

# THE CHALLENGES OF EUROPEANIZATION IN THE REALM OF PRIVATE LAW: A PLEA FOR A NEW LEGAL DISCIPLINE\*

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## ABSTRACT

There are good reasons to expect that the process of European integration might bring about a renaissance of both comparative and private international law—the two disciplines in which Herbert Bernstein had excelled in both New and Old World alike. To be sure, Europe’s legal systems must respond to processes of economic and political integration. Nevertheless, it seems quite unrealistic to expect from the European Union any comprehensive harmonization of private law, as Europe’s systems of private law are

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\*\* Professor Christian Joerges, Professor of Economic Law, Centre for European Law and Politics at the University of Bremen and European University Institute, Florence, Italy. “*L’essentiel est invisible pour les yeux*,” explains *le petit prince* in Antoine de Saint Exupéry’s famous novel—and hosts at Duke could not possibly know all of the reasons which made their invitation so precious to me. My doctoral dissertation dealt with the conflict of laws methodology of one of Duke Law’s famous scholars, the late Brainerd Currie. See CHRISTIAN JOERGES, ZUM FUNKTIONSWANDEL DES KOLLISIONSRECHTS: DIE “GOVERNMENTAL INTEREST ANALYSIS” UND DIE “KRISE DES INTERNATIONALEN PRIVATRECHTS” (1971). This thesis, written under the supervision of Rudolf Wiethölter and Heinrich Kronstein, used Currie’s critique of traditional (American) conflict of laws scholarship as a basis for a critique of the Savignian tradition in German private international law. It obtained an optimal assessment in Frankfurt but the quest for publication in the prestigious series of Hamburg’s famous *Max Planck Institut für ausländisches und internationales Privatrecht* caused some frowning in the Institute’s directorate. Konrad Zweigert, however, was fair enough to ask for a review by a young professor whose authority in the field was undisputable. It was none other than Herbert Bernstein, who defended my work—and my chances for an academic career. Decades later, at a conference in Bonn on emigrants from Nazi Germany to the United States, I realized that we shared a concern for Germany’s darker past, but only at Duke did I learn about Herbert Bernstein’s personal history told so movingly by Paul H. Haagen in this Journal. See Paul H. Haagen, *A Hamburg Childhood: The Early Life of Herbert Bernstein*, 13 DUKE J. COMP. INT’L L. 7, 7–60 (2003). These are all good reasons to be grateful for the invitation to Duke, but I would like to mention another—the wonderful hospitality I experienced during my visit to Durham, North Carolina.

deeply entwined in the economic and political histories of the polities which they order and to which they owe their legitimacy. Europe's identity is defined by the diversity of its legal heritage. Should not deepened comparative studies prepare and accompany the search for a Europeanized private law system? Further, is it not the very vocation of private international law to organize constructive responses to legal diversity?

Pertinent efforts have been undertaken and are under way. And yet, this essay argues that the Europeanization process follows a logic of its own, with which none of our inherited legal disciplines currently seem able to cope. Three difficulties will be discussed. One is inherent in the very general developments of "post-classical" private law, in particular its linkages with regulatory and distributive policies and its opening to social values and human rights. Comparative law has often furthered and private international law has adapted to this (in Germany) so-called materialization process. Europeanization, however, adds challenging new dimensions. These dimensions are inherent in the multilevel structures of the European polity and hence inevitable. The interventions of European law into general private law (the codified systems of continental Europe and the common law of the United Kingdom) have so far been quite marginal. Yet Europe has very intensively and quite comprehensively reorganized the regulatory framework of private transactions, whereas the distributive welfare state institutions in which private relations are embedded have remained the domain of national legal systems. The Europeanization of private law is therefore to a large degree about the restructuring of the linkages of private law with its (Europeanized) regulatory environment and the manner in which it is embedded in welfare state institutions. Europeanization affects this dimension through the freedoms it grants to European citizens.

European law is a transformative discipline. It requires respect for its principles and the regulatory prescription it imposes in the realms of the enumerated competencies of the European legislature. It cannot, however, provide comprehensive responses to its quests for change. Europeanization affects national systems of private law only selectively. The process of change is incremental and this essay, therefore, does not try to present the Europeanization of private law as the building of a new system of rules and principles. Rather, it presents and explores patterns of legal change in three cases of exemplary importance.

As will become apparent, neither comparative law, nor private international law, nor European law, can lay claim to exclusive leadership in the Europeanization process. Europeanization is generating a new legal discipline. The challenging task of this discipline is to provide normative guid-

ance for the operation of private law within the multilevel system of governance that Europe has become.

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## INTRODUCTION

In what way can one expose an American readership to the particular challenges of the Europeanization of private law? Comprehensive reports on the state of legal developments and academic debates are currently not conceivable. The study of the Europeanization of private law is an expand-

ing discipline, and is growing at exponential rates. Germany is certainly the most prolific of all European legal communities, boasting a production of not less than eleven habilitations theses defended over the last few years, many more than several hundred pages each.<sup>1</sup> The Netherlands is hardly less active, and is arguably more effective because it tends to give up the use of its own language in its habilitations.<sup>2</sup> Ever more jurisdictions make their views known and the epistemic community is Europeanizing. Indeed, conferences on European private law have long been multinational, transnational working groups and academic societies have been established,<sup>3</sup> and the annual meetings of the Common Core project in Trento attract ever more attention—even overseas.<sup>4</sup> Meanwhile, in the background, the European Commission and other institutional actors tirelessly promote (their view of) the cause of Europe's private law.

Instructive reports addressing an American readership are of course nevertheless possible—and available.<sup>5</sup> This provides me with a unique opportunity to try a different approach. My objective in this essay will be to explore and explain why Europe has become such a fascinating legal laboratory. Messages from a laboratory should not be expected to transmit fully elaborated, complete conceptualizations. The specific risk of such messages is their tendency to seem both cryptic and eclectic simply because they presuppose too much background information. Their possible benefit, however, is that they may create and enhance interest in proceedings in the laboratory, and in fact may excite study on this side of the Atlantic.

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1. Since JOSEF DREXL, *DIE WIRTSCHAFTLICHE SELBSTBESTIMMUNG DES VERBRAUCHERS* (1998), the most recent habilitation I am aware of was submitted by Christoph Schmid to the law faculty in Munich. CHRISTOPH SCHMID, *DIE INSTRUMENTALISIERUNG DES PRIVATRECHTS DURCH DIE EUROPÄISCHE UNION: PRIVATRECHT UND PRIVATRECHTSKOZEPTIONEN IN DER ENTWICKLUNG DER EUROPÄISCHEN INTEGRATIONSVERFASSUNG* (2004) (thesis on file with author). It is outstanding in the depth of its analyses which reflect developments of postclassical private law on the one hand and the various stages of the European integration project on the other.

2. ARTHUR S. HARTKAMP, ET AL., *TOWARDS A EUROPEAN CIVIL CODE* (2nd ed. 1998); MARTIJN W. HESSELINK, *THE NEW EUROPEAN PRIVATE LAW: ESSAYS ON THE FUTURE OF PRIVATE LAW IN EUROPE* (2002). English is the *lingua franca* of the *Maastricht Journal of Comparative Law*, the *European Review of Private Law*, *The Ius Commune Lectures*, and *The Electronic Journal of Comparative Law*, at <http://www.ejcl.org> (last visited May 28, 2004).

3. See Kristina Riedl, *Europäisierung des Privatrechts: Die "Recht-Fertigung" wissenschaftlicher Vereinheitlichungsprojekte* (2003) (Ph.D. thesis, European University Institute Florence 2003) (on file with author).

4. See *The Common Core of European Private Law*, University of Trento, <http://www.jus.unitn.it/dsg/common-core/home.html> (last visited Jan. 1, 2005).

5. See Christoph Schmid, *Patterns of Legislative and Adjudicative Integration of Private Law in Europe*, 8 COLUM. J. EUR. L. 415, 415–86 (2002).

This article will proceed in two steps. Section I will first sketch out how the three disciplines of European law, comparative law and private international law approach the Europeanization process. It is submitted that none of these disciplines can effectively address the unique intricacies of the Europeanization process by themselves. A two-step argument is presented to support this thesis. First, I will resort to an analysis of the European Union (EU) as a “multi-level system of governance” and the critique of “methodological nationalism” in political science. Second, I will provide a preliminary reconstruction of these theorems into a more legal, albeit transdisciplinary, language.

Section II will substantiate my skepticism as to the potential of the three established legal disciplines to effectively orient the process of Europeanization through an analysis of three case studies. The first example is from the field of product liability law, where the European Court of Justice (ECJ) seems to suggest that European legislation should govern Europeanization. The second example addresses the privatization of public services—specifically the legal battle between European state aid law, a section of the European Community Treaty chapter on competition policy, and regulatory arrangements at the national level. In characterizing this tension, I will use the term “diagonal conflict” and praise the ECJ for its sensitivity to the non-unitary character of the European polity and its “proceduralizing” approach to the resolution of tensions. The third example is drawn from company law. Whereas the jurisprudence of the ECJ since its famous *Centros*<sup>6</sup> judgment is widely interpreted as a move towards regulatory competition, I will defend a different interpretation, arguing that the ECJ is transforming the economic freedoms as enshrined in the European Community Treaty<sup>7</sup> into political rights held by European citizens. The case studies do not reveal a new “system” of principles and rules. Rather, they illuminate patterns of change which are at work—and in conflict—in the Europeanization Process. Section III will take up the analytical framework introduced in the second part of Section I. It will substantiate the reconstruction of Europe’s multilevel system of governance into a framework of legal categories. The concluding message will be that the Europeanization of private law should be conceived as a process which must find its legitimacy in the normative quality of the Europeanization process.

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6. Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

7. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

## I. EUROPEANIZATION AS A CONTEST OF LEGAL DISCIPLINES

Three legal disciplines seem particularly close to the Europeanization process in the realm of private law—European law, comparative law and private international law. “Close” is a metaphor for the validity criteria and normative perspectives of these disciplines, however they are not identical. For that reason, the claims of these disciplines to govern and orient the Europeanization process represent a contest, akin to the “contest of faculties” Immanuel Kant analyzed in his famous 1789 essay.<sup>8</sup> Kant’s master discipline is not among the three candidates engaged in the contest—Kant’s master discipline is philosophy. It is this discipline which he sought to promote because in it reason (*Vernunft*) is the highest—and in fact the only—authority. Philosophy is not among the three legal disciplines engaged in our contest. Should that imply that no discipline deserves the championship in our contest? Not exactly. Although the allusion to Kant is intended to signal a conceptual and normative lacunae in our discourse, I do not wish to insinuate that we could derive from practical philosophy satisfactory answers to our queries. My contention is more modest, but still ambitious enough. It has both an analytical and a prescriptive dimension. My argument rests on the premise that all three disciplines are not yet conceptually in tune with the postnational constellation the Europeanization process has generated.<sup>9</sup>

These legal disciplines are still ruled by their inherited methodological nationalism.<sup>10</sup> This is why they are engaging in a contest which none of them can effectively win. In essence, they need to transform their contest into a search for a new paradigm, and it goes without saying that the generalizing qualifications which I will employ are inadequate in that they do not

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8. Immanuel Kant, *The Contest of Faculties*, in KANT: POLITICAL WRITINGS (Hans Reiss, ed., 2nd ed. 1991).

9. Two concepts seem particularly helpful in this respect. One is Jürgen Habermas’s “post-national constellation,” introduced in an essay on the contemporary problems of democratic governance. Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 58–112 (Max Pensky ed., 2001). That term and Habermas’s normative concerns are of general importance. Constitutional democracies were institutionalized in nation states and federations. Post-national constellations are therefore highly ambivalent—as the debates on the European Union’s democracy deficit document. In the “Editor’s Introduction” to Habermas’ essays, Max Pensky explains the term constellation as correcting the understanding of “globalization as the end of democratization—not as its culmination but as the defining feature of the historical epoch marking the end of the national-state model for the institution of democracy”. The erosion of that model is accompanied by conflicting fears and hopes: “Finding a way to sort them out, to confront their ambiguity squarely, and to shed some explanatory light on them—to analyze them as challenges, rather than as overwhelming fate—is not so easy. But this is the task that Jürgen Habermas sets for himself in *The Postnational Constellation*.” *Id.* at viii.

10. On these terms see I.D *infra*.

exhaust the specter of tendencies and views in any of the fields under consideration. Comprehensive accounts are not possible, but they might also be unnecessary. My claim, however, is that the term “methodological nationalism” is effective in that it captures and conveys the unique national characteristics from the formative phases which have remained decidedly influential. The validity of the argument does not depend on the current strength of these inherited orientations. Quite to the contrary, it claims that these traditions are eroding and is a plea for their conscious abolition.

#### A. European Law

My argument may sound particularly irritating in relation to the first-named discipline, European law. Isn't the European project exactly about the abolition of the nation-state as a sovereign entity? Yes and no. The answer is yes insofar as the European Community was designed as primarily an economic project, not designed to establish a federation or an entity substituting the nation-state but rather crafted to exert a disciplining control over the nation-state. The answer is no, however, insofar as conceptualizations of European law in general—and of European private law in particular—copy nation-state models. Both dimensions can be observed in the legendary *Van Gend en Loos*<sup>11</sup> judgment, which marks the birth of the Integration-Through-Law project:

[The EEC Treaty] is more than an agreement which merely creates mutual obligations between the contracting states. . . . [T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law, therefore, not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. . . .<sup>12</sup>

This message has evolved into the supremacy doctrine,<sup>13</sup> in which Community law—even secondary law—trumps national law, even constitutional law. It is, paradoxically enough, the steady deepening of European integration which renders the orthodox understanding of legal supranationalism factually implausible and normatively unattractive.

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11. Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 1 [hereinafter *Van Gend en Loos*].

12. *Van Gend en Loos*, 1963 E.C.R. at 24.

13. See PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* 275–315 (3rd ed. 2003).

The debate on the constitutionalization of Europe and the so-called convention process<sup>14</sup> mirrors these tensions. They are also visible in the Europeanization of private law for compelling, although not necessarily sound, reasons, as the Community effectively entered the private law arena through a somewhat disdained backdoor—consumer protection. Consumer protection has been both a functional need and a normative achievement since the 1970s. Initially, the European Commission supported pertinent research activities and the formation of a European community of consumer law advocates.<sup>15</sup> The private law community, however, generally responded with benign neglect for as long as practically possible. When the growing weight of European law grew irresistibly, however, attitudes changed profoundly. The lamenting over the patchwork character of European legislative acts characterized by early initiatives in the realm of consumer protection<sup>16</sup> was followed by the plea for nothing less than a European codification of private law. The alliance defending this idea, however, has been decidedly heterogeneous.<sup>17</sup> The European Parliament is often cited as the most committed institutional advocate of a European code, primarily due to its resolutions of 1989<sup>18</sup> and 1994,<sup>19</sup> which did not have an immediate impact, but did help to keep the idea of a European code alive.<sup>20</sup> By now, the European Parliament has become more cautious, or at least more patient.<sup>21</sup>

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14. Which lead to the Draft Treaty Establishing a Constitution for Europe of July 18, 2003, European Convention, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last visited May 28, 2004).

15. On the history, achievements and ambitions of European consumer law see generally NORBERT REICH & HANS W. MICKLITZ, *EUROPÄISCHES VERBRAUCHERRECHT* (4th ed. 2003). This book is the latest in a long and ongoing cooperative project which started out with NORBERT REICH & HANS W. MICKLITZ, *CONSUMER LEGISLATION IN THE EC COUNTRIES: A COMPARATIVE ANALYSIS* (1980). Consumer law is thoroughly “Europeanized.” Its proponents not only know and cite each other, they strive for a common cause. See e.g., STEPHEN WEATHERILL, *EC CONSUMER LAW AND POLICY* (1997).

16. See among many Hein Kötz, *Gemeineuropäisches Zivilrecht*, in *FESTSCHRIFT FÜR KONRAD ZWIEGERT* 481, 483 (1981); Peter Hommelhoff, *Zivilrecht unter dem Einfluß europäischer Rechtsangleichung*, 192 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS*, 71, 71–107 (1992).

17. See generally Schmid, *supra* note 5.

18. 1989 O.J. (C 158) 400.

19. 1994 O.J. (C 205) 518.

20. See Christian von Bar, *From Principles to Codification: Prospects for European Private Law*, 8 *COLUM. J. EUR. L.* 379 (2002). Christoph Schmid, *Legitimacy Conditions of a European Civil Code*, 8 *MAASTRICHT J. EUR. & COMP. L.* 277, 277–98 (2001).

21. In Resolution A5-0384/2001, Resolution on the Approximation of Civil and Commercial Law, dated Nov. 15, 2001, which responded to the European Commission’s Communication on European Contract Law, COM (01) 398, the Parliament advocated the creation of a European Law Institute for the preparation of a European Restatement.

The agenda of the European Commission is more difficult to decipher. The Commission's most important and widely discussed recent initiative, the Communication on the future of European Contract Law, published in July 2001,<sup>22</sup> continues to appeal, as the consumer protection directives did, to the functional necessities of market building and the need to prevent distortions of competition caused by legal differences among Member States. Yet the implications of this appeal are not spelled out unambiguously. On the one hand, the Commission left the narrow confines of consumer protection and announced that it may have to look at unjust enrichment and "aspects of tort law."<sup>23</sup> On the other hand, it has restricted itself to four relatively limited inquiries, without explicitly revealing its own preferences. Should Europeanization be left to market mechanisms?<sup>24</sup> Should Europe follow the American Restatement technique?<sup>25</sup> Alternatively, should Europe "consolidate" what has been accomplished so far?<sup>26</sup> Or should Europe embark upon wide-ranging legislative activities? The 181 responses from European institutions, governments, the business world, consumer organizations, legal practitioners and academics have been summarized by the Commission in a recent "Action Plan."<sup>27</sup>

While the Commission prefers not to reveal its own preferences, many of its close academic supporters—especially those in Germany and the Netherlands—do make their desire for a European civil code project known.<sup>28</sup> The most prominent advocate of this idea is Christian von Bar.<sup>29</sup> Is this a state-building project? The SGECC, the Study Group on a European Civil Code,<sup>30</sup> emphasizes that its contribution should be neutral and non-political—essentially an academic research project.<sup>31</sup> German observers will recognize the continuities and hardly be surprised by the protests against this project in France.<sup>32</sup> Unlike the creator of the French *Code*

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22. COM(01)398 final.

23. Communication from the Commission on European Contract Law, COM(01) 398 final, at para. 13.

24. *Id.* at paras. 49–51.

25. *Id.* at paras. 52–56.

26. *Id.* at paras. 57–60.

27. A More Coherent European Contract Law—An Action Plan, COM(03)68 final.

28. ARTHUR S. HARTKAMP ET AL., *supra* note 2.

29. *See supra* note 20, at 385. For a detailed reconstruction of the origins of these ideas in the Netherlands and Northern Germany, see Riedl, *supra* note 3, at 297.

30. For more information, please visit the Study Group's website at [www.sgecc.net](http://www.sgecc.net) (last visited Sept. 1, 2004).

31. Riedl, *supra* note 3, at 300 and accompanying references.

32. Yves Lequette, *Quelques remarques à propos du projet de code civil européen de Monsieur von Bar*, RECUEIL DALLOZ SIREY, No. 28, Jul. 25, 2002, at 2202–14; but see Bénédicte Fauvarque-Cosson, *Faut-il un Code civil européen*, REVUE TRIMESTRIELLE DE DROIT CIVIL, No. 3, at 463–80

*civil*—and unlike Heidelberg’s famous Anton Justus Friedrich Thibaut (1772–1840)—the von Bar Group<sup>33</sup> defines codification not as a political act, but rather places itself in the tradition of Friedrich Carl von Savigny (1779–1861) and Bernhard Windscheid (1871–92), the mastermind in the construction of Germany’s *Bürgerlichem Gesetzbuch*—that “cathedral of national glory.”<sup>34</sup> In that tradition the codification of private law does not require a specifically political mandate. Rather, its legitimacy stems from scholarly deliberation which guides the process of codification. Already in their “Joint Response” to the Commission Communication of 2001, Ole Lando’s Contract Law Group and Christian von Bar’s Code Group have spelled out how this vision should be implemented, namely, in four—or five—steps.<sup>35</sup> First, the Joint Response advocates a Restatement based upon “an impartial formulation of principles in the light of detailed comparative research.” Second, the Joint Response suggests this Restatement should then become “the binding foundation of all private law questions raised by the award of contracts by public bodies.” The joint response provides three additional recommendations to arrive at what is essentially a mandatory European Law.<sup>36</sup> Sweet melodies?<sup>37</sup>—Familiar old melodies, at any rate. The input and output of this process could be characterized in the words of Horst Heinrich Jakobs in his praise of the German example, representing a code created by scholarship, a code not dominating scholarship

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(2002); B. Fauvarque-Cosson, *Droit européen des contrats: première réaction au plan d'action de la Commission*, RECUEIL LE DALLOZ, No. 18, at 1171–73 (2003); Ph. Malinvaud, *Réponse - hors délai - à la Commission européenne: à propos d'un code européen des contrats*, RECUEIL LE DALLOZ, No. 33, at 2542–51 (2002); Jean Huet, *Nous faut-il un "euro" droit civil?*, RECUEIL LE DALLOZ, No. 34, at 2611–14 (2002).

33. See Reidl, *supra* note 3; Von Bar, *supra* note 20.

34. “Dom nationaler Herrlichkeit,” cited by Reinhard Zimmermann, in *HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB: BAND I: ALLGEMEINER TEIL* (Matthias Schmoeckel, Joachim Rückert & Reinhard Zimmermann eds., 2003).

35. Commission on European Contract Law & Study Group on a Civil Code, Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code of October 25, 2001, at [http://www.sgecc.net/index.php?subsite=subsite\\_4&id=27](http://www.sgecc.net/index.php?subsite=subsite_4&id=27) (last visited May 28, 2004) [hereinafter Joint Response].

36. Joint Response, *supra* note 35, at paras. 62 and 69. The five steps are summarized on pages 49–50 of the Joint Response. Step 4 is optional and might seem a bit odd at first blush. It maintains European law should be mandatory for cross border transactions. That restraint is apparently meant as a precautionary measure against anxieties in national legal systems. A sophisticated version of this idea was developed by Stefan Grundmann & W. Kerber, *European System of Contract Laws: A Map for Combining the Advantages of Centralised and Decentralised Rule-making*, in *AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW 295* (Stefan Grundmann & Jules Stuyck eds., 2002).

37. Reinhard Zimmermann, *Heard melodies are sweet, those unheard are sweeter...*, 193 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* 122–69 (1993).

but dominated by it.<sup>38</sup> In plain English: It is the learned jurist who is best qualified to produce the law, not the legislature and not the judge.

Neither Savigny nor Windscheid represent the full range of the German codification tradition, nor are their heirs monopolists in the debates on the significance of codification. Among their most outspoken adversaries is Ugo Mattei, one of the leading figures of the Trento Common Core Project.<sup>39</sup> In his philippic *Hard Code Now!*,<sup>40</sup> Mattei pleads for a code of a different quality. Mattei argues that only a civil code that fits the specific social fabric of European capitalism could counter the erosion of the social state content of private law. A code “with deep enough foundations and high enough vaulting,” designed to include these social values “in its conceptual edifice” is what Otto von Gierke (1841–1921), one of Bernhard Windscheid’s most famous adversaries, had postulated.<sup>41</sup>

But do such references to old German professors make any sense? Is the choice between the heritage of Windscheid and that of von Gierke really on the European agenda? The call for these civil codes is not in touch with the present state of the European Union and neither of these perspectives seem normatively attractive. These reservations will be substantiated below<sup>42</sup> after a discussion of the two other competing disciplines: comparative law and private international law.

## B. Comparative Law

European law is often perceived as an autonomous body of law, striving for the harmonization, and often even the uniformity, of rules. Such a perception, however, is overly simplistic and incomplete. Even European law as enshrined in the original 1958 Treaty and the many later amendments is not uniform throughout the Union. Since the uniformity of its meaning cannot be ensured through the adoption of a common text (as translated in so many languages), one could argue there is no such thing as a common European law. Summarizing some two decades of coteaching European law with many colleagues from many European countries: What

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38. “. . .[e]in Gesetzbuch, das die Quelle des Rechts nicht in sich trägt, sondern in der Wissenschaft hat, von der es geschaffen worden ist, ein Gesetzbuch, das nicht die Wissenschaft beherrschen will, sondern das von dieser beherrscht sein soll. . .” HORST HEINRICH JAKOBS, *WISSENSCHAFT UND GESETZGEBUNG IM BÜRGERLICHEN RECHT NACH DER RECHTSQUELLENLEHRE DES 19. JAHRHUNDERTS* 160 (1983).

39. See *supra* note 4.

40. Ugo Mattei, *Hard Code Now!*, *GLOBAL JURIST FRONTIERS*, Vol. 2, No. 1, Art. 1 (2002), available at [www.bepress.com/gj/frontiers/vol2/iss1/art1](http://www.bepress.com/gj/frontiers/vol2/iss1/art1).

41. OTTO VON GIERKE, *DIE SOZIALE AUFGABE DES PRIVATRECHTS* 17 (1889).

42. See discussion in *infra* Section I.D and III.C.

we have instead (and have learned to live with) are Belgium, Dutch, English, French, German, Italian, and many more versions of European law. In essence, there are as many European laws as there are relatively autonomous legal discourses, organized mainly along national, linguistic and cultural lines. How could it be otherwise? In the core areas of private law, the European Union has to this point affected only marginal change. Indeed, Europe's systems of private law are deeply entwined in the economic and political circumstances of the polities which they order and to which they owe their legitimacy. Comparative law is the discipline which seems best equipped to explore and articulate these insights.<sup>43</sup> Comparative research is generally a cumbersome exercise and intra-European comparisons have long been neglected because of the common interest of all Europeans to learn about the most dynamic of all legal cultures, the United States. This is now changing rapidly. Intra-European comparative studies are well under way.<sup>44</sup> These activities are accompanied by rich theoretical debates. It is not my ambition here to review, let alone evaluate, these myriad debates and studies. I will instead point to the often quite paradoxical dimensions of the present state of the comparative art—comparative law owes its existence to the discovery of legal diversity as established by the Westphalian state system. Comparativists have always done both: they have underlined the autonomy of legal systems and sought for substantive similarities and functional equivalents.<sup>45</sup> In both orientations they have cultivated traditions of “methodological nationalism” which are not well prepared to understand denationalization processes, the interactions between formerly more autonomous legal systems and their links to transnational levels of governance. “Methodological nationalism” is of surprising vitality.

An example is Pierre Legrand's provocative and thought provoking nonconvergence thesis.<sup>46</sup> This thesis is directed against functionalism in comparative law and equally against any codification initiative. Its basis is

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43. Cf. Konrad Zweigert, *Die Rechtsvergleichung im Dienste der europäischen Rechtsvereinheitlichung*, 16 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 387 (1951).

44. Suffice it here to point again to the Common Core project, *supra* note 4, the *ius commune* lectures and casebook series; Ole Lando's Lando group; and the new attention for integration perspectives. Cf. Ralf Michaels, *Epistemology and Methodology of Comparative Law in the Light of European Integration*, *Brüssel 26–28. Oktober 2002*, 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (1993).

45. See David Kennedy, *The Politics and Methods of Comparative Law*, in *THE COMMON CORE OF EUROPEAN PRIVATE LAW: ESSAYS ON THE PROJECT* 131–208 (Mauro Bussani & Ugo Mattei eds., 2002).

46. Cf. Pierre Legrand, *European Legal Systems are not Converging*, 45 INT'L & COMP. L.Q. 52 (1996); Pierre Legrand, *The Impossibility of “Legal Transplants”*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Pierre Legrand, *Are Civilians Educable?* 18 LEGAL STUD. 216 (1998); PIERRE LEGRAND, *FRAGMENTS ON LAW-AS-CULTURE* (1999).

the epistemological assertion that common law and civil law cannot communicate. Legrand's powerful critique of rule-oriented, rule-restricted ideas about law and comparative research, his emphasis on the cultural specificity of laws and his respect for the "deep structures of legal rationality"<sup>47</sup> all seem to presuppose an autonomy which none of the individual legal systems in the EU can claim.<sup>48</sup>

Reinhard Zimmermann posits opposing views. He believes in the existence and survival of a common European legal heritage, which comprises the (non-American) common law.<sup>49</sup> This common heritage has in his view survived the formation of the European nation states, and thus it is by definition transnational. Can we, and does Zimmermann himself, trust in the vitality of this heritage? The nation-state has during its welfarist era transformed the systems of private law thoroughly. Europeanization has not turned the wheel of history around. It has instead reformed and modernized the regulatory frameworks of the European economy. The *ius commune* had little to contribute to that transformation. Zimmermann has joined the codification movement.<sup>50</sup> Does this indicate that he would not really believe in his own theses about the common legal heritage on which the Europeanization process should build? This is not his message. What may look like inconsistency at first glance has logic. In order to survive and gain acceptance, Europe's common legal heritage seems to depend upon a helping legislative hand.<sup>51</sup>

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47. Pierre Legrand, *European Legal Systems are not Converging*, 45 INT'L & COMP. L.Q. 52, 60–61 (1996).

48. Geoffrey Samuel, *Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences*, in EPISTEMOLOGY AND COMPARATIVE LAW (Mark van Hoecke ed. forthcoming 2004).

49. Reinhard Zimmermann, *Das Römisch-Kanonische ius commune als Grundlage europäischer Rechtseinheit* 47 JURISTENZEITUNG 8 (1992); Reinhard Zimmermann, *Der europäische Charakter des englischen Rechts—Historische Verbindungen zwischen civil law und common law*, 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 4 (1993); Reinhard Zimmermann, *Civil Code and Civil Law: The "Europeanization" of Private Law Within the European Community and the Re-emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63, 63–105 (1994/95); cf., Reiner Schulze, *European Legal History—A New Field of Research in Germany*, 13 J. LEGAL HIST. 270, 270–95 (1992).

50. See Reinhard Zimmermann, *Roman Law and European Legal Unity*, in ARTHUR S. HARTKAMP ET AL., *supra* note 2, at 21.

51. Functionalism, as represented famously in the Kötz/Zweigert standard *oeuvre* continues to dominate comparative research. KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., Oxford, 3d ed., 1998); see also AXEL FLESSNER & HEIN KÖTZ, EUROPÄISCHES VERTRAGSRECHT (1996). Hein Kötz has always differentiated between the comparative law perceptions of the international system and that of other disciplines. The term "multi-level governance" designates a post-national constellation which functionalism has not been prepared to address. At the same time, Kötz was ever an outspoken skeptical critic of harmonization projects. Compare Hein Kötz, *The Trento Project and its Contribution to the Europeanization of Private Law*, in THE COMMON CORE OF EUROPEAN PRIVATE LAW: ESSAYS ON THE PROJECT 209–19 (Mauro Bussani & Ugo Mattei

### C. Private International Law

The tensions between private international law and European law are fascinating and they have a history of their own.<sup>52</sup> Since European law established itself as a *sui generis* discipline between national public law and international law, and the integration process did not address it for such a long time, the masters of the new discipline did not pay it a great deal of attention.<sup>53</sup> The decisions in which the ECJ adjudicated private international law constellations and set aside its rules and principles without mentioning this discipline are indeed legion. Academic discoveries and encounters were bound to follow. Private international law scholars started to recommend their discipline as the softer alternative to a harmonization of substantive law.<sup>54</sup> Some of them began to realize that the principle of mutual recognition adopted by the ECJ in its celebrated *Cassis de Dijon* decision amounted to a duty to apply foreign mandatory (public) law.<sup>55</sup> The Community legislators resorted to choice-of-law rules in its secondary legislation.<sup>56</sup> Consumer lawyers saw a chance to overcome the social poverty of private international law.<sup>57</sup> Intensive research has been undertaken to determine to what degree European law, especially the fundamental free-

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eds., 2002). Functionalism can see equivalencies in the responses of legal systems to the problems they have to address. It has no conceptual language for the integration process.

52. The legendary Integration-Through-Law Project initiated in the 1980s by Mauro Cappelletti, Maria Secombe and J.H.H. Weiler had included comparative analyses of the choice-of-law problems in Europe's internal market and the American federation. INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Cappelletti, Soccombe & Weiler eds. 1986). For a particularly nuanced later survey compare Holger Spamann, Choice of Law in a Federal System and an Internal Market (Jean Monnet Program Working Paper No. 8/01, 2001), available at <http://www.jeanmonnetprogram.org/papers/01/012601.html> (last visited May 28, 2004).

53. Among the often cited exceptions is Walter Hallstein, *Angleichung des Privat und Prozeßrechts in der europäischen Wirtschaftsgemeinschaft*, 28 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 211 (1964).

54. Karl F. Kreuzer, *Die Europäisierung des internationalen Privatrechts - Vorgaben des Gemeinschaftsrechts*, in PETER-CHRISTIAN MÜLLER-GRAFF, GEMEINSAMES PRIVATRECHT IN DER EUROPÄISCHEN GEMEINSCHAFT 273 (1993). Wolfgang Fikentscher, *Harmonizing National and Federal European Private Laws, and a Plea for a Conflicts-of-law Approach*, in THE COMMON CORE OF EUROPEAN PRIVATE LAW: ESSAYS ON THE PROJECT 43-48 (Mauro Bussani & U. Mattei eds., 2002) comes close to the positions defended in the text, especially when considering the selective scope of European law. See discussion *infra* I.I.C on "diagonal conflicts."

55. Case 120/78, *Cassis de Dijon*, 1979 E.C.R. 649; Cf. JOHANNES FETSCH, EINGRIFFSNORMEN UND EG-VERTRAG 5, 21, 71, 126, 319 (2002).

56. For a very comprehensive survey see Frédéric Fourtoy, *L'impact du droit communautaire secondaire sur le droit international privé français* (2003) (Ph.D. thesis, European University Institute Florence 2003) (on file with author).

57. Konrad Zweigert, *Zur Armut des internationalen Privatrechts an sozialen Werten*, 37 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 435 (1973).

doms and the principle of mutual recognition, trump private international law.<sup>58</sup>

By now, we are witnessing, particularly in Germany,<sup>59</sup> the steady growth of this sophisticated debate—a debate which will likely go on for some time to come. These developments are all the more interesting since the awareness that European law can be constructively interpreted as a conflict-of-laws discipline is gaining some ground.<sup>60</sup> What remains apparently difficult to accept is the message that choice-of-law methodologies can be used in postnational constellations where they no longer refer to a comprehensive legal system, but rather organize the cooperation between different levels of governance and resolve the tensions which result within national systems from the selective interventions of European law.<sup>61</sup> The message of such analyses is no longer to recommend private international law as a

58. Wulf-Henning Roth, *Der Einfluss des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht*, 1991 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 623, 623–73; Jürgen Basedow, *The Communitarization of the Conflict of Law Rules under the Treaty of Amsterdam*, 37 COMMON MKT. L. REV. 687 (2000); Stefan Grundmann, *Binnenmarktkollisionsrecht—Vom klassischen IPR zur Integrationsordnung*, 69 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 457–77 (2000).

59. But not exclusively! See Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383, 383–409 (2003).

60. See Christian Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, 3 EUR. L.J. 378, 378–406 (1997); ANDREAS FURRER, ZIVILRECHT IM GEMEINSCHAFTSRECHTLICHEN KONTEXT: DAS EUROPÄISCHE KOLLISIONSRECHT ALS KOORDINIERUNGSMITTEL FÜR DIE EINBINDUNG DES ZIVILRECHTS IN DAS EUROPÄISCHE WIRTSCHAFTSRECHT (2002); Marc Amstutz, *Zwischenwelten: Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht*, in CHRISTIAN JOERGES & GUNTHER TEUBNER, RECHTSVERFASSUNGSRECHT: RECHT-FERTIGUNG ZWISCHEN PRIVATRECHTSDOGMIK UND GESELLSCHAFTSTHEORIE 213 (2003); Thomas Vesting, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung*, 63 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 41, 65, 41–70 (2004); SCHMID, *supra* note 1, at 371; Gunther Teubner & Andreas Fischer-Lescano, *Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

61. See Christian Joerges, *Economic Law, the Nation-State and the Maastricht Treaty*, in EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION? 29 (Renaud Dehousse ed., 1994) (detaching the specific mode of thought in conflict of laws from Private International Law and making it serve other areas of law, and in particular a social theory of law, was the great project of Rudolf Wiethölter, *Begriffs- oder Interessenjurisprudenz—falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm*, 1977 FESTSCHRIFT KEGEL 223 (1977). As Gunther Teubner explains, the point was no longer merely to reflect conflicts between national legal systems theoretically and cope with them in practice, but to generalize conflict-of-laws thinking itself in such a way as to make it yield results for conflicts between complexes of norms, areas of law and legal institutions, but also those between social systems, indeed even for divergences between competing social theories. This two-fold recourse to rich historical experience of private international law on the one hand and to competing theories of society on the other managed to establish “conflicts-of-laws” as the central category for legal reconstruction of social contradictions. See Gunther Teubner, *Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter*, in ON PARADOXES AND SELF-REFERENCE IN LAW (Oren Perez & Gunther Teubner eds., 2004).

softer alternative to harmonization or unification. It is a much more radical quest to take the nonhierarchical, plural<sup>62</sup> (“heterarchical”<sup>63</sup>) characteristics of the European polity seriously. To anticipate the argument which will be developed later<sup>64</sup> in more detail: None of Europe’s semiautonomous political subunits are empowered with *Kompetenz-Kompetenz*—the power to determine one’s range of competences—which would be necessary for an authoritative resolution of jurisdictional conflicts. Equally, and even more importantly, the type of conflicts such power has to resolve are not those for which private international law scholars suggest their jurisdiction selection rules (*Verweisungsnormen*).

#### D. A First Outlook into International Relations Theory: The Poverty of Methodological Nationalism in Postnational Constellations

To argue that legal disciplines like private international law and comparative law are tied in their conceptual foundations to the sovereign nation state, is like taking tea to India. Similarly, it should not come as a surprise that one can identify tendencies in the present debates toward the building up of a federal-style of European state in the integration process or continuities and analogies with the formation of nation-states. This is not the gist of the argument this article seeks to develop. That argument is more complex, more radical and more constructive. In a nutshell, there are structural reasons for the need to loosen the ties of our discipline with the nation-state and to replace that heritage by a different model. Europe is neither an international organization nor a federation but can best be characterized as a multilevel system of governance *sui generis*, a concept widely used among political scientists.<sup>65</sup> I have already referred to this analytical concept<sup>66</sup> and will come back to it more in the third section of this essay.<sup>67</sup> I will use it heuristically in the following section as a background for the analysis of patterns in the Europeanization process. Only

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62. As argued by Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002).

63. KARL-HEINZ LADEUR, THE THEORY OF AUTOPOIESIS. AN APPROACH TO A BETTER UNDERSTANDING OF POST-MODERN LAW: FROM THE HIERARCHY OF NORMS TO THE HETERARCHY OF CHANGING PATTERNS OF LEGAL INTER-RELATIONSHIPS (EUI Working Paper Law 99/3, 1999).

64. See discussion *infra* Sections I.D and III.A.2.

65. The term was coined by Gary Marks, Lisbeth Hooghe and Kermit Blank in their *European Integration from the 1980s: State Centric vs. Multi-level Governance*, 34 J. COMMON MKT STUD. 341 (1996). Its use is by now widespread, if not inflationary. The contributions to CHRISTIAN JOERGES, ET AL. EDs., SYMPOSIUM: MOUNTAIN OR MOLEHILL? A CRITICAL APPRAISAL OF THE COMMISSION WHITE PAPER ON GOVERNANCE (Jean Monnet Working Paper No. 6/01). See also *infra* note 174 on the adaptation of the term by European law scholars (Permice and Furrer are cited there as examples).

66. See discussion *supra* in the Introductory Remarks.

67. See discussion *infra* III.A.

through such analyses can one find out to what degree the model can provide instructive orientation to lawyers in their interpretation of Europeanization processes. Even more importantly, only through such concrete analyses can one explore normative implications of the re-orientation that the multilevel governance model suggests.

It is my ambition to develop this perspective inductively in the next section and to resort to a series of abstract statements. Europe, so the multilevel literature suggests, is a case *sui generis*. This is but a truism. Europe is inherently different from other polities. The transformations the European nation-states have experienced are not in every respect unique, and it is important, especially in the presentation of European developments to a non-European readership, to remain aware of the more general features of Europeanization. Two concepts seem particularly helpful in this respect. One is Jürgen Habermas's "postnational constellation," introduced in an essay on the contemporary problems of democratic governance.<sup>68</sup> That term and Habermas's normative concerns are of general importance. Constitutional democracies were institutionalized in nation-states and federations. Postnational constellations are therefore generally highly ambivalent—as the debates on the European Union's democracy deficit document. The second term I take from Michael Zürn<sup>69</sup> who uses it to characterize a dilemma and a challenge which is very similar to that of the legal disciplines addressed in this essay<sup>70</sup>—Politics and law are crucial to the effective functioning of postnational constellations, yet the concepts and theories they have inherited and learned to work with were formed within nation-states or federations. Zürn underlines three characteristics of the postnational constellation: (1) The nation-state is no longer autonomous in *determining political priorities* but must coordinate its policies within the

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68. Jürgen Habermas, *The Postnational Constellation and the Future of Democracy*, in JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 58–112 (2001).

69. MICHAEL ZÜRN, *THE STATE IN THE POST-NATIONAL CONSTELLATION—SOCIETAL DENATIONALIZATION AND MULTI-LEVEL GOVERNANCE*, ARENA Working Paper No. 35/1999 (1999); Michael Zürn, *Politik in der postnationalen Konstellation*, in *POLITIK IN DER ENTGRENZTEN WELT* 181 (Landfried ed., 2001).

70. Similarly, the sociological version of Ulrich Beck is instructive. "Methodological nationalism takes the following premises for granted: it equates societies with nation-state societies, and sees states and their governments as the cornerstone of social-scientific analysis." Ulrich Beck, *Toward a New Critical Theory with a Cosmopolitan Intent*, *CONSTELLATIONS*, 10:4, at 453 (2003). Beck distinguishes further between *methodological* and *normative* nationalism. "In a normative sense, nationalism means that every nation has the right to self-determination within the frame of its cultural distinctiveness." *Id.* at 454. He emphasizes the blurring of the "boundaries between political, moral and social communities." *Id.* at 455. Such processes mean, so he goes on to argue, that we can no longer rely in our analyses on "national organization as a structural principle of societal and political action." *Id.* at 456. Instead, we must search for and identify with a "cosmopolitan perspective"—the equivalent of a "methodological universalism." *Passim*.

framework of international institutions; (2) national political actors must *strive for recognition* beyond their national constituencies as their practices are increasingly exposed to evaluation at international level; and (3) the nation-state *retains significant resources* which are indispensable for an implementation of internationally agreed-upon policies.

The scheme points to developments which do not just affect the Member States of the European Union but are of general importance—even though they may be experienced less intensively in the United States than in Norway, for instance. Zürn's operationalization of the postnational constellation is particularly helpful for legal analyses because he makes us aware of the interactions and interdependences that affect political processes and law-making process within national systems. Last but not least, his scheme helps to overcome the famous schism between functionalist and intergovernmentalist theories of European integration because it links both approaches in a plausible way.

#### E. A Preliminary Step Towards a Legal Conceptualization of the Europeanization Process

“Multilevel governance” and “methodological nationalism” are not legal concepts—we cannot rely on them as “objectively valid” restatements of “the reality,” or “apply” them in legal conceptualizations and reasoning. Their import into the world of law requires their reconstruction in the introduction of normative dimensions into analytical concepts. Zürn's critique of methodological nationalism is a step in that direction because Zürn pleads for a new orientation for both politics and policymaking. What I suggest is a step towards a reconstruction of the *legal* dimension of the European polity—to start with a suggestion submitted some time ago.<sup>71</sup> The national systems of private law have all found responses to the tensions between economic efficiency, functional necessities and the normative commitments of welfare states—and the legitimacy of these responses is generally unquestioned. European integration exposes these systems to new exigencies, namely that of market integration which was the main objective of the European Economic Community and was both an indispensable prerequisite and a crucial element of Europe's harmonization policies. Europeanization as a process can therefore be characterized by a fundamental tension: The European project of market integration started to im-

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71. See Christian Joerges & Gert Brüggemeier, *Europäisierung des Vertrags und Haftungsrechts*, in *GEMEINSAMES PRIVATRECHT IN DER EUROPÄISCHEN GEMEINSCHAFT* (Peter-Christian Müller-Graff ed., 1993). See also IRENE KLAUER, *DIE EUROPÄISIERUNG DES PRIVATRECHTS—DER EUGH ALS ZIVILRICHTER* (1998); SCHMID, *supra* note 1, at 362.

pose its functionalist logic on the private law systems of the Member States, their various legal traditions, and visions of private law justice. The tension could neither be resolved by the replacement of European law by a supranational equivalent of nation-state law; nor can national law be replaced by European exercises in market building. Such exercises may result in disintegrative effects—or trigger innovative developments within national systems. Such risks and potentials are explored in the following section. This analysis remains a useful starting point, however, it must be refined mainly because the integration project has continuously widened in scope. It has increasingly affected national systems, which in turn have learned to develop more sophisticated responses to these external legal stimuli. The brief references to these two non-legal categories—“multilevel governance” and “methodological nationalism”—suffice to substantiate this observation a step further: It follows from the characterization of the European Union as a multilevel system of governance and from the disaggregation of formerly integrated national competences that the tensions between the functionalist logic of integration and the normative logic inherent in national legal systems cannot be resolved by the building up of a hierarchy within which a “higher” European level could exert comprehensive control over national law. That is a complex formula for a clear message and a compelling logic: The European Union is no unitary state and no federation. It is composed of semiautonomous units, which have become interdependent. These units are not subject to comprehensive supranational authority. The common interest in, and commitments to, the building up of a functioning market has continuously to be balanced with the normative preferences legitimized in the national legal systems. It further follows from the “heterarchical” nature of the European Union that we cannot expect its law to achieve the same type and the same degree of coherence we seek to achieve in the legal systems of unitary polities.

## II. THE PRACTICE OF EUROPEANIZATION: THREE EXEMPLARY PATTERNS

Europeanization cannot be expected to reproduce a system of private law equivalent in its comprehensiveness and consistency to that of the Continental civil code systems. What else will emerge out of the interaction and tensions between the functionalist logic of market integration and the normative logic of preference formation in national legal systems? This question has an empirical and a normative dimension, and both are contested. As a first approximation to the state of the debate on the objectives of Europeanization and of the best means to achieve them, we can look again at the contest of legal disciplines and read their disciplinary ap-

proaches as both a description of the Europeanization process and a cure to the failures they perceive. We then become aware that their contest is linked to an ancillary agenda, namely a contest over the structuring of the emerging European polity which takes place between—but also within—the individual disciplines. To rephrase the perceptions and positions already mentioned:

1. Europeanization is about to destroy the systematic coherence of private law. This is a widely shared concern, particularly in Germany.<sup>72</sup> One cure to that problem is to replace national laws with a European law more systematically, i.e., to proceed from the limited interventions characteristic of Europeanization thus far, to a more comprehensive European code.<sup>73</sup> An alternative here would be to reduce European legislative activities, defend national legal cultures and organize cooperation via private international law.<sup>74</sup>
2. Europeanization, like globalization, fosters deregulation, privatization and regulatory competition, an assessment that can lead to two competing conclusions. While (some) proponents of the “European social model” seek to defend the social dimensions of private law with the help of a European code,<sup>75</sup> proponents of economic efficiency argue that Europeanization has the potential of modernizing and rationalizing European private law, not just because it values individual freedoms so highly, but because the exercise of these freedoms will trigger processes of regulatory competition.<sup>76</sup>

Whose perception is correct? Which normative options are open? Which perception deserves support? It seems worth noting at the outset that “methodological nationalism” requires orchestrating the concert of voices

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72. See *supra* note 16.

73. See *supra* notes 18 and 19.

74. See *supra* note 54.

75. See UGO MATTEI, THE EUROPEAN CODIFICATION PROCESS—CUT AND PASTE 107–28 (2003); Ugo Mattei, *Hard Code Now!*, GLOBAL JURIST FRONTIERS, Vol. 2: No. 1 (2002), available at [www.bepress.com/gj/frontiers/vol2/iss1/art1](http://www.bepress.com/gj/frontiers/vol2/iss1/art1) (last visited Sept. 1, 2004).

76. Out of a steady growing body of literature see Simon Deakin, *Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation: A Law and Economics Perspective on Centros*, 2 CAMBRIDGE Y.B. EUR. L. 231 (1999); EVA-MARIA KIENINGER, WETTBEWERB DER PRIVATRECHTSORDNUNGEN (2003); Jan Smits, *How to predict the differences in uniformity between different areas of a future European private law? An evolutionary approach*, in THE ECONOMICS OF HARMONIZING EUROPEAN LAW 50–70 (Alain Marciano & Lean-Michel Josselin eds., 2002); Gerhard Wagner, *The Economics of Harmonisation: The Case of Contract Law*, 39 COMMON MKT. L. REV. 995 (2002).

just described—and it might be that the Europeanization process is not adequately represented by any of these voices.

How can one determine whether this is so? There is certainly no way to describe the Europeanization process comprehensively. What seems possible and instructive, however, is to explore patterns of this process to which we can ascribe exemplary importance. This is indeed the thrust of the following case studies. Each relates to a distinct link between European law and national law. The first example from the field of product liability law concerns a field in which the European legislature has been active, providing an excellent example of an encounter between European (supra-national) and national private law. The second example is drawn from the field of company law and concerns the impact of European primary law on national legal systems. The third example addresses the tensions between European policies in the field privatization of public services and national distributive policies, more technically speaking between European state aid law, a section of the Treaty chapter on competition policy, and regulatory arrangements at the national level. The exemplary quality of these three types of conflicts seems obvious, however, one must be cautious when evaluating the results reached in each of the cases—while the language of European law is seemingly compelling doctrinal logic, its messages are much more indeterminate and ambivalent.

#### A. Product Liability Law: The Poverty of Orthodox Supranationalism

Consumer protection used to be perceived as the flagship of Europeanization. The European Community, so often described and criticized as building up its common market through strategies of “negative” integration (the abolition of legal provisions impeding free trade) entered the field of private law through the promotion of a “social” private law, promoting a field unknown or marginal in some states, of dubious reputation in others. The frontlines seemed clear: On the one side, the European Community, promoting directives on consumer protection,<sup>77</sup> unfortunately constrained by the unanimity rule of Article 100, but advised and encouraged by a transnational epistemic community of consumer law advocates; on the other side, the defenders of the unity or normative coherence of the national private law system, complaining about such interventions, questioning the Community’s competence<sup>78</sup> and questioning the validity of the argument

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77. The author, promoter and defender of the directive, however, was prudent enough to downplay the consumer protection objective. Cf. Hans C. Taschner, *Die künftige Produzentenhaftung in Deutschland*, 39 NEUE JURISTISCHE WOCHENSCHRIFT 611 (1986).

78. See with regard to the product liability directive, Bodo Börner, *Die Produkthaftung oder das vergessene Gemeinschaftsrecht*, in EUROPÄISCHE GERICHTSBARKEIT UND NATIONALE

that uniform rules of consumer protection would enhance the quality of competitive processes.

1. *The ECJ Judgments of April 25, 2002 on the Product Liability Directive.* The Directive 85/374/EEC<sup>79</sup> on Product Liability was widely considered to be a piece of legislation with many defects. It harmonized only a small segment of product liability law.<sup>80</sup> Its standard of consumer protection seemed generally unimpressive.<sup>81</sup> Critics, skeptics and defenders agreed, however, as to its efficacy, tending to characterize it as quite marginal legislation that would neither do much good nor much harm. This conclusion seemed to be well-founded in view of Article 13 which provided that the Directive did “not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects” and hence did not affect national tort law.<sup>82</sup> It was also understood that consumer protection provisions should be viewed as minimum standards which would not preempt the adoption of more stringent rules by national legislatures.<sup>83</sup>

These views were well established from 1985 until, to the surprise of most observers, the ECJ, in three judgments handed down on April 25, 2002,<sup>84</sup> assigned a new importance to what had been to that point a dormant directive through a doctrinally bold move—in the Court’s view, the Community legislature had not merely laid down minimum standards, but instead aimed at a “complete harmonization” of its provisions on the compensation of consumers. The term “complete harmonization” is an element of the supremacy doctrine. That doctrine would be weakened substantially

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VERFASSUNGSGERICHTSBARKEIT: FESTSCHRIFT ZUM 70: GEBURTSTAG VON HANS KUTSCHER 43 (1981).

79. Council Directive 85/374/EEC, 1985 O.J. (L 210) 29.

80. Cf. H. Koch, *Internationale Produkthaftung und Grenzen der Rechtsangleichung durch die EG-Richtlinie*, 152 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS UND WIRTSCHAFTSRECHT 537 (1988).

81. Cf. Gert Brüggemeier & Norbert Reich, *Die EG-Produkthftungsrichtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach Paragraph 823 Abs. 1 BGB*, WERTPAPIER MITTEILUNGEN 149 (1986).

82. Gert Brüggemeier, *Produkthaftung und Produktsicherheit*, 152 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS UND WIRTSCHAFTSRECHT 511, 531 (1988).

83. Had the Directive been adopted after the Single European Act and accordingly based on Article 100(a) (now 95), then the adoption of more stringent standards (subject to the procedure laid down in Sections 4 and 5 of that provision) would have been possible. The Advocate General Geelhoed was able to bring the orthodox understanding of supremacy and pre-emption to bear. See his Conclusions in Case C-154/00, para. 4; Case C-52/00, para. 14 and Case C-183/00, para. 27. The ECJ followed suit. See Case C-154/00, para. 10; Case C-52/00, para. 14, Case C- 183/00.

84. Case C-52/00, *Commission v. France*, 2002 E.C.R. I-3827; Case C-183/00, *María Victoria González Sánchez v. Medicina Asturiana SA*, 2002 E.C.R. I-3901; Case C-154/00, *Commission v. Greece*, 2002 E.C.R. I-3879.

if national law could adopt provisions deviating from primary European law (Treaty provisions) or from secondary law (acts adopted in the Community legislative process). The doctrine of preemption is a quasilogical implication—where the Community legislature has “occupied” a field, the Member States can no longer pursue deviating policies.

The views on the limited reach of the Product Liability Directive were not just shared by advocates of consumer protection. The most important reason militating in favor of a narrow interpretation stems from the dynamics of general tort law and the interdependencies of product liability in tort law with contract law and product safety law. The ECJ would only very occasionally have an opportunity to develop its views on the Directive. It seemed reasonable to conclude that an ossification of the whole field might follow from any extensive interpretation of the effects of the directive on national law.<sup>85</sup>

Indeed, such fears seem cogent in light of the ECJ’s three new products liability judgments. The decision concerning Spanish law<sup>86</sup> seems particularly troubling.<sup>87</sup> In *Medicina Asturiana SA*, Maria Sanchez, the plaintiff, required a blood transfusion in the hospital run by the defendant institution. As a consequence of the transfusion, she was infected with the Hepatitis C virus. She based her action on the law by which Spain had transposed the Directive into Spanish law and, in addition, on the general liability provisions of Spanish civil law and on the Spanish General Law for the Protection of Consumers and Users of July 19, 1984, under which the claimant had only to prove damage and a causal connection. Under the Product Liability Directive, implemented ten years after the 1984 Law,<sup>88</sup> she also had to prove that the hospital had produced the blood conserves at issue, which she failed to show. Therefore, the success of her claim depended on the relationship between the three legal bases. Article 13 of the Directive provides that the Directive “shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment

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85. Brüggemeier, *supra* note 82, at 531.

86. C-183/00, *María Victoria González Sánchez v. Medicina Asturiana SA*, 2002 E.C.R. I-03901; Marie-Eve Arbour, *Compensation for Damage Caused by Defective Drugs: European Private Law between Safety Requirements and Free-Market Values*, 10 EUR. L.J. 87 (2004); Schmid, *supra* note 5, especially Part 2, Section 4, Ch. 5.

87. The two parallel decisions concerned the conformity of transpositions going beyond its standards of protection with the Directive: Greece had wanted to spare its citizens from the personal contribution of €500 provided for in Article 9 I (b) of the Directive. Case C-183/00, para. 8. France wanted to hold the distributor liable alongside the manufacturer, and, additionally, to restrict the exemptions from liability foreseen in Article 7 of the Directive. Case C-52/00, para. 6.

88. Case C-183/00, *Medicina Asturiana SA*, 2002 E.C.R. I-3901, at paras. 7, 8.

when this Directive is notified.” Does this mean, the Spanish court asked the ECJ, that the Directive could “be interpreted as precluding the restriction or limitation, as a result of transposition of the Directive, of rights granted to consumers under the legislation of the Member State?”<sup>89</sup> To the unversed reader, the question may sound rhetorical. But the Court responded:

“[. . .]Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.”<sup>90</sup> . . . The provision that Article 13 does not affect claims on a different basis cannot “be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive.”<sup>91</sup>

In its analysis of the Community law provisions, the ECJ refers to Recital 1 in the preamble of the Directive, according to which “approximation is necessary because legislative divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property.”<sup>92</sup> It had been necessary at the time to introduce this sentence, in order to “establish” the Community’s (functional) legislative competence. Since then, the paragraph has become neither more empirically relevant, nor normatively more correct. Nevertheless, the Court’s judgment reaffirmed its value as a virtually teleological motivation for restricting Member States’ legislative autonomy.<sup>93</sup>

2. *Critique.* The style of reasoning of the ECJ is often formalistic for many reasons, among them the precarious legitimacy of the Court. Is formalism a plausible strategy and normatively sound response to queries as to the Court’s legitimacy? Should the commentators of the Court seek to protect it by submitting restrictive interpretations of the judgment? The annotations to the judgment are in disagreement. A German commentator, in a very comprehensive and careful analysis,<sup>94</sup> suggests that the ECJ’s intrusion into product liability law should be read as preempting not just national transformations of the Directive, but also tort law more generally.

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89. *Id.* at para. 13.

90. *Id.* at para. 30.

91. *Id.* at para. 33.

92. *Id.* at para. 3.

93. *Id.* at paras. 24, 25.

94. Renate Schaub, *Abschied vom nationalen Produkthaftungsrecht? Anspruch und Wirklichkeit der EG-Produkthaftung—Zugleich Besprechung der Urteile des EuGH vom 25. 4. 2002, Rs. C-52/00, C-154/00 und C-183/00*, in 2003 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT III 541-589 (2003).

While the doctrinal or conceptual basis of European strict liability is not clear, what is clear is the ECJ's harmonization objective. As a result, national courts must now turn to the ECJ and submit questions of tort law to it. This can be argued under the *acte claire* and supremacy doctrine. According to this tandem, national courts must ask the ECJ for clarification wherever the meaning of European concepts seem ambiguous. In this way the system seeks to ensure the uniformity of law in Europe. "What a civil law fantasy!" common law lawyers may tend to think. Or perhaps they would characterize this as a pure nightmare? If these doctrines were applied extensively, they could potentially increase the burden of the ECJ enormously. This would imply that the Court would get increasingly involved in the adjudication of issues which it is not well prepared and equipped to address. Indeed, the majority of the annotations to the ECJ's intrusion into product liability law criticize the court for not exercising more restraint.<sup>95</sup>

It seems absolutely unlikely that national courts will abstain from developing their product liability law further and impose upon the litigating parties the burdens and references to the Directive that the ECJ judgments apparently require. At the same time, it seems equally implausible that the ECJ will pursue a strategy of expanding its reach to include ever more responsibilities—especially responsibilities over such a complex and contested area. Given that the Product Liability Directive is based upon now outdated Treaty provisions, the chances for a more prudent exercise of judicial powers seems likely, although such comments cannot explain, let alone justify, the Court's revival of the language of orthodox supranationalism.

## B. Company Law: The Transformation of Economic Freedoms into Political Rights

The ECJ's *Centros* judgment<sup>96</sup> is to be regarded as its most important—and certainly its most debated—holding since the legendary *Cassis de Dijon* decision of 1979.<sup>97</sup> Expectations of the subsequent *Überseering*<sup>98</sup>

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95. G. Viney, *L'Interprétation par la CJCE de la Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits Défectueux*, LA SEMAINE JURIDIQUE, 2002, I 177, No. 44-45, 1945-1948 (2002); Jean Calais-Auloy, *Menace européenne sur la jurisprudence française concernant l'obligation de sécurité du vendeur professionnel*, RECUEIL LE DALLOZ, No. 31, at 1458 (2002); A. Palmieri & R. Pardolesi, *Difetti del prodotto e del diritto privato europeo*, IL FORO ITALIANO, 125, IV, at 296 (2002). See also Marie-Eve Arbour, *supra* note 86, and Schmid, *supra* note 5.

96. Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459.

97. Case C-120/78, *Cassis de Dijon*, 1979 E.C.R. 649.

98. Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, 2002 E.C.R. I-9919.

and, soon thereafter, *Inspire Art*<sup>99</sup> judgments were correspondingly tense. So much has been written about these judgments<sup>100</sup> that any comprehensive presentation of the debate could easily fill a book. The purpose, however, for which this recent jurisprudence will be analyzed in this essay is both limited and specific. Its focus is an analysis of the law-generating process, in which individuals and companies exercising their economic freedoms under national and European legislation, and both national and European courts, participate and interact. This analysis will defend three theses: (1) The ECJ's company law case law has effectively transformed economic freedoms into the rights of political participation; (2) the ECJ's jurisprudence is not exposing company law to the logic of economic processes but rather strives towards a "juridification" of regulatory competition; and (3) the theoretical and practical challenge of these law-generating processes stems from their "constitutional" importance. A constitutionalization of the European Union, which seeks to ensure the legitimacy of its law production must turn its attention to the quality of these processes.

1. *Centros*. The judgment in *Centros* concerns the core of all the European legal rules and principles (the famous *acquis communautaire*), namely, the freedoms of market citizens, which apply directly and ought, therefore, to take primacy over national law. Moreover, the decision counts as an extension and strengthening of a perception that has deeply penetrated the legal consciousness and awareness of economic law as it is held to serve so-called negative integration, because the directly applicable freedoms can be invoked by European citizens when asking for review of the content of national law by the ECJ. Through such reviews, national laws can be exposed to "regulatory competition." These perceptions of *Centros* have their *fundamentum in re*, but they neglect important dimensions.

As so often occurs, the facts of this *cause célèbre* were quite trivial.<sup>101</sup> A Danish married couple, Marianne and Tony Bryde, wished to import wine into Denmark but hoped to save the fee of DK200,000 (approximately €28,000) that Denmark requires for the registration of companies. They

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99. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155.

100. A Celex search on March 25, 2002 indicated 112 commentaries. That figure was too modest, for it did not take into account, for instance, HARALD HALBHUBER, *LIMITED COMPANY STATT GMBH? EUROPARECHTLICHER RAHMEN UND DEUTSCHER WIDERSTAND—EIN BEITRAG ZUR AUSLEGUNG VON ART. 48 EG UND ZUM EUROPÄISCHEN GESELLSCHAFTSRECHT* (2001).

101. The following owes much to BARBARA TREFIL, *CENTROS UND DIE NIEDERLASSUNGSFREIHEIT VON GESELLSCHAFTEN IN EUROPA* (European University Institute Working Paper Law No. 2003/9), available at <http://www.iue.it/PUB/law03-9.pdf> (last visited May 38, 2004).

founded a private limited company in the United Kingdom in May of 1992 with a “seat” at the home of English friends—the now legendary Centros Ltd.—and set up a subsidiary in Copenhagen. None of these steps required the capital investment they would have required in their home state of Denmark.<sup>102</sup>

The Danish authorities refused registration, arguing that the only reason why the Brydes had sought the help of their friends in the United Kingdom was to avoid the burdens of Danish law. The Brydes went to court. Their complaint went through all official channels until it reached the highest possible judicial authority, Denmark’s Højesteret.<sup>103</sup> The Højesteret submitted the question of whether the refusal of registration was compatible with the guarantee of freedom of establishment to the ECJ in early June 1997. The ECJ’s decision of March 9, 1999 read:

It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the state in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that state, are more restrictive as regards the paying up of a minimum share capital.<sup>104</sup>

2. *Discussion.* The ECJ decision was read by some<sup>105</sup> as cautiously continuing its earlier interpretations of freedom of establishment.<sup>106</sup> Others

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102. Their conduct is interpreted with this degree of severity by Germany’s *maitre penseur* of private international law, Gerhard Kegel in an editorial in *Europäisches Wirtschafts und Steuerrecht*, Heft 8, 1999. Gerhard Kegel, *Es ist was faul im Staate Dänemark...* (There is Something Rotten in the State of Denmark), *EUROPÄISCHES WIRTSCHAFTS UND STEUERRECHT HEFT*, Sept. 8, 1999, editorial.

103. Case C-212/97, para. 13: “Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 56 and 58 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with company capital of GBP 100 (approximately DKK 1 000) and exists in conformity with the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying up company capital of not less than DKK 200 000 (at present DKR 125 000)?”

104. Sentence 1 of the tenor of the Judgment, 1999 E.C.R. I-1947.

105. Completeness can scarcely be achieved by portraying the range of opinions. For a specific discussion of the response in Germany, see Harald Halbhuber, *National Doctrinal Structures and European Company Law*, 38 *COMMON MKT. L. REV.* 1385 (2001). A very comprehensive survey on the overall development of company law from an outsider’s perspective is offered by Jan Wouters, *European Company Law: Quo Vadis?*, 37 *COMMON MKT. L. REV.* 257 (2000). For a more topical discussion, see TREFIL, *supra* note 101.

106. Case C-79/85, *Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswesens, Groothandel en Vrije Beroepen*, 1986 E.C.R. 2375.

maintained that the ECJ was radicalizing its jurisprudence in a questionable fashion.<sup>107</sup> Substantial energies were spent on the reconstruction of the case in the terms of a discipline the ECJ tends to neglect persistently—did “incorporation theory” (*Gründungstheorie*)<sup>108</sup> trump the “company seat principle” (*Sitztheorie*)<sup>109</sup> with the help of the ECJ,<sup>110</sup> or did the judgment respect diversity in the European Union at the expense of the proper choice-of-law principle? Had not the ECJ just confirmed its respect for private international law in general and the seat in particular in its *Daily Mail*<sup>111</sup> decision?<sup>112</sup> A considerable number of commentators saw the ECJ as opening the road to regulatory competition, suggesting the potential for Delaware effects in Europe—anathema to adherents of the seat theory.<sup>113</sup>

Does it make sense to interpret the reasoning of the ECJ in the light of a discipline the court does not consider? The answer to that question depends upon the problem and the context of the problem the Court seeks to resolve. Could a decision on the merits of the two competing theories be a constructive contribution to the Europeanization of company law? That field is characterized by endless efforts to harmonize statutory law, to live

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107. Ernst Steindorff, *Centros und das Recht auf die günstigste Rechtsordnung*, 1999 JURISTENZEITUNG 1140.

108. According to the law of all common law and some continental jurisdictions, the corporate law governing the internal affairs of a given corporation is the law of the place of incorporation (*Gründung*)—a very convenient doctrine for an expansionist economy like that of imperial England, comment the critics.

109. According to the theory traditionally dominating the (European) Continent, the effective seat doctrine—“*Sitz*” or “*siège réel*”—the internal affairs of a corporation are to be governed by the national law of the state where its effective seat is located. This doctrine is based on the assumption the seat jurisdiction has the most contact with the business of the company and should protect the what is regarded there as a public interest.

110. See, e.g., Peter Behrens, *Das Internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH*, 19 PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHTS 323 (1999). This was the question the Federal High Court submitted to the ECJ on May 25, 2000 in the *Uberseering* decision. See discussion *infra* II.B.3.

111. Case C-81/87, *The Queen/Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*, 1988 E.C.R. 5483. At stake in this case was the compatibility with European law of an English tax law requiring the consent of the Treasury before a resident corporation could move its headquarters out of the country. This served precisely the purpose to tax gains that had accrued while the company was a resident of the UK.

112. See, e.g., Werner Ebke, *Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH*, 1999 JURISTENZEITUNG 656; Peter Kindler, *Niederlassungsfreiheit für Scheinauslandsgesellschaften? Die Centros-Entscheidung des EuGH und das internationale Privatrecht*, 52 NEUE JURISTISCHE WOCHENSCHRIFT 1993 (1999); Wulf-Henning Roth, *Case Note*, 37 COMMON MKT. L. REV. 147 (2000).

113. The “Delaware effect” denotes the move of companies into the legal regime most convenient to them, the (in)famous “race to the bottom.” It was especially paragraph 20 in Advocate General La Pergola’s opinion that inspired this sort of interpretation. See Matthias Baudisch, *From Status to Contract? An American Perspective on Recent Developments in European Company Law*, in THE EUROPEAN UNION AND GOVERNANCE 24, 44 (Francis Snyder ed., 2003).

with German sensitivities over their codetermination legislation and to enable economic actors to do business in an integrating market. Would it be a constructive contribution of the ECJ to confirm that the believers in incorporation theory should proceed with their principle while the defenders of the seat theory should continue to insist on the application of the laws of the “real seat” of a company? I cannot see why the ECJ should have thought along such lines. The manner in which the ECJ considered the conduct of the Bryde couple in *Centros* seems to be focused instead on what it means to be a Dane and a European citizen: European law, proffers the criticism of the ECJ’s decision, has no business interfering with a purely internal Danish matter and the Brydes, who were pursuing no business interests in England, ought to have bowed to their home sovereign. But are the Brydes only Danes? The ECJ does not think so, stressing there is nothing in itself abusive when a citizen of a Member State founds a company in accordance with the laws of another Member State’s provisions which are more favorable for him. According to the ECJ, this is simply a matter of right:

That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.<sup>114</sup>

As Ernst Steindorff has critically observed, this argument seems to be establishing, a “right to the most favourable legal system.”<sup>115</sup> If this were so, the ECJ could indeed be interpreted as pursuing a strategy of “negative” integration, of exposing national legislatures to a regulatory competition orchestrated by private actors or of sending Europe on the road to Delaware. But the ECJ’s message is more complex—it did not question in principle the competence of Denmark to impose regulatory requirements on both its own and foreign citizens and companies. Indeed, this argument expressly confirmed that “a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.”<sup>116</sup>

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114. Case C-212/97, *Centros*, 1999 E.C.R. at para. 27.

115. Steindorff, *supra* note 107.

116. According to Case C-212/97, *Centros*: “[A]ccording to the Court’s case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the

Yet the Court insisted that such regulatory restrictions be based on good grounds of public interest. European law does not push Danish law aside, but rather places it under pressures of justification. It was this pressure that Denmark could not stand up to—it could not explain how its statutory requirements would achieve the protection of creditors which was, according to the Danish government’s presentation, their very objective. In essence, the ECJ acted as a constitutional court in the *Centros* case in that it assumed the right to test Danish law according to whether it respected rights guaranteed at the European level. Even so, the constraints imposed on Denmark’s sovereignty were limited, and Denmark soon made use of its retained autonomy by adopting a new regulation requiring that companies that wish to do business in Denmark and who maintain their main administrative center there, either deposit DK110,000 with the Danish bank authorities in the form of cash, government bonds or bank guarantees (which in the event of insolvency serve exclusively to meet tax demands), or provide proof that minimum assets of at least DK125,000 are available.<sup>117</sup>

Have the Danes simply put new gloss on the old provisions? Some Danish commentators think so.<sup>118</sup> In its judgment of February 3, 2002, the Danish Supreme Court was silent on the issue of *Centros*’ tax liability; it simply reprimanded that the forms had not been completed correctly.<sup>119</sup> What, then, is so “rotten”—in the state of Denmark and elsewhere?<sup>120</sup>

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Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it . . . .” *Id.* at para. 34. “Those conditions are not fulfilled in the case in the main proceedings. First, the practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk.” *Id.* at para. 35. “Since the company concerned in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish law, its creditors are on notice that it is covered by laws different from those which govern the formation of private limited companies in Denmark and they can refer to certain rules of Community law which protect them, such as the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies . . . , and the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State . . . .” *Id.* at para. 36 (citations omitted).

117. See TREFIL, *supra* note 101, at 31 (referencing [www.retsinfo.dk](http://www.retsinfo.dk) and a survey of the debate on the questionability in European law of the new regulations).

118. F. Hansen, *From C 212 to L 212—Centros Revisited*, 2 EUR. BUS. ORG. L. REV. 141, 156 (2001) (citing “a flagrant violation of Article 43 EU”).

119. Ugeskrift for Retsvæn 2002.1079H; Laurits Christensen (Copenhagen) and Hanne B. Jensen (Florence) kindly pointed me to the judgment.

120. Kegel, *supra* note 102.

Denmark has to justify itself before its own citizens in the forum of the ECJ. It is entitled to pursue its regulatory interests, but it also must show that the means that it chooses serve the ends that it pursues. It must not discriminate against foreign citizens and its law should be as Community-friendly as possible.

What legal discipline are we dealing with here? Clearly we are no longer in the realm of private international law. Comparative studies on the company law traditions of the EU Member States are certainly instructive, but they do not reveal much about the proper design of company law in a multilevel system of governance. Is the Court building a European body of company law which would conceivably replace national laws—essentially a European company code? What we are witnessing is a process of law production which deals with contested regulatory objectives and the tensions of national and supranational competencies. Europeanization occurs through a European “conflict of laws” which must cope with legal differences, in an effort to define and maintain Denmark’s political autonomy while at the same time protecting rights that European law is granting to all Europeans. How else than through the shaping of procedures in which responses are required could this be accomplished? *Centros* is dealing only with segments of company law production, namely the freedom of establishment and it effectively proceduralizes this right. The Brydes have not acquired the “right” to replace Danish law by some other law that they find more pleasant. Rather, they have the right to initiate a process in which Denmark must justify its regulatory measures. It is precisely this reshaping of economic freedoms as rights to political participation where the constitutional core of the decision lies. This interaction is novel in that it bridges different levels of governance, yet it seems more familiar when contrasted with the interaction of private rights and the political sphere in constitutional democracies. Private autonomy and political rights, so Jürgen Habermas has continually argued since his seminal *Between Facts and Norms*,<sup>121</sup> must be conceived as two co-original positions.<sup>122</sup> What does this mean in the European context? According to the *Centros* judgment, it means that a Danish citizen can bring his sovereign to court with the argument that the latter lacks justification for denying him the exercise of his rights in accordance with the regulatory schemes approved by other Member States.

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121. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 82, 133 (1998).

122. Cf. his recent restatement in Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 766–81. See also Jürgen Habermas, *Why Europe needs a Constitution?*, in ERIK O. ERIKSEN ET AL., *DEVELOPING A CONSTITUTION FOR EUROPE* 19 (2004), also available at [http://www.iue.it/RSC/EU/Reform02\(uk\).pdf](http://www.iue.it/RSC/EU/Reform02(uk).pdf) (last visited May 28, 2004).

3. *Überseering and Inspire Art*. *Centros* produced dramatic effects at two levels. It was foreseeable that interested actors would test the strength of their legal positions to explore possibilities to save capital by establishing businesses in the United Kingdom, although little systematic sociological research has been undertaken so far to ascertain the true effect.<sup>123</sup> The debate in *Centros* concerned the interpretation of the new legal situation and the discussion of the next steps the ECJ would take. These steps were illuminating—and they may initiate a less doctrinal but more constructive turn in the Europeanization debate.

In a decision of March 30, 2000<sup>124</sup> the German Federal High Court submitted the question to the ECJ of whether German law is incompatible with the EC Treaty if it prevents a Dutch company from pursuing its claims against a German defendant in a German court. This is a possible procedural implication of Germany's seat theory. According to Section 50(1) of the German Civil Procedures Act (*Zivilprozessordnung*), *locus standi* of companies in German courts is dependant upon their competence to act legally (*Rechtsfähigkeit*). In the present case, the plaintiff *Überseering* had moved the center of its activities from the Netherlands to Germany. The plaintiff sought to bring an action against the defendant, a German company, which sought compensation for defective work carried out by the company. Because a company incorporated according to Dutch law could essentially lose its legal capacity once it transferred its "seat" (*Verwaltungssitz*), such a company was essentially forced to reregister in Germany.<sup>125</sup> In an internal market, such legal principles seem downright incredible.

German law is not quite that rigid, however. As Advocate General Colomer noted in his opinion, the German government had argued in the oral hearings that a company in the plaintiff's position could, in fact, continue to assert its rights under German law,<sup>126</sup> and that, in German law, *Überseering's* passive *locus standi* continued to exist despite the new

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123. Matthias Baudisch argues that firms will not so easily risk their reputation by engaging in a "race to the bottom" in an analysis that is not sociological but nonetheless extremely informative. Matthias Baudisch, *From Status to Contract? An American Perspective on Recent Developments in European Company Law*, in *THE EUROPEAN UNION AND GOVERNANCE*, 24, 44 (Francis Snyder ed., 2003). See also Catherine Holst, *European Company Law after Centros: Is the EU on the Road to Delaware?* 8 *COLUM. J. EUR. L.* 323–41 (2002).

124. *BGH: Rechtsfähigkeit niederländischer Gesellschaft bei Verwaltungssitzverlagerung*, 11 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 412 (2000).

125. Cf. para. 45 in Advocate General Colomer's opinion in Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, 2002 E.C.R. I-09919.

126. *Id.* at para. 55.

“seat” of the company.<sup>127</sup> Despite this apparent way out of the dilemma, the ECJ refrained from using the escape, holding that, “[a] necessary precondition for the exercise of the freedom of establishment is the recognition of those companies by any Member State in which they wish to establish themselves.”<sup>128</sup>

My initial impression was that the ECJ’s reasoning resulted in an unnecessarily harsh treatment of Germany,<sup>129</sup> however in the meantime, the ECJ has clarified its position. In *Inspire Art*<sup>130</sup> it became definitively clear that the ECJ sought to provide enhanced guidance for the Europeanization process. *Inspire Art* was a company incorporated in the United Kingdom but which operated exclusively in the Netherlands. According to the Dutch *Wet op de Formeel Buitenlandse Vennootschappen*<sup>131</sup> (Law on Formally Foreign Companies) of December 17, 1997, *Inspire Art* was required to register in the Netherlands and to add that it is a formally foreign company, which would nevertheless be subject to Dutch minimum capital and disclosure requirements, as well as provisions on the personal liability of the directors.

In its ruling, the Dutch disclosure provisions were held to be incompatible with secondary Community law.<sup>132</sup> As to the rules on minimum capital and the liability of directors, the ECJ concluded “that neither the [Dutch] Chamber of Commerce nor the Netherlands Government has adduced any evidence to prove that the measure in question satisfies the criteria of efficacy, proportionality and non-discrimination mentioned. . . . [They therefore] cannot be justified under Article 46 EC, or on grounds of protecting creditors, or combating improper recourse to freedom of establishment or safeguarding fairness in business dealings or the efficiency of tax inspections.”<sup>133</sup>

What is left of private international law and its competing theories? The ECJ’s reference to the rights guaranteed by the Treaty, to the supremacy of secondary legislation over national provisions on the same subject, and, last but not least, the subjection of national legislation to European

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127. *Id.* at para. 46.

128. Case C-208/00, *Überseering*, 2002 E.C.R. at para. 59.

129. See CHRISTIAN JOERGES, ON THE LEGITIMACY OF EUROPEANISING PRIVATE LAW: CONSIDERATIONS ON A JUSTICE-MAKING LAW FOR THE EU MULTI-LEVEL SYSTEM 17 (European University Institute Working Paper Law No. 3003/3, 2003), available at <http://www.iue.it/PUB/law03-3.pdf> (last visited May 28, 2004); see also SCHMID, *supra* note 1, at 428.

130. Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* (Judgment of September 30, 2003), available at [www.curia.europa.eu](http://www.curia.europa.eu).

131. Staatsblad 1997, No. 697.

132. Case C-167/01, *Inspire Art*, 2003 E.C.R. at paras. 71, 72.

133. Case C-167/01, *Inspire Art*, 2003 E.C.R. at paras. 140, 142.

standards of reasonableness, provide a Europeanization framework which is superior to anything so far conceived under private international law. This does not imply that all the objectives which were generally ascribed to the seat theory—“requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities”<sup>134</sup>—would now have been outlawed. They remain alive but must be reconsidered and substantiated anew in the ECJ’s framework following *Inspire Art.*<sup>135</sup>

Germany’s codetermination law is the most difficult case. What would be left of it if subjected to the standard the Court has adopted in *Inspire Art.*?<sup>136</sup> There are reasons to believe that we need not find an answer to this question. At first blush, codetermination seems to lead us into the kind of dilemma that the recent Microsoft decision by the European Commission presented<sup>137</sup>—that a company present in two jurisdictions is subjected to the rules of one of them in such a way that the other jurisdiction’s policy is subverted, be it *de jure* or *de facto*. Essentially, you either have codetermination or you don’t. If Volkswagen operates under a codetermination at home and codetermination is considered bad, then all the countries in which Volkswagen does business are essentially negatively affected.

What kind of conceptual framework could help to resolve the socio-economic *Kulturkampf* between Germany’s traditions and the rest of the world? Perhaps we should be content with the practices already developed. Volkswagen has neither been confronted with requests to give up its commitments to codetermination nor has it threatened to leave the country because of the burdens codetermination imposes. Germany has not imposed its codetermination laws on pseudoforeign corporations,<sup>138</sup> but quite pa-

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134. Case C-208/00, *Überseering*, 2002 E.C.R. at para. 92.

135. Erich Schanze and Andreas Jüttner consider these concerns exaggerated and rather unhelpful for the development of a control theory moderated by European law. Erich Schanze & Andreas Jüttner, *Anerkennung und Kontrolle ausländischer Gesellschaften. Rechtslage und Perspektiven nach der Überseering-Entscheidung des EuGH*, 2003 DIE AKTIENGESELLSCHAFT 36; Cf. Peter Ulmer, *Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandsbesitz*, 54 (13) JURISTENZEITUNG 662 (1999).

136. For a comprehensive and thoughtful discussion, see Jens C. Dammann, Note, *The Future of Codetermination after Centros: Will German Corporate Law Move Closer to the U.S. Model?*, 8 FORDHAM J. CORP. & FIN. L. 607 (2003).

137. Case COMP/C-3/37.792, Microsoft, Commission Decision of March 24, 2004, COM(04)900 final, available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf> (last visited Jan. 31, 2005).

138. See Dammann, *supra* note 136, at 621.

tiently sought to find a European framework within which its traditions might survive.<sup>139</sup>

### C. Diagonal Conflicts: “Invasions of the Market”?<sup>140</sup>

It is an important characteristic of the integration process that it effectively dissolves the links between private law and its regulatory environment.<sup>141</sup> This disintegrative side-effect is an implication of a fundamental constitutional principle of the European construct. The EU’s competencies are restricted to the fields enumerated in the Treaty. The principle is uncontested in theory, but it is difficult to apply in practice. Indeed, real-world constellations generally do not proceed according to the lines drawn by the drafters of the Treaty. It is typical in the European Union that the European level is competent—sometimes even exclusively—to regulate one aspect of a problem, whereas Member States remain competent to regulate another. As a result, the term “diagonal conflict” is useful to distinguish such constellations from “vertical” conflict resolutions where Community law trumps national law on the one hand, and from “horizontal” conflicts which arise from differences among the legal systems of Member States and belong to the realm of private international law on the other.

Examples are legion. I restrict myself to a discussion of two recent examples from fields in which the logic of market integration tends to jeopardize the individual policy objectives pursued by Member States. The examples concern the extent of private as opposed to public governance. They do not deal with rules of private law, but rather an instrumentalization of private governance arrangement in the context of public governance. The first example addresses environmental policy objectives which have not only been tolerated but actively pursued by the Community and the second deals with a conflict between European privatization policies and national distributive concerns in the field of public services. Both examples document the deepening and increasing complexity of the integration project. The old harmonization policies through which the Community initially sought to ensure the equality and fairness of competitive conditions are insufficient when it comes to policies of social and economic regulation for which the Member States have retained competence.

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139. For an overview, see Dieter Sadowski, Joachim Junkes & Sabine Lindenthal, *The German Model of Corporate and Labour Governance*, 22 COMP. LAB. L. & POL’Y J. 33 (2000).

140. This term is borrowed from Steven Lukes, *Invasions of the Market*, in FROM LIBERAL VALUES TO DEMOCRATIC TRANSITION: ESSAYS IN HONOR OF JÁNOS KIS ch. 4 (Ronald W. Dworkin ed., 2004).

141. See Joerges, *supra* notes 60 and 61.

What discipline can the Community exert in such fields? Can it control the anticompetitive effects of national regulations? The complexity and normative sensitivity of such issues render the tasks of the ECJ ever more difficult. In principle, European law must respect national or regional political preferences—the ECJ evinced such a respect, but only in the second example was the Court’s performance truly impressive.

1. *Windmills in Schleswig Holstein*. Germany’s governing coalition has a common enemy, a common problem and a common hope. The common enemy is atomic energy, the common problem is coal, both black and brown, and their hope lies in windmills. All three industries are heavily subsidized. The government’s hope, however, is that the energy gained from windmills will be increasingly competitive. It will take time and money until the present technology is developed so that environmentally friendly energy will be available at competitive prizes. The German government, especially the Ministry for the Protection of the Environment, believes that the objective is worth the effort. Yet, European law becomes a factor by virtue of Article 87 of the EC Treaty which prohibits in principle “any aid granted by a Member State or through State resources in any form whatsoever. . .”<sup>142</sup>

This is, of course, known to the German government and motivated the specific legislative design of the *Stromeinspeisungsgesetz* (the law on feeding electricity from renewable energy sources into the public grid) of December 7, 1990,<sup>143</sup> as amended in 1998.<sup>144</sup> This law obliges regional public electricity suppliers to purchase all the electricity produced within their area of supply from renewable sources such as wind, water and sun and to pay a fixed minimum price for that electricity which is higher than that for other electricity. Moreover, the law obliges upstream suppliers of electricity to pay partial compensation to those regional distribution undertakings for the additional costs caused by that purchase obligation.<sup>145</sup>

What is so clever about this legislative design? The German Federal State and the state of Schleswig-Holstein are of course aware of European state aid law. Article 87(1) EC Treaty prohibits in principle “any aid

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142. Article 87(1) EU Treaty states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. EC TREATY art. 87 (as amended), available at [http://europa.eu.int/comm/competition/legislation/treaties/ec/art87\\_en.html](http://europa.eu.int/comm/competition/legislation/treaties/ec/art87_en.html) (last visited Jan. 31, 2005).

143. BGB. 1990 I, 2633.

144. BGB. 1998 I, 730.

145. For a very detailed account of the legislative history and the controversies surrounding it cf. the opinion of Advocate General Jacobs, delivered on October 26, 2000 in Case C-379/98, paras. 5–62.

granted by a Member State or through State resources.” Article 87(2) and (3) lists two groups as exceptions to the rule. One group enjoys *per se* legality under Article 87(2). Much more important and interesting is the second group which subjects aid schemes to an evaluation by the Commission undertaken “in cooperation with the Member States” (Article 88). Article 88(3) obliges Member States to inform the Commission “of any plans to grant or alter aid” in a timely manner so that the Commission can evaluate such plans before they are put into effect.

The German government had notified the Commission of its legislative intentions in 1990 and received a letter from the Commission authorizing the notified draft, explaining that it was in accordance with the energy policies of the EU and acceptable also because wind energy constituted only a small segment of the market.<sup>146</sup> In 1996, however, the Commission had informed the German Ministry for the Economy of its doubts as to whether in view of the increasing production of wind energy the *Stromeinspeisungsgesetz* was still compatible with the Treaty.<sup>147</sup> The 1998 amendment had not yet been notified.<sup>148</sup>

The present conflict was, however, initiated by the private actors on which the *Stromeinspeisungsgesetz* imposes the duty to use and to pay wind energy. The plaintiff PreussenElektra AG complained about the compensation of the extra costs the local energy distributor Schleswig AG incurred when purchasing from renewable sources.<sup>149</sup> PreussenElektra argued that the 1994 amendment of the *Stromeinspeisungsgesetz*, which had not been notified to the Commission, should not be applied and could hence not create an obligation to compensate Schleswig. As is apparent from the fact that Schleswig was held as to 65.3 percent by PreussenElektra, the true addressee of the complaint was the German legislature whom the parties sought to correct with the help of European law.<sup>150</sup>

Environmental protection is a mandatory Community objective [Articles 3 (1) (1) and 6)], just as it is a *Staatsziel* (objective of national interest) in Germany. Thus, the conflict is not about the legitimacy of environmental protection, but rather is about the competence to weigh the pros and cons of the *Stromeinspeisung* (i.e., the feeding of electricity from renewable energy sources into the public grid) policy. If the scheme of the German statute constituted a state aid in the sense of Article 87, it would, ac-

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146. Case C-379/98, PreussenElektra AG v. Schleswaf AG, 2001 E.C.R. I-02099, at para. 11.

147. *Id.* at para. 12.

148. *Id.* at para. 13.

149. *Id.* at paras. 20–21.

150. *Id.*

ording to Article 88, be up to the Commission to supervise the weighing between competitive and environmental rationality, and it could seek the confirmation of its assessment by the ECJ.

Ever since 1993 and the *Sloman Neptun* cases<sup>151</sup> the Court has chosen to read Article 87 literally:

Only advantages granted directly or indirectly through state resources are to be considered aid within the meaning of Article 87 (1). The distinction made in that provision between ‘aid granted by a Member State’ and aid granted ‘through state resources’ does not signify that all advantages granted by a state, whether financed through state resources or not, constitute aid, but is intended merely to bring within that definition both advantages which are granted *directly* by the state *and* those granted by a public or private body designated or established by the state.<sup>152</sup>

This formalism, famously confirmed half a year later in *Ferring*,<sup>153</sup> enabled the ECJ to keep itself at a distance from the quarreling between national and European governmental and nongovernmental actors, or so the ECJ may hope. That hope is unfounded, the critics—most prominently by its own Advocate Generals<sup>154</sup>—argued that the ECJ’s formalism is an unsound judicial response to the governance arrangements modern state aid schemes use.<sup>155</sup> In *PreussenElektra* the ECJ remained unimpressed:

“[T]he case-law of the Court of Justice shows that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1). The distinction made in that provision between ‘aid granted by a Member State and aid granted ‘through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but

151. Cases C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesemer*, 1993 E.C.R. I-887. At issue was a measure enabling certain shipping undertakings flying the German flag to subject seafarers who were nationals of non-member countries to working conditions and rates of pay less favorable than those applicable to German nationals.

152. Case C-379/98, *PreussenElektra*, 2001 E.C.R. at para. 58.

153. Holding that a tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs incurred by wholesale distributors in discharging their public service obligation, Case C-53/00, *Ferring v. ACOSS*, 2001 E.C.R. I-9067, at para. 27.

154. See Case C-80/00, *Italian Leather SpA v. WECO Polstermöbel GmbH & Co.*, 2002 E.C.R. I4995, at paras. 73 (Léger, AG); Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, 2003 E.C.R. paras. 54 (Léger, AG). See also Case C-126/01, *Ministère de l’Économie, des Finances et de l’Industrie v. GEMO SA*, 2003 E.C.R., paras. 87 (Jacobs, AG) and joined Cases C-34/01 to C-38/01, *Enirisorse SpA v. Ministero delle Finanze*, 2003 E.C.R. paras. 153 (Stix-Hackl, AG).

155. GERD SCHWENDINGER, “DEUTSCHE RUNDFUNKGEBÜHREN—”STAATLICH ODER AUS STAATLICHEN MITTELN GEWÄHRT“? ZUGLEICH EINE KRITISCHE BESTANDSAUFNAHME DER RECHTSPRECHUNG DES EUGH ZUR STAATLICHEN ZURECHENBARKEIT VON BEIHILFEN GEMÄß ART. 87 ABS. 1 EGV (European University Institute Working Paper Law No. 2003/5), available at <http://www.iue.it/PUB/law03-5.pdf> (last visited May 28, 2004). Schwendinger comprehensively and thoughtfully addresses the *PreussenElektra* case. *Id.* at 20.

is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State. . . .

In this case, the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.”<sup>156</sup>

This is in no way convincing. There are better ways available to balance the tensions between Community concerns and the political autonomy of Member States. The ECJ demonstrated this in its recent *Altmark Trans* judgment.<sup>157</sup>

2. *Daseinsvorsorge in Sachsen-Anhalt (Services of General Interest in the Land of Sachsen-Anhalt)*. This judgment was awaited with anticipation throughout Europe because it concerned the broader constitutional dimensions of European state aid control and privatization policies. *Altmark Trans* is a conflict about the reorganization of public transport—just one example of the huge field of public interest services,<sup>158</sup> organized differently throughout Europe in line with different national traditions and political priorities as *services publiques* in France, and as *Daseinsvorsorge*<sup>159</sup> in Germany.<sup>160</sup> There is more at stake than a conflict over the competences at

156. Case C-379/98, paras. 58, 61. Another difficult, but less troubling aspect of the judgment is the Court’s handling of Article 28 in paras. 68–81. The German scheme was not available to foreign suppliers. This seemed acceptable to the ECJ as it found, “the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced.” *Id.* at para. 79.

157. Case C-280/00, *Altmark Trans*, 2003 E.C.R.

158. The debate has raged for nearly a decade. See, e.g., *Editorial: Public service obligations: A blessing or a liability?*, 33 COMMON MKT. L. REV. 395 (1996). On the legal significance of the introduction of Article 16 by the Amsterdam Treaty see Ross, *Article 16 and Services of General Interest: From Derogation to Obligation?*, 25 EUR. L. REV. 22 (2000).

159. The history of that term deserves to be mentioned briefly. The term was invented before 1933 by a highly respected philosopher (Karl Jaspers), then introduced into administrative law by Ernst Forsthoﬀ in 1938 in *Daseinsvorsorge als Aufgabe der modernen Verwaltung*, in ERNST FORSTHOFF, *DIE VERWALTUNG ALS LEISTUNGSTRÄGER* (1938), cited from the reprint in ERNST FORSTHOFF, *RECHTSFRAGEN DER LEISTENDEN VERWALTUNG* 23 (1959).

160. Public services can be defined as “services or activities, recognised as public in the sense that the State is seen as ultimately responsible for the provision of them, [but which] are nevertheless not provided by the State itself but by institutions which are intermediate between the market and the State. These institutions are, on the one hand, too independent of the State to be regarded as part of the State, but are, on the other hand, too closely and distinctly associated with the goals, activities, and responsibilities of the State to be thought of as simply part of the private sector of the political economy”; thus Mark Freedland, *Law, Public Services, and Citizenship—New Domains, New Regimes*, in PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW: PUBLIC AND LABOUR LAW PERSPECTIVES 3 (Mark Freedland & Silvana Sciarra eds., 1999). This definition already presupposes that these services are no

different levels of government or the further development of environmental policies. What makes the European involvement in this field so interesting and sensitive are notions of social justice. The northern European welfare states which have so far successfully reorganized and defended their social models, would have to surrender aspects of their welfare state models if European law could insist on privatization policies which render their support of public services illegal. The problems are of course complex. It is hardly disputed that so many public services deserve to be reorganized. That reorganization will have to ensure that non-local suppliers get access to publicly cofinanced service markets. There are many more reasons to welcome outside intervention and at might be that it is only thanks to the assignment of supervisory function to the European level of governance that the reform can be carried out successfully<sup>161</sup>—a long road to be sure, but *Altmark Trans* is a promising beginning.

*Altmark Trans GmbH* and *Nahverkehrsgesellschaft Altmark GmbH* both sought to organise public transport in the *Landkreis* of Stendal in Sachsen Anhalt, one of the new East German states (*Länder*). *Altmark Trans* had been licensed, and procured renewal by the *Regierungspräsidentium* (governmental authority of the Land), whereas the bid of *Nahverkehrsgesellschaft* was rejected.<sup>162</sup> The ECJ was asked to delineate the scope of European secondary legislation and the competencies of the German legislature. The core issue, to which the ECJ responded, was the characterization of the German support scheme. The ECJ opinion builds from well-known definitions of state aid but then take two innovative steps. With the first, the ECJ reduces the supervisory powers of the European Commission by expressly accepting that it is up to the national authorities to define the public interest and to pay compensation for so-defined services:

Measures which, whatever their form, are likely directly or indirectly to favor certain undertakings or are to be regarded as an economic advan-

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longer provided by administrative bodies but are privatized to a certain degree. It is general enough to cover various forms of “public-private partnerships” through which these services may be organized and, most importantly, it does not prescribe the public involvement in the provision of such services. This it cannot do because legal traditions, social expectations, political preferences, and administrative know-how all differ widely between Sicily and Mecklenburg, between Scotland and Greece, Estonia and Burgundy—and these differences have to be taken into account in the efforts which the Commission has initiated to reorganize them.

161. The most important recent official documents are: European Commission’s Communication: Communication on Services of General Interest of Sept. 11, 1996, COM(96)443 final; Report on Services of General Interest of 17 October 2001, COM(01)598 final; Green Paper on Services of General Interest of 21 May 2003, COM(03)270 final.

162. See Case C-280/00, *Altmark*, 2003 E.C.R. at para. 21.

tage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid.”<sup>163</sup>

However, “where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favorable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty.”<sup>164</sup>

The Court subjects the non-application of the state aids regime to four conditions: (1) the recipient must be required to discharge clearly defined public service obligations; (2) the parameters of the calculated compensation must be established in advance in an objective and transparent manner; (3) the compensation must not exceed costs plus a reasonable profit; and (4) decisions are to be taken either after a public procurement procedure or the level of compensation is to be determined on the basis of an analysis of the costs of typical undertaking, well run and adequately provided with adequate means of transport.<sup>165</sup>

What is innovative about this holding is the redesign of the relations between the various levels of governance in the European Union. The ECJ has opened the door for policy pluralism within the Union while at the same time relieving the Commission from a supervisory burden that it would hardly be able to cope with anyway. To be sure, the new criteria the ECJ has spelled out must be refined further, but the prospects for productive contestation over the organization of public services have improved dramatically.

### III. THE SEARCH FOR LEGITIMIZATION IN THE EUROPEANIZATION PROCESS

Section I of this essay concluded after mere theoretical deliberation that the Europeanization process will require the development of a new discipline which would conceptualize Europe as a multilevel system of governance, overcoming the legacy of methodological nationalism in European law, comparative law and private international law. The case studies in Section II can be read as confirming the utility of that analytical framework. Yet the practice of the ECJ has a utility of its own. This practice cannot be expected to fit neatly into the analytical and interpretative

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163. *Id.* at para. 84 (citations omitted).

164. *Id.* at para. 87.

165. *Id.* at paras. 88-93.

schemes through which we have traditionally observed it. The kind of confirmation we can expect is primarily negative in the sense that the ECJ's jurisprudence is in fact often moving beyond the horizons of conventional legal doctrines. The messages implicit in this jurisprudence do not, however, reveal a coherent set of responses to the problematic of multilevel governance. How are we to interpret them?

Three steps will be undertaken to answer this question. The first two concern the theoretical framework of this essay. The analytics of multi-level governance will be presented in more detail.<sup>166</sup> What then follows is a translation of the political science language into legal categories<sup>167</sup> and a refinement of the normative perspectives sketched out at the end of the introductory section.<sup>168</sup> These perspectives will be concretized further in the concluding comments on the case studies.

#### A. The European Polity as a "Multi-level System of Governance *sui generis*"

"Less than a federation, more than a regime"—despite dating from 1983, this characterization of the European polity by William Wallace dates is not outdated.<sup>169</sup> Integration research continues to oscillate between federation and regime and the search for a positive definition of what the European Union is continues. The notion en vogue today is a step forward. Students of the Integration Project have suggested, for some time now, that the EU is to be understood as a "multi-level system of governance"—akin to federations and other systems of governance. What, then, is specific—*sui generis*—about the European system? This question is at the core of a very rich debate.<sup>170</sup> The specification that I am relying on stresses the non-hierarchical network character of the system—arguing that this perceived weakness is also a potential strength. Because the powers and, also, to some degree, the resources for political action, are located at various and relatively autonomous levels dispersed throughout the Union, the responses to functionally interwoven problems must be developed through communi-

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166. See discussion *supra* I.D.

167. For a more general and subtle discussion of such interdisciplinary borrowings see GUNTHER TEUBNER, NETZWERK ALS VERTRAGSVERBUND 17–22 (2004).

168. See discussion *supra* I.E.

169. William Wallace, *Less than a Federation, More than a Regime: The Community as a Political System*, in POLICY-MAKING IN THE EUROPEAN COMMUNITY 403–36 (Helen Wallace & William Wallace eds., 1983).

170. For recent summaries, see Markus Jachtenfuchs, *The Governance Approach to European Integration*, 39 J. COMMON MKT. STUD. 245 (2001); Fritz W. Scharpf, *Notes: Toward a Theory of Multi-level Governing in Europe*, 24 SCANDINAVIAN POL. STUD. 1 (2001); MARKUS JACHTENFUCHS & BEATE KOHLER-KOCH, EUROPÄISCHE INTEGRATION 11, 18 (2d ed. 2003).

cations between actors who are genuinely competent in their various domains. No longer does this lock us in what Fritz Scharpf has famously characterized as Europe's "joint-decision trap" over two decades ago.<sup>171</sup> Institutional innovations and learning have instead lead to a much more favorable constellation. Jürgen Neyer<sup>172</sup> argues—and he is representative of this school of thought<sup>173</sup>—that, in the specific conditions of the European Union, successful solutions to problems can be expected from "deliberative" modes of communication based on universal motivations tied to rules and principles. What Neyer underlines in his analysis can be characterized as the "facticity"—the actual impact—of normativity. The insight that the multilevel analysis portrays constellations that legal science confronts in a similar fashion, has gained ground over a number of years.<sup>174</sup> The normative turn that Neyer gives to the multilevel approach, enhances its accessibility and attractiveness for lawyers considerably. It gives credit to the assumption that European governance is not inconceivable by relying on deliberative interaction instead of the formation of hierarchies.

#### B. Integration through Deliberation as an Alternative to Orthodox Supranationalism

It is a small step from such theorizing to an interpretation of legal provisions as precepts for a communication-oriented, "deliberative" political style which can be easily explained in a broader context—in our "post-

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171. Fritz W. Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239–78 (1988).

172. See J. Neyer, *Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance*, 41 J. COMMON MKT. STUD. (2003). Neyer elaborates further in J. NEYER, *POSTNATIONALE POLITISCHE HERRSCHAFT: VERGESELLSCHAFTUNG UND VERRECHTLICHUNG JENSEITS DES STAATES* (2004).

173. INTEGRATION THROUGH DELIBERATION? ON THE PROSPECTS FOR EUROPEAN DEMOCRACY (Erik O. Eriksen & John E. Fossum eds., 2000); DEVELOPING A CONSTITUTION FOR EUROPE (Erik O. Eriksen et al. eds., 2004).

174. See, e.g., Ingolf Pernice, *Multi-level Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 COMMON MARKET LAW REVIEW 703 (1999); FURRER, *supra* note 60, at 56, 155, and accompanying references. Oddly and inexplicably, the comparative law tradition seems less impressed by all this than conflict of laws scholarship. At the same time, there exists a conceptualization of the EU as a multi-level system demonstrates with particular emphasis on mutual influences between regulatory systems and the restructuring of international relations. Of course, generalizing judgments in a discipline can always be falsified. The law will respond in some way real problems and legal science in turn will reflect on them, explicitly or more implicitly. Compare with further references by Watt, *supra* note 59); Ralf Michaels, *Im Westen nichts neues? Zum Stand der Rechtsvergleichung 100 Jahre nach dem Pariser Kongress—Gedanken anlässlich einer Jubiläumskonferenz in New Orleans* [Nothing new in the West? On the State of Comparative Law 100 Years after the Paris Congress—Reflections on the Occasion of a Centennial Conference in New Orleans], 66 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 97 (2002).

national constellations,” typified by economic interpenetration and interdependency, the extraterritorial effects of the decisions and omissions of democratic polities are simply unavoidable; yet the burdens imposed unilaterally on one’s neighbor cannot be sufficiently legitimated by “democratic” processes which are internal to the state. It may seem like a paradox, but it has become an irrefutable insight—nation states cannot act democratically. “No taxation without representation”—this is a principle that imposes on the Member States of the EU the obligation to take account of the interests and concerns of non-nationals even within the national polity.<sup>175</sup> “Deliberative” supranationalism is an alternative to orthodox notions of supranationalism which have underlined the autonomy of European law and its supremacy over national law. It also deviates from the “integration-through-law” tradition, in that it seeks to overcome the law-politics dichotomy inherent in J. H. H. Weiler’s famous distinction between legal supranationalism and political intergovernmentalism.<sup>176</sup>

The normative core message of Deliberative Supranationalism is that Europe, through its supranational rules and principles, should give voice to “foreign” concerns and insist that Member States mutually “recognize” their laws (essentially that they “apply” foreign law) and refrain from insisting on their *lex fori* and domestic interests. The discipline this principle seeks to impose on a Member State’s political autonomy is limited.<sup>177</sup> The

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175. See Joerges, *The Impact of European Integration*, *supra* note 60, at 390.

176. J.H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, in 1 Y.B. EUR. L. 257–306 (1981).

177. See the analyses by FURRER, *supra* note 60, at 171; JOHANNES FETSCH, EINGRIFFSNORMEN UND EG-VERTRAG 126, 139 (2002). For a discussion of the conflict of laws principles, see *id.* at 21, 71. See SCHMID, *supra* note 1, at 167. For a heuristic using American conflict of law methodologies for the structuring of European *Kollisionsrecht* see Christian Joerges, “*Deliberative Supranationalism—Two Defences*,” 8 EUR. L.J. 133, 135 (2002), with references especially to Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Law*, in BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 177 (1963); Brainerd Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242 (1963). I have no difficulty with characterizing the mediation between differences in regulatory policies and the diverse interests of the concerned jurisdictions that ECJ’s jurisprudence has so often achieved as a truly European law of conflict of laws. The decisive difference with Currie’s thinking is the turn to deliberation as a mode of legitimizing the resolution of conflicts. Currie insisted that “[the C]hoice between the competing interests of co-ordinated states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: . . . the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress.” Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 272 (1963). Deliberative Supranationalism advocates exactly that—it is “deliberative” in that it does not content itself with appealing to the supremacy of European law; it is European because it seeks to identify principles and rules which make differing laws in the EU compatible; with this ambition it stands “above” national law, because it indicates and declares binding a metanorm under which intra-European conflicts can be resolved. For a more detailed elaboration see Joerges, *Deliberative Supranationalism—Two Defences*,

principle and its limitations can be discovered and studied best in the jurisprudence on Article 30 (now 28). The ECJ has so often convincingly demonstrated<sup>178</sup> how the idiosyncrasies of individual states can be identified as such and reduced to a civilized level—*autonomieschonend und gemeinschaftsverträglich* (protective of autonomy and compatible with the Community).<sup>179</sup>

What can be achieved through an enlightened interpretation of Article 28 of the EC Treaty is a resolution of frictions among national jurisdictions. But this is a very incomplete characterization of the challenges European law faces. Three interdependent complications need to be outlined.

There is a need to find a mechanism for the reconciliation of a broader variety of conflicting policies and legal traditions. The “orthodox” answer to such constellations has been “harmonization”—a search for uniformity which would rule out future conflicts. This was the strategy of the ECJ in the product liability cases discussed above.<sup>180</sup> Its answer was neither workable nor normatively attractive. Legislative acts like the Product Liability Directive are selective interventions into complex legal fields. Such acts may at best cause some irritation;<sup>181</sup> where rules are so specific as those of the product liability directive to which the ECJ ascribed preemptive effects, the intervention will have disintegrative consequences which damage the normative coherence of an entire field of law.

Is ever more comprehensive harmonization—in the case of private law, a European code—a promising alternative, as so many observers believe?<sup>182</sup> If so, how comprehensive should such a code be? The propo-

*supra*, at 135 and Christian Joerges, *Constitutionalism and Transnational Governance: Exploring a Magic Triangle*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM § 1.3.2 (Christian Joerges et al. eds., 2004).

178. See, e.g., M. MADURO POIARES, *WE THE COURT* 150 (1998); J.H.H. WEILER, *THE CONSTITUTION OF EUROPE* 221 (1999).

179. Fritz W. Scharpf, *Autonomieschonend und gemeinschaftsverträglich. Zur Logik der europäischen Mehrebenenpolitik*, in FRITZ W. SCHARPF, *OPTIONEN DES FÖDERALISMUS IN DEUTSCHLAND UND EUROPA* (1994), 131. As a follow-up to introductory note \*\*, I may point to analogies and contrasts in Brainerd Currie’s conflict-of-laws theories even though the comparison may seem at first glance far-fetched. Currie was a “methodological nationalist” in his insistence on the importance of the *lex fori* and his plea for the defense of “governmental interests” by courts. But in his later writings, he has allowed for a “moderate and restrained interpretation” of state interests so as to “avoid” conflicts. See Currie, *Comment on Babcock v. Jackson*, *supra* note 177, at 1242; Brainerd Currie, *The Disinterested Third State*, 28 L. & CONTEMP. PROBS. 754, 763 (1963). On the related term “avoidable conflicts” see DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 73 (1965).

180. See discussion *supra* Section II.A.

181. As in the case of the good faith principle of the unfair contract terms directive, analyzed by Gunther Teubner, *Legal Irritants: Good Faith in British Law Or How Unifying Law Ends Up in New Divergences*, 62 MOD. L. REV. 1 (1999).

182. See discussion *supra* Section I.A.

nents of a European code pay little attention to the “regulatory embeddedness” of private law. The present state of that relation mirrors Europe’s multilevel governance. Whereas the traditional core areas of private law have retained much of their familiar grammar, the institutional frameworks of the private economy and the concomitant regulatory activities have been “Europeanized.” Thus, Europeanization has radically altered the overall legal (and normative) environment in which private law operates. This discrepancy between the apparent survival of private law institutions has led to an erosion of their social function which is often neglected.<sup>183</sup> If this observation is valid, does it not become ever more plausible to opt for a European code? I have characterized the discrepancies between (European) regulatory provisions and national private law as “diagonal” conflicts.<sup>184</sup> It has become apparent, albeit only in the specific fields under scrutiny here, that there are alternatives available to uniformity. It is possible, so we have argued, to retain diversity and to nevertheless ensure the workability of the internal market.<sup>185</sup> This alternative is normatively attractive because it respects the political autonomy of lower levels of governance.

Yet it is not merely a normative preference for diversity and for a decentralized Europe which motivate this plea for caution. A further objection against codification stems from the logic of justification institutionalized in our systems of private law and adjudication on the one hand and in the fields of regulatory policies on the other. Regarding the latter,<sup>186</sup> the prerogatives of the European in all fields of economic and social regulation level have led to the establishment of complex transnational governance arrangements involving European and national, governmental and non-governmental actors. These governance arrangements accomplish a continuous supervision of the regulated fields, flexible responses to changes, and the revision of agreed upon standards. The nature and legitimacy of regulatory policies is distinct and each field follows a dynamics of its own. The links and potential tensions within private law vary broadly. One particularly interesting example is the present “modernization” of European competition policy,<sup>187</sup> which will affect its impact on private law—

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183. See Joerges, *The Impact of European Integration*, *supra* note 60; Christian Joerges, *European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for a Constitutional Perspective*, 18 LEGAL STUD. 146–66 (1998).

184. See IIC *supra*.

185. *Supra* IIC and ILB.

186. On the following in more detail Christian Joerges & Michelle Everson, *Law, Economics and Politics in the Constitutionalization of Europe*, in ERIK O. ERIKSEN ET AL., DEVELOPING A CONSTITUTION FOR EUROPE, 162–79.

187. See Council Regulation 1/2003 on the Implementation of the Rules on Competition, 2003 O.J. (L 1) and the officious explanations by Emil Paulis, *Latest Commission Thinking Progress on the Mod-*

especially on contract law—considerably. The regulation of product risks and standardization are fields which underwent dramatic changes during the last decade and are unlikely to come to rest in the foreseeable future. In all fields of regulatory policy, Europe must balance centralization, coordination, and decentralization. It has relegated the adaptation of private law to the European regulatory environment, to national legal systems, and especially to national courts. If flexibility is both a necessity and a goal of regulatory policy, more legislative uniformity in private law or its codification hardly seems desirable.

Private law systems are different in many ways, but not in their need for flexibility and their need to seek legitimacy in the processes of law production. That production is not confined to the application of previously given rules; nor does it operate in full autonomy. It is exposed to a continuing discourse with interested parties, experts and academics—and to the threat of legislative interventions. The legitimacy and rationality of the interplay of legislation, case law, scholarship and political discourse is the resource which generates its legitimacy.<sup>188</sup> This resource is not available in the European polity because that polity remains heterarchical. European law is legitimated to instigate innovation and change, to organize diversity, and to ensure the compatibility of diversity with Community concerns—its vocation is not to produce uniformity.<sup>189</sup>

### C. Europeanization as Process

To summarize this lengthy argument: The complexity of the Europeanization process is nobody's "mistake." It is not by chance that we witness such a multifaceted mixture of "primary law" which grants basic freedoms and rights; transnational governance arrangements which organize regulatory activities; and legislative and judicial interventions which irritate. This mixture is the State of the (European) Union. It is by no means a comfortable situation, yet it has great potential—at least in theory. Its performance to date has not been so bad—at least in the examples we have examined here.

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*ernization of Antitrust*, in EUROPEAN COMPETITION LAW: A NEW ROLE FOR THE MEMBER STATES 15–31 (2001).

188. See Rudolf Wiethölter, *Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung: Fragen eines lesenden Recht-Fertigungslehrers*, 3 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 1 (1988). For American law see PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 450 (1992).

189. A further parallel between regulatory policy and private law is the turn governance alluded to in the text. What is so characteristic of all areas of regulatory politics, namely the inclusion of non-governmental actors, is currently happening in all fields of economic regulation—and it is unlikely that a European code will be able reach into these important practical spheres of modern legal systems.

The ECJ's recent product liability cases can be interpreted as a move back into orthodox supranationalism. But this is a worst case scenario. The Court will realize that the European product liability law directive is a relatively insignificant element in a complex web of product safety law and regulation which, in Europe, is intimately related to semi-private Europeanized standardization activities. It is of course a highly contested sphere, but none of the stakeholders are likely to encourage the ECJ to take the 1985 directive as a basis from which European level of governance would seize control of legal developments.

The *Centros* jurisprudence, however, is of another caliber. Here, the ECJ has transformed the freedoms ensured by the EC Treaty into a true European citizenship by empowering the *Untertan* (subject) of a Member State to bring his or her own sovereign to court and force national governments to provide justification for their regulatory practices. The Court also has managed to create a legal framework linking the various levels of European governance without assigning comprehensive *Kompetenz-Kompetenz*—the power to determine one's range of competencies—to any of them.

The ECJ has performed less well in its reaction to the tensions between European state aid policies on the one hand, and national environmental concerns and industrial policy objectives on the other in the *PreussenElektra* case.<sup>190</sup> Its restrictive definition of state aid allows flexibility for legislative strategies by national policy makers which avoid any contestation.<sup>191</sup> This type of judicial self-restraint has been followed and corrected by a much more promising strategy in the *Altmark Trans* judgment. The reform of public services (*services publiques*, *Daseinsvorsorge*) need not have uniform results. Legal traditions, social expectations, political preferences, and administrative know-how differ widely between Sicily and Estonia, between Scotland and Greece. Europe can continue to initiate further changes and foster social learning at the same time. This is its mandate—the imposition of uniform regimes would be a nightmare.<sup>192</sup>

Europeanization is about social learning through conflict management and contestation. The role of law in such a law in that process is essential. But the law itself must learn how to find principles and provide procedures which organize the interactions between political actors and courts at varying levels of governance, and must function to both accompany and legitimate social change. This is both a challenge and an opportunity.

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190. See discussion *supra*.

191. See I.I.C.1 *supra*.

192. See I.I.C.2 *supra*.