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Response to Matthew W. Finkin and Catherine Barnard

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Professor Matthew Finkin provides an inventory of options in international employment regulation, follows this with an examination of international cross-fertilization of domestic social policy before and after the New Deal, and concludes with a comparison of employment law in Minnesota and Indiana to illustrate policy variation among midwestern U.S. states.¹ He asserts that it is unlikely that international regulatory efforts will consist of any more than international lending criteria that encourage “‘upward sedimentation’ of better, if not best, practices in developing economies,”² basing his opinion on the global hegemony of corporations and the post-World War II trend toward insularity.

Finkin notes two approaches to the analysis of corporate power in the era of rapidly globalizing capital: The first claims that regnant capitalism stands astride states and “hollows out” their regulatory capacities, and the second, that there is no inherent necessity that globalization will result in this tendency.³ The truth, of course, is somewhere in the middle. In the absence of international regulation, corporations are free to search out the lowest-cost labor and resources in the least-regulated economies of the world, subject to the constraints of transportation costs and availability of other infrastructure. Indeed, if individual firms do not take advantage of low-cost production options, economic models predict that other firms will do so and will drive them out of the market. International capital thus requires a legal framework—some “rules of the game”—to free firms from the “race to the bottom,”⁴ in the process reducing costs (including wages) below what is environmentally and politically sustainable in the long run. In the past, welfare states’ provision of labor standards, education, environmental regulations, health care, and business and human-level insurance in recessions solved this type of market failure at the national level, and in so doing had fostered income and productivity growth.⁵

The same logic applies to the international economy, but most economists do not acknowledge the need for similar institutions and policy to resolve market failures at an international or global level.⁶ However, with increasingly global production, trade, and finance, nation states are constrained by falling tax revenues (as firms relocate to

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1. See Matthew W. Finkin, *International Governance and Domestic Convergence in Labor Law as Seen from the American Midwest*, 76 IND. L.J. 143 (2001).

2. *Id.* at 148.

3. *Id.*

4. For a general discussion of this “race to the bottom” theory, see Finkin, *supra* note 1, at 148; Catherine Barnard, *The Transnational Regulation of Employment Law: Evolution of the EU* 6, 36-50 (July 5, 2000) (unpublished manuscript, on file with the *Indiana Law Journal*).

5. See generally Samuel Bowles & Herbert Gintis, *Productivity-Enhancing Egalitarian Policies*, 139 INT’LLAB. REV. 559 (1995) (arguing that egalitarian policies can be productivity enhancing if considered to be incentive compatible).

6. See Wolfgang H. Reinicke, *Integrating the World Economy: Economics Is Not Enough*, in *OVERCOMING INDIFFERENCE: TEN KEY CHALLENGES IN TODAY’S CHANGING WORLD* 224-28 (Klaus Schwab ed., 1995).

countries with lower taxes and cheaper labor) and by falling currencies (when finance capital relocates to avoid devaluation, bringing about greater devaluation in the process). As these massive market failures and the mechanisms for their prevention become clear, institutions parallel to those of welfare states may be used to bolster and insure the international macroeconomy.

But welfare states vary a great deal and represent varying types of compromise among Finkin's "regnant capitalists" and the different class, social, and demographic groupings within nations. This brings me to a related question regarding the relatively bipolar labor standards of Indiana versus Minnesota, cited by Finkin as evidence of insularity among citizens of different states within the United States. At first glance these states may look similar, aside from differences in educational attainment, but the race/ethnicity data Finkin provides go no deeper than to note the percentage of these states' populations that are "white."⁷ Within this "whiteness," I would venture to suggest that there are large differences in the cultural background of the populations of these two states and that the Scandinavian heritage of Minnesotans has been a significant factor in the development of higher labor standards in that state's laws.

Indiana, by contrast, not only does not have the decidedly Scandinavian heritage, but was settled to a large extent by migrants from Southern states, such as the Carolinas, Virginia, Kentucky, and Tennessee, some of which were slave states prior to the Civil War.⁸ It is likely that Indiana's and Minnesota's populations did not value the notion of their own "whiteness" (in stark contrast to slaves'/former slaves' "blackness") in the same ways, and that the types of ethnic and racial tensions generated in each state were therefore quite different.⁹ Hence, when it comes to intracountry comparisons, it may prove fruitful to compare solutions to public-goods problems and other market failures, with an eye to the relationships among racial and ethnic groups, and to compare national-level solutions while keeping in mind the disenfranchisement of demographic groups within the nation. Perhaps U.S. policymakers' insularity has something to do with the fact that U.S. industries historically negotiated with a labor force unique in the degree to which it was riven by racial strains and the history of exclusion and nonenforcement of citizens' rights, with acute implications for labor solidarity.

Proceeding to Professor Catherine Barnard's paper, a richly-textured history of the social charter of the European Union, I would like to focus on the preliminary question framing her analysis, that of whether there is or will be "social dumping" within the European Monetary Union ("EMU") if regulations are not undertaken to prevent it.¹⁰ Barnard mentions the "constraints imposed by the convergence criteria and EMU" and the argument that "Member States have lost their ability independently to regulate interest rates and exchange rates."¹¹ But she does not return to the question whether this will severely constrain nations' ability to pursue social policy, focusing instead on

7. See Finkin, *supra* note 1, at 158, 159 tbl.1.

8. See ELEANOR MYERS, A MIGRATION STUDY OF THE THIRTY-TWO STATES AND FOUR ORGANIZED TERRITORIES COMPRISING THE UNITED STATES IN 1850, at 20, 22 (1977); EMMA LOU THORNBROUGH, INDIANA IN THE CIVIL WAR ERA: 1850-1880, at 540 (1965).

9. See DAVID R. ROEDIGER, *Whiteness and Ethnicity in the History of 'White Ethnics' in the United States*, in TOWARD THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY 181 (1994).

10. *Id.* at 36-37.

11. *Id.* at 40.

evidence for and against firms' migration to areas with cheaper labor, ultimately dismissing this debate as unresolved.¹² In failing to deal with the implications of currency union on states' social policy, Barnard weakens the argument for a social charter and focuses on the issue of citizen rights only insofar as they legitimize the EMU.¹³ When barriers interfering with the free flow of money, goods, and services are dismantled, states lose a degree of autonomy and, with it, their capacity to incur debt to pursue social goals, a phenomenon that warrants much more attention than it has received up to now.¹⁴ Increased currency flows and speculation have produced this effect in various countries around the world—witness the severe constricting effects on national budgets of currency devaluations in Mexico, Malaysia, Korea, Thailand, and Indonesia.¹⁵

As an economist, my main criticism of this paper is that it overly emphasizes economic factors. Barnard's discussion of the efficiencies of federalism-decentralization or centralism suggests that the equilibrium solution to this problem will be determined by efficiencies of decisionmaking and economies of scale, but much more is at stake here than efficiency.

The proposed fusion of market-making and market-correcting that Barnard describes is compatible with this economic lens. The trend Barnard notes of the resolution of the public-good/externality problem of employee training to increase firms' "competitiveness," while improving efficiency within an industry or occupation, falls in the category of corporate cost cutting, with governments or the European Union providing the training previously supplied by firms, as in the model of internal labor markets described by Professor Kenneth Dau-Schmidt.¹⁶

This type of analysis ignores a large part of the question whether transnational regulation is necessary and justifiable, which has to do with workers' rights to act as citizens—rather than as factors of production—in the face of supernational forces of supply and demand; for example, with the extent to which an international politico-legal system can buffer workers from global economic forces, allowing people the option to remain in a place and a community, and to resist economic pressure to follow roving capital. People are not as capable or willing to vote with their feet as is necessary for federalism to operate most efficiently, and Barnard briefly notes that there are "major costs (including linguistic and cultural costs) to the mobility of citizens between Member States."¹⁷ But the tools offered by mainstream economics will not prove helpful in upholding citizens' rights. Mainstream economics frames citizens, who need time and continuity in one place to participate in politics and community, only as workers and consumers.

12. *Id.* at 45-50.

13. *Id.* at 60-63.

14. See MICHAEL STEWART, *THE AGE OF INTERDEPENDENCE: ECONOMIC POLICY IN A SHRINKING WORLD* 49-50 (1984).

15. See Laura D'Andrea Tyson, *The Global Meltdown: What To Do Next*, BUS. WK., Oct. 26, 1998, at 22.

16. See Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 5-8 (2001).

17. Barnard, *supra* note 4, at 14.

