

# Penn State Journal of Law & International Affairs

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Volume 4  
Issue 1 *Seventeenth Biennial Meeting of the  
International Academy of Commercial and  
Consumer Law*

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December 2015

## On the Intellectual History of Freedom of Contract and Regulation

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ISSN: 2168-7951

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### Recommended Citation

Hans-W. Micklitz, *On the Intellectual History of Freedom of Contract and Regulation*, 4 PENN. ST. J.L. & INT'L AFF. 1 (2015).  
Available at: <https://elibrary.law.psu.edu/jlia/vol4/iss1/3>

*The Penn State Journal of Law & International Affairs* is a joint publication of Penn State's School of Law and School of International Affairs.

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2015

VOLUME 4 NO. 1

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## ON THE INTELLECTUAL HISTORY OF FREEDOM OF CONTRACT AND REGULATION

*Hans-W. Micklitz\**

### INTRODUCTION

Are we private lawyers not convinced that we share a common understanding of “freedom of contract,” of “freedom”<sup>1</sup> and “contract,” and of restrictions on that freedom of contract through “regulation?”<sup>2</sup> Is this common understanding not the basis on which we all operate implicitly or explicitly in our intellectual discourse cutting across different legal traditions and different legal cultures?<sup>3</sup> At the very least, is not the notion of contract freedom shared in all countries governed by a market society and even more so if the market society is embedded into the Westernized model of democracy?<sup>4</sup>

What if this common assumption turns out to be wrong or is no more than a rather superficial “gentleman’s agreement,” which allows us to communicate with each other whilst maintaining our own preconceptions? Digging deeper into intellectual history, legal theory, and legal philosophy reveals that, for example, a French lawyer and an

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<sup>1</sup> See generally UDO DI FABIO, *DIE KULTUR DER FREIHEIT* (2005) (for a German understanding of freedom of contract).

<sup>2</sup> See HUGH COLLINS, *REGULATING CONTRACTS* (1999); Gary Marks, Liesbet Hooghe & Kermit Blank, *European Integration from the 1980s: State-Centric v. Multi-level Governance*, 34 *J. COMMON MARKET STUD.* 3341 (1996).

<sup>3</sup> See Kaarlo Tuori, *Regulation Theories*, in *TRANSNATIONAL LAW: RETHINKING EUROPEAN LAW AND LEGAL THINKING* 11-57 (Miguel Maduro, Kaarlo Tuori & Suvi Sankari eds., 2014); *THE MANY CONSTITUTIONS OF EUROPE* (Kaarlo Tuori & Suvi Sankari eds., 2010).

<sup>4</sup> Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 *SOC. & LEGAL STUD.* 399 (2000).

English common lawyer may not necessarily be talking about the same thing when they argue about “freedom of contract.” This becomes even more complicated if we look at the limitations and restrictions on “freedom of contract,” which are set out via statutory regulation.<sup>5</sup> These lawyers might agree on what a state is by equating it with the “nation state,” but might encounter more problems in understanding and agreeing on the meaning of “regulation.” Regulation can be private or public. When created statutorily, regulation might facilitate or restrict freedom of contract. Statutory intervention, might, depending on one’s perspective (liberal or welfarist), trigger very different expectations, feelings, or sentiments. Our perception of “regulation” very much depends on what we expect as citizens from “our” state.

This paper starts with two examples that are meant to highlight deeper cultural differences in deciding conflicting contractual issues. One example is taken from the French/German context, the other example is from the German/American context. These examples serve to underpin the hypothesis that the understanding of contract and regulation in the three countries under investigation – France, Germany and the United Kingdom – differs considerably and the reasons for the differences can be found in the intellectual history of the respective states. Further, this paper continues by contrasting the three different models of freedom of contract and regulation with the emerging European model. The hypothesis is that the European Union is yielding its own model which differs from the Member States model. This is not only due to the particular legal nature of the European Union as a quasi-state, but also to the changing economic and political environment after World War II. The conclusions remain tentative. The reader is invited to stand back and carefully look at the ongoing transformations of contract and regulation. Intellectual history and comparative research are the appropriate tools for such an exercise.

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<sup>5</sup> ROLF KNIEPER, *ZWANG, VERNUNFT, FREIHEIT: STUDIEN ZUR JURISTISCHEN KONSTRUKTION DER GESELLSCHAFT* (1981).

## I. ENGLISH-FRENCH DEFECTIVE SWIMMING POOLS

A well-known pair of cases<sup>6</sup> were decided before English and French courts facing a nearly identical problem.<sup>7</sup> In *Ruxley*, a homeowner mandated a construction company to build a swimming pool in his garden.<sup>8</sup> The water depth did not comply with what was agreed upon in the contract by twenty-two centimeters. The homeowner asked the construction company to rebuild the swimming pool. The House of Lords did not grant the homeowner specific performance.<sup>9</sup> The House of Lords found that the swimming pool was usable, although not in the envisaged way; therefore, pecuniary damages sufficed to compensate the homeowner. Implicit in the House of Lords decision is the idea that it does not make sense to destroy a usable swimming pool just to satisfy the original contract. This combination of *pragmatic* and *utilitarian* considerations will be explained as the “English model.”

Similarly, in France, a home was built thirty-three centimeters lower than what was agreed upon in the contract. In contrast to the House of Lords in *Ruxley*, however, the French Cour de Cassation held that the construction company must rebuild the house because it did not deliver exactly what was agreed to between the parties. Moreover, the construction company had to bear the full cost of reconstruction, and pecuniary damages did not suffice to compensate the homeowner for the broken promise.<sup>10</sup> The “reason” behind the agreement prevailed over any other considerations one might have invoked. This “French model” will later be examined under this rationale.

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<sup>6</sup> *Ruxley Electronics and Construction Ltd. v Forsyth*, [1996] A.C. 344 (H.L.) (appeal taken from Eng.); Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., May 11, 2005, Bull. civ. III, no. 103 (Fr.).

<sup>7</sup> I have taken this example from Ruth Sefton-Green. Ruth Sefton-Green, *The European Union, Law and Society: Making the Societal-Cultural Difference*, in PRIVATE LAW AND THE MANY CULTURES OF EUROPE 37, 52 (Thomas Wilhelmsson et al. eds., 2007).

<sup>8</sup> *Id.* at 52.

<sup>9</sup> *Ruxley Electronics and Construction Ltd.*, [1996] A.C. 344.

<sup>10</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., May 11, 2005, Bull. civ. III, no. 103 (Fr.).

Comparative lawyers who study these and other similar cases are aware of the differences between English common law and the French Civil Code.<sup>11</sup> However, the fact that a layperson, had they to decide the case, would come to the same result tells us something about our legal consciousness, and the deeper assumptions we share about our own legal systems based on the expectations we have in the functioning of the courts and of society, for good and for bad. The Eurobarometer is a neat indicator that allows for a deeper look into these differing preconceptions at least between the twenty-eight E.U. Member States.<sup>12</sup> We may speculate on what courts in the United States, Canada, Brazil, Israel, Italy, or Germany would have decided in a case similar to the English or French cases. I am sure there are similar, if not identical, cases, and I assume that a survey of the citizens of these countries would lead to results similar to my English-French comparison.<sup>13</sup> If my assumption is correct, there must be a deeper layer of rationales enshrined in long-grown cultures and traditions behind the legal rules.<sup>14</sup>

## II. GERMAN TOURISTS STRANDED IN FLORIDA

My second example deals with consumer law, which restricts and limits freedom of contract via statutory intervention. In the early

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<sup>11</sup> *Ruxley* and the French example are not unique. They represent a well-established and long standing doctrine. *See id.*; *see also* Franz Werro, *Comparative Studies in Private Law: A European Point of View*, in *THE CAMBRIDGE COMPANION ON COMPARATIVE LAW* 132-33 (Mauro Busani & Hugo Mattei eds., 2012).

<sup>12</sup> Since 1973, the European Commission has been monitoring the evolution of public opinion in the Member States, thus helping the preparation of texts, decision-making and the evaluation of its work. The surveys and studies address major topics concerning European citizenship: enlargement, social situation, health, culture, information technology, environment, the Euro, defence, etc. *See, e.g.*, European Commission, *Public Opinion*, [http://ec.europa.eu/public\\_opinion/index\\_en.htm](http://ec.europa.eu/public_opinion/index_en.htm) (last visited Jan. 27, 2015).

<sup>13</sup> For example, the Trento Common Core Project is based on the idea that the same case is looked at through the eyes of different legal orders. *THE COMMON CORE OF EUROPEAN PRIVATE LAW*, <http://www.common-core.org/> (last visited Jan. 27, 2015).

<sup>14</sup> At this point in my paper, I do not argue that these rationales are “eternal” in the sense of Pierre Legrand’s argument that European legal cultures are not converging. *See* Pierre Legrand, *European Legal Systems Are Not Converging*, 45 *INT’L & COMP. L.Q.* 52 (1996).

1990s, German tourists used a tour operator to book all-inclusive trips, which included transportation, accommodations, and meals, to Florida at a favorable price. The trip operator went bankrupt, and the German tourists found themselves stranded in Florida. The tourists were forced to buy tickets at their own cost to return to Germany.<sup>15</sup>

The German tourists sued the German state under the *Francovich* doctrine.<sup>16</sup> The tourists sought restitution or compensation of the costs for their return tickets.<sup>17</sup> At the time of litigation, Germany had not implemented Directive 90/314/EEC on package tours.<sup>18</sup> This Directive obliges Member States to shield consumers from the bankruptcy of tour operators and shifts the risk of default from the individual traveler to the community of travelers. The risk is thereby socialized, as all potential travelers must cover the costs for a fund the tour operator provides.<sup>19</sup> The German state lost and its liability was later confirmed by the Court of Justice of the European Union (CJEU) in *Dillenkofer*.<sup>20</sup> This was a costly lesson for the German state which had to pay roughly 20 million German Marks (10 million Euros). Consumer organizations and consumer victims celebrated the judgment as a great success.

The societal dimension of the conflict underlying the case is of particular interest here. At the time of the intense debate on who should bear the costs of the stranded tourists, a German television

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<sup>15</sup> For the facts and the subsequent decision of the CJEU, see Joined Cases C-178, 179/94 & C-188-90/94, *Dillenkofer v. Germany*, 1996 E.C.R. I-4845.

<sup>16</sup> Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5395. The *Francovich* doctrine creates non-contractual liability of Member States for violations of EU law: “a State must be liable for loss and damage caused to individuals as a result of breaches of [European Union] law for which the State can be held responsible.” *Id.* ¶ 35.

<sup>17</sup> *Dillenkofer*, 1996 E.C.R. I-4845.

<sup>18</sup> Council Directive 90/314 of the European Parliament and of the Council of 13 June 1990 on Package Travel, Package Holidays, and Package Tours, 1990 O.J. (L 15) (EC).

<sup>19</sup> *Id.* at art. 7; see STEPHEN WEATHERILL, EU CONSUMER LAW AND POLICY 98-101 (2005); Klaus Tonner, *Kommentierung des Kapitel 13: Reisevertrag*, in ZIVILRECHT UNTER EUROPÄISCHEM EINFLUSS: DIE RICHTLINIENKONFORME AUSLEGUNG DES BGB UND ANDERER GESETZE – ERLÄUTERUNGEN DER WICHTIGSTEN EG-VERORDNUNGEN (Herausgeber Gebauer & Thomas Wiedmann eds., 2010).

<sup>20</sup> *Dillenkofer*, 1996 E.C.R. I-4845.

program invited several of the stranded tourists and an American lawyer to discuss the proper remedy in the case. When given the opportunity to tell their stories, the German tourists said that, since a single return ticket cost three to four times more than the package tour, they went to the German embassy asking for financial support. At some point during the television program, the American lawyer asked the stranded tourists and the listeners a simple question: why not charter a plane? The lawyer suggested that chartering a plane would have been much less expensive for both the stranded tourists and for Germany.

The lawyer's question brings to light the expectations of German citizens, particularly the economically suspect deal of two weeks holidays in Florida for 500 to 600 German Marks. The tourists trusted the contract adage that a deal is a deal. Maybe the tourists subconsciously were also convinced that the German state would bail them out if their contractual expectations turned out to be wrong. Would consumers of a state other than Germany have had the same expectations of their contract with a package tour operator and of their state? Similarly, would these consumers have bombarded their embassies with complaints, or would they have chartered a plane? I assume that the expectations differ considerably.

However, there is more at stake than the help provided by national embassies for stranded citizens. As a result of the Francovich doctrine, E.U. law equips all E.U. citizens with individually enforceable rights to force their state to pay for the transfer, provided the respective state has not implemented, or has not correctly implemented, the Directive on package tours. How is this possible? It is not that the Member States accept liability voluntarily. Instead, it is the European Union which imposes such liability on Member States via the CJEU. Thus, the regulation of package tours by the European Union not only sets boundaries for the freedom of package tour operators, who are forced to abide by the E.U. rules when exercising their economic activity, but also paves the way for more entrepreneurial freedom in a European market.

### III. THE CONDITIONS FOR A JOURNEY INTO INTELLECTUAL HISTORY

This paper will now discuss the rationales behind the notion of freedom of contract by examining the German, French, U.K., and E.U. legal systems, all of which I am familiar with from extensive training and practice.<sup>21</sup> I want to ground this discussion in my experiences with

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<sup>21</sup> A word is needed on my knowledge of foreign legal systems, especially since current comparative legal methodology is in a state of crisis. When I was educated in comparative legal research in the 1970s and 1980s, the thinking in Europe followed the ground-breaking work of Zweigert and Kötz. *See generally* KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weier trans., 3d ed. 1998); TONY WEIR ON THE CASE (Catherine Barnard et al. eds., 2012). Legal systems were grouped around “legal families”—namely the four European families, the Romanic, the Germanic, the common law, and the Nordic countries—all of which share a common European culture, i.e., Roman law and Christian canon law. *See* Franz Wieacker & Edgar Bodenheimer, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1 (1990); FRANZ WIEACKER, VORAUSSETZUNGEN EUROPÄISCHER RECHTSKULTUR VERLAG GÖTTINGER TAGEBLATT (1985). The method applied was a functional comparison by looking for the “best solution,” or the solution that best fit the differing traditions of the states. What is more important here was the pedagogical message inherent to the idea of legal families. Engaging in comparative law and comparative legal method requires not only knowledge of the language, but also knowledge of the country and the cultural foundations of the respective societies. This kind of knowledge, however, must be gained through training and education in the country itself. In that spirit, I benefited from the opportunity to study law in Switzerland (the French speaking part), France, the United Kingdom, the United States, and Italy. Today, such a rigorous training requirement seems old-fashioned, as comparative lawyers have to engage in the comparison of countries and legal systems even if they know neither the language nor have fully experienced the country’s culture. The E.U. promoted this type of approach through its insistence on “inclusion,” which does not follow the traditional division of legal families, but converges the legal orders of twenty-eight Member States. This approach leads to a comparison of legal systems via simplistic methods, such as tables and charts. I admit that I have been involved in this more modern approach. Interestingly enough, legal origin theory (LOT) took the legal families approach seriously, which could have reinvigorated the approach of Zweigert and Kötz. *See generally* LEGAL ORIGIN THEORY (Simon Deakin & Katharina Pistor eds., 2012) (analyzing the different strains of legal origin theory). However, what actually happened was that LOT revealed the weakness of thinking in families, as it cannot do justice to the deeper traditions and cultures of the countries compared. Professor Ralf Michaels labelled LOT “comparison in numbers,” and questioned why comparative lawyers remained so speechless in their reaction and did not defend the functional method. Ralf Michaels, *Comparative Law*

the countries' culture and history. Building on previous research on social justice in private law<sup>22</sup> and the (un)systematics of European legal culture,<sup>23</sup> I seek to identify the dominating *Rechtsbewußtsein*, i.e., legal conscience,<sup>24</sup> with respect to intellectual history, legal theory, and legal philosophy. Then, I want to transpose the intellectual history to my question on the cultural and societal foundations of freedom of contract. I am fully aware that modelling by country is risky and that it might look as if traditions and cultures are not subject to political, economic, and social change.<sup>25</sup> I would defend, nevertheless, that such grouping around models is useful in identifying differences and maybe in deepening the mutual understanding of our conceptions of freedom of contract and the regulation thereof.

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*by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765 (2009); see also Mathias M. Siems, *Comparative Law* (Oct. 21, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2512938](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512938).

<sup>22</sup> See THE MANY CONCEPTS OF SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW (Hans-W. Micklitz ed., 2011).

<sup>23</sup> Hans-W. Micklitz, *The (Un)-Systematics of (Private) Law as an Element of European Legal Culture*, in TOWARDS A EUROPEAN LEGAL CULTURE 81-115 (Geneviève Helleringer & Kai Purnhagen eds., 2014).

<sup>24</sup> See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 19 (David M. Trubek & Alvaro Santos eds., 2006); *The Rule of Law, Political Choices and Developing Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 95 (David M. Trubek & Alvaro Santos eds., 2006); MENTALITÄTEN-GESCHICHTE: ZUR HISTORISCHEN REKONSTRUKTION GEISTIGER PROZESSE (André Burguière & Ulrich Raulff eds., 1987); Hagen Schulze, *Mentalitätsgeschichte – Chancen und Risiken eines Paradigmas der französischen Geschichtswissenschaft*, 36 GESCHICHTE IN WISSENSCHAFT UND UNTERRICHT 247 (1985). See also Sebastian Conard & Shalini Randeria, *Geteilte Geschichten – Europa in einer postkolonialen Welt*, in JENSEITS DES EUROZENTRISMUS: POSTKOLONIALE PERSPEKTIVEN IN DEN GESCHICHTS-UND KULTURWISSENSCHAFTEN 9-49 (Sebastian Conard & Shalini Randeria eds., 2002).

<sup>25</sup> See WOLFGANG STREECK, RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY 251 (2009) (strongly critiquing that the 'Varieties of Capitalism' neglects the two major driving forces of change in capitalist societies: the fear of workers and the greed of entrepreneurs); Dorothee Bohle & Béla Greskovits, *Varieties of Capitalism and Capitalism << tout court >>*, 50 EUR. J. SOCIETY 355 (2009); Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001) (a stock taking of the debate).

## IV. WHERE TO START WITH THE INTELLECTUAL HISTORY?

The analysis of the notion of freedom contract should begin with the Roman law. We can refer to the history of Roman law, and how its foundations have survived the last 2,000 years in both continental and common law countries;<sup>26</sup> however, the historical ground might be less stable and less safe than its promoters pretend.<sup>27</sup> Regulation is much more complicated. The Roman Empire used what today we call “regulation” to govern the economy. “Regulations,” whether back then or now, have almost always been associated with the existence of a state and a territory. This brings us to the Peace of Westphalia, concluded in 1648, which laid the foundations for what later became the nation state.

The benchmark for the beginning or the reinvigoration of Roman law is the foundation of the University of Bologna around 1130/1140 and the scholastic school of law. According to Harold Berman, the conflict between Pope Gregory VII and Henry IV, Holy Roman Emperor, a century earlier over the independence of the Church from the temporal power heralded and triggered the re-establishment of Roman law, private law, and contract law.<sup>28</sup> Berman argues that the separation of spiritual and temporal power not only initiated early state building and paved the way for the development of the nation state after the religious wars of the sixteenth and seventeenth century, but also led to the creation of the scholastic school of law first in Bologna and then elsewhere in Europe.<sup>29</sup> The Crusades between the eleventh and thirteenth centuries led to a stronger intellectual exchange between the West and the East through the reinvigoration of Greek and Roman philosophy, as well as through

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<sup>26</sup> See Reinhard Zimmermann, “*Heard Melodies are Sweet, but Those Unheard are Sweeter . . .*” *Conditio tacita, Implied Conditions und die Fortbildung des europäischen Vertragsrechts*, 193 ARCHIV FÜR CIVILISTISCHE PRAXIS 121 (1993).

<sup>27</sup> Thomas Duve, *Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive*, 20 J. FOR MAX PLANCK INST. FOR EUR. LEGAL HIST. 16 (2012) (a more nuanced analysis of the transfer and re-transfer of laws between European countries and what later became their colonies).

<sup>28</sup> See generally, HAROLD J. BERMAN, *RECHT UND REVOLUTION: DIE BILDUNG DER WESTLICHEN RECHTSTRADITION* (2001).

<sup>29</sup> *Id.* at 146, 215.

commercial exchange.<sup>30</sup> Hence, there is a connection between the rediscovery of Roman law, the split of spiritual and temporal power, and the Crusades, which renders the intellectual history of Western law to that époque indispensable.

One might alternatively argue that the starting point of my undertaking could and should be the discovery of the Americas in the fifteenth century and the conflict between the Spanish and English empires, without which the deeper intellectual history of the United States cannot be fully understood. New research initiated by Thomas Duve, the Director of the Max-Planck-Institut at Frankfurt am Main, emphasizes the cultural, political, and economic interaction and interchange between Europe and the “New World,” or the two Americas.<sup>31</sup> My approach is more modest and is more closely tied to my European cultural roots, the younger history of codified continental law, and the established role of the state in the economy and society.

This paper owes its origins to an invitation to speak on social justice in private law at the Cour de Cassation in Paris.<sup>32</sup> Thinking about justice in the French academic and judicial environment must coincide—at least this is what I am convinced of—with an analysis of the connection between state-building and constitution-building, as well as private legal order building and codification in the aftermath of the French revolution 1789. Whilst such a starting point offers joint perspectives in comparing France and Germany, it falls short by not taking the United Kingdom into account. If anything, a parallel may be drawn between the French Revolution of the late eighteenth century and German state-building of the nineteenth century on the one hand, and the Civil War and the conflict between the English Crown and Oliver Cromwell in the seventeenth century on the other. This period, i.e. the seventeenth throughout the nineteenth century, is roughly the period I investigated in attempting to explain where the different patterns of freedom of social justice derive from. I use these findings

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<sup>30</sup> *See id.*

<sup>31</sup> *See Duve, supra* note 27.

<sup>32</sup> Hans-W. Micklitz, Speech at the Cour de Cassation Paris: From Social Justice to Participatory Justice (2007).

in my attempt to transfer them an understanding of the deeper layers of freedom of contract.

V. MODELING THE MANY FACES OF “FREEDOM OF CONTRACT”

Table 1 illustrates my understanding of *freedom of contract* and *regulation*, rooted in *intellectual history*. This section will first explain the categorization of England, France, Germany, and the European Union.<sup>33</sup> I will then provide a rough account of the socio-economic and political background to the different models of autonomy and regulation in those three countries and the European Union, thereby elaborating on the characteristics of the many faces of freedom of contract in a bottom-up perspective.

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<sup>33</sup> The following analysis is a developed and adjusted version of Hans-W. Micklitz, *supra* note 23.

Table 1: Understandings of Freedom of Contract, Regulation and Their Intellectual History (France, Germany, United Kingdom European Union)

<b>Country</b>	<b>Model of freedom of contract</b>	<b>Intellectual history</b>	<b>Regulation</b>
<b>France</b>	A political project Code Civil	French rationalism Enlightenment	Regulating contracts as a political counter-project
<b>Germany</b>	A liberal authoritarian/ paternalistic project Bürgerliches Gesetzbuch	German idealism Metaphysics	Regulating contracts as a technical bureaucratic exercise
<b>United Kingdom</b>	A liberal pragmatic project Common law	Empiricism and Utilitarianism Pragmatism	Regulating contracts to solve 'concrete Problems'
<b>European Union</b>	A technocratic project Regulatory private law	Instrumentalism and functionalism	Regulated freedom – enabling and shaping autonomy

A. The English Model: Liberal and Pragmatic

In English history there is no comparable event to the adoption of the Civil Code in France or in Germany. The civil war that took place in the seventeenth century in England led to major changes in society and the parliamentary system. However, the English Civil War neither yielded a constitution nor a coherent codified body of civil law; rather, it only made way for the Declaration of the Bill of Rights in 1689. The French and the German legal systems, as seen through the eyes of a common law lawyer (daring to suggest that this is possible for me, a civil law lawyer), share a relatively homogenous view on the role and function of freedom of contract in society. These legal systems are united in the idea of universal values that infiltrate legal principles and concepts. “Autonomy” or “autonomie” is at the core of these values, and this is exactly where common lawyers run into difficulties.<sup>34</sup>

The true difference between continental law and common law dates further back than the French revolution, and it was crucial to identify the point at which the continental and common law systems diverged. I considered the clash between different philosophies, and to the remaining influence of the scholastic in continental Europe and its growing critique through nominalism in the United Kingdom. I also considered that the divergence occurred during medieval times when the relative cultural unity of Europe broke into pieces.<sup>35</sup> Therefore, I think empiricism is responsible for the deep differences between continental and common law legal systems. Despite the strong intellectual exchange, especially between France and England, Hobbes imported ideas from France, Rousseau referred to John Locke, and the ideas and concepts of Francis Bacon’s empiricism became prevalent after the failure of Cromwell. Empiricism paved the way for utilitarianism—and here we have not only the key to understanding English reservations against regulatory intervention into the economy,

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<sup>34</sup> See Lord R. Goff, *The Future of the Common Law*, 46 INT’L & COMP. L.Q. 745 (1997).

<sup>35</sup> BERMAN, *supra* note 28, at 265.

but also the explanation for English pragmatism,<sup>36</sup> which allows for regulatory intervention when there is a concrete need for action.

Both historical strings, which are tied together in my discussion above, justify the assumption that the continental European understanding of freedom of contract does not comply with philosophical, historical, economic, and legal structures in England. In other words, England has paved the way for a legal system which is deeply rooted in nominalistic and utilitarian thinking. Freedom of contract lies at the crossroads of these deep roots in English intellectual history. Nominalism served to cut away the ideological barriers enshrined in the scholastic school of law and to free English contract law from the Pandectist heritage; utilitarianism went hand in hand with the rise of the English “trading state” (Handelsstaat), which has its origins in the nineteenth century.<sup>37</sup> The heart of English contract law lies in the freedom of commerce and the freedom to conclude contracts. Freedom of contract, therefore, means first and foremost the economic freedom to voluntarily engage in economic transactions without any risk of statutory interferences, with the exception of paying taxes to the Crown.<sup>38</sup>

Compared to German Idealism (Kant, Fichte, Hegel, Schelling) and French Rationalism (Descartes, Pascal, Voltaire, Rousseau), the English view of the role and function of contract law is much more economic in its basic assumptions. It is a much smaller argumentative step from utility to economic efficiency and economic effectiveness, compared with duty, reason, will, or spirit (Pflicht, Vernunft, Wille, Verstand, Geist). English contract law can be much more easily adapted to European “integration through law,”<sup>39</sup> where

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<sup>36</sup> See Goff, *supra* note 34; Basil Markesinis, *Learning from Europe and Learning in Europe*, in THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY (Basil Markesinis ed., 1994); Thijmen Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, 39 AM. J. COMP. L. 493 (1991).

<sup>37</sup> See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1909).

<sup>38</sup> LAWRENCE JAMES, *THE RISE AND THE FALL OF BRITISH EMPIRE* (1st ed. 1994).

<sup>39</sup> See “INTEGRATION THROUGH LAW” REVISITED: THE MAKING OF THE EUROPEAN POLITY (Daniel Augenstein ed., 2012); *Integration Through Law: Europe and the American Federal Experience*, in INTEGRATION THROUGH LAW 3-68 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986).

the judicial system is given a major role in the realization of the Internal Market.<sup>40</sup>

What is the relationship between the particular English variant of freedom of contract and English legal culture? The English state is a liberal state. Its function is not to control economic behavior but to guarantee freedom of contract. In the seventeenth century this concerned the merchant adventurer, today it concerns the business environment at large.<sup>41</sup> Statutory intervention in the economy is feasible if there is a political need. Labor law and consumer law legislation illustrate this approach. The U.K. Parliament was at the forefront of consumer legislation. With regard to consumer credit and consumer safety, the U.K. Parliament has long set the benchmark for statutory intervention. Pragmatism is the guiding idea of statutory regulation restricting the freedom to contract.

This approach can be felt in the way in which the transposition of European consumer law directives are integrated into the English system. Directive 99/44/EC<sup>42</sup> is an example. The U.K. Parliament rejected any attempt to revise the English law on contracts. Such an attempt would have challenged the foundations of freedom of contract by creating a separate legislation to stand side-by-side with the common law on contracts on the one hand, and the Sale of Goods Act

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<sup>40</sup> No research has been undertaken as to whether there is a link between the adherence of the United Kingdom to the Europe Union and the deepening of European integration via case law. Whilst the building blocks *van Gend en Loos* and *Costa Enel* were decided before the UK joined the EU, the ground-breaking judgments of *Dassonville* and *Cassis de Dijon* paved the way for the development of the Internal Market and were made with the participation of UK judges. Today's pattern of integration might have changed. Christian Joerges, *What is left of the integration through law project? A reconstruction in conflicts-law perspectives*, in THE EUROPEAN RESCUE OF THE EUROPEAN UNION? 37-67 (Edoardo Chiti, Augustín José Menéndez, Pedro Gustavo Teixeira eds. 2012) (speaks of "integration without law," referring to the dominance of politics and the influential role of governance.)

<sup>41</sup> PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1985); DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (1999) (showing that the real turning point was between 1790 and 1830, when the last remnants of just price were stripped away).

<sup>42</sup> Council Directive 99/44 on certain aspects of the sale of consumer goods and associates guarantees, 1999 O.J. (L 171) (EC).

on the other.<sup>43</sup> Under E.U. Directive 93/13/EEC, a similar continuity can be demonstrated in the recent decisions of the House of Lords on the control of unfair contract terms in consumer contracts.<sup>44</sup> This piece of E.U. law has led to irritation in the English system, as it submits standard terms to a general fairness test, an approach which runs counter to the ideology of the English Parliament,<sup>45</sup> where regulatory intervention is not meant to challenge the significance of freedom of contract in general but to solve concrete problems.<sup>46</sup>

In conclusion, the basic formula which lies at the heart of English legal culture can be condensed into one single formula—what is useful is right. Here nominalism, empiricism and utilitarianism come together. Freedom of contract is foundational to the common law on contracts, and statutory intervention is acceptable as long as it aims at solving concrete consumer or labor concerns.

#### B. The French Model: Rational and Political

France has a particular historical role in the legal and theoretical discourse on the interrelationship between constitution-building and the making of private legal order. The results of the French revolution are still shaping our understanding of constitutions, civil codes, “contract,” and “tort” today. In only twenty years the key events in France which would define these notions occurred. In contrast, in the United Kingdom similar notions developed from an evolutionary process, where no clear-cut moment of constitution building and private legal order making can be fixed. The French Revolution led to a break with feudalistic structures<sup>47</sup> and instituted a

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<sup>43</sup> See LUCINDA MILLER, *THE EMERGENCE OF EU CONTRACT LAW – EXPLORING EUROPEANIZATION* (2011) (analyzing the struggle in the UK over the implementation of Directive 99/44).

<sup>44</sup> Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 95) (EC).

<sup>45</sup> See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, 61 MOD. L. REV. 11 (1998).

<sup>46</sup> See *Office of Fair Trading v. Abbey Nat'l plc & Others*, [2009] UKSC 6, [2010] 1 A.C. 696 (appeal taken from Eng. and Wales); *General of Fair Trading v. First Nat'l Bank plc*, [2001] UKHL 52, [2002] A.C. 481 (appeal taken from Eng. and Wales); Hein Kötz, *Schranken der Inhaltskontrolle bei den Allgemeinen Geschäftsbedingungen der Banken: Entscheidung des britischen Supreme Court*, 25 ZEuP 332 (2012).

<sup>47</sup> See HANNAH ARENDT, *ON REVOLUTION* (1963).

bourgeois society governed by individual freedom and equality of rights, which became even more visible in the Code Civil and in the French Constitution.<sup>48</sup> The Revolution's legacy can easily be found in the German Civil Code, which was adopted a century later.

To portray the French understanding of freedom of contract and regulation, I start from two premises. First, the vision of the French revolution, which was proclaimed in the Declaration of Human Rights, pinned down in a Constitution, and later codified in the Civil Code, has deeper social, cultural, economic, and intellectual roots. I argue that today's conception of freedom of contract in France can best be understood as a political forward-looking concept, which can be traced back to French Rationalism<sup>49</sup> and Descartes.<sup>50</sup>

Secondly, French society may be characterized by the tension between intellectual projects guided by “les grandes idées,”—the French Constitution and the French Code—which strengthen the power of the Executive to the detriment of the Judiciary, and the highly politicized bottom-up resistance against an excessively far-reaching executive power.<sup>51</sup> The fight over “the Social”<sup>52</sup>—the regulatory intervention to protect workers in employment contracts and later the consumers in business to consumer (B2C) contracts—has demonstrated that setting limits to freedom of contract through statutory intervention is a highly politicized matter that is subject to potential conflicts.

Just as in England, the intellectual turning point in France can be attributed to the fading influence of scholastic thinking. Academic

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<sup>48</sup> See FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 343 (1967).

<sup>49</sup> For a deeper analysis, see LAURENCE BONJOUR, *IN DEFENSE OF PURE REASON* (1998); Laurence BonJour, *A Rationalist Manifesto*, 18 *CANADIAN J. OF PHIL. SUPPLEMENTARY* 53 (1992).

<sup>50</sup> See EGON FRIEDEL, *KULTURGESCHICHTE DER NEUZEIT: DIE KRISE DER EUROPÄISCHEN SEELE VON DER SCHWARZEN PEST BIS ZUM ERSTEN WELTKRIEG* (2007) (discussing Descartes and his methodological thinking).

<sup>51</sup> This is my own interpretation of the French development.

<sup>52</sup> See Kennedy, *supra* note 24, at 19, 95 (discussing the rise of “The Social” and its intellectual origins); from a German perspective, but taking the French impact into account, in particular Duguit, Salleilles and Gény, see Wieacker, *supra* note 48, at 543 § 28 (“Der Zerfall der inneren Einheit des Privatrechts und das Sozialrecht”). In that vein, law has a particular social function to fulfill.

questioning of the spirit evolved from the methodological constraints of scholasticism and paved the way for a new rational method in philosophy. French philosopher Michel Eyguem de Montaigne (1533-1592) set long-lasting incentives for critical reflection of all existing knowledge and values, which later came to be known as “Enlightenment.”<sup>53</sup> This new method to investigate the “truth” and the concept of the truth was left in the seventeenth century to Descartes, who began with his *Discours de la Méthode*.<sup>54</sup> Descartes claimed that a particular method to acquire the truth was needed to solve all philosophical questions. Unlike utilitarianism, Descartes believed that what is true is useful. Without Descartes’s theory, it is difficult to understand the political conception of the French Civil Code. Descartes’ philosophy results in the priority of theory over practice, which is the basic thesis of French intellectualism.

Based on this premise, the link between the French political project of freedom of contract and the particularities of the French legal culture become clear. Freedom of contract is first and foremost tied to the key function of the “reason,” “*raison*,” or “*Vernunft*” in the French civil law system. The idea is that freedom of contract is more than just an exercise to maximize mutual economic benefit. More is at stake in the communication between the parties, namely, the commitment to a contract is the product of a reasonable decision. *Autonomie de la volonté* is bound in the belief or assumption (“*Einsicht*”) in a higher reason that is deeper than the individual transaction.<sup>55</sup> This is the Cartesian side of the concept of *autonomie de la volonté*. However, there is also the *Rousseauian* side, and it is here where the political dimension of the concept of *autonomie de la volonté* is more obvious. *Autonomie de la volonté* may not be equated with individual freedom in the meaning of German idealism, which is inward looking. To the contrary, it is outward looking toward society itself and to the embedding of reason into the political environment. This is what Rousseau called the *volonté générale* (general will). Without Rousseau’s concept of democracy and the conviction that the people will consent

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<sup>53</sup> See FRIEDEL, *supra* note 50.

<sup>54</sup> RENÉ DESCARTES, DISCOURS DE LA MÉTHODE POUR BIEN CONDUIRE SA RAISON, ET CHERCHER LA VÉRITÉ DANS LES SCIENCES (1637).

<sup>55</sup> This implies the need to look for a certain substantive equivalence in the mutual contractual relations, in German “*das materielle Äquivalenzprinzip der vernunftrechtlichen Vertragslehre*.”

to the *volonté générale*, it is not possible to understand the political dimension of the concept of autonomy in the French civil code.<sup>56</sup>

In France, there is also a peculiar understanding of the role and function of regulatory intervention in the economy to protect workers and consumers and, more in general, to restrict freedom of contract in commercial transactions through statutory regulation. Since mercantilist times, the French government played a strong role in the organization and creation of the economy.<sup>57</sup> The economy must follow political prerogatives in order to address social concerns and any other political requirements. What matters for our discussion is the strong connection between the role and function of the political, and the understanding of regulatory intervention. The political dimension must not necessarily materialize in a top-down fashion, i.e. through legislative acts on what nowadays is called social regulation or executive intervention into the management of the economy of the country. The political may also emerge bottom-up, through resistance on the streets against the supremacy of the state managed economy over politics.

To demonstrate the continuity of the French legal conscience (*Rechtsbewußtsein*) and of the breadth and depth of the political in social regulation, I will again start with reference to the implementation of E.U. Directive 99/44/EC on consumer sales. Under strong pressure from civil lawyers and civil law doctrine, the French legislature decided that, rather than integrate the rules on consumer protection into the Civil Code, it would place the respective articles in the *Code de la Consommation*.<sup>58</sup> This strategy preserved the integrity of the Civil Code as an “eternal” political project, which might be regarded as an integral part of the French identity.<sup>59</sup> However, there is one notable difference

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<sup>56</sup> I am fully aware that Rousseau differs from Descartes in his image of the person.

<sup>57</sup> See KARL PRIBRAM, *GESCHICHTE DES ÖKONOMISCHEN DENKENS*, [A HISTORY OF ECONOMIC REASONING] 194 (Erster Band ed., Horst Brühmann trans., 1998); COLIN HEYWOOD, *THE DEVELOPMENT OF THE FRENCH ECONOMY 1750-1914* (1995).

<sup>58</sup> See MILLER, *supra* note 43 (reconstructing the political fights over the correct way to implement Directive 99/44 in the French legal system).

<sup>59</sup> French scholars had a strong reaction against the idea of a European Civil Code. See YVES LEQUETTE, *QUELQUES REMARQUES A PROPOS DU PROJET DE CODE CIVIL EUROPEEN DE MONSIEUR VON BAR 2202-14* (2002); Bénédicte

to the English method of transposition. Contrary to the problem based U.K. approach on consumer protection, the French *Code de la Consommation* was originally designed according to a political model, a blueprint which was similar to the Civil Code in that it could guide the development in Europe of a consistent body of consumer law rules.<sup>60</sup>

Contrary to most other Member States in the European Union, the consumer movement in France bore a strong political dimension, at least in the 1970s and 1980s, which largely derived from politicization through integrating consumer policy into politics. Trade unions in France were tied to various left wing parties, each of which had to leave their footprint on the then new policy.<sup>61</sup> It is only because the European Union took over consumer policy in the second half of

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Fauvarque-Cosson, *Faut-il un code civil européen?*, REVUE TRIMESTRIELLE DE DROIT CIVIL 463 (2002); see also Christian Joerges, *Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechtsdisziplin*, in EUROPÄISCHES PRIVATRECHT IM WISSENSCHAFTLICHEN DISKURS 133, 142 (Andreas Furrer ed., 2006) (interpreting the conflict between the German professorial model of the Bürgerliches Gesetzbuch (BGB) and the democratic tradition of the Code Civil); Wolfgang Wurmnest, *Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze – Ansätze internationaler Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa*, 11 ZEUP 714 (2003); Bénédicte Fauvarque-Cosson, *Droit européen des contrats: première réaction au plan d'action de la Commission*, RECUEIL DALLOZ 1171 (2003); Philippe Malinvaud, *Réponse-bors délai-à la Commission européenne: à propos d'un code européenne des contrats*, in PENSEE JURIDIQUE FRANCAISE ET HARMONISATION EUROPEENNE DU DROIT 231 (Bénédicte Fauvarque-Cosson & Denis Mazeaud eds., 2003) ; JEAN HUET, *NOUS FAUT-IL UN 'EURO' DROIT CIVIL?* 2611-14 (2002). Whether or not the French Civil Code would pass the identity test under the Lisbon Treaty is another story. See Hans-W. Micklitz, *German Constitutional Court (Bundesverfassungsgericht BVerfG) 2 BvE 2/08, 30.6.2009 – Organstreit Proceedings between Members of the German Parliament and the Federal Government*, 7 EUR. REV. CONT. L. 528 (2011).

<sup>60</sup> JEAN CALAIS-AULOY, COMMISSION DE LA REFONTE, LE DROIT DE LA CONSOMMATION EN FRANCE (1981).

<sup>61</sup> This might explain why attempts to build connections between labor law and consumer law were particularly strong in France, to some extent in Italy, and only marginal in Germany. See MICHEL MIAILLE, *UNE INTRODUCTION CRITIQUE AU DROIT* (1976); ENZO ROPPO, *VERBRAUCHERSCHUTZ UND KLASSENTHEORIE* 109 (1976); KLAUS TONNER, *VERBRAUCHERSCHUTZ ALS GEWERKSCHAFTLICHE AUFGABE* 252 (1979); KLAUS TONNER, *VERBRAUCHERSCHUTZ UND KLASSENTHEORIE – ERWIDERUNG AUF ENZO ROPPO* 241 (1976).

the 1980s after the Single European Act<sup>62</sup> that consumer policy became de-politicized in France.

### C. The German Model: Liberal and Authoritarian/Paternalistic

The German Civil Code is 100 years younger than the French Civil Code. In 1815, the aftermath of the Congress of Vienna and the scattered German regions that comprised various kingdoms and counties (earldoms) failed to unite into a German state under a common constitution. It took until 1871 before Germany managed, under the regime of the Prussian king and his chancellor Bismarck, to finally adopt a constitution. It took an additional thirty years before the *Bürgerliches Gesetzbuch* (BGB), as it is called in German, was enacted.

My arguments are built upon two major guiding assumptions. First, there is a direct line from Kant to Savigny to Weber and the formal rationality of the private law system, which serves to constitute the capitalist society. The Kantian philosophy inspired Savigny to formulate the so-called *Historische Schule* (Historical School), which was influential during the nineteenth century among private law theorists and, remarkably, continues to be influential even after the fall of the wall in 1989.<sup>63</sup> *Historische Schule* has created a particular way of thinking, favoring the transition from “The Social” to the “pure” private law system. Social issues and regulations were outsourced by a technocratic decision to specialize private law legislation outside the BGB, although adopted 100 years later than the more integrative approach of the French Code Civil.<sup>64</sup> This time period gave the German BGB a

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<sup>62</sup> Single European Act, Feb. 28, 1986, 1987 O.J. (L 169) (entered into force July 1, 1987).

<sup>63</sup> See Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Science*, 112 L.Q. REV. 576 (1996); Horst Eidenmüller et al., *The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems*, 28 OXFORD J. LEGAL STUD. 659 (2008) (criticizing the European private law codification project, which is inspired from and based on the destruction of the common philosophical ground of private law in the civil and common law systems).

<sup>64</sup> Both the French Code Civil and the German BGB covered tenant law. In France, tenant law has remained an integral part of the civil code, whereas German tenant law has become a legal field in itself, outsourced in special acts and only partially integrated in the BGB through the modernization of the law of obligations (*Schuldrechtsmodernisierungsgesetz*) in 2002. For details on the development of

particular ideological outlook, which maintained and defended an early nineteenth century bourgeois model of society and economy against the rising political and social transformations brought about by the industrial age and the labor movement.<sup>65</sup>

Second, there is the link between Fichte, Hegel, Thibaut, German idealism, and legal naturalism, as expressed in Jhering, von Gierke, Ehrlich, Weber, and Kantorowicz wherein national ideals were tied to the social ideals of a society and a nation.<sup>66</sup> Such a vision can hardly be connected to the authoritarian Prussian state, which provided social protection to workers<sup>67</sup> only as a means to compensate workers for their exclusion from political participation (*Sozialistengesetze* 1978). The German version of legal naturalism favors an instrumental use of social regulation, but carefully avoids and downplays the political dimension inherent in “The Social.”<sup>68</sup>

The intellectual quarrel between two German law professors, Thibaut and Savigny, over the value of a codified German Civil Code is paradigmatic for tensions arising in the German legal system: Thibaut fought enthusiastically in Heidelberg—inspired by German Idealism and les *grandes idées* of the French revolution—for a genuine German Code; Savigny fought brilliantly (but not enthusiastically) for the maintenance of the old Roman law.<sup>69</sup> Law-making in Germany in the early nineteenth century was understood as an academic exercise, quite contrary to the democratic discussion that surrounded the

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tenant law in Europe, see Christoph U. Schmid & Jason R. Dinse, *The European Dimension of Residential Tenancy Law*, 9 EUR. REV. CONT. L. 201 (2013).

<sup>65</sup> There is a connection between the late industrialization relative to the UK, the labor movement, and the Bismarckian reaction. See, e.g., HUGO SINZHEIMER, EIN ARBEITSTARIFGESETZ: DIE IDEE DER SOZIALEN SELBSTBESTIMMUNG IM RECHT (1916).

<sup>66</sup> See WIEACKER, *supra* note 48. Most of the legal auxiliary sciences such as criminology and legal sociology have their origin in legal naturalism and in the Freirechtsschule (Free Law Movement).

<sup>67</sup> E.g., 1883 health insurance, 1884 accident insurance.

<sup>68</sup> See Hermann U. Kantorowicz who attacks Savigny’s influence on the construction of the Civil Code and on what I call here “Rechtsbewußtsein”. Hermann U. Kantorowicz, *Was ist uns Savigny*, 1 RECHT UND WIRTSCHAFT 47, 76 and seq. (1911).

<sup>69</sup> ANTON FRIEDRICH JUSTUS THIBAUT & FRIEDRICH CARL VON SAVIGNY, IHRE PROGRAMMATISCHEN SCHRIFTEN, MIT EINER EINFÜHRUNG VON HANS HATTENHAUER (1973).

adoption and distribution of the French Civil Code.<sup>70</sup> The outcome was a civil code that lacked the required “socialist oil.”<sup>71</sup> This defect was remedied in the twentieth century by judges through judge-made law, and by the legislator through the adoption of numerous special laws.

German legal culture has two main components: a liberal dimension, which is shared by English law and enshrined in commercial freedom to contract; and a political dimension, which is shared by French law and enshrined in the much stronger commitment to “The Social.”<sup>72</sup> The English streak dates back to the merging of the German *Länder* (states) under a tight Prussian grip, which triggered the industrial revolution and led to an amazing boost for the economy. In this context, the predominance of the market and a sense of English pragmatism can be felt. The German state, however, is not a liberal-enabling state in the Anglo-Saxon sense. The German state is rooted in the authoritarian heritage of pre-democratic times. As such, the state is seen as the key regulator to realize not only economic but also political objectives, which brings German legal culture nearer to its French counterpart. However, contrary to France where the political also bears a strong top-down dimension, the political dimension in Germany is more bottom-up as it is always connected to expectations set by the citizens of the state. Today, the early Bismarkian regulatory state and the post-World War II welfare state still bears elements of authoritarian care-taking, which is different from England due to the strong interventionist side and different from France due to the lack of an open political discourse. The tension between the liberals and the

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<sup>70</sup> See Reinhard Zimmermann, *Consumer Contract Law and General Contract Law: The German Experience*, 58 CURRENT LEGAL PROBS. 415 (2005); Harm Schepel, *Professorenrecht? The Field of European Private Law*, in LAWYER'S CIRCLES – LAWYERS AND EUROPEAN LEGAL INTEGRATION 115 (2004); Rainer Maria Kiesow, *Rechtswissenschaft – was ist das?*, 12 JURISTEN ZEITUNG 585, 586 (2010).

<sup>71</sup> OTTO VAN GIERKE, *DIE SOZIALE AUFGABE DES PRIVATRECHTS* 13 (1889); TILMAN REPGEN, *DIE SOZIALE AUFGABE DES PRIVATRECHTS: EINE GRUNDFRAGE IN WISSENSCHAFT UND KODIFIKATION AM ENDE DES 19. JAHRHUNDERTS* (2001).

<sup>72</sup> GERT BRÜGGEMEIER, *ENTWICKLUNG DES RECHTS IM ORGANISIERTEN KAPITALISMUS, BAND 1: VON DER GRÜNDERZEIT ZUR WEIMARER REPUBLIK* (1977); GERT BRÜGGEMEIER, *ENTWICKLUNG DES RECHTS IM ORGANISIERTEN KAPITALISMUS, BAND 2: VOM FASCHISMUS BIS ZUR GEGENWART* (1979).

authoritarians explains why political debates in Germany so easily turn into ideological conflicts, just as it was between Thibaut and Savigny.

What does this mean for the German variant of freedom of contract—or private autonomy (*Privatautonomie*) as phrased in the context of the intellectual history—and the limitation of freedom of contract via statutory regulation? Private autonomy centers on the individual. But who is the individual? The reasonable Cartesian French person/citizen, the utilitarian Englishman, or the idealistic Kantian/Hegelian subject? The key question in German legal theory—although not in commercial transactions, freedom of contract, the common law of contracts, or the *droit des obligations*—is how this individual can bind himself legally. The conceptual difference is visible in the comparison between the common law and the German Civil Code. Only the German BGB contains a General Part (*Allgemeiner Teil*), which not only precedes the law of contract, but also precedes family law and the law of succession. The General Part holds the entire German private law system, as laid down in the BGB, together. Its content triggers irritation and uncertainty outside Germany (what is a juridical act? *Ein Rechtsgeschäft?*<sup>73</sup>). The key to understanding the idealistic German concept of private autonomy is to appreciate its roots in the so-called “will theory” (*Willenstheorie*), which states that the individual is bound through his will, rather than through his declaration (*Erklärung*).<sup>74</sup> It is true that the Prussian legislator introduced corrections to the “will theory” into the BGB, which have been amplified by the judiciary in the twentieth century. Idealistic thinking embedded in the concept of private autonomy is still alive: it has been taken up by the Freiburg school, ordo-liberalism, and the private law society.<sup>75</sup> Its counterpart, the resistance against restrictions, more often than not bears a strong ideological bias that is outweighed

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<sup>73</sup> The Academic Draft Common Frame of Reference contains such a general part in compliance with the German BGB.

<sup>74</sup> The “will theory” is extremely helpful because it combines European legal thought with American legal thought. See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94 (2000).

<sup>75</sup> See ERNST-JOACHIM MESTMÄCKER, A LEGAL THEORY WITHOUT LAW: POSNER V. HAYEK ON ECONOMIC ANALYSIS OF LAW 174 (2007) (responding to the critics of law and economics against ordo-liberalism).

by intense legislative activities in the twentieth century for the benefit of those contracting parties with weaker bargaining power.

Again, I will use Directive 99/44/EC as a blueprint to explain the continuity of the German *Rechtsbewusstsein* and the tension between the liberal and authoritarian views of freedom of contract. In the shadow of the so-called modernization of German contract law (*Schuldrechts-Modernisierungsgesetz*) in 2002, the executive, i.e., the Ministry of Justice, used the expiry of the two-year implementation period to complete the twenty-year long pending project of revising the German Civil Code, thereby “smuggling” the bulk of consumer contract law rules into the German Civil Code. This integration of Civil Code and consumer contract law perhaps was not an authoritarian, but a paternalistic move.<sup>76</sup> The academic debates focused almost entirely on the proposed revision of the prescription rules, in particular, on *Leistungsstörungenrecht* (law on the interference with or impairment of the performance of an obligation). This revision has been performed as a technical bureaucratic exercise.<sup>77</sup> Pragmatism might have guided German scholars to accept the development of a new sales law, as a common pattern for business to business (B2B) and B2C relations; however, contrary to France and the Netherlands, there was no deeper political discussion, especially on the possible role of consumer law as an integral part of the civil code, in the open democratic fora in Germany. Until today, consumer law has remained a foreign body in

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<sup>76</sup> There is a deeper discussion needed on the difference between (Prussian) authoritarianism and (post-Second World War) German paternalism. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* ch. VI (1835), for a starting point on this distinction (“[a]bove this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood: it is well content that the people should rejoice, provided they think of nothing but rejoicing. For their happiness such a government willingly labors, but it chooses to be the sole agent and the only arbiter of that happiness; it provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances: what remains, but to spare them all the care of thinking and all the trouble of living?”).

<sup>77</sup> See, e.g., Stephan Lorenz, *Fünf Jahre “neues” Schuldrecht im Spiegel der Rechtsprechung*, 1-2 NEUE JURISTISCHE WOCHENSCHRIFT 1 (2007).

the German BGB. The integration of “The Social” has not led to an overall re-thinking of the foundations of the German BGB. Instead, the two parts, although located in the same civil code, are each rooted in their very particular intellectual history.<sup>78</sup>

#### D. The European Model: Enabling and Restricting

Over the last sixty years, the European legal order and the European constitutional charter<sup>79</sup> have yielded a genuine model of freedom of contract to protect participants in an ever-growing Internal Market. At the same time, however, the European legal order and constitutional charter have also set boundaries to this established freedom of contract.<sup>80</sup> How is it possible that the European Union is able to generate a distinct model, different from national ones? I am not so much interested in whether the emerging European model should be understood as some kind of reaction to the globalization of markets.<sup>81</sup> My focus is on the intellectual history of the European legal order that underpins Europe and the European Union. Although Europe and the European Union are intertwined, they must be kept separate in our discussion.

Perspective matters. Europe is treated as a homogenous whole by those on the outside, and particularly by U.S. legal scholars. Two examples of such over-generalized discussions about Europe include the work of James Whitman on U.S. consumerism versus E.U.

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<sup>78</sup> See HANS-W. MICKLITZ, BRAUCHEN KONSUMENTEN UND UNTERNEHMEN EINE NEUE ARCHITEKTUR DES VERBRAUCHERRECHTS? GUT-ACHTEN A ZUM 69. JURISTENTAG 129 (2012); Hans-W. Micklitz, *Do Consumers and Business Need a New Architecture for Consumer Law? A Thought Provoking Impulse*, 32 Y.B. EUROPEAN L. 266 (2012).

<sup>79</sup> Neil Walker, *Big “C” or Small “c”?*, 12 EUR. L.J., 12 (2006).

<sup>80</sup> See Guido Comparato & Hans-W. Micklitz, *Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU*, in GENERAL PRINCIPLES OF EU LAW AND EUROPEAN PRIVATE LAW 121-54 (Ulf Bernitz, Xavier Groussot & Felix Schulyok eds., 2013); NORBERT REICH, GENERAL PRINCIPLES OF EU CIVIL LAW (2013).

<sup>81</sup> KARL POLANYI, THE GREAT TRANSFORMATION (1944); KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS (Christian Joerges & Josef Falke eds., 2011).

producerism,<sup>82</sup> and the work of Daniel Kelemen on Eurolegalism.<sup>83</sup> In general, scholars tend to treat the south and north, the east and west, and the European Union and European Council the same. Similarly, there is little discussion in contemporary research on where Europe ends: European countries are considered a single entity, this entity is often implicitly equated with the European Union, and then the entity is compared with the United States.<sup>84</sup>

Does the conception of freedom of contract and its statutory limitation reflect a common denominator of English Utilitarianism, French Rationalism, and German Idealism? Is there a foundation shared by the English liberal and pragmatic, French rational and political, and German liberal and authoritarian? To what extent does this intellectual crossover mutually impact England, France, and Germany? Those who stress a common cultural foundation insist on an intellectual exchange between the great minds behind the concepts of empiricism, utilitarianism, rationalism, enlightenment, and idealism. For centuries, European intellectuals shared a common language, Latin, which gradually vanished between the seventeenth and nineteenth centuries. The deeper cultural foundation, however, cannot be based in language alone. For example, in the late nineteenth and early twentieth centuries, leading private lawyers from all over Europe and the United States were involved in intellectual exchange, but all wrote in their respective languages.<sup>85</sup> It seems as if the intellectual

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<sup>82</sup> James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 407 (2007).

<sup>83</sup> R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011).

<sup>84</sup> This kind of stereotyped, over-simplified thinking has been promoted by the Integration Through Law Project by Mauro Cappelletti, Monica Secombe, and Joseph Weiler to compare the constitutional architecture of the then European Economic Community and the United States. See *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE*, *supra* note 39, at 3-68; “INTEGRATION THROUGH LAW” REVISITED: THE MAKING OF THE EUROPEAN POLITY, *supra* note 39. This kind of thinking might be due to the historical circumstances in which it took places. In the mid 1980s there was still the political idea pending that the Member States of the European Union would be ready and willing to transform the European Union into a fully fledged federal United States of Europe.

<sup>85</sup> René Demogue, *La Notion de Sujet De Droit*, *REVUE TRIMESTRIELLE DE DROIT CIVIL* 611-55 (1909); *RECUEIL SIREY, ÉVOLUTIONS ET ACTUALITES CONFÉRENCES DE DROIT CIVIL* 29-51 (1936).

exchange was much more intense hundreds of years ago than it is today, since today the English language dominates the intellectual discourse and non-English contributions to the intellectual history of Europe are no longer perceived.

Wieacker is perhaps one of the few scholars who looks behind the three main intellectual historical strains and condenses the common European legal culture that unites the private law *in der Neuzeit*<sup>86</sup> (in modern times) into three invariables. The first invariable is personalism, which is directly connected to the role of the individual, autonomy, and freedom in private law. The second invariable is legalism in which decisions are bound to the rule of law. The third invariable is European intellectualism, which drives European legal thinking in the direction of thematization, conceptualization, and contradiction-free consistency of the law.

Is Wieacker's theory correct? Is the revitalization of the common European legal culture after the Second World War not guided by the political purpose it had to fulfill? Can the common European legal culture be regarded as an attempt to rewrite legal history? I fear that these questions are too broad for this paper.<sup>87</sup> The debate on the possible legal philosophical foundations of Europe<sup>88</sup> and European private law<sup>89</sup> is just about to start. The handbook edited by Julie Dickson and Pavlos Eleftheriadis<sup>90</sup> on the philosophical foundations of E.U. law mainly focuses on European constitutional

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<sup>86</sup> This is the title of Franz Wieacker's masterpiece, which was translated into English by Tony Weir. See generally WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZENT*, *supra* note 48.

<sup>87</sup> See, e.g., WOLFRAM KAISER, *CHRISTIAN DEMOCRACY AND THE ORIGINS OF EUROPEAN UNION* (2007); RAOUL CHARLES VAN CAENEGEM, *EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENNIA* (2002); FRIEDRICH HEER, *THE INTELLECTUAL HISTORY OF EUROPE* (1968); see also *Kolleg-Forscherguppe Working Paper Series*, KOLLEG-FORSCHERGRUPPE: *THE TRANSFORMATIVE POWER OF EUROPE*, (2009-2015) available at [http://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working\\_paper/index.html](http://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/index.html).

<sup>88</sup> See JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE* (2014).

<sup>89</sup> *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW* (Roger Brownsword et al. eds., 2011).

<sup>90</sup> *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

theory, rather than European private law and European private law theory.<sup>91</sup>

To understand the European model of freedom of contract, it is helpful to look at the intellectual history, and perhaps the constitutional history, of the European Union. This understanding requires a leap to the post-war period, when the European Economic Community was launched and the European Union was created. Scholars<sup>92</sup> advocated for the revitalization and re-invigoration of a common European culture to enable a peaceful and prosperous future for the European peoples. For example, scholars advocated for peace through economic integration, and in 1986, the Single European Act added social integration to the new European legal order.<sup>93</sup>

Economic integration of the European Union is based on the free movement rights and competition. In particular, German academics in the ordo-liberal tradition have argued that private autonomy is enshrined into the free movement rights.<sup>94</sup> Economic integration aims at enabling the growth of, or paving the way for, private entrepreneurship in the ever-bigger common European market. The abundant case law of the European Court of Justice (ECJ) on the four freedoms often involves contractual disputes in which one party seeks access to the market but is barred by national statutory

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<sup>91</sup> The Oxford University Press series, where Julie Dickson and Paylos Eleftheriadis also appeared, includes an ongoing project on the philosophical foundations of private law.

<sup>92</sup> These scholars include academics such as Wieacker, Grossi, and Coing, and political scholars such as Monnet, Schuman, de Gaspari, de Gaulle, and Adenauer.

<sup>93</sup> Fritz Scharpf was one of the most influential scholars in this field. *See generally* FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999) (analyzing the relationship between economic and social integration in Europe).

<sup>94</sup> *See* Stefan Grundmann, *The Concept of the Private Law Society: After 50 Years of European and European Business Law*, 16 EUR. REV. PRIVATE L. 553 (2008). For a nice account of the European economic constitution and its influence on (European) private law, *see* Sabine Frerichs & Teemu Juutilainen, *Rome under Seven Hills? An Archeology of European Private Law* (Helsinki Legal Studies Research Paper Ser., Paper No. 32, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2465873](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465873).

regulation.<sup>95</sup> Private autonomy then obtains a different meaning, namely, it is bound to trans-border business and European economic integration. The European variant is functional and instrumental.

Social regulation in European private law is very much focused on consumer protection.<sup>96</sup> The tone of such social regulation is set by the famous Sutherland Report.<sup>97</sup> Consumers and consumer protection rules are needed to complete the Internal Market (the 1986 program behind the Single European Act). Putting it differently, the price to pay for the Completion of the Internal Market is the adoption of minimum social (protection) standards.<sup>98</sup> The overall philosophy is enshrined in the wording of Article 114 of the Treaty on the Functioning of the Europe Union (TFEU), formerly Article 95 EC and Article 100a respectively, which adopted measures to complete the Internal Market in realizing social protection standards.<sup>99</sup> In the late 1970s and early 1980s, several consumer and labor protection rules were adopted under the unanimity principle, the *enabling* of autonomy and the *limitation* of autonomy go hand-in-hand. The broadening of economic freedoms, similar to common law freedom of contract, preceded the development of protective standards that limited freedom of contract, mainly through binding legal standards.

This development is by no means limited to the field of traditional private law, contract law and consumer protection, or employment contracts and labor protection. European private law is

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<sup>95</sup> Gareth Davies, *Freedom of Contract and the Horizontal Effect of Free Movement Law*, in THE INVOLVEMENT OF EU LAW IN PRIVATE LAW RELATIONSHIPS (Dorota Leczykiewicz & Stephen Weatherill eds., 2013).

<sup>96</sup> See Weatherill, *supra* note 19; HANS-W. MICKLITZ ET AL., EUROPEAN CONSUMER LAW (2d ed., 2014).

<sup>97</sup> PETER SUTHERLAND ET AL., THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENIUM: REPORT BY THE CONSULTATIVE BOARD TO THE DIRECTOR-GENERAL SUPACHAI PANITCHPAKDI (2004).

<sup>98</sup> The European Commission has made an enormous effort after 2000 to transform the minimum social protection standards into maximum standards. However, this effort has largely failed. See Hans-W. Micklitz & Norbert Reich, *Crónica de una Muerte Anunciada: The Commission Proposal for a "Directive on Consumer Rights,"* 46 COMMON MKT. L. REV. 417 (2009).

<sup>99</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 114, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

regulatory by nature, as the European Union is and will be under constant construction. Legal rules remain a key instrument for regulation. The most prominent field of action beyond traditional private law and even traditional fields of social regulation (*e.g.*, consumer and labor protection) has been the so-called regulated markets. The liberalization and privatization policy implemented by the Single European Act in telecom, energy, postal services, transport, and financial services, the dismantling of former state monopolies, amounts to a political decision to establish markets where there were none.<sup>100</sup> This policy enabled freedom of contract with statutory limitations. Therefore, enabling and restricting are the two parameters that characterize the European model of freedom of contract.

#### E. Stand and Stare

Provided my analysis contains an element of truth—and I hope it does—what is the added value of this finding for our understanding of freedom of contract and even more so for the communication between lawyers across legal cultures and traditions, just like those lawyers in our Academy for International Commercial and Consumer Law? First and foremost, the value added is to “Stand and Stare,”<sup>101</sup> and to distance ourselves from our subjects of analysis and own cultural roots and traditions.

“Stand and Stare,” however, is just the first step. I do not want to argue that our legal cultures and traditions are set in stone and that there is no room for mutual learning and for change. Indeed, there is arguably an emerging European legal culture, certainly in key areas of

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<sup>100</sup> See Hans-W. Micklitz, *The Visible Hand of European Private Law*, 28 YEARBOOK OF EUROPEAN LAW 3 (2009); in Italian, *La mano visibile del diritto privato europeo in materia normativa – La trasformazione del diritto privato europeo dall'autonomia al funzionalismo nella concorrenza e nella regolamentazione*, in SEMINARI DEL CONSIGLIO NAZIONALE FORENSE: COLLANA “STUDI STORICI E GIURIDICI” 125-92 (Guido Alpa & Roberta Mazzei, eds. 2010); in Finnish, *Lakimies* 3/2010, 330-56; in Japanese, *Yōroppa kisei watashi-hō no mokusuteki-teki shuhō: Yōroppa watashi-hō no, kyōsō to kisei ni okeru jūritsu kara kinō shugi e no hen'yō*, 12 HOKKAIDO JOURNAL OF NEW GLOBAL LAW AND POLICY 17 (2011); in French, *La main visible du droit privé réglementaire Européen*, 28 REVUE INTERNATIONALE DE DROIT ECONOMIQUE 5-57 (2014).

<sup>101</sup> Roger Brownsword, *The Theoretical Foundations of European Private Law: A time to Stand and Stare*, in FOUNDATIONS OF EUROPEAN PRIVATE LAW 159 (Roger Brownsword et al. eds., 2011).

private law<sup>102</sup>—some would argue this legal culture has been enshrined in Europe since the *ius commune*. There is also an emerging culture of transnational law,<sup>103</sup> which is now gaining ever stronger attention with a refocused understanding and design of comparative and transnational (legal) history.<sup>104</sup> I fear, however, that we are approaching a divided legal world—a world where each state contains a national legal order in which the territory and language are transnational. There is a chance for deepening our understanding of the “many faces of freedom of contract,” for learning from each other and for developing even a common cultural ground.<sup>105</sup>

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<sup>102</sup> TOWARDS A EUROPEAN LEGAL CULTURE (Genevieve Helleringer & Kai Purnhagen eds., 2014).

<sup>103</sup> See Kaarlo Tuori, *Transnational Law: on Legal Hybrids and Legal Perspectivism*, in TRANSNATIONAL LAW, RETHINKING EUROPEAN LAW AND LEGAL THINKING 11 (Miguel Madur, Kaarlo Tuori & Suvi Sankari eds., 2014).

<sup>104</sup> See Thomas Duve, *European Legal History – Global Perspectives Working paper for the Colloquium “European Normativity – Global Historical Perspectives”* (Max Planck Inst. for Euro. Legal Hist. Research Paper Ser. No. 2013-06, 2013).

<sup>105</sup> See Hans-W. Micklitz, *An Essay on the Bifurcation of Legal Education - National vs Transnational* (forthcoming 2015).