly internal situation outside the scope of EU law. The Government of the French Community argued that the requirement of residency for entitlement to the insurance scheme amounted to a restrictive measure that infringed on provisions of Community law concerning freedom of movement of persons and, as such, this was a matter of EU law. In contrast, the Flemish government, the legislator of the care insurance scheme, argued that the matter had no link with EU law since it was a purely internal situation.[65]

The Court did not fully agree with either argument but instead unpacked the effect of the insurance scheme vis à vis different groups. It distinguished between two categories of workers impacted differently by the scheme. First, the Court addressed those "Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of the Brussels-Capital but who live in the French- or German-speaking region and have never exercised their freedom to move within the European Community."[66] The Court held that for these workers, "[c]ommunity law clearly cannot be applied

63. *Gov't of the French Cmty.*, [2008] E.C.R. I-1683.

64. *See id.* ¶¶ 12–13. The motivation behind this insurance scheme reflects the internal division that permeates Belgium and the ethnic and linguistic divisions between the three major language groups: Dutch (Flemish), French (Wallons), and German speakers. Belgium's Walloons and Flemish, characterized by cultural differences as well economic disparities, often engage in political stalemates at the national level, resulting in Belgium's government often being a "near-ungovernable federation" because of its internal rivalries. *See The Trouble with Flanders: Why Belgium's Unending Linguistic Disputes Matter to Europe*, ECONOMIST, Jan. 29, 2011, at 51.

65. *Gov't of the French Cmty.*, [2008] E.C.R. I-1683, ¶¶ 12–13.

66. *Id.* ¶ 37

to such purely internal situations."[67] For a second category of workers,

> [B]oth nationals of Member States other than the Kingdom of Belgium working in the Dutch-speaking region or in the bilingual region of Brussels-Capital but who live in another part of the national territory, and Belgian nationals in the same situation who have made use of their right to freedom of movement

the Court held that EU law precluded the Flemish scheme.[68] This split between these two categories of workers showed the paradoxical outcome that EU (non-Belgian) citizens residing in Belgium were better protected than other Belgian citizens who moved because EU law offered more protection than Belgian law. Rather than completely abandoning the wholly internal situation doctrine, the Court ventured a careful analysis of which groups could be protected under EU law according to whether they had taken advantage of their ability to move.

This unusual outcome has been decried by scholars who dislike the fact that Member States may legally discriminate against their citizens who have never worked outside that state, so long as the discrimination is done locally as part of the Member State's internal policy.[69] In her opinion in the case, Advocate General ("AG") Sharpston mocked this outcome:

> I must confess to finding something deeply paradoxical about the proposition that, although the last 50 years have been spent abolishing barriers to freedom of movement *between* Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them *within* Member States. One might ask rhetorically, what sort of a European Union is it if freedom of movement is guaranteed between Dunkirk (France) and De Panne (Belgium), but not between Jodoigne and Hoegaarden?[70]

---

67. *Id.* ¶ 38.

68. *Id.* ¶¶ 41–42, 60.

69. *See* Piet Eeckhout, *The Growing Influence of European Union Law*, 33 FORDHAM INT'L L.J. 1490, 1495–96 (2010); *see also* ALINA TRYFONIDOU, REVERSE DISCRIMINATION IN EC LAW 43–44 (2009).

70. Opinion of Advocate General Sharpston, *Gov't of the French Cmty.*, [2008] E.C.R. at I-1687, ¶ 116.

Sharpston's description of the paradoxical situation of allowing localities but not Member States to discriminate among their residents is a powerful reason to set aside the wholly internal situation doctrine and an explicit reference to the discriminatory taxation opinion by AG Tesauro: "[B]arriers to trade between Portugal and Denmark are prohibited, whilst barriers to trade between Naples and Capri are immaterial."[71]

Sharpston relies on the antidiscrimination principle in the TFEU,[72] as strengthened by the Charter of Fundamental Rights,[73] to argue that "[d]iscrimination is thus generally perceived to be repugnant and something that should be prohibited."[74] Her analysis, however, goes further to unpack the effects of the Belgian insurance scheme. In doing so, she follows AG Poiares Maduro's opinion in *Carbonati Apuani*[75] where he used the Community objective of nondiscrimination to set aside the wholly internal situation doctrine.[76]

In *Carbonati Apuani*, an Italian municipality tried to characterize a local taxation on export as having a wholly internal impact so that it would not be deemed in conflict with the TFEU-based prohibition of customs duties on exports and charges having equivalent effect.[77] The CJEU held that the local taxation scheme was incompatible with Article 30 of the TFEU despite the well-founded argument that the city tax revenue was "intended to cover the expenses borne by the Comune di Carrara as a consequence of the marble industry's activities in its territory."[78] In relying on the AG's opinion, the Court held that

---

71. Opinion of Advocate General Tesauro, Lancry & Others v. Direction Générale des Douanes & Others, Joined Cases C-363, 407–411/93, [1994] E.C.R. I-3957, I-3960, ¶ 28.

72. TFEU, *supra* note 4, art. 18, 2010 O.J. C 83, at 56.

73. Charter of Fundamental Rights of the European Union art. 21, 2010 O.J. C 83/389, at 396 [hereinafter Charter of Rights].

74. Opinion of Advocate General Sharpston, *Gov't of the French Cmty.*, [2008] E.C.R. at I-1687, ¶ 147.

75. *See* Carbonati Apuani Srl v. Comune di Carrara, Case C-72/03, [2004] E.C.R. I-8027.

76. *See* Opinion of Advocate General Maduro, *Carbonati Apuani*, [2004] E.C.R. at I-8029, ¶ 63 ("I take the view that it is now clearly one of the fundamental objectives of the Community to ensure that no discrimination of any kind should arise as a result of the application of its own rules.").

77. *See Carbonati Apuani*, [2004] E.C.R. I-8027, ¶¶ 7–8; TFEU, *supra* note 4, art. 30, 2010 O.J. C 83, at 60.

78. *Carbonati Apuani*, [2004] E.C.R. I-8027, ¶¶ 30, 42.

the costs sought by the municipality were not only to the benefit of the economic operators who transported the marble but that they had a broader general redistributive scope among the community.[79]

Even though in this case the city could not apply for an exemption because its tax scheme was equivalent to a custom duty prohibited by the TFEU, Maduro suggested that it should be left to the national court to balance the costs that the tax scheme created for the different groups that were benefitting from, or penalized by, the export tax.[80] When balancing conflicting interests requires a deeper contextual knowledge, the CJEU has often deferred this proportionality decision to domestic courts. As Gráinne de Búrca explains, "the interest affected is seen as a collective or general public interest rather than an individual right and . . . the interest of the State is a mixed and complex one."[81] Likewise, in addressing wholly internal situation doctrine, Maduro has advocated that national courts should "review cases of reverse discrimination."[82] As these authors suggest, the impact of the local regulation at stake might require more information and closer scrutiny to figure out what kind of communities will be impacted by EU law.

If deferring the final balancing to domestic courts has been one possible avenue to take local stakes seriously, another avenue is to have European courts balancing the plurality of conflicting interests especially in those situations where the legislation at stake has simultaneously a local, national, and transnational impact. For instance, Maduro has stated that:

> Apart from policies protecting their own nationals to the disadvantage of other nationals, however, policy-making is still seen as internal matter for each State . . . . [I]t is debatable if that is still the case in the European Union and whether Member States regulatory powers should not be

---

79. *See id.* ¶ 32.

80. *See* Opinion of Advocate General Maduro, *Carbonati Apuani*, [2004] E.C.R. I-8029, ¶ 36 ("It will be for the national court to determine whether those conditions have been satisfied in the circumstances of this case.").

81. Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. L. 105 (1993).

82. *See* Miguel Poiares Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, *in* THE FUTURE OF REMEDIES IN EUROPE 117, 118 (Claire Kilpatrick et al. eds., 2000).

> seen as strictly interdependent and subject to participation by a larger political community (that, of all those affected by the State regulation within the single European market).[83]

In addressing Maduro's challenge, this Essay suggests that understanding the reasons both in favor and against reverse discrimination as articulated by local communities will allow European judges to have a better distributive assessment of the implication of discriminatory provisions on local and transnational communities. When European judges are called upon to strike down reverse discriminatory schemes they have the opportunity to decide a socially explosive matter that will likely have an impact in state-local relations. In her opinion in the *Government of the French Community* case, Sharpston does not shy away from such a challenge and ultimately is willing to openly evaluate territorial regulatory schemes by the Member States, and their local governments. She explains that a discriminatory scheme might discriminate per se or it might seek to promote development in underdeveloped territories through subsidies targeted towards less advantaged communities.[84] In either case, European judges are well-situated to understand the effects of the domestic regulatory scheme on different local or transnational communities and to decide or remand the decision to domestic courts.

---

83. *See* MIGUEL POLARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION; A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY 148 (1998).

84. Opinion of Advocate General Sharpston, Gov't of the French Cmty.& Walloon Gov't v. Flemish Gov't, Case C-212/06, [2008] E.C.R. I-1683, I-1687, ¶ 155 ("Any discrimination against that group would, of course, be indirect rather than direct. For that reason, it would be open to Member States to raise arguments of objective justification. It is not difficult to foresee circumstances in which such objective justification could potentially be made out. One can readily imagine (for example) that, in order to promote a less-developed region within its territory, or to deal with a problem that is endemic to one region but does not affect the rest of its territory, a Member State might wish to make certain advantages available only to those living within a particular region. Well-founded objective justification would leave Member States ample scope to apply differentiated rules in situations that, objectively, merited such treatment, whilst safeguarding citizens of the Union against arbitrary discrimination that could not be so justified.").

2. Policy Arguments in Internal Market Adjudication

This Section analyzes the different policy arguments that European judges use in interpreting the provisions regulating the internal market. Judges have used policy arguments to justify the triangular relationship between the European Union and the Member States as two independent spheres of authority on the one hand, and the European Union and its citizens to show that these are bestowed with EU law rights independently from their states, on the other. Each argument reflects a different normative theory that judges have used to interpret the provisions of the internal market. These policy arguments address national welfare, public policy, regulatory competition, and citizens' rights in the internal market through a mix of state/individual and private/public arguments.[85]

This Essay shows that policy arguments in European adjudication have stifled the way in which lawyers think about the social and democratic relevance of local policies because they have reduced any divergence to two conflicting spheres of autonomous and independent power: the European Union versus the Member States. Cities are reduced to invisible actors because judges have characterized them either as public actors as long as they are mere subdivisions of the state, or as private actors who are mere market participants. In doing so, judges have collapsed the numerous local with a single national position in a way that hides the internal conflicts among state constituencies over the adoption of a national policy. Alternatively, cities remain private actors in the internal market so long as they have no governmental functions. In this way, cities are equal to private corporations that do not receive the benefit of the several public exceptions in competition law.[86]

---

85. For a semiotics of policy arguments in adjudication, see Jack Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 20–36 (1986) (categorizing and describing the most common recurring arguments, which theoretically "recapitulate the dialectic of individualism and communalism"); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 77–80 (1991) (illustrating the "maxim and countermaxim" structure of legal argument and focusing, in particular, on policy arguments often deployed in adjudication).

86. *See* Frug, *supra* note 3, at 1127–28; *see also* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 43–46 (2008).

To reproduce this battle of competing interests between the European Union and its Member States, judges have used four different arguments in order to mediate sovereignty and welfare tensions emerging in the internal market. I have called these arguments "national welfare," "public policy," "regulatory competition," and "rights of EU citizens."[87] The first two arguments on "national welfare" and "public policy" help judges to limit market liberalization and uphold Member State welfare measures restricting the free movement of goods, workers, and services. Through these arguments, the courts have created some important exceptions to their free movement jurisprudence and competition law rules.[88] In contrast, judges have used a second set of arguments on "regulatory competition" and "rights of EU citizens" to strike down those national measures limiting the free movement of goods, workers, services, and EU citizens, all of which hold the right to move freely in the internal market without being discriminated against on the basis of their nationality.

Both sets of arguments have limited the balancing of the proportionality approach of the Court to an assessment of the burden created on the EU free trade regime by protectionist Member State measures.[89] Often the European Courts refer the proportionality test to domestic courts because these cases are embedded in moral, social, and religious values that they are ill-suited to deal with.[90] This approach has secured a strong form of constitutional pluralism in European adjudication,[91] even though critics have pointed out that the legal analysis that the

---

87. *See infra* Table I.

88. *See* Torfaen Borough Council v. B & Q Plc (*Sunday Trading*), Case C-145/88, [1989] E.C.R. 3851, ¶ 12.

89. *Compare* TFEU, *supra* note 3, art. 34, 2010 O.J. C 83, at 61, *with id.* art. 36, at 61.

90. *See* Rewe-Zentral A.G. v Bundesmonopolverwaltungfür Branntwein (*Cassis*), Case 120/78, [1979] E.C.R. 649. *Cassis* is the landmark decision concerning the free movement of goods. In interpreting Article 28 of the Treaty Establishing the Economic Community ("EC Treaty"), which regulates the free movement of goods, the CJEU asserted its competence to assess the intrinsic reasonableness of all national health, safety, or environmental product regulations that could have a negative impact on cross-border trade. *Id.*

91. *See generally* Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT'L L.J. 211 (2008).

CJEU offers to the domestic courts leaves little room to maneuver to local judges.[92]

Through these policy arguments, European adjudication has overlooked the powers of cities or those intermediate associations whose welfare policies depart from national ones or cannot be reduced to mere private activities. The four types of policy arguments that judges have used to interpret internal market provisions have made cities invisible to a new legal order where the main actors are the European Union, the Member States, and eventually their citizens.

Judges have interpreted "national welfare" arguments to limit free movement and favor national legislation in free movement of goods cases. The CJEU has referred to national welfare to uphold those national policies that would otherwise have been struck down because they were incompatible with Article 34 of the TFEU.[93] However, judges have used these national welfare arguments to justify national, rather than local, diversity against the deregulatory pressure of the four freedoms in the internal market.

National welfare arguments find a source of legitimacy in Fritz Scharpf's notion that the internal market triggers social dumping because of the constitutional asymmetry intrinsic in

---

92. *See generally* Konsumentombudsmannen v. Gourmet Int'l Prods. AB (*The Gourmet Case*), Case C-405/98, [2001] E.C.R. I-1816. See Ulf Djurberg, *The Gourmet Case: A Revolution in the "Cuisine Suédoise" and a Major Development of EU Case Law?*, EUR. LAW., Apr. 2003, which shows the inflexibility afforded to domestic courts where a local Swedish court was forced to strike down a ban on alcohol advertising to remain in accordance with the CJEU's reasoning.

93. *See* TFEU, *supra* note 4, art. 36, 2010 O.J. C 83, at 61 (providing a list of exceptions to the quantitative restrictions to trade forbidden by Article 34); *see also The Gourmet Case*, [2001] E.C.R. I-1816; Council of the City of Stoke-on-Trent v. B & Q Plc, Case C-169/91, [1992] E.C.R. I-6635, ¶ 11 (holding that "national rules restricting the opening of shops on Sundays reflected certain choices relating to particular national or regional socio-economic characteristics"); Quietlynn Ltd. v. Southend Borough Council, Case C-23/89, [1990] E.C.R. I-3059, ¶ 9 (holding that national legislation limiting the sale of sex articles to licensed stores only is a rule "merely . . . regarding [sex article] distribution" is not caught by Article 34 of the Treaty on the Functioning of the European Union ("TFEU")); *Sunday Trading*, [1989] E.C.R. 3851; *Cassis*, [1979] E.C.R. 649. *Compare* Summary Proceedings Against Sergius Oebel, Case 155/80, [1981] E.C.R. 1993 (holding that a measure prohibiting bread delivery to retailers at night does not discriminate among producers and is a legitimate socioeconomic policy), *with* Lochner v. New York, 198 U.S. 45 (1905). For a comparison between the two, see Daniela Caruso, Lochner *in Europe: A Comment on Keith Whittington's "Congress Before the* Lochner *Court,"* 85 B.U. L. REV. 867 (2005).

EU law.[94] This asymmetry lies in the structure of the European Union, which, by contrast with its Member States, prioritizes free market goals over social welfare goals.[95] Thus, European integration creates an opposition between the EU level, intrinsically connected to economic regulation, and the Member State level, intrinsically connected to welfare policies. The construction of rigid dichotomies between Europe and its Member States legitimizes the Court's role as an umpire without blurring the distinction between law and politics.

The problem with national welfare arguments, however, is that the fear of social dumping is based on public/state arguments that only consider the states rather than the more complex internal dynamics that might show strong opposition to welfarist legislation even by some local governments. Thus, city policies are upheld by the CJEU as justified state policies as long as they do not depart from national welfare policies.[96]

The CJEU has used a "public policy" argument to uphold national legislation that defends values explicitly recognized by the different constitutional regimes, against the pressure of the internal market. This argument performs a similar function to the "national welfare" argument insofar as it creates a limit to free movement in the internal market. Judges have interpreted public policy arguments, however, to uphold national legislation

---

94. Social dumping is a strategy promoted only at the EU level rather than at the national one, whereby you can replace a service or an employee with a cheaper one from another Member State. *See* Flora Lewis, *Europe's Social Dumping*, N.Y. TIMES, July 24, 1993, at 19; *see also* Damjan Kukovec, A Critique of the Rhetoric of Common Interest in the European Union Legal Discourse 4 (May 25, 2012) (unpublished manuscript) (on file with the Harvard Law School Institute for Global Law & Policy), *available at* http://www.harvardiglp.org/wp-content/uploads/A-critique-of-the-rhetoric-of-common-interestMay17.pdf.

95. *See* Fritz Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 J. COMMON MKT. STUD. 645 (2002).

96. A striking example is the protection of labor. In many CJEU cases, associations such as unions are considered to be communities of workers protecting the individual interests of a specific and limited group of workers rather than national public interests. *See* Dirk Rüffert v. Land Niedersachsen (*Rüffert*), Case C-346/06, [2008] E.C.R. I-1989 (providing that the Land's policy vis à vis public workers is one of the most protective of labor than in the rest of Germany); Opinion of Advocate General Van Gerven, *Merci*, Case C-179/90, [1991] E.C.R. I-5889, I-5905 (unionized labor in the Genova harbor that creates strong protections for dock workers in that municipality is likely to create a restriction of competition).

through a balancing test that is often carried out by domestic courts.[97]

When European judges have balanced national legislation on free movement rules, they have done so in conjunction with rights or values protected by constitutional regimes. In these cases, the CJEU has used public policy arguments to balance, for instance, state discriminatory practices arising in the case of free movement of workers. By strengthening the free movement of workers, the Court upheld forms of indirect discrimination by public and private institutions that did not hire workers on the basis of nationality.[98] The CJEU has, however, interpreted the free movement provisions as creating an exemption to the free movement of services by upholding individual rights or domestic values when protected under national constitutional regimes.[99]

The theory of constitutional patriotism provides legitimacy to public policy arguments. This theory reconciles internal market freedoms with a pluralist constitutional regime that protects diverse national and cultural values.[100] Through these policy arguments, however, pluralist values prevail over free movement only as far as they are formally recognized by national constitutions. Thus, European courts will uphold local measures against free movement only when city policies are

---

97. *See, e.g.*, Skatteverket v. Gourmet Classic Ltd., C-458/06, [2008] E.C.R. I-4207; Konsumentombudsmannen v. Gourmet Int'l Prods. AB, Case C-405/98, [2001] E.C.R. I-1816.

98. *See* Anita Groener v. Minister for Educ., Case C-379/87, [1989] E.C.R. I-3967 (upholding the Irish Minister for Education's decision to deny a permanent art teacher position to a national of the Netherlands upon her failure to pass an Irish language skills test).

99. *See* Int'l Transp. Workers' Fed'n v. Viking Line ABP (*Viking*), Case C-438/05, [2007] E.C.R. I-10779, ¶ 46 ("[T]he exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality. . . ."); Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, [2004] E.C.R. I-9609, ¶¶ 12, 36; Eugen Schmidberger v. Republik Österreich, Case C-112/00, [2003] E.C.R. I-5659 (finding that the public interests involved in an environmental demonstration, which prohibited the free movement of goods, should be weighed against the prohibition of the free movement of goods).

100. *See* Bignami, *supra* note 91; *see also* Jürgen Habermas, *Why Europe Needs a Constitution*, NEW LEFT REV., Sept.–Oct. 2001; Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

consistent with rights and values protected under the Member States' constitution or EU law. If local stakes or collective bargaining policies clash with national laws, such stakes are not upheld by judges as justifiable limitations on the four freedoms.

European judges have used "regulatory competition" arguments in order to create more efficiency and mobility in the internal market by rewarding those Member States with lower protections for consumers and investors.[101] Judges have upheld free movement based on an efficiency rationale, while striking down protectionist state measures that overall created barriers to trade. An example is the well-known labor union saga in which the CJEU has increased the fear of social dumping at least vis à vis free movement of workers and companies exploiting cheap wage labor coming from former Eastern European countries. In these cases, the Court has upheld free movement against national collective bargaining agreements in order to promote regulatory competition in the European Union.[102]

European scholars have used regulatory competition arguments to advocate for less harmonization in the internal market and more competition among legal regimes.[103] In its free movement of services and establishment jurisprudence, the CJEU has voided national legislation that restricted the mobility of companies and the possibility to provide services freely in the

---

101. *See* Centros Ltd. V. Erhvervs-og Selskabsstyrelsen, Case C-212/97, [1999] E.C.R. I-1484 (holding that a Board's refusal "to register a branch of a company formed in accordance with the law of another Member State" is preventative of "any exercise of the right freely to set up a secondary establishment which Articles 52 and 68 [of the TFEU] are specifically intended to guarantee" and thus limiting the free movement of establishment affecting the movement of corporations); *see also* Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., Case C-167/01, [2003] E.C.R. I-10195; Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC), Case C-208/00, [2002] E.C.R. I-9943.

102. For a full description of the dispute, from which the following draws, see Charles Woolfson & Jeff Sommers, *Labour Mobility in Construction: European Implications of the Laval un Partneri Dispute with Swedish Labour*, 12 EUR. J. INDUS. REL. 49 (2006).

103. *See* Roger Van den Bergh, *Forced Harmonisation of Contract Law in Europe: Not to Be Continued*, *in* AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW 249 (Stefan Grundmann & Jules Stuyck eds., 2002); *see also* Fernanda G. Nicola, *Transatlanticisms: Constitutional Asymmetry and Selective Reception of U.S. Law and Economics in the Formation of European Private Law*, 16 CARDOZO J. INT'L & COMP. L. 87 (2008) (mapping the schools of thought importing US law and economics in European private law, entailing a shift from German economic ordo-liberalism to US regulatory competition ideas).

internal market.[104] Such regulatory diversity has created incentives to shop around for better legislation to incorporate companies or provide more efficient services.

According to regulatory competition arguments, deregulation creates a more efficient marketplace for services and labor while also fostering competition among states.[105] The inaccuracy of these arguments is that they reduce the conflicts on market deregulation to European versus state interests in a false way. For instance, Damjan Kukovec has shown that in the labor deregulation saga, the Member States were split along a West/East divide where former Eastern European states were favorable to strike down labor and collective bargaining protections in the West in order to have their low-wage workers compete in European labor markets.[106]

Likewise, local interests cannot be reduced to state and welfarist ones. At times, local actors are more favorable to market deregulation and neoliberal policies than supranational actors.[107] Therefore, regulatory competition arguments might benefit some local agendas but simultaneously undermine others.[108]

The "rights of EU citizens" argument performs a similar function to the regulatory competition argument insofar as it has been used by judges to strike down discriminatory state or local measures. Judges assert this argument to promote free

---

104. *See Überseering*, [2002] E.C.R. I-9943; *Centros*, [1999] E.C.R. I-1484; *see also* Criminal Proceedings Against Massimiliano Placanica, Christian Palazzese & Angelo Sorricchio, Joined Cases C-338, C-359–60/04, [2007] E.C.R. I-1891 (finding that the Italian sports betting licensing regime was discriminatory and in breach of Articles 43 and 49 of the EC Treaty on the freedom of establishment and free provision of services); Criminal Proceedings Against Piergiorgio Gambelli, Case C-243/01, [2003] E.C.R. I-13031.

105. *See generally* UGO MATTEI, COMPARATIVE LAW AND ECONOMICS (1997).

106. *See* Damjan Kukovec, *Whose Social Europe?: The Laval/Viking Judgments and the Prosperity Gap* (Harvard Law Sch. Inst. for Global Law & Policy, Working Paper Series No. 3, 2011), *available at* http://www.harvardiglp.org/all-resources/working-papers/iglp-working-paper-series-20113-whose-social-europe-the-laval-judgment-and-the-prosperity-gap-by-damjan-kukovec-sjd-harvard-law-school/.

107. *See* James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421 (2011).

108. For the local implication of their decisions, see the discussion of free movement of services and workers in the *Rüffert* case. *See Rüffert*, Case C-346/06, [2008] E.C.R. I-1989. The *Rüffert* judgment has important national-local implications in Germany.

movement of EU citizens in receiving public subsidies without being discriminated against by national or local rules. The CJEU has expanded the rights of European citizens by interpreting the free movement of workers provision in the TFEU in conjunction with the principle of antidiscrimination.[109]

Today, EU citizens have the right to move freely across Europe by increasingly enjoying social welfare provisions granted by host states without being discriminated against on the basis of their nationality.[110] The construction of EU citizenship has entailed the dismantling of state or local discriminatory practices with respect to equal access to education, in a subject matter where the European Union has only a complementary competence to intervene and no power to harmonize legislation.[111] Over time, however, the CJEU has intervened in several cases on tuition fees and the recognition of diplomas that highlight the deep connection between vocational training and higher education and the internal market. The Court clarified that once students can access higher education abroad, they become more competitive workers and as a consequence they have greater potential for mobility in seeking jobs all over the European Union.[112] If initially scholars welcomed this line of cases on EU citizenship that expand the rights of free movement of students through the right of equal access to education,[113] others have addressed the distributive

---

109. *See* TFEU, *supra* note 4, arts. 19, 45, 2010 O.J. C 83, at 56, 65–66; Council Regulation No. 492/2011 on Freedom of Movement for Workers Within the Community (codification), 2011 O.J. L 141; Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. L 158/77, arts. 27–33, at 113–19 [hereinafter Directive on Citizens' Free Movement and Residence Rights].

110. *See* Commission v. Austria, Case C-147/03, [2005] E.C.R. I-5969; Regina Bidar v. Ealing London Borough Council & Another, Case C-209/03, [2005] E.C.R. I-2119; Françoise Gravier v. City of Liège, Case 293/83, [1985] E.C.R 593. For an overview of education in EU law, see generally Josephine Shaw, *Education and the Law in the European Community*, 21 J.L. & EDUC. 415 (1992).

111. TFEU, *supra* note 4, art. 165(4), 2010 O.J. C 83, at 120–21 (permitting "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure . . . [to] adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States" after consultation with the Economic and Social Committee and the Committee of the Regions).

112. *See* Opinion of Advocate General Jacobs, *Austria*, [2005] E.C.R. at I-5972.

113. *See* Francesca Strumia, *Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity*, 12 COLUM. J. EUR. L. 713 (2006); *see also*

impact of these decisions on local or state welfare policies[114] as well as the Member State resistance vis à vis the CJEU attack on national education discriminatory schemes.[115]

The CJEU has promoted students' mobility as a basic right of the market entailing the fact that states should abandon the discriminatory practice denying education subsidies based on nationality or residency requirements. Initially, the Court promoted a version of consumer-citizens who can choose where to live as long as there is an overall gain for the internal market. While EU citizens could move freely with minimal residence restrictions, state and local actors had to compete among each other as best suppliers of public goods or education services to attract European consumer-citizens.[116]

Even though the CJEU adjudication in the realm of student mobility has recently paid greater attention to Member States arguments against dismantling discriminatory schemes such as quota restrictions,[117] the Court has not yet differentiated between state or local funding. Where local actors, rather than national ones, participate through educational grants or housing subsidies in supporting their residents' access to higher education, the CJEU judgment favoring European students' mobility might lead to the shrinking of local subsidies.[118]

The current student saga has led to the incorrect classification of the education conflict as one between the European Union (committed to students' mobility) and the Member States (discriminating against nonnationals to preserve

---

Siofra O'Leary, *Equal Treatment of EU Citizens: A New Chapter on Cross-Border Educational Mobility and Access to Student Financial Assistance*, 34 EUR. L. REV. 612 (2009).

114. *See* Eric Beerkens, *The Emergence and Institutionalisation of the European Higher Education and Research Area*, 43 EUR. J. EDUC. 407 (2008).

115. *See* Sacha Garben, *The Belgian/Austrian Education Saga* (Harvard European Law Ass'n, Working Paper No. 1, 2008).

116. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 421–23 (1956). For a European version of the Tiebout thesis, see Christian Iaione, *Local Public Entrepreneurship and Judicial Intervention in a Euro-American and Global Perspective*, 7 WASH. U. GLOB. STUD. L. REV. 215 (2008).

117. *See* Bressol v. Gouvernement de la Communauté Française, Case C-73/08, [2010] E.C.R. I-2735; *Austria*, [2005] E.C.R. I-5969.

118. *See* Regina Bidar v. Ealing London Borough Council & Another, Case C-209/03, [2005] E.C.R. I-2119. Part B.2 argues that the CJEU decision in *Bidar* has contributed to dismantling local redistributive schemes that were targeting a particular group of less advantaged people living in the Ealing Borough rather than foreign students coming to study in London. *See infra* Part B.2.

their public services). Much more, however, is at stake. For example, a recent Scottish policy highlights an internal controversy regarding public education that unsettles this view. Recently, Scotland, in contrast to the British government, reaffirmed its commitment to public education by deciding to allow Scottish and EU undergraduate students to get their degree for free, whereas students from England, Wales, and Northern Ireland will be charged a higher sum that might increase up to UK£9000 per year.[119] If this case were to land before the Luxembourg judges, they would have to unpack the distributive effects of the Scottish education scheme. The split in the United Kingdom is marked by Scotland's argument against the dismantling of its reverse discrimination scheme, whereas England, favoring the student free choice argument, would argue in favor of dismantling the Scottish subsidy. In such a scenario, similar to *Government of the French Community*, European judges have to specify some of the distributive effects of the Scottish education subsidy vis à vis different groups of students. Such an exercise will entail reimagining the elaboration of different policy arguments that can no longer reduce the education conflict to European mobility rights versus Member States' discriminatory policies. Rather than drawing lines between two spheres of independent powers, the Court will have to make a normative decision based on its views on public education.

The table below is a schematic overview of the four arguments that judges have used in interpreting the internal market doctrines in connection to a supporting normative theory.

119. *See* Amelia Hill, *Scotland's University Fees 'Discriminatory,' Says Lawyer*, GUARDIAN (U.K.), Aug. 21, 2011, http://www.guardian.co.uk/education/2011/aug/21/scotland-university-fees-discriminate-lawyer.

Table 1. Four Arguments in EU Adjudication to Regulate the Internal Market

	STATE	**INDIVIDUAL**
PUBLIC Doctrines Limiting Free Movement Competition Law and Public Procurement Rules	**National Welfare** Exceptions to Free Movement: "SGEI" Exception to EC Competition Law "In House" Exception to Public Procurement Rules *Constitutional Asymmetry*	**Public Policy** Exceptions to Free Movement: Public Service Employees Exception for Workers *Constitutional Patriotism*
PRIVATE Free Movement Competition Law and Public Procurement Rules	**Regulatory Competition** Free Movement Competition Law Public Procurement Rules *Efficiency*	**Rights of EU Citizens** Free Movement of Workers and Services Nondiscrimination Equal Access to Education *Free Choice*

C. *Including Local Stakes in Judicial Balancing*

The invisibility of cities in European adjudication is deeply connected to the idea that EU law has fostered of two autonomous spheres of power: the Union and its Member States. In balancing the powers of these two conflicting actors to regulate the internal market on the one hand and welfare policies on the other, the Court assumed the latter would be

controlled by Member States' governments. There is, however, a tremendous variation in Europe on which local, regional, or federal actors can adopt social policy depending on the decentralization of power in each Member State.[120] For instance, German Länder have a greater ability than Italian regions to regulate the delivery of public healthcare in hospitals and the allocation of education subsidies. In addition, because of different types of decentralization of power existing in each Member State, there are important interlocal differences in the quality of public health and education services that vary enormously from land-to-land or region-to-region.[121] For instance, there is tremendous interlocal variation in the quality of services provided by hospitals between northern and southern Italy. Likewise, in both Belgium and England, the quality and prestige of education varies tremendously between schools situated in Brussels and London, the respective capitals, when compared with schools in the rest of the country.

Finally, the invisibility of cities in EU adjudication harkens back to their status in contemporary liberal thought. Cities are an association of citizens or a public institution that lies between states and individuals.[122] Cities remain invisible in a legal system that creates rights and obligations vis à vis states and individuals only.[123] Not surprisingly, EU judges have framed arguments by addressing either individual rights or national policies in the context of public or private relations while overlooking city policies. Thus, EU adjudication has remained blind to the implications of city power. Alternatively, one might suppose that James Madison's approach, depicting cities as dangerous factions for the construction of the US Union, has prevailed in EU law.[124] Here, cities are state creatures that have been

120. *See* Fernanda Nicola, *The False Promise of Decentralization in EU Cohesion Policy*, 20 TUL. J. INT'L & COMP. L. 65 (2011).

121. *Id.*

122. *See* Frug, *supra* note 3, at 1076 n.80 (citing OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (Frederic William Maitland trans., 1958)); *see also* FERDINAND TONNIES, GEMEINSCHAFT UND GESELLSCHAFT (Charles P. Loomis trans., 1957).

123. *See* Frug, *supra* note 3.

124. *See* GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW 557 (3d ed. 2001). The authors begin their casebook by highlighting these two opposite conceptions of decentralization of power. A skeptical vision of decentralization of power goes back to James Madison and his justification of the US Union in Federalist Paper No. 10 as a way

dismissed in EU adjudication, which depicts them as being either state subdivisions acting in their public capacity or mere market actors acting in their private capacity.[125]

This Essay analyzes the absence of and suggests including cities in the policy arguments made by judges in interpreting internal market rules. While cities are crucial local actors because of their democratic and redistributive potential, cities also pose threats to European integration through discriminatory and exclusionary policies.

II. *THE CITY AND THE INTERNAL MARKET*

> *When he enters the territory of which Eutropia is the capital, the traveler sees not one city but many, of equal size and not unlike one another . . . but all these cities together; only one is inhabited at a time, the others are empty; and this process is carried out in rotation. Now I shall tell you how. On the day when Eutropia's inhabitants feel the grip of weariness and no one can bear any longer his job, his relatives, his house and his life, debts, the people he must greet or who greet him, then the whole citizenry decides to move to the next city, which is there waiting for them, empty and good as new; there each will take up a new job, a different wife, will see another landscape on opening his window, and will spend his time with different pastimes, friends, gossip. . . . Thus the city repeats its life, identical, shifting up and down on its empty chessboard.*[126]

This Part analyzes three different doctrines through which judges have shaped the internal market: free movement of goods, competition law, and public procurement rules. Like the city of Eutropia, the Court looks at cities in a context where people, services, and goods are interchangeable and citizens

---

to "break and control the violence of faction." *Id.* at 12. A more positive vision of decentralization prompted by Alexis de Tocqueville in *Democracy in America* refers to towns as "the only association which is so perfectly natural, that, wherever people come together, it seems to constitute itself." *Id.* at 3.

125. *See* Frug, *supra* note 3.

126. CALVINO, *supra* note 1, at 64.

look forward to moving from place to place with little cost. The rules of the chessboard that regulate the internal market are shaped by the Union, the states, and their citizens. Cities are empty containers: sometimes they are the agents of the states, while other times they are private corporations competing for services.

A. *Free Movement for Cities:* Maastricht Coffee Shop

The Treaty of Lisbon establishes that the powers of the European Union should be limited to those specifically conferred on it by the Treaty.[127] In practice, however, the allocation of power between the European Union and its Member States is neither clear nor stable over time.[128] There is a traditional perception that it is the responsibility of the European Union to adopt internal market regulations in order to promote the "free movement of goods, persons, services and capital,"[129] while individual Member States retain autonomy to regulate public welfare. Despite the expansion of competences of the Union,[130] lawyers still embrace this longstanding private (market regulation) versus public (social welfare) dichotomy, using it to draw a line between the competences of the European Union and its Member States.[131]

The free movement of goods provision empowers the European courts to void any legislative or other measure that

---

127. *See* TEU post-Lisbon, *supra* note 6, art. 5, 2010 O.J. C 83, at 18 ("1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."). For an analogous provision in United States, see U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

128. *See* CRAIG & DE BÚRCA, *supra* note 21, at 74–87 (discussing the problems that arise with conferral).

129. TFEU, *supra* note 4, art. 26, 2010 O.J. C 83, at 59.

130. *See* PAUL CRAIG, THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM (2011).

131. *See* Nicola, *supra* note 103, at 13–14; Okeoghene Odudu, *The Public/Private Distinction in EU Internal Market Law*, 46 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 826, 829–34 (2010).

creates a quantitative restriction on trade.[132] This "European dormant commerce clause" jurisprudence was possible due to the Court's interpretation of the primacy of EU law vis à vis Member States' laws.[133] The dormant commerce clause jurisprudence of the CJEU fostered "negative integration," through deregulation by striking down national and municipal measures limiting the free movement of goods in the internal market.[134] In interpreting Article 34 of the TFEU judges have used different policy arguments to address the Member States' welfare concerns that conflict with the free movement rules of the internal market.[135] In doing so, the CJEU has created some important exceptions to its free movement jurisprudence, upholding social policies that conflict with free movement but that were justified by national welfare goals.[136]

In the *Rewe-Zentral A.G. v Bundesmonopolverwaltungfür Branntwein*, also known as the *Cassis* case, the CJEU held that a "mandatory requirement," or a state interest, if nondiscriminatory and proportionate, could legitimately restrict

---

132. TFEU, *supra* note 4, art. 34, 2010 O.J. C 83, at 61 ("Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."); *see* Donald H. Reagan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1178–79 (1986) (discussing Europe's interests in promoting the free movement of goods); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1117 (2008) (discussing international trade more generally).

133. *See* Costa v. Ente Nazionale per l'Energia Elecrtrica (ENEL), Case 6/64, [1964] E.C.R. 585, at 593–94; *see also* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 247–56 (3d ed. 1993).

134. *See* FRITZ SCHARPF, GOVERNING EUROPE: EFFECTIVE AND DEMOCRATIC (2001). The CJEU jurisprudence has made large use of the TFEU's prohibition against "measures having equivalent to quantitative restrictions" to trade. TFEU, *supra* note 4, art. 34, 2010 O.J. C 83, at 61. This was mostly adopted against protectionist Member States' policies rather than against local government's law. However, the TFEU itself, as well as the CJEU jurisprudence, has limited the reach of the European dormant commerce clause to public policy matters such as health even though the CJEU has been severe in its scrutiny. *See* BERMANN ET AL., *supra* note 133, at 479.

135. *See* Fernanda G. Nicola, *Transatlanticisms: Constitutional Asymmetry and Selective Reception of U.S. Law and Economics in the Formation of European Private Law*, 16 CARDOZO J. INT'L & COMP. L. 87, 144–46 (2008) (explaining constitutional asymmetry in the context of social justice in European contract law).

136. Some of the exceptions to the free movement were already present in Article 36 of the TFEU, but the CJEU jurisprudence has expanded the list of exceptions and introduced the *Cassis* test with a proportionality principle. *See, e.g.*, Cinéthèque SA & Others v Fédération Nationale des Cinémas Français, Joined Cases 60–61/84, [1985] E.C.R. 2605.

the free movement of goods.[137] In other words, the Court established that only national public policies justified by a state interest could limit the application of the "free trade constitution."[138] This meant that city policies departing from national ones and conflicting with the European free trade rules were likely to be struck down by the Courts. The legal invisibility of cities began with this doctrine.

In contrast to its holding in *Cassis*, however, in the *Sunday Trading* case, the Court showed sensitivity to state-local dynamics when it determined that the proportionality test had to take into account the existence of different local values.[139] The CJEU held that although it could have found a prohibition against Sunday trading in England to be justified as a social policy, the domestic courts could best determine whether the policy in questions was proportionate to its goal or whether it overly burdened the free movement of goods.[140] When faced with having to assess the implication of a social policy embedded in moral and religious values, which were not homogenous even throughout England, the Court preferred to grant the last word to the domestic courts.[141]

In contrast to the *Sunday Trading* case, in the *Josemans v. Burgemeester van Maastricht*, also known as the *Maastricht Coffee Shop* case,[142] the court showed little deference to conflicting local interests. In this case, the owner of a Dutch coffee shop selling marijuana was obliged to shut down his business because he violated a city ordinance that banned the sale of marijuana to non-Dutch citizens.[143] Mr. Josemans challenged the city

---

137. *Cassis*, Case 120/78, [1979] E.C.R. 649, ¶¶ 8, 14–15. In interpreting Article 34 of the TFEU, the Court asserted its competence to assess the intrinsic reasonableness of all national health, safety, or environmental product regulations that could have a negative impact on cross-border trade. *See* MADURO, *supra* note 83, at 104–08.

138. *See generally* Schragger, *supra* note 132 (using the term "free trade constitution").

139. *See Sunday Trading*, Case C-145/88, [1989] E.C.R. I-3851, ¶ 12.

140. *See* Council of the City of Stoke-on-Trent v. B & Q Plc, Case C-169/91, [1992] E.C.R. I-6635.

141. *See* Simon Deakin, *Sunday Trading: Simone Uses and Abuses of European Law*, 52 CAMBRIDGE L.J. 364, 366 (1993).

142. *See* Josemans v. Burgemeester van Maastricht, Case C-137/09, [2010] E.C.R. I____ (delivered Dec. 16, 2010) (not yet reported).

143. *See* Daley, *supra* note 12, at A1.

ordinance on the grounds that it denied to non-Dutch the possibility of smoking cannabis and receiving other services provided by the coffee shop, such as the provision of nonalcoholic beverages and food. The Court upheld the city ordinance.[144]

The Court held that because narcotic drugs are distributed through strictly controlled channels for medical purposes, they are prohibited from commercial sale. Thus, insofar as the marketing of cannabis is concerned, a coffee shop proprietor cannot rely on the freedoms of movement or the principle of nondiscrimination to object to municipal rules such as the Maastricht ordinance. As to the argument based on the general prohibition of all discrimination on grounds of nationality in relation to the freedom to provide services,[145] the CJEU held that such overt discrimination was justified by a mandatory interest, namely the fight against drug tourism. This justification, the Court held, could legitimately create a restriction on the free movement of services through a proportionate and necessary measure to reach the policy objective.[146]

Six months after the *Josemans* decision, in June 2011, the Dutch Council of State declared that the mayor's decision to close the Easy Going coffee shop was incompatible with the Dutch Opium Act that already banned the sale of cannabis in the Netherlands, despite a policy of tolerance towards soft drugs, which allows the sale of marijuana in coffee shops. The administrative court held that the city of Maastricht, in adopting the drug ordinance, had violated Dutch administrative law in overstepping its authority vis à vis the state.[147] Soon after, however, in October 2011 the Maastricht local authorities began sponsoring a voluntary ban among coffee shops that was in fact supported by a right-wing government coalition in The Hague.[148] This coalition pushed for a bill to fight drug tourism

144. *See Josemans*, [2010] E.C.R. I____, ¶¶ 54, 83–84.

145. TFEU, *supra* note 4, arts. 19, 56, 2010 O.J. C 83, at 56, 70.

146. *See Josemans*, [2010] E.C.R. I____, ¶¶ 65–66.

147. *See* Mayor's Closure of Maastricht Coffee Shop Ruled Unlawful, ATV11/RS102373, at 1 (June 29, 2011), http://www.raadvanstate.nl/pers/maastricht%20coffeeshop%20persbericht%20engels.pdf.

148. *See* Giles Scott-Smith, *Populist Puff I*, HOLLAND BUREAU, Oct. 18, 2011, http://www.thehollandbureau.com/tag/marc-josemans/ (citing *Maastricht Bans*

that was much contested in Parliament. Some Members of Parliament called the bill "tourism suicide," and municipalities such as Amsterdam opposed its passage.[149] The law passed. It restricted access to the coffee shops to residents of the Netherlands. This law is now in force in the southern part of the Netherlands, the area most affected by drug tourism, and will enter into force in the rest of the country on January 1, 2013.[150]

This internal Dutch struggle and the resistance to the *Josemans* decision was in part caused by the overreliance by the CJEU on a national mandatory interest: the fight against drug tourism. What the Court confused for a statewide policy was in reality an open struggle among cities with conflicting agendas towards the sale of soft drugs. With the *Josemans* decision, the CJEU intervened profoundly in state-local matters by empowering cities like Maastricht, which are in favor of a statewide restriction to coffee shops for tourists, at the expense of cities like Amsterdam, which embrace their history of tolerance towards soft drugs and which have profitable commercial activities deriving from coffee shop tourism. The Court further transformed a contested local interest, namely the fight against drug tourism, into a European goal of preventing and eliminating the trafficking of drugs in the Union.[151]

B. *The Competition Exemption for Cities*

EU competition provisions enshrined in the TFEU apply indiscriminately to both Member States and local governments without the sort of immunity provided in the Eleventh

---

Cannabis Coffee-Shop Tourists, BBC NEWS (Sept. 30, 2011, 21:25 ET), http://www.bbc.co.uk/news/world-europe-15134669).

149. *See, e.g.*, *Ban on Tourists Visiting Dutch Cannabis Cafes Will Go Ahead*, DAILY MAIL (U.K.), Nov. 15, 2011, http://www.dailymail.co.uk/travel/article-2061730/Dutch-cannabis-coffee-shops-ban-tourists-January-1-new-ruling.html ("The Dutch justice ministry announced the ban [on cannabis-selling coffee shops] . . . despite opposition from some [Members of Parliament] who branded the move 'tourism suicide.'"); *Netherlands Judge Backs Cafe Cannabis Ban*, BBC NEWS (Apr. 27, 2012, 5:50 AM), http://www.bbc.co.uk/news/world-europe-17865151 ("[T]he nationwide ban is being strongly opposed by the Mayor of Amsterdam, Eberhard van der Laan, because around a third of the city's tourists visit to smoke cannabis in the cafes.")

150. *See Ban on Tourists Visiting Dutch Cannabis Cafes Will Go Ahead*, *supra* note 149.

151. *See Josemans*, [2010] E.C.R. I____, ¶ 40.

Amendment of the US Constitution.[152] In contrast, European jurisprudence on competition law has gone a long way in condemning private, as well as public, undertakings for infringing antitrust provisions and in scrutinizing state services under competition rules.[153] The main competition provisions contained in Articles 101 and 102 of the TFEU prevent firms from restricting or distorting competition by engaging in anticompetitive behavior or abusing their power from a dominant position on the market.[154]

---

152. U.S Const. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). In the United States, the US Supreme Court has limited the application of federal antitrust law when a local action is clearly articulated as state policy and it is supervised by the state. FRUG ET AL., *supra* note 124, at 250–51 (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), to indicate that a state statute must "say expressly that anticompetitive activity was authorized"). When local governments undertake anticompetitive behavior, the Supreme Court has expanded the state immunity to include their activities as long as their action has been authorized by the state, in line with the theory that cities are creatures or state subdivisions. *Id.* (citing *Hallie* to illustrate that the "anticompetitive activity of cities" need not be "actively supervised by the state"). In *Parker v. Brown*, the Supreme Court strengthened the notion of state immunity from the Sherman Act by resorting to the dual federalism theory in order to allow sovereign states to maintain anticompetitive behaviors, despite federal legislation. 317 U.S. 341 (1943); *see* S. Paul Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 698–99 (1974). However, Supreme Court jurisprudence has created a state immunity that precludes federal antitrust legislation from regulating state action but not necessarily the action of cities when these act by virtue of their independent home rule power. *See* Cnty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 56–57 (1982) ("Judicial enforcement of Congress' will regarding the state-action exemption renders a State 'no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws.'" (citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 416 (1978))); *see also* Schragger, *supra* note 132, at 1123. Some work has been done in this respect to compare antitrust and competition law provisions vis à vis public and private action. *See* BERMANN ET AL., *supra* note 133, at 1043–86; Luc Gyselen, *Anti-Competitive State Action in the Area of the Liberal Professions: An EU/US Comparative Law Perspective*, *in* EUROPEAN COMPETITION LAW ANNUAL 2004, at 353 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2004).

153. *See* France, Italy, & United Kingdom v. Commission, Joined Cases 188–90/80, [1982] E.C.R. 2545; *see also* GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak (INNO v. ATAB), Case 13/77, [1977] E.C.R. 2115.

154. TFEU, *supra* note 4, arts. 101–02, 2010 O.J. C 83, at 88–89; *see also id.* art. 101(2), at 88 ("Any agreements or decisions prohibited pursuant to this Article shall be automatically void.").

Whenever a public undertaking is at stake, however, Article 106 of the TFEU comes into play. This Article creates a limited exemption from competition law only as far as public administration would be hindered by competition rules from performing a service of general economic interest.[155] This provision allows the Court to determine if public or private undertakings involving an economic activity violate competition rules because of the type of service they are performing. When conducting an economic activity, the Court can apply the competition law exemption of Article 106(2) of the TFEU to a company under the total or partial control of a municipality. The Commission has defined economic activity broadly to mean "any activity consisting in offering goods and services."[156]

The concept of services of general economic interest ("SGEI") first appeared in Community law in the 1960s and 1970s.[157] In the 1980s, the Court held that state interests could be exempted from the free movement provisions in the Treaty only in SGEI instances.[158]The CJEU jurisprudence shifted the burden onto the Member States to prove that a particular SGEI, despite its economic implications, should be exempted from competition law because of its national solidarity goals. As market liberalization took place and the privatization of services

---

155. *Id.* art. 106, at 90–91 ("(1) In the case of public undertakings and undertakings to which Member states grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109. (2) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.").

156. *See* Commission of the European Communities, Services of General Interests: Green Paper from the Commission, COM (2003) 270 Final, ¶ 45 (May 2003) [hereinafter Green Paper].

157. *See* CRAIG & DE BÚRCA, *supra* note 21, at 1073–74; Catherine Haguenau-Moizard, *Book Review*, 14 EUR. PUB. L. 269 (2008) (reviewing LES SERVICES D'INTERÊT ECONOMIQUE GÉNÉRAL ET L'UNION EUROPÉENNE (Jean-Victor Louis & Stéphane Rodrigues eds., 2006)).

158. *See* Commission v. Belgium, Case 149/79, [1980] E.C.R. 3881, ¶¶ 9–10 (holding that the concept of public administration cannot obstruct the application of Community rules on the freedom of movement of workers and advocating to keep the exception only for posts involving the exercise of powers conferred by public law and posts aimed at safeguarding the general interests of the state).

increased, the definition of SGEI by the Court became central to the creation of the internal market.[159]

Today, basic services such as public health, social services, and education are increasingly classified as SGEI. They are administered in radically different ways by national or local public administrations.[160] In 1996, the European Commission acknowledged the importance of SGEI.[161] The 1997 Treaty of Amsterdam added a further protection of SGEI in the text of what is today Article 14 of the TFEU.[162] Finally, the importance of SGEI was reinstated in a Green Paper published in 2006 by the Commission,[163] in anticipation of the highly controversial Services or "Bolkestein" Directive.[164] Despite the fear that the

---

159. The situation changed rapidly in the mid-1980s when the full protection of states' public services ended as a result of economic and ideological pressures triggered by the transnational liberalization of services and the demise of communist regimes. *See* EUROPEAN INST. OF PUB. ADMIN., A NEW SPACE FOR PUBLIC ADMINISTRATIONS AND SERVICES OF GENERAL INTEREST IN AN ENLARGED UNION: STUDY INTENDED FOR THE MINISTERS RESPONSIBLE FOR PUBLIC ADMINISTRATION OF THE MEMBER STATES OF THE EUROPEAN UNION 6 (2005), *available at* http://www.arhiv.mju.gov.si/filcadmin/mju.gov.si/pageuploads/mju_dokumenti/pdf/ETUDE_un_nouvel_espace_pour_les_adm.pub_EN.pdf.

160. *See* Henri Courivaud, *Le Droit de la Concurrence Contre les Libertés Communales? L'exemple des Stadtwerke Allemandes Confrontées à la Libéralisation du Secteur de l'Électricité*, 14 REVUE INTERNATIONALE DE DROIT ECONOMIQUE 405 (2000).

161. *See* Commission of the European Communities, Services of General Interest in Europe: Communication from the Commission, COM (96) 443 Final, at 1b (Sept. 11, 1996). The Commission defines services of general interest as "*market* and *non-market* services which the public authorities class as being of general interest and subject to specific public service obligations." *Id.* at 2. In the Commission's view, these services "meet basic needs" and "play an important role as social cement over and above simple practical considerations. They also have a symbolic value, reflecting a sense of community that people can identify with. They form part of the cultural identity of everyday life in all European countries." *Id.* at 3. They are "meant to serve . . . society as a whole and therefore all those living in it." *Id.*

162. *See* TFEU, *supra* note 4, art. 14, 2010 O.J. C 83, at 54 ("[G]iven the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions.").

163. *See* Green Paper, *supra* note 156, at 18, ¶ 63.

164. Directive 2006/123/EC of the European Parliament and of the Council of on Services in the Internal Market, 2006 O.J. L 376/36 [hereinafter Services Directive]; *see* Laura Petricola, *Frankenstein Directive Passes European Union Parliament*, PEOPLE'S WORLD (Feb. 24, 2006), http://www.peoplesworld.org/-frankenstein-directive-passes-european-union-parliament/.

services directive would create a race to the bottom in the internal market through a wild liberalization of services in the aftermath of European Eastern enlargement, the scope of the directive was limited with respect to SGEI.[165] Thus, European adjudication remains central in interpreting the Treaty provisions such as Article 106(2) of the TFEU. Under this provision, the Court can decide whether a public administration will benefit from a competition exemption because it provides a service that involves the distribution of a public good with a solidarity goal.[166]

---

165. *See* Services Directive, *supra* note 164, art. 1(2), at 50 ("This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services."). In particular, the directive expressly provides that:

> It is appropriate that the provisions of this Directive concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States either to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services.

Id. pmbl. ¶ 8, at 37. Moreover, the directive specifies further its limited area of application with respect to services of general economic interest ("SGEI"), which is directly inspired by the provision of the Treaty and its interpretation by the jurisprudence of the Court. This directive covers only:

> Services which are performed for an economic consideration. . . . Services of general economic interest are services that are performed for an economic consideration and therefore do fall within the scope of this Directive. However, certain services of general economic interest, such as those that may exist in the field of transport, are excluded from the scope of this Directive and certain other services of general economic interest, for example, those that may exist in the area of postal services, are the subject of a derogation from the provision on the freedom to provide services set out in this Directive. This Directive does not deal with the funding of services of general economic interest and does not apply to systems of aids granted by Member states, in particular in the social field, in accordance with Community rules on competition.

Id. pmbl. ¶ 17, at 38.

166. *See* TFEU, *supra* note 4, art. 106, 2010 O.J. C 83, at 90–91. In US law, the exceptions to competition law tend to be limited when cities act in their proprietary function. When cities act as market participants, the *Parker* exception (see *supra* note 152) is not likely to apply, even though in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the US Supreme Court recognized that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Id.* at 373; *see* Schragger, *supra* note 132, at 1124.

For instance, the Court dealt with this issue in *Gemeente Almelo v. Energiebedrijf Ijsselmij NV*. This case involved a 1918 Dutch Royal Order that granted Energiebedrijf Ijsselmij NV ("IJM"), a private company that supplied electricity to local distributors, "a non-exclusive concession to distribute electricity within" a certain territory, including rural areas.[167] This Royal Order limited local distributers to IJM when purchasing electricity, which led the distributors to file suit when IJM raised prices on January 1, 1985.[168] IJM had initiated the increase in prices in attempt to equalize the costs it incurred distributing electricity to consumers in rural areas, which were significantly higher than in urban areas where the required infrastructure already existed.[169] The local distributors in urban areas, who initiated arbitration proceedings concerning "the legality of the equalization supplement imposed by IJM," were bearing the brunt of these costs.[170] Their claim was initially rejected at the local level, but on appeal the national court insisted the lower court provide a preliminary ruling, "suggesting that without the import ban IJM could probably not have imposed the equalization supplement."[171] According to the Court, the Dutch model of cooperation between the state and the local authorities on the distribution of electricity was strong evidence that the electricity regime was properly administered as an SGEI.[172] In highlighting the convergence between local and state interests,

---

167. Gemeente Almelo & Others v. Energiebedrijf Ijsselmij NV (*Almelo*), Case C-393/92, [1994] E.C.R. I-1477, ¶ 5. The US Supreme Court addressed similar issues in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), wherein government-owned electric utility systems brought action against competing, privately-owned electric utility on charges of federal antitrust violation. *Id.* at 389.

168. *Almelo*, [1994] E.C.R. I-1477, ¶¶ 6, 11, 19.

169. *Id.* ¶ 11.

170. *Id.* ¶ 19.

171. *Id.* ¶ 20.

172. *See id.* ¶ 38; *see also id.* ¶¶ 31, 35 (emphasizing the cooperation). In its judgment, the Court found that:

> The distribution of electricity is organized at regional and local level. Within the territory granted to them, the regional distribution undertakings supply the local distribution undertakings owned by the municipalities and, in some cases, the end-users. The local distribution undertakings handle supplies to customers within the municipalities. The production and distribution undertakings are owned, directly or indirectly, by the provinces and municipalities.

Id. ¶ 4.

the CJEU held that unless the national court ruled otherwise, the equalization supplement was not a violation of competition rules, but rather was a mechanism to fulfill the SGEI function of the Dutch electric company.[173]

Each Member State, however, administers SGEI with different rationales and through different mechanisms that often prompt conflicts between states and municipalities. An important example of such state-local tensions is the jurisprudence over port authorities. Major cities with well-established harbors often have the power to use local ordinances to grant exclusive rights to one company to manage the basic services of the harbor. The *Porto di Genova* case has substantially contributed to the case law regulating the competition law exemption for services of general economic interest.[174]

In *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, the CJEU held that the exclusive right to supply labor was not protected by the exemption of Article 106(2) of the TFEU.[175] In this case, the company Merci Convenzionali Porto di Genova SpA had an exclusive concession for handling the loading operations on the docks of Genoa. However,

---

173. *See id.* ¶ 51(c) ("Article 90(2) of the Treaty is to be interpreted as meaning that the application by a regional electricity distributor of such an exclusive purchasing clause is not caught by the prohibitions contained in Articles 85 and 86 of the Treaty in so far as that restriction of competition is necessary in order to enable that undertaking to perform its task of general interest. It is for the national court to consider whether that condition is fulfilled.").

174. In Commission Decision No. 97/745/EC (*Re Tariffs for Piloting in the Port of Genoa*), 1997 O.J. L 301/27, arts. 1–2, and in *Corsica Ferries Italia Srl v. Corpodei Piloti del Porto di Genova*, Case C-18/93, [1994] E.C.R. I-1783, ¶ 45, the Commission and the Court respectively condemned the tariffs set for pilotage services in Genoa and the Commission held that the subsequently amended tariff infringed Article 86 of the TFEU regarding tariffs for piloting in the Port of Genoa. In *Corsica Ferries France v. Gruppo Antichi Ormeggiatori del Porto di Genova*, Case C-266/96, [1998] E.C.R. I-3949, the Court held that the mere grant of exclusive rights for the supply of mooring services did not in itself breach Article 86 of the TFEU and that the tariffs required to be charged fell within the derogation under Article 90(2). *Id.* ¶¶ 40–41, 47.

175. *See generally Merci*, Case C-179/90, [1991] E.C.R. I-5889. Article 86(1) of the TFEU could not be invoked in the case of a breach of a provision not having direct effect, such as Article 87. *See, e.g.*, *id.* ¶ 23 (noting that "the provisions of Article [] . . . 86 of the [TFEU] have direct effect and give rise for interested parties to rights which the national courts must protect"). The Commission subsequently held that the Italian legislation as revised to comply with the *Merci* ruling was still contrary to the Treaty. *See* Commission Decision 97/744/EC (*Re Provisions of Italian Ports Legislation Relating to Employment*), 1997 O.J. L 301/17, arts.1–2.

unloading imported goods had been delayed because of a strike, causing the Siderurgica Gabrielli company to sue to recover the money paid as well as damages because of poor service. The Tribunale di Genova referred the case to the CJEU, asking if competition rules precluded an undertaking from being granted an exclusive right to dock work for a company whose workforce was composed exclusively of nationals who were mostly unionized. The CJEU held that such a dock-work company, as described by the question, did not satisfy the function of an SGEI and thus did not benefit from the exception to competition rules.[176]

Commentators have argued that Article 106(2) of the TFEU is applicable only when the violation of competition rules is "indispensable for the proper operation of the service of general economic interest," often coinciding with broader justification that is defined as a national mandatory interest.[177] In this respect, unionized labor was not considered an SGEI characterized as a public good, or better, a state interest, because it was too limited to a particular group of unionized workers, historically called "camalli" in the Port of Genoa.[178] The attack on labor unions as potential obstacles to the functioning of the internal market rather than as the expression of democratic associations goes much further in other recent cases, to which *Porto di Genova* can be seen as the precursor.[179]

In a subsequent case, *Calì v. Servizi Ecologici Porto di GenovaSpA (SEPG)*, while addressing another exclusive grant from Porto di Genova to a public undertaking performing

176. *Merci*, [1991] E.C.R. I-5889, ¶¶ 24, 27–28.

177. *See* Luc Gyselen, *Case C-192/90*, Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA, *Judgment of 10 December 1991 (Full Court), not yet reported; Case C-18/88*, Régie des Télégraphes et des Téléphones v. SA "GB-Inno-BM", *Judgment of 13 December 1992 (Fifth chamber), not yet reported*, 29 COMMON MKT. L. REV. 1229, 1245 (1992).

178. *See generally* CLAUDIO COSTANTINI, LA REPUBBLICA DI GENOVA (1987).

179. *See, e.g.*, Int'l Transp. Workers' Fed'n v. Viking Line ABP (*Viking*), Case C-438/05, [2007] E.C.R. I-10779; Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet (*Laval*), Case C-341/05, [2007] E.C.R. I-11767; *see also* Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 EUR. L.J. 279, 281 (2007); Michael Dougan, *Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU?*, 42 COMMON MKT. L. REV. 943 (2005); Christian Joerges & Florian Rödl, *Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections After the Judgments of the ECJ in* Viking *and* Laval, 15 EUR. L.J. 1, 10–13 (2009).

antipollution services, the Court reached the opposite conclusion.[180] There, the CJEU held that competition law provisions are not "applicable to anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port of a Member State, even where port users must pay dues to finance that activity."[181] The Court held that because an exception was envisioned in this case, competition law did not apply.[182] The convincing opinion of AG Cosmas, relying on environmental values, stated that "it affords the Court of Justice an opportunity to clarify to what extent protection of the environment is or is not a core public authority activity and, consequently, whether a body whose main task is preventing pollution is exercising an activity that constitutes a state responsibility."[183]

In dismissing the local dimension of this case, the Court held that competition law did not apply because antipollution surveillance "is a task in the public interest which forms part of

---

180. *See* Calì v. Servizi Ecologici Porto di Genova SpA (SEPG), Case C-343/95, [1997] E.C.R. I-1547.

181. *Id.* ¶ 25.

182. *Id.* In this case, the body governed by public authorities was the Consorzio Autonomo del Porto ("CAP"), which managed the Port of Genoa until 1994 and then was replaced by the Autorità Portuale. *Id.* ¶ 3. In an order dated August 23, 1991, the President of the CAP created "a compulsory surveillance and rapid intervention service intended to protect maritime areas against any pollution caused by accidental discharges of hydrocarbons into the sea" and gave Servizi Ecologici Porto di Genova SpA ("SEPG") an exclusive concession to run and collect fees for it. *Id.* ¶¶ 5–8. On August 30, 1991, the President of CAP approved tariffs that SEPG was authorized to apply. Diego Calì and FigliSrl ("Calì"), a petrochemical shipping company that used the port, refused to pay the fees "on the ground that it had never requested nor had recourse to [the] services." *Id.* ¶¶ 11, 9–10. In response to a petition by SEPG, the Tribunale di Genovaordered Calì to pay the fees, but in the course of those proceedings referred the case to the Court asking whether there was an abuse of dominant position by SEPG and if it was exempted under Article 106(2) of the TFEU. *Id.* ¶¶ 12–13.

183. Opinion of Advocate General Cosmas, *Calì*, [1997] E.C.R. at I-1549, ¶ 3. As Advocate General Cosmas stated:

> This case calls for consideration of the extent to which the various services compulsorily provided by the ports in the Member States are compatible with Article 86 of the Treaty. The issue here bears certain similarities to the question raised in an earlier reference by the same court in the case of *Merci Convenzionali Porto di Genova v Siderurgica Gabriellii* . . . .

Id. ¶ 2.

the essential functions of the State as regards protection of the environment in maritime areas."[184]

In a similar case involving the municipality of Copenhagen's system for collecting "non-hazardous building waste" the Court was adamant that environmental values were a valid state goal.[185] In 1993, a Danish company applied to the government of Copenhagen for approval to pursue its activities, recycling building waste, within the city. After Copenhagen approved the company's application, it contracted with the Port of Copenhagen to set up a plant there. To actually process waste from within the city of Copenhagen at that plant, however, the company needed separate city approval, which the city refused to grant. Thus, in effect, the company was only allowed to collect building waste from neighboring municipalities of Copenhagen. The company brought an action against the city of Copenhagen in domestic court, claiming that it "had no authority to prevent third parties from shipping [their] building waste" to the company's plant.[186]

The CJEU held that the management of waste "may properly be considered to be capable of forming the subject of a service of general economic interest, particularly where the service is designed to deal with an environment problem."[187]

---

184. *Calì*, [1997] E.C.R. I-1547, ¶ 22.

185. *See* Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune, Case C-209/98, [2000] E.C.R. I-3743, ¶¶ 2, 75, 83, 88.

186. *Id.* ¶ 28. The Danish court referred the case to the CJEU, asking if Article 106(2) of the TFEU could be:

> [C]onstrued as precluding the establishment of a municipal system which–with a view to ensuring that specially selected undertakings will have sufficiently large access to environmentally non-hazardous building waste destined for recovery from private builders to enable those undertakings to exploit that waste on an economically justifiable and rational basis-excludes other undertakings from collecting and receiving the same type of waste.

Id. ¶ 29(1)(a).

187. *Id.* ¶ 75. The Court held that Article 106 of the TFEU:

> [D]oes not preclude the establishment of a local system, such as the system at issue in the main proceedings, under which, in order to resolve an environmental problem resulting from the absence of processing capacity for non-hazardous building waste destined for recovery, a limited number of specially selected undertakings may process such waste produced in the area concerned, thus making it possible to ensure a sufficiently large flow of such waste to those undertakings, which precludes other undertakings from processing that waste, even though they are qualified to do so.

Id. ¶ 83.

The Commission's Directorate General for Competition Law, commenting on this case, stated that Article 106(2) of the TFEU generally does not apply to companies that are directly entrusted by Member States to operate SGEI but that waste management "may constitute a service of general economic interest."[188]

In these cases, the Court depicts environmental values as shared on a nationwide agenda and within the internal market. While this might be true for Denmark, where there is a widespread pro-environment culture, it would certainly not be the case for countries such as Greece or Italy, where numerous conflicts have arisen in state-local matters over the implementation of environmental regulations because of internal divides.[189]

C. *In-House Exemption to Public Procurement*

EU law intervenes significantly in municipal decisionmaking in the regulation of public procurement contracts involving the purchasing of goods and services by public administrations. In the late 1970s, the European Economic Community began regulating the field of public procurement in order to increase cross-border competition in sectors in which public authorities purchase goods and services through contracts.[190] EU public procurement directives coordinate the procedures for the awards of contracting authorities of public works, supply and services contracts, and procurement procedures of entities operating in the water,

---

188. DIRECTORATE GEN. FOR COMPETITION, DG COMPETITION PAPER: CONCERNING ISSUES OF COMPETITION IN WASTE MANAGEMENT SYSTEMS ¶ 54, at 14 (2005). The Directorate General characterized the case as "concern[ing] a municipality which was faced with a serious environmental problem because of insufficient capacities to recycle building waste" and described the Court's decision as concluding that a "State-granted exclusive right to receive building waste in order to ensure a sufficient flow of waste for the new building waste facility could be justified under Article 86(2) [of the EC Treaty] where such exclusivity was required (and the least restrictive measure) for the accomplishment of the mission of general economic interest." *Id.*

189. *See* Nicola, *supra* note 11, at 162, 178.

190. *See generally* CHRISTOPHER BOVIS, EC PUBLIC PROCUREMENT: CASE LAW AND REGULATION, ch. 3 (2006) (discussing the historical development of public procurement regulation).

energy, transport, and postal services sectors.[191] Public procurement restrictions consist of regulated procedures based on the principles of transparency and equal treatment of those making tender offers, two principles that also apply to the realm of concessions contracts that are normally excluded from public procurement directives.[192]

In interpreting public procurement rules, the CJEU has relied on the public/private distinction to enable or disable city economic activities depending on whether the service provider is a public or private company.[193] The public/private distinction plays an important role in the interpretation of public procurement provisions because, when the company operating the service for the municipality is fully public it does not have to follow EU public procurement rules due to the "in-house exemption." In *Teckal Srl v. Comune di Viano & Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*, the CJEU held that the in-house exemption is satisfied only when a municipality exercises control over the public company that is awarded the contract.[194] The Court developed a test to assess whether the

---

191. Generally, contracting authorities are also public authorities, but not always. Contracting authorities, as defined in Directives 2004/18 and 2004/17, have an obligation to apply public procurement rules. *See* Directive 2004/18/EC of the European Parliament and of the Council on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. L 134/114, art. 1(9), at 127; Directive 2004/17/EC of the European Parliament and of the Council on Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors, 2004 O.J. L 134/1, art. 2, at 16. The category "bodies governed by public law" are not necessarily "public law" entities in each Member State—this is a different category. The Court explicitly rejected this notion in C-214/00 and C-283/00 in which the Spanish government defended itself by holding that if it does not fall under national "public law" it still can be a "body governed by public law" under the directives. *See* Commission v. Spain, Case C-283/00, [2003] E.C.R. I-11719; Commission v. Spain, Case C-214/00, [2003] E.C.R. I-4700.

192. *See generally* Sacha Prechal & Madeleine de Leeuw, *Dimensions of Transparency: The Building Blocks for a New Legal Principle?*, 0 REV. EUR. ADMIN. L. 51 (2007) (discussing transparency between public authorities and individuals in the European Union).

193. *See, e.g.*, Frug, *supra* note 3, at 1061 ("[T]he public/private distinction no longer justifies preferring corporations to cities as vehicles for decentralized power."); Odudu, *supra* note 131, at 827 (arguing that how the Court applies "a particular Treaty provision . . . depends on whether it is being applied to public or private functions").

194. *See* Teckal Srl v. Comune di Viano & Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, Case C-107/98, [1999] E.C.R. I-8121, ¶ 50. The Court has established that public procurement rules do not apply when a public authority uses his own

direct award of a service to a company that is controlled by a municipality can be exempted from the public procurement scrutiny.[195] Subsequently, the Court has interpreted strictly the *Teckal* test, which created an exception for "in-house providing" of services controlled by cities.[196]

Almost five years after the *Teckal* decision, in *Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti* the Court ruled against a small Italian municipality for violating free movement of services laws and EU public procurement principles.[197] By directly awarding the maintenance and operation of a gas network to a company called Padania and

---

administrative or technical resources to carry out a contract. *See* Stadt Halle & RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna (*Stadt Halle*), Case C-26/03, [2005] E.C.R. I-1, ¶ 48. In *Teckal*, the Court considered the validity of a direct contract with an interlocal consortium of 456 municipalities for the operation of the heating systems of the buildings of the contracting municipalities. *Teckal*, [1999] E.C.R. I-8121, ¶¶ 17–25. The Court held that the granting of a public service to an entity in which the contracting authority is itself a member is subject to the in-house operation exception, which in that situation is simply extended to relations between a contracting authority and entities having distinct legal personality. The in-house test that the Court devised looks at 1) whether the control exercised by the public authority over the legal person is similar to the control the authority exercises over its own departments and 2) whether the legal person concerned "carries out the essential part of its activities with controlling local authority." *Id.* ¶ 50. The exemption also broadens the scope of the derogation to public supply and other infrastructure works.

195. *See id.* ¶ 50.

196. *See, e.g.*, Parking Brixen GmbH v. Gemeinde Brixen & Stadtwerke Brixen AG, Case C-458/03, [2005] E.C.R. I-8585, ¶¶ 66–67 (finding that a public entity is transformed by a municipality into a company open to private capital and controlled by the market more than the public authority); *Stadt Halle*, [2005] E.C.R. I-1, ¶ 49 (noting that the award of public responsibilities to public-private companies does not fall within the scope of the in-house exception and is therefore subject to EC public procurement laws).

197. *See* Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti, Case C-231/03, [2005] E.C.R. I-7287, ¶¶ 19–20, 28. Commenting on *Coname*, the Secretary General of the Council of European Municipalities and Regions complained that:

> This case highlights once again the unacceptable level of uncertainty that European local governments have to face whenever their own in-house services are concerned. The Court of Justice keeps moving the goalposts. The EU institutions are supposed to be neutral between the public and private sectors in service delivery, but that is not how things are working out in the Court's case law.

Press Release, Council of European Municipalities & Regions, CEMR "Baffled" by Court of Justice Ruling on Public Procurement Case(July 28, 2005), *available at* http://www.ccre.org/en/champsactivites/detail_news/560.

excluding Coname, a private company, from competing for a bid for municipal services, the city violated the EU free movement of services.[198] Padania, the company in question, had a limited private partnership with the majority of public capital held by several municipalities and the province of Cremona, including Cingia de' Botti. The Court held that the principle of free movement of services precluded "the direct award by a municipality of a concession . . . to a company in which there is a majority public holding."[199]

The Italian government specified that the practice of a small municipality creating a consortium with other cities to provide public services in-house was necessary in that particular geographic territory.[200] The Court was not persuaded by this argument.[201] Rather, because Padania was open in part to private capital, the Court held that it was not a *fully* public structure shielded from the application of EU public procurement principles.[202] Because of the small percentage of private actors participating in the Italian municipalities' consortium, the Court defined the in-house company as a private undertaking whose behavior was proscribed by the rule of the market.[203]

---

198. *Coname*, [2005] E.C.R. I-7287, ¶ 28. The preliminary question posed to the Court by the Italian court was:

> Do Articles 43 [EC], 49 [EC] and 81 EC, in so far as they prohibit, respectively, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State and on freedom to provide services within the Community in respect of nationals of Member States, as well as commercial and corporate practices which are liable to prevent, restrict or distort competition within the European Union, preclude provision for the direct award, that is to say without an invitation to tender, of the management of the public gas—distribution service to a company in which a municipality has a holding, whenever that holding is such as to preclude any direct control over the management itself, and must it therefore be declared that, as is the case in these proceedings, where the holding amounts to 0.97%, the essential preconditions for "in-house" management are not met?

Id. ¶ 8 (alteration in original).

199. *See id.* ¶ 28.

200. *See id.* ¶ 25.

201. *See id.* ¶ 26.

202. *Id.* ¶¶ 25–26.

203. *See id.* ¶ 26. The Council of European Municipalities and Regions has stated that "one of the Court's main arguments is that a municipality cannot simply award a local task to a company which it and other local authorities own if this company is

In *Coname*, the consequences that judges could have foreseem amount to both selection of the board of the public company and also to the quality of its services. The President of Padania, who was nominated by the same left-wing coalition as the President of the Province of Cremona, has been criticized for making inefficient policy choices for the company.[204] Padania, however, extended gas services across its territory and improved water quality rather than reduce the cost of gas and water services to consumers.[205]

In a subsequent case, *Coditel Brabant SA v. Commune d'Uccle & Région de Bruxelles-Capitale*, the Court ruled against Coditel, a Belgian cable television operator that had applied for a concession to operate the network of the municipality of Uccle.[206] The city decided to sell the network rather than grant a concession, at which point Coditel submitted a purchase bid under the terms of the relevant tender. Coditel's bid was the only offer that was in conformity with the tender, but it was also the lowest.[207] Brutélé, an intermunicipal cooperative society whose members were municipalities, also responded to the call

---

partially 'open to private capital'" and that this argument is "baffling" because it "is not based on the fact that a percentage of a public company's shares *are* actually owned by a private undertaking, but on the fact that some of these shares *might one day be* owned by a private company!". Press Release, Council of European Municipalities & Regions, *supra* note 197. In the same vein, the Council of European Municipalities criticized the 2005 *Stadt Halle* judgment, calling it "an unbalanced prioritization of the market over local democracy and self-government. [The Council of European Municipalities and Regions] called for the law to be changed to respect the principles of subsidiarity and local democracy." Press Release, Council of European Municipalities & Regions, Public Services: The European Court of Justice Is Creating "De Facto Legislation Outside Democratic Control" (Oct. 14, 2005), *available at* http://www.ccre.org/en/actualites/view/593.

204. Critics claim that the policy choices are dictated by his political ideology rather than by a purely market rationale. For instance, a resident and beneficiary of the gas service argued that the noncompetitive prices charged by the company for gas and water services resulted in hidden taxes on consumers. *See* Letter from Giuseppe Dasti, Pres., Padania Acque Spa, L'utile Esercizio di Padania è Frutto di Buona Amministrazione (Apr. 22, 2005), *available at* http://74.125.47.132/search?q=cache:_locQj3cjmcJ:www.padaniaacque.it/download/notizie/050421cronaca%2520-%2520risposta.doc+giuseppe+milanesi+Padania+Acque+Dasti&cd=1&hl=en&ct=clnk&gl=us (in which Giuseppe Dasti, former president of Padania, responds to this criticism).

205. *See* PADANIA ACQUE S.P.A., http://www.padania-acque.it/padania_acque/ChiSiamo.asp (last visited May 25, 2012).

206. Coditel Brabant SA v. Commune d'Uccle & Région de Bruxelles-Capitale (*Coditel*), Case C-324/07, [2008] E.C.R. I-8457, ¶ 9.

207. *Id.* ¶¶ 10, 12.

for tenders—not with a purchase bid but with an offer of affiliation. In response, the municipality of Uccle then decided not to sell the cable television network and instead became a member of Brutélé.[208] Coditel appealed against these decisions by arguing that they violated free movement provisions in the TFEU, the provision of nondiscrimination based on nationality, and the related obligation of transparency, which precluded the municipality of Uccle from directly awarding a public service concession.

The Court held that "by becoming a member of Brutélé," the city "entrusted it with the management of its cable television network."[209] Brutélé's income "[came] not from the municipality but from payments made by the users of that network," which is a "characteristic of a public service concession."[210] The Court reiterated that the application of

> [TFEU Articles 18, 49, and 56], as well as of the general principles of which they are the specific expression, is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority.[211]

The Court found that because the above conditions were met, the municipality of Uccle's actions were in compliance with EU law.[212]

In both *Coname* and *Coditel*, the CJEU held that municipalities were not constrained by EU public procurement rules when awarding public services to a public company.[213] These could benefit from an "in-house exception" if the company providing the service is entirely public.[214] In this case, the public/private dichotomy allows the CJEU to draw the

---

208. *Id.* ¶¶ 11, 13–14, 16–18.

209. *Id.* ¶ 24.

210. *Id.*

211. *Id.* ¶ 26 (citing *Teckal* and *Parking Brixon*).

212. *Id.* ¶¶ 27, 41.

213. *See Coditel*, [2008] E.C.R. I-8457, ¶ 42; *Coname*, [2005] E.C.R. I-7287, ¶ 12.

214. In the cases above, Padania Acque Spa is a company predominantly financed by public capital under Italian law, while Brutélé is an intermunicipal cooperative society among thirty cities owned exclusively by public authorities under Belgian law. *See Coname*, [2005] E.C.R. I-7287, ¶ 5; *cf. Coditel*, [2008] E.C.R. I-8457, ¶ 16.

distinction between private undertakings' behavior regulated by EU law and public companies controlled by one or more municipalities exempted from such scrutiny.[215]

These cases show how the CJEU draws lines enabling municipalities, without having to follow public procurement rules, to grant public services to public companies at the expense of private ones. EU adjudication is not a neutral application of the TFEU policing the powers of the Union and its Member States. Rather, it is a way for judges to implicitly shape internal state-local relations by favoring certain economic interests rather than others. European judges are creating distributive consequences on the territories in which the public companies, formed by the municipalities, are managing cable or gas services.

In these cases, European judges neglect to evaluate the distributive impact of their decisions on city policies and to evaluate the redistribution of power in national-local relations.[216]

Policy arguments, such as national welfare goals, allow judges to collapse conflicting city policies into statewide policies.[217] Likewise, public procurement rules exempt cities when they contract for services "in-house" by hiring administrative bodies financed solely with public capital. European courts depict cities as providers of welfare, as long as they are mere creatures of the states. In contrast, when city interests collide with statewide policies such as in *Porto di Genova* and *Coname*, the CJEU no longer depicts cities as public actors. For instance, in *Porto di Genova* the Court characterized

---

215. *See* KENNEDY, *supra* note 10, ch. 2 (discussing public as opposed to private pre-Classical legal thought); Caruso, *supra* note 46, at 873.

216. This choice resonates with the US doctrine of *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), according to which city policy should remain solely an issue of domestic jurisdiction because municipalities are mere creatures of the state. *See id.* at 177–79; *see also* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 74–75 (7th ed. 2009) (reviewing the debate regarding local self-government).

217. *See, e.g.*, Ambulanz Glöcknerv. Landkreis Südwestpfalz, Case C-475/99, [2001] E.C.R. I-8089, ¶ 66 (defining ambulance services provided by the Austrian Länder as an SGEI even when only one Länder is involved, "provided that it does not bar the grant of an authorisation to independent operators where it is established that the medical aid organisations entrusted with the operation of the public emergency ambulance service are manifestly unable to satisfy demand in the area of emergency ambulance and patient transport services").

unionized labor as a source for anticompetitive behavior and collusion in the market.[218] In *Coname*, the Court characterized cities as neutral market participants without a political and public identity.

III. *DISTRIBUTIVE EFFECTS OF FREE MOVEMENT OF WORKERS AND STUDENTS*

> *Arriving at each new city, the traveler finds again a past of his that he did not know he had: the foreignness of what you no longer are or no longer possess lies in wait for you in foreign, unpossessed places.*[219]

European adjudication interpreting the free movement of workers and the rights of EU citizens to move have steadily expanded the scope of EU law vis à vis private and public authorities.[220] Notably, this includes the freedom to provide but also to receive services,[221] and equal access to education for European citizens.[222] The CJEU jurisprudence on the free movement of workers and EU citizens has broad implications for urban policies. Cities implicitly attract certain types of

---

218. *See Merci*, Case C-179/90, [1991] E.C.R. I-5889. This case is an important precursor of the challenges posed by a possible trade union movement that could ultimately limit those economic freedoms guaranteed by the European Union internal market. *See* Bercusson, *supra* note 179, at 280–81.

219. CALVINO, *supra* note 1, at 28–29.

220. *See, e.g.*, Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98, [2000] E.C.R. I-4139 (holding that Article 45 of the TFEU applies not only to public measures, but also to private measures that discriminate against workers); Union Royale Belge des Sociétés de Football Association ASBL v. Bosman, Case C-415/93, [1995] E.C.R. I-4921 (holding that the rules of a national sporting association of a Member State cannot discriminate against players from other Member States).

221. *See* Luisi & Carbone v. Ministero del Tesoro, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377, ¶ 16, where, as underlined by CRAIG & DE BÚRCA, *supra* note 22, at 792–93, the Court explains:

> It follows that the freedom to provide services included the freedom, for the recipients of services, to go to another member State in order to receive a services there, without being obstructed by restrictions, even in relation to payments, and that tourists, persons receiving medical treatment and persons travelling for the purposes of education or business are to be regarded as recipients of services.

222. *See, e.g.*, Gravier v. City of Liège, Case 293/83, [1985] E.C.R. 593; Forcheri v. Belgium, Case 152/82, [1983] E.C.R. 2323; Donato Casagrandev. Landeshauptstadt, Case 9/74, [1974] E.C.R. 773.

residents.[223] They may also intentionally attract certain type of workers or students by favoring their own residents over outsiders in awarding local jobs and subsidies.[224] Moreover, cities might limit the access of local services to outsiders through residence requirements because they fear that free movement will attract higher numbers of outsiders desiring to take advantage of their public services.[225]

These local fears increased in 2004 when ten new Member States, the former communist countries, acceded to the European Union. Soon after the eastern enlargement, certain stereotypes emerged in EU public opinion. For instance, the "Polish plumber" refers to those workers coming from former eastern European countries who, by offering cheap wage labor, would take over lower-skilled jobs in the original Member States.[226] The "healthcare tourist" represents those EU citizens that shop around for the best healthcare services in order to skip the queue for healthcare in their home countries.[227] According to these stereotypes, the fear in Western European countries was that lower-paid workers would flood higher-paid markets for

---

223. *See, e.g.*, RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS (2005) (arguing that cities that foster diversity and tolerance thrive because they attract the most creative and talented citizens, which in turn leads to economic growth).

224. *See* Schragger, *supra* note 132, at 1116–18.

225. *See* Natalie Shimmel, *Welcome to Europe, but Please Stay Out: Free Movement and the May 2004 Expansion of the EU*, 24 BERKELEY J. INT'L L. 760, 782–83 (2006).

226. *See* Martin Arnold, *Polish Plumber Symbolic of All French Fear About Constitution*, FIN. TIMES (London) (May 28, 2005, 3:00 AM), http://www.ft.com/intl/cms/s/0/9d5d703a-cf14-11d9-8cb5-00000e2511c8.html#axzz1yAVrNMP0 ("If French President Jacques Chirac finds himself scratching his head on Monday morning, wondering why so many voters rejected the European Union Constitution, he should know immediately who to blame: the Polish plumber. This mythical, rarely seen figure has become the symbol of everything that is wrong with the constitution for the French people, worried about an invasion of low-paid workers from new EU member states stealing their jobs and destroying their social system.").

227. *See generally* Watts v. Bedford Primary Care Trust, Case C-372/04, [2006] E.C.R. I-4325. The plaintiff in Watts was a British citizen who sought reimbursement for the costs of surgery she had in France after the British National Health Service ("NHS") put her on a months-long waiting list. The Court held that the obligation to reimburse healthcare costs from treatment provided in another Member State applied there, and that in order to refuse to authorize a patient to receive treatment abroad on the grounds of waiting time for hospital treatment, the NHS must show that the waiting time does not exceed a medically acceptable period based on the patient's condition.

services while consumer-citizens would travel to different jurisdictions to gain better welfare services.[228]

Through its free movement jurisprudence, the CJEU has fostered or undermined these stereotypes by promoting social dumping in wage labor or by upholding statewide restrictions to free movement in healthcare cases.

However, judges have consistently overlooked city power. This Section examines how the European Courts have redistributed power and resources in a way that deeply affects state-local matters. It foregrounds the overlooked local consequences for the allocation of power and resources in the free movement of workers and students jurisprudence of the Court.

A. *Local Effects of Free Movement of Workers*

The European jurisprudence of free movement of workers and services underwent revolutionary changes in the last decade.[229] These freedoms, initially only guaranteed to workers, were expanded through judicial and legislative means to include their families, job seekers, students, and, more generally, EU citizens entitled to a variety of social welfare benefits as well as protections to immigrants moving to different Member States.[230]

---

228. After the 2004 and the 2007 enlargement, a transitional regime on free movement of workers has delayed the full implementation the rights of migrant workers up to seven years from the date of the accession. *See* CRAIG & DE BÚRCA, *supra* note 21, at 728.

229. *See* CATHERINE BARNARD, SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS (3d ed. 2010) (exploring the development of the right of free movement in EU case law); CRAIG & DE BÚRCA, *supra* note 21, at 741–45.

230. *See* TFEU, *supra* note 4, art. 45, 2010 O.J. C 83, at 65–66. Article 45 of the TFEU establishes that:

> 1. Freedom of movement for workers shall be secured within the Union.
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
> (a) to accept offers of employment actually made;
> (b) to move freely within the territory of Member States for this purpose;
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

The doctrinal structure of the free movement of workers allows judges to balance EU free movement interests with statewide welfare policies. In fact, Article 45 of the TFEU, which aims to secure the free movement of workers and abolish discrimination based on nationality, includes a limitation of such freedom based on the "grounds of public policy, public security or public health."[231] In using a proportionality test to balance free movement against national mandatory interests, judges have used policy arguments based on national welfare or public policies to justify Member States' welfarist legislation conflicting with internal markets goals.

Table 2 below traces the arguments mapped in Part I, which judges have used to balance these conflicting interests. Further, it adds the case law that foregrounds the local implications of each case, and demonstrates the effects of EU adjudication on state-local relations and among subnational actors.

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

231. *See id.* arts. 18, 45, 49, 56, at 56, 65–68, 70. The provisions protecting the free movement of workers and services are often overlapping due to the way the CJEU jurisprudence has interpreted and Article 18 (antidiscrimination on grounds of nationality), Article 45 (free movement of workers), Article 49 (freedom of establishment), and Article 56 (free movement of services) of the TFEU.

Table 2. Policy Arguments and Case Law on Free Movement and Competition Law

	STATE	**INDIVIDUAL**
Public Limiting Free Movement & Competition Law *Case Law with Local Implications*	**National Welfare** Exceptions to Free Movement of Services SGEI Exception to EC Competition Law *Merci*	**Public Policy** Exceptions to Free Movement of Workers Public Service Exception *Angonese*
Private Enhancing Free Movement *Case Law with Local Implications*	**Regulatory Competition** Free Movement of Services and Workers EU Nondiscrimination *Rüffert*	**Rights of EU Citizens** Free Movement of Citizens EU Nondiscrimination Equal Access to Education *Bidar*

1. Some Distributive Implications of *Rüffert*

The recent trade union saga in EU law resonated among Western labor lawyers and those expecting that CJEU social dumping jurisprudence would prompt global reactions against European integration.[232] In the *International Transport Workers' Federation v. Viking Line ABP* and *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* decisions, trade unions in Western Europe challenged private companies that were trying to take advantage of lower wages and worse employment conditions by

232. *See* Bercusson, *supra* note 179, at 279–80.

hiring workers coming from Estonia and Latvia.[233] In both cases, the CJEU rejected the challenges by the trade unions and held that the respective Finnish or Swedish collective agreement provisions could not restrict the free movement of services or establishment without an overriding public interest justification. On the one hand, scholars have commented that these cases were explicit attacks against collective labor with the undisputed outcome of creating a race to the bottom in worker standards across the European Union.[234] On the other hand, scholars have pointed out that former Eastern European companies that could no longer compete for goods with Western European companies viewed collective bargaining as an obstacle to workers willing to offer cheap labor in order to enter more affluent Scandinavian or German job markets.[235] The court was clearly caught between both rationales. Despite upholding the fundamental right to strike in *Viking*, both cases balanced free trade versus collective bargaining by favoring EU free movement at the expense of national or local labor protections.

The *Rüffert v. Land Niedersachsen* case continued the labor saga by introducing a local perspective to a decision very similar to the *Laval* judgment. *Rüffert* dealt with the interpretation of Posted Workers Directive 96/71, which regulates the movement of workers posted for a limited time in another Member State.[236] Even though the directive was drafted to protect workers against social dumping, particularly in the construction industry, it has caused the opposite outcome in both cases.[237] The directive

---

233. *See* Int'l Transp. Workers' Fed'n v. Viking Line ABP (*Viking*), Case C-438/05, [2007] E.C.R. I-10779; Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet (*Laval*), Case C-341/05, [2007] E.C.R. I-11767. The saga continued with *Rüffert*, Case C-346/06, [2008] E.C.R. I-1989, and finished with *Commission v. Luxembourg*, Case C-319/06, [2008] E.C.R. I-4323. Both Finland and Sweden acceded to the European Union in May 2004 as part of the Eastern European enlargement.

234. *See* Joerges & Rödl, *supra* note 179, at 14.

235. *See* Kukovec, *supra* note 106; *see also* Kukovec, *supra* note 94, at 5.

236. *See Rüffert*, [2008] E.C.R. I-1989, ¶ 3; Directive 96/71/EC of the European Parliament and of the Council Concerning the Posting of Workers in the Framework of the Provision of Services, 1997O.J. L 18/1 [hereinafter Posted Workers Directive].

237. *See Posted Workers and the Implementation of the Directive*, EUR. INDUS. REL. OBSERVATORY ON-LINE (Sept. 28, 1999), http://www.eurofound.europa.eu/eiro/1999/09/study/tn9909201s.htm ("The [P]osted [W]orkers Directive, which came into force in December 1999, seeks to prevent free movement of labour within the [European Union] from causing distortions of competition and bringing forms of 'social dumping'. The basic principle of the Directive is that working conditions and pay in

allows only national or collective bargaining agreements, "universally applicable," rather than local ones to apply to posted workers.[238] The Court held that those labor protections, which were not universal and did not apply to the entire national territory, were not considered valid.[239]

Rüffert concerns the conflict between the free movements of services guaranteed in the Treaty under Article 56 of the TFEU, as performed by Polish construction workers posted by their employer in Germany, and the requirement to pay workers a minimum wage established by the local collective agreement.[240] The interesting aspect is that the German Land of Niedersachsen (Lower Saxony) involved in the case adopted higher labor standards in public procurement contracts than other Länder.[241] The goal of the Lower Saxony legislation, the *Landesvergabegesetz*, was not only to provide minimum wage protections for employees in public procurement contracts over EU€10,000, but also to serve as a model to mobilize the federal government to adopt a nationwide bill imposing higher employment standards throughout Germany.[242]

The conflict among different Länder on labor standards in public procurement contracts started in Germany in the late 1990s and lasted until 2000 when the conservative party took power and only six Länder out of sixteen were able to adopt higher labor standards in public procurement contracts.[243]

---

effect in a Member State should be applicable both to workers from that State, and those from other EU countries posted to work there.").

238. Posted Workers Directive, *supra* note 236, arts. 3(1), 3(8), at 3–4.

239. *See Rüffert*, [2008] E.C.R. I-1989, ¶¶ 21–22.

240. *See id.* ¶¶ 10–11; *see also* M. Franzen & C. Richter, *Case C-346/06*,Rechtsanwalt Dr. Dirk Rüffert, in His Capacity Liquidator of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen, *[2008] ECR I-1989*, 47 COMMON MKT. L. REV. 537 (2010).

241. *See* Franzen & Richter, *supra* note 240, at 543–44 (noting that the *Landesvergabegesetz* required a higher minimum wage than is normally applicable in the construction industry in Germany).

242. *See Rüffert*, [2008] E.C.R. I-1989, ¶¶ 5–9; EUROPEAN TRADE UNION INST., REPORT 111, VIKING–LAVAL–RÜFFERT: CONSEQUENCES AND POLICY PERSPECTIVES 37 (Andreas Bücker & Wiebke Warneck eds., 2010), *available at* http://library.fes.de/pdf-files/gurn/00379.pdf. *Rüffert* resonates with the living wage initiative launched by several cities in the United States. *See* New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So.2d 1098, 1120 (La. 2002) (holding that state law preempted the local minimum wage); *see also* FRUG ET AL., *supra* note 124, at 216–20.

243. *See* Florian Rödl, The CJEU's Rüffert-Judgement: A Case for "Undistorted" Wage Competition 3–6 (2009) (unpublished manuscipt) (on file with author). This

Florian Rödl commented on this legislative patchwork in Germany explaining that"[t]he main political reason for this mixed picture is that the question of 'collective agreement declarations' is highly contested inside the conservative party."[244]

In *Rüffert*, the Land of Lower Saxony awarded a public procurement contract to build Göttingen-Rosdorf prison to a German contractor who employed a subcontractor established in Poland.[245] The German company signed a contract for an amount of over eight million euros that included standard labor provisions deployed in public contracting tenders. These provisions required that the contractor and its subcontractors would commit to pay workers the remuneration prescribed by the collective agreement in the place where the obligation was performed. Moreover, Lower Saxony could impose a penalty or terminate the contract in case local labor standards were not respected.[246] When the government of Lower Saxony found that the contractor had employed a subcontractor who had hired fifty-three Polish workers at about half of the minimum wage established by the local collective agreement, it issued a penalty notice of approximately EU€85,000 and terminated the contract.[247]

The question before the CJEU was whether Lower Saxony's higher labor standards in public procurement contracts were consistent with the EU free movement of services and the derogations of the Posted Workers Directive.[248] The Court, in sharp opposition with the opinion of AG Bot, held that the *Landesvergabegesetz* did not comply with the Posted Workers Directive interpreted in light of the freedom to provide services of Article 56 of the TFEU.[249] The Court first rejected a public

---

article was published in Italian as Florian Rödl, *La Corte di Giustizia CE nel Caso Rüffert: Per la "Non Distorsione" della Concorrenza in Materia Salariale*, *in* IL CONFLITO SBILANCIATO: LIBERTÀ ECONOMICHE E AUTONOMIA COLLETTIVATRA ORDINAMENTO COMUNITARIO E ORDINAMENTI NAZIONALI 131 (Vimercati Aurora ed., 2009).

244. Rödl, *supra* note 243, at 6 n.15.

245. *See Rüffert*, [2008] E.C.R. I-1989, ¶ 10.

246. *Id.* ¶¶ 6–9, 11.

247. *Id.* ¶¶ 11–12.

248. *See id.* ¶¶ 13–16; *see also* TFEU, *supra* note 4, art. 56, 2010 O.J. C 83, at 70 (enabling the Council, acting by a qualified majority on a proposal from the Commission, to extend the provisions of the Chapter to nationals of a third country).

249. *See Rüffert*, [2008] E.C.R. I-1989, ¶¶ 38–43; *see also* TFEU, *supra* note 4, art. 56, 2010 O.J. C 83, at 70 ("[R]estrictions on freedom to provide services within the

policy argument made by the German government arguing that the restriction promoted by the Lower Saxony law was justified by the "objective of ensuring protection for independence in the organisation of working life by trade unions."[250] Then it rejected, for lack of evidence, the German government's national welfare argument that the provisions of the Land aimed at "ensuring the financial balance of the social security systems [that] . . . depends on the level of workers' salaries."[251] Finally, it held that because these provisions only covered public and not private contracts and the minimum wage protections were geographically limited to the territory of Lower Saxony, rather than being "universally applicable" on the entire German territory, the restrictions could not fall under the exception of the Posted Workers Directive.[252]

The reactions to the *Rüffert* judgment were numerous and varied. First, it is significant that in 2009 even Mario Monti, an economist who is now the Prime Minister of Italy, noticed the polarization between on pro-workers advocates on the Left, versus pro-employers advocates on the Right.[253] Other critics highlighted the fact that the Posted Workers Directive does not cover substantive labor protections but recognizes only "national" minimum standards, and thus undermines a long tradition in Europe of decentralization and pluralism in labor

---

Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."). *But see* Opinion of Advocate General Bot, *Rüffert*, [2008] E.C.R. at I-1993, ¶ 5 (arguing that neither the Posted Workers Directive nor Article 56 of the TFEU "must be interpreted as precluding a national measure such as the one at issue").

250. *Rüffert*, [2008] E.C.R. I-1989, ¶ 41.

251. *Id.*¶ 42.

252. *See id.*¶ 29; *see also* Posted Workers Directive, *supra* note 236.

253. *See* EUR. PARLIAMENT, THE IMPACT OF THE ECJ JUDGEMENTS ON VIKING, LAVAL, RÜFFERT AND LUXEMBOURG ON THE PRACTICE OF COLLECTIVE BARGAINING AND THE EFFECTIVENESS OF SOCIAL ACTION 13 (2010) ("As pointed out in the Monti Report, the Laval-quartet has revived the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level."); *see also* Michelle Meyer, Rüffert v. Land Niedersachsen*: The ECJ's Departure from Traditional European Socialism*, 32 LOY. L.A. INT'L & COMP. L. REV. 273, 284–86 (2010) (enumerating arguments on both sides of the political split over this decision).

law that have been dominant both in the Mediterranean and the Scandinavian traditions.[254]

The implications of *Rüffert* were relevant to the internal balance of power in the struggle between the German federal government and the different Länder. In striking down the higher labor standard promoted by Lower Saxony, the Court inevitably strengthened the already powerful position of those Länder that were against the minimum wage bill by completely undermining the possibility of the law having a successful outcome before the Parliament.[255]

2. Public Policy Exceptions to Free Movement of Workers

An important limit to the free movement of workers is the exclusion of public service employees from the realm of application of the free movement provision included in Article 45(4) of the TFEU.[256] Local governments have a big stake in this provision as public employment is one of the major ways to redistribute resources for cities as well exert power through the employment of civil servants.[257] Over time, the Court has substantially restricted this exception through a long battle against the Member States in which it made it clear that it was up to the Court to determine the content of the public service

---

254. *See* Alan Hyde & Mona Ressaissi, *Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism* (Rutgers Sch. of Law-Newark, Research Paper No. 40, 2009), *available at* http://ssrn.com/abstract=1323807.

255. *See* Rödl, *supra* note 243, at 6, 11–12 (explaining that because the relevant laws on public procurement are made at the Länder level, after the *Rüffert* shock, the Länder have changed their provisions and at least some have tried to push things as far as possible: the best version of the social clause includes a minimum wage requirement, collective agreements that are binding for foreign employers on the basis of the posted workers legislation, and all collective agreements in the case of public transport, because the sector is excluded from the market freedom to provide services).

256. TFEU, *supra* note 4, art. 45(4), 2010 O.J. C 83, at 65.

257. In a Commission Communication on the restrictions in the public sector, a number of healthcare, transportation, and commercial distribution works were excluded by the exception while a number of judiciary, police, tax authority, and diplomatic services could have been limited to Member States' nationals. *See* Commission Communication on Freedom of Movement of Workers and Access to Employment in the Public Service of the Member States, Commission Action in Respect of the Application of Article 48(4) of the EEC Treaty, 1988 O.J. C 72/02, at 3 [hereinafter Freedom of Movement Communication].

exception.[258] Initially, the Court upheld this restriction by linking the job requirements to "a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality."[259] In subsequent cases, however, the Court held that the same jobs were not protected by the public service exception with the exclusion of supervisory posts, night watchmen, and the architect for the city of Brussels.[260]

Even though the Court has upheld the public service exception in very limited cases, especially for highly skilled jobs or in particular territorial circumstances,[261] the Court has shown the irrelevance of a nationality requirement to perform services such as nurses in public hospitals.[262] Today, local governments still maintain some power to limit local job access to their nationals rather than their residents, especially for higher skilled jobs or in some other sensitive areas in which the local scale plays a role, such as police work or the city architect.[263] The

---

258. *See, e.g.*, Sotgiu v. Deutsche Bundespost, Case 152/73, [1974] E.C.R. 153, at 159–60.

259. Commission v. Belgium (I), Case 149/79, [1980] E.C.R. 3881, ¶ 10. The Court ruled that it did not have enough information to decide the specific case but interpreted the requirement of a "bond of nationality" and invited Belgium national courts to decide in light of its reasoning. *Id.*

260. *See, e.g.*, Commission v. Belgium (II), Case 149/79, [1982] E.C.R. 1845, ¶ 11.

261. *See, e.g.*, Commission v. Luxembourg, Case C-473/93, [1996] E.C.R. I-3207, ¶¶ 32–35 (discussing Luxembourg's argument that the public service exception was adopted for teachers who had to preserve the identity of the people from a small geographical territory and population). On the functional approach of the CJEU, see BARNARD, *supra* note 229, at 482.

262. *See* Commission v. France, Case 307/84, [1986] E.C.R. 1725. In this case, the French government argued in favor of the nurses having French nationality because of "rules [such as the] principle of unity of the public service, [and] the fact that the civil service is governed by public law . . . which are specifically intended to ensure that the public service serves as an instrument for giving effect to the public interest." *Id.* ¶ 8. However, the Court held that "by restricting to its own nationals appointment and establishment in permanent employment as a nurse in a public hospital," France had violated the Treaty's free movement provisions. *Id.* ¶¶ 16–17. As Advocate General Mancini stated in his opinion for this case: "It is a fact that an extremist disciple of Hegel might truly think that access to posts like the ones at issue here should be denied to foreigners." Opinion of Advocate General Mancini, *France*, [1986] E.C.R. 1726, ¶ 7.

263. In the United States, Supreme Court jurisprudence has shielded protectionist local measures protecting local jobs under the market participant exception. In *White v. Massachusetts Council of Construction Employers*, for example, the Rehnquist Court considered an order by the mayor of Boston that required work crews on all construction projects funded by the city and all federal grants fully administered to consist of at least half city residents. 460 U.S. 204, 205–06 (1983). The Rehnquist

territorial dimension of these cases appears relevant, yet in its decisions the Court has not taken it into account. A clear example of such judicial behavior emerges in cases concerning linguistic requirements, where the distinction between a national language versus a dialect or a local language ends up making a significant difference in outcomes.[264]

In *Groener v. Minister for Education*, for example, the plaintiff was required to speak Irish (Gaelic) to be hired as an art instructor at a school in Dublin.[265] The CJEU ruled that such requirements were proportionate because the national policy in question did not impose any requirement that the linguistic knowledge be acquired in the territory. The CJEU held that this linguistic requirement was not an indirect discrimination but rather a legitimate demand as long as those skills could be obtained through equivalent qualifications.[266] The CJEU was asked to balance the European free movement of workers against Irish protectionism supported by the winning public policy argument that the national measure was extending the constitutional protection granted to Gaelic, the national language protected by the Irish constitution.[267]

In contrast, in *Angonese v. Cassa di Risparmio di Bolzano SpA*, the linguistic barrier to access the job market had a clear local

---

Court held that the order did not violate the Commerce Clause if the city, by spending its own money, was a market participant rather than a regulator of the market. *Id.* at 210, 214–15. However, in a subsequent case, *United Building & Construction Trades Council of Camden v. Camden*, the Rehnquist Court considered a local ordinance requiring at least forty percent of the contractors and subcontractors' for the city's construction projects to be city residents. 465 U.S. 208, 210 (1984). The Court rejected the city's argument that the ordinance sought to prevent the "middle class flight" from the city into the suburbs, declaring that the ordinance could be discriminatory under the Privileges and Immunities Clause. *Id.* at 223. The Court remanded the case to the New Jersey Supreme Court. *See id.*; *see also* Schragger, *supra* note 132, at 1112–13 ("The Court [in *Camden*] . . . held that state and municipal labor residency requirements should be treated the same; the protection afforded by the in-state political processes to out-of-state residents was too 'uncertain' to be relied upon. The Camden case thus extended the nondiscrimination rule to cities and the Court sent the case back to the district court to determine whether Camden's statute was justified and narrowly tailored.").

264. In the language requirement cases, the Court is interpreting the exception in Article 39(3) of the TFEU, *supra* note 4, art. 45(3), 2010 O.J. C 83, at 65 (allowing limits "justified on grounds of public policy, public security or public health").

265. Groener v. Minister for Educ., Case C-379/87, [1989] E.C.R. 3967, ¶¶ 2–8.

266. *Id.* ¶¶ 20, 23.

267. *Id.* ¶¶ 17–19.

dimension. Here, the plaintiff was an Italian who was fluent in German and who resided in the Italian Province of Bolzano.[268] Italian constitutional law maintains that the Province of Bolzano has wide regional and provincial autonomy due to its geographic location at the border of Austria and its German-speaking minority.[269] The plaintiff was refused a job in a local bank because he did not obtain the required German and Italian bilingual certificate from the provincial government. The bank in question was initially managed by the province but was later privatized.[270] Angonese was an Italian worker whose mother tongue was German and resided in the Autonomous Province of Bolzano. He was refused a job in a local bank because he did not obtain the Italian and German bilingual certificate from the Province.[271] Clearly, this was a local protectionist measure through which the local bank aimed to exclude those workers who did not learn German within the bilingual Province of Bolzano. In the Italian context of the time, this measure clearly aimed to discriminate against Southern Italian workers, who despite their knowledge of the German language were prevented from coming to the richer Northern region to get jobs.

The CJEU found that a requirement making access to the job conditional on a language diploma obtained only in Bolzano Province, without recognizing equivalent degrees, was not justified and proportionate to the goals of the bank employment policy.[272] The Court held that Article 45 of the TFEU applied not only to public measures, but also to those private measures that discriminate against workers.[273] Thus, the attempt by the

---

268. *See* Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98, [2000] E.C.R. I-4139, ¶ 5.

269. The Region of Trentino-Alto Adige is made up of the provinces of Trento and Bolzano, and constitutes an "autonomous Region, with legal status, within the political structure of the Italian Republic." *See* Special Statute for Trentino-Alto Adige, D.P.R. n. 670/1972 (It.), *available at* http://www.provincia.bz.it/downloads/autonomy_statute_eng.pdf.

270. *Angonese*, [2000] E.C.R. I-4139, ¶¶ 6, 9; *see* Leonardo Giani, *Profili di Efficienzanel Completamentodella Privatizzazione del Sistema Bancario Italiano: Il Casodelle Fondazioni Bancarie*, 14 STUDI E NOTE DI ECONOMIA 269 (2009) (explaining the privatization of Italian banks in the 1990s).

271. *Angonese*, [2000] E.C.R. I-4139, ¶¶ 5–8.

272. *Id.* ¶ 42.

273. *Id.* ¶ 36.

Bolzano, through a local bank, to justify a discriminatory scheme was not permissible. The difference in the outcomes of *Angonese* and *Groener* lies in the relevance of Gaelic as the national language recognized by Irish constitution, even though the Gaelic requirement has an indirect discriminatory potential in so far as it might be hard to acquire fluency in Gaelic outside of Ireland. Regardless, the Court's bias in upholding national measures that are protected by constitutions, rather than local legislation, discourages judges for understanding the local, national, and transnational implications of their decisions for different groups of workers.

B. *Local Effects of the Free Movement of Students*

The expansion of rights guaranteed to EU citizens happened through an activist adjudication of the CJEU interpreting the free movement of workers and services. This development prompted the CJEU to develop EU citizenship rights arguments in support of the freedom to move or receive private or public services without being discriminated against. The EU principle of antidiscrimination based on nationality enshrined in Article 18 of the TFEU has since become a central provision in these cases because not only did it serve to dismantle economic protectionism, it also acquired stronger equality values among individual citizens.[274] This nondiscrimination provision on freedom to receive services was later incorporated in the Directive on Citizens' Free Movement and Residence Rights ("CRD"), requiring equal treatment for all EU citizens residing within a different Member State.[275] The CRD consolidated the jurisprudence of the Court insofar as it ensured a right of residence, through different periods of time,

---

274. *See* TFEU, *supra* note 4, art. 18, 2010 O.J. C 83, at 56 ("Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."); Catherine Barnard, *EU Citizenship and the Principle of Solidarity*, *in* SOCIAL WELFARE AND EU LAW: ESSAYS IN EUROPEAN LAW 157 (Michael Dougan & Eleanor Spaventa eds., 2005).

275. *See* Directive on Citizens' Free Movement and Residence Rights, *supra* note 109, arts. 27–33, at 113–19. In regard to the free movement of citizens, Article 21 of the TFEU confers the right to "move and reside freely within the territory of the Member States" to citizens defined by Article 20 of the TFEU as "[e]very person holding the nationality of a Member State." TFEU, *supra* note 4, arts. 20–21, 2010 O.J. C 83, at 56–57.

and subsequently ensured the right of residents to obtain social benefits on equal terms with nationals.[276] This trajectory in European jurisprudence puts new emphasis on the individual rights of EU citizens with particular attention to their right not to be discriminated against by the Member States.

1. The Activist Equal Access to Education Jurisprudence

Initially the free movement of workers included only two categories of "economically active" persons: employees and self-employed workers. The CJEU judgments,[277] followed by Community legislative action, have progressively expanded the right of free movement beyond "economically active" persons to all citizens.[278] The jurisprudential work initiated by the CJEU jurisprudence culminated in the CRD.[279] In 2004, the CRD conferred on EU citizens, and their families, the right to move and reside freely in the territory of the European Union.[280]

With respect to the mobility of students, there has been a long CJEU saga challenging university discriminatory practices that limited the right of students to access education.[281] Since

---

276. The case law of the Court consolidated by the Directive on Citizens' Free Movement and Residence Rights includes Trojani v. Centre Public d'Aide Sociale de Bruxelles, Case C-456/02, [2004] E.C.R. I-7573; Baumbast v. Secretary of State for the Home Department, Case C-413/99, [2002] E.C.R. I-7091; Martínez-Sala v. Freistaat Bayern, Case C-85/96, [1998] E.C.R. I-2691; Brown v. Sec'y of State for Scotland, Case 197/86, [1988] E.C.R. 3205.

277. *See generally Trojani*, [2004] E.C.R. I-7573; *Baumbast*, [2002] E.C.R. I-7091; *Martínez-Sala*, [1998] E.C.R. I-2691; *Brown*, [1988] E.C.R. 3205.

278. *See* Barnard, *supra* note 274, at 250; *see also* Annette Schrauwen, *Sink or Swim Together? Developments in European Citizenship*, 23 FORDHAM INT'L L.J. 778, 787 (2000); Strumia, *supra* note 113, at 716–17.

279. *See generally* Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 31 EUR. L. REV. 613 (2006) (providing an overview of citizenship-related directives and their relationship to the Court's jurisprudence).

280. *See generally* Directive on Citizens' Free Movement and Residence Rights, *supra* note 109.

281. In contrast, in the United States it is not considered a violation of the right to travel when public colleges and universities adopt durational-residence requirements for in-state tuition. Such policies, upheld by the US Supreme Court in *Saenz v. Roe*, 526 U.S. 489 (1999), are based on the principle that tuition primarily reflects the contribution that resident taxpayers have made to the welfare of the state. *See* Strumia, *supra* note 113, at 741–42; *see also* Douglas R. Chartier, Note, *The Toll for Traveling Students: Durational-Residence Requirements for In-State Tuition After* Saenz v. Roe, 104 MICH. L. REV. 573 (2005). This vision of education as a service paid directly through the residents' contributions is embraced by some but remains problematic for others based on different theories of democracy. *See* FRUG ET AL., *supra* note 124, at 102–07

the Maastricht Treaty, education is a matter that falls within the shared competences of the European Union, although the European Union has only limited legislative power in this sphere.[282] The Commission has undertaken many initiatives to address the mobility of European students, which remains relatively low.[283] European adjudication has contributed to the increase of mobility across national boundaries by strengthening the right to access education. The Court has dramatically changed in the last twenty years the status of European students, who are not workers, but rather non-economically active citizens. While the Court has recently begun to pay greater attention to Member States' public policy and national welfare arguments justifying restrictions to the mobility of students,[284] judges have overlooked the local effects of their decisions.

In the area of educational fees, which vary from state to state, often with national and nonnational students charged different rates, the Court has vigorously enforced the nondiscrimination provisions enshrined in the Treaty and in EU

(contrasting James M. Buchanan's article "Principles of Urban Fiscal Strategy" with Frank I. Michelman's article "Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy").

282. Education in the European Union is regulated by Article 165(1) of the TFEU: "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity." TFEU, *supra* note 4, art. 165(1), 2010 O.J. C 83, at 120. In the domain of vocational training, Article 166(1) of the TFEU states that "[t]he Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training." *Id.* art. 166(1), at 121.

283. The continuous efforts made by the Commission to promote European education through policy coordination and the enhancement of student mobility policies has led to programs such as Socrates, Erasmus, and Marie Curie. *See, e.g.*, *The Lifelong Learning Programme: Education and Training Opportunities for All*, EUR. COMMISSION, http://ec.europa.eu/education/lifelong-learning-programme/doc78_en.htm (last visited Mar. 18, 2012); *Research & Innovation–Marie Curie Actions*, EUR. COMMISSION, http://ec.europa.eu/research/mariecurieactions/ (last updated June 22, 2012).

284. *See, e.g.*, Bressol v. Gouvernement de la Communauté Française, Case C-73/08, [2010] E.C.R. I-2735; Commission v. Austria, Case C-147/03, [2005] E.C.R. I-5969.

secondary legislation.[285] In the mid-1980s, *Gravier v. City of Liège* became the leading case in which the Court took an antidiscrimination approach towards enrollment or "minerval" fees.[286] In *Gravier*, a French student wanted to study the art of comic strips at the Académie Royaledes Beaux Arts of the City of Liège and applied for exemption from paying the foreign student enrollment fee for higher art education. The Académie Royale rejected her request on the grounds that "all foreign students must be aware that such education is not free of charge and must anticipate payment of an enrollment fee."[287]

The AG's opinion held that the Belgian rule constituted a form of discrimination because it was based on nationality and

---

285. In particular, the Court has been interpreting in conjunction Articles 39 and 12 (the broad nondiscrimination provisions) of the EC Treaty and Article 7 of Regulation 1612/68, which provides that:

> 1) A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment; 2) He shall enjoy the same social and tax advantages as national workers. 3) He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centers. 4) Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lies down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States.

Council Regulation No. 1612/68/EC on Freedom of Movement for Workers Within the Community, 1968 O.J. L 257/2, art. 7, at 477 [hereinafter Freedom of Movement Regulation].

286. *See generally* Gravier v. City of Liège, Case 293/83, [1985] E.C.R. 593.

287. *Id.* ¶ 5. The Académie Royale charged all its students a yearly registration fee of 10,000 Belgian francs, under a Belgian law that permitted "institutions of post secondary or higher education," such as the Académie Royale, to "charge only low registration fees intended to finance their social services." *Id.* ¶ 3; Opinion of Advocate General Slynn, *Gravier*, [1985] E.C.R. 593, at 595. Additionally, the Belgian Minister of Education had authorized "an enrollment fee for foreign pupils and students whose parents are not resident in Belgium and who attend a State educational institution," which included the Académie Royale. *Gravier*, [1985] E.C.R. 593, ¶ 3. The enrollment fee for those, like the plaintiff, who were "undertaking full-time artistic education," was 24,622 Belgian francs per year. Opinion of Advocate General Slynn, *Gravier*, [1985] E.C.R. at 595; *Gravier*, [1985] E.C.R. 593, ¶ 5. "[S]tudents having one parent of Belgian nationality, students of Luxembourg nationality, and students whose father or mother resides in Belgium and carries on a principal occupation or receives social security income or a pension and pays income tax there" were exempted from paying the enrollment fee. *Gravier*, [1985] E.C.R. 593, ¶ 4.

not on residence: "A Belgian national is never required to pay the minerval, even if he has spent the rest of his life outside Belgium and even if his parents live out of Belgium and pay no Belgian taxes."[288] The Belgian government responded that the reason why foreign students in Belgium were required "to contribute to the financing of education" was the imbalance "between the number of foreign students studying in Belgium and the number of Belgian students living abroad."[289] In making a national welfare argument, the government argued that "the imbalance had serious consequences for the national education budget," and because of that, the government was forced to require foreign students, "who do not normally pay taxes in Belgium to make a 'proportional contribution' to the costs of education."[290] Nevertheless, the CJEU held that the national measure was a form of discrimination incompatible with EU law.[291]

The CJEU saga over Belgian educational fees continued with two more cases involving universities in the Municipality of Liège. In one case, *Barra v. Belgium & the City of Liège*, French students who were taking technical classes organized by the City of Liège sued the Belgian government because they were required to pay an enrollment fee that Belgian students were

288. Opinion of Advocate General Slynn, *Gravier*, [1985] E.C.R. at 595.

289. *Gravier*, [1985] E.C.R. 593, ¶ 12.

290. *Id.* ("Far from being discriminatory, such a contribution puts foreign students on the same footing as Belgian nationals."). According to figures provided by the Commission, Belgium had the highest percentage "of students who are national of other member states, in relation to the total number of students" as compared to the rest of the European Community. *Id.* ¶ 13. However, this data also showed that Belgium was the only Member State that "require[d] foreign students to pay an enrollment fee." *Id.*

291. *Id.* ¶ 26 ("[T]he imposition on students who are nationals of other Member States, of a charge, a registration fee or the so-called 'minerval' as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to [Article 18 of the TFEU]."). The question that had been posed to the Court was whether nationals of one Member State who go to another Member State to take "courses in an institution offering instruction relating in particular to vocational training are within the scope of [Article 18 of the TFEU]." *Id.* ¶ 9; *see* TFEU, *supra* note 4, art. 18, 2010 O.J. C 83, at 56 ("Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.").

not required to pay.[292] In *Barra*, the CJEU held that the imposition of a registration fee on students who are foreign nationals not only constitutes discrimination on the grounds of nationality, which is contrary to the Treaty, but also that the students were entitled to repayment from the City of Liège.[293] In a subsequent case, *Blaizot v. University of Liège*, involving four main Belgian universities, the Court did not grant the repayment of fees already paid but reaffirmed the nondiscrimination principle and the elimination of discriminatory charges based on nationality.[294] The principal difference between *Blaizot* and *Barra* was that the plaintiffs in *Blaizot* attended, not technical colleges founded by municipalities, but public universities, and the Court feared that repayment would "retroactively throw the financing of university education into confusion and might have unforeseeable consequences for the proper functioning of universities."[295]

Despite the important economic burden that these cases created for the municipality of Liège, which had expressed on several occasions the problem of French students taking advantage of cheaper education in Belgium, the CJEU did not take into account the local consequence of its judgments. Instead, the Court maintained this jurisprudential trajectory until resistance came from the governments of Austria and France,[296] rather than from the City of Liège.

2. Some Distributive Implications of *Bidar*

What happens when a city or a municipality allocates benefits, in particular education allowances, only to their residents, who are also state nationals? When a regional or local

---

292. Barra v. Belgium & the City of Liège, Case 309/85, [1988] E.C.R. 355, ¶¶ 2–3.

293. *Id.* ¶ 21 ("Community law precludes the application to students from other Member States who have unduly paid a supplementary enrolment fee of a national law which deprives them of the right to repayment if they did not bring legal proceedings for repayment before the delivery of the judgment of 13 February 1985.").

294. Blaizot v. University of Liège, Case 24/86, [1988] E.C.R. 379, ¶¶ 24, 35.

295. *Id.* ¶¶ 34–35. In *Blaizot* the Court also limited the nondiscrimination provision only to those students who were going to universities to receive vocational training for a specific profession rather than improve their knowledge generally. *Id.* ¶¶ 19–20.

296. *See* CRAIG & DE BÚRCA, *supra* note 21, at 840–41.

authority give grants to favor a certain group of nonwealthy or historically discriminated-against groups living within its territory, such aid aims to create incentives among certain residents who have been historically less able to access higher education. The landmark CJEU case, *Bidar v. London Borough of Ealing*, is relevant in this respect.

The antecedent of *Bidar* can be found in *Brown v. Secretary of State for Scotland,* in which the CJEU resisted opening the access of maintenance grants to out-of-state students.[297] Mr. Brown had a dual French and British nationality. He lived in France until he earned his bachelor's degree, and then went to the United Kingdom in early 1984 where he worked for eight months in Edinburgh, Scotland. In October, he began studying to obtain a degree in electrical engineering at Cambridge University, but the Scottish Education Department ("SED") refused to award him a student allowance. Because of this refusal, Mr. Brown brought an action against the SED "claiming that he was entitled to the award of an allowance under Community law."[298] By addressing the different scope of tuition fees and maintenance grants, the CJEU held that while the former fell within the scope of the Treaty, the payment of grants for student fees does not.[299] The Court, and subsequently the new Students' Directive 93/96, excluded maintenance grants from the scope of the EU Treaty, thus limiting the mobility of

297. *See* Brown v. Sec'y of State for Scotland, Case 197/86, [1988] E.C.R. 3205, ¶ 18. This Section will discuss the local distributive implications of *Bidar* rather than the European or national implications.

298. *See id.* ¶¶ 3–5. The plaintiff based his suit on four provisions: Article 7 of the Treaty Establishing the European Economic Community, as interpreted by the Court in *Gravier*, and Articles 7(3), 7(2), and 12 of the Freedom of Movement Regulation. *Id.* ¶ 5. The CJEU held that university studies that prepare for a qualification for a particular profession or provide the necessary training skills constitute vocational training despite the fact that universities are not generally considered "vocational schools." *Id.* ¶¶ 10–13.

299. *Id.* ¶ 19. "Vocational schools" refers to the terminology used by the Freedom of Movement Regulation. *See* Freedom of Movement Regulation, *supra* note 285, art. 7(3), at 477 (A worker who is a national of a Member State in the territory of another Member State shall, "by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres"). According to the Court, "[t]he term 'vocational school' has a narrower meaning and refers solely to establishments which provide only instruction interposed between periods of employment or else closely connected with employment, particularly during apprenticeship," which is not the case with universities. *Brown*, [1988] E.C.R. 3205, ¶ 12.

students receiving these grants. However, neither the Court nor the directive excluded all other forms of assistance from the scope of the Treaty, such as income benefits, housing benefits, and child support.[300]

Bidar concerned a French national who moved to the United Kingdom with his mother in 1998 and there completed his secondary education without ever needing state aid. In 2001, he enrolled at University College London. He received assistance for his tuition fees, but was denied a loan for housing costs "on the ground that he was not settled in the United Kingdom."[301] The CJEU held that:

> [T]he first paragraph of Article 12 EC must be interpreted as precluding national legislation which grants students the right to assistance covering their maintenance costs only if they are settled in the host Member State, while precluding a national of another Member State from obtaining the status of settled person as a student even if that national is lawfully resident and has received a substantial part of his secondary education in the host Member State and has consequently established a genuine link with the society of that state.[302]

The "genuine link" that the Court established in *Bidar* derived from his right to reside enshrined in the CRD, rather than the

---

300. *See* BARNARD, *supra* note 229, at 282–83; Catherine Barnard, *Case C-209/03,* R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills, *Judgment of the Court (Grand Chamber) 15 March 2005, Not yet Reported,* 42 COMMON MKT. L. REV. 1465, 1467 (2005) [hereinafter Barnard, *Case C-209/03*].

301. *See* Bidar v. London Borough of Ealing, Case C-209/03, [2005] E.C.R. I-2119, ¶¶ 20–22. According to the national court, the plaintiff was not covered by either the Freedom of Movement Regulation or Students' Directive 93/96. However, the national court asked the CJEU for a preliminary ruling on:

> Whether, given the decisions of the [Court in *Lair* and *Brown*] and developments in the law of the European Union, including the adoption of Article 18 EC and developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses, such assistance being given by way of either (a) subsidised loans or (b) grants, continues to fall outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition on discrimination on grounds of nationality?

Id. ¶ 27.

302. *Id.* ¶ 63.

Students' Directive, insofar as he could demonstrate that he had already lived in the United Kingdom.[303]

How far Member States can go in insisting on the existence of a genuine link between a student and a host society is a flexible requirement. This has changed over time, as in the case of the United Kingdom, to more socially grounded requirements showing the integration of the migrant student to a particular territory. The reason behind this flexibility is the possibility for the host state to impose a limit when a migrant student endangers a particular welfare regime by imposing a high burden on the host society.[304] Additionally, the CRD allows Member States a margin of discretion to determine the length of stay in the host state to qualify as a resident. For instance, the United Kingdom changed its law in the aftermath of *Bidar* to require a period of three years as a residence requirement.[305] Finally, the fear that the CJEU would use the citizenship provision to expand free movement through the principle of equal access to education has been considerably limited by the adoption of the CRD establishing that economically inactive migrant students need to provide for their subsistence in the host state.[306] Thus, the underlying lesson from *Bidar* is that the distinction between fees and maintenance established in *Brown* is still tenable and that the Court did not establish that maintenance grants are to be provided to all migrant students.

In holding that the plaintiff could receive the maintenance grant, the *Bidar* court linked "residence, integration and solidarity: the longer migrants are resident in the host State, the more integrated they are in the society of the host State in and thus the more solidarity they can expect from the host State in

303. *See id.* ¶¶ 44–48, 55; Council Directive 90/364/EEC on the Right of Residence, 1990 O.J. L 180/26, replaced by the Directive on Citizens' Free Movement and Residence Rights, *supra* note 109.

304. *See* Dougan, *supra* note 179, at 972.

305. Some commentators have gone as far as arguing that residency is replacing nationality as the basis for membership in the community and access to its benefits in the European Union, which is becoming more and more similar to the United States. *See* Gareth Davies, *"Any Place I Hang My Hat?" or: Residence Is the New Nationality*, 11 EUR. L.J. 43 (2005).

306. In *Bidar*, according to some commentators, the CJEU has only "played around at the margins" of the Residency Directives and "judges as much as legislators have accepted that significant limits remain to how far the host State can be expected to subsidize the university studies of foreign nationals." Dougan, *supra* note 179, at 974.

terms of benefits."[307] Yet, in establishing a genuine link with the local community, neither the CJEU nor the *Bidar* commentators have addressed the city policy implications of this case.

The maintenance allowance requested in *Bidar* was a housing grant from the Ealing Borough. Traditionally in England, local authorities such as county councils and borough councils have had great power in designing education policies, especially, though not only, for primary schools. Since the UK Education Reform Act 1988, the twenty London boroughs lost their power over higher education, with all polytechnics and colleges of higher education becoming independent corporations.[308]

Nevertheless the housing subsidy in question, which was only allocated to students residing in the Ealing Borough, had a precise redistributive aim in that context. The Ealing Borough is located in West London and is populated in large part by nonaffluent and immigrant populations.[309] The resident subsidy for students residing in that particular borough was probably targeted to certain groups, such as the first generation children of Polish, Caribbean, and African immigrants, rather than foreigners.[310] But in the aftermath of *Bidar* the website of Ealing Borough shows that housing allowances to residents going to London universities were substantially lower.

These local redistributive polices are popular all over Europe and not only in London but in many European cities. For example, these are common in Paris suburbs, where riots among poorer residents and immigrants resulted into the burning of cars all over the city. This shows that local

---

307. Catherine Barnard, *Of Students and Babies*, 64 CAMBRIDGE L.J. 560, 563 (2005); *see* Barnard, *Case C-209/03*, *supra* note 300, at 1489.

308. *See* TONY BYRNE, LOCAL GOVERNMENT IN BRITAIN: EVERYONE'S GUIDE TO HOW IT ALL WORKS 93–95 (6th ed. 1994). *See generally Funding Higher Education*, HIGHER EDUC. FUNDING COUNCIL ENG., http://www.hefce.ac.uk/about/intro/fundinghighereducation/ (last updated Jan. 3, 2012). The Higher Education Funding Council distributes money to the independent universities and colleges and monitors their financial and managerial health. *See id.*

309. *See* EALING COUNCIL, EALING COUNCIL CORPORATE PLAN 2010–14, at 5 (2010).

310. *See ONS Population Estimates by Ethnic Group, 2001–2005*, DATA MGMT. & ANALYSIS GROUP UPDATE (Oct. 2007), http://legacy.london.gov.uk/gla/publications/factsandfigures/dmag-update-20-2007-ons-ethnic-group-estimates.pdf (providing an overview of the ethnic group populations in the London Boroughs from 2001 to 2005).

government redistribution is important to maintain social peace and is supposedly race-neutral, since subsidies are given based on geographic rather than ethnic characteristics.[311] In *Bidar*, the CJEU sets aside a local policy for being discriminatory instead of giving to the Ealing Borough a voice in explaining the rationale behind its housing subsidy scheme aimed at creating an incentive for children of first generation immigrants to attend local universities. In hindsight, if the Court had paid more attention to the impact of its decision on the local redistributive scheme perhaps it could have anticipated part of the current resistance to its activist jurisprudence on access to education.

Finally, these territorial and distributive considerations are not totally alien to the court. In interpreting reverse discrimination and the nexus of a national measure with EU law, AG Sharpston explained that redistributive territorial policies ought to be balanced against free movement in light of how they will affect the different communities of people that will be granted or excluded from the subsidy.[312]

CONCLUSION

> *At times all I need is a brief glimpse, an opening in the midst of an incongruous landscape, a glint of lights in the fog, the dialogue of two passersby meeting in the crowd, and I think that, setting out from there, I will put together, piece by piece, the perfect city, made of*

311. *See* RIVA KASTORYANO, NEGOTIATING IDENTITIES: STATES AND IMMIGRANTS IN FRANCE AND GERMANY 79 (Barbara Harshav trans., Princeton Univ. Press 2002) (1997) ("[I]n France no measure is specifically oriented toward immigrants, their descendants, or foreigners, at least not officially. In discourse, 'less' is determined economically, like social handicaps. The state does not take account a priori of the national or religious origin of families but refers to all economically disadvantaged families. Local actions are undertaken to improve neighborhoods and their image, using various means: if possible, by dispersing the group that 'lowers values' or by encouraging the residents to participate in the neighborhood's social life. To calm fears and antagonisms, the less must be integrated into the more."); *see also* Daniela Caruso, *Limits of the Classical Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT'L L.J. 331, 360 (2003) (arguing in favor of redistribution based on the territory as more effective than national positive action legislation of the type that the Court struck down).

312. *See* Opinion of Advocate General Sharpston, Gov't of the French Cmty. & Walloon Gov't v. Flemish Gov't, Case C-212/06, [2008] E.C.R. I-1683, I-1687, ¶ 129; *see also supra* note 80 and accompanying text.

> *fragments mixed with the rest, of instants separated by intervals, of signals one sends out, not knowing who receives them. If I tell you that the city toward which my journey tends is discontinuous in space and time, now scattered, now more condensed, you must not believe the search for it can stop.*[313]

In supporting deregulation in the internal market and in deferring to national welfare schemes, European judges have largely overlooked how their decisions redistribute power and resources in state-local relations. In addition the structure of legal arguments that judges have used to interpret EU internal market doctrines allows them to collapse local into national and European interests, or reduce cities into private market actors. This practice makes cities invisible to EU law.

This Essay shows that when judges balance national welfare or public policy arguments to justify Member State policies against EU free movement principles, they have collapsed local interests into prevailing national or EU interests.[314] For instance, in the *Maastricht Coffee Shop* case, the Court upheld a city ordinance banning drug tourism that was highly contested at the national and local level because the goal of the ordinances conformed with the European fight against drug trafficking.[315]

To contribute to the invisibility of cities in the internal market adjudication, judges use regulatory competition and citizenship rights arguments to enhance the free movement of services and workers in a way that masks the deeper local conflicts among cities, regions, and Länder. For instance, the *Rüffert* court held that mandatory collective agreements in public procurement contracts administered by Lower Saxony were incompatible with the Posted Workers Directive and the

---

313. CALVINO, *supra* note 1, at 164.

314. This could have been the case in Angonese if the bank of Province of Bolzano had not been privatized and would have required that instead of speaking German the employee spoke the dialect in the region that is very similar to Germna. *See generally* Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98, [2000] E.C.R. I-4139; *see also supra* notes 268–73 and accompanying text.

315. *See Josemans*, Case C-137/09, [2010] E.C.R. I____ (delivered Dec. 16, 2010) (not yet reported); *see also supra* notes 142–51 and accompanying text.

free movement of services.[316] Rather than acknowledging the internal political divide among the sixteen German Länder, this decision weakened the position of six Länder that had adopted higher labor standards public procurement contracts and that were lobbying for the same legislation at the federal level.

By regulating the internal market, European judges necessarily intervene in state-local relations by redistributing powers and resources, even though they claim not to do so. Rather than relying on a fiction of nonintervention judges ought to understand the interests of local actors involved in each case in order to decide what stakes they are likely to support in each case. This is a hard, but not impossible, task that some judges have already partially undertaken. It requires them to openly acknowledge the costs and consequences of maintaining, displacing, and creating welfare policies rather than relying on the assumption that city interests can be identified within state and EU interests or that they fully resemble those of private market actors.

316. *See Rüffert*, Case C-346/06, [2008] E.C.R. I-1989; *see also supra* notes 236–55 and accompanying text.