Articles

A Viking We Will Go! Neo-Corporatism and Social Europe

Eric Engle[*]

Abstract

In *Viking* and *Laval*, the European Court of Justice (ECJ) adjudicated the rights of labor and capital mobility under E.U. law. Both cases strengthen the single European market through economic liberalization to generate greater prosperity for all Europeans as part of the process of European economic and political integration. Labor and capital mobility create greater prosperity for all through more rational market exchanges. Free trade is good for goods and is even better for labor. A liberalized and fully mobilized labor market results in more productivity and greater wealth in the European polity, as well as interdependence, and thereby deeper integration resulting in greater understanding and less conflict. The decisions, wrongly criticized by some as "bad for workers" are justified by the fact that they will benefit workers in Eastern Europe, consumers in Western Europe, and the Community as a whole by deepening integration. A key challenge for the European Union is to economically anchor and deepen the political restructuring of Eastern Europe by enabling the natural labor and capital movements which an open marketplace generates. Europe does this not with the failed neo-liberal model which has ravaged the wealth of the United States and squandered it in illusory booms based on consumer borrowing and deficit spending to fund war for oil. Rather, Europe is developing a neo-corporatist social model. This article uses the *Viking* and *Laval* cases as examples of this development.

A. Introduction

In the cases of *Viking*[1] and *Laval*,[2] the European Court of Justice (ECJ) adjudicated the rights of labor and capital mobility under E.U. law. There is a vast literature on *Viking* and *Laval*.[3]

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[1] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti,* ECJ (2007), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0438:EN:HTML.

[2] Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, ECJ (2007).

[3] See, *e.g.*, THE LAVAL AND VIKING CASES: FREEDOM OF SERVICES AND ESTABLISHMENT V. INDUSTRIAL CONFLICT IN THE EUROPEAN ECONOMIC AREA AND RUSSIA (Roger Blanpain and Andrzej Marian Swiatkowski, eds., 2009).

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After all, the stakes – people's livelihoods and social peace – are very high.[4] *Viking* and *Laval* have been considered from a variety of perspectives. One viewpoint is globalization: *Viking* and *Laval* are just instances of the globalization, the deterritorialization of states and markets[5] transforming and modernizing the transnational economy.[6] Another focal point has been the conflict between the highly compensated workers in Western Europe and the less protected workers of the East.[7] And, inevitably, any discussion of the cases comes back to the interpretation and application of the general principle of proportionality in E.U. law.[8]

Viking and *Laval* are rightly considered together because they determine parallel issues and represent the future of political economy in the E.U. In *Viking*, the legitimacy of capital outsourcing within Europe was questioned and upheld: the E.U. guaranteed the right of capital to relocate anywhere in the Union. *Laval* is the opposite side of the same coin: in-sourcing of labor. Yet, the result is similar: the E.U. guaranteed economic mobility, this time of labor. The results of the cases are coherent with each other in this light. Both cases aim at the same goal: the strengthening of the single European market through economic liberalization aiming to generate greater prosperity for all Europeans as part of the process of European economic and political integration.[9]

Viking and *Laval* might appear to favor the wealthy and to disfavor the poor from a classical left of center labor aristocracy perspective.[10] That view, however, is erroneous. Labor and capital mobility alike create greater prosperity for all through more rational market exchanges. Free trade is good for goods[11] and is even better for labor; a liberalized

[4] "[C]ollective autonomy has a civilizing influence on labor relations. Denying collective autonomy means encouraging social violence." Patrick Chaumette, *Reflagging A Vessel In The European Market and Dealing With Transnational Collective Disputes: ITF & Finnish Seamen's Union V. Viking Line*, 15 OCEAN & COASTAL L.J. 1, 19-20 (2010).

[5] Guy Mundlak, *De-Territorializing Labor Law*, 3 LAW & ETHICS HUM. RTS. 188 (2009).

[6] Inge Govaer, *The Future Direction Of The E.U. Internal Market: On Vested Values And Fashionable Modernism*, 16 COLUM. J. EUR. L. 67 (2009/2010).

[7] See, *e.g.*, Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union -- the Laval and Viking Cases before the ECJ*, 2 GLJ, 125- 161 (2008).

[8] A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 INDUS. L.J. 126 (2008).

[9] For a corporatist view of Laval, see: Alban Davesne, *The Laval Case and the Future of Labour Relations in Sweden*, CAHIERS EUROPEEN (2009), available at: http://*www.cee.sciences-po.fr/fr/publications/les-cahiers-europeens/doc/81/raw*

[10] See, *e.g.*, Susan George, *Predictable Poverty: The Inevitable Legacy of a Neo-Liberal Europe*, Transnational Institute (2008), available at: http://www.tni.org/article/predictable-poverty-inevitable-legacy-neo-liberal-europe.

[11] See: Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 461 (Edwin Cannan ed., 1937) (trade as positive sum in cases of absolute advantage); David Ricardo, ON THE PRINCIPLES OF POLITICAL

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and fully mobilized labor market results in more productivity and greater wealth in the European polity as well as creating interdependence and thereby deeper integration resulting in greater understanding and less conflict. The *apparently* incompatible decisions, wrongly criticized by some as "bad for workers"[12] and as "social dumping"[13], are justified by the fact they will benefit workers in Eastern Europe, consumers in Western Europe, and the E.U. as a whole by deepening integration.

Laval and *Viking* are not merely mirrors of each other in a theoretical juridical sense. They are also mirrors of structural economic reality. The reality is that there is a capital surplus in Western Europe and a labor surplus in Eastern Europe. The demographics are just as clear. Western Europe is aging. Eastern Europe is young. Western Europe needs workers. Eastern Europe has them. The key challenge for the European Union is to economically anchor and deepen the political restructuring of Eastern Europe by enabling the natural labor and capital movements which an open marketplace generates. Europe does this not with the failed neo-liberal model which has ravaged the wealth of the United States and squandered it in illusory booms based on consumer borrowing and deficit spending. Rather, Europe is developing a neo-corporatist social model.[14] This article uses the *Viking* and *Laval* cases as foils with which to highlight that model.

B. The Political Framework

I. Social Democracy

The (neo-)corporatist overtones of European social policy are evident in the texts of the Union itself.[15] The ECJ underscored these treaty commitments in *Viking*[16] and *Laval*.[17] *Laval* made it clear:

ECONOMY AND TAXATION (3d ed.) 132-34 (1821), reprinted in THE WORKS AND CORRESPONDENCE OF DAVID RICARDO, 132-34 (Piero Sraffa ed., 1953) (trade as positive sum even in cases of comparative advantage).

[12] Ronnie Eklund argues that the cases reach contradictory results; such *appears* to be true, however the cases are compatible from a teleological perspective as exposed here. See Ronnie Eklund, *A Swedish Perspective On Laval,* 29 COMP. LAB. L. & POL'Y J. 551, 565-570 (2008). This fact, that the characterization of rights is - to some extent - malleable is seen in the anti-social dumping literature.

[13] See, *e.g.*, Uladzislau Belavusau, *The Case Of Laval In The Context Of The Post-Enlargement Ec Law Development*, 9 German L.J. 2279 (2008).

[14] See: European Commission, *Is Social Europe Fit for Globalisation?A study on the social impact of globalisation in the European Union*, Center for European Policy Issues (2007), available at: http://ec.europa.eu/employment_social/social_situation/docs/simglobe_fin_rep.pdf.

[15] See, *e.g.*, TFEU Articles 4(2)(b), (c); 5(3); 9; 14 *inter alia.*

[16] *Viking*, note 1, para. 78.

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> "the Community has … not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include … improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour."[18]

That is, the objective of the Union is to create prosperity for all with a labor-management partnership which further deepens the economic and political integration of the European Union.[19]

With this in mind, rather than seeing *Viking* and *Laval* in terms of the existence and extent of the right to strike,[20] we should look at them as decisions about European social democracy.[21] The proper question when looking at the cases is not "was this a decision for labor or capital?" Instead, one should look to the *effects* of *Viking* and *Laval* and their implications for the European body corporate and politic.

Viking and *Laval* are controversial because they are highly political, and touch one of the most fundamental of people's concerns – their jobs. American authors sometimes argue that these decisions are evidence of a "recalibration" of European social policy[22] in a

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[17] *Laval*, note 2, para. 104.

[18] *Id.*, para. 105.

[19] European Parliament resolution of 20 May 2010 on the contribution of the Cohesion policy to the achievement of Lisbon and the EU2020 objectives (2010), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0191.

[20] The Court speaks of the right to collectively organize labor, though in the cases it was in fact not merely labor organization but the collective actions of labor which were litigated. I use "right to strike" as a convenient short-cut for the right to collectively organize labor.

[21] For a critical take on social democracy in Europe see generally John Monks, *European Court of Justice (ECJ) and Social Europe: A Divorce based on Irreconcilable Differences?*, 4 SOCIAL EUROPE JOURNAL 22-26 (2009), available at: http://www.social-europe.eu/2009/04/european-court-of-justice-ecj-and-social-europe-a-divorce-based-on-irreconcilable-differences.

[22] While unlikely a conscious attempt to avoid the pitfalls of American Lochnerism, in the last fifteen years the EC has reflexively taken a number of steps to recalibrate the relationship between social and economic rights, even as the Community continues to expand and consolidate its program of market integration. A central question looming over EC legal discourse is whether these developments have satisfactorily rebalanced the dynamics of Community law to accord proper deference to both social and economic considerations. In short, has the European Community experienced its own version of a "switch in time"? Ian H. Eliasoph, *A "Switch In Time" for the European Community? Lochner Discourse and the Recalibration of Economic and Social Rights in Europe,* 14 COLUM. J. EUR. L. 467, 493 (2008).

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European version of rigid anti-labor Lochnerism.[23] That is not the case. European neo-corporatism is not merely a simplistic *laissez-faire* robber baron version of capitalism gone wild, riding acrest (neo-)formalism. Yes, *Viking* and *Laval* indicate a reorientation of the means the European Union uses to attain the ends of economic and political integration in order to obtain the good life for all Europeans and ultimately the world. These decisions reflect a change of course which the European ship of state *can* take as a result of the new geographic realities the Union faces, which it *should* take because of the better economic climate the world has enjoyed since the end of the Cold War, and indeed, which it *must* take due to demographics. Rather than harbingers of class-war, a permanent underclass, or some other dystopian apocalyptic American nightmare, these cases follow the teleology of the Union as a whole: the attainment of the good life for *all* Europeans.

II. Corporatism

A key problem and opportunity facing Europe since the end of the Cold War has been the economic restructuring of Eastern Europe and its integration into the European Union.[24] I argue that *Viking*, *Laval,* and related cases, represent the rise of neo-corporatism.[25] This position is presented below.

Historically, first generation corporatism was predicated on neo-mercantilist closed national markets - autarchic national economies.[26] Corporatism was often (not always) linked to small-c catholicism,[27] and thus concepts such as 'subsidiarity'.[28] Subsidiarity is the idea that local rule is best whenever possible, that the central authority must act only when no other better regional or local means could be found.[29] Corporatism sought to end labor-capital strife by creating a more secure economic system for all.[30]

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[23] *Id.*

[24] *See, e.g.,* Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union -- the Laval and Viking Cases before the ECJ*, 2 GLJ, 125, 125- 161 (2008).

[25] See, generally, Schäfer, Armin and Simone Leiber, *The double voluntarism in EU social dialogue and employment policy. In: Kröger, Sandra (ed.): What we have learnt: Advances, pitfalls and remaining questions in OMC research*, 13 *EUROPEAN INTEGRATION ONLINE PAPERS (EIOP)* (2009), available at: http://eiop.or.at/eiop/texte/2009-009a.htm.

[26] See, *e.g.*, HOWARD J. WIARDA, CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT "ISM" 59 (1997).

[27] For a critical view of first generation corporatism outlining its linkage to fascism, see Thomas J. DiLorenzo, *Economic Fascism*, 44 THE FREEMAN 6 (1994), available at: http://www.thefreemanonline.org/columns/economic-fascism/#.

[28] JOSEPH MARTIN PALACIOS, THE CATHOLIC SOCIAL IMAGINATION: ACTIVISM AND THE JUST SOCIETY IN MEXICO AND THE UNITED STATES 44 (2007).

[29] The intellectual origins of the subsidiarity doctrine are found in Catholic social thought. There, too, we see theories of humanizing relations between labor and capital. See, Pope Leo XIII, *Rerum Novarum* (1891), available

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Neo-corporatism should be distinguished from traditional corporatism.[31] Neo-corporatists recognize that we now live in an interdependent world, and that interdependence creates conditions of peace and prosperity for all.[32] Thus, neo-corporatists, unlike first generation corporatists, do not seek to build national economies or consider themselves as functioning within national economies.[33] Autarchic national economies have not existed for decades because autarchic national economies are fare worse than networked, interdependent, specialized trading economies. The increased productivity resulting from trade and specialization explain why economic interdependence leads to prosperity. Further, economic interdependence discourages war.[34] Europe has been linked together in trade, making all Europeans wealthier and happier, for 60 years. As a consequence of interdependence through trade, Europe no longer suffers from recurrent wars for market share and territory. Territory has become irrelevant due to changes in production and because market share is no longer linked to a national (monopolistic and territorial) economic order.

What, then, is the role of neo-corporatism in the European construction? First generation corporatism[35] was defensive, inward looking, focused on a domestic autarchic national economy and trapped in a world of zero-sum conflict. In short, first generation corporatism was too influenced by international relations realism. Of course, the hopeful idea of the early corporatists, to end class conflict, to create a more prosperous and happier world for all, was the correct teleology, a good goal. The end of class war is social peace. However, the early corporatists' intellectual framework was too limited by the borders of the then-

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at: http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html

[30] Christian Joerges, in *Sozialstaatlichkeit In Europe? A Conflict-of-Laws Approach to the Law of the EU and The Proceduralisation of Constitutionalisation*, 10 German L.J. 335 (2009) traces out the history of corporatist thinking in a succinct yet incisive and accessible way.

[31] For critique of neo-corporatism as a resolution to the problems of labor-capital and Member States-E.U. governance, see Blanca P. Ananiadis, *Globalization, Welfare and 'Social' Partnership*, 3 GLOBAL SOCIAL POLICY 213-233 (2003), available at: http://gsp.sagepub.com/cgi/content/abstract/3/2/213.

[32] For an overview of transnational influences shaping neocorporatism, see LABOR AND AN INTEGRATED EUROPE, 83, 87 (Lloyd Ulman, Barry J. Eichengreen, William T. Dickens, (eds.), 1993).

[33] On neocorporatism in the context of Eastern Europe, see Dorothee Bohle and Béla Greskovits, *Neoliberalism, Embedded Neoliberalism, and Neocorporatism: Paths towards Transnational Capitalism in Central-Eastern Europe*, WEST EUROPEAN POLITICS (2007), available at: http://econ.core.hu/doc/seminar/Bohle-Greskovits_WEP_Final.doc.

[34] For a hard-nosed look at trade's influence on war see: Dale C. Copeland, *Economic Interdependence and War: A Theory of Trade Expectations*, 20 INTERNATIONAL SECURITY (1996).

[35] One of the defining documents of corporatism was Pope Pius XI, *Quadragesimo Anno* (1931), available at: http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

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current economic and political realities, to prevail. Thus, liberalism triumphantly emerged from the Second World War and presented a view of social democracy[36] different than corporatism. However, the liberal-pluralist view of social democracy ultimately broke down into neo-liberalism, the social Darwinist world where the winner takes all. Europe rightly rejected neo-liberalism's dark promise of a glorious future for the winners, and forget about the losers. Because of the post-war success of liberalism, the myth of the inevitability of class conflict continued for at least a few decades, in part due to Marxism and in part reactions against Marxism.

Class conflict *is* a reality, but is not inevitable. In the post-war world, the liberal vision of free movement of goods, later of capital, and finally of labor triumphed. Emergent neo-liberalism argued for the idea of total capital mobility with no labor guarantees.[37] And it was justified by the prosperity that freer trade and greater labor mobility led to. However, at least the U.S. variant of neo-liberalism sacrificed entirely the idea of basic security and guarantees for the first world working class – to say nothing of the third world industrial workers who are the productive base of the first world service economies. Neo-liberalism robbed first world workers of their pensions and sacrificed third world workers to oil wars, sweatshops and the sorts of inhumanities which first world labor movements seem to think we are all beyond. We are not. Sweatshops or starvation are still the reality on most of the planet. Labor exploitation in the Third world by the first world remains a reality and only if that reality can be overcome through labor mobility, fair trade and green economics can backlash like 9/11 be avoided in the future - and that is true whether we are looking at backlash as neo-fascism, national bolshevism, or religious fundamentalism - all of which are mobilizing ideologies aiming to resist exploitation. If you want less terrorism, work to end poverty.

III. Neo-liberalism

Neo-liberalism, ascendant since 1980 in North America and since 1990 in parts of Europe, appeared to be the death knell of social democracy. However, neo-liberalism created a world of corruption characterized by pension-looting and fraud, and which marked the maladministration by the Bush regime. The result? Poverty where there could have been prosperity and hatred where there could have been friendship. In sum, neo-liberalism *provokes* backlash whether neo-fascist, national-bolshevist, or fundamentalist. Neo-

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[36] "[T]he economic constitution of the EC was the conscious expression of the post-war institutional compromise of 'embedded liberalism.' The compromise entailed the view that the wealth generating effects stemming from reductions or eliminations of trade barriers between modern welfare states served to enhance the redistributive capabilities and functions of such member states vis-à-vis the states' own citizens. Thus would emerge a 'virtuous cycle' in which international free trade benefited the regulated welfare state and the welfare state, by protecting the losers of a free trade regime, made transnational free trade politically palatable." Eliasoph (note 22), 479.

[37] *Id.,* 479.

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corporatism seeks to avoid such backlash by integrating the desperate into a world which has generally used and abused them.

IV. "Social Dumping"?

Rather than seeing the *Viking* and *Laval* cases as examples of social dumping[38] - the unfair use of lower labor conditions abroad to undermine labor conditions at home – we should understand that they are decisions about creating better conditions of labor for *all* European workers,[39] creating greater wealth by applying the natural free market forces of supply and demand to the labor market.

V. Labor and Capital Mobility are Means to Attain the End of Social Europe

Aspects of the reorientation of Europe toward a neo-corporatist model seem neo-liberal but are not. *Laval* and Rüffert[40] alike appear to condemn the national model of Northern European social democracy centered on local consensus, labor-government cooperation, and the Member State's social security system.[41] The apparent subversion of these strong social democracy models generates uncertainty and feelings of fear,[42] leading to accusations of neo-liberalism. In reality these transformations are decidedly *not* neo-liberal, rather they are neo-corporatist. They seek to generate a European rather than a national social model, which will become more and more democratic as the European polity matures.

One key aspect of this neo-corporatism is the place of social rights such as the right to shelter, the right to food, and the right to work.[43] Individualist neo-liberalism has

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[38] *Id.*, 471.

[39] See, *e.g.*, Renewed social agenda: Opportunities, access and solidarity in 21st century Europe, COM, 10 (2008), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0412:FIN:EN:PDF.

[40] Dirk Rüffert, in his capacity as liquidator of the assets of Case C-346/06*Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen*, (2006), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0346:EN:HTML.

[41] Davies (note 8), 145.

[42] *Id.*, 148: "there is a deep uncertainty within the EU about the role of the trade union movement. As the ECJ itself recognized, the Community has a social agenda as well as an economic one."

[43] Eliasoph (note 22), 502-503: "[T]he Court has developed the principles of Community citizenship and intra-Community solidarity to require host states to extend national benefits to migrants from other Member States. While this is likely to be a very consequential development, the ECJ's recent social rights activism is perhaps best demonstrated by the controversial decision of Mangold, which has been described as "the most startling employment law decision of that Court for the past thirty years."

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constantly rejected such claims as "rights" because they are supposedly non-justiciable and affirmative/substantive rather than negative/procedural[44] The Anglo-American individualism which rejects collective/social rights is the minority position within the E.U. – and the one that has been shown to have failed so badly in the U.S. as even a cursory examination of statistics on poverty, imprisonment, and other quality of life indicators reveals. The neo-corporatist objective is not merely to form a social Europe; it is to form a single market, a united polity wherein the worker in any European country enjoys a good quality of life with adequate housing, shelter, and health care so that they can be as productive as possible. A *European* social democracy.[45] Social rights assure economic productivity - and are a very productive investment. Free public education and socialized medicine make labor more productive. Such programs enabled the U.S.S.R. under Lenin and Stalin, and Maoist China, to double national average life expectancy in one generation despite war, waste and corruption. Social rights are a profitable investment because healthy, educated workers are more productive. In short, social democracy is also in the interests of capitalists.

Of course, wage differentials are one of the economic facts driving worker mobility within Europe. That is the law of the marketplace, the law of supply and demand, playing out in labor markets as it does in markets for capital and goods. Allowing labor markets to clear freely, as the *Viking* and *Laval* cases do, creates a more prosperous Europe for all Europeans. Furthermore, labor mobility increases the tax base. Labor movements generate tax revenues because of value-added taxes which are the main form of state financing in Europe; social security pay-ins are also augmented by permitting labor movements. The simple reality is that the tax structure of value-added taxes and pay-as-you-earn social security systems means that migrant labor is more than self-financing: which is one of the reasons there has been such labor mobility from North Africa and South Asia during the

[44] See, *e.g.*, Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COL. H.R. L. REV. 262 (2007), available at: http://www3.law.columbia.edu/hrlr/hrlr_journal/38.2/Christiansen.pdf.

[45] Article 151 TFEU (ex Article 136 ECT) states in its entirety: "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action."

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last forty years: it has benefited the Third World and Europe alike. Now it is Eastern Europe's turn.

C. The Legal Struggles

We have reviewed at political economy in detail because the political goals justify and explain the *Viking* and *Laval* decisions. We could not understand those decisions otherwise. When we examine the rules set out in *Viking* and *Laval* we note two things: First, the rules that are developed and used are clear enough to indicate the direction of European social policy. Second, the rules are arrived at in an operational method determined by the realities of the world as it is and the objectives to be attained within that world.[46]

I. The Facts

Viking and *Laval* were cases of deep divisive conflicts between labor and management – the sort of conflicts a rational economic policy seeks to avoid and resolve so that the business of production can go forward to the benefit of all.

In *Viking* the Finnish ship *Rosella* was operating at a loss due to competition from Estonian vessels on the Tallinn-Helsinki route. Finnish crews were better paid than Estonian crews and thus Estonian shipping had a competitive advantage. Consequently, Viking wished to register the *Rosella* as an Estonian or Norwegian ship[47] to become more competitive.

The facts in *Laval* were similar. Migrant Latvian workers were to perform construction on a school in Vaxholm, Sweden. However, the Swedish labor union blockaded the Vaxholm building site, picketing the site and blocking workers and vehicles from entering.[48] Sympathy strikes from other labor unions followed.[49] As a result, the Latvian workers went home and did not return.[50] Sympathy strikes and boycotts spread throughout Sweden;

[46] Naturally, much of the scholarship about *Viking* and *Laval* centers on the interpretation and application of the general principle of proportionality in E.U. law. See, *e.g.*, Alicia Hinarejos, *Laval and Viking: The Right to Collective Action Versus Eu Fundamental Freedoms*, 8 HUM. RTS. L. REV. 714 (2008).

[47] *Viking* (note 1), para. 9.

[48] *Laval* (note 2), para. 34.

[49] *Id.,* para. 37.

[50] *Id*.

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ultimately the town of Vaxholm terminated the construction contract and Baltic went bankrupt.[51]

In *Viking* and *Laval*, the action taken was very effective. The *Rosella* was not reflagged; Laval's Swedish subsidiary ultimately became insolvent.[52] In both cases, labor union activity resulted in lost productivity and raised the specter of violence. Neo-corporatism argues that lost productivity and low standards of living for Eastern Europe are not the way forward.

Having laid out the facts we now turn our attention to legal analysis. First, we examine the black letter doctrinal issues which are clearly resolved, however artificially. Then we examine the aspects of the cases which were determined by realist legal reasoning. We conclude that the legal reasoning in the cases can only be understood correctly in terms of political economy which verifies the hypothesis that these cases are evidence of neo-corporatist thinking at the ECJ.[53]

II. Formal Doctrinal Analysis ("Black Letter Law")

The tension between formalism and legal realism plays out quietly but clearly in both cases. First we analyze the black letter neo-formalist rules, then the apparent manipulations through legal realism.

1. Jurisdiction

In black letter terms, the courts could have, but did not, divest itself of decisional authority, either via the doctrine of subsidiarity or by Article 153 TFEU (ex Article 137(5) ECT). Article 153(5) facially divests the application of Article 153 (which implements Article 151 on social Europe (ex Article 136)) to strikes and lock-outs. The court rejected the argument[54] that it lacked jurisdiction despite the plain meaning argument based on the treaty text and the doctrine of subsidiarity. This is the first of several examples where the court has acted like policy-oriented legal realists.

[51] *Id.*, para. 38.

[52] Davies (note 8), 136-137.

[53] Davies (note 8) provides the best "pro-labor" perspective on the cases.

[54] *Id.,* 130-131.

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2. Flags Of Convenience

One of the black letter rules reached can be disposed with quickly and clearly – flags of convenience. Europe is unifying and creating a single market with uniform standards. Thus, there is to be no flag of convenience within Europe. Each European Member State's vessels are and should be recognized as legitimate by all Member States. Article 1(1) of Council Regulation (EEC) No 4055/86[55] provides:

> "Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply 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."

Although the International Transport Workers' Federation has long opposed the use of flags of convenience,[56] the ECJ could not see the *Viking* case as one of a "flag of convenience".

The remaining issues, however, were not settled by a simple black letter literalist interpretation of existing E.U. legislation.

3. The Right to Collective (Industrial) Action

It is unsurprising that the court found the existence of a right to collective action. It identified the existence of this right not only in E.U. law but also in the European Social Charter (referenced in Article 151 TFEU, ex Article 136 ECT), the ILO Convention No 87 (9/VII/1948), the Community Charter of the Fundamental Social Rights of Workers (9/X/1989) and the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1).[57]

However, in keeping with the contemporary view, the right to take collective action is not an absolute right and cannot be understood in isolation. Rather, the fundamental right must be understood in context of other fundamental rights including "Community law and national law and practices."[58] Thus, as is typical for contemporary law, the court found the existence of a fundamental right, the right to collective labor, and then pointed out that

[55] 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.

[56] Davies (note 8), 133.

[57] Laval (note 2), para. 90.

[58] *Laval* (note 2), para. 91; *Viking* (note 1), para. 44.

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this fundamental right does not exist in isolation but must be contextualized by competing (fundamental) rights such as the right of establishment and the free movement of labor. The court determines the extent and limitations of these conflicting rights in the way designed to attain maximum production and well-being for *Europe* as a whole, not for workers, nor management. It is in that sense that these decisions could be seen as neo-corporatist. In my opinion, that is the best way to understand both decisions and resolve their apparent incompatibility.

4. The Right of Establishment

Just as labor unions have a right to collective action guaranteed by the EC Treaty, so too do enterprises have a fundamental right to establish themselves anywhere in the territory of the E.U.[59] In black letter terms, the court in *Viking* found that the right of establishment includes the right to delocalize.[60]

The more interesting question is whether the labor union, exercising its right to strike, could thereby interfere with the right of the enterprise to establish itself anywhere in the E.U. The court determined the two abstract rights could conflict. To resolve that conflict the court had to determine whether the right in fact applied to the labor union. This raised the issues of whether a labor union is a private person or an institution of state power, and whether the prohibition of hindrances of the right to establishment applies only to institutions of state power or also to private actors.

5. Horizontal Direct Effect of the EC Treaty to Labor Unions

The labor union was *not* taken as an instance of state power even though *de facto* it functioned as such. The functionalist policy arguments appear to have been defeated by the formalist literal argument. However, the provisions prohibiting the E.U. from interfering with the right to establishment[61] were nonetheless held to apply not only to the Member States and the organs of the Member States but also to private persons. That is, the prohibition against interfering with the right to establishment is directly effective – a case of horizontal direct (negative) effect, even though the literal text of the treaty does not seem to directly address private persons. This tension of formalism versus teleology is

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[59] *Laval* (note 2), para. 101.

[60] *Viking* (note 1), para. 69.

[61] Davies (note 8), 126: "Treaty provisions can have horizontal direct effect".

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characteristic of contemporary legal thought.[62] The court justified its determination of the direct applicability of the prohibition of interference with the right to establishment by a results-orient effects analysis:[63] the effect of allowing private actors, like labor unions, to interfere with the right of establishment would frustrate the purpose of the EC Treaty.[64]

Fundamental rights were found to exist in both *Viking* and *Laval* and were found to be in conflict. The two norms in conflict were the right to establishment and the right to strike. To determine their relationship, the court used the proportionality test.[65]

6. Proportionality: Restrictions on the right of establishment

Having found the existence of a right to strike and a right to establishment, the court then found that the right to take collective action can interfere with the right to establishment (Art. 165 TFEU, ex Article 49 ECT).[66] So the court had to determine how those two fundamental rights interact - and it did so using the general principle of proportionality.

In *Laval* the court ruled that a restriction on fundamental freedoms such as the right of establishment "is warranted only if [1] it pursues a legitimate objective compatible with the Treaty [legitimate ends] and is justified by [2] overriding reasons of public interest [justifiable mean]; if that is the case, [3] it must be suitable for securing the attainment of the objective which it pursues and [4] not go beyond what is necessary in order to attain it".[67]

Just as proportionality was used to determine the relationship of the competing fundamental rights in *Laval*, so too was it used in *Viking.* The court in *Viking* reiterated the test for proportionality:

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[62] See, Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL (David Trubek and Alvaro Santos, eds., 2006), available at: http://duncankennedy.net/documents/Photo%20articles/Three%20Globalizations%20of%20Law%20and%20Legal%20Thought.pdf.

[63] *Viking* (note 1), para 57: "the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy".

[64] Davies (note 8), 136.

[65] *Viking* (note 1), para. 46.

[66] Laval (note 2), para. 99.

[67] *Id.,* para. 101.

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> "[A] restriction on freedom of establishment can be accepted only if [1] it pursues a legitimate aim compatible with the Treaty and [2] is justified by overriding reasons of public interest. But even if that were the case, it would [3] still have to be suitable for securing the attainment of the objective pursued and [4] must not go beyond what is necessary in order to attain it"[68]

One view is that the proportionality analysis goes not just to the determination of the relationship of the competing fundamental rights but also to the extent of the labor union's activity with respect to management's actions. To that view, labor unions have the fundamental right to strike, but must exercise that right proportionally to the threat they face.[69]

Critics have argued that the *Viking* decision disfavors the labor movement because effective industrial action provokes economic dislocation.[70] That is true. It is also exactly why industrial action is treated with caution – disruptions of production flows ultimately disfavor workers.

7. Conclusion: Prohibition of blockades

The court concludes from its examination of the competing interests - the fundamental right to collective industrial action versus the fundamental right to establishment - that blockades of work-sites were a violation of the EC Treaty because of their interference with the right of establishment.[71] This result can best be explained and justified by the neo-corporatist analysis of Social Europe presented in Part I. It seems neo-liberal, but is not; trade unions are no state organ, but still enjoy fundamental rights, rights which can serve to stem neo-liberal excesses.

We now turn our attention from those aspects of the decisions which were plausible within a black-letter literalist formal analysis to those aspects of the decision which can only be comprehended by a teleological analysis going beyond text to context, history and structure to consider the finalities of law and policy goals.[72]

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[68] *Id.,* para. 75.

[69] Davies (note 8), 126.

[70] *Id.*, 141-143.

[71] *Laval* (note 2), para. 111.

[72] Joachim Rückert, *Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law,* 11 JURIDICA INTERNATIONAL 55-57 (2006), available at: http://www.juridicainternational.eu/index/2006/vol-xi/friedrich-carl-von-savigny-the-legal-method-and-the-modernity-of-law.

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III. Legal Realist Doctrinal Maneuvers

1. Illusory Distinctions Justified by Teleology/Policy

Much of the court's decision can be criticized as being not "law" but "policy". That is, just as parts of the decision were clear "black letter law" neo-formalism, other parts were just as clearly "manipulative" neo-realism. The play of this tension can really only be explained in terms of political-economy, the idea that the decisions will generate peace and prosperity, universally desired goals. The "manipulative" (or, manipulated?) distinctions follow.

a) Law/Not Law

In terms of legal theory the interesting points about *Viking* and *Laval* are the permutations of legal terms intended to reach the desired result. Much of the case could be described as skirting around the issue of private action versus state action, *i.e.* direct horizontal effect of fundamental rights to individuals *inter-se*. The public-private distinction has been long described as illusory.[73] Similarly, at times, the court treats public law provisions as 'not laws'.[74] These manipulations seem driven not by detached neutral *ex-post* judgment but by activist intense *ex-ante* planning which looks to the result of the judicial decision and then rationalizes that decision. The error, if any, is whether the results desired are in fact desirable and are attained – not the epistemology, at least not in a contemporary view of judicial activism which has failed to sharply distinguish between judging, which is always *ex-post* from legislating, which is *ex-ante*.

b) The Public/Private Distinction

Similarly, the court could have treated the labor unions as "public" and "regulatory" or as "private" "market participants". The court ignored a functionalist analysis of the role of labor unions and did not see the labor unions as part of the public regulatory structure – even though in Germany and Sweden unions do in fact serve as quasi-public institutions. The court regarded the labor unions as "private" and thus unable to invoke public policy in order to maintain that collective action complies with E.U. law.[75] However, even though

[73] Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

[74] For example "legislative measure such as the Landesvergabegesetz, which does not itself fix any minimum rates of pay, [instead relying on voluntary compliance sanctioned with threat of fine for non-cooperation] cannot be considered to be a law, within the meaning of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, which fixed a minimum rate of pay, as provided in Article 3(1)(c) of that directive. Case C-346/06, Dirk Rüffert, in his capacity as liquidator of the assets of *Objekt und Bauregie GmbH & Co. KG*, para. 24.

[75] *Laval* (note 2), para. 84.

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the union could not invoke public policy on its own behalf, prohibitions directed to the public authority were applied to the unions for "limiting application of the prohibitions [of interference with the right to establishment] laid down by these articles to acts of a public authority would risk creating inequality in its application"[76] That is, the court presents us with inconsistent formal manipulations of terminology. Those terminological manipulations and inconsistencies can be explained as results-oriented determinations. They can only be justified by policy goals.

c) Are rights held by individuals, corporations or unincorporated associations?

Like the formal "public/private" distinction, the questions whether the fundamental right applies directly (a) to natural as well as (b) legal persons in their dealings *inter-se* can also best be understood in terms of the finalities of law and policy.

Under the EC Treaty, the freedom of establishment is a fundamental right.[77] The provisions of the Treaty guaranteeing it are directly applicable not only to individuals but also to companies.[78] Thus, lurking in the background is the question, again answerable only by a results-oriented effects analysis,[79] whether the fundamental right applies only to natural persons (human beings), to artificial persons (*e.g.* public limited companies), or also even to unincorporated association (trade unions). This is one more level where the court is free to develop the law more or less as it sees fit absent an explicit regulation by the E.U. The court found the rights directly effective and applicable to private parties *inter-se* (horizontal direct effect) because to find otherwise would essentially frustrate the purpose of the EC Treaty goal to create a single integrated European market.

2. Unconvincing Formal Arguments Based on (Policy) Contingency Rather than Deductive Necessity

Just as the public/private, law/not law distinctions were argued unconvincingly (because the distinction itself is either overly rigid or unprincipled), so too were unconvincing arguments made that wage protections via sectoral arrangements do not protect workers

[76] *Viking* (note 1), para. 34.

[77] Art. 46, EC Treaty, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E046:EN:HTML.

[78] *Viking* (note 1), para. 68.

[79] *Id.*, para 57.

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or their right to organize and negotiate collectively[80] -- apparently because they protect only some workers. That looks terrible for labor at first glance. However, what this amounts to is the breaking of *national* sectoral arrangements in order to create a *continental* labor market wherein the well being of workers in western Europe remains at least as high as it is, and the well being of workers in Eastern Europe rises. That is, the compromise benefits Western European consumers and businesses (more goods at lower prices) just as it benefits Eastern European workers (higher wages and more goods) resulting in an integrated continental labor and capital market, a win-win situation generated through increased productivity. Thus, transformations of industrial and labor relations throughout Europe are necessary – however, they are along neo-corporatist and not neo-liberal lines, fortunately.

Another legal realist move the court makes concerns the text and intent of Art. 49 TFEU, ex Art. 43 ECT. Art. 49 TFEU prohibits interference with the right to establishment and applies to trade unions[81] - even though the text of the Treaty only addressed the Member States - because:

> "the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down"[82]

While this argument is accepted today, it was controversial when first made.

3. Judicial neutrality in service of the dominant class.[83]

The conclusion from these cases is perhaps already inevitable in the facts of social power. Decisions and actions of those who hold state power serve the interests of those who hold state power in a sort of self-justifying and self-reproducing cycle.[84] The (neo-) Marxist critique is that Judicial "neutrality" is an illusion and that the illusion serves the interests of the dominant class[85] - law as the mask of power. That is true, however the objective of

[80] Case C-346/06, Dirk Rüffert, in his capacity as liquidator of the assets of *Objekt und Bauregie GmbH & Co. KG*, para. 38-41.

[81] *Viking* (note 1), para. 55.

[82] *Id.*, para. 58.

[83] Eliasoph (note 22), 467, 477.

[84] See, generally, Pierre Bourdieu, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE (1990), with Jean-Claude Passeron (in French: LA REPRODUCTION. ÉLÉMENTS POUR UNE THÉORIE DU SYSTÈME D'ENSEIGNEMENT (1970).

[85] Eliasoph (note 22), 477.

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neo-corporatism is to create a society in which all persons have common interests such that the benefit of any individual or class always works to the benefit of the entire society. One can question and critique whether such is possible, but the alternatives - neo-liberalism or Marxism - are vicious and have failed. Can capitalism create neo-corporatist structures that bring all social sectors, even those in the Third World, into the sphere of ever greater prosperity for all? That is the challenge globalization faces.

D. Alternative Perspectives (Other Literature)

This paper presented a neo-corporatist perspective on *Viking* and *Laval.* Other perspectives have been presented in the vast literature on these cases. For example, Aravind R. Ganesh criticizes the decisions as being bad for governance of labor and management relations due to a "total lack of transparancy" in adjudication, *i.e.* an impoverished conception of transparancy.[86] Daniel Komo and Charlotte Villiers similarly argue that "the failure to establish at European level a coherent policy that draws on the inherent links between corporate law, labour law and corporate social responsibility puts at risk existing arrangements for codetermination and employee participation" [87] Just as alternative perspectives are possible, so are other solutions. In a similar vein to Joerges comprehensive and cogent (historical) analysis and conflict of laws approach, Elina Paunio regards the problems of E.U. governance from the perspective of legal certainty, *i.e.* of formal rationality (predictability) and substantive justification. She directs our attention particularly to Aulis Aarnio, Peczenik and Habermas. Thereto I note: by creating procedures which are both formally predictive and substantively justifiable we reach a form of legal certainty which is neither teleologically blind nor fully unpredictable.[88] Also complementary to Joerges conflict of laws approach, Katherine Apps considers the issue from the perspective of private law liabilities (*i.e.* in tort, perhaps also contract) under E.U. for violations of the E.C. Treaty by labor.[89] Another proposed innovative solution to the problems of balancing social rights of labor against market rights of capital is to answer the questions with an E.U. Civil Code.[90] There is no shortage of issues and answers.

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[86] Aravind R. Ganesh , *Appointing Foxes To Guard Henhouses: The European Posted Worker's Directive,* 15 COLUM. J. EUR. L. 123, 142 (Winter 2008/2009).

[87] Daniel Komo, Charlotte Villiers, *Are Trends In European Company Law Threatening Industrial Democracy?* 34 E.L. REV. 175-204 (2009).

[88] Elina Paunio, *Beyond Predictability - Reflections on Legal Certainty and the Discourse Theory of Law in The EU Legal Order*, 10 GERMAN L.J. (2009).

[89] Katherine Apps, *Damages Claims Against Trade Unions After Viking And Laval*, 34 E.L. REV. 141-154 (2009).

[90] Christoph U. Schmid, *A European Civil Code As A Building Block For A European Social Model?* 35 E.L. Rev. 103-111 (2010).

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E. Conclusion: The Rules of the New Game

Corporatism originated in a world where labor and capital movements were limited and restricted. Liberalism succeeded in creating a world where free movement of goods is the rule, tariffs the exception, and even could liberalize capital movements. But it was the neo-corporatist European Union which was the first transnational trading bloc to take the next step forward to the free movement of workers. *Viking* and *Laval* are not about neo-liberal union busting in a quest to enrich the wealthiest 1% of the population. Rather, the objective is to obtain flexible, rapid movements of labor and capital so that market exchanges clear as quickly as possible and at minimal costs in order to generate the greatest possible wealth for all. Under the new rules of the game, firms can de-localize capital and in-source labor. Stability is maintained through the social security mechanisms funded via the self-financing value added tax and pay-as-you-earn style contributions. The objective of *Viking* and *Laval* was not to end any and all union protest or negotiation. Rather, it was to restrain violent actions and to limit sector-wide/transnational collective actions.[91] Non-violent collective actions are not barred, nor are actions which do not dislocate the entire economy because highly disruptive collective action generates a vicious downward spiral leading to a lower standard of living for all. After *Laval* it is clear: labor unions can strike but cannot blockade or otherwise physically interfere with the targets of their protests.

Neo-corporatism is very different from old school corporatism. Old school corporatism saw social stability and certainty as key to well being in a world divided into hostile, warring camps. Thankfully, we no longer live in a world of autarchic national economies locked in a mutual death struggle of destructive zero-sum competition for resources and market share. Today, we live in an intensively networked world of open borders and disaggregated sovereignty. Neo-corporatism and classical corporatism alike recognize that the basis of all human rights is ultimately economic – that the level of human rights protection is dependent on the level of social wealth. Just as a vicious race to the bottom is possible and to be avoided, so also is a virtuous spiral of greater productivity through protection of basic rights possible and to be sought after. The decisions of the ECJ are steered by the pole star of greater worker protection through wealth creation.

Neo-corporatism and corporatism alike seek to share prosperity between formerly conflicting classes. However, the early corporatists were limited to a nationalist-mercantilist perspective which was inevitably geared toward wars for market share and thus doomed to failure. Neo-corporatism in contrast is unbounded, globalist, and seeks to create stability and prosperity not for any one nation state but for the entire global society. That is the guiding vision of social Europe – and the real message of *Viking* and *Laval*.

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[91] *Laval* (note 2), para. 111.

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