Is Constitutional Symmetry Enough?
Social Models & Market Integration in the US and Europe

by

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For many, Europe is the home of tame capitalism: the EU seems to have facilitated market integration and monetary union while allowing member states to hold on to their elaborate corporate arrangements and welfare safety nets. This popular impression is bolstered by an arsenal of empirical studies that have documented the ability of member states to maintain generous social spending and wage levels.

While significant differences of opinion continue to exist, I don’t think it is controversial to depict a consensus in this literature—one that finds scant empirical support for any sort of “race to the bottom” in Europe’s level of social protection, as measured by such diverse indicators as levels of social security, wages, public expenditures, etc. Moreover the findings suggest that member states have been able to maintain national, path-dependent, patterns of social policy.¹ The resilience of these European Social Models (ESM) is usually explained with reference to any number of domestic influences and preferences, ranging from the electoral strength of left-leaning parties, the continued influence of powerful interest groups, and the efficiencies that are generated by more coordinated forms of exchange.²

One important exception to this analytical trend is the recent work by Fritz Scharpf, especially his 2002 article in the JCMS.³ Sharpf’s approach is different than the broader ESM literature in a number of significant ways. First, by focusing on the European treaties and the European Court of Justice (ECJ), Sharpf’s study examines the ESM from a more European (rather than a constituent or national) perspective. Second, his argument rests on

¹ These findings are remarkable, almost inconceivable, if only because so many of the traditional tools used to deliver these social models have been undermined by greater economic and monetary union. Gone are the possibilities to use frequent exchange rate adjustments and the monetary autonomy that accompanies them; state budgets are now constrained by the need to conform to the stability and growth pact; Europe’s liberalization drive has made it more difficult for member states to use public sector programs as a means to boost employment and demand; while Europe’s competition policy has robbed member states of the ability to use state and public procurement programs in a similar fashion.

² To understand the continued attractiveness of social democratic regimes in a globalized economy, see e.g. Garrett (1998) and Swank (2002). For similar arguments, as applied to the ESM, see e.g., Alber (2006) and several contribution in the special 2000 issue of the Journal of European Social Policy, as introduced in Alber and Standing (2000). For a discussion of the economic benefits, see Kruger (2000).

³ See also Scharpf (1999 and 2009).
legal and constitutional irregularities, rather than brute empirical evidence gathered at the nation-state level. Finally, he is decidedly more skeptical about the ability of European states to maintain their social models in the face of market integration (at least particular variants of these models). In particular, Scharpf retraces the history of European treaty-making to point to the creation of what he calls Europe’s constitutional asymmetry. He then uses the bulk of his article to elaborate on how Europe might introduce new modes of governance to overcome that asymmetry (in particular, by using a system of closer cooperation and/or a combination of differentiated “framework directives” with the open method of co-ordination).

This piece takes Scharpf’s argument, extends it, and examines it in a different light. Since the piece was first published, a number of headline-grabbing ECJ cases have only strengthened Scharpf’s depiction of the challenges facing European Social Models. For this reason, I begin by surveying three recent court decisions and the controversial Services Directive to show how this challenge is clearly reflected in recent European developments.

While I think Scharpf’s diagnostic is spot-on, I have my doubts about his proposed treatment. These doubts are informed by the American experience with market integration. In the US, like in Europe, there were vigorous attempts to develop and protect state-based regulatory and protective regimes in the face of greater market integration. Here too, we find an early Supreme Court whose decisions helped to unleash (national) market forces while restricting the capacity of progressive state governments to cope with them. But in America, the erosion of state regulatory regimes is traditionally explained by the force and logic of federal markets, not with reference to any sort of constitutional asymmetry. Indeed, I will argue that the US constitution provides the sort of constitutional symmetry that Scharpf hopes might cure what ails the ESM patient.
In short, by comparing the American and European paths to market integration, this paper questions the commonly-held idea that European-style integration can continue to protect nation-based models of social protection. While the broader ESM literature appears to show that European member states have managed to preserve a relatively high degree of social protection, the experience of American market integration, and mainstream theories of economic federalism, suggest that it will be very difficult to maintain vibrant European Social Models, anchored in member-states, in the wake of greater market integration. In the absence of an overarching European social policy (ala the American New Deal), or a new constitutional asymmetry which prioritizes social protection over market integration, I suspect that the logic of economic integration will override the capacity of member states to provide effective social protection.

Europe’s Constitutional Asymmetry

Many of the roots of Europe’s promise, and problems, can be traced to Rome. Signatory states to the Treaty of Rome were anxious to protect sovereign powers and interests while encouraging economic integration and growth. Obviously, one of the motivations for membership was to encourage the economic gains that could be reaped from increased integration. But member states hoped to do this without losing their grip on national policies that could encourage domestic economic growth and deliver social security/welfare.

The founding members found it convenient to focus their common energies on facilitating European economic integration, believing that this would not force a harmonization in social policy (delegated now to the different national arenas). This view was supported by the influential Ohlin Report (ILO 1956), which had concluded that the social policy differences between countries were sustainable—so that no harmonization among
member states was necessary. It should be noted that the report specifically linked the ability to secure social policy with the strength of national trade-union movements in Europe.\(^4\)

In a nutshell, the original European design reflected a view that the larger Community could become an engine of economic growth by encouraging economic trade and integration, while the Community’s constituent member-states would be free to develop the redistributive magic that we now associate with the European Social Models.\(^5\)

In agreeing on this politically-convenient division of labor, member states managed to decouple economic integration and social protection issues at the European level. It is this decoupling which leads to Scharpf’s constitutional asymmetry:

It allowed economic-policy discourses to frame the European agenda exclusively in terms of market integration and liberalization, and it ensured the privileged access of economic interests to European policy processes. Even more important, however, was the constitutional asymmetry following from the selective Europeanization of policy functions. At the national level, economic policy and social-protection policy had and still have the same constitutional status…[but] once the European Court of Justice (ECJ) had established the doctrines of ‘direct effect’ and ‘supremacy’, any rules of primary and secondary European law, as interpreted by the Commission and the Court, would take precedence over all rules and practices based on national law, whether earlier or later, statutory or constitutional. When that was ensured, all employment and welfare-state policies at the national level had to be designed in the shadow of ‘constitutionalized’ European law (2002: 646-7, emphasis added).

Since its 2002 publication, Sharpf’s diagnosis has been lent additional credence and support by a wave of European legal developments, in the wake of a push to extend integration deeper into service markets. As the trade in services often entails the movement of people, liberalizing the trade in services introduces a number of especially thorny issues in

\(^4\) “…while the level of living of workers in high-wage countries would continue to rise, that of workers in lower-wage countries would tend to rise more rapidly. This tendency, however, is relatively weak and would not by itself lead to anything near equality in standards of living between countries…More important than this tendency in its effects on workers’ living standards, we believe, would be the more rapid growth of productivity to be expected as a result of the more efficient international division of labour. This would be amply sufficient, in our view, when account is taken of the strength of the trade union movement in European countries and of the sympathy of European government for social aspirations, to ensure that labour conditions would improve and not deteriorate” (ILO 1956: 86-7).

\(^5\) Of course, this belief did not go unchallenged. Under the 1956 negotiations leading to the Treaties of Rome, the French Prime Minister, Guy Mollet, tried unsuccessfully to make the harmonization of social regulations and fiscal burdens a precondition for the integration of markets.
the politics of market integration. For example, service provision is often temporary and usually labor-intensive; labor costs are the principle factor determining the price of a given service; and many service markets exhibit very little price elasticity of demand. In addition, the trade in services constitute a substantial part of the European economy (representing some 50% of the EU’s GDP, and 70% of overall employment), but it is the one area of European integration that has been least successful (it constitutes only 20% of the volume of EU internal trade) (see EESC 2007). For these reasons, any attempt to integrate European service markets was bound to raise the public’s attention.

This public attention is most evident in the vocal opposition to the so-called Services, or Bolkestein, Directive. The biggest magnet of controversy was a reference in the original draft to the so-called “country-of-origin principle”, under which companies registered in any EU member state may not only provide services in any other, but can also employ workers to perform such services abroad under the laws of the country in which they are registered. While the “country-of-origin” reference was dropped from the text of the revised directive, its political sting lingered, as it provoked intense debate and mass protests in several countries, including France, Belgium, Sweden and Denmark. Indeed, the directive became a flashpoint for European integration; it was perceived as a critical test for the Commission’s (liberalizing) agenda and a threat to the power of organized labor in Europe.

While I think it is a mistake to focus too hard on the threats derived from this particular directive, the muddled and confused result of this process confirms Scharpf’s

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7 While the public’s critical gaze was piercing, it was probably misdirected, for three, related reasons. First, the legal foundations for prioritizing European integration (over national regulation) are of a more structural nature and can be traced to the original agreement to sideline social issues in the Treaty of Rome, as described above. Second, it can be (and has been) argued that the “country-of-origin” principle is a manifestation of a much older “mutual recognition” principle, which has long been recognized as valid (e.g. Nicolaides and Schmidt 2007). Finally, the most controversial part of the directive—concerning the conditions under which workers providing cross-border services would labor—was already
depiction of a Europe that decouples economic integration and social protection, and where
nation-based systems of social protection are being eroded by an integration-minded ECJ.

amendments have turned the original directive proposal into a Swiss Emmenthaler cheese—
with more holes than substance.” As a result, “the case law of the Court of Justice takes the
country of origin principle as its starting point when assessing the application of the
justification for restrictions on the free movement” (*CMLR* 2006: 309). Nicolaïdes and
Schmidt (2007: 732) are even more direct: “…there can be no doubt that the directive leaves
the door wide open for judicial activism on the part of the ECJ.”

This sort of judicial activism is clearly evident in three recent—and head-line
going—cases that have appeared before the Court: Viking, Laval and Rüffert.

**Viking**

In 2003, the Viking Line reflagged a vessel that commuted between Finland and Estonia. By
moving the ship’s registry from Finland to Estonia, the shipping company could employ an
Estonian crew at Estonian wages (which were roughly 60% of those won by Finnish
workers). Consequently, the Finnish shipping union appealed to the International Transport
Workers’ Federation (ITF) in London, which: 1) called for Viking to maintain the existing
pay and working conditions or risk a strike; and 2) informed its affiliates to avoid future
negotiations with Viking.

When Estonia joined the EU in 2004, Viking sued the ITF in the British High Court
for restricting its freedom of establishment (as guaranteed by Article 43 in the Treaty of
Rome). The case was referred to the ECJ, which ruled that any future strike action affecting

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covered by the 1996 Posted Workers Directive (96/71/EC) and its application of host labor law and wages. In short, this cat
was let out of the bag long before the Services Directive came to life.
this freedom would have to meet stringent legal tests that the court itself would asses. In
effect, European workers are being told that “the right to strike is a fundamental right, but not
as fundamental as the EU’s free movement provisions” (ETUC 2008: 2, emphasis in
original). As a result, the standards of collective action in Europe are now being set in the
ECJ, rather than by national parliaments or the collective agreements of the labor market
partners involved.

It should be noted that this case involved the application of the “free establishment”
article of the Treaty, not the Service or Posting Directives. Still, it sent a clear signal about
the importance of protecting interstate commerce and the freedom of establishment, even if
this meant undermining local collective agreements. Although the Court recognized the right
to take collective action as a general principle of Community law, this principle was
circumscribed when the Court held that collective action could constitute a restriction on the
freedom of establishment.

Vaxholm

In 2004, Laval—a Swedish subsidiary of a Latvian company—secured a contract to renovate
a school in Vaxholm, Sweden. Under Swedish law (and practice), building contractors who
were not a member of the national employers’ organization were approached by trade unions
to sign a collective agreement at the outset of their activities. These agreements were used to
ensure that the wages to be paid would reflect the average wage paid in the geographical area
where the activity is located. After a series of negotiations, Laval and the Swedish building
and public-works union (Byggnads) failed to reach a collective wage agreement. Laval then

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8 In particular, the Court stressed that collective action needed to be “proportionate” to the issue under dispute. Consequently, the Court will need to define proportionality in the context of each case. Case C-438/05 Viking Line Abp OU
signed a collective agreement with the Latvian building-sector trade union (the Latvian Building Workers’ Union), agreeing on wages below the Swedish level.

The Swedish union responded by calling for a full blockade of Laval’s worksites in Sweden, and encouraging other trade unions to join the blockade. This was legal under Swedish law, where workers enjoyed extensive rights in the absence of a collective agreement. As a result, the organized building trades (most notably, the electricians) joined in the blockade and refused to enter any Laval worksites in Sweden. Not surprisingly, Laval’s Swedish subsidiary became insolvent, and the Latvian workers returned home.

Laval then sued the unions in a Swedish Labor Court (SLC) for compensation, arguing that the blockade was illegal under EU rules guaranteeing free establishment. The unions argued that the right to strike trumped any EU single-market or establishment rights. The Swedish court rejected Laval’s request for an interlocutory decision to discontinue the industrial action, and concluded that the trade union had acted according to Swedish law.9 Although it supported the unions, the SLC then deferred the case to the ECJ.

In December 2007, the ECJ decided over its first case on industrial action.10 In its decision, the Court had to weigh the freedom of movement of establishment and services against the right to organize effectively and use non-statutory means for securing local protection. The importance of the case was underscored by the fact that 17 of the EU’s 27 member states intervened in the case.

The ECJ ruled that the unions’ blockade of Laval was not illegal per se. Such a blockade would only be unacceptable if it was designed to impose terms more generous than those protected under EU legislation and where there were no specific domestic minimum

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10 Case C-34105 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others (18 December 2007).
pay rules. In short, it ruled that unions are forbidden to use blockades to try and improve local conditions more than is provided for by existing legislation. In particular, the Court concluded (using the exact language as it did in the Viking case, one week earlier):

Although the right to take collective action must therefore be recognized as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions.

While the ECJ seems to have shown some judicial self-restraint in the earlier (Viking) case, its Laval judgment sent a clear signal to European workers that the Court intended to prioritize the defense and nurturing of European economic integration, as granted by member-state treaty obligations, even if these restricted local rights and practices (see, e.g., Joerges 2008, Eklund 2008).

Rüffert

In the fall of 2003, a German construction company, Objekt und Bauregien GmbH and Co. won a public bid to build a prison in Niedersachsen, Germany, which it subsequently subcontracted out to a Polish firm. The terms of the contract were clear: the Polish workers had to be paid according to a collective agreement already in force at the building site, which was part of the local authority’s procurement policy.

The German firm later discovered that the Polish company was employing workers at less than half of the applicable minimum wage. As a result, it sacked the Polish subcontractor, and the local authority demanded compensation for breach of contract. The company then hired Dirk Rüffert to take legal action that eventually ended up before the ECJ.

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11 EU legislation allows member states to impose local minimum working conditions on foreign workers, but these conditions must be: 1) statutory; and 2) not more stringent than those that apply to the local workforce. As Swedish wages (and many working conditions) are set by collective agreement, not by law, they are not protected by this EU legislation.

12 *Laval*, §91.
At issue was whether it is legal to insist on wages that are higher than the statutory minimum in cases of public bidding/tendering.\textsuperscript{13}

The ECJ focused on these local wage differences by means of a strict interpretation of the Posting Directive 96/71, which the Court meant “seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty.”\textsuperscript{14} This new and stricter interpretation of the directive seems to counter an earlier interpretation by the Court in another German case, when it found that “there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. The fifth recital in the preamble to Directive 96/71 demonstrates that those two objectives can be pursued concomitantly.”\textsuperscript{15} In short, the Rüffert ruling seems to introduce a new interpretation of the Posting Directive, where the Court is clearly prioritizing the freedom to provide services, at the expense of non-statutory worker rights.

Indeed, in the Court’s findings it is evident that the ability to offer lower wages is an important element in a member state’s ability to compete in the internal market.

Consequently, requiring foreign firms to pay the locally-determined wage can mean that they lose their competitive advantage.\textsuperscript{16} This, in turn, restricts their freedom of movement, as secured by Article 49:

\begin{quote}
By requiring undertakings performing public works contracts and, indirectly, their subcontractors to apply the minimum wage laid down by such a collective agreement, such legislation may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host
\end{quote}

\textsuperscript{13} On the basis of a regional collective agreement, the German state in question (Lower Saxony) had in place minimum wage provisions that applied to public works contracts which exceeded the national standard.

\textsuperscript{14} Case C-346/06 Dirk Rüffert v. Land Niedersachsen (3 April 2008), §36.

\textsuperscript{15} Case C-60/03 Wolff & Müller (12 October 2004), §42.

\textsuperscript{16} Note the contrast with the U.S., where the Davis-Bacon Act is used to encourage local hiring and protect local wages in public procurement projects.
Member State. Therefore, such a measure is capable of constituting a restriction within the meaning of Article 49 EC (C-346/06, §4).

Not surprisingly, the European Trade Union Conference reacted angrily to the ruling, calling it “in effect an open invitation for social dumping, which not only threatens workers’ rights and working conditions, but also the capacity of local (small and medium) enterprises to compete on a level playing field with foreign (sub)contractors.”17

In these three recent Court cases, and the evolving interpretations of the directives that support them, it is clear that some of the most progressive variants of the European Social Model—especially those that rely on a strong and vibrant union movement—are being eroded by an overarching need to secure greater service-market integration in Europe. In countries where national legislation once allowed social partners to implement local provisions, these local provisions cannot be applied to posted workers. Similarly, in recognizing that the right to collective action can be subject to certain conditions, the ECJ is restricting important worker rights; rights that were once an integral part of many member state constitutions.

In its attempt to secure a non-discriminatory approach to service-market integration, the ECJ is clearly discriminating against social models that rely on corporatist channels of influence to secure non-statutory—but still binding—agreements on central areas of common concern (e.g., local wages and the ground rules for acceptable action/conflict). By forcing these states to adopt statutory measures, the ECJ undermines the power and influence of the labor market partners—by requiring them to limit their activity to traditional political (party) channels and to jettison the elaborate frameworks they’ve erected in national contexts, over decades of agreement and struggle.

17 Quoted in EurActiv (2008).
These developments support Scharpf’s contention that member states are finding it difficult to maintain important components to their social models in the face of increased market integration. Indeed, it is easier to see the disparate challenges to the ESM here in the legal no-man’s land where Europeans and their interest groups meet (rather than in the national indicators more commonly used in the broader ESM literature). It is on this legal terrain that some member states are now being forced to change the way in which they have protected worker rights, risking just the sort of social dumping that the European Union explicitly hopes to avoid.

**America’s Functional Federalism**

There is another way to look at Europe’s struggle to protect national social models, and that is in light of the earlier American experience with market integration. Such a comparative strategy is not without its problems, as Europe and the United States experienced economic integration at different times, under different levels of economic and political development, and with significantly different notions of the role of the state and organized interests in influencing economic development. After all, America is not generally celebrated for its social or redistributive efforts.18

Still, the American experience can be useful in that it points to some of the hidden pitfalls along the way to market integration. More to the point, the American experience informs a conventional economic wisdom about federal (integrated) economies, where it is recognized that redistribution within a large economic entity is best organized at the highest (read federal) level, while economic development is best secured at lower levels of

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18 Consequently, I have used a very vague notion of “social model” to compare regulatory and support measures in the American and European contexts. Given the already broad variance in models across Europe, this does not seem unreasonable.
This tidbit of economic wisdom seems to conflict with Europe’s institutional design, and the tension between the two models of market integration should draw our attention.

Perhaps the best introduction to the economics of American federalism is Paul Peterson’s (1995) *The Price of Federalism*. Here we learn that governments are saddled with two main economic responsibilities: development and redistribution. Developmental programs provide the sort of infrastructure (both physical and social) necessary for encouraging economic growth; redistributive programs allocate societal resources from those who have gained most from economic development to those who have gained least.

To function effectively, Peterson holds that the federal government needs to respect the comparative advantage associated with different levels of government: “Specifically, the national government should assume the primary responsibility for redistribution, while state and local governments assume primary responsibility for development” (1995: 18). This argument, though relatively vague, rests on three underlying logics: 1) recognition that local authorities will be more in touch with local market conditions; 2) an implicit acknowledgement of the role played by Tiebout-sorting; and 3) the threat of a regulatory race-to-the bottom, as states compete to attract mobile labor and capital.

In the federalist literature, the federal government is best situated to engage in redistributive programs, as it can set the broader parameters for economic policy (i.e., prevent

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19 See e.g. Oates (1972, 1999), Wildasin (1991, 1994), and— as elaborated upon below—Peterson (1995). This functionalist approach does not stand alone. For example, Bruce Ackerman (1991, 1998) has developed a very rich argument that emphasizes the political logic of American style federalism. While my argument emphasizes an economic (functionalist) more than the political logic, it should be recognized that the two types of argument are clearly related to one another. Unfortunately, one of the most striking things about Ackerman’s otherwise elaborate depiction of America’s second constitutional moment is the dearth of references to the underlying economic developments that fueled the political logic that drives his story. The Great Depression and the political logic of what Ackerman refers to as America’s third constitutional regime are two sides of the same coin.

20 Briefly, Tiebout sorting can be summarized as follows: “Politics that promote residential mobility and increase the knowledge of the consumer-voter will improve the allocation of government expenditures in the same sense that mobility among jobs and knowledge relevant to the location of industry and labor improve the allocation of private resources” (Tiebout 1956: 423). Although Tiebout is not mentioned in the text, Peterson (1995: 18) holds: “Unless local public services are provided in ways that meet the needs of local business and residents, residents will consider moving to another locality better attuned to their needs.”
the import of foreign labor and capital). Consequently, America’s largest redistribution
efforts, such as social security and medicare, could only be provided by the federal
government: “If any state or local government had attempted to mount a comparable program
by itself, it would have gone bankrupt long before becoming a haven for the aged” (Peterson
1995: 30).

While this division of labor between states and federal authorities now reflects
conventional economic wisdom, it was not always the case. Actually, this understanding
developed in the wake of America’s experience with a drawn-out evolution of regulatory
powers and their appropriate location. This experience can be depicted in terms of three
different regulatory responses over time: first, regulatory authority and protection was
anchored in states; then it was coordinated in more uniform legislation across neighboring
states; and finally it was lifted up to the federal level.21 The engine driving these changes
was the need for consistent and uniform rules in light of the growing power of firms that
could exploit an increasingly national market for goods and services.

State Responses

The first American responses were uncoordinated state measures that were largely
endogenous reactions to local demand and conditions. Prior to the Civil War, state
governments in the US were the main generators of economic activity: funneling large
amounts of both foreign and private capital into local investment projects. The federal
government, by contrast, played only a limited role in these areas, as evidenced by the level
of debt furnished by different levels of government at the time (Fishback 2007: 26). After the

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21 This three-part framework parallels, but is different from, those employed by lawyers (e.g., Coenen), political
philosophers (e.g. Ackerman) and economists (e.g., Peterson) when they describe the radical changes in America’s political
economy during the interwar period. Careful readers will distinguish between the many overlapping dichotomies that are
addressed in the literature (such as differences over approaches (e.g., monistic or dualistic, laissez faire or regulatory)
and/or seats of power (e.g., presidential versus congressional or federal versus state). Our current focus is trained on the
roles of the federal and state governments in encouraging economic growth and its redistribution in large political entities.
Civil War, for rather obvious reasons, the authority of state governments (relative to the federal government) was diminished, as individual states could no longer be seen as the final guarantors of liberty. Still, the role of the federal government was held in check by a Supreme Court that fought to protect the right of states to regulate internal (intrastate) commerce.

By the late 1800s, however, it was becoming increasingly evident that new forms of regulation and support were needed to deal with an increasingly national economy (and the national corporations that dominated it). These changing perceptions were a response to three related developments. First, a number of sundry attempts at introducing state-based laws were ineffective, if only because “employers had equal or possibly greater political power than did reformers and workers in determining the path of regulation in most state legislatures” (Fishback 1998: 724). Second, and relatedly, as states began to develop competing regulatory frameworks, they often found themselves in a competitive dynamic with other states. Finally, the US Supreme Court was willing to declare state regulations unconstitutional if they were seen to interfere with free interstate commerce as guaranteed in Article 1, Section 8 of the Constitution.²²

Indeed, it is important to emphasize that this early (pre-1937) US Supreme Court tended to encourage national economic growth while constraining the states’ ability to build local protective frameworks. The Court did this with reference to the judicial doctrines of “economic due process” and by way of what became known as the “negative (or dormant) commerce clause”.²³ According to Robert Stern (1951: 447):

…as late as 1936 the Court was still holding that labor relations in the coal industry only affected interstate commerce "indirectly," and therefore were not subject to the

²² For example, a five-Justice majority found the 1916 Child Labor Act to be in violation of the constitution, as “the goods shipped are of themselves harmless”, even if the labor used to produce those goods was harmful. *Hammer v. Dagenhart*, 247 US (1918), at 272. See Coenen (2004: 40f).

²³ See, e.g., Stern (1951) and McCloskey (1962).
power of Congress, that the amount of cotton produced in the United States was only of local concern and therefore not subject to federal control; and that the fixing of minimum wages for women violated the due process clause.”

To a certain extent, the situation in Europe today—which reflects the division of labor envisioned in the Treaty of Rome—resembles conditions during the first phase of America’s market integration. While the overarching political bodies (the EU or the federal authorities in the US) were granted the authority to encourage interstate trade and market integration, member states were encouraged to both facilitate economic growth and maintain local models of social protection and welfare.

These examples differ in at least two significant respects. First, in America these social regulations were new responses to a nascent industrial expansion and market integration, while in Europe, integration was occurring on top of states that already provided significant levels of social protection. Second—and more importantly for my argument—the US did not suffer from the sort of constitutional asymmetry that is said to ail Europe. Indeed, the US Constitution explicitly grants the federal government the sole right to regulate interstate (and international) commerce (Article 1, Section 8) and concomitantly allows for state-level occupational licensing and inspection laws (Article 1, Section 10).24

Despite this constitutional symmetry, the US Supreme Court consistently found it necessary to protect and nurture the needs of a growing national market over those of local (state) regulators; the guarantees of Article 1, Section 10, in themselves, were incapable of tempering the forces that drove the development of a federal market and their accompanying political logic.

24 Not to mention the 10th Amendment to the Constitution, which holds “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.”
Uniform Responses

Indeed, in the United States, the division of responsibility between state and federal authorities proved to be very problematic as the market began to expand in the wake of industrialization and the growing concentration of capital. The next American response was to coordinate state regulatory reforms in a way that would protect states from the threat of what we today would call social dumping. Actually, an emphasis on uniform state reform legislation is one of the defining characteristics of America’s Progressive Era (Graebner 1977: 332f). Toward that end, the 1902 report of the Industrial Commission—which was established to investigate the effects of industrial concentration—concluded that the federal system, itself, was a major obstacle to productive legislation: “Employers and employees who have appeared before the commission have quite generally agreed upon the usefulness and the importance of factory legislation and its strict enforcement. The main criticism brought out is that of the lack of uniformity” (Industrial Commission 1902: 901).

While an earnest attempt to encourage uniform legislation generated a number of novel political alliances, fascinating attempts at coordinating regulatory reform across state borders, and the development of national organizations that could support uniform bills in different (state) legislatures (and to assist surrounding states), the attempt proved largely ineffectual in the face of “a development of business and social life which tends more and more to be the obliteration of State lines and the decrease of State power as compared with National Power.”25 Worse, as Woodrow Wilson noted, it was producing a plethora of overlapping state legislation that was, itself, a growing concern: “the enforcement of the laws of the States in all their variety threatens the country with a new war of conflicting regulation as serious as that which made the Philadelphia convention of 1787 necessary…This conflict of laws…constitutes the greatest political danger of our day” (Wilson 1908: 693).

25 This quote is by Elihu Root in 1906, as referenced in Graebner (1977: 347). Root was then New York’s Secretary of State.
The National Response

By the early 20th century it was becoming increasingly obvious that a state-based approach to social protection, whether alone or in unison, was not working. Its ineffectiveness was evident in the rising instances of labor unrest, and in the 1912 Platform of the Progressive Party, which—among other things—called for the establishment of federal regulations in the face of federal challenges:

> Up to the limit of the Constitution, and later by amendment of the Constitution, if found necessary, we advocate bringing under effective national jurisdiction those problems which have expanded beyond reach of the individual States.

> It is as grotesque as it is intolerable that the several States should by unequal laws in matter of common concern become competing commercial agencies, barter the lives of their children, the health of their women and the safety and well being of their working people for the benefit of their financial interests.\(^{26}\)

Before 1936, however, the federal route to regulation was blocked by a US Supreme Court that consistently protected local (state) regulation from federal interference,\(^{27}\) as guaranteed by the US Constitution:

> Federal legislation dealing with other phases of national or interstate industry than transportation was on important occasions found to invade the powers reserved to the states. State laws were frequently found invalid because they impinged on the field of interstate commerce committed by the Constitution to the Federal Congress. And the due process clauses of the Fifth and Fourteenth Amendments were held to bar both state and federal governments from regulating such economic factors as prices, wages, and labor relations in businesses ‘not affected with a public interest’ (Stern 1951: 446).

> In effect, the early Supreme Court used the US constitution’s symmetry to fight a two front battle against local regulators. On the one hand, the Court discouraged state-based regulations that might hinder greater (federal) market integration. On the other hand, the


\(^{27}\) For elaboration on this series of court decisions, see Coenen (2004: chapter 3). See also Ackerman (1991, 1998).
Court discouraged national (federal) regulations that might interfere with the state’s right to regulate local economic and social affairs. From the perspective of American workers and consumers, it might have seemed that constitutional symmetry only encouraged the Court to defend the worst of both possible worlds.

America’s adoption of federal economic and social regulations—its second constitutional moment, to use Ackerman’s phrase—was designed to protect workers and consumers from the growing power and influence of monopoly producers. Thus, when the Supreme Court opposed the new federal design and intervened to protect local interests, the result tended to benefit the interests of (more concentrated and mobile) capital owners, at the expense of (more diffuse and immobile) worker and consumer interests, in a logic reminiscent of Mancur Olson (1965).28

These difficulties became especially acute in the wake of the Great Depression, when President Roosevelt and the US Congress attempted to introduce a number of federal regulations that could serve as a foundation for protecting workers and consumers from the most damaging aspects of industrialization and the growing monopolization of production. But it was only after 1936 that America settled on its third regulatory response.

This response began as an attack on the most important stumbling block to President Roosevelt’s plan for political reform: the five-Justice majority on the Supreme Court. On the back of an impressive re-election victory, Roosevelt announced his intent to increase the size of the Supreme Court from nine to fifteen judges, in an attempt to overwhelm the five conservative jurists who had jettisoned earlier attempts at national regulatory reform (in

28 For example, an 1895 ruling restricted Congress from breaking up a sugar monopoly that was clearly influencing national sugar prices, as the monopoly had refined its sugar within a single state (Pennsylvania) [United States v. E. C. Knight Co., 156 U.S. 1 (1895)]. Similarly, in 1935, the court held that Congress was not allowed to regulate the sale of poultry because the regulation took effect after the chicks had already arrived within a given state (Illinois), not while they were in transit [Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)]. With respect to industrial relations, the logic was exactly the same, as Justice George Sutherland noted in an important 1936 decision: “The relation of employer and employee is a local relation...over which the federal government has no legislative control” [Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936)].
While the President was unsuccessful in this bid, the Court itself began to sing a different tune. In March of 1937, the Supreme Court upheld the National Labor Relations Act’s protections of union activity and ruled on a series of other cases which provided the legal foundation for building the President’s New Deal edifice. In each case, the four minority opinions in important pre-1936 cases (e.g. *Alton Railroad* and *Carter Coal*) were now joined by Justice Owen Roberts in a new-born majority which facilitated the spread of national (federal) regulations.

The American example illustrates the difficulty of trying to secure state-based redistribution and regulatory policies in an integrated (federal) market, even in the absence of constitutional asymmetries. In many ways, the US provides an ideal political context for state-based solutions, as its cultural and institutional biases have always leaned in the direction of state-rights. The fact that US states were trying to introduce new social models (rather than protect existing models) suggests that it should have been easier to coordinate state-based legislation in an attempt to counter the growing political influence of concentrated money and industry. Under such favorable conditions, it is noteworthy that the United States found it easier, and more efficient, to builds its redistributive edifice or Social Model (as modest as it is) at the federal level. It is this American experience that has informed functionalist theories of federalism, and their conclusion that member-states are not particularly well-equipped to pursue regulation and redistribution policies in a larger (federal) market.

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29 Historians have long argued whether the attempt to pack the court actually triggered the change in Court opinion. Whatever the trigger, the Court’s transformation was unmistakable.

Conclusion

At the most general level, it is possible to find important parallels between early attempts at market integration in both Europe and the US. In both contexts, state interests were protected by a number of institutional guarantees, while member-states were tempted to cooperate by promises of economic growth and expanded trade. In both cases, the tensions derived from this regulatory division of labor become more evident as integration deepened. In the US, this deepening occurred in the wake of industrialization and the concomitant centralization of capital. In Europe, this deepening is associated with the expansion of trade into the services sector.

There are, of course, very important differences separating the United States from Europe, and I do not wish to belittle these. The point of the comparison is to show that federal-like structures can impose an economic and political logic of their own which is difficult to overcome. This logic has influenced conventional theories of economic federalism, which hold that redistribution and regulatory support are best delivered at the super-state (federal) level, while local (member-state) governments are best situated to encourage economic development. Europe’s division of regulatory authority flies in the face of this logic: it delegates distributive responsibilities to the lower (member-state) authorities, while encouraging economic growth at the European level.

The American example shows us how difficult it is to defend state-based social models in a larger economic union. I should hasten to point out that this is not an argument about the level, or content, of social policy (for that matter, we can simply assume that Americans prefer a lower level of social protection); rather it is an argument about where the authority and execution of that policy should lie to be effective. Throughout the 19th century the U.S. experimented with a number of state-based approaches for securing an American-style Social Model, but each of these attempts succumbed to the pressures of competition. To
economic historians of the era, it appeared that “Federalism, in conjunction with national markets, meant that the states were part of the economies of competition” (Graebner 1977: 332).

To overcome these economies of competition, Americans found it necessary to focus their most ambitious redistributive and regulatory measures at the federal level. State-based attempts were under constant threat of a race to the bottom and the pressures of mobile factors of production. It is these practical experiences that have informed federalist thinking about the efficient division of regulatory authority across different levels of government.

Alas, these lessons seem to go unheeded in the European experiment. In stark contrast to the conventional federalist wisdom, European member states continue to believe that it is possible to maintain unique social models while pushing for greater economic and market integration. The result is Europe’s “non-discriminatory” approach to market integration, where member-states are required to introduce and enforce statutory protections and regulations that do not challenge the fundamental right to free establishment and trade.

This approach, as illustrated by the cases above, forces states with strong corporatist frameworks to set these aside and to rely instead on national parliaments to secure worker rights/benefits. This path cuts across a defining characteristic of corporatist-based social models. In effect, Northern Europe’s labor market partners are being asked to shelve their extra-parliamentary (market-based) powers, and join the pluralist race for influence within national parliaments.

In order to protect its sundry social models, Europe needs to set out on a new course. In light of the above comparison, it is possible to imagine three paths forward. The first of these, as advocated by Scharpf, is to introduce the sort of constitutional symmetry necessary to protect national models of worker and social protection. As James Caporoso (2000: 28) shows, the existence of explicit constitutional provisions (such as Article 119 on equal pay
for equal work) can provide the Court with some of the tools it needs to reverse the institutional dynamics of the Council of Ministers and to play a more progressive role in protecting the interests of European workers and consumers (see also Caporaso and Tarrow, 2007). But I fear that this strategy, by itself, will be insufficient to counteract the strong economic forces at work, as exemplified by American history. Any new political arrangement for securing Europe’s sundry social models needs to be more aware of the difficulty of anchoring redistributive authority at the national (member-state) level.

The second path was blazed by the American experience. This path leads to the realization that Europe needs to build a European-wide social edifice or accept more significant restraints on intra-European trade and the freedom of establishment. This Europeanization of social policy could be more ambitious and encompassing than the American attempt, but it will need to overcome enormous (and familiar) political barriers to accomplish this. For these reasons, and in the absence of a more threatening economic crisis, this path probably leads to a political dead end.

The third path still waits to be cleared. This path recognizes the functionalist logic of America’s federalist experience to argue for a new type of constitutional asymmetry—one that provides Europe’s social partners and the ECJ with the legal leverage it needs to overcome the logic of large, supra-state, markets. If the needs of Europe’s diverse social models were explicitly prioritized over the demands of market integration, Europe could enjoy the sort of constitutional leeway that is necessary to experiment with, and develop, new modes of market integration that are better equipped to facilitate and protect nation-based (or local) social models.

In light of America’s federal experience, the hope of protecting Europe’s diverse social models does not lie along Europe’s current path, or in trying to secure a constitutional symmetry between market and social demands. In order to defend Europe’s various social
models, it would seem that Europe needs to secure a new type of constitutional asymmetry—one that is explicitly designed to protect the interests of European workers and consumers, in the face of Europe’s market integration.

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