

TRANSATLANTICISMS: CONSTITUTIONAL ASYMMETRY AND SELECTIVE RECEPTION OF U.S. LAW AND ECONOMICS IN THE FORMATION OF EUROPEAN PRIVATE LAW

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ABSTRACT

The recurrent claim made by judges, scholars, and lawyers shaping the debate on European private law is that there is a constitutional asymmetry in the European Union (EU). The asymmetry lies in the fact that European Community competences mostly encompass market and economic matters at the expense of social issues, while Member States have full jurisdiction over social matters but only limited jurisdiction over economic matters. Thus, the European constitutional structure leads to a market/technocratic orientation in its supranational institutions, as opposed to the social/political orientation of Member State governments. The pervasiveness of this claim allows jurists critiquing European adjudication from both the Right and the Left to systematically claim that the European Court of Justice lacks democratic legitimacy to adjudicate particular cases on European contract or torts rules. Recently, European scholars, lawyers, and judges have departed from constitutional asymmetry claims. This article demonstrates that there are several factors that have played an important role in undermining the credibility of the constitutional asymmetry claim. First, the emergence of a well-established scholarship in European private law has raised awareness among academics and lawyers regarding the complexities of the process of harmonization of private law. Second, in light of a transatlantic legal dialogue, European jurists have increasingly received law and

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economics from the United States in a context that has been hermeneutically rich but increasingly ideologically divided. While the Right and mostly neoliberal scholars welcomed United States law and economics, the Left rejected it and promoted a social justice agenda for the internal market. Such selective reception of U.S. legal thought contributed to the radicalization of the debate over European private law. Ultimately, with the establishment of a European private law scholarship and the emergence of new academic debates, which are increasingly ideologically divided, lawyers and scholars are frequently departing from constitutional asymmetry claims; instead, they are evaluating the consequences the European Court of Justice's decisions on their own terms.

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I. INTRODUCTION

This article elucidates some of the changes that have taken place over the last decade in the way lawyers, judges, and scholars address the question of harmonizing contracts and torts rules in European private law. Methodologically, I depart from a time-worn comparative technique of emphasizing differences and similarities between rules, doctrines, and schools of thought in Europe and the United States.¹ A classic example of such a comparative technique is the claim that European lawyers are still formalist because American Legal Realism did not take place in Europe or because European jurists did not experience the ideological and political shifts that took place in the United States over judicial federalism.² Rather, I concentrate on the ideological differences

¹ See Mathias W. Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002) (providing an account of the limitations and stagnations in the realm of European private law).

² See Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 Hastings Int'l & Comp. L. Rev. 295 (2008) (discussing the absence of legal realism in Germany). Though expressing divergent political views on the "new federalism" of the Rehnquist Court, scholars have emphasized that its agenda is not committed to an intellectually consistent version of federalism. Rather, depending on the circumstances of the various cases, the Court might or might not favor state rights at the expense of the federal government, or vice versa. See David J. Barron, *A Localist Critique Of The New Federalism*, 51 DUKE L.J. 377 (2001); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002). As to the judicial federalism argument, the U.S. Supreme Court's dominant mode of legal reasoning and its view on federalism have shifted several times over the course of the Twentieth Century. By internalizing the lesson of American Legal Realism, jurists no longer make false associations by collapsing institutional competence arguments (federal vs. state; courts vs. legislatures) with substantive values (free market vs. social concerns; efficiency vs. equitable distribution). In fact, when a U.S. lawyer addresses the U.S. Supreme Court he does not argue that its judicial law-making will favor free market values rather than social concerns. In contrast, until recently European lawyers argued that the European Court of Justice favored free market or efficiency rationales rather than social and redistributive goals. See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (3d ed. 2000).

among various groups of lawyers and scholars in the debate on European private law and the function that their particular claims play regarding the democratic legitimacy of the European Judiciary and the neoliberal bias of European integration. In particular, I focus on judicial law making by the European Court of Justice (ECJ) and the role of legal scholarship in shaping the discourse on the formation of European private law.³ My claim is that European private law has changed over time through the establishment of an EU-wide private law scholarship. This scholarship, in turn, has been advanced by a number of politically divided groups of scholars who have selectively received United States law and economics in a context that has been hermeneutically rich but increasingly ideologically divided.⁴ This selective reception of United States law and economics has contributed to a radical change in the views of scholars who are involved in the debate on European private law. An example of such a change is the use of the “subsidiarity” argument,⁵ which over time has been adopted by diverse groups to achieve opposite political outcomes.⁶ Initially, scholars

³ For similar approaches, see DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006); Pier Giuseppe Monateri, *Critica dell'ideologia e analisi antagonista: il pensiero di Marx e le strategie giuridiche della comparazione*, 18 RIVISTA CRITICA DEL DIRITTO PRIVATO 703 (2000) (It.) [*Critique of Ideology and Antagonistic Analysis: Marxism and the Legal Strategies of Comparative Law*, CRITICAL REVIEW OF PRIVATE RIGHTS]. See also Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World*, in RETHINKING THE MASTERS OF COMPARATIVE LAW 152, 152-189 (Annelise Riles ed., 2001); Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 EUR. L.J. 751, 762 (2004).

⁴ See DIEGO LOPEZ MEDINA, *TEORIA IMPURA DEL DERECHO* (2004) [IMPURE THEORY OF LAW].

⁵ See Treaty Establishing the European Community, art. 5 (ex art. 3b) (as amended by Maastricht in 1992) (using a procedural approach to determining issues of subsidiarity, rather than substantive criteria, and stating that “[i]n areas which do not fall within its exclusive Competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”). See also George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 334 (1994) (analyzing “the apparent contradiction between subsidiarity’s high claims and its relatively low esteem”).

⁶ For an analysis of the structure of legal arguments, see Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991); *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979); *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). See also David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. OF INT’L L. & POL. 335 (2000) (discussing the professional vocabulary international lawyers use to debate reform, how one set of ideas gains dominance, and renewal in the field).

on the progressive side of the spectrum cited the principle of subsidiarity to resist harmonization of private law and to protect national private laws.⁷ Later, scholars on the conservative side of the spectrum deployed the subsidiarity principle to advocate for regulatory competition and diversity of legal rules rather than the adoption of a European civil code.⁸

Recently, some scholars have claimed that the “lack of success of the economic analysis of law in Europe to date can be traced to characteristics of European culture, legal systems, and the European legal academy.”⁹ In contrast, this article demonstrates that scholars, lawyers, and judges have incorporated law and economics in the debate on European private law, but in a selective fashion.¹⁰ This article shows that during the formation of European private law and its body of scholarship, a dialogue among lawyers, scholars, and judges, across the Atlantic has deeply influenced the current European legal thinking.

Part II analyzes the creation of European private law when the European Commission (EC or “Commission”) first began harmonizing contract and tort rules by way of European directives in the mid-1980s, which the ECJ then was called on to interpret in the 1990s. These judgments created a sort of federal common law in Europe,¹¹ which sparked much criticism among jurists and created what I call a “legitimation puzzle.”¹² Specifically, European jurists on both sides of the political spectrum frequently attacked the

⁷ See Hugh Collins, *European Private Law and Cultural Identity of States*, 3 EUR. REV. PRIVATE. L. 353 (1995).

⁸ See Roger Van den Bergh, *Forced Harmonisation of Contract Law in Europe: Not to Be Continued*, in AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW 249 (Stefan Grundmann & Jules Stuyck, eds., 2002).

⁹ Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and in Europe*, 44 COLUM. J. TRANSNAT'L L. 602, 616 (2006). See also Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 INT'L REV. L. & ECON. 277 (1991). But see Ugo Mattei & Roberto Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT'L REV. L. & ECON. 265-66 (1991).

¹⁰ This section explains why jurists on the Right have adopted mainstream law and economics theories while jurists on the Left have rejected the entire discipline, including its mainstream, liberal, and critical approaches. For an account of the reception of legal theories and ideologies in different hermeneutical contexts, see MEDINA, *supra* note 4.

¹¹ See Koen Lenaerts & Kathleen Gutman, *Federal Common Law in the European Union: A Comparative Perspective From The United States*, 54 AM. J. COMP. L. 1 (2006).

¹² The legitimation puzzle relates to the way in which lawyers attempt to sharply distinguish law from ideology because they believe that the former offers a more just and natural worldview than the latter. See KENNEDY, *supra* note 2, at 236-37.

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ECJ, stating that it lacked the institutional competence to adjudicate cases interpreting European private law directives.¹³ In commenting on ECJ adjudication, these jurists often conflated institutional competence arguments (European level versus Member State level) with substantive value arguments (efficiency versus equitable distribution; free market versus social goals), assuming that the ECJ was committed to free market and efficiency values whereas courts of the Member States were committed to social and redistributive goals. The conflation of institutional competence and substantive value arguments was directly connected to the argument about “constitutional asymmetry” in the EU. Rather than evaluating the consequences of each case on its merits, European jurists were constantly adopting constitutional asymmetry arguments to delegitimize ECJ law making and question the democracy of the European legal architecture as well as its neoliberal economic policies. The legitimation puzzle shows how critics despite opposing claims and diverging political beliefs agreed that the ECJ was not a democratically legitimate forum to decide social reforms or efficiency questions specific to the private law regimes of each Member State.

Part III recasts the process of harmonization of private law within the larger politics of economic integration. It discusses the continuing tension between the European level and Member States during two alternative phases: negative and positive integration.¹⁴ Further, it shows how legal scholars, judges, and lawyers have contributed significantly to the process of European integration by creating a new European professional vocabulary.¹⁵ This part shows

¹³ See Council Directive 85/374, 1985 O.J. (L210) 29 (EC) [hereinafter Products Liability Directive] (on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products); Council Directive 90/314, 1990 O.J. (L158) 59 (EC) [hereinafter Package Travel Directive]. See also Mathias Reimann, *Product Liability in a Global Context: The Hollow Victory of the European Model*, 11 EUR. REV. PRIVATE L. 128 (2003) (providing a comparative analysis of the Products Liability Directive).

¹⁴ See FRITZ SHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 43 (1999).

¹⁵ See PIERRE BOURDIEU, *HOMO ACADEMICUS* 72-73 (1984); PIERRE BOURDIEU, *THE STATE NOBILITY: ELITE SCHOOLS IN THE FIELD OF POWER* 264 (Lauretta C. Clough trans., Stanford Univ. Press 1996) (1989):

The field of power is a field of forces structurally determined by the state of the relations of power among forms of power, or different forms of capital. It is also, and inseparably, a field of power struggles among the holders of different forms of power, a gaming space in which those agents and institutions possessing enough specific capital (economic or cultural capital in particular) to be

how some of the most influential social scientists making “constitutional asymmetry” claims were on the one hand warning about the increasing democratic deficit and the neoliberal trend affecting European institutions while at the same time “Europeanizing” domestic and national debates. Instead of highlighting the different types of local resistance to integration by national bureaucracies or local elites, the constitutional asymmetry claim successfully shifted the debate from a domestic level to a European level.¹⁶

Part IV examines the harmonization of private law from the perspective of a European-wide legal scholarship, which is increasingly politically divided. The scholarly debate has been characterized by three different phases where, over time, opposing elites, consisting of lawyers and scholars, have departed from constitutional asymmetry claims. This approach to the European scholarly debate shows how jurists have deployed similar policy arguments and, often, constitutional asymmetry claims in support of opposing normative aspirations.¹⁷ Scholars on the Right and the Left have radically shifted their positions in favor or against harmonization of private law during this time. However, today there are two main opposing groups: neoliberal lawyers advocating for an efficient common market and greater regulatory competition and welfarist lawyers advocating for greater social justice and a European civil code for private law.

Part V offers a further explanation of why European scholars, lawyers, and judges have departed from making constitutional asymmetry claims. In the last decade, European jurists increasingly have participated in a transatlantic debate by selectively receiving United States law and economics in a hermeneutically rich context.¹⁸ However, while neoliberal scholars have welcomed mainstream United States law and economics, social justice advocates have in large part rejected it, even the more progressive ver-

able to occupy the dominant positions within their respective fields confront each other using strategies aimed at preserving or transforming these relations of power.

¹⁶ For local resistance to European integration, see Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 EUR. L.J. 3 (1997); Henry G. Schermers, *Comment on Weiler's The Transformation of Europe*, 100 YALE L. J. 2525, 2527 (1991). On the shift from the national to the international and how a depoliticization effect is intrinsic in such a move, see David Kennedy, *Receiving the International*, 10 CONN J. INT'L L. 1 (1994).

¹⁷ For an analysis of the structure of legal arguments, see sources cited *supra* note 6.

¹⁸ See MEDINA, *supra* note 4, at Prologo XIV.

sion that addresses distributive concerns. This selective reception of U.S. law and economics by European lawyers has had two results. First, it has contributed to the radicalization of the debate on the harmonization of private law. Second, it has obliged lawyers, scholars, and judges to depart from making constitutional asymmetry claims to instead evaluate the efficiency and distributive consequences of each European private law rule.

II. COURTS AND LEGAL SCHOLARSHIP IN EUROPEAN PRIVATE LAW

A. *From European Integration to the Harmonization of Private Law*

The creation of a European private law is conceptually problematic for jurists who traditionally understand private law as those provisions enshrined in continental civil codes that regulate contract, tort, and property law and later on included consumer, landlord and tenant, and labor law provisions.¹⁹ Therefore, European lawyers tend to consider this more or less coherent body of private law rules as inherently controlled by national governments and interpreted by domestic courts.²⁰ However, due to the prominent role of the European Community in adopting and interpreting directives aimed at modifying private law rules, this belief has radically changed in the last twenty years. Today jurists are obliged to re-conceptualize conventional legal categories in order to address the changing notion of European private law.

In 1992, the Treaty of Maastricht adopted EC Treaty art. 95 that gave the Community the power to harmonize national legislation only if it contributes to the establishment and functioning of the internal market. Similar to the Commerce Clause in the United States, this provision gives the Community relatively broad powers to issue directives and to harmonize specific private law rules.²¹ In the late 1950s, however, it was not clear which instru-

¹⁹ See FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE, WITH PARTICULAR REFERENCE TO GERMANY* (Tony Weir trans., Oxford Univ. Press 1995).

²⁰ On the understanding of "private law" as a coherent body, see Duncan Kennedy, *Thoughts on Coherence, Social Values and National Tradition in Private Law*, in *THE POLITICS OF A EUROPEAN CIVIL CODE* (Martijn Hesselink ed., 2006).

²¹ The term "harmonization," or approximation, of the laws was introduced in the original Treaty of Rome (1958) under article 100 (now EC Treaty art. 94) with the goal of eliminating the distortions of competition created by the laws of the Member States. The Single European Act (1987) adopted article 100A (now EC Treaty art. 95) that required

ments the Community could use to create the internal market and implement the four freedoms (free movement of goods, services, capital, and persons).²² By the 1960s, the ECJ began “constitutionalizing” the Treaty. Through the adoption of the doctrines of supremacy of EC law and direct effect, the Court exercised strict scrutiny over the implementation of EC law by the Member States.²³ For many commentators, the Court became the engine of market integration, acting as a quasi-federal judiciary.²⁴ Through vertical judicial review, the ECJ struck down national laws that conflicted with EC law because they created an impediment to the free movement of goods between Member States.²⁵ By the 1990s,

majority voting rather than unanimity to achieve the approximation of national measures for the establishment and functioning of the common market. In contrast, under EC Treaty art. 95, the Council decides via majority voting through a co-decision procedure. See Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 251 [hereinafter EC Treaty] (stating that the European Council and the European Parliament share equal powers), available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf; see also Walter van Gerven, *Harmonization of Private Law: Do We Need It?*, 41 COMMON MKT. L. REV. 505, (2004).

²² See CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 10 (2004):

The creation of a common market lies at the heart of the EU. Article 2 says that the Community has as its task the establishment of a common market, and one of the activities of the Community listed in Article 3 is the creation of ‘an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital.’

²³ With the doctrine of Direct Effect the ECJ has confirmed that the Treaty, as well as Regulations and in certain cases European directives, directly confer individual rights to persons who can enforce those rights before their domestic court. See Case 26/62, *Van Gend v. Netherlands*, 1963 E.C.R. 00095; Case 6/64, *Costa v. Ente Nazionale per l’Energia Electrica*, 1964 E.C.R. 585.

²⁴ See J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L. J.* 2403 (1991). The question of whether Europe is a federation or something else has been the object of studies on integration through law since the late 1970s. See 1:1 *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (Mauro Cappelletti et. al. eds., 1986). However, during the 1990s, the dominant political science vocabulary addressed the EU as a polity less integrated than a federation but more integrated than a custom union, namely a “multi-level system of governance”—a polity composed of multiple layers of government in which power is diffused across the different levels rather than hierarchically imposed. See LIESBET HOOGHE & GARY MARKS, *MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION* (2001); *GOVERNANCE IN THE EUROPEAN UNION* (Gary Marks et. al. eds., 1996); Gary Marks, Liesbet Hooghe & Kermit Blank, *European Integration from the 1980s: State-Centric v. Multilevel Governance*, 34 *J. COMMON MKT. STUDS.* 341 (1996). However, to simplify some aspects of the comparison with the United States, this article uses the term “federal.”

²⁵ See Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 00873, para. 5 (citing the broad formula deployed by the ECJ: “All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community

it became clear that EC law, encompassing free movement and competition law, as interpreted by the ECJ was the instrument *par excellence* of market integration.²⁶

Unlike the United States, the EU did not create a system of federal courts. Thus, what is largely understood as European private law results from the complex interplay between harmonizing directives and national private law regimes. The process of private law harmonization encompasses a large number of legal formants, or legal sources, and institutional actors both at the European and at the national level.²⁷ European private law comprises a variety of legal rules, which derive from legislative, judicial, and scholarly sources operating at different levels of government.²⁸ The legislative formant of European private law comprises both the body of EC legislation, namely directives that since the mid-1980s created a patchwork harmonization of private law rules, and national legal rules enshrined in continental civil codes and Member States' own legal traditions interpreting those laws.²⁹ Therefore, European private law also encompasses those legal provisions that Member States have introduced into their pre-existent civil codes in order to transpose European directives.

In response to the democratic concerns raised by policy-makers and academics, the Commission in 2001 consulted with stakeholders likely to be affected by European contract law to determine whether to continue adopting consumer protection directives and soft law instruments or whether to adopt a more comprehensive European contract code.³⁰ In February 2003, the European Commission published an Action Plan aimed at achiev-

trade are to be considered as measures having an effect equivalent to quantitative restrictions.”).

²⁶ See generally MIGUEL POIARES MADURO, *WE, THE COURT* (2000); REIN WESSELING, *THE MODERNIZATION OF EC ANTITRUST LAW* (2000).

²⁷ See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 *AM. J. COMP. L.* 1 (1991); RODOLFO SACCO, *INTRODUZIONE AL DIRITTO COMPARATO* (5th ed.1992).

²⁸ See P.G. Monateri & Rodolfo Sacco, *Legal Formants* in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 531 (Peter Newman ed., 1998).

²⁹ See Reiner Schultze, *European Private Law and Existing EC Law*, 13 *Eur. Rev. Private L.* 3, 4 (2005).

³⁰ See *Commission of the Eur. Communities, Communication from Commission to the Council & the European Parliament on European Contract Law*, COM (2001) 398 final (Nov. 7 2001) [hereinafter *Com. on Contract Law*].

ing greater coherence in European contract law.³¹ The Action Plan reflects the concerns raised by stakeholders and academics, and it attempts to resolve the practical and technical problems arising from the divergence of national contract law regimes.³² By targeting the obstacles that prevent the ‘smooth functioning’ of the internal market, the Action Plan aspired to improve the quality of Community regulation through legislative transparency and stakeholders’ participation.

In the Action Plan, the Commission addresses contract law but appears uncertain about which tools to employ; for example, whether to use hard or soft measures or sectoral or comprehensive initiatives to achieve its goal of an efficient and coherent regulation of contract law. In departing from a European codification, the Action Plan ameliorates the existent contract *acquis*.³³ It does so by improving coherence through both a hard measure and a soft one, in particular the non-binding Common Frame of Reference (CFR).³⁴ Similar to the Restatement of Contracts in the U.S., the CFR aims to increase coherence of European contract law and to achieve the uniform application of directives. But the Commission carefully avoids the term “code” and instead adopts the softer notion of CFR. This non-binding codification aims to provide common principles, terminology, and rules for contract law in order to address gaps, conflicts, and ambiguities in the application of European contract law.³⁵

³¹ See *Commission of the European Communities, Communication from the Commission to the European Parliament and Council – A More Coherent European Contract Law – An Action Plan*, COM (2003) 68 final (Dec. 2 2003) [hereinafter *Action Plan*].

³² See *Com. on Contract Law*, *supra* note 30; see also Dirk Staudemayer, *The Commission Action Plan on European Contract Law*, 2 EUR. REV. PRIVATE. L. 113 (2003).

³³ The *acquis communautaire* in a particular legal field encompasses all EC law sources stemming from the treaty, community acts (regulations, directives, or communications), and case law from the ECJ and the Court of First Instance (CFI). See, *infra* note 116; *Action Plan*, *supra* note 31.

³⁴ See *Action Plan*, *supra* note 31 para. 77 (addressing consolidation, codification, and the existing instruments as possible means to achieve greater coherence). “Codification means the adoption of a new legal instrument which brings together in a single text, but without changing the substance, a previous instrument and its successive amendments, with the new instrument replacing the old one and repealing it.” *Id.* at n.56.

³⁵ See *id.* at paras. 55-68.

[T]he Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the EC contract law *acquis*, both in their drafting and in their implementation and application. Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all inter-

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According to the Commission, the obstacles arising from the non-uniform implementation of directives by Member States leads to inconsistencies and fragmentation of contract regimes, creating different legal rules for the same commercial situation.³⁶ The Commission maintains that a non-uniform application of contract rules entails high transaction costs, which burden both industries and 'active' consumers in search of precious information.³⁷ High transaction costs emerge not only in the formation of cross-border contracts, but also through judicial control over the fairness of contractual terms.³⁸ In order to achieve greater coherence in the application of European contract law, and consequently reduce transaction costs, the Commission's strictly functionalist approach aims to improve the quality of the existing European legislation and case law. In short, the Action Plan reinforces the view that the existence of different contract law regimes creates a barrier to trade and cross-border transactions within the internal EU market. Thus, coherence means more efficient outcomes, which can be reached through more uniform implementation and maximal harmonization.³⁹

In response to the Action Plan, the European Parliament (EP) also recognized the need for further harmonization in order to facilitate cross-border transactions within the internal market.⁴⁰ Even though the EP offered its political guidance in order to encourage further Europeanization of contract law, it warned the Commission not to overstep the boundaries of Community competences.⁴¹ Supranational institutions, such as the Commission, the Council, and the European Parliament, are particularly concerned

ested parties. This common frame of reference should provide for best solutions in terms of common terminology and rules

Id. at Executive Summary.

³⁶ See *id.* paras.16-24, 57. See also Rodolfo Sacco, *L'Interpret et la Regle de Droit Europeenne*, in *LES MULTIPLES LANGUES DU DROIT EUROPÉEN UNIFORME* 226, 226-38 (Rodolfo Sacco & Luca Castellani eds., 1999).

³⁷ See *Action Plan*, *supra* note 31, paras. 25-51.

³⁸ See *id.* paras. 34-36. For example, more information is necessary for different national mandatory rules limiting or excluding contractual liability.

³⁹ See *id.* para. 57 ("An improved *acquis* should enhance the uniform application of Community law as well as facilitate the smooth functioning of cross-border transactions, and, thereby, the completion of the internal market.").

⁴⁰ See *id.* The EP argues that new harmonizing directives on contract law should be based on EC Treaty art. 95, and, in the aftermath of the *Tobacco Advertising* judgment (*infra* note 83), their primary goal should be to establish and promote the internal market.

⁴¹ See Staudemayer, *supra* note 32, at 116-17.

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that EC Treaty art. 5 and the principle of attributed competences of the Community are respected.

B. *Conflicting Views on the “Federal Common Law”:
Constitutional Assymetry in the Eurpoean Union*

Once the European Commission adopts the same directives that the ECJ has in the last ten years, it will exercise the role of the uniform interpreter of Community law, thus creating a federal common law for Europe. This Part addresses products liability litigation through numerous decisions by the ECJ on the non-conformity of national laws with the Products Liability Directive, focusing on the different reactions by two groups of scholars to the ECJ judgments interpreting the Product Liability Directive and the Travel Package Directive. The section emphasizes that, despite their conflicting political views and normative aspirations on private law, both groups of lawyers deploy similar arguments to criticize ECJ adjudication. They both claim, for different reasons, that rather than having the ECJ decide crucial distributive questions through private law adjudication, such decisions should be made by democratically elected national legislatures.

In *González Sánchez*, a Spanish citizen brought a claim under Spanish law seeking compensation for injuries suffered as the result of a blood transfusion during which she was infected with Hepatitis C. The defendant, *Medicina Asturiana*, who owned the medical premises where the transfusion took place, challenged the applicability of the national provisions in light of a subsequent national law that transposed the Product Liability Directive.⁴² The national court concluded that the rights conferred to consumers were more extensive under the Spanish law invoked by the plaintiff than under the law transposing the directive.⁴³ Through a preliminary question, the Spanish tribunal referred the matter to the ECJ to determine whether, under Article 13 of the Product Liability Directive, the rights conferred under national legislation to plaintiffs

⁴² See Products Liability Directive, *supra* note 13.

⁴³ See Case C-183/00, *González Sánchez v. Medicina Asturiana SA*, C-183/00 judgment, 2002 E.C.R. I-03901 [hereinafter *González*]; C-183-00, *González v. Medicina Asturiana SA*, *Opinion of the A.G. Geelhoed*, 2002 E.C.R. I-03827, at paras.16-19 [hereinafter *A.G. Opinion*] (explaining the difference between the regime under Spanish law and the regime set up by the Products Liability Directive).

in defective product cases were to be restricted or limited as a result of the transposition of the Directive into domestic law.⁴⁴

The Spanish government and the Commission supported the defendant's argument, asserting that the purpose of the Product Liability Directive was to harmonize the laws of the Member States. They argued that Article 13 of the directive did not allow Member States to maintain a liability regime that was more favorable to plaintiffs than the one provided by the Directive.⁴⁵

Agreeing with the plaintiff, the Greek, French, and Austrian governments advocated the opposite interpretation of the Product Liability Directive provision. They argued that because the Directive was an incomplete measure, it allowed Member States to exercise their discretion in adopting a liability standard more favorable to the plaintiff. Relying on the EC consumer protection title enshrined in EC Treaty art. 153, the governments claimed that the Directive entailed only minimal harmonization, which did not preempt Member States' laws. They asserted that the Community was committed to guaranteeing a minimum threshold of protection, while allowing Member States to maintain or adopt more stringent protective measures.⁴⁶

The ECJ held that "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."⁴⁷ The opinion of Advocate General (A.G.) Geelhoed recalled the history of the Directive and the fact that the negotiation process was difficult due to the high political stakes involved for both businesses and consumers. In contrast to EC Treaty art. 95, which comprises the legal basis of the Directive and

⁴⁴ See González, para. 13.

⁴⁵ *Id.* paras. 19, 33-34. Such interpretation would create barriers to trade for the functioning of the internal market.

⁴⁶ *Id.* paras. 21-28. The Court relied on three arguments addressing the purpose, the wording, and the structure of the directive. First, the ECJ clarified that the purpose of the directive was to "ensure undistorted competition between traders, to facilitate free movement of goods and to avoid differences in levels of consumer protection." *Id.* para. 26. Second, in addressing the text of the directive the Court highlighted that "the Directive contains no provision expressly authorizing the Member States to adopt or maintain more stringent provisions in matters in respect of which it makes provision, in order to secure a higher level of consumer protection." *Id.* para. 27. Third, in clarifying the structure of the Directive, the Court held that "the fact that the Directive provides for certain derogations or refers in certain cases to national law does not mean that in regard to the matters which it regulates harmonization is not complete." *Id.* para. 28.

⁴⁷ *Id.* para. 30.

was unanimously adopted by the Council, EC Treaty, art. 94 did not explicitly allow Member States to maintain or establish more stringent provisions. Because of the difficulty in reaching an agreement among parties with conflicting interests, the Directive was intended to completely harmonize product liability and to establish a specific liability regime reflecting a complex political equilibrium.⁴⁸

Moreover, the ECJ held that the consumer protection title contained in EC Treaty art. 153, allowing Member States to maintain higher standards of consumer protection, was not to “be relied on . . . [to seek] a minimum harmonization of the laws of the Member States.”⁴⁹ The ECJ followed the reasoning of A.G. Geelhoed, who claimed that if the Community wanted to change the liability regime, it could adopt a new directive using a different legal basis, thereby modifying the particular balance struck between consumers and producers when the Directive was adopted in 1985.⁵⁰ Through deductive legal reasoning, the A.G. further justified a maximal harmonization regime for the Product Liability Directive on textual grounds. He referred to the preamble of the directive, which explicitly referred to the unity and the functioning of the internal market. Therefore, he claimed that a minimal harmonization regime not adequately would fulfill this goal.⁵¹

⁴⁸ *Id.* para. 23; see also *A.G. Opinion, supra* note 43, para. 39. The Advocate General is not a public prosecutor. He is a member of the ECJ, even though he does not participate in its deliberations, and he has the same status as a judge. His individual opinion is presented after the oral proceedings, but it does not reflect the view of the Court. However, when the ECJ follows the A.G. opinion, it constitutes a precious source of information on the legal reasoning adopted by the ECJ. R

⁴⁹ See González, *supra* note 43, para. 24; see also *A.G. Opinion, supra* note 43, para. 43. R
[I]nserted into the Treaty after the adoption of the Directives . . . Article 153 EC is worded as a valid instruction to the Community with regard to future policies. Under that provision, the Community legislature would be entitled to undertake initiatives to shift, in favor of consumers, the current balance between the interests of producers and not those of consumers which is laid down in the Directive. However, Article 153 EC does not, under any circumstances, grant Member States the power unilaterally to adopt measures, which would infringe the rules of Community laid down in directives to date. Any other interpretation would endanger the *acquis communautaire* of the uniformity and correct functioning of the common market.

Id. para. 43.

⁵⁰ See González, *supra* note 43, para. 24. This interpretation by the ECJ has important implications for future harmonization measures since it establishes a presumption in favor of maximal harmonisation. Unless future directives contain a provision explicitly authorizing Member States to maintain or adopt legislation that is more stringent to secure a high level of consumer protection, the presumption will be against such a possibility. R

⁵¹ See *A.G. Opinion, supra* note 43. R

The same opinion by A.G. Geelhoed in *González* supported an analogous judgment in *Commission v. France*.⁵² The Commission challenged the French government, alleging non-conformity in transposing the Product Liability Directive. The French government argued that such transposition would have infringed Article 6(1) of the European Convention on Human Rights by denying a fair trial to the plaintiffs, who, under the Product Liability Directive, were left in a situation of *damnum absque injuria*. The ECJ decided that European law preempted those French product liability provisions, which were incompatible with the Directive and more favorable to consumers. Thus, the Court condemned France for not implementing the same liability standards imposed by the Product Liability Directive.⁵³

In his opinion, A.G. Geelhoed explained that the evolution of western private law at the beginning of the twentieth century developed social legislation in order to protect vulnerable categories, such as employees, tenants, and consumers. This *ad hoc* legislation deployed to protect particular disadvantaged groups was created in derogation of general private law regimes, which continued to apply as the default rule. The decision about which category of harms and in which situation the law should protect certain groups should be reached as the result of a balancing conflicting considerations, and only the legislature can balance “*l’interet juridique materiel et l’efficacite de l’administration de la justice.*” The A.G. explained

The objective of the unity and functioning of the common market, which is set out in the first and last recitals, does not accord with the view that the Directive only provides for minimum harmonization. It can be deduced from the wording of the last two recitals that the Community legislature considered that harmonization was incomplete because there were still derogations open to the Member States.

Id. para. 50.

⁵² Case C-52/00, *Commission v. French Republic*, 2002 E.C.R. I-03827.

⁵³ *Id.* The Court held that:

- by including damage less of EUR 500 in Article 1386-2 of the Civil Code;
- by providing in the first paragraph of Article 1386-7 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and
- by providing in the second paragraph of Article 1386-12 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of the Directive, the French Republic has failed to fulfil [sic] its obligations under Articles 9(b), 3(3) and 7 of the aforementioned directive

Id. para. 49.

that the product liability directive was the clear result of this balancing, and no individual Member State could derogate from it. Thus, changes would require a future policy enacted by the Community legislature.⁵⁴

In the aftermath of this judgment, France did not change one of the provisions of its civil code that conflicts with the Products Liability Directive, which expressly exempts from liability the supplier of a product when the producer of the product can be identified. In contrast, the French civil code considered the supplier of a defective product liable on the same basis as the producer, even if the supplier informed the injured person of the supplier's identity within a reasonable time. In its judgment in March 2006, the ECJ held that France was in breach of Community law not only by incorrectly transposing the directive but also by not complying with the previous judgment of the ECJ.⁵⁵ Thus, the French Republic was required to pay a penalty to the community, whereby the ECJ ordered:

the French Republic to pay to the Commission of the European Communities, into the 'European Community own resources' account, a penalty payment of EUR 31 650 for each day of delay in taking the necessary measures to comply fully with the judgment in Case C-52/00 *Commission v France* from delivery of the present judgment until full compliance with the judgment in that case.⁵⁶

Similar to the French saga, in *Commission v. Greece*, the ECJ found that the Greek consumer protection law did not include a provision limiting recoverable damages to the five hundred Euro threshold mentioned in Article 9 of the Product Liability Directive.⁵⁷ Greece attempted to justify its domestic provision by arguing that the directive merely achieved a minimum harmonization regime that allowed the Member States to maintain domestic provisions more favorable to consumers. Moreover, it argued that the concept of damage was not within the scope of the directive; thus,

⁵⁴ See A.G. Opinion, *supra* note 43, para. 68.

⁵⁵ Case C-177/04, *Commission v. French Republic*, O.J. 2006 C131/10 (where the ECJ held that "the French Republic has failed to take the necessary measures to comply fully with the judgment in Case C-52/00 *Commission v. France* as regards the transposition of Article 3(3) of Council Directive 85/374/EEC of 25 July 1985 . . ."). *Id.* para. 1.

⁵⁶ *Id.* at para. 2.

⁵⁷ See Case C-154/00, *Commission v. Hellenic Republic*, 2002 E.C.R. I – 03870, para. 8.

it should be interpreted under national law to require full compensation to the injured party.⁵⁸

In following its previous judgments and the Opinion of the A.G., the ECJ held that the Directive “seeks to achieve in the matters regulated by it, complete harmonization of the laws, regulations and administrative provision of the Member States.”⁵⁹ As to the incompatibility of the threshold with the principles of Greek private law, the ECJ used deductive reasoning and held that, “. . . the recourse to provisions of domestic law to restrict the scope of the provisions of Community law would have the effect of undermining the unity and efficacy of that law and cannot consequently be accepted.”⁶⁰

Commentators have debated this well-known trilogy of cases. Commentators on the Left were especially enraged by the ECJ decisions for at least three different reasons, which have varied over time. First, Daniela Caruso addressed legislative resistance against European integration emerging from the failed transposition of the Product Liability Directive in France.⁶¹ According to the resistance thesis, while European bureaucrats and judges were deploying increasing formalism in defending the doctrinal coherence of European law, national elites were resisting its effects in France.⁶²

In the context of transposing the directive, the French government was in a difficult situation: it had to adopt unpopular legislation over the protests of national legal elites because it had to comply with its obligations towards the Community under EC Treaty art. 10.⁶³ Not surprisingly, France took more than a decade to implement the Product Liability Directive, and it was condemned twice by the ECJ. Despite the fact that, at the declaratory

⁵⁸ See *id.* paras. 22-23.

⁵⁹ *Id.* para. 20.

⁶⁰ *Id.* para. 24.

⁶¹ See Caruso, *supra* note 16, at 15 (claiming that the implementation of the Products Liability Directive had important distributive consequences that the French Parliament was not comfortable with).

⁶² See *id.*

⁶³ EC Treaty art. 10 imposes upon Member States an obligation “[to] abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.” EC Treaty art. 10, *supra* note 21. The ECJ has interpreted EC Treaty art. 10 to apply to unimplemented directives and has imposed a duty on Member States to “refrain from taking any measures liable seriously to compromise the result prescribed.” Case C-129/96, *Inter-Environmental Wallonie ASBL v. Region Wallonie*, 1997 E.C.R. I-07411, para. 45; see also Case C-14/02, *ATRAL SA v. Belgian State*, 2003 E.C.R. I-04431.

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level, the French civil code embraced a negligence regime, in practice, due to judge made law, courts relied on the code provisions in sales contracts to enact a strict liability regime for victims of product-related accidents. Because France's liability standards were considered more favorable to consumers than the ones set by the directive, the Commission in 1998 brought the French government before the ECJ for a second time to implement the directive. Both national politicians and the legal profession in France had persistently resisted the complete transposition of the Product Liability Directive.

Second, European consumer advocates claimed that the ECJ rulings tipped the balance in favor of a particular approach to European consumer policy: serving consumer interests through the internal market and increasing consumer choice.⁶⁴ In contrast, they maintained that, despite the ECJ trend toward self-regulation and the increasing maximal harmonization tendency, EC consumer policy should remain a critical tool to be widely developed for the protection of weaker parties rather than enhancing consumer choice.⁶⁵ In particular, they stated that before *Commission v. France* the Court had never taken such a clear-cut position toward maximal harmonization. In fact, previous ECJ judgments interpreting harmonizing directives in this area suggested a less strict rule and a more flexible standard *vis à vis* the preemption of Member State laws.⁶⁶

Third, social justice advocates argued that the ECJ should refrain from deciding questions that should be determined by demo-

⁶⁴ See Jules Stuyck, *European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?*, 37 COMMON MKT. L. REV. 367, 400 (2000) ("The acceptance of the proper functioning of the (internal) market and the effective competition policy as the very foundations of consumer policy does not mean that the consumer is reduced to the status of a benefit-maximizing creature. Consumer wants, no matter how frivolous . . . can be expressed in the market.").

⁶⁵ See Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law: Has it Come of Age?* 28 EUR. L. REV. 370, 376 (2003).

Thus, the scope for using the Treaty to allow Member States to improve on European solutions is therefore very narrow. If maximal harmonization is the favored approach of the Commission there will be no minimal harmonization clauses in the directive(s) and the Court is unlikely to be able to construe the directive as a minimal one. . . . Maximal harmonization fits into a pattern of approaches to Community regulation that favor trade liberalization.

Id. at 376.

⁶⁶ See Fabio Marchetti & Fernanda Nicola, *Constitutionalizing Tobacco: The Ambivalence of European Federalism*, 46 HARV. INT'L L.J. 507, 513 (2005).

cratic institutions.⁶⁷ Although not explicitly, these lawyers deployed institutional competence arguments to express their skepticism on two different fronts. First, they were skeptical that legal elites sitting in Luxembourg would preserve the social justice values embedded in national traditions and instead thought these elites would come to prioritize market goals. Second, in following a Jacobinian tradition, they believed that legal elites, in particular lawyers and judges, could not be trusted to achieve social justice because, contrary to legislatures, courts have not traditionally been a forum for social struggles.⁶⁸

C. *The Activist European Court of Justice and the Legitimation Puzzle*

In *Simone Leitner v. TUI Deutschland GmbH*, the Court was asked to interpret the notion of damages for the non-performance of a contractual obligation.⁶⁹ Simone Leitner, a ten-year-old girl whose parents booked an all-inclusive two-week holiday at a club in Turkey through the travel agent TUI, developed symptoms of salmonella poisoning attributed to the club's food. The girl's illness lasted throughout the holiday and two weeks following her return to Austria. Simone Leitner brought an action for damages against TUI before an Austrian trial court, which awarded her damages for only physical pain and suffering but denied her non-material damages for loss of enjoyment of the holiday.

On appeal, the Austrian *Landesgericht Linz* referred the question of the interpretation of Article 5 of the Package Travel Directive to the ECJ. The question concerned which damages the organizer and/or the retailer were liable for as a result of the non-performance or the improper performance of the package tour contract.⁷⁰ Specifically, the Austrian court asked the ECJ whether

⁶⁷ See Hugh Collins, *Editorial: The Future of European Private Law: An Introduction*, 10 EUR. L.J. 649, 650 (2004).

⁶⁸ See CARLO AUGUSTO CANNATA & ANTONIO GAMBARO, *LINEAMENTI DI STORIA DELLA GIURISPRUDENZA EUROPEA* (3d ed. 1989).

⁶⁹ See Case C-168/00, *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, 2002 E.C.R. I-02631.

⁷⁰ Package Travel Directive, *supra* note 13. Article 5 provides:

1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.

the directive required Member States to provide for compensation of non-material damages, which were excluded under Austrian law.

On the defendant's side, the Austrian, the French, and the Finnish government asserted that the Travel Package Directive aimed to provide minimal harmonization; that is, what was not expressly covered by the text of the Travel Package Directive remained a matter of Member States' competences. On the plaintiff's side, the Belgian government and the Commission pointed out that since the purpose of the Travel Package Directive was to approximate the laws of Member States, "damages" as used in the text was to be 'construed broadly' to include the notion of non-material damages caused by loss of enjoyment of a holiday. The ECJ holding recognized the right to compensation for damage other than personal injury, including non-material damages.⁷¹

Prominent commentators criticized the holding of the ECJ. In particular, jurists advocating for regulatory competition and greater efficiency of the common market have emphasized the activism of the *Leitner* court and the consequences precipitated by the case. They argue that the judgment created a 'floodgate' concern within the Austrian legal system because it created the potential for judges to award high non-material damages with respect to package-holidays. They argued that *Leitner* would serve as precedent and create incentives for consumers to litigate claims for high

2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services

In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.

In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

3. Without prejudice to the fourth subparagraph of § 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.

Id. at art. 5.

⁷¹ See *Leitner*, *supra* note 69. The Court affirmed that Article 5 [of the Package Travel Directive] "is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday." *Id.* para. 24.

damages, thereby turning litigation into an insurance mechanism. Scholars have pointed out that, in extending the compensation for non-material damages, this decision “stands [as] a fundamental value judgment with far-reaching economic implications which the Community apparently was not (yet) ready to take when the Directive was discussed by its institutions. This issue was still left to the Member States.”⁷²

These jurists have a neoliberal Hayekian understanding of how the market should function in the European Union and the role that courts and legislatures should play in the single market. In particular, these neoliberal jurists have asserted that the problem with the EU legal system is that courts, instead of national parliaments, are making important social welfare choices. These jurists highlight that the *Leitner* holding is likely to alter an important equilibrium within national private law regimes by undertaking the “Promethean job of creating a European private law [which] should be shouldered by other institutions.”⁷³

Both social justice scholars and neoliberal jurists have criticized the controversial rulings of *González*, *Commission v. France*, and *Leitner*. Even though these jurists have opposite political views on the goals of European integration, they both condemn the ECJ for making decisions that, in their eyes, should be left to the legislature rather than courts. Social justice advocates address questions concerning distributive justice and the shrinking welfare state in the EU, while neoliberal advocates are committed to efficiency goals and limited social intervention in order to promote economic life and fairness. However, paradoxically, they both espouse similar institutional competence arguments to evaluate the ECJ and to delegitimize the role of courts in favor of legislatures.

The aim of this article is to contextualize both the social justice perspective and the neoliberal view in order to offer an explanation of the evolution of European private law in light of wide constitutional, political, and comparative law changes affecting legal scholarship. Through an understanding of the institutional and the substantive evolution of European integration—from merely market to social policy objectives—this work traces the appearance of legitimation concerns that were first used by commentators on the

⁷² Wulf-Henning Roth, *Case C-168/00 Simone Leitner v. TUI Deutschland GmbH & Co.KG*, 40 *COMMON MKT. L. REV.* 937 (2002).

⁷³ *Id.* at 950.

Left around the 1980s and by commentators on the Right in the mid-1990s.

By analyzing the constitutional changes in the EU, the article shows how scholars have strategically adopted, over time and depending on the political circumstance and the debates they participated in, the claim of “constitutional asymmetry.” When this claim is translated into the Europeanization of private law discourse, it enables jurists to conflate institutional competence arguments (courts versus legislatures; European level versus Member State level) with substantive arguments (efficiency versus equitable distribution; free markets versus social goals). Thus, initially scholars on both the Left and the Right have used constitutional asymmetry claims to criticize ECJ judgments and delegitimize the structure of the European architecture.

III. MARKET HARMONIZATION AND IDEOLOGY: CONSTITUTIONAL ASYMMETRY IN THE EU

A. *Building the Internal Market Through Law: Negative and Positive Integration*

Economists predicted that European market integration would initially entail the elimination of trade barriers via market liberalization but that it would also later require extensive re-regulation.⁷⁴ In the mid-1980s, the Delors Commission launched its agenda for the completion of the internal market.⁷⁵ Deepening market integration required the Commission to adopt wide policy action at the Community level via re-regulation and harmonization of contract and tort law.⁷⁶ In particular, the Community harmonized national consumer laws that, due to diverse regulations, impeded goods from circulating freely in the internal market.⁷⁷ The Commission regulated sectoral areas of private law via directives, which obtained the necessary political support of Member States notwithstanding their thin legal basis.⁷⁸ Initially, the Commission

⁷⁴ See WILLEM MOLLE, *THE ECONOMICS OF EUROPEAN INTEGRATION: THEORY, PRACTICE, POLICY* (1999).

⁷⁵ See JACQUES DELORS, *OUR EUROPE* (1996).

⁷⁶ See Products Liability Directive, *supra* note 13; Council Directive 85/77, 1985 O.J. (L 372) 31 [hereinafter Doorstep Selling Directive] (for the protection of consumers in respect of contracts negotiated away from business premises).

⁷⁷ See STEPHEN WEATHERILL, *CONSUMER LAW AND POLICY* (1997).

⁷⁸ See *id.* at 346; Stephen Weatherill, *Reflections on the EC's Competence to Develop a "European Contract Law,"* 13 *EUR. REV. PRIVATE L.* 405, 411 (2005) (“In some cases, how-

addressed the diversity of consumer regulations to assert the existence of an obstacle to cross-border trade, which prompted the use of directives as a re-regulatory device. Later, the Commission became more cautious in adopting directives for cases in which the link between the harmonized measure and the establishment of the internal market was tenuous.⁷⁹

In the 1990s, scholars pointed out the increasing “competence creep” in the Commission’s initiatives to harmonize private law.⁸⁰ They pointed to the principle of attributed competences in the EC Treaty art. 5, which limits the power of the Community to the competences conferred to it in the Treaty.⁸¹ Because there is no explicit competence to harmonize private law rules in the Treaty, consumer contract directives were based on an expansive functional reading of EC Treaty art. 95—as a means to establish and ensure that the internal market functioned properly.⁸²

However, a decade after the adoption of the Treaty of Maastricht, the Tobacco Advertising Judgment in 2000 illustrated the importance of the problem of competence creep.⁸³ In striking down a European directive for the first time, the ECJ set new limits to positive integration through Community re-regulation. In this case, the ECJ relied on the constitutional principle of attributed competences to limit the expansive reading of EC Treaty art. 95 by the Community decision-makers.⁸⁴ Fearing the expansion of Community competences at the expense of Member States, the German government challenged the legitimacy of the Tobacco Advertising Directive, which imposed a total ban on the advertise-

ever the political reality was that Member States were committed to the development of an EC consumer policy and, in the absence of any more appropriate legal basis in the Treaty, chose to ‘borrow’ the competence to harmonize laws to put it in place.”).

⁷⁹ See Stephen Weatherill, *The European Commission’s Green Paper on European Contract Law: Context, Content and Constitutionality*, 24 J. OF CONSUMER POL’Y 339, 347 (2001) (commenting on the legal basis of the Doorstep Selling Directive).

⁸⁰ See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2405-06 (1991); Mark A. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14 J. PUB. POL’Y 95 (1994).

⁸¹ See EC Treaty, *supra* note 21 (“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”).

⁸² See WEATHERILL, *supra* note 77, at 14.

⁸³ See Case C-376/98, Federal Republic of Germany v. European Parliament and Council of the European Union, 2000 E.C.R. I-08419 [hereinafter Tobacco Advertising Judgment].

⁸⁴ See Stephen Weatherill, *Why Object to the Harmonization of Private Law by the EC?*, 5 EUR. REV. PRIVATE L. 633, 641-46 (2004).

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ment of tobacco products.⁸⁵ In questioning the legitimacy of the Directive before the ECJ, Germany alleged that the objective of the Directive was to regulate public health rather than the marketing of tobacco products.⁸⁶ The ECJ annulled the Tobacco Advertising Directive for lack of a legal basis on the grounds that it was a health measure rather than an internal market provision.⁸⁷ Because the Community has no competence to harmonize public health matters, which falls under the regulatory competence of the Member States, the Court ruled that the Directive was void.⁸⁸

Even though negative and positive integration were institutionally associated with the ECJ and the Commission, respectively, this part shows that both phases are present simultaneously in the development of European law. Rather than two alternative processes taking place in different periods of time, negative and positive integration took place at the same time through the collaboration of the ECJ with the Commission.

Scholars depicted negative integration as comprising the initial phase of the internal market in the 1960s and the 1970s, in which the Community aimed to remove “tariffs, quantitative restrictions, and other barriers to trade or obstacles to free and undistorted competition.”⁸⁹ Negative integration was built into the Treaty of Rome through the explicit commitment to reduce tariff and non-tariff barriers and to enhance competition within the internal market.⁹⁰

Negative integration consists of the prohibition of quantitative restrictions to trade under EC Treaty art. 28, a sort of European equivalent to the dormant commerce clause in the United States.⁹¹ The ECJ broadly defined national measures as those having an ef-

⁸⁵ See Council Directive 98/43, 1998 O.J. (L 213) 9 [hereinafter Tobacco Advertising Directive].

⁸⁶ See Marchetti & Nicola, *supra* note 66.

⁸⁷ See Tobacco Advertising Judgment, *supra* note 83. The Tobacco Advertising Directive was enacted pursuant to EC Treaty art. 95, which authorizes the approximation of national laws with the express objective of establishing a single European market. See also EC Treaty, *supra* note 21, art. 95.

⁸⁸ See Tobacco Advertising Judgment, *supra* note 83, para. 83.

⁸⁹ See SCHARPF, *supra* note 14, at 45.

⁹⁰ See *id.* at 50.

⁹¹ See EC Treaty, *supra* note 21, art. 28 (“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”). For a comparative perspective, see Donald H. Regan, *Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing*, *Da Capo*, 99 MICH. L. REV. 1853, 1893 (2001).

fect equivalent to quantitative restrictions. Thus, the ECJ exercised vertical judicial review each time national laws created an impediment to interstate commerce.⁹² In this scenario, the ECJ played a crucial role in constitutionalizing the four freedoms: the free movement of goods, services, capital, and persons.⁹³ By means of direct effect and supremacy of EC law, the Court interpreted the four freedoms to prevail over national legislation.⁹⁴ Through vertical judicial review, which had “low visibility” compared to the political opposition to Community decision-making, the ECJ struck down national laws that created barriers to trade.⁹⁵

Conflicts arose within the internal market when an increasing number of national measures conflicted with the European dormant commerce clause, or when businesses entering a new market denounced the ability of a Member State to impose technical requirements limiting the free movement of goods. In response, the ECJ adopted two competing strategies. First, by narrowly interpreting the list of derogations falling under EC Treaty art. 30,⁹⁶ the Court clarified that Member States could not utilize the exemptions to serve their economic objectives.⁹⁷ Second, in its landmark

⁹² See Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 873; see also J.H.H. Weiler, *Epilogue: Towards a Common Law of International Trade*, in *THE EU, THE WTO AND THE NAFTA 206* (J.H.H. Weiler ed., 2000) (explaining that “[r]emoving obstacles, not merely discrimination and protectionism is the hallmark of the true common or single market-place”).

⁹³ See SCHARPF, *supra* note 14, at 54. R

⁹⁴ See Joseph Weiler, *The Community System: the Dual Character of Supranationalism*, 1982 Y.B. EUR. L. 257, 257-306.

⁹⁵ See Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993); SCHARPF, *supra* note 14, at 24 (explaining how the invisible power of the ECJ extended “the prohibitions of negative integration against national policy measures that could constitute barriers to free market”). R

⁹⁶ See EC Treaty, *supra* note 21, art. 30. R

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Id.

⁹⁷ See Case 113/80, *Commission v. Ireland*, 1981 E.C.R. 01625, para. 7.

decision *Cassis de Dijon*, the ECJ created a test that conferred greater power to the Court to solve future disputes.⁹⁸

The ECJ deployed the reasonableness test of *Cassis de Dijon* to strike down national laws that were not proportionate to their goals. By balancing the (national) mandatory interests permitted under EC Treaty art. 30 against the (European) guarantees of free movement, the ECJ upheld national laws that were in fact proportionate to their goals.⁹⁹ The *Cassis* test did allow the ECJ to apply the European dormant commerce clause more broadly, but it also increased the ambiguity of ECJ jurisprudence.¹⁰⁰ On the one hand, the test enabled the ECJ to strike down national laws that were not proportionate to the interests they were protecting; on the other hand, the *Cassis* test allowed the ECJ to expand the list of derogations under EC Treaty art. 28.¹⁰¹

In implementing the *Cassis* test, the Commission adopted the concept of “mutual recognition,” stating that when a product was lawfully marketed in one Member State, it could circulate freely in other Member States as well.¹⁰² By focusing on only one side of the test, namely that national measures restricting cross-border trade would be void unless they were proportionate to their aims,

⁹⁸ See Case 120/78, *Rewe-Zentral A.G. v Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 00649, [hereinafter *Cassis*]. *Cassis* is the landmark decision concerning the free movement of goods. In interpreting EC Treaty art. 28, which regulates the free movement of goods, the ECJ asserted its competence to assess the intrinsic reasonableness of all national health, safety, or environmental product regulations that could have a negative impact on cross-border trade.

⁹⁹ See *Cinéthèque S.A. v. Federation Nationale Des Cinemas Français*, Cases 60 & 61/84, [1986] 1985 E.C.R.; *Torfaen Borough Council v. B&Q plc*, Case 145/88 [1989] ECR 3851. In both cases the ECJ considered national laws justified by mandatory interests and proportionate to their goals.

¹⁰⁰ See *Cassis*, *supra* note 98, para. 8. The ECJ laid down the test and the list of the mandatory interests Member States could use to justify their national legislation:

[O]bstacles to movement within the community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.

Id.

¹⁰¹ See Case 463/01, *Commission v. Federal Republic of Germany*, 2004 E.C.R. I-11705; Case 112/00, *Eugen Schmidberger Internationale Transporte Planzuge v. Republik Österreich*, 2003 E.C.R. . I-5659.

¹⁰² See *Communication from the Commission Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in case 120/78*, 1980 O.J. C 256/2 (Mar. 10 1980).

the Commission interpreted *Cassis* in a pro-freedom-of-movement fashion. Mutual recognition alleviated the harmonization burden of the Commission, which could now secure the Europeanization of national regulations that created obstacles to trade.¹⁰³ However, some scholars asserted that the implementation of the *Cassis* test by the Commission actually aimed to limit Member States' regulatory powers. In short, these scholars maintained that mutual recognition triggered a race to the bottom within the internal market by endorsing free movement at the expense of Member States' welfare legislation, thus promoting European consumer choice over national social goals.¹⁰⁴

Negative integration left a need for a supplementary positive contribution by the Community to the harmonization of Member States' laws.¹⁰⁵ In the mid-1980s the Community harmonized door-to-door sales and product liability rules.¹⁰⁶ By the end of the 1980s, numerous consumer contracts directives created a body of EC consumer policy, which was expressly included under the competence or jurisdiction of the Community in the Maastricht Treaty in 1992.¹⁰⁷ Even though these directives regulated consumer contracts, their goal was the establishment and functioning of the internal market, based on EC Treaty art. 95, rather than the creation

¹⁰³ See Kenneth A. Armstrong, *Mutual Recognition*, in *THE LAW OF THE SINGLE EUROPEAN MARKET* 225 (Catherine Barnard & Joanne Scott eds., 2002) (defining three dimensions of the policy evolution of the concept of mutual recognition).

¹⁰⁴ See SCHARPF, *supra* note 14; WEATHERILL, *supra* note 77, at 10-11. In the 1980s the ECJ deployed the rhetoric of the active European consumer who shops and enters into contracts across Member States. This became a powerful image in order to eliminate national regulations, which, according to the Court, limited the free circulation of goods and were protectionist measures aimed at protecting national economies rather than protecting consumers.

¹⁰⁵ See Giandomenico Majone, *The Rise of Statutory Regulation in Europe*, in *REGULATING EUROPE* 58 (Giandomenico Majone, ed., 1996). Similar to environmental protection, consumer regulation included hundreds of pieces of legislation, but as Majone puts it, "while the first directives were for the most part concerned with *product* regulation, and hence could be justified by the need to prevent that national standards would create non-tariff barriers to the free movement of goods, later directives increasingly stressed *process* regulation . . . and thus aimed explicitly at environmental rather than free-trade objectives." *Id.*

¹⁰⁶ See Doorstep Selling Directive, *supra* note 76; Products Liability Directive, *supra* note 13.

¹⁰⁷ See EC Treaty, *supra* note 21, art. 153; WEATHERILL, *supra* note 77 (describing how EC consumer policy constructed its identity in the shadow of fundamental constitutional omissions from the original treaty); Geraint Howells, *Soft Law and Consumer Law*, in *LAW MAKING IN THE EUROPEAN UNION* (Paul Craig & Carol Harlow eds., 1998).

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of a body of EC consumer policy under EC Treaty art. 153.¹⁰⁸ Jurists both criticized and acclaimed these directives, which in certain contexts lowered and in other contexts raised national standards of protection.¹⁰⁹

Positive integration led jurists to start questioning the relation between European constitutionalism and the harmonization of private law. Despite the fact that the Community had no explicit competence to harmonize private law, by the end of the 1990s there was a consistent body of European contract law that, according to the Commission, only served the goal of efficient market integration rather than other social goals.¹¹⁰ Moreover, in 2001, the Commission envisaged among other things, the possibility of adopting a uniform European contract code, which became central to scholarly debates.¹¹¹

In these debates, jurists questioned the competences of the Community to regulate private law in order to avoid *ultra vires* acts annulled by the ECJ.¹¹² To assert the competence of the Community to harmonize a particular private law rule, the Commission often selects EC Treaty art. 95 as a legal basis because it is a broad provision for the establishment and functioning of the internal market. However, disgruntled minorities, namely Member States unhappy with an EU directive or a regulation, increasingly challenge before the ECJ Community acts adopted through the majority voting by asserting that they lack a valid legal basis. In the Tobacco Advertising Judgment, the ECJ for the first time annulled

¹⁰⁸ From 1985 to 1999 the Commission agenda triggered seven directives on European contract law. See *Commission Green Paper on European Union Consumer Protection*, at 7, COM (2001) 531 final (February 10, 2001) [hereinafter Green Paper].

¹⁰⁹ See Carla Joustra, *Consumer Law, in TOWARDS A EUROPEAN CIVIL CODE* 140, (Arthur Hartkamp et. al. eds., 2d ed. 1998).

¹¹⁰ The *acquis communautaire* is the result of the body of directives and their common interpretation by the ECJ. See Reiner Schulze, *The Acquis Communautaire and the Development of European Contract Law*, in INFORMATION REQUIREMENTS AND FORMATION OF CONTRACT IN THE ACQUIS COMMUNAUTAIRE 15 (Reiner Schulze et al. eds., 2003); Reiner Schulze, *European Private Law and Existing EC Law*, 19 EUR. REV. PRIVATE L. 3, 10 (2005) (explaining the development of a European contract *acquis*).

¹¹¹ See *Action Plan*, *supra* note 31. Jurists suggested that to adopt a European civil code the Community could, in theory, deploy particular legal bases or even draft an intergovernmental treaty. Walter van Gerven, *Communication on European Contract Law: Codifying European Private Law*, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.5.pdf (last visited Dec. 6, 2007); Walter van Gerven, *Bringing (Private) Laws Closer to Each Other at the European Level* (Jan. 2005), available at <http://www.law.kuleuven.ac.be/ccle/cv.php?id=WVG> (last visited Dec. 6, 2007).

¹¹² See Tobacco Advertising Judgment, *supra* note 83.

a directive because it lacked a legal basis. In that judgment, the Court also elaborated a test to determine when EC Treaty art. 95 can be asserted as a legal basis for Community acts.¹¹³ The ECJ made clear that the Community does not have a general power to regulate the internal market. Rather in order to harmonize a specific legal issue, the Commission needs to show that different national regulations have created a significant distortion of competition that hinders the free movement of goods.¹¹⁴ As a result, the Commission has become more cautious in its harmonization proposals, which must be based on relevant hard data demonstrating that disparities in national contract laws create market failures or obstacles to competition.¹¹⁵ As scholars have pointed out, the competence creep resulted in a heightened burden of proof for the Commission's regulatory initiatives on European private law.¹¹⁶

Moreover, jurists also questioned the preemption of national laws by European directives and the shift of the ECJ and the Commission toward a maximal approach to harmonization. While the Commission can determine the type of harmonization adopted by a directive, which is then amended or adopted as a result of the political compromise between the Council and the EP,¹¹⁷ the actual level of harmonization is often unclear from the text, and the ECJ therefore is called upon to interpret the directive. Recently, ECJ

¹¹³ *Id.* EC Treaty, *supra* note 21, art. 230 specifies four grounds of review for community acts:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Id.

¹¹⁴ See Tobacco Advertising Judgment, *supra* note 83, paras. 106-8; *A.G. Opinion*, *supra* note 43, paras. 82-98.

¹¹⁵ See *Com. on Contract Law*, *supra* note 30; see also Stephen Weatherill, *The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis* 13 EUR. BUS. L. REV. 497 (2002).

¹¹⁶ See Weatherill, *supra* note 79; Armin Von Bogdandy & Jurgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposal for its Reform* 39 COMMON MARKET L. REV. 227 (2002).

¹¹⁷ See Van Gerven, *supra* note 21, 508-12 (explaining how the Commission combined the different harmonization methods in the various fields).

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jurisprudence and the Commission's initiatives on European contract law have favored a maximal approach to harmonization, which allows no derogation by Member State laws; thus, the directive completely preempts the field.¹¹⁸ In contrast, a minimal harmonization approach allows Member States to maintain more stringent rules than the ones set by the directive.¹¹⁹ The Commission's justification for maximal harmonization is to further market integration that will on the one hand increase the coherence of existent *acquis communautaire*,¹²⁰ while on the other hand, it will benefit both businesses and consumers by ensuring legal certainty in contractual transactions.¹²¹ In addressing this regulatory shift, scholars are highly divided between advocating for maximal harmonization, because it will lead to a more integrated and efficient common market, and advocating against maximum harmonization, because it will likely lower, rather than increase, national standards of protection.¹²²

In describing European integration, scholars associate negative integration with the constitutionalization of free movement via ECJ adjudication, whereas they associate positive integration with European re-regulation via the legislative initiatives of the Commission. But, in fact, both the ECJ and the Commission have been jointly involved in both positive and negative integration. In order to legitimize Community action in the eyes of the Member States, cooperation between the ECJ and the Commission is necessary to assure the implementation of EC law and to strengthen Community trends towards centralization or decentralization.

As illustrated earlier, a striking example of this supranational cooperation that centralized and strengthened Community action *vis à vis* the Member States took place in the mid-1970s with the creation of the *Cassis* test by the ECJ, which was subsequently

¹¹⁸ See González, *supra* note 43; Jens Karsten & Gosta Petri, *Towards a Handbook on European Contract Law and Beyond: The Commission's 2004 Communication "European Contract Law and The Revision of the Acquis: The Way Forward,"* 28 J. CONSUMER POL'Y 31, 32-33 (2005). R

¹¹⁹ See Case C-11/92, *The Queen v. Sec'y of State for Health*, 1993 E.C.R. I-03545.

¹²⁰ The *acquis communautaire* in a particular legal field encompasses all EC law sources stemming from the treaty, community acts (regulations, directives, or communications), and case law from the ECJ and the Court of First Instance (CFI). See Reiner Schulze, *European Private Law and Existing EC Law*, 1 EUR. REV. PRIVATE L. 3, 10 (2005).

¹²¹ See *Action Plan*, *supra* note 31. R

¹²² See Thomas Wilhelmsson, *The Abuse of the "Confident Consumer" as a Justification of EC Consumer Law*, 27 J. CONSUMER POL'Y 317 (2004).

adopted by the Commission. According to the *Cassis* test, any national regulation hindering cross-border trade must be justified by a mandatory interest of the state and be proportionate to its regulatory aim.¹²³ In the aftermath of *Cassis*, the Commission adopted the principle of mutual recognition, which entailed the automatic harmonization of legal standards. Thus, in adopting the *Cassis* test, the Commission, together with the ECJ, was pursuing a Community centralizing agenda.

Another example of this joint cooperation emerged in the mid-1980s with the distinction elaborated by the ECJ in *France v. Keck and Mithouard*. This decision influenced the Commission's regulatory initiatives. In light of *Keck* the Commission initiated a new decentralization trend, both in its legislative initiatives as well as its executive ones, aimed at restraining Community action *vis à vis* the Member States.¹²⁴ In *Keck*, the ECJ created a distinction between "product requirements," which fall under the scrutiny of the EC Treaty art. 28, and "selling arrangements," which do not fall under the ECJ's scrutiny. The distinction rests on the different regulatory nature of the two. In characterizing selling arrangements

¹²³ Following *Cassis*, the Commission interpreted the ECJ holding as advancing the principle of mutual recognition, entailing the automatic harmonization of legal standards. See EUROPEAN COMMISSION, GUIDE TO IMPLEMENTATION OF DIRECTIVES BASED ON A NEW APPROACH AND A GLOBAL APPROACH (2000), available at http://ec.europa.eu/enterprise/newapproach/legislation/guide/document/1999_1282_en.pdf.

[The *Cassis* case] provides the key elements for mutual recognition. The effect of this case is as follows.

Products legally manufactured or marketed in one country should in principle move freely throughout the Community where such product meet equivalent levels of protection to those imposed by the Member State of exportation and where they are marketed in the territory of the exported country.

In absence of Community measures, Member States are free to legislate in their own territory.

Barriers to trade, which result from differences between national legislations, may only be accepted, if national measures:

are necessary to satisfy mandatory requirements (such as health, safety, environmental and consumer protection);

serve a legitimate purpose justifying the breach of the principle of free movement of goods; and

can be justified with regard to the legitimate purpose and are proportionate with the aims.

Id. at 7.

¹²⁴ See Case C-267/91, *France v. Keck and Mitouard*, 1993 E.C.R. I-06097; Nibert Reich, *The "November Revolution" of the European Court of Justice: Keck, Merng and Audi Revisited*, 31 COMMON MKT. L. REV. 459 (1994).

as a neutral regulatory device, the ECJ allowed Member States to regulate the modalities of sales because, according to the Court, these did not directly affect interstate sales. Thus, selling arrangements were left to the discretion of local regulatory interventions. Similarly, the Commission adopted the *Keck* decentralizing strategy in its proposals to harmonize product requirements by letting the Member States exercise regulatory control over their selling agreements.¹²⁵

These examples show that both negative and positive integration strategies have been part of the Community agenda pursued jointly by the ECJ and the Commission, despite their different powers and institutional capacities. Moreover, it shows that, as predicted by scholars, the problem of the “competence creep” or lack of legal basis should be managed by both the Commission and the ECJ jointly. In fact, the ECJ made clear in the Tobacco Advertising judgment that Community Acts proposed by the Commission under a broad provision of the EC Treaty, such as art. 95, need to be substantiated by further evidence.¹²⁶ In addition to showing a legal basis for harmonization efforts in a particular area, the Commission will have to show that the different national legislative provisions have created real obstacles to competition. In this way disgruntled minorities will be less likely to bring a Community Act for horizontal judicial review before the ECJ and the Court less likely to annul it.

B. *A Genealogy of Constitutional Asymmetry in European Legal Consciousness*

Scholars have divided the process of integration into two competing phases. The first phase of negative integration entailed market-making strategies through EC competition law and the constitutionalization of the four freedoms (goods, services, capital, and workers).¹²⁷ A second phase of positive integration entailed

¹²⁵ See Tobacco Advertising Judgment, *supra* note 83, paras. 106-13; see also Marchetti & Nicola, *supra* note 66 (discussing the follow up of the Tobacco Advertising Directive and the new legislative initiatives of the Community).

¹²⁶ See WEATHERILL, *supra* note 77, at 14. On the “competence creep” in the EU, see Pollack, *supra* note 80.

¹²⁷ Negative integration has been achieved mostly by judicial fiat. The ECJ through vertical judicial review has been voiding domestic laws clashing with the free movement provisions of the EC Treaty because of their protectionist goals. Many authors have linked negative integration with one of the initial ECJ decisions on free movement of goods. In *Dassonville*, in the early 1970s, the ECJ shifted the burden of proof to the Member States

Community re-regulation through market-correcting strategies. For some scholars, the process of negative integration advanced by supranational institutions consisted mostly of market deregulation through the elimination of trade barriers. Under the pressure of negative integration, Member States managed to preserve their national welfare states, but their capacity to maintain public interest regulations through national environmental, public health, and consumer safety laws was severely limited by the pressure of negative integration.¹²⁸

Initially, positive integration, or market-correcting measures, consisted in re-regulation at the Community level, mostly via directives, aimed at the narrow goal of establishing a functioning internal market. Later, in 1992, the Treaty of Maastricht expanded EC competences to regulate consumer and environmental protection to maintain high standards of protection to guarantee the safety and public interest of European citizens.¹²⁹ Because of these constitutional changes, the Community has broader competences that go beyond the mere internal market scope. In noticing this change, scholars who are concerned with national welfare regimes maintain that a constitutional asymmetry pervades the EU institutional arrangement. Thus, the legitimacy of the Community is at stake, and the interrelation between economic globalization and European integration through judicial activism leads to the “weakening of political legitimacy in Western Europe.”¹³⁰

According to Fritz Scharpf, while negative integration led to the establishment of the internal market, positive integration or market-correcting strategies were “limited by the need to achieve action consensus among a wide range of divergent national and group interests.”¹³¹ This is what Scharpf calls the “decoupling of economic integration and social protection issues which has charac-

to demonstrate that their domestic laws were not in conflict with the free movement of goods provision of Article 28 EC Treaty. . See *Procureur du Roi v. Dassonville*, *supra* note 25.

¹²⁸ See 1 *Welfare and Work in the Open Economy*, in *FROM VULNERABILITY TO COMPETITIVENESS* (Fritz W. Scharpf & Vivien A. Schmidt eds., 2000); *THE NEW POLITICS OF THE WELFARE STATE* (Paul Pierson ed., 2001).

¹²⁹ See EC Treaty, *supra* note 21, art. 95 (ex art. 100A), art. 152-3 (expanding the competences of the EU for consumer protection and public health).

¹³⁰ See SCHARPF, *supra* note 14, at 2; see also HANS-W. MICKLITZ, *THE POLITICS OF JUDICIAL CO-OPERATION IN THE EU: SUNDAY TRADING, EQUAL TREATMENT AND GOOD FAITH* 17 (2005).

¹³¹ *Id.* at 71.

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terized the real process of European integration”¹³² Likewise, jurists addressing European law, and in particular the process of harmonization of private law, argued that positive integration could not always fill the regulatory gap left by negative integration in the EU.¹³³ Most importantly, the constitutional asymmetry consisted of the fact that while the harmonization of the internal market was based largely on economic rationales, social protection initiatives were to be left either to the Member States or to difficult compromises in European policies.¹³⁴

In providing a genealogy of the scholarly claim that the EU is pervaded by a constitutional asymmetry when compared to the constitutional arrangements of its Member States, the goal is to depart from questions of origins or foundations and instead to focus on accidental events, historical facts, and influential scholarship that shaped the discourse on the Europeanization of private law.¹³⁵

During the 1980s, scholars were familiar with the notion of a “democratic deficit” intrinsic to the Community decision-making processes. According to Joseph Weiler, the democratic deficit could be traced back to the Treaty of Rome in 1957, which gave power to the executive branch (the Commission) at the expense of the legislative branch (the EP).¹³⁶ In Weiler’s view, supranational structural deficiencies were aggravated by two elements. First, the dual character of supranationalism revealed that legal, instead of

¹³² Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, in *INTEGRATION IN AN EXPANDING EUROPEAN UNION* 109, 110 (Joseph H. H. Weiler et al. eds., 2003).

¹³³ See Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 *HARV. INT’L L.J.* 331, 378 (2003) (claiming that “[f]or many years, this test allowed the ECJ to strike down many forms of state regulation as incompatible with the Treaty of Rome. Such holdings resulted, to varying degrees, in the disempowerment of local governments. The ensuing normative vacuum would at times, but not always, be filled by Community regulation”).

¹³⁴ See SCHARPF, *supra* note 14, at 59.

¹³⁵ See Michel Foucault, *Nietzsche, Genealogy, History*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS BY MICHEL FOUCAULT* 139 (Donald F. Bouchard ed., 1977).

¹³⁶ See J.H.H. WEILER, *THE CONSTITUTION OF EUROPE. ‘DO THE NEW CLOTHES HAVE AN EMPEROR?’ AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999). Weiler explains that the notion of a “democratic deficit” reinforced the fear that the Community would increasingly decide on issues that are perceived to be symbolically of national competence, thus triggering reactions from French or German citizens that the Brussels bureaucrats tell us “how to run our lives.” In Weiler’s view, at the core of the democratic deficit, were European policies ramifying beyond the economic sphere and decision-making processes with low accountability. *Id.* at 77.

political, processes fueled European integration. Second, the lack of democratic legitimacy was reflected in the activism of a quasi-federal judiciary and the limited powers of the EP.¹³⁷ Thus, in the aftermath of the Maastricht Treaty in 1992, the “transformation of Europe” led to a paradoxical situation. While political scientists speculated that intergovernmental decision-making slowed down European integration, lawyers, observing the federal judiciary, perceived that European integration “moved powerfully ahead.”¹³⁸ The widespread concern among scholars was that a quasi-federal judiciary was driving European integration and leaving behind political and democratically elected bodies, resulting in increased asymmetry between law and politics in the EU.

In the mid-1990s, Fritz Scharpf elaborated further on the idea of asymmetry between European law and politics by analyzing the patterns of economic integration. He argued that negative integration had prevailed in Europe at the expense of positive integration. As a result, negative integration constrained national regulatory capacities through the legal prohibitions contained in the Treaty and the downward pressure of regulatory competition.¹³⁹ According to Scharpf, there is a fundamental “constitutional asymmetry” between policies promoting market efficiencies and those promoting social protection and equality. These two groups of policies are not competing on a similar constitutional level.¹⁴⁰ European integration has created a relationship between economic and social policies that “has become asymmetric[,] as economic policies have been progressively Europeanized, while social protection policies [have] remained at the national level.”¹⁴¹

By referring to these scholarly interpretations of European integration, jurists perceived the process of harmonization as having a deregulatory bias, enabling European bureaucrats and, espe-

¹³⁷ See Joseph Weiler, *Community, Member States and European Integration*, 21 J. COMMON MT. STUDS. 39, 51-52 (1982).

¹³⁸ See Weiler, *supra* note 80, at 2410.

¹³⁹ See SCHARPF, *supra* note 14, at 59-60. Through the “constitutionalization” of competition law, the ECJ launched a successful “legal attack on the privileged status of the *service public* . . . on the grounds that the authorizing legislation was in violation of competition law.” In Scharpf’s view, the liberalization of EC policies has “eliminated the possibility of using public-sector industries as an employment buffer,” therefore “European *legal* constrains have greatly reduced the capacity of national governments to influence growth and employment in the economies for whose performance they are politically accountable.” See also Scharpf, *supra* note 132, at 648.

¹⁴⁰ Scharpf, *supra* note 132, at 646.

¹⁴¹ *Id.* at 665-66.

cially, judges to foster market deregulation at the expense of national social provisions. When transferred to the realm of European private law, the constitutional asymmetry claim enabled jurists to make institutional competence arguments when commenting on ECJ judgments. European private lawyers who disagreed with the decisions of the Court argued for greater deference to domestic courts. Jurists made constitutional asymmetry claims about the EU to communicate two different concepts. For some, the asymmetry claim stood for the predominance of free-market concerns over national social goals; for others, the asymmetry claim stood for the imbalance between a powerful ECJ and a weak Community legislature.

When these claims were translated into the private law debate, some jurists envisioned contract law as a set of market-oriented informational measures, aiming to extend party autonomy. They welcomed the harmonization of contract law characterized by negative integration.¹⁴² In contrast, other jurists who conceived of contract law as a redistributive tool that limited individual freedom argued in favor of a national resistance to Europeanization, thus attacking harmonization to promote national private law traditions.¹⁴³

C. *Democratic Legitimacy in Constitutional Adjudication*

In addressing ECJ adjudication, European jurists have put forward democratic legitimacy concerns by adopting recurrent legal dichotomies, which characterize the constitutional asymmetry claim (free market versus social goals; European level versus Member State level; and law versus politics). Jurists have pointed out the dangers of European judicial lawmaking, which tends to prevail over national legislation, over Community acts, and even over national judiciaries. They have put forward two different democratic legitimacy arguments regarding the ECJ's vertical and horizontal power of judicial review and a third one concerning the power of the ECJ to interpret directives that harmonize private law rules.

First, European jurists claimed that the constitutionalization of the European dormant commerce clause, namely EC Treaty art.

¹⁴² See Jürgen Basedow, *A Common Contract Law for the Common Market*, 33 COMMON MKT. L. REV. 1169 (1996); Von Ernst-Joachim Mestmäker, *On the Legitimacy of European Law*, 58 RABELS ZEITSCHRIFT 615 (1994).

¹⁴³ See Caruso, *supra* note 16; Hugh Collins, *Good Faith in European Contract Law*, 14 OXFORD J. LEGAL STUD. 229, 230-31 (1994).

28, enabled the ECJ, through vertical judicial review, to strike down national legislation protecting consumers, the environment, and public health.¹⁴⁴ They argued that the ECJ will generally annul domestic regulations democratically approved by national parliaments by means of counter-majoritarian rulings. Moreover, European jurists claimed that, in balancing the free movement of goods and services against national social goals, the ECJ tends to constantly favor free trade over local interests.¹⁴⁵ For instance, in *Gambelli*, the ECJ interpreted the Treaty provisions on the free movement of services to favor the free trade interest over the national one.¹⁴⁶ Mr. Gambelli, who took bets from Italian gamblers on sports events, transmitted these data electronically to a UK betting company. His activity constituted a fraud under Italian law, which requires that those operating gambling activity on sporting events obtain a state granted license. The ECJ ruled that Italian administrative and criminal rules were not proportionate to the mandatory interest they sought to protect. Thus, the Italian regulations created a barrier to providing cross-border services that was incompatible with the principle of free movement of services included in the Treaty. In short, the ECJ ruling annulled two national provisions that had been democratically approved by a national parliament.

A second democratic legitimacy claim addresses the ECJ's power of horizontal judicial review as deployed in the Tobacco Advertising Judgment to annul a directive.¹⁴⁷ After the judgment, the democratic legitimacy concern with EC law prevailing over Euro-

¹⁴⁴ See MADURO, *supra* note 26 (highlighting that the ECJ could interpret EC Treaty art. 28 to create refined criteria to prevent State protectionism or to rely on the general notion of a European economic constitution, which was "built on the free market, open competition, and a particular view of the kinds of regulation that are acceptable").

¹⁴⁵ See Cassis, *supra* note 98; Case 212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-01459 (1999). In the *Centros* case, Danish authorities denied the freedom of establishment (art. 43 TEU) to Centros, a private limited company registered in the UK that was trying to circumvent national rules concerning the paying-up of minimal capital. The ECJ ruled that this Danish provision is contrary to the free movement principle. Similar to the *mutual recognition* principle, *Centros* establishes that, since the company was legally incorporated in accordance with the law of another Member State (UK), it has the right to register its branch in Denmark. *Id.* para. 7. 21.

¹⁴⁶ See Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli*, 2003 E.C.R. I-13031 (proving the consistency of the ECJ jurisprudence on the four freedoms).

¹⁴⁷ See Tobacco Advertising Judgment, *supra* note 83. In annulling the Directive on the ground that the ban on tobacco advertising regulated public health instead of the internal market, the Court held that the ban fell under the competence of Member States and not of the Community legislature.

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pean politics increased exponentially. Jurists have highlighted how horizontal judicial review enables disgruntled legislative minorities (i.e., national governments) to bring claims against Community institutions before the ECJ, who then strikes down directives adopted through the co-decision procedure.¹⁴⁸ Because of the administrative legal nature of the Treaty, the ECJ has broad power to exercise horizontal judicial review over Community legislation.¹⁴⁹ In the aftermath of the Tobacco Advertising Judgment, scholars drew parallels between ECJ adjudication and the Rehnquist Court in the United States, in that the latter struck down federal legislation adopted by Congress under the Commerce Clause in the well-known U.S. Supreme Court cases *Lopez* and *Morrison*.¹⁵⁰

A third democratic legitimacy concern addresses the excessive use of preliminary ruling procedures by domestic courts in referring questions of EC law interpretation directly to the ECJ.¹⁵¹ Some jurists maintain that this process undermines the role of national courts, while the ECJ obtains more power to judicially define contractual rules. Thus, scholars have suggested that national courts be more cautious in referring questions to the ECJ through preliminary rulings. Member States' domestic courts have adopted this cautious approach, in particular the courts in Scandinavia.¹⁵²

Ultimately, ECJ commentators effectively claimed that these three different types of democratic legitimacy arguments showed that there was a "constitutional asymmetry" in the EU framework. In fact, rather than focusing on national resistance, local discontent, and social struggles against European integration, legal elites

¹⁴⁸ See WEATHERILL, *supra* note 79.

¹⁴⁹ See GEORGE A. BERMAN, ET. AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW (1993); Peter Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community*, 99 COLUM. L. REV. 628 (1999) (addressing EU law in relation to French administrative law).

¹⁵⁰ See Geraint G. Howells, *Federalism in the USA and EC—The Scope for Harmonized Legislative Activity Compared*, 5 EUR. REV. PRIVATE L. 601, 620 (2002) (comparing the Tobacco Advertising Judgment to the U.S. Supreme Court decisions on the limits of the Commerce Clause, *Lopez* and *Morrison*: "Within this area of exclusive Community competence it is to be hoped that the Court does not become too interventionist both because it is not well equipped to determine what is needed to create the internal market and because as protection is a legitimate objective, the level of that protection is best determined by the political procedures laid down in the Treaty.").

¹⁵¹ See EC Treaty, *supra* note 21, art. 234.

¹⁵² This phenomenon became relevant in Sweden when the Commission asked the government to press courts to refer preliminary questions to the ECJ. See Brochs Redovisningsbyrå KB, <http://www.broch.se/html/sve/news/2004/news6.htm> (last visited November 10, 2007).

all over Europe began a sophisticated legal dialogue with Luxembourg and Brussels. Rather than an open discussion exposing federal, socio-economic, and ideological disagreements among the different legal elites, the European legal elites exposed their disagreements over democratic legitimacy. This moderation effect of the legal dialogue between national elites and European judges was successful in channeling the conflicts and constraining the debates to federal adjudication, judicial law making, and institutional competences.¹⁵³

TABLE 1. INSTITUTIONAL COMPETENCE AND DEMOCRATIC LEGITIMACY IN THE EU		
EU = Free Market	vs.	Member States = Social
(J.H.Weiler) European Law	vs.	European Politics
(F.Scharpf) Negative Integration STRONG	vs.	Positive Integration WEAK
European Rule of Law	vs.	Democratic Legitimacy
ECJ	vs.	National Legislation (<i>Cassis, Gambelli</i>)
ECJ	vs.	National Courts (<i>Océano, Leitner</i>)
ECJ	vs.	EU Legislation (<i>Tobacco Advertising</i>)

IV. THE PHASES AND THE POLITICS OF EUROPEAN PRIVATE LAW

A. *Three Phases in the Europeanization of Contract Law*

From the mid-1980s until today, three different scholarly phases have characterized the debate on the harmonization of private law. Each period reflects a change in the methodologies as well as in the normative aspirations of lawyers who have shaped

¹⁵³ See KENNEDY, *supra* note 2, at 220-21.

the field of European private law. The first phase from 1985 to 1992 was characterized by market functionalism in the harmonization of private law rules.¹⁵⁴ The second phase from 1992 to 2000 was characterized by three different constitutional understandings of European integration: the European economic constitution, constitutional asymmetry, and deliberate supranationalism.¹⁵⁵ Finally, the third phase of European contract law from 2001 to the present has been characterized by a deep ideological divide between neoliberal and social justice advocates¹⁵⁶ as well as by a new trend in European scholarship that I will call Deliberative Supranationalism or New Governance advocacy.

During the first phase, the consolidation of the internal market led the Community to harmonize private law through sectoral directives in the areas of consumer law. By deepening market integration, the Commission harmonized contract and tort law as a functional tool for the completion of the single market. Likewise, jurists addressed contract law as a technical tool, which was functional to the Commission's agenda of realizing an efficient internal market.

In this phase, scholarly projects shared a similar technical approach to the harmonization of private law. However, methodologically they oscillated between advocating for the unification of contract law rules, which was merely functional to the achievement of the internal market, and adopting a more sophisticated comparative law methodology to unearth the "common core" of European private law.¹⁵⁷

In 1992, the Treaty of Maastricht created the European Union and expanded Community competences beyond merely economic activities. This constitutional transformation inaugurated the sec-

¹⁵⁴ See PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II (Ole Lando & Hugh Beale eds., 2000).

¹⁵⁵ For the economic constitution approach, see Jürgen Basedow, *supra* note 142; for the constitutional asymmetry approach, see Daniela Caruso, *supra* note 133; for the deliberative supranationalism approach, see Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for New Legal Discipline*, 14 DUKE J. COMP. & INT'L LAW 149 (2004).

¹⁵⁶ See Fernanda Nicola & Ugo Mattei, A 'Social Dimension' in European Private Law? The Call for Setting a Progressive Agenda, 41 New Eng. L. Rev. 1 (2006). This phase will be explained in detail in Part IV; however, for Regulatory Competition advocates, see Van den Bergh, *supra* note 8.

¹⁵⁷ For an insightful analysis of both approaches, see Elena Ioriatti, *A Methodological Approach for a European Restatement of Contract Law*, 3 GLOBAL JURIST TOPICS 1 (2003), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1107&context=GJ>.

ond phase of the European private law debate. Paradoxically, in expanding the functional capability of the Community, the Commission and the ECJ showed greater uncertainty about the Community re-regulation resulting in the decentralization approach of *Keck*.¹⁵⁸ Towards the end of the 1990s, scholars increasingly accused the Community of exceeding its capacity through a “functional creep.”¹⁵⁹ They often highlighted that the Commission lacked the competence to regulate private law.¹⁶⁰

In this phase, scholars involved in the Europeanization debate expressed two major views. On the one hand, some jurists associated with a neoliberal private law tradition claimed that a European economic constitution should attempt to harmonize private law. In their view, an economic constitution, comprising private law rules, would enhance private autonomy and contractual freedom as well as create better procedural guarantees for efficient markets.¹⁶¹ On the other hand, jurists who claimed that the EU was pervaded by a constitutional asymmetry urged national lawyers, judges, and politicians to resist the harmonization of private law. According to these progressive lawyers, ECJ jurisprudence reflected the free-market bias of the Commission’s bureaucrats. Both views, despite their opposite political positions, reinforced the widespread claim that while the European level was connected to free markets, the national level was connected to social goals.

This second phase ended with the Tobacco Advertising Judgment in which the ECJ, for the first time, invalidated a directive because it lacked a legal basis.¹⁶² This decision produced a shift in consciousness among jurists because the Commission was success-

¹⁵⁸ See Paul Craig, *The Evolution of the Single Market*, in *THE LAW OF THE SINGLE EUROPEAN MARKET* 27 (Catherine Barnard & Joanne Scott eds., 2002).

¹⁵⁹ See Marchetti & Nicola, *supra* note 66.

¹⁶⁰ See Weatherill, *supra* note 79.

¹⁶¹ See Jürgen Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid*, 1 *EUR. REV. PRIVATE L.* 35 (2001); Joustra, *supra* note 109 (discussing the possibilities of harmonization of national consumer law regimes into European consumer law).

¹⁶² In curtailing the action of the Community legislature, the ECJ interpreted EC Treaty art. 95, which allows harmonization of laws only for market functioning measures. In citing an insufficient connection between the market-building process and the total ban of advertising of tobacco products, the court considered the directive a disguised public health measure, which the Community cannot regulate since it falls under the exclusive competence of Member States, as mandated by EC Treaty art. 152. See Weatherill, *supra* note 115, at 504 (explaining that in annulling the Tobacco Advertising Directive, the ECJ reaffirmed that “there is not *carte blanche* to harmonize national laws, but rather only a power to achieve defined ends”).

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fully challenged by a Member State. For the first time, it became clear that Community-wide social policies, environmental laws, or a consumer protection agenda would be challenged by Member States concerned that such polices encroached on their powers.

The third phase of European private law began in July 2001, when the Commission published the White paper on European Governance¹⁶³ and the Green Paper on European Contract Law.¹⁶⁴ In both cases the Commission sought to involve a larger public, such as academics and stakeholders, in the process of the re-regulation and harmonization of contract law. These documents expressed the anxieties surrounding the democratic accountability of European institutions and highlighted the need for more effective and transparent regulatory strategies. The Green Paper signaled that the Commission intended to move ahead with the harmonization of contract law after triggering wider public debates and academic involvement. Jurists were now expressly invited by the Commission to participate in the debate regarding the desirability of further harmonization of private law, and in its latest document the European Commission decided to go forward with its project of creating a sort of restatement for European Contract law.¹⁶⁵

The shift in consciousness produced by these European transformations triggered some skepticism among lawyers committed to the economic constitution. Moreover, during this phase jurists began prominently deploying United States economic analyses. Thus, Regulatory Competition advocates began arguing in terms that were radically different from their predecessors. They asserted that diversity of legal rules, rather than uniformity, was more efficient in achieving a competitive internal market. In contrast, jurists who had before opposed the harmonization of contract law began addressing social justice in European contract law, insisting that the Commission adopt a distributive justice perspective in the process of the harmonization of private law.¹⁶⁶

¹⁶³ See COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN GOVERNANCE: A WHITE PAPER, COM (2001) 428 final (July 25, 2001).

¹⁶⁴ See Green Paper, *supra* note 108.

¹⁶⁵ Karstan & Perti, *supra* note 118; Dirk Staudenmayer, *The Way Forward in European Contract Law*, 2 EUR. REV. PRIVATE L. 95 (2005).

¹⁶⁶ See *infra* Part V (analyzing the shift of consciousness of European private lawyers and the reception of United States law and economics).

TABLE 2. THREE PHASES IN THE EUROPEANIZATION OF CONTRACT LAW	
<p style="text-align: center;">First Phase (1985-1992)</p> <p>Market Functionalism</p> <ul style="list-style-type: none"> • Doorstep Selling Directive 85/577 • Directive on Consumer Credit 87/102 (amended 98/7) • Directive on Package Travel, Holidays and Tours 90/314 	<div style="font-size: 3em; line-height: 1; padding: 0 10px;">{</div> <p style="text-align: center;">Uniform Law Approaches PECL, Unidroit Principles And Comparative Law Approaches Common Core & Casebook Project</p>
<p style="text-align: center;">Second Phase (1992-2000)</p> <p>Constitutional Perceptions</p> <ul style="list-style-type: none"> • Directive on Unfair Terms 93/13 Timeshare Directive 94/47 • Directive on the Protection of Consumers in Respect of Distance Contracts 97/7 • Directive on Certain Aspects of the Sale of Consumer Goods and Associated Warranties 99/44 	<div style="font-size: 3em; line-height: 1; padding: 0 10px;">{</div> <p style="text-align: center;">Economic Constitution More Europeanization Versus Constitutional Asymmetry Resistance to Europeanization</p>
<p style="text-align: center;">Third Phase (2001-present)</p> <p>Ideological Divide U.S. Law & Economics</p> <ul style="list-style-type: none"> • Green Paper on European Contract Law (2001) • Action Plan for a More Coherent Contract Law (2003) • European Contract Law & the Revision of the Acquis: The Way Forward (2004) 	<div style="font-size: 3em; line-height: 1; padding: 0 10px;">{</div> <p style="text-align: center;">Efficient Harmonization Regulatory Competition Versus Social Justice Distribution in Private Law</p>

B. *Market Functionalism and Uniformity in Contract Law*

In 1999, Professors Ole Lando and Hugh Beale published the Principles of European Contract Law (PECL). The so-called Lando Commission sought to contribute, via PECL, to the unification of European contract law that had been initiated by the Com-

mission.¹⁶⁷ The Lando principles represented an important model for a uniform body of contract law and provided a basis for future codification. In advocating for uniform contract laws, the Lando Commission used a functionalist approach that sought to strengthen the single market by overcoming the obstacles to trade created by different legal regimes.¹⁶⁸ The PECL approach emphasized private autonomy in contractual obligations. It gave a central position to the principle of freedom of contract and elaborated its exceptions through general clauses or mandatory provisions.¹⁶⁹

PECL is emblematic of the unification of contract law in Europe, which reflects a broader global trend, namely post-war projects of harmonization through the creation of a new transnational law for business regulations. In this spirit, the United Nations General Assembly in 1962 created the United Nations Commission on International Trade Law (UNCITRAL).¹⁷⁰ UNCITRAL's mission was to harmonize laws that impeded transnational business transactions. Through the drafting of international conventions, guidelines, and model laws, UNCITRAL sought to promote different forms of trade liberalization that could be adopted in flexible ways by different legal regimes in order to remove legal obstacles to trade. In the realm of international contracts, the Vienna Convention on the International Sale of Goods (CISG) has been one of the most used and widely adopted instruments regulating the sale of goods through international contracts, even though some countries still refuse to become part of it and some practitioners have discouraged its adoption.¹⁷¹

More recently, the work of the International Institute for the Unification of Private Law (UNIDROIT) has led to the adoption of various model laws in the realm of international business and

¹⁶⁷ The Lando Principles were inspired by the UNIDROIT Principles for international contract law adopted in 1994.

¹⁶⁸ See Schultze, *supra* note 110; see also Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 110 (Pierre Legrand & Roderick Munday eds., 2003).

¹⁶⁹ See COMMISSION ON EUROPEAN CONTRACT LAW, *THE PRINCIPLES OF EUROPEAN CONTRACT LAW* art. 1:102 (1999); see also HESSELINK, *supra* note 7, at 111-12 (explaining that the regime of freedom of contract is subject to the requirements of good faith and fair dealing and other mandatory requirements).

¹⁷⁰ See UNCITRAL, *Origin, Mandate and Composition of UNICTRAL*, <http://www.uncitral.org/> (last visited Dec. 6, 2007).

¹⁷¹ Luke R. Nottage, *Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan*, 36 *VIC. U. WELLINGTON L. REV.* 815 (2005).

commercial law.¹⁷² In particular, in 1994, UNIDROIT published the Principles of International Commercial Contracts, which served to interpret international contract rules in international arbitration disputes—a sort of restatement of contracts.¹⁷³ Similar to a transnational *lex mercatoria*, at least in the view of some of its most influential authors, the Principles have been widely used to interpret and supplement both international uniform law as well as domestic law.¹⁷⁴

In sharp contrast to these unification trends in private law, some European comparative lawyers departed from the PECL approach and sought to contribute to European scholarship and legal education by drawing a map of the similarities and differences emerging in private law regimes.¹⁷⁵ Compared to PECL, the Common Core Project¹⁷⁶ and the Casebook Project¹⁷⁷ are methodologically more eclectic in their attempt to be purely descriptive and therefore to present greater scientific neutrality. The goal of the Common Core is to create a cartography of European private law in order to highlight differences and commonalities emerging among different private law regimes. The Casebook Project deploys the comparative methodology to shape European legal education. Through rigorous examination of national and ECJ case law, the Casebook project aims to introduce civil lawyers to the analytical aspects of a case-law approach and foster a bottom-up approach to Europeanization.¹⁷⁸ Both projects undertake an anti-formalist exercise in inquiring into the application of legal doctrines. In assessing the role of the national courts in shaping con-

¹⁷² See UNIDROIT's Achievements, www.unidroit.org/english/presentation/achievements.htm (last visited Dec. 6, 2007).

¹⁷³ See UNIDROIT Principles of International Commercial Contracts, <http://www.unidroit.org/english/principles/contracts/main.htm> (last visited Dec. 7, 2007); see also Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129 (1998) (discussing the use of the UNIDROIT Principles in arbitration disputes).

¹⁷⁴ See Michael Joachim Bonell, *The UNIDROIT Principles and Transnational Law*, 52 UNIFORM L. REV. 218 (2002), available at <http://www.unidroit.org/english/publications/review/articles/2000-2.htm>.

¹⁷⁵ For this distinction, see Ioriatti, *supra* note 157.

¹⁷⁶ See *The Common Core of European Private Law*, in 1 PRIVATE LAW IN EUROPEAN CONTEXT SERIES (Mauro Bussani & Ugo Mattei eds., 2003).

¹⁷⁷ See WALTER VAN GERVEN ET AL., COMMON LAW OF EUROPE CASEBOOKS: TORT LAW (2000).

¹⁷⁸ See Walter Van Gerven, *The Case-law of the European Court of Justice and National Courts as a Contribution to the Europeanization of Private Law*, 3 EUR. REV. PRIVATE L., 367, 374-75 (1995).

tract law rules, they maintain a cautious and at times skeptical approach towards the Europeanization of contract law. While distancing themselves from the functionalist approach of the PECL, these European lawyers affirm their methodological maturity and eclecticism and emphasize their political neutrality, which leads them to claim of scientific reliability.¹⁷⁹

C. Diverging Constitutional Views over Europe

The harmonization of contract law contributed to strengthening the single market by ensuring a level-playing field that enhanced individual freedoms. In the second phase of the Europeanization process, some European jurists, supporting the PECL agenda, emphasized that harmonization of contract law could provide greater information to private actors and enhance their private autonomy.¹⁸⁰ In supporting the idea of a European economic constitution, a group of scholars argued in favor of a European codification, which would guarantee to each person the disposition of her individual entitlements. For instance, Jürgen Basedow maintained that the notion of freedom of contract remained the core idea for a European codification since every person has the individual right to enter into a binding contract. In his view, European codification strengthened economic freedoms and counterbalanced the growing importance of consumer regulation that undermined the basic values contained in the notion of freedom of contract.¹⁸¹ For these lawyers the goal of market harmonization was to remedy the market failure created by the disparity between commercial and non-commercial contractual regimes, which restricted market competition and created information asymmetry.¹⁸² These lawyers have tied claims in favor of European

¹⁷⁹ See David Kennedy, *The Methods and Politics of Comparative Law*, in *COMPARATIVE LEGAL STUDIES: TRADITIONAL AND TRANSITIONS* 345, 373 (Pierre Legard & Roderick Munday eds., 2003).

¹⁸⁰ See *PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET* (Stefan Grundman, Wolfgang Kerber & Stephen Weatherill eds., 2001).

¹⁸¹ See Basedow, *supra* note 161, at 35-49. The role of contract law “is based upon the theoretical perception that a promise and the reliance on it is a basic behavior in human society.” *Id.* at 38.

¹⁸² See Stefan Grundmann, *The Structure of European Contract Law*, 4 *EUR. REV. PRIVATE L.* 505, 518 (2001).

codification to a notion of contract law as a tool for enhancing party autonomy rather than enhancing social values.¹⁸³

These pro-harmonization lawyers have devoted great attention and support to legislative measures of the Commission. However, they have highlighted that the Community should be careful not to undermine its democratic legitimacy, which is grounded in European procedures and, primarily, national democratic processes.¹⁸⁴ For instance, the Community cannot strip European citizens of their individual rights conferred on them by the Treaty.¹⁸⁵ In casting light on the procedural guarantees of EC law, they have advocated for a European codification that supports the functioning of the single market and legislative discretion by supranational institutions.

Jurists who favored the harmonization of contract law often shared a common intellectual tradition, which can be traced back to the Freiburg ordo-liberal school, which also falls under the rubric of 1930s *German neoliberalism*.¹⁸⁶ In drawing on the ordo-liberal intellectual tradition, jurists traced the meaning of concepts such as contractual freedom to the post-World War II economic compromise of the German social-market economy. The ordo-liberal tradition offered the European integration project an influential model of legitimization through the notion of the “economic constitution.”¹⁸⁷ In relying on the central tenets of the ordo-liberal tradition, jurists perceived the European economic constitution enshrined in the Treaty as a means to ensure greater individual autonomy within the internal market.¹⁸⁸ In arguing in favor of a

¹⁸³ See *Id.*; Stefan Grundmann & Jules Stuyck, *An Academic Green Paper on European Contract Law*, in 2 PRIVATE LAW IN EUROPEAN CONTEXT SERIES (Stefan Grundmann & Jules Stuyck eds., 2002).

¹⁸⁴ See *Brunner v. European Union Treaty*, Bundesverfassungsgericht [BverwfG] [Federal Constitutional Court] Oct. 12, 1993, 89 BverfGE 155 (F.R.G.), *translated in* 1 C.M.L.R. 57 (1994). But see J.H.H. Weiler, *The State “über alles:” Demos, Telos and the German Maastricht Decision* (New York School of Law, Working Paper No. 6/95, 1995), *available at* <http://www.jeanmonnetprogram.org/papers/95/9506ind.html> (last visited Dec. 7, 2007); see generally Peter Lindseth, *The Maastricht Decision Ten Years Later: Parliamentary Democracy, Separation of Powers and the Schmittian Interpretation Reconsidered*, (European University Institute, Working Paper RSC No. 2003/18, 2003), *available at* http://cadmus.iue.it/dspace/bitstream/1814/1893/1/03_18.pdf (last visited Dec. 7, 2007).

¹⁸⁵ See Ernst-Joachim Mestmäcker, *On the Legitimacy of European Law*, 58 RABELS ZEIT 615 (1994).

¹⁸⁶ See VIKTOR J. VANBERG, *THE CONSTITUTION OF MARKETS: ESSAYS IN POLITICAL ECONOMY* 37 (2001).

¹⁸⁷ *Id.*

¹⁸⁸ See Basedow, *supra* note 142.

European codification, they were attempting to provide a framework of general contract rules that would ensure equal possibilities to all players in a free market.

After World War II, as a reaction to totalitarian regimes and economic collectivism, ordo-liberalism became one of the most influential schools of thought among political economists and lawyers, whose views ranged from neoliberal to socially conservative.¹⁸⁹ The aim of ordo-liberal scholars was to break with a tradition in social science that was highly influenced by historicism and Marxist relativism.¹⁹⁰ Ordo-liberals wanted to reassert the role of individual action in the economic and legal disciplines and to reconcile both creativity and reason within their work. In their 1936 Manifesto, Frantz Böhm, Wilhelm Eucken, and Grossman-Doerth asserted that in order to protect individual freedom, a polity should have an “economic constitution” modeled after a “general political decision as to how the economic life of the nation is to be structured.”¹⁹¹ The economic constitution should provide a minimal regulatory framework to avoid monopolies, ensure the private ownership of the means of production, and protect individual freedom. In the view of the ordo-liberals, both efficiency and distributive considerations were relevant for market correcting purposes and for competition rules, which prevented the creation of monopolies and the abuse of a dominant position.¹⁹² Within the ordo-liberal tradition there were two different lines of thought, which reflect significant differences within the tradition’s economic and legal approaches. While the early ordo-liberal founders developed a procedural approach to the economic constitution, the second generation was largely associated with the social market economy. The founders of the Freiburg school, Walter Eucken and Franz Böhm (whose disciple Ernst-Joachim Mestmäcker actively participates in the debate on European private law), favored a procedural and rule-oriented approach to law.¹⁹³ Their goal was to establish a framework of general rules, implemented by a centralized and interdependent administrative system, that would reform

¹⁸⁹ See Franz Böhm et al., *The Ordo Manifesto of 1936*, in *GERMANY’S SOCIAL MARKET ECONOMY: ORIGINS AND EVOLUTION* (Alan Peacock & Hans Willgerodt eds., 1989); Dongsheng Zang, *Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate*, 33 *Syracuse J. Int’l L. & Com.* 393 (2006).

¹⁹⁰ See Böhm, *supra* note 189.

¹⁹¹ See *id.*

¹⁹² KERRY RITTICH, *RECHARACTERIZING RESTRUCTURING* 112 (2002).

¹⁹³ See Vanberg, *supra* note 186, at 35.

the market in an indirect way.¹⁹⁴ In contrast, the second generation of ordo-liberal scholars, such as Alfred Mueller-Armack and Wilhelm Röepke, were associated with the notion of a “social market economy.”¹⁹⁵ Their interventionist economic project focused on outcome-oriented solutions, including a comprehensive welfare program, which Kerry Rittich defined as somehow “nostalgic, if not romantic and utopian, in its orientation.”¹⁹⁶

In this second phase of European private law scholarship, lawyers were divided between those favoring the harmonization process and those opposing it. The latter claimed that not only was the Community decision-maker—namely the Commission, the Council, and the European Parliament involved in the adoption of Community Acts—severely constrained from regulating social policy by its attributed competences, but that the ECJ jurisprudence was pervaded by a “market holistic” bias.¹⁹⁷ Rather than a liberal interpretation of European law, commentators, such as Alexander Somek, explained that the ECJ jurisprudence was driven by major free market concerns rather than social ones.

These jurists asserted that while Member States’ regulatory capacity was limited by the legal constraints set up by the Community, harmonization of private law was constrained by the single market rationale.¹⁹⁸ In response to the argument that there was a constitutional asymmetry in the EU, they advocated for a social and redistributive notion of contract law, which was embedded in the national private law regimes that were threatened by the Europeanization of contract law.¹⁹⁹ These jurists opposed the Europeanization process. They advocated for a “national resistance”²⁰⁰ against future harmonization by praising the values intrinsic in the local private law traditions.²⁰¹

¹⁹⁴ *Id.* at 37.

¹⁹⁵ RITTICH, *supra* note 192, at 112.

¹⁹⁶ *Id.*

¹⁹⁷ See Alexander Somek, *Good News for a Bad Habit: Tobacco, Culture and the Rule of Law in the European Union* (2004) (unpublished manuscript, on file at Harvard Law School for the European Law Reading Group), <http://www.law.harvard.edu/programs/elrc/events/2003-2004/SomekOnPower.pdf> (last visited Dec. 7, 2007); Alexander Somek, *From Liberalism to Holism: Some Observations Regarding the ECJ's New Theory of Community Competence*, 143 *JURIDIKUM* 6 (2004).

¹⁹⁸ See SCHARPF, *supra* note 14, at 54-58.

¹⁹⁹ See COLLINS, *supra* note 7, at 365.

²⁰⁰ See CARUSO, *supra* note 16.

²⁰¹ See Pierre Legrand, *European Legal Systems Are Not Converging*, 45 *INT'L & COMP. L.Q.* 52, 60-61 (1996).

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Jurists who advocated for a welfarist approach to private law and in favor of distributive justice in contract law argued that contract law should abandon a procedural conception of justice and move towards a substantive one.²⁰² If the notion of procedural justice entailed the protection of individual rights and market efficiency, they favored a substantive notion of justice in order to achieve an “acceptable pattern of welfare” with fair distributive results.²⁰³

According to these lawyers, the Community *leit-motif* in drafting consumer protection directives rested on a market efficiency rationale, which aimed to expand consumer choice. They pointed out that the Unfair Terms Directive²⁰⁴ presupposed that buyers were shopping for their best contractual terms across Member States and assumed that consumers would be better off through greater competition among contractual terms.²⁰⁵ They noted that the Commission assumed that consumers were actively involved in gathering and using information to make decisions.²⁰⁶ The Unfair Terms Directive enlisted contract law as a market-perfecting device through which properly informed consumers could avoid unfair terms.²⁰⁷

When explaining the stakes of harmonization, jurists put forward three different theses that all share a skeptical view on the European constitutional arrangement: national resistance (Caruso), subsidiarity (Collins) and cultural difference.²⁰⁸ The national resistance thesis focuses on the reactions of national legal regimes to the implementation of European directives.²⁰⁹ According to this view, the problem of harmonization of contract law manifests itself in the implementation of the directives in the Member States’ legal orders, often represented by national civil codes. The different outcomes of the implementation of the Unfair Terms

²⁰² See Hugh Collins, *Distributive Justice Through Contracts*, 45 CURRENT LEGAL PROBS. 49, 51 (1992).

²⁰³ See Hugh Collins, *Introduction: The Research Agenda of Implicit Dimensions of Contracts*, in IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RATIONAL AND NETWORK CONTRACTS 11 (David Campbell, Hugh Collins & John Wightman eds., 2003).

²⁰⁴ Council Directive 93/13, 1993 O.J. (L 95) 29-34 (EEC).

²⁰⁵ GERAINT HOWELLS & THOMAS WILHELMSSON, EC CONSUMER LAW (1997).

²⁰⁶ *Id.* See generally Weatherill, *supra* note 77, at 57.

²⁰⁷ See Collins *supra* note 143, at 237 (explaining that the consumerist movement “has percolated into the organs of the EC”).

²⁰⁸ See *infra* notes 209-216.

²⁰⁹ See Caruso, *supra* note 16.

Directive in Italy, Germany, and France revealed not only the difficulty of harmonizing contract rules but also how little national contract laws were harmonized in practice.²¹⁰ Daniela Caruso claimed that the Commission's attempt to reform private law through directives has actually prompted national legislators and courts to resist the Europeanization process.²¹¹

The subsidiarity thesis, based on the subsidiarity principle introduced by the Maastricht Treaty,²¹² focuses on the social dimension of contract law as being inherently national and therefore culturally diverse. Some jurists claimed that contract law could not rely on abstract general principles and therefore that Europeanization was not appropriate in this area.²¹³ They argued that the Commission should make greater use of the subsidiarity principle, allowing Member States to regulate their contract law regimes in different manners. Those subscribing to the subsidiarity thesis have advanced the view that national contract law is replete with distributive concerns, which are now threatened by European market integration. According to this thesis, Europeanization is a formalist process that suppresses diversity as an obstacle to free trade, while it undermines the distributive capacity of national contract law.²¹⁴

²¹⁰ See *id.* at 24. Daniela Caruso describes how the implementation of the Unfair Contract Terms Directive encountered resistance from national legislators. In particular, the Products Liability Directive of 1985 was a big disappointment, as Member States delayed its implementation. *Id.*

²¹¹ See *id.*

²¹² See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332 (1994) (citing the subsidiarity principle as explained in revised Article 3b of the Maastricht Treaty on the European Union (TEU)). The subsidiarity principle states:

In areas which do not fall within its exclusive Competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Id. at 346. Bermann's article analyzes the principle of subsidiarity in reference to procedural aspects, rather than in light of any substantive criteria that it may offer to officers of the court. See also Grainne de Burca, *Re-appraising Subsidiarity's Significance After Amsterdam* (Harvard Law Sch. Jean Monnet Working Paper Group, Paper No. 7/99, 2000), available at <http://www.jeanmonnetprogram.org/papers/99/990701.rtf>.

²¹³ See Hugh Collins, *Transaction Costs and Subsidiarity in European Contract Law*, in 2 PRIVATE LAW IN EUROPEAN CONTENT SERIES: AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW 269 (Stefan Grundman, & Jules Stuyck eds., 2003).

²¹⁴ See Collins, *supra* note 143.

Some jurists have advanced a third thesis based on the notion of cultural difference. In valuing the cultural diversity among national legal regimes, they view the possibilities of the harmonization process skeptically. Drawing on sociological,²¹⁵ cultural,²¹⁶ and linguistic²¹⁷ insights, these scholars are skeptical of the unification of private law regimes that occurs more at the level of declarations than at the level of operative rules. In their view, the harmonization of contract law erases European identities and offers a troubling systematization of contract law without attempting to tackle the fragmentation of legal contexts and the dilemmas of the welfare state.²¹⁸ Scholars adopting the cultural difference thesis generally argue against Europeanization by characterizing it as a formalist threat to preserving the cultural tradition inherent in local or national contract law regimes.²¹⁹

V. SELECTIVE RECEPTION OF U.S. LAW AND ECONOMICS

A. *The Ideological Divide: Receiving Mainstream Law and Economics*

In the late 1990s, the debate over European private law became increasingly politicized. On the one hand, neoliberal scholars began familiarizing themselves with law and economics analyses imported from the United States while also realizing that Social Europe, in the realm of private law, was more effective than what they hoped for.²²⁰ On the other hand, social justice advocates, rather than rejecting Europe *tout court*, began engaging with European private law by proposing, in their Social Justice Manifesto, some avenues of reform for the Commission's agenda. In this third phase, not only did the views opposing and in favor of European harmonization change radically, but most interestingly, democratic legitimacy claims were made by jurists on the Right and on the Left to criticize ECJ adjudication in a highly strategic way. While neoliberal jurists influenced by U.S. law and economics turned

²¹⁵ See Gunter Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

²¹⁶ See Legrand, *supra* note 201, at 60.

²¹⁷ See Sacco, *supra* note 36.

²¹⁸ See Thomas Wilhelmsson, *Welfare State Expectations, Privatisation and Private Law in FROM DISSONANCE TO SENSE: WELFARE STATE EXPECTATIONS, PRIVATISATION AND PRIVATE LAW* (Thomas Wilhelmsson & Samului Hurri eds., 1999).

²¹⁹ Pierre Legrand, *La leçon d'Apollinaire*, in L'HARMONIZATION DU DROIT DES CONTRATS EN EUROPE 37 (Christophe Jamin & Denis Mazeaud eds., 2001).

²²⁰ See *supra* Part II.C (discussing reactions to the ECJ Simone Leitner case).

against the Europeanization of private law, social justice advocates turned towards European private law.

In this changing scenario, neoliberal jurists advocated for greater efficiency of the internal market, but they also started to oppose the “forced harmonization” of contract law in Europe.²²¹ While supporting greater diversity among private law regimes rather than harmonization projects, these neoliberal scholars justified diversity of national contract laws by the subsidiarity principle. Roger Van den Bergh affirmed that Member States should resist the harmonization process because diversity of contractual regimes improved efficiency within the single market.²²² According to this view, the application of the subsidiarity principle could enhance regulatory competition, reduce transaction costs, and satisfy preferences?thus maximizing market efficiency.²²³

In adopting United States mainstream law and economics insights, neoliberal jurists attacked welfare provisions contained in European directives.²²⁴ They deployed public choice rationales to undermine the goals of the Unfair Terms Directive, which they claimed “may cause inefficiencies rather than curing them.”²²⁵ In drawing on law and economic insights, they argued that although the Directive aimed to protect consumers against unfairness, in reality it created potential inefficiencies, causing negative welfare implications.²²⁶

In receiving United States mainstream law and economics theories, European jurists began associating institutional competence arguments (courts versus legislatures) with substantive values (efficiency versus distribution). For instance, in criticizing the institu-

²²¹ See Van den Bergh, *supra* note 8, at 254.

²²² See Bermann, *supra* note 212 (discussing the subsidiarity principle of EC Treaty art. 5).

²²³ See Roger Van den Bergh, *The Subsidiarity Principle in European Community Law: Some Insights from Law and Economics*; 1:4 MAASTRICHT J. EUR. & COMP. L. 337, 339 (1994).

²²⁴ For a definition of United States mainstream law and economics, see Duncan Kennedy, *supra* note 179. For a definition of the same as it pertains European private law, see Roberto Pardolesi, *Clausole Abusive, Pardon Vessatorie: Verso L'attuazione di una Direttiva Abusata*, CARDOZO ELECTRONIC L. BULL. (1995), <http://www.jus.unitn.it/cardoza/Review/home.html> (attacking the unfair contract terms directive). For a more recent approach, see ANTONIO CUCINOTTA, ROBERTO PARDOLESI & ROGER VAN DEN BERGH, *POST-CHICAGO DEVELOPMENTS ON ANTITRUST LAW* (2002).

²²⁵ See Van den Bergh, *supra* note 8, at 261.

²²⁶ Peter Van Wijck & Jules Theeuwes, *Protection Against Unfair Contracts: An Economic Analysis of European Regulation*, 9 EUR. J. L. & ECON.73 (2000).

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tional changes triggered by the Unfair Terms Directive, they deployed Mitchell Polinsky's view to argue that the increased discretion of judges to decide the unfairness of the terms would limit the autonomy of private parties to achieve an efficient solution.²²⁷ They claimed that since efficiency provides objectivity, this is a "technical everyday problem solving" tool that keeps "political disagreements outside the core" of scholarly fields.²²⁸ According to these jurists, distribution concerns, which are inherently political and subjective, should remain outside of both the sphere of judicial interpretation and the scholarly analysis of lawyers. When contributing to the European private law debate, they argued that the interpretation of directives by courts should be guided by efficiency goals instead of distributive considerations. Thus, while the ECJ could legitimately address efficiency considerations, distributive concerns should be left to Member State legislatures.

In selectively adopting US law and economics, European scholars advocated for minimal state intervention in private transactions, allowing pockets of public regulation as long as these ensured free and competitive market places.²²⁹ They claimed that, instead of benefiting consumers, welfarist legislations backfired and hurt the people the legislations were trying to help. In fact, by increasing the prices of consumer goods, sellers could easily pass on the costs of a warranty to the consumers. In this way, some of the beneficiaries of the warranty would be driven out of the market.

In addressing compulsory terms, which performed an insurance-like function for buyers, US mainstream law and economics scholars argued that they created inefficient outcomes by diminishing overall consumer welfare by increasing prices. The warranty undermined the goal of reducing transaction costs through contracts of adhesion and made marginal groups of consumers worse off because they were priced out of the market. Thus, compulsory

²²⁷ See Pardolesi, *supra* note 224.

²²⁸ See UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 5 (1997).

²²⁹ See Richard A. Epstein, *Contracts Small and Contract Large: Contract Law Through the Lens of Laissez-Faire*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 25, 30-31 (F.H. Buckley ed., 1999) (stating that laissez-faire makes "explicit substantive judgments about which kind of regulations work in the common interest and which do not; . . . its practical side stresses the bad consequences to civil society that flow from ambitious government regimes of taxation and regulation that violate its precepts").

warranties in consumer contracts “run[] counter to prevailing redistributive rationales” by creating non-optimal market results.²³⁰

Chicago legal economists explained that when buyers are free to choose any contractual term they will benefit from market competition and will choose the most efficient term for their transaction.²³¹ Regulation of consumer contracts through judicial or legislative intervention, such as the unconscionability doctrine or compulsory warranties, will diminish the overall market efficiency. First, equity doctrines allow judges to deploy the unequal bargaining power rhetoric, which is not a “fruitful, or even meaningful” criterion to assess legal consequences.²³² Second, courts are “institutionally incapable of choosing the defining values and finding the relevant facts” in order to determine equity considerations.²³³ Third, private regulation made by markets is more efficient than judicial intervention based on fairness, since the former accurately reflects the aggregate preference of buyers.²³⁴

²³⁰ Alan Schwartz, *A Reexamination of Non-Substantive Unconscionability*, 63 VA. L. REV. 1053, 1062 (1977).

The efficiency of a standardized contract lies in its internal construction—once the seller pre-establishes the terms of the contract and the consumer is presented with a ‘take it or leave it’ agreement. Both buyer and seller thereby avoid further transaction costs of negotiating individual agreements while a legal rule restricting the enforceability of standardized contracts creates large efficiency loss.

²³¹ See Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 61-78 (1969). Posner not only critiques the inefficiency of FTC regulation that is unable to protect consumers, but he also claims that “administrative enforcement of antifraud principles has no comparative advantage procedurally or institutionally, over judicial” enforcement. *Id.* at 67.

²³² RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 87 (2d ed. 1977).

²³³ Alan Schwartz, *Seller Unequal Bargaining Power and The Judicial Process* 49 IND. L.J. 367, 367-368 (1974). To assess whether buyers in a given transaction do or do not have unequal bargaining power, courts have the impossible task of determining, in relation to the market and to the choice of terms offered to buyers at different prices, if the given term of a contract is fair or not. In Schwartz’s view, courts do not have standard criteria to strike down a clause because it required an excessive price. Moreover, judges use two sets of non-convincing arguments: (1) the term can be void because it produces effects that are inconsistent with the policies that the court enforces, and (2) the term can be void because the seller’s power produced that term. *Id.* at 368.

²³⁴ See *id.* at 380. Schwartz uses the consumer sovereignty rhetoric even when buyers negotiate for terms with a monopolist. He states, “these buyers may still, in the aggregate, choose the contract clauses which monopolists offer. Those choices are more likely to reflect their own preferences than the choices courts would make for them.” See also RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 86-129 (5th ed. 1998). Posner offers an alternative interpretation of the *Thomas Walker Furniture* case, suggesting that the seller’s right of repossession was an efficient way to allow consumers to purchase the goods in advance.

Even more significantly, European scholars adopted what U.S. mainstream legal economists referred to as “Kaldor-Hicks efficiency” as the objective guiding principle that would drive decisions of both legislators and judges. While the Pareto-superiority criterion did not favor those rules, which cannot make both buyers and sellers better off, the Kaldor-Hicks criterion allows choosing a rule even if only the seller is better off, as long as the seller’s gain exceeds the buyer’s losses. The seller would then theoretically be able to compensate the buyer. Even when the choice of a determined rule justified by a Kaldor-Hicks criterion creates actual losers, the rule is the most efficient one, since as Posner puts it “the winners could compensate the losers, whether or not they actually do.”²³⁵

The Kaldor-Hicks criterion refers to the relationship between the aggregate benefits and the aggregate costs of a situation, thus referring to the “size of the pie” and its overall maximization. The attractiveness of this criterion, which mainstream legal economists presented as an objective one, is that everyone can be better off if society is organized in an efficient manner. In dismissing the distributive consequences of the efficient solution and depicting society as an aggregate of individual well being, mainstream legal economists deployed Kaldor-Hicks efficiency as a neutral and non-political criterion. In allowing this trade-off between ‘efficiency’ and ‘distribution’ of resources, because of the beneficial increase in aggregate wealth, mainstream legal economists set aside more political and costly distributive choices.

Mainstream legal economists put forward a consistent institutional competence argument according to which judges should pursue Kaldor-Hicks efficiency while they should set aside distributive goals in adjudication. According to them, it is difficult or impossible to redistribute through legal rules, and legislatures only have the competence to deal with distribution of resources. In their view, legislatures rather than courts are institutionally capable of deciding distributive questions. By means of the government’s tax

²³⁵ See RICHARD POSNER, *supra* note 232, at 518:

The use of liability rules or other legal sanctions to redistribute income from wealthy to poor is likely to miscarry. A rule of liability is like an exercise tax: it induces a contraction in output and increases price. However, the party made liable may be able to shift much of the liability cost on the poor through prices. The result is a capricious redistribution of income and wealth within the class of poor people themselves and an overall reduction in their welfare.

and transfer systems, legislative decisions are likely to be more precise than the decision of a random judge.²³⁶ Due to high administrative costs of the legal system, mainstream legal economists advocate that legislatures are not only the most apt but also the most efficient institutions to decide distributional issues.²³⁷

B. *Resisting law and Economics: Social Justice in European Contract Law*

From a different ideological perspective, jurists advocating for social justice in European private law drafted a manifesto in 2004 to address democratic concerns regarding the harmonization process.²³⁸ The Social Justice Manifesto focuses on the need to secure legitimacy, namely democratic acceptance of the socio-economic values embedded in the harmonization of private law. In advocating for greater social justice and legitimacy in European contract law, the Manifesto stresses the importance of preserving cultural and local diversity that allows “variation, experimentation and innovation.”²³⁹ In short, the Manifesto aims to tie the European notion of a social market economy together with regulatory legitimacy in order to overcome the troubling democratic deficit in the EU.²⁴⁰

²³⁶ See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 4 (1999) (“Economists understand how laws affect the distribution of income and wealth across classes and groups and while they often recommend changes that increase efficiency, they try to avoid taking sides in disputes about distribution, usually leaving recommendations about distribution to policy-makers or voter.”).

²³⁷ See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 9-10, 125 (2d ed. 1989) (arguing that “[i]t is often impossible to redistribute income through the choice of legal rules and even when it’s possible redistribution through government tax and transfer system may be cheaper and is likely to be more precise” so that “redistribution through legal rules is costly, not precise for income groups purposes and it only takes place when a dispute happens, not on a consistent base”). For a more recent approach, see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 31-35 (2002).

²³⁸ See Hugh Collins, Editorial, *The Future of European Private Law: An Introduction*, 10 *EUR. L.J.* 649 (2004).

²³⁹ See Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 *EUR. L.J.* 653, 672 (2004) [hereinafter *Social Justice Manifesto*].

²⁴⁰ Collins, *supra* note 238, at 650:

The institutions of the European Union, with their unique constellation of multilevel systems of governance, are not designed, and were never intended to be competent, to engage in the construction of such a political settlement. If Europe is to embark on this process of general harmonization of laws, it should not start from here, that is the current processes for enacting legislation, be-

In following a well-known social tradition in contract law, social justice advocates state that the new European legal culture offers a possibility to depart from legal formalism, allowing for a more contextualized and open dialogue about the political stakes of European integration.²⁴¹ These scholars explain that the problem with the harmonization of private law arises when national fairness standards are replaced by a much narrower conception of the principle of social justice than the one existing at the national level. They fear that such replacement is likely to occur in order to secure the effective realization of European regulation.

Rather than a technocratic enterprise based on neutral principles such as freedom of contract, social justice advocates in their Manifesto envisage European contract law as a set of doctrinal rules chosen to advance fairness and distributive justice.²⁴² They emphasize that the harmonization of contract law needs to be understood as part of European multi-level governance that creates political consequences for citizens of the Union and not merely as a functional tool for the completion of the internal market. In opposing a technocratic approach to harmonization, they depart from those progressive views suggesting *tout court* the need to resist harmonization of contract law because the European level is pervaded by constitutional asymmetry. In contrast, they side with the slogan “Hard Code now!”²⁴³

Thus social justice advocates claim that unification of private law should proceed as part of the political evolution to construct the European Union. The Commission should address socio-economic values more openly and democratically through “new methods for the construction of this union of shared fundamental values (which include respect for cultural diversity) as represented in the law of contract and the remainder of private law.”²⁴⁴ They state,

Unless a more democratic and accountable process is initiated, there is a clear danger that these fundamental issues will never

cause those processes lack the necessary legitimacy to engage with these fundamental political questions.

²⁴¹ See MARTIJN W. HESSELINK, *THE NEW EUROPEAN LEGAL CULTURE* 72 (2001); Robert W. Gordon, *Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law*, 1985 WISC. L. REV. 565 (1985).

²⁴² See HUGH COLLINS, *REGULATING CONTRACTS* (1999).

²⁴³ See Ugo Mattei, *Hard Code Now!*, 2 GLOBAL JURIST FRONTIERS 1:1 (2002) (arguing that a European Code will benefit consumers, but that soft law measures would advance corporate interests).

²⁴⁴ *Social Justice Manifesto*, *supra* note 239, at 657.

be openly addressed, and a serious risk that powerful interest groups will be able to manipulate the technocratic process behind the scenes in order to secure their interests at the expense of the welfare of ordinary citizens.²⁴⁵

In embracing the view that the European Union is pervaded by an asymmetry when it comes to social justice, these scholars claim, “The values of negative integration and competition were never intended to provide an exhaustive scheme of social justice for a market order. They should not be used now as the exclusive determinative foundations for a consensus of values underpinning European contract law.”²⁴⁶

In considering the distributive consequences of contract law, the Manifesto provides no answer to neoliberal critics for which social legislation is highly inefficient because it passes on the costs of protections. Neoliberals argue that when the distribution of wealth happens through cross-subsidies among differently situated groups of buyers these “are prima facie unjustifiable.”²⁴⁷

The second idea of the Manifesto is that the constitutionalization of private law provides the opportunity to give a concrete expression to individual rights protected by the European Convention of Human Rights and to the social and economic rights recognized by the Nice Charter of the Fundamental Rights of the European Union.²⁴⁸ However, the constitutionalization approach of the Manifesto recognizes social rights only to European citizens. Immigrants, or socially marginalized individuals who are excluded from the possibility of concluding contracts, will not enjoy European social rights.

C. *The Distributive Analysis: A Limited Reception*

In response to the attacks of Chicago legal economists to welfare regulation by administrative agencies and courts, some United States jurists developed a distributive analysis of legal rules as an alternative law and economics theory. In deploying a law and economics methodology, these progressive scholars began writing in

²⁴⁵ *Id.* at 658.

²⁴⁶ *Id.* at 667.

²⁴⁷ Duncan Kennedy, *Thoughts on Coherence, Social Values and National Tradition in Private Law*, in *THE POLITICS OF A EUROPEAN CIVIL CODE* 9 (Martin W. Hesselink ed., 2006).

²⁴⁸ See *Social Justice Manifesto*, *supra* note 239, at 667.

the 1970s, but it was not until the 1990s that European jurists became aware of the distributive analysis.

One could trace the distributive analysis back to an article by Arthur Leff, which demonstrated how the legal process creates high transaction costs that are unequally distributed among litigants, especially between business and consumers.²⁴⁹ The following year, Bruce Ackerman's response to the attack by Chicago legal economists against welfare regulation elaborated an economic model to justify the enforcement of housing codes as a means to rectify inequalities in wealth distribution.²⁵⁰ In response to the argument that the cost of social legislation is passed on to the poor he elaborated an economic model that showed the contrary. An effective and comprehensive housing code could, under certain conditions, redistribute income from landlords to tenants.²⁵¹

In the 1980s, scholars shifted their attention from administrative regulation to private law rules because housing codes were no longer a viable option under the current administration. Duncan Kennedy applied Ackerman's economic model to justify the use of compulsory terms in contract and tort rules. Despite the attempt by sellers to pass on the costs of the mandatory term to buyers, their effectiveness depended on the shape of supply and demand curves and the competitive structure of the market. By disaggregating the group of buyers in at least four sub-groups, in relation to

²⁴⁹ See RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 337-38 (1st ed. 1973) (claiming that three factors can affect the decision to settle rather than litigate: "the relative cost of litigation and settlement, the parties' attitude toward risk and differences between the parties' judgment of the likely outcome of litigation"). See also Arthur A Leff, *Injury, Ignorance, Spite—The Dynamics of Coercive Collection*, 80 *YALE L.J.* 1, 8 (1970). Leff engages with the law and economics methodology by offering four reasons for the costs of due process:

First, due process demands that at the outset the court and its officers be wholly ignorant of what happened and it is expensive to educate them, at least using the pleading-and-playlet format of the common law. Second, the process of education cannot proceed on a generalized (mass produced) basis; each case is theoretically hand-crafted. Third, save in a court of small claims it is usually specialists (e.g., lawyers) who do the crafting. Fourth, because the courts do not allocate docket space by competitive bidding between plaintiffs, the creditor with the largest claim at stake must take his place in a "queue" behind plaintiffs with smaller claims.

²⁵⁰ See Bruce Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093 (1971).

²⁵¹ See *id.* at 1111.

their utility and risk preferences, the introduction of an insurance-like term had distributive consequences “possibly, not necessarily including enriching part of the buyer group at the expense of other buyers and sellers.”²⁵²

In following the compulsory terms analysis, Richard Craswell demonstrated that the benefit of a warranty in consumer contracts is “inversely related to sellers’ ability to pass on their costs.”²⁵³ In rejecting the indeterminacy of the passing-on-the-cost argument, he showed that distributive gains were perceived, not by an increase in price, but through the willingness to pay of marginal consumers.²⁵⁴ More recent applications have analyzed the favorable consequences of welfare regulations for specific groups of workers through accommodation mandates²⁵⁵ and particular debtors through the imposition of compulsory terms protecting mortgagors.²⁵⁶

One of the most important receptions of the distributive analysis in European scholarship can be traced to Hugh Collins’s work in the 1990s. In response to European lawyers engaging with mainstream law and economics,²⁵⁷ Collins addressed the regulation of contractual unfairness and the costs of effective welfare regulation. In examining the Unfair Terms Directive, he emphasized that consumers are unlikely to litigate the term before a court; thus the Directive has little impact on the use and content of adhesion contracts. Moreover, according to Collins, the Directive suffered “the weakness of creating an unsophisticated framework for enquiry”²⁵⁸ in which the judge lacks information to police a particular clause because of insufficient information about the market conditions,

²⁵² See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 app. B at 654 (1982).

²⁵³ See Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 398 (1991).

²⁵⁴ See *id.* (“If sellers can pass on much of the costs of a rule, this usually indicates that consumers benefit a good deal from the rule. If sellers cannot pass on very much of their costs, the rule has probably made their product less attractive to consumers.”).

²⁵⁵ Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000). In demonstrating that favourable distributive effects are assured for certain accommodated groups, Jolls provides a counterpoint to the existing literature, which assumes that desirable effects for accommodated workers are unlikely to happen because costs will be shifted to the accommodated group in the form of reduced wages or reduced employment.

²⁵⁶ See Duncan Kennedy, *The Ex-Post Distributive Case for Insurance Like Compulsory Terms in Consumer Contracts* (1998) (unpublished manuscript, on file with the author).

²⁵⁷ See COLLINS, *supra* note 242.

²⁵⁸ *Id.* at 233.

the particular quality of the product, and the business conditions to supply it. In attacking the “open texture rules” or general clauses to police unfairness, Collins claimed that they favor businesses rather than consumers since such rules require judges to contextualize the legal framework.²⁵⁹ Collins asserted that private law regulation cannot improve contractual fairness by open texture rules, but instead should do so through higher formal standards. For instance, the Unfair Terms Directive set up a black list of unfair terms, which are to be immediately voided by judges.²⁶⁰ Moreover, through an examination of empirical models, Collins convincingly argued that there are markets in which the price of welfare regulation, such as minimum wages or compulsory duties of disclosure, cannot be passed on to the protected group.²⁶¹ In these cases regulating unfairness produces the desired redistributive results, and formal standards or compulsory terms produce a better regulatory outcome than open texture rules such as good faith or other general clauses.

The reception of the distributive analysis in European legal thought was limited to those progressive scholars addressing consumer regulations and, tangentially, European private law.²⁶² Scholars have not yet elaborated a response, aiming to show desirable economic effects of welfarist regulations for determinate groups of buyers, debtors, or workers, to counter the attacks against social welfare regulation by jurists who support regulatory competition for European contract law.²⁶³

An example of a regulatory effort that, while highly criticized by scholars, has not been subject to any form of meaningful scrutiny is the Directive harmonizing the law of consumer sales and

²⁵⁹ See Hugh Collins, *Formalism and Efficiency: Designing European Commercial Law*, 8 Eur. Rev. Private L. 211 (2000).

²⁶⁰ See Council Directive 93/13/EEC, art. 3(3), 1993 O.J. (L 95) 29 (EEC) (addressing the Unfair Terms Directive’s “indicative” but “non-exhaustive” list of terms that “may” be unfair).

²⁶¹ See COLLINS, *supra* note 242, at 286.

²⁶² See *id.*; see also GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT (Roger Brownsword, Norma J. Hird, & Geraint Howells eds., 1999); Leone Niglia, *Standard Form Contracts in Europe and North America: One Hundred Years of Unfair Terms?*, in INTERNATIONAL PERSPECTIVES ON CONSUMERS’ ACCESS TO JUSTICE 101, 127 (Charles E.F. Rickett & Thomas G.W. Telfer eds., 2003).

²⁶³ See Stuyck, *supra* note 64.

warranties.²⁶⁴ Adopted by the Council in 1999 after a long and difficult struggle between conflicting political and economic interests, the Directive is an outstanding example of how European scholarship fails to address the distributive consequences of Community re-regulation. Aimed at improving the functioning of the internal market, the Directive harmonizes guarantee regimes in consumer sales.²⁶⁵

Under this Sales-Warranties Directive, sellers must warrant the conformity (merchantability) of their goods for at least two years following the delivery to the consumer. If a good lacks conformity, the remedies available to the consumer are repair and replacement of the good and, in the alternative, price reduction and rescission of the contract.²⁶⁶ Member States have the possibility of introducing an obligation for consumers to inform the seller of the defect within a flexible notification period of at least two months.²⁶⁷ The Directive requires that if the guarantee under national laws has a limitation period, this time period cannot be less than two years from the day of delivery. In that case the directive places consumers in a more advantageous position than under several national laws.²⁶⁸

Some jurists have criticized this measure as a paternalistic intervention, imposing a compulsory warranty that harms consumers instead of protecting them. By overestimating the risks for consumers, the introduction of the compulsory warranty forces sellers to pass on the cost of the term to consumers. Thus, the mandatory warranties will increase prices of goods while also stimulating alter-

²⁶⁴ See Council Directive 1999/44/EC, On Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, 1999 O.J., (L 171/12) (EC) (hereinafter Sales-Warranties Directive).

²⁶⁵ See *id.* art. 1(2)(e). According to the definitions, a guarantee shall mean any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.

²⁶⁶ *Id.* art. 3-5.

²⁶⁷ See *id.* art. 5(2) and for used goods art. 7(1). Art. 7(1) states that the period should be no less than one year, and both provisions allow Member States to enact more stringent provisions.

²⁶⁸ See *id.* art. 5:

The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.

native solutions to circumvent the compulsory term. For instance, after the adoption of the Directive, Germany imposed a mandatory liability for used cars of at least one year. Scholars argue that this regulation has increased market prices for used cars, while creating incentives for lawyers to circumvent the compulsory warranty. In light of these assumptions, they suggest that a more sound solution would have left it up to private parties to negotiate conditions of a warranty for non-conformity. Rather than adopting an ex-ante perspective by imposing the mandatory warranty, they suggest that in the case of a violation of contractual good faith, national courts could enforce ex-post the Unfair Terms Directive.²⁶⁹

In response to such claim, a distributive analysis of the German market of used cars could show how the ‘passing-on-the-cost’ argument is highly indeterminate, and that the argument that consumers benefit from a mandatory rule only when sellers cannot pass on the cost of the warranty is misleading. For instance, a distributive analysis of the effect of the warranty in this case could demonstrate whether the value of the good offered in the market after the imposition of the compulsory term is underestimated by marginal consumers. Through cross subsidization among marginal and infra-marginal consumers, some buyers will fully benefit from a compulsory warranty “only when sellers are able to pass on a large share of their costs.”²⁷⁰ Consequently, jurists should argue whether the compulsory warranty creates more or less consumer welfare without relying on the consumers’ willingness to pay, which is a highly indeterminate criterion.

If by imposing a compulsory warranty the Sales-Warranties Directive favors certain consumers because it burdens the sellers with the cost of the information about the risk of the products, one should still assess how redistribution plays out, not necessarily among buyers and sellers, but between different groups of buyers. In Craswell’s analysis of consumer contracts, buyers might end up benefiting from the mandatory guarantee, but their willingness to pay varies in a way that is not related to the warranty’s true benefits. In order to determine whether consumer welfare increases, one should address the “relationship between the warranty’s true benefits and the marginal consumer willingness to pay for the war-

²⁶⁹ See Gerhard Wagner, *The Economics of Harmonization: The Case of Contract Law*, 39 *Common Mkt. L. Rev.* 995, 1020 (2002).

²⁷⁰ See Craswell, *supra* note 253, at 361.

ranty” rather than the sheer price increase.²⁷¹ In the case of second hand cars in Germany, jurists should verify which groups of consumers are benefiting from the warranty and how redistribution takes place in that market. By means of this analysis scholars could respond to the ‘passing-on-the-cost’ claim by showing that consumers are willing to pay for a product, namely the used car plus the guarantee, that they would not get from the market without the regulatory intervention of the Directive.²⁷²

According to social justice advocates, the ECJ is institutionally constrained to address efficiency consideration because of a constitutional asymmetry pervading the EU. Ultimately, these jurists argue that judges, and European judges in particular, cannot be fully trusted to promote social justice.²⁷³ This idea is based on the view that substantive and social justice concepts should pass through legislatures, as they reflect the democratic consensus, whereas one should be skeptical of judges because of their elitist or passive take on such concepts.

This part demonstrated that neoliberal advocates have deployed United States law and economics theories to limit the harmonization of private law rules. In contrast, social justice advocates have resisted the reception of United States law and economics to argue in favor of harmonized rules. However, both groups deploy similar institutional competence claims, and they have strategically deployed constitutional asymmetry claims to criticize ECJ adjudication and to delegitimize European and national courts at the benefit of Community or national legislatures.

As a result, European jurists on both sides of the political spectrum have not yet engaged with the distributive consequences of private law rules. In particular, when European courts rather than national legislatures determine private law rules, European jurists tend to collapse institutional competence arguments with substantial ones rather than assessing their distributive consequences.

This article showed that even if some jurists have welcomed?and others have resisted?the virtual transplant of United States legal thought for a variety of legal, socio-economic, and historical reasons, at the operational level both groups recurrently

²⁷¹ *Id.* at 391.

²⁷² See Kennedy, *supra* note 252.

²⁷³ See *Social Justice Manifesto*, *supra* note 239.

adopt constitutional asymmetry claims in ways that constrain the debate on European private law to a pair of stifled positions.

VI. CONCLUSION

Recently, lawyers, scholars, and judges have changed their claims towards European private law, and this change has taken place in the broader context of a transatlantic dialogue between European and U.S. lawyers and scholars. This article demonstrates that despite a recurrent claim made by European private lawyers that there is a constitutional asymmetry in the EU, in the last decade such a claim has lost its appeal. While a deeper understanding of European integration has required lawyers to pay greater attention to ECJ jurisprudence, others lawyers have engaged in the bigger enterprise of elaborating new ideas and receiving new legal theories that could better inform them in how to approach the harmonization of legal rules. Primarily, European lawyers have shifted the focus of their analysis from democratic legitimacy concerns to substantive concerns by addressing the consequences of legal rules. This change in part explains the current emphasis of the European Commission on modernizing rather than drafting new regulations and the important role played by legal scholars in advising and legitimizing the work of the Commission.²⁷⁴ Moreover, the selective reception of United States law and economics has induced lawyers to partly reject the harmonization of legal rules in favor of regulatory competition models. Finally, the creation of a well-established group of European private law academics, with a large number of publications in this field, has enriched the debate and has demonstrated how the field is increasingly ideologically and politically divided.²⁷⁵

²⁷⁴ See Green Paper, *supra* note 108.

²⁷⁵ See Mattei & Nicola, *supra* note 156.

