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## **CENTER FOR INTERNATIONAL & COMPARATIVE LAW OCCASIONAL PAPERS**

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# Comparative Law as a Bridge Between the Nation-State and the Global Economy

## An Essay for Herbert Bernstein\*

Richard M. Buxbaum\*\*

### I. INTRODUCTION: COMPARATIVE LAW IN A TRANSNATIONAL ECONOMY

What should, what might be the role of comparative law as the regionalization and globalization of many segments of formerly national economies proceed? I hope to propound and weave together three strands of my approach to that question.<sup>1</sup> The first has to do with the fact that while organized economic life increasingly is transnational, much law bearing on the economy still is national law. I say “much law” but the second strand, not surprisingly, has to do with the recognition that much national law, as indeed it has begun to do, must move up one step. This second strand—and second step—concerns the increasing federalization or regionalization of previously national law, as well as the inevitable and perhaps even legitimate lag of that process behind the regionalization and, at least in its financial aspects, the globalization of organized economic life. The third strand bears on the characterization of that part of the law—be it national, regional, or even global—that focuses on the economy; that is, it bears on the slippery notion of “economic law”, an ill-defined concept straddling private law and public law. For reasons that arise from that exploration, I also propose a mission for comparative law that I label the “coordination” mission, which in my view promises a

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\* Fourth Annual Herbert L. Bernstein Memorial Lecture in Comparative Law, Duke University School of Law, Sept. 27, 2005.

\*\* Jackson H. Ralston Professor of International Law, Boalt Hall, University of California Berkeley School of Law. Note from Author: An expanded and slightly footnoted version of the Fourth Herbert Bernstein Memorial Lecture given at Duke on September 27, 2005. With some exceptions, this version has not been updated to take account of more recent developments. I thank Ralf Michaels for his inestimable help in this conversion, even if I did not always follow his advice.

1. Right away I violate one of Herbert Bernstein’s central injunctions: “Innumerable comparatists have felt the urge to marvel over...our discipline. My plea...is: Resist [the urge]. What we need much more than such soul-searching is hard-nosed comparative work on clearly defined specific institutions or subject-matter areas.” Book Review, 40 Am. J. Comp. L. 261 (1992). On the other hand, even he yielded to the temptation once, if only in the form of a review essay: Herbert Bernstein, “Rechtsstile und Rechtshonoratioren,” 34 *RebelsZ* 443 (1970).

more fruitful role for comparative law in this contemporaneous context than do earlier missions as understood by the first generations of modern comparative-law scholars.

Given both Herbert Bernstein's and my experiences, the legal regimes I am comparing are, not surprisingly, the US and European Community/Union regimes. That, however, only becomes relevant as we move to the second-mentioned strand, that of the possible federalization or regionalization of national law, since it is there that the differences between the two "federal" (in quotation marks) hierarchies—those of the United States and those of the European Union—become relevant. Let me foreshadow the significance of this difference to the not-yet-defined coordination mission of comparative law: what is important here is that the horizontal coordination of national law within the EC is more important as a mission than is the shrinking need for a similar coordination mission among the states of the American Union.

## II. PRIVATE LAW AND ECONOMIC LAW IN THE EUROPEAN COMMUNITY

All of this suggests that my presentation will be more about the European than the American scene. Therefore, let me begin with some brief comments about the situation in the European Community (EC),<sup>2</sup> because there one can see the third strand more clearly; namely, how the struggles over the definition of "economic law" matter more there than how they matter—though they do—in the United States. Specifically, the relatively recent European focus on "private law" (as distinguished from "public law") arose and has flourished because the heavily top-down harmonization of laws considered essential to the establishment of a genuine Internal Common Market had to move into other spheres than governmental regulation of business—and that of course problematized the distinction between the two sub-disciplines of law, as the very concept of "economic law," straddling them, suggests.

### *A. The Focus on European Private Law*

The origins and motivations of the current focus on a European core of private law are mixed and hard to disentangle. Whether the relatively new energy pulsing on the private-law side stems from a defensive strategy against the unsystematic incursions of EC directives and regulations into the national legal regimes, whether it stems from the related effort of the European Court of Justice to provide a modicum of systematic order

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2. I refer to "European Community" rather than "European Union" because my focus on economic law suggests the traditional pre-Maastricht division of powers rather than those new federal powers added by the additional pillars associated with the "European Union."

to its interpretative jurisprudence, or whether it stems from the responses of legal scholarship to the various Decisions and Action Plans of the organs of the EC,<sup>3</sup> beginning with the 1989 Decision of the European Parliament to support research into the harmonization of the member states' private law and culminating for now in the Commission's Action Program of 2004:<sup>4</sup> whatever its origins, the result is clear. The decades-long monopoly of public-law scholarship in the European Community is over. European Private Law has been on the agenda for over a decade now, and has developed a dynamic of its own that transcends the various reasons for its original appearance.

The mission of the proponents of this expansion or incursion also has varied and evolved. At one end of the spectrum lie efforts to integrate those new federal regulations that adhere to the classic codes like barnacles without being integrated into them.<sup>5</sup> The notorious Products Liability Directive is the classic example.<sup>6</sup> At the other end lie the ambitious efforts to develop, if not an entire European Civil Code, at least major elements of one. The so-called Lando Principles of European Contract Law is an oft-cited example of this ambition.<sup>7</sup> A different mission is that of developing principles of adjudication that permit a greater integration of varying national code provisions through interpretative techniques, an approach

3. Good examples of this literature include *An Academic Green Paper on European Contract Law* (Stefan Grundmann & Jules Stuyck eds., 2002) and *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Stefan Vogenauer & Stephen Weatherill eds., 2006).

4. Commission, "European contract law and the revision of the acquis: the way forward," COM (2004) 651 final, October 11, 2004; Communication of July 11, 2001, COM (2001) final, OJ C255 of Sep 13, 2001; Action Plan of [Feb. 2] 2003, COM (2003) final, OJ C 63, of 15 March 2003.

5. This criticism is a major theme of Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (2003).

6. *Supra* n. 2. The various directives pertaining to consumer protection, in particular the Unfair Contract Terms Directive (No. 93/13 EEC, in OJ 1993 L95/29), also have given rise to system-breach criticism—in this case further conflated with disagreement over the values of "weaker-party" protection. As to the former see, e.g., Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law Aldershot 1997*, 19ff, esp. 22; to the latter, Peter Hommelhoff, *Verbraucherschutz im System des deutschen und europäischen Privatrecht* (Heidelberg 1996) is instructive.

7. *The Principles of European Contract Law* (Ole Lando & John Beale, eds., Dordrecht 1995). An important if contested additional program is that launched through the Commission's Action Plan of 2003 for a "Common Frame of Reference" in the field of contract law that would identify the commonalities of national systemic and linguistic usage as an aid to courts, legislators, and the private bar. See most recently the Commission's Communication of October 11, 2004, "European Contract Law and the Revision of the Acquis: The Way Forward," COM (2004) 651 final; and the sympathetic explanation of this project in "Uniform Terminology for European Contract Law (Gianmaria Ajani & Martin Ebers, eds., Karlsruhe 2005).

found already in 1991 in the Symposium of the Hamburg Max-Planck-Institute on “Alternatives to Legislative Unification of Law.”<sup>8</sup>

### *B. The Challenge from Economic Law*

For some time in the 1990s, the effort to position this unification of private law in a contemporary version of the *usus modernus pandectarum*, an effort associated above all with Reinhard Zimmermann and the *Zeitschrift für europäisches Privatrecht* he co-founded, claimed much attention.<sup>9</sup> It was always challenged, however, by another and older movement that insists on the centrality of economic law as the legitimate and perhaps (though this may be only my view) limiting basis of any unification of private law the European Community should strive for. This focus, which hews more closely to the still largely economic functions and legitimation of the EC, even in this day of the new pillars of defense, security, environment, justice, etc., is not a narrow one. Rather, it is what its proponents in the 1970s titled it: a challenge to the very concept of private law.<sup>10</sup> And this tension, the challenge modern economic law poses for private law, is my subject today.<sup>11</sup>

Like Herbert Bernstein, it is a European subject; but, also like him, it illuminates the historic tension between the (apparently) resolutely un-systematic Anglo-American conception of law and the (apparently) resolutely systematic conception of law associated with the Civilian legal families. This tension is apparent in the very label “economic law.”<sup>12</sup> It is unfamiliar to the US academy, and the very notion that it is a challenge to private law perplexes us, if only because the label “private law” itself is not a significant feature of US legal discourse.<sup>13</sup> No teacher of Corporation Law, for example, would worry whether it was a private-law subject and therefore consider omitting treatment of civil litigation under Rule 10b5; and definitely we would not be concerned about the contours of such an

8. “Alternativen zur legislatorischen Rechtsvereinheitlichung,” 55 *RabelsZ* 215 (1992).

9. He describes this approach in Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford 2001).

10. Heinz-Dieter Assmann, Gert Brüggemeier, Dieter Hart & Christian Joerges, *Wirtschaftsrecht als Kritik des Privatrechts* (1980).

11. As it was for a previous Bernstein Lecture: Christian Joerges, “The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline,” 14 *Duke J. of Comp. & Int’l L.* 149 (2004).

12. A digression: In my first year of teaching in 1961, the Italian scholar, Rodolfo de Nova, was a visitor at Berkeley. He told me of having met Chief Justice Charles Evans Hughes in the mid-1920s, while a young visiting scholar at Yale. In response to Hughes’ gracious question of what he was doing, de Nova told him he was studying the US legal system. Hughes responded in turn and apparently without irony: “My goodness; I didn’t realize we had a system.”

13. For the “public-private law” distinction, see n. 40 below.

amorphous and pervasive notion as “economic law” in the context of deciding where to place its components in our curricular divisions. If anything, we have the opposite problem: the dominance of the economic analysis of law across the curriculum is so advanced that, like Voltaire’s Monsieur Jordain, we all speak economic law without knowing it.<sup>14</sup>

Given this situation, namely, that legislating and ruling about matters concerning the economy are a far larger part of the legislative and judicial tasks of the past century than they were during the *laissez-faire* era,<sup>15</sup> and given the further fact that the competencies delegated to the federal level of the European Union are precisely these economic matters, it seems to me that the role of Comparative Law in moving any legal agenda along deserves a new look. The notion that economic law is a challenge to private law has a largely European or Civilian flavor about it. But the notion that economic law is a challenge to traditional understandings about the competencies of units of a federal system is as much an American notion as it is a European one. After all, it was Justice, then Professor, Felix Frankfurter who said of the Dormant Commerce Clause that so far as the states were concerned, in the absence of federal action *laissez-faire* was the only permissible regulator.<sup>16</sup>

### III. THE VERTICAL DIVISION OF POWERS

This brings me to the second strand of this presentation; namely, to a comparative (i.e., EC-US) look at the classic division of powers. Any argument that national law needs to remain relevant at a time when the transnational economy in facilitative terms increasingly demands, and in regulatory or redistributive terms increasingly should be required, to accept a transnational legal order has to begin there. Why national law nonetheless should remain relevant, however, will be the final element of this discussion.

#### *A. Coordination—the Third Function of Comparative Law*

The term I have elsewhere used to highlight this function of comparative law is that of “coordination.”<sup>17</sup> It joins, and supplements, the two

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14. Another digression: The “it” in that sentence bears two meanings. Many of us, myself included, often speak of economic law in this analytical sense without knowing what we are talking about.

15. Its proportional importance during the age of mercantilism is another matter.

16. Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (Chapel Hill 1937) 65f.

17. Richard M. Buxbaum, “Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft,” 60 *RabelsZ* 201 (1996). The similarity of that title with the present one is no coincidence, even though the present paper expands the inquiry into dimensions

traditional functions of comparative law as these have been accepted in academic discourse for now almost two centuries; namely, the instrumental function of identifying “other” law that might be considered, via appropriate adaptation,<sup>18</sup> for one’s own legal order and the visionary or legal-cultural function of showing the path towards a universal legal order. The historian of comparative law might associate Mittermaier with the former,<sup>19</sup> Wigmore<sup>20</sup> and Kohler<sup>21</sup> with the latter function.

Coordination implies a horizontal function; specifically, that of the adaptation of a state’s laws to those of another formally equal state. It suggests a cooperation of equals within a system that is either hierarchical in the sense of federal-state structures or networked as a web of formally equal sovereigns in a structure without a more or less authoritative center. In comparative terms, this issue of coordination of course is much more salient for the European Community/Union than for the United States. Despite the 10<sup>th</sup> Amendment and the sputtering states’ rights discourse, the legal orders of our states exist at the sufferance of the national legal order as authoritatively interpreted, in constitutional terms, by our Supreme Court. “Puppy federalism” is Edward Rubin’s term for this arrangement,<sup>22</sup> and an apt term it is, given the powerful preemptive role of the Supremacy Clause, especially in economic law. What little horizontally developed uniformity our states have seemed to achieve voluntarily through this coordination function was only voluntary in the sense that they acceded to the requirements of the market in preference to what otherwise would surely have been imposed as national law; the Uniform Laws headed by the Uniform Commercial Code and the Model Laws headed by the Model Business Corporation

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not considered more than a decade ago.

18. These transplantation problems of course are a favorite subject of comparatists, but they are not for today.

19. The *Kritische Zeitschrift fuer Rechtswissenschaft und Gesetzgebung des Auslandes*, which Mittermaier co-founded in 1829, in its title [Critical Journal for Legal Science and Foreign Legislation] and in his foreword to the first issue, “Ueber den Zweck dieser Zeitschrift” [Concerning the Purpose of this Journal], id. at 1, suggests his—and this—“practical” approach. A recent appreciation of this approach is that of Heinz Mohnhaupt, “Rechtsvergleichung in Mittermaiers ‘Zeitschrift fuer Rechtswissenschaft und Gesetzgebung des Auslandes,’” in *Juristische Zeitschriften* (Michael Stolleis, ed., Frankfurt 1999) 282.

20. On Wigmore’s similar aims, see Annelise Riles, “Encountering Amateurism,” in *Rethinking the Masters of Comparative Law* (Annelise Riles, ed., Oxford 2001) 94.

21. Josef Kohler, who wrote on almost everything, is noted for his aim at universality and the evolution of a world law through the study of comparative law. See, e.g., his *Das Recht als Kulturerscheinung* (Würzburg 1885). For an appreciation see, e.g., Günter Spendel, *Josef Kohler. Bild eines Universaljuristen* (Heidelberg 1983).

22. Edward L. Rubin, “Puppy Federalism and the Blessings of America”, 574 *Annals of Am. Acad. Of Pol. & Soc. Sci.* 37 (2001).



Act illustrate the point.<sup>23</sup> To put it another way: what some states enacted as obstacles to the inevitable and inevitably legitimate corporate form of economic activity may not have been removable via the Privileges and Immunities Clause but were rendered irrelevant by way of the Commerce Clause.<sup>24</sup> The European Community is not yet at that stage, and its Supremacy Clause has not yet been lowered to room height. The concept of limited delegated powers still is taken relatively seriously, and one of the principal reasons for that constraint bears directly on the coordination concept I am proposing as a function of comparative law. That reason is the so-called “democratic deficit,”<sup>25</sup> the fact that the one body directly elected by the peoples of the member states, the European Parliament, to this day is not yet a parliament in the classic sense. Despite the increase in its role of co-legislator, the legislative initiative of the EC remains with the Commission, an organ whose members are appointed by the executive branches of the national governments represented in the EC’s Council of Ministers.

In this framework of significantly attenuated lines of democratic legitimation via the aggregate of national electorates, in which at least two tiers of government lie between any given national polity and the EU’s principal legislative bodies, unification or harmonization of law from the top down suffers two potentially negative consequences. In comparative terms, only one of these also weighs on top-down unification via national legislation in the US, and even that one weighs more heavily on the European law-making mission than it does on ours. Let me describe these so that these abstract concepts gain some context.

#### *B. The Remaining Relevance of National Law*

The first consequence, the one common to both regions in kind if not in degree, concerns the benefits of experimentation and flexibility. The near consensus on the benefits of regulatory competition,<sup>26</sup> or at least on using the states as laboratories, is applied today to challenge much national or centralized legislation. In the United States, that is more of an academic than a practical argument, in part for the reasons just

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23. The uniformity dictated by the quasi-constitutionalized Internal Affairs Doctrine in corporation law, leading to the squatter sovereignty of Delaware, is a variant on this theme.

24. See Richard M. Buxbaum and Klaus J. Hopt, *Legal Harmonization and the Business Enterprise* (Berlin 1988) 36ff.

25. Works on this subject are legion; for a recent entrant providing the variations on this theme, see *Transnational Governance and Constitutionalism* (Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds., Oxford 2004).

26. For a respectful critical view of its role for legal scholarship, see Eva-Maria Kiesinger, *Wettbewerb der Privatrechtsordnung im Europäischen Binnenmarkt* (Tübingen 2002).

mentioned. The essential uniformity of US economic law, based on the essential unity of the US economy, has narrowed the field of application in which that desideratum has much purchase;<sup>27</sup> and, to repeat Frankfurter's axiom, that competition in any event can only be a race for the bottom in a non-pejorative sense, that is, it can only be a race to provide market-supporting facilitative law.

The European Union situation does vary in degree if not in kind from that obtaining in the United States. The EC member states' laws, reflecting its member states' less complete economic unity, evidence a higher degree of differentiation. Regulatory variation—not only regulatory competition—will have more bite there, and, given the less rigorous application of the EU version of the Dormant Commerce Clause, be less controllable. In this situation, the attraction of top-down unification, demanded now both by the market and the more regulation-oriented member states, will be harder to resist.<sup>28</sup> As a result, a somewhat peculiar situation will arise, indeed already has arisen. Market pressures push for positive central legislation, but that is a less desirable solution than the solution the proponents of regulatory competition envisage. Even for those, like myself, who are less convinced of the unalloyed benefits of this beneficent version of the race for the bottom, there is a concern with some of the more practical consequences of top-down unification in the European context. The legislative process is clumsier than in the United States, the formal structure of directives with their need for national adoption and concretization paradoxically leaves significant room for resistance at the national level, and the flexibility needed for adaptation to changed circumstances is less than optimal.<sup>29</sup>

The second consequence of top-down unification or harmonization, the already mentioned democratic deficit, is unique to the EU, and may be the more significant. The coordination of lawmaking among sovereign states of equal formal status, and with an identical need to adapt to the realities of an economic system that more and more tran-

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27. Justice Brandeis' famous comment in dissent in *New State Ice Co. v. Liebmann*, 285 US 262 (1932) is less regnant today. Consider the battles California had to fight to gain some autonomy over regulation of automobile emission standards.

28. Whether the battle over control of the Delaware phenomenon of mobile corporations, provoked by the European Court of Justice's use of the Treaty's Establishment Clause in the *Centros*, *Überseering*, and *Inspire Art* cases is an invigoration of a type of Dormant Commerce Clause jurisprudence or only the beginning of a new round of centralized regulation permitting only a limited range of variation, or of both, is not yet determinable. See Richard M. Buxbaum, "Private International Law and Regulatory Competition in Comparative Perspective," *RabelsZ* (forthcoming 2009).

29. Buxbaum & Hopt, *supra* n. 24 at 242f.

scends their particular boundaries, offers a better chance of eliminating this politically volatile deficit than does top-down harmonization. It also provides a further benefit; namely, the power inherent in such a coordinated state network to control the race to the bottom faced by states standing in isolated and non-communicative competition with one another. While that sounds like a cartel of states, and thus antithetical to the very notion of regulatory competition, it is, in terms of accommodating a “decent”<sup>30</sup> level of regulation and perhaps of redistributive policies, a virtuous cartel.

This can profitably be compared with the current effort of the political organs of the EC to achieve a similar goal by combining the principle of subsidiarity with the principle of minimum common standards. Absent minimum standards, the so-called *Cassis de Dijon* principle,<sup>31</sup> mandating full faith and credit to the laws of the home state of a legal person whose behavior is sought to be controlled, leads to the market-driven facilitative law we associate with this race to the bottom. To control this drift, the concept of minimum common standards is superimposed on the subsidiarity concept, much as the new mandatory minimum standards of the Sarbanes-Oxley Act are superimposed on state corporation law in certain sensitive fields. Here, too, however, some of the concerns just discussed remain relevant. While minimum common standards are a coarser mesh than fully centralized law-making, they, by definition, cannot avoid ossification and inflexibility over time, and of course they also still suffer some of the problems of the described democratic deficit.

To end this introduction to the coordination mission, one additional insight, blindingly obvious, nonetheless is worth making. Market pressure for bottom-up harmonization essentially is little more than pressure for uniform measures facilitative of transactions. To the extent policy disputes exist as to the outer boundaries of facilitation, the “market” solution taken in isolation only represents the net power of the winners of those debates; that is, usually, the private sector providers of the goods, services, and investments at issue, and among them the net power of the more organized participants (for example, banks

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30. I put this in quotes to avoid having to define it.

31. *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [*Cassis de Dijon*], [1979] ECR 649. The application of this mutual-recognition principle, mitigated by the mentioned possibility of uniform minimum standards, was made a keystone of Community legislative policy through *The White Paper Completing the Internal Market*, Com. (85) 310 (June 1985) and has found significant application in the free-movement-of-capital and financial-services sectors. See the brief overview in George A. Bermann, Roger J. Goebel, William J. Davey & Eleanor M. Fox, *Cases and Materials on European Union Law* (2d ed. St. Paul 2002) at 1175 f., 1186 f., 1194 f.

over merchants). Plenty of examples come to mind: the battle over shrinkwrap licenses in the failed UCC effort to create an Article 2A; the internecine battles over priorities in creditors' remedies; the battle over labor codetermination; the battles—and they are constant—over appropriate capital market legislation. Market failure, in this context, is a political standoff between the proponents of discordant policies; market success represents the lack of politically significant policy objections to facilitative norms.

#### IV. THE COORDINATION OF ECONOMIC LAWS

##### *A. The Challenges of Economic Law for Comparative Law*

Before this coordination mission, with its asserted benefits, can be meaningfully applied, its necessary attributes need to be specified, a requirement that returns us to the particular concept of economic law and its mix of facilitative and regulatory elements. Three assumptions about the addressees of economic law introduce this brief discussion. First, in the present era, the transnational economy is built upon the privately (not state) owned business firm, a firm that is hierarchically organized and plans its activities even if they have to exist within a more or less unplanned economy. Second, in the short run, trade and investment is largely, though of course not totally, concentrated at the next level above the national economy, the regional economy of blocs, rather than immediately at the fully global level. Third, regional legal regimes, preeminent in the EC, of course, with widely different levels of the vertical division of powers will exist but only partially shadow the level of regional economic integration.

Following on these assumptions, the central elements of economic law (and thus of its coordination) can be better understood. Two elements stand out. First, despite the tendency to think of the harmonization of private law, the essential core of comparative law will move more than previously towards public law.<sup>32</sup> That is in part, of course, due to the simple definitional assumption that economic law is more than private law. It also, however, is due to the fact that any single state's effort to legislate about cross-border economic matters in which other states also have a legislative interest needs to consider that legislation's prescriptive reach across its borders, which by definition means to step beyond the private-law realm since that incursion may meet other policy bases than those

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32. For a full review of the current state of that definitional problem and its contexts, see Nils Jansen & Ralf Michaels, "Private Law Beyond the State: Comparative Perceptions and Historical Observations," 71 *RabelsZ* 345 (2007).

supporting the home state's laws. And as regional legal regimes follow in the path of regional or global economic regimes, these regional law-making bodies will have to engage even more fully in these coordination efforts. Since they have no higher hierarchy to speak of, they are condemned to follow this path to "doing" comparative law if they are to engage in the process at all. Here even more than on the purely inter-state level, issues of policy analyses and of the appropriate reach of prescriptive jurisdiction will be essential.

Second, the significance of economic and other social-science elements underlying or influencing law-making in any given state increases as the substantive differences between different economic or other policy judgments of other states increase. This impels comparative law practice to be deepened and contextualized through what one might call comparative social science practice. Put another way, the cryptotypes that Rodolfo Sacco has explored so fruitfully in his study of Legal Formants concern not only the hidden forms that support legal doctrines but also the hidden forms that support the social-science or policy judgments underlying those doctrines.<sup>33</sup> The uncovering of these cryptotypes thus is inescapably a function, a social-science function, of comparative law. Its importance cannot be underestimated. At the domestic level, the various ideological, political, and economic conflicts that underlie all law-making can be left more or less unarticulated, embedded as they are in the historically contingent path of the particular polity. At the inter-state level, however, they need to be articulated—to be translated and made transparent—if transnational facilitation and regulation of economic activity and economic actors are to be successfully coordinated. A small example from the extensive debate about the contestable convergence of national capital market laws comes to mind: assumptions about the coming victory of the US model of this type of regulation<sup>34</sup>—informational transparency and adequacy in lieu of substantive regulation—rest on more or less articulated assumptions about the depth and liquidity of the American capital markets; i.e.,

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33. Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," 39 *Am. J. Comp. L.* 1, 343 (1991). For earlier insights into that issue, both connected with the institute with which Herbert Bernstein was long connected, see Andreas Heldrich, "Sozialwissenschaftliche Aspekte der Rechtsvergleichung," 34 *RabelsZ* 427 (1970); and, early in his career, Ulrich Drobniig, "Rechtsvergleichung und Rechtssociologie," 18 *RabelsZ* 295 (1953), esp. at 304.

34. An aggressive version of this argument is that of Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *Georgetown L. J.* 439 (2001), reprinted in *Convergence and Persistence in Corporate Governance* (Jeffrey Gordon and Mark Roe, eds., Cambridge 2004).

on cryptotypes.<sup>35</sup> Without clarity about the power of these cryptotypes in determining the doctrines and laws, no convergence or transplantation effort would make much sense.

*B. Don't Talk About It—Do It*

So the question is fairly posed: can the process of comparative law provide this network of states with the benefits of politically legitimate and economically responsible law-making that can meet an increasingly globalized system of economic actors—on its own terms, so to speak—while escaping these two pitfalls of lack of adaptability and lack of democratic accountability? With this question I return to Herbert Bernstein's injunction: don't talk so much about what comparative law is; start doing it. My case study, a foolhardy term for the following few remarks, of whether "doing it" is possible is a project that has been under way for over a decade now, the Trento 'Common Core' Project of European Private Law.<sup>36</sup> This project is based, in turn, on the approach the late Rudolf Schlesinger took when in the 1950s he developed the subject of comparative law in terms of its practical utility for the legal profession, judiciary, and legislature;<sup>37</sup> in other words, following the instrumental mission of the subject.<sup>38</sup> Both began at the bottom, with close study of the law on the books and the law in action in specific fields; Schlesinger's on contract law, the Trento Project on private law *tout court*. The former's approach was perhaps too microscopic; in any event, given its limited resources it essentially exhausted itself with a definitive, if too narrow, study of the formation of contracts. The Trento Project has had the resources to support a larger ambition, as its title, "The Common Core of European Private Law," suggests.

The most recent substantive study produced by the Project, Eva-Maria Kieninger's thorough report on European national law governing non-possessory security interests in moveables, provides my example.<sup>39</sup>

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35. For recent scholarship recognizing these issues in the field of corporate and capital-markets law, see John Coffee, "Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance," 102 Colum. L. Rev. 1757 (2002) and Ronald Gilson, "Globalizing Corporate Governance: Convergence of Form or Function?," 49 Am. J. Comp. L. 329 (2001).

36. For a description see Mauro Bussani & Ugo Mattei, *Making European Law: Essays on the "Common Core" Project* (Trento 2000).

37. *Formation of Contracts: A Study of the Common Core of Legal Systems* (Rudolf B. Schlesinger, gen. ed., Dobbs Ferry 1968).

38. In this he followed his bent towards the practical-analytical; but his larger mission, a reflection of his personal history, was an idealistic one closer aligned to the "universal-law" mission, if never ostentatiously trumpeted as such.

39. *Security Rights in Moveable Property in European Private Law* (E.-M. Kieninger, ed.,

First of all, it is a classic example of the awkwardness of fitting economic law into the standard private-public dichotomy.<sup>40</sup> Creditor-debtor law, including this sub-set, is a subject that only exists inside two very powerful bookends of classical public law—between the consumer protection bookend and the insolvency bookend.<sup>41</sup> In that sense, it reveals exactly the challenge and the potential success in seeing comparative law work as a work of coordination; after all, for policy reasons stemming from different national views of these bookends, the actual doctrines almost inevitably differ—will have to differ—no matter how strongly market forces seek maximum facilitative framing of these credit devices in the applicable law. Consider only the listing of the issues Kieninger identifies as representing continuing substantially divergent positions: the publicity requirement for the creation of non-possessory proprietary rights; the derogation by contract of mandatory rules of property law such as the retention of title approach to the security interest in newly manufactured goods; lease forfeiture in the event of the lessee's insolvency; the assignability of security interests and the related issue of the notification of the debtor or the public; the validity of floating charges that cover all, even after-acquired property, of the debtor; above all, perhaps, the variously mandatory or less-than-

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with the assistance of M. Graziadei, Cambridge 2004). Note that this subject is categorized as private law in traditional terms, thus implicitly questioning my offhand characterizations in the immediately preceding text.

40. This is—finally—the place at which to look at the contestable private/public law distinction in comparative terms. Early assumptions about its dichotomous nature and its variously located roots in Roman, Westphalian or 19<sup>th</sup> century soil have been discredited; see in lieu of other citations the thorough study of Martin Bullinger, *Öffentliches Recht und Privatrecht* (Stuttgart 1968). Putting aside its remaining power as a means of cartelizing the internal distribution of teaching and research chairs, it survived into the 20<sup>th</sup> century in one shorthand form: public law is that whose substantive expression either includes the state as a party or the role of state's institutions in any law's enforcement, i.e., constitutional and administrative law in the former case, civil procedure and bankruptcy law in the latter. In the United States, the only possible dichotomous classification would have to be an indirect one: if the substantive law is enforceable privately (i.e., through contractually authorized arbitration), it is private law; if not, it is public.

But that shorthand classification no longer works, for the same reason that the Civilian distinction no longer works. In the first two-thirds of the last century, the state's increasing engagement in providing social goods and curbing private power "publicized" much formerly private law and diminished the value of the Civilian distinction. In the last third, the state's increasing disengagement from both the provision of social goods and the regulation of economic life diminished the value of the American version of the distinction (almost all "public law" is arbitrable today).

41. "Classical" in the American sense—consumer protection once was non-arbitrable. It was not classical in the Civilian sense, since consumer protection did not fit within the formal definition of public law (see the preceding footnote). But consumer protection is, in both systems, a policy limit on the freedom of contract; and in that sense it will display national variation as national policy responses to the issue vary.

mandatory rules of private international law when the goods in question cross borders; and more.

Transparent communication of individual states' doctrines and underlying policies among themselves, as equals, is what the coordination mission of comparative law is about. Its advantages over top-down harmonization lie, first of all, in the inherent flexibility of the preferred approach. An example taken from the Kieninger volume: Finnish law apparently permits the secured creditor to obtain only 50% of the value of the property covered by a floating (or "enterprise") charge in the case of the debtor's insolvency—a rule that itself is a good example of how the typical conflict between institutional lenders and trade creditors arguing over the body of the commercial debtor produces ad-hoc legislative compromises. Putting aside the actual fact that the EC Council of Ministers did not wish to force a reconciliation of numerous such differences by forcing a common compromise down the throats of recalcitrant Member States,<sup>42</sup> the choice between a top-down solution and a coordinated interstate one seems to me to lie with the latter. A directive or regulation "curing" (again in quotes) one or even a series of random variations simply lays one patchwork over another, compared with the preservation of domestic-level systemic and political harmony that results when any given country is persuaded by this exercise in comparative law to coordinate its laws with its fellows through smoothing out its own lumps and bumps. Those bumps may be simply the contingent result of historical accident; they may be the remnants of local political bargains now rendered obsolete by changing circumstances, including of course the development of the common internal market itself; or they may be needed even today in the context of today's political bargains. In the last case only, a separate calculation may have to be made whether the local aberration indeed distorts internal-market conditions to an extent justifying federal intervention; but in all other cases, coordinating local responses within this network frame seems to me a far sounder way to expend scholarly and policy-making energy than to move immediately towards imposed unification. Unification may in the end be the preferred solution, but not on an *a priori* basis.

This may, of course, strike some as simply "bargaining in the shadow of the ruler," much as we have semi-coerced market-driven harmonization or unification in what otherwise seems like open and voluntary bottom-up harmonization.<sup>43</sup> That objection, however, is not at

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42. Kieninger, at 22ff.

43. The semi-coercive role of the pseudo-constitutional conflicts norm that the law of the state of incorporation governs the internal affairs of the corporation is a homely domestic ex-



all relevant if coordination of law in a system without a hierarchy is at issue, and only marginally relevant if the hierarchy is not yet omnipotent, as in the EC, rather than all-powerful as in the US. And the objection does not touch at all on the two pitfall points I have raised, those of flexibility and democratic legitimation, which the state-based coordination approach largely avoids. Within the context of the world we live in, a multi-storied economy living in a number of one-story state houses, a new look at the missions of comparative law is appropriate. Mine, I hope, is one such look that may open some new approaches to our work.

The coordination mission of comparative law I have suggested is specifically relevant to economic law and I do not know whether it can be readily applied to those fields of the law that the economic world of System graciously permits the *Lebenswelt*, the world of non-instrumental actors like families and friends, to govern.<sup>44</sup> The private-law norms of that life-world also have their overarching policy frame, even if it derives more from what once was unabashedly called “organic life.” What is clear is that the private-law norms of the world of the instrumental actors never have been only that. To the extent the Trento Project belies its self-professed “private law” core, to that extent it will be a success and remain, for now, my prime example of the comparative advantage of the coordination mission of comparative law.

## V. CONCLUSION

I suspect that Herbert Bernstein would have been happier had my examples come from that *Lebenswelt*; after all, family law was one of his favorite subjects, and the theme of the *Habilitation* he abandoned in order to come to the new world. But it was not his only interest, as his doctoral dissertation on workers’ compensation<sup>45</sup> and his study of the effects of East German nationalization decrees on the extraterritorial life of those nationalized companies<sup>46</sup> demonstrate. Indeed, even his family-law project was not without its public-law overlay, since it analyzed the impact of constitutional equal-protection and non-discrimination doctrines on traditional private international law treatment of foreign marriages and local divorces.<sup>47</sup> Herbert Bernstein was a widely read, broadly inter-

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ample, as already suggested.

44. This distinction, derived from the phenomenological literature, is fruitfully used in our context in Jürgen Habermas, “Law as Medium and Law as Institution,” in *Dilemmas of Law in the Welfare State* (Gunther Teubner ed., Berlin 1985) at 203.

45. Herbert Bernstein, *Schadensausgleich bei Arbeitsunfällen* (Karlsruhe 1963).

46. Herbert Bernstein, Corporate Identity in International Business: The Zeiss Controversy, 20 Am. J. Comp. L. 299 (1972).

47. Herbert Bernstein, “Ein Kollisionsrecht für die Verfassung,” 19 Neue Juristische Wo-

ested, humane and engaged person, and given that range I hope this tribute would have been acceptable to him, a dear colleague and friend.

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chenschrift 2273 (1965). Left incomplete, it was aptly characterized as a “drumroll without symphony” in the review essay of Franz Gamillscheg, “Gleichberechtigung der Frau und Reform des Internationalen Eherechts, 33 *RabelsZ* 654 (1969), at 701f.