2008

Contract Regulation, With and Without the State: Ruminations on Rules and Their Sources

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Washington College of Law Research Paper No. 2008-54

CONTRACT REGULATION, WITH AND WITHOUT THE STATE: RUMINATIONS ON RULES AND THEIR SOURCES. A COMMENT ON JÜRGEN BASEDOW, THE STATE'S PRIVATE LAW AND THE ECONOMY—COMMERCIAL LAW AS AN AMALGAM OF PUBLIC AND PRIVATE RULE-MAKING

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Contract Regulation, With and Without the State: Ruminations on Rules and their Sources. A Comment on Jürgen Basedow, The State's Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making

This paper, commenting on the work of Jürgen Basedow, addresses the legal regulation of economic relations in the context of globalization. The paper applies the idea of the mixed jurisdiction, traditionally focused on legal systems that partake of both the common law and the civil law, to the complex of privately made law and publicly made law that governs contemporary economic relations. Differing criteria that might be used to assess and choose between competing rules or competing systems of rule generation are evaluated, and normative considerations are raised. The paper proposes a model to demonstrate how privately made law, though generated by and adopted in the marketplace, can nevertheless be inefficient economically and questionable politically. The conclusion offers the musical metaphor of a trill to appreciate the dynamics involved in regulating economic relations in a world where rules may come from several states or from private entities.

The symposium called for these papers to consider "The State's Private Law and the Economy," a topic interesting enough, not least because it raises essential questions about what might be meant by the phrase. Jürgen Basedow's article raises this issue, concentrating on two different sorts of private law: "non-state rules governing

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economic life"[1] (which I will call privately made law) and "state law" governing economic life[2] (which I will call publicly made law).[3] For introductory purposes—and at this point speaking roughly—both the state law and the non-state law, or in other words, both the publicly made law and the privately made law, are within the sphere of private law. This sphere stands in classic, if questionable, contradistinction to public law. These carefully drawn categories give structure and life to Professor Basedow's appreciation of this topic, and this comment will follow those categories.

While sympathetic to this approach, one aside should be given voice before we cross the threshold of this lively structure. Curiously, particularly to American eyes, Professor Basedow's paper does not engage in any extensive economic analysis of either privately made law or publicly made law.[4] The paper sometimes discusses economics, to be sure. For example, it underlines how the Coase theorem, together with Cooter and Ulen's corollary, leads to "the implication that property rights must be assigned by the State" to assure "efficient use of resources."[5] But even with points like this one, the paper seems akin to the more humanistic approach to economics that might be associated with scholars like Allan Farnsworth.[6] Professor Basedow's article is not the sort that would likely be classified as a work within any of the several schools of law and economics current in the American academy, whether Judge Posner's neoclassical law and economics, or the newer behavioral law and economics, or law and socioeconomics, or even Austrian economics. That a paper devoted to "The State's Private Law and the Economy" does not easily fall into some such category is remarkable enough in a comparison of German and American approaches to legal scholarship. It is perhaps some testimony to the limited reception of thick economic analysis in the German legal academy,[7]

1. *See* Jürgen Basedow, *The State's Private Law and the Economy*, 56 AM. J. COMP. L. 703, 708 (2008).

2. *Id.* at 715-19. I use *rules* in a rough sense to include rules, norms, standards, and perhaps principles; I believe Basedow is following this usage as well.

3. My phraseology is explained in David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 375-76 (2003) [hereinafter Snyder, *Private Lawmaking*]; *cf.* Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 850 (2006).

4. Professor Basedow does use a somewhat more explicit economic approach in another, related paper. *See* Jürgen Basedow, *Lex Mercatoria and the Private International Law of Contracts in Economic Perspective*, *in* AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 57 (Jürgen Basedow & Toshiyuki Kono eds., 2006).

5. Basedow, *supra* note 1, at 717.

6. *See, e.g.*, E. Allan Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 247-48, 251 (1979).

7. *See* Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602 (2006). I do not wish to overemphasize the point; any subscriber

although not too much should be extrapolated from a single datum.

In any case, the fact that the principal article is not devoted to extended or formal economic analysis is merely an aside. I wish to turn to three other points, and at the end, I will offer a metaphor. The first section applies the idea of the mixed jurisdiction to the structure of lawmaking considered in these papers. A stylized example is given to illustrate potential problems of efficiency and political economy even for privately made rules. The next section suggests some of the differing criteria that might be used to assess and choose between competing rules or competing systems of rule generation. The third section briefly raises the normative issue, and the final section offers the metaphorical conclusion.

I. WE ALL LIVE IN A MIXED JURISDICTION NOW

The "mixed jurisdiction," an object of fascination for scholars of comparative law, provides a nice framework for understanding the legal dynamic that Professor Basedow describes. Traditionally scholars have used the term to describe places where both the common law and civil law govern, such as Scotland, South Africa, Louisiana, Quebec, and perhaps a dozen or so others.[8] The term is sometimes used to include any jurisdiction with competing legal systems as sources of law, though they may not be so easily categorized as common law or civil law. Recently, an alternative approach to classifying mixed jurisdictions has emerged, and interested researchers have begun to apply their tools and analyses to jurisdictions characterized by a plural legal order.[9] On this theory,

to the Social Science Research Network will see legions of articles from European scholars who are doing economic work in the law. Still, there does seem to be something to this notion; one of the German conference participants most immersed in economic analysis has himself discussed the issue. *See* Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 INT'L REV. L. & ECON. 277 (1991); *see also* Kristoffel R. Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism* (U. St. Gallen L. & Econ. Working Paper No. 25, 2007), *available at* http://ssrn.com/abstract=1019437.

8. For a recent survey, see Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 477, 484 (Mathias Reimann & Reinhard Zimmermann eds., 2006). The traditional view was stated influentially in the work of Sir Thomas Smith. *See, e.g.*, T.B. Smith, *The Preservation of the Civilian Tradition in 'Mixed Jurisdictions,' in* CIVIL LAW IN THE MODERN WORLD (Athanassios N. Yiannopoulos ed., 1965); T.B. Smith, *The Common Law Cuckoo: Problems of a 'Mixed' Legal System with Special Reference to Restrictive Interpretations in the Scots Law of Obligations*, [1956] Butterworth's SALR 147, *reprinted in* T.B. SMITH, STUDIES CRITICAL & COMPARATIVE 89 (1962).

9. For reflections on this point, see Vernon Valentine Palmer, *Mixed Legal Systems . . . and the Myth of Pure Laws*, 67 LA. L. REV. 1205, 1205-09 (2007); see also the study by the Law Faculty of the University of Ottawa that is discussed in du Plessis, *supra* note 8, at 482. *Cf.* Michaels & Jansen, *supra* note 3, at 876 (describing jurisdictions that owe "allegiance to numerous different normative orders.").

work on legal pluralism and mixed jurisdictions begins to merge.

A. A Mixture of Publicly and Privately Made Laws

With this understanding, coupled with the insights of Professor Basedow's paper, we come to see that we all live in a mixed jurisdiction now, even without enjoying a legally exotic location like Scotland or Louisiana. Private law, Professor Basedow shows, results from two competing sources: organs of the state and organizations of private parties. The state and non-state systems sometimes complement each other and sometimes compete. The competition occurs in the dialectic that is observable in some reasonably familiar areas of transnational economic regulation. Although state sovereignty might be presumed to win such competitions, experience shows that sometimes privately made law prevails.[10]

Following Professor Basedow's lead, the law on letters of credit provides a fine example. These financial and legal instruments have for centuries been governed by international customs, and these customs have long been codified by the International Chamber of Commerce in the *Uniform Customs and Practice for Documentary Credits* (or the UCP, as it is called).[11] At the same time, letters of credit are governed in the United States by state law, particularly Article 5 of the Uniform Commercial Code (UCC). Before its 1995 revision, Article 5 was dissonant with the UCP in a number of important respects, including basic issues of revocability and preclusion. One of the chief goals of the revision was to "[h]armonize" Article 5 with the UCP, and this harmonization was vaunted by its

10. *Cf.* Basedow, *supra* note 1, at 720 ("the State may interfere with private rules by appropriate legislation or court decisions at any time"). *See also* Ralf Michaels, *The Re*-state-*ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1236-37 ("The state can only hope to maintain its legitimacy and the legitimacy of its lawmaking monopoly if it gives non-state communities sufficient space for the development and enforcement of their own norms.").

11. The current version is generally known as UCP-600 (eff. July 1, 2007). *See* INT'L CHAMBER OF COMMERCE, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS: UCP 600 (2007 rev.). The influence of the UCP that is discussed in the text is based on UCP-500, which was in force from January 1, 1994 to June 30, 2007. *See* U.C.C. Article 5; *see also* Basedow, *supra* note 1, at 709-10; Snyder, *Private Lawmaking*, *supra* note 3, at 389-95. Of course custom arises in private law in many ways other than private codification. Deference to custom is familiar in countless governmental codes, including the seminal French *Code civil*, both in contract interpretation in general, *see* C. CIV. (Fr.) art. 1160, and in the more tasty particular, *see id.* art. 1587 (tasting of wine and oil). For a more general view of custom and its role in contract, see David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617 (2001) [hereinafter Snyder, *Custom*]. *See also infra* note 49 (on the debatable efficiency of custom).

sponsors as one of the chief benefits of the revision.[12] Two systems, publicly made law and privately made law, offered competing rules. The privately made law prevailed.[13]

To be clear, the argument here is not that privately made law will always prevail. How the systems react to each other and which rules prevail in a system of both publicly and privately made law is a large question on which Professor Basedow offers insights[14] with which I have no quarrel, although the question can also be analyzed in the terms of political economy (such as federalism)[15] or market theory (regulatory competition).[16] Nor is my point that the state and private actors are inevitably in competition. Indeed, even law that appears to come from the state is sometimes privately made before the official state intermediation, and this is true not only as a deep historical matter, as Professors Jansen and Michaels have shown,[17] but is particularly true of the UCC, including Article 5.[18] Rather, the suggestion here is that there are competing sources of rules from competing systems, some characterized more by their private origins and some more by state intermediation. Thus the phenomena Professor Basedow has described fit the broad theory of the mixed jurisdiction.

For some purposes such a broad view could make the category of the mixed jurisdiction limitless and therefore taxonomically useless, or it could simply collapse into notions of legal pluralism.[19] For other purposes—bringing the lessons of mixed jurisdictions to a wider world—the broad view is promising. This suggestion is related to F.H. Lawson's argument that the mixed jurisdiction is a potential

12. UCC Art. 5 prefatory note ("Harmonization with International Practice" refers explicitly to the UCP and several areas of dissonance under the heading "Balance of Benefits").

13. This exposition simplifies the characterizations of these rulemaking systems, and one might argue (as several have, including the present author) that the UCC should itself be considered privately made law, to some degree. Even so, the UCC has more hallmarks of publicly made law than does the UCP, for legislative enactment is required in the case of the UCC, and thus the example holds. At the same time, such worldly examples highlight an important qualification to the textual dialectic, for often rules and the systems of making them will include both private and public aspects. *See generally* Snyder, *Private Lawmaking*, *supra* note 3, at 378-80 (UCC); *see also id.* at 389-95 (examining relation of UCC Article 5 to UCP); Basedow, *supra* note 1, at 16. A similar point is discussed *infra* note 68.

14. Basedow, *supra* note 1, at 720-22.

15. *See* David V. Snyder, *Molecular Federalism and the Structures of Private Lawmaking*, 14 IND. J. GLOBAL LEGAL STUD. 419 (2007) [hereinafter Snyder, *Molecular Federalism*].

16. Some entries into this large literature are collected in *id.* at 421 n.8.

17. Nils Jansen & Ralf Michaels, *Private Law and the State: Comparative Perceptions and Historical Observations*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 345, 358-92 (2007).

18. *See supra* notes 10-13 and accompanying text.

19. *See* Palmer, *supra* note 9, at 1205 & n.2; du Plessis, *supra* note 8, at 481.

source for "a future uniform law of the world,"[20] or in other words, for a law beyond the state. Indeed, this idea suggests a way to put together the kinds of insights offered by Paul Schiff Berman on global legal pluralism[21] with the learning of the last few generations on mixed jurisdictions. Professor Berman suggests the value of sustaining and managing "hybridity" instead of suppressing it through, for instance, universalist efforts to achieve uniformity. Coupling this idea with Lawson's admittedly different idea points to a possible resolution of competing views as the world moves to a law beyond the state. The answer might be found in an effort to achieve a uniform recognition and management of multiple sources of law, just as has existed for centuries in the several carefully studied mixed jurisdictions.

This approach to regulation seems especially appropriate in the context of these papers: economic relations. The law can realize the efforts of multiple rule-makers, private and public, just as private transactions capitalize on the multiple inputs and combinations, sometimes cooperative and sometimes adversarial, of market actors. Although I do not mean to suggest that the market for laws is the same as the markets that those laws regulate,[22] the similarity has to be mentioned, particularly here. Markets, after all, have become increasingly globalized. The development of a law beyond the state may well be expected to follow the same generative dynamics that loosened the bonds between markets and the state in the first place.

B. Characteristics of the Competing Legal Systems: Of Economics and Political Economy

From the recognition of the mixed nature of the current legal order (in this context, the term *jurisdiction* seems narrow and outmoded), it follows that the competing systems will require further consideration. Given that they produce different rules, the fact that they have different goals should hardly be surprising. Professor Basedow goes to the heart of the issue when he notes that the goal of a (presumably democratic) state will seek to protect society at large, and state legislation could thus interfere with the privately ordered affairs of a more particular group.[23] On the other hand, he does not

20. F.H. Lawson, *The Field of Comparative Law*, 61 JURID. REV. 16, 26 (1949). Lawson attributed the idea to Lévy-Ullmann. *See also* Palmer, *supra* note 9, at 1210-12.

21. *See, e.g.*, Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

22. Erin O'Hara and Larry E. Ribstein have worked on these ideas for some time. For a recent effort, see *Rules and Institutions in Developing a Law Market: Views from the U.S. and Europe*, *available at* http://ssrn.com/abstract=1100277. Their book, THE LAW MARKET, is forthcoming from Oxford University Press.

23. *See* Basedow, *supra* note 1, at 720.

elaborate on the goals of private lawmakers, aside from their aim to avoid the interference of public lawmakers.[24] A few more words seem in order.

Private rule-makers will plausibly have a number of additional goals. Some are economic. Private groups may seek to reduce transaction costs. By specifying many terms centrally (as in the UCP or other trade codes),[25] individual parties are saved the expense of either specifying the terms individually or risking terms imposed by a relatively ignorant tribunal. Another goal may be to seek the benefits of uniformity when they outweigh the benefits of diversity.[26] These goals seem largely unobjectionable, although some pause is required to consider whether all of the practices are as efficient as they look. There may be an irrational attachment to elegant uniformity,[27] for instance, and commercial norms can develop in inefficient ways, as has been discussed in a substantial economic literature.[28]

More pointedly, some other less beneficial economic activity may be going on, even on the surface. There may be rent-seeking as monopolistic potentials are realized; whenever players get together to form rules, concerns about competition arise. The group may seek to fix prices, to coordinate their practices in a way that has an effect similar to price fixing, to exclude others from entering the market, and so on. By erecting an elaborate regime to which all serious market players must adhere, a group can certainly achieve

24. *See id.* at 721-22.

25. *Cf.* Basedow, *supra* note 1, at 716. For a study of codification efforts in other contexts, see Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 780 (1999) [hereinafter Bernstein, *Questionable Basis*]; *see also* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

26. For a consideration of the costs and benefits of uniformity and diversity, see Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 137-41 (1996). Note that sometimes even private rule-makers are able to achieve a remarkable degree of uniformity, possibly because their work is of outstanding quality, and possibly because they lobby public lawmakers, successfully arguing that any state or party that fails to adopt the privately made rules will suffer high transaction costs, obstreperous coordination problems, and consequent economic detriment. These arguments have been well studied with respect to the Uniform Commercial Code, almost all of which has been enacted in one form or another by virtually all U.S. states, even though it is promulgated by the private American Law Institute and the quasi-private National Conference of Commissioners on Uniform State Laws. Some leading articles are collected in Snyder, *Private Lawmaking*, *supra* note 3, at 383 n.35. The nearly uniform adoption of the UCP in international letters of credit is also often remarked. For some estimated statistics, see *id.* at 391, n.71.

27. *See* Ribstein & Kobayashi, *supra* note 26, at 150-55, 183-84, 187.

28. *See infra* note 49.

anticompetitive effects. But anticompetitive effects are a lesser concern as myriad antitrust and competition laws are in place to address the problem. Although enforcement may not be optimal, it is nevertheless a reasonably robust threat to deter misbehavior.

Other activity is not as well addressed by publicly made law, however. Professor Bernstein has observed that some industry players may seek to have their rules imposed on other industry players—not to raise barriers to entry, but to gain a competitive advantage over a rival that will have to change the way it does business. This practice is a form of rent-seeking and such behavior may be expected.[29] For example, the (successful) effort of money-center banks to use a UCP revision to consolidate their position over other banks, and to enhance their revenues, should be no surprise.[30]

Further, while one actor or group of actors may seek to gain advantages over rivals, the organizational entity itself may seek to extract rents for itself, even at the expense of its members. Caution about casting an unjustified aspersion leads me to state this possibility in the abstract:

> Suppose there is an Association (*A*) composed of many businesses and banks (B_1 to B_{500}). *A* publishes a widely adopted and influential rulebook that arguably is in need of revision. The revision will cost each *B*, on average, $100,000. The revision will cost *A* $200,000. *A* can expect to earn $1 million from publishing revenues generated by the revision. Each *B* faces a return that is uncertain; the return could be negative because of continuing costs of implementation, unexpected and new litigation costs, and so on, or could be positive, based on reduced litigation and transaction costs.
>
> In addition, there are many further businesses and banks (C_1 to $C_{10,000}$) that use the rulebook but that are not members of *A*. The revision will cost each, on average, $20,000 in initial implementation costs. Further costs and benefits are again uncertain and could be either positive or negative.
>
> Suppose further that members of the staff at *A* will gain job security and prestige, as well as greater employment prospects in the future, if they work on the revision of the rulebook.

On these facts, the cost to the members of *A* is $50 million in return for benefits that no one can predict with confidence. The cost to the industry (*B* and *C*) is $250 million, again with no more certain benefits. The cost to *A* is a substantial $200,000 but with an

29. *See* Bernstein, *Questionable Basis*, *supra* note 25, at 740-44.
30. *See* Snyder, *Private Lawmaking*, *supra* note 3, at 393-94.

attractive return of $1 million, along with prestige, job security, job prospects, and other intangible benefits.

These numbers may be exaggerated, but I suspect that few readers will doubt that this revision will be undertaken, and many readers probably can think of such revisions that have indeed been undertaken in similar circumstances.

While these ruminations can be nothing more than surmise on my part, if the model is plausible then the conclusion is that coordination can encourage inefficient rent-seeking that sometimes is not fully recognized. Private lawmaking can have economic goals, but those goals are not necessarily efficient. Several modes of analysis offer tools for understanding these problems, and they can be considered in terms of political economy, collective action, and bureaucracy, or in terms of economics, market power, and agency. On the first set of terms, the conflict is between the staff and the *C* group, and to a lesser extent, the *B* group. Because the *C* group lacks representation in *A*, the staff can appropriate rents from *C* without worry. In addition, but to a lesser extent, the staff conflicts with the *B* group as well, but in this case the staff must be careful because the *B* group ultimately controls *A*. This control, however, may be more theoretical than real. With concentrated benefits and low costs to the staff, and diffuse and uncertain costs and benefits to the *B* group, the staff or management can and will drive the agenda. The dynamics might work otherwise if the costs to the *B* group were better known, or if those costs were less dispersed among the group, or if the staff did not have an incentive to keep those costs as obscure as possible. In this case, however, the staff may well achieve the rulemaking revision, even though society in general and the industry in particular may have been better off either without the revision or by waiting longer before embarking on the project.

Along the same lines, law and economics offers another terminology for this problem, seeing the matter in terms of a principal-agent conundrum coupled with market power and negative externalities. Most of the costs ($200 million) of the revision will be borne by the *C* group, which has no say in a decision that will be taken by the staff and the *B* group. This is a typical example of externalizing costs. The *B* group itself bears some of the costs, so *A* and the staff cannot externalize all costs. As before, though, the diffuse costs among the *B* group and the concentrated benefits at *A* render the *B* group unable, or at least unlikely, to police *A* and its staff, even though *A* in theory consists simply of the *B* group and is under the control of the *B* group. This point is fortified by the problem of information costs. Knowing the costs engendered by the revision will be difficult—costly—under the best of circumstances, and here the staff will have an incentive to keep those information

costs prohibitively high to the *B* group. Although the staff is hardly in control of all of the information, the costs of information, added to the concentrated benefit to the staff and the diffuse costs to the *B* group will make the revision likely. The *B* group, while in theory the principal, will in practice often be unable or unwilling to exert effective control over *A* and the staff, though both are agents of the *B* group.

If there were viable rivals to *A* and its rulebook, or sufficiently low barriers to entry, the problem would not arise. In rule-generating situations, however, these checks on the power of *A* and its staff will often be illusory. The rulebook likely holds much of its importance from being in widespread use (a network effect). For a serious rival to emerge, its rules would have to come into sufficiently widespread use to carry the network benefits of rules. The point of rules, after all, is to assure that not only one party but that other counterparties will be following them. In this situation rivals or market entrants will have great difficulty in emerging. This frequent reality will contribute to *A*'s market power and will dampen potential market responses.

None of these observations is really new, and extensive work in other contexts buttresses the point. The literature on the de facto independence of corporate management from shareholder control[31] illustrates what is much the same problem, although perhaps in a paler version as the network benefits of rulemaking do not necessarily apply to the typical corporate context. In terms of political economy, and in a closer context, Professors Schwartz and Scott have shown that the prestige of achieving enacted law reform can be an attractive prize, a lure that can shape the formal rules into platitudes or principles that may be less efficient than harder, clearer rules.[32] To simplify their conclusion: faced with a choice between proposing a soft rule that will pass and a hard rule that will not, the "reformers" choose the soft rule in order to have an accomplishment to show for their efforts, even if a hard rule would be better.

This observation leads to two related points, leaving aside the sizeable question whether soft rules (standards) are really bad and hard rules (rules) are really good. First, the political economy of

31. Recent and helpful contributions from prominent scholars include Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789 (2007). They provide ample entry into the large body of scholarship on this issue.

32. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); *see also* Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994); Robert E. Scott, *The Truth About Secured Financing*, 82 CORNELL L. REV. 1436 (1997); Robert E. Scott, *Commentary on Professor Carlson's Article: The Mythology of Article 9*, 79 MINN. L. REV. 853 (1995).

private lawmaking in general and of the ALI and NCCUSL in particular is different from the political economy of public lawmaking. Second, different private lawmakers can be expected to be characterized by different political economies. A private organization dedicated to law reform and consisting of lawyers, judges, and academics is different from a private organization consisting of a significant staff but whose members are banks and businesses, and both of these private organizations are different from public legislatures and from courts. And of course the public institutions themselves can differ significantly in their structure and goals, and thus their political economies. The European Union is dedicated to the common market and its legislation is thus purportedly aimed at market concerns,[33] but the existence of an enormous bureaucracy interested in the agglomeration of further power, prestige, and money in central E.U. institutions can have a significant effect on the shape of E.U. law.

C. Alternatives: Of Competing Goals and Logic

Keeping this range of public and private lawmakers in mind, we may analyze the point further, noting that the goals of the lawmaking organizations are different, the training and outlook of the members are different, and each lawmaker will follow a different method in generating rules. Perhaps *logic* is better than *method*, as a method implies a purposeful approach that may be lacking. Logic, on the other hand, suggests that each mode of rule generation makes sense on the terms of the particular system and the world in which it operates—with its peculiar assumptions, definitions, orientations, and goals. Some organizations and their members may be more lawyerly and attuned to procedural values, while others may be more businesslike and attentive to economic considerations. Others may be academic. As such, they may be interested in rationality and technical coherence. They may instead prefer theoretical or ideological commitments, like a sociological approach to law, or an aim to implement immanent norms, or an effort to achieve distributional fairness. Some rulemaking may be spontaneous while some may be deliberative. Some rule-makers are market-driven while others are democratic.

This abstract catalog brings to mind a number of concrete examples. Consider the American Law Institute and its lawyerly and procedural projects,[34] or the Lando Commission and its careful

33. *See* Michaels & Jansen, *supra* note 3, at 861.

34. This characterization is perhaps most apparent from the verbatim transcripts of the ALI meetings, taken down by a court reporter and published from 1923 to the present in the A.L.I. PROCEEDINGS.

academic work.[35] Then contrast the Lando Commission's *Principles of European Contract Law* with the approach to harmonization advanced by the "Social Justice Manifesto" and its exponents.[36] On another continent and in a different generation, the original UCC project has long been associated with sociological jurisprudence and an attempt to attune the law to immanent norms.[37] On the less purposeful side, recall the trade customs that Lisa Bernstein studied, particularly as they existed before codification. These were more spontaneous, and even variable to the point (according to Professor Bernstein) of nonexistence.[38] Less spontaneous but nevertheless keenly attuned to the market and its concerns are the listing standards of the New York Stock Exchange.[39] Finally, many bodies contend for the mantle of deliberation and democracy. Some particular examples may not be overly controversial. The debate in the House of Lords over a transformation of itself that was tantamount to abolishing the privileges of the vast majority of its members comes to mind as an extraordinary instance of a deliberative lawmaking process.[40] The democratic ideal is perhaps exemplified nowhere better than in its ancient prototype,[41] whose legacy countless governments still claim.

Of course these examples are oversimplified, and each instance of real lawmaking efforts will doubtless include several of the characteristics listed; there is certainly a taste of democratic regulation in the New York Stock Exchange rules, despite their

35. *See* PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II (Ole Lando & Hugh Beale eds., 2000); PRINCIPLES OF EUROPEAN CONTRACT LAW, PART III (Ole Lando et al. eds., 2003).

36. *See* Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653 (2004) [hereinafter *Manifesto*]; *cf.* Fernanda Nicola & Ugo A. Mattei, *A Social Dimension in European Private Law? The Call for Setting a Progressive Agenda*, 41 NEW ENG. L. REV. 1 (2006).

37. *See generally* Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALBANY L. REV. 325 (1995); Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code 1940-1949*, 51 SMU L. REV. 275 (1998); Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 BUFFALO L. REV. 359 (2001); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

38. *See supra* note 25; *see also* Basedow, *supra* note 1, at 709.

39. *See* N.Y. STOCK EXCHANGE LISTED COMPANY MANUAL (CCH) § 1.

40. The major debates in the House of Lords took place on Oct. 14 and 15, 1998, Feb. 17, 22, and 23, 1999, and Mar. 29 and 30, 1999. *See* 593 PARL. DEB., H.L. (5th ser.) (1998) 920; *id.* at 1052; 597 *id.* at 685 (1999); *id.* at 841; *id.* at 955; 599 *id.* at 47; *id.* at 204. *See generally* A HOUSE FOR THE FUTURE: REPORT FROM THE ROYAL COMMISSION ON REFORM OF THE HOUSE OF LORDS (2000). I do not mean to imply that the debates in the House of Commons were insignificant, but the Lords provide a cleaner example of non-democratic deliberation than the Commons.

41. *See generally* DONALD KAGAN, PERICLES OF ATHENS AND THE BIRTH OF DEMOCRACY (1998).

market origin and orientation.[42] The main point here is that different lawmakers, public and private, will have very different characteristics and will make rules according to their own internal logic and orientation. Put simply, private lawmakers and public lawmakers compete by offering rules that are the result of different and competing goals and logic. This competition flags the dynamics of the mixed jurisdiction, and it indicates the need for study of the competing systems, just as the civil law, the common law, and civil- and common-law mixes have richly repaid careful study.

II. HOW'S A BODY TO CHOOSE?

The fertility of Professor Basedow's observations comes at this step, which is deciding how to milk the learning for well-informed action. The active question is how to choose between (a) rules, or (b) systems of rules, or (c) systems of rule generation. In other words, we could choose between particular rules in particular contexts, and/or choose between different sets of rules, and/or choose a method, logic, or institution for generating rules. The uninformed observer would presumably think we had already chosen a system for generating rules, at least domestically, based on the constitution of the nation-state. This myth of teenage civics is powerful, as myths are, but misleadingly elliptical. It does not give an accurate description of rule generation even within the nation-state, much less in the international realm that by definition is located beyond the nation-state. Sophisticated observation discloses that not all rules will come from a congress or parliament or legislature, nor necessarily from a constitutionally created supranational government like the United Nations or the European Union. Custom matters, as do individual transactors and their associations, whether they be international labor unions, multinational business corporations, or even wider groups like industry associations or other nonprofit non-governmental organizations. If we at least assume, then, that a commitment to a traditional constitutional structure does not resolve all questions of how to make rules, the question becomes: how to choose?

Gillian Hadfield has argued that in the economic realm, efficiency is the right criterion for choosing a system of rule generation and she therefore comes down for private lawmaking rather than public lawmaking, with some qualification.[43] Many

42. For more discussion and further history and sources, see Snyder, *Private Lawmaking*, *supra* note 3, at 384-88.

43. Gillian K. Hadfield, *Privatizing Commercial Law*, 24 REG. 40, 41 (Spring 2001) [hereinafter Hadfield, *Privatizing*]; *see also* Gillian K. Hadfield & Eric Talley, *On Public versus Private Provision of Corporate Law*, 22 J.L. ECON. & ORG. 414, 436-40 (2006); *cf.* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers*

others make similar arguments about choosing specific rules or sets of rules, whether based on neoclassical efficiency[44] or new institutional economics.[45] A related scholarly project addresses how best to set the default rules of contract[46] and even the seemingly perverse possibility of penalty default rules, to achieve the goal of efficiency.[47] In terms of mixed jurisdictions, economic studies and assessments are a current rage, assessing the economic success of systems based on the common law as opposed to the civil law.[48] We also see similar work that debates the efficiency *vel non* of commercial customs.[49] Especially in the United States, the

Distorts the Justice System, 98 MICH. L. REV. 953 (2000); Gillian K. Hadfield, *Privatizing Commercial Law: Lessons from ICANN*, 6 J. SMALL & EMERGING BUS. L. 257 (2002).

44. Judge Posner is perhaps the best known exponent of this approach, and his corpus is immense. The idea should be clear enough from RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).

45. *See, e.g.*, Christian Kirchner, *An Economic Analysis of Choice-of-Law and Choice-of-Forum Clauses*, *in* ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW, *supra* note 4, at 33, 40-41.

46. *See* Basedow, *supra* note 1, at 715-17.

47. The seminal article is Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989). For some other prominent discussion and debate, see Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1 (1993); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992); Lucian Arye Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J. L. ECON. & ORG. 284 (1991); Jules L. Coleman, Douglas D. Heckathorn & Steven M. Maser, *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. PUB. POL'Y 639 (1989); Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535 (1990); Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); *see also Symposium on Default Rules and Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 1 (1993). Lest anyone think that the debate could not still be going, see Eric Maskin, *On the Rationale for Penalty Default Rules*, 33 FLA. ST. U. L. REV. 557 (2006); Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563 (2006); Ian Ayres, *Ya-HUH: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589 (2006).

48. Michaels & Jansen, *supra* note 3, at 866, allude briefly to this work, which is the fruit of a considerable scholarly devotion. For a recent reassessment and review of the literature, see Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 47 J. ECON. LIT. (forthcoming) (currently available on SSRN).

49. Some helpful contributions to this debate include ERIC A. POSNER, LAW AND SOCIAL NORMS (2002); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT'L L. 707 (1999); Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998); Juliet P. Kostritsky, *Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem*, 39 CONN. L. REV. 451 (2006); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377 (1997); Jody S. Kraus & Steven D. Walt, *In Defense of the Incorporation Strategy*, *in* JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 193 (Jody S. Kraus & Steven D. Walt eds., 2000); Eric A. Posner, *Law, Economics and Inefficient Norms*, 144 U. PA. L. REV. 1697

application of economic analysis to the law has been a sizeable and growing industry since the 1980s, and there seems to be little worry that economics as a field will find itself unable to provide insights, if not answers, in response to legal questions about rules and rule generation. Further economic work assessing the relative merits of publicly versus privately made law seems promising.

At the same time, a more difficult issue is to what degree the economic criterion is sufficient or even appropriate. Professor Hadfield carefully notes that economic criteria are appropriate in the economic realm but not in the justice realm,[50] but this distinction has so far eluded my grasp, and I have developed some doubts as to the possibility of divorcing economic transactions from notions of justice. Similar skepticism is advanced with greater rigor elsewhere in this symposium.[51] It is certainly true that if an important function of private law is to protect private parties from the state,[52] then notions of privacy and autonomy that are grounded in justice and morality are central to the enterprise of generating and choosing rules of private law.

These thoughts bring up the other prominent criteria (aside from economics) used in choosing rules or systems related to rules. Liberal conceptions of human activity and libertarian ideas about freedom of contract are certainly traditional modes of assessing privately made rules, subject of course to many limits, some of which are obvious and some of which are the subject of ancient and continuing debate. Professor Basedow reminds us of pragmatic limits on contractual freedom; allocating property rights *ab initio*, protecting competitive markets, and preventing market failures are insusceptible of private solutions.[53] In addition, there are the well known boundaries imposed by established policies or by the importance of stopping parties from externalizing their costs. These contractual limits sound just as strongly in the realm of private lawmaking, and even more so, as the effects are greater and broader when private rules reach across the globe.[54] Still, the liberal capitalist society whose growth continues is premised on these notions of freedom and of assent. The basis of these norms will not be reexamined here,[55] but the norms themselves should nevertheless

(1996).

50. Hadfield, *Privatizing*, *supra* note 43, at 44-45.

51. Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008).

52. *See* Hans-Peter Haferkamp, *The Science of Private Law and the State in Nineteenth Century Germany*, 56 AM. J. COMP. L. 667 (2008).

53. Basedow, *supra* note 1, at 715-19.

54. For more detail on the problems of externalities as applied in the realm of private lawmaking, see Snyder, *Molecular Federalism*, *supra* note 15, at 442-43.

55. For some relatively recent entries into the venerable literature on assent and

be on the surface. They are not the only norms, but they are among the best entrenched and—I suspect—most widely accepted.

Other norms compete for prominence as well. Their technocratic tilt links them more to economics than to liberalism, but whatever their functional character, they are surely important in economic transactions. We may choose (or allow others to choose) rules generated by bodies with particular knowledge, expertise, or skill. To return to Professor Basedow's example of the UCP, one may argue that the Banking Commission of the International Chamber of Commerce has special (and perhaps relatively inexpensive) access to the institutional knowledge of businesses intimately involved in the issuance, examination, and payment of letters of credit. To move to other areas of economic activity, particular people with great expertise in the comparative and international law of sales may be chosen as the best instrument for devising improved or harmonized rules for international sales.[56] Such avenues have the twin advantages of greater information at lower cost. Rulemaking, after all, is not costless and—putting aside the costs of implementing new rules—those costs *ceteris paribus* ought to be kept low. Along these lines, efficiency and fairness both require that the costs of rulemaking be borne by those who will benefit from the rules. Thus, rulemaking may be assigned to organizations that can effectively internalize the costs. If new rules are needed on bills of lading, the shippers and carriers ought to pay for the making of the rules.

These technocratic considerations are all important in a well engineered system of generating rules, but the analysis must also account for—and perhaps end with—principles of democratic legitimacy. Florian Rödl has written persuasively on this point elsewhere in this volume,[57] but some consideration is worthwhile here. Before arriving at complex and potentially moral issues, we may begin with the practical side of democracy and democratic institutions. Assuming away corruption, agency costs, and other problems, democracy brings legitimacy, and that very legitimacy can

contract, see Snyder, *Custom*, *supra* note 11, at 632.

56. *See supra* note 35 and accompanying text (on the Lando Commission). We may also recall earlier efforts before the United Nations Convention on Contracts for the International Sale of Goods was hatched. *See* Peter Huber, *Comparative Sales Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 8, at 939-41 (discussing the role of Ernst Rabel in efforts that led to the Convention relating to a Uniform Law of International Sales (ULIS) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)). I am also grateful to Ralf Michaels for pointing out the relevance of Hannes Rösler, *Siebzig Jahre Recht des Warenkaufs von Ernst Rabel, Werk- und Wirkgeschichte*, 70 RABELSZ 793, 798-802 (2006).

57. Florian Rödl, *Private Law Beyond the Democractic Order? On the Legitimatory Problem of Private Law "Beyond the State,"* 56 AM. J. COMP. L. 743 (2008).

achieve successful rule acceptance as well as rule generation. More specifically, to persuade private actors and sovereign nations to adopt rules, one can try to devise the best possible rules. One might also succeed, and perhaps succeed more, by adopting rules that were convincingly the result of a legitimate, democratic process. The work of building consensus and gaining the participation and investment of those who will adopt the rules is itself an important practical strategy for assigning rulemaking to democratic institutions, or at least institutions that are perceived as legitimate. Although this particular case may not hold, one might at least surmise that international sales rules that resulted from an intensive and debated democratic process within the United Nations achieved greater adoption and use compared to a product that was viewed as more academic or that resulted from a less robust institution. Whether this is true of the United Nations Convention on Contracts for the International Sale of Goods (as opposed to ULIS and ULF)[58] in particular is something that I do not know, but the argument seems plausible, and may well hold in other cases even if not in this one.

Next, recall that private law is hardly immune from questions of distributive justice. Aside from political commitments,[59] anyone who labors in the fields of contracts or commercial law faces these questions constantly. With contracts viewed as devices for allocating risks,[60] and with the necessity that all contracts be incomplete, the default rules of contract law will necessarily allocate risks that have distributive impact. Even default rules that are displaced by agreement have an allocative effect in that they distribute information and transaction costs, imposing those costs on the party forced to either disclose information (e.g., "seller will not be liable if the machine does not work the way such machines are supposed to work") or be liable.[61]

Consider another example along these lines, even more arcane and technical. The swap contracts so ably discussed by Professor Riles[62] raise great normative questions. As opposed to the quotidian contract of sale, these swap contracts are virtually unknown outside a few specialized circles. Yet their operation for allocating collateral in the case of a default will have an immense impact on whether businesses in crisis will be able to reorganize themselves as going

58. *See* Huber, *supra* note 56, at 940-41; *see also* UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18, *reprinted in* 19 I.L.M. 668, art. 35(2)(a) [hereinafter CISG].

59. *See supra* note 36 and accompanying text (*Manifesto*).

60. The classic statement is Edwin Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335 (1924).

61. *See, e.g.*, U.C.C. § 2-314; CISG, *supra* note 58, art. 35(2)(a).

62. Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. COMP. L. 605 (2008).

concerns or will instead be carved up for creditors who have staked individualized, contracted-for claims. If the latter, further questions arise as to whether to give rein to absolute priority based on these individualized contracts-cum-conveyances or to allow some other kind of prioritized claims, such as for workers or tort victims. The way the law understands and implements the private orders created by collateralized swap contracts will move policies one way or another on each of these fundamental questions.[63]

These familiar themes need little rehearsal, but their implications for distributive justice should be made clear. I do not—and would not—assume simplistic propositions, like sellers and secured creditors are big, rich, evil corporations and that buyers and unsecured creditors are small, one-shot, poor, good victims. But I also would not assume that allocating certain burdens to sellers or to buyers, and that making some rules defaults and others immutable, are technical decisions without distributive implications. Of course Professor Basedow's paper does not indulge any such simple assumptions either, and I do not mean to imply otherwise. Even as a descriptive matter, however, we should not neglect the likelihood that allocating rulemaking power to private actors will have some important repercussions on distribution of wealth. The question is empirical and therefore no doubt complex. Nevertheless, I wish at least to raise the issue explicitly and to refer to another of its aspects, which might be seen as competition, or federalism.

Whether in the realm of public or private lawmaking, competition is at least theoretically possible, and may be quite desirable in and of itself. The very competition of legal systems that occurs in any mixed jurisdiction implies not a competitive game but a potential choice. Where more than one system can provide rules, the consumers of rules can choose. Choice itself implies freedom, a good in itself, and competition suggests a race for improvement. Freedom, choice, a competition for betterment, and all the interests of diversity suggest that one way to respond to the question of this section—how is a body, whether it be a body politic or a body economic, to choose?—is not to answer, but to embrace and even foment competing systems.[64] At the same time, though, the drawbacks of such a complex system cannot escape notice, and the costs of diversity and the loss of uniform solutions can be serious. Moreover, competitive lawmaking races, which inevitably involve differing goals, can lead to one kind of race to the top (e.g., increased tax revenues) that might potentially lead to a race to the bottom

63. *See id.*

64. On this pluralism point, see Berman, *supra* note 21; *see also* Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809, 818 (2008).

along another axis (e.g., shareholder protection). These are large questions, and as with the other choices outlined above, cannot be considered in detail here.[65] The point for now is that in a realm beyond a monolithic state, there are not only countless choices but multiplicitous criteria by which to choose. Even the criteria require choice, and the choice is one of polity. This raises the last point.

III. THE INESCAPABLE NORMATIVE QUESTION, SHADED BY POSSIBILITY

In the end, "economic regulation," the topic assigned for consideration here, cannot escape these normative questions any more than law can. They are akin to the questions of validity and legitimacy raised by Professors Jansen and Michaels.[66] Professor Basedow has given a masterly description of the private lawmaking phenomenon within the realm of economic regulation, as well as its relation to public lawmaking. His description is crucial for informed analysis. This comment mainly seeks to round the picture, in however sketchy a fashion, by referring to the problem of prescription in a compound, complex polity that consists of competing systems—public and private—for generating rules in a realm that transcends the modern nation-state.

The problem of prescription, probably the most important, is also the most difficult. With competing public and private regulators of economic activity, the problem translates into a further question about the constitution of rulemaking—the constitutional structure, or the meta-rules that themselves establish the framework for making further rules.[67] Such rules would presumably come from the state,[68] and this assumption was implicit in the preceding discussion that suggested that there is a choice to be made between publicly made rules and privately made rules. The assumption is questionable, though, and the issue of what the state *should* do, in the world beyond the state, needs to be preceded by the question of

65. A less abbreviated consideration of the advantages and disadvantages of a competitive, federalist-style regime of private and public lawmaking is the focus of Snyder, *Molecular Federalism*, *supra* note 15.

66. *See* Jansen & Michaels, *supra* note 17, *passim* but especially at 393-94; Michaels & Jansen, *supra* note 3, at 874-77, 879-81.

67. *See* Snyder, *Molecular Federalism*, *supra* note 15, at 439 (citing Ladeur).

68. This seems true given the observable facts, that is, as a matter of inductive reasoning. If rules on conflict of laws were to recognize non-state norms, *see* Michaels, *supra* note 10, those conflicts rules—meta-rules—still seem inescapably to come from the state. Although the current lex mercatoria may be proposed as a law that does not depend on the state, the proposition is at best debatable, and current practice suggests that the lex mercatoria partakes of both state and non-state elements. *See* Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007). Possibilities of a lex mercatoria truly beyond the state (i.e., independent of state mechanisms, or at least tolerance) so far appear merely theoretical.

what the state *can* do. Recall that publicly made rules do not always prevail.[69]

In the globalized world it is perhaps usual to think that force, which had become the monopoly of the state,[70] has become almost useless because business relations take place beyond the power of a single state. The physical force that the state can wield with impunity is still present, but it is rarely important in economic relations, with the exception of a few areas. Even in these few exceptional areas, the brutal puissance of the state is difficult and expensive to invoke and is used rarely. With this dynamic, the question must be reformulated, from what the state can do, to what it is worth having the state do. At the same time, we may well observe that a subtler force can be wielded privately in sufficiently well-planned transactions, as when assets (like the shares in a corporation) are put in escrow in an offshore jurisdiction. As few enterprises can function solely offshore, however, there is still a sphere for state influence, particularly through the rules of private international law and on the recognition and enforcement of judgments.[71] A complicated and dynamic division of power thus subsists. Our world is characterized by sophisticated inroads on the state monopoly on force and by the attenuating but still real importance of the force that the state retains. Such a world requires a fine balance, not only of efficiency, but of polity. One choice, one normative order, is unlikely. A more complicated music can be expected.

IV. A METAPHORICAL CONCLUSION

With such a delicate and dynamic weighing in mind, neither public lawmaking nor private lawmaking will always prevail. In the end, we are left with constant and changing choices between publicly and privately made systems of rules, although as Professor Basedow observes, certain areas tend to gravitate to one or the other.[72] One of the chief points of this comment is to show that the goals, method, and logic of these systems are quite different, but not unknowable. Particularly in a world of diminishing effectiveness and continuing costliness of state power, the choices will occur infinitely, and each

69. *See supra* notes 10-13 and accompanying text (on the UCP prevailing over U.C.C. Article 5). Other similar examples are discussed in Snyder, *Molecular Federalism*, *supra* note 15.

70. *See, e.g.*, MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (1958).

71. *See, e.g.*, Gran Canaria Timeshare Cases, Bundesgerichtshof [BGH] [German Federal Court of Justice], Mar. 19, 1997, RECHTSPRECHUNG ZUM INTERNATIONALEN PRIVATRECHT [IPRSPR.] 1997, no.34.

72. Basedow, *supra* note 1, at 720-22.

choice will effectuate the different goals and logic that generated it. To understand this abstract reality, I suggest the metaphor of a keyboard trill.

Trills occur in many varieties, but the analogy can begin most simply by imagining a pianist playing two notes, separately, rapidly, and repeatedly, sometimes over the course of several measures.[73] Played as a trill, the notes make a different sound from either note played on its own, and different from the sound of the notes played simultaneously. While this complex sound plays from one hand, the main business of the music plays from the other hand. Eventually, the trill must resolve; it cannot go on forever. How it resolves is the question, and the answer rests with the other hand: the main business of the music, which is infinitely variable, but determinate at any moment. This potential variety of the music is a key piece of the metaphor. Although the possibilities for the main music are infinite, it will go on in a particular way and a way that will (and must) obey the logic of the music. The trill will resolve in a way determined by the main music and the musical logic of the composition. The law is no different.

73. An example that should be familiar to many occurs twice in J.S. Bach's Two-Part Invention No. 4.